SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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128 HESTER LLC,

Plaintiff,

Index No. 651523-2011

-against-

DECISION/ORDER

NEW YORK MARINE AND GENERAL INSURANCE COMPANY, TOWER INSURANCE COMPANY OF NEW YORK, CALABRESE ASSOCIATES, INC., and 93 BOWERY HOLDING LLC,

Defendants.

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NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Third-party Plaintiff,

-against-

93 BOWERY HOLDINGS, LLC,

Third-party Defendant.

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93 BOWERY HOLDINGS LLC,

Third-party Plaintiff,

-against-

TOWER INSURANCE COMPANY OF NEW YORK and CALABRESE ASSOCIATES, INC.,

Third-party Defendants.

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HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affirmation & Exhibits Annexed, Affidavits, Memorandum of Law	1, 2, 3, 4, 5
Notice of Cross-Motion, Affirmation & Exhibits Annexed, Affidavit	6
Affirmations in Opposition, Affidavit(s) & Exhibits	7, 8, 9, 10
Replying Affidavits & Exhibits, Memorandum of Law	11, 12, 13

In this action for property damage arising out of the demolition of a building located at 128 Hester Street in New York County (subject building) defendant/second third-party defendant Tower Insurance Company (Tower) moves, by Notice of Motion dated July 2, 2013, for an for an order granting it summary judgment pursuant to CPLR § 3212 and dismissing the complaint of plaintiff 128 Hester LLC (plaintiff), third party-plaintiff 93 Bowery Holdings LLC (93 Bowery Holding) and all cross-claims against it. Plaintiff, 93 Bowery and defendant/second third-party defendant Calabrese Associates, Inc. (Calabrese) oppose the motion. Defendant/third-party plaintiff New York Marine and General Insurance Company (New York Marine) opposes the motion and, in the event the court finds that the property damage occurred during its policy period, cross-moves for summary judgment dismissing the complaint, cross-claims and counterclaims asserted against it.

A preconstruction survey of the subject building was performed for 93 Bowery by Roebling Engineering (Roebling). In a report dated October 2, 2006 Roebling noted that the exterior and interior of subject building were in poor condition and that there were too may cracks to be documented in the report. The report further noted that there was evidence of fallen brick facade and lateral displacements of the wall on the adjourning portion of the wall with 93 Bowery. The report also states that the evidence of fallen brick facade would require subject building to stabilized during the demolition and construction of the hotel. Demolition and construction of the hotel went forward. Thereafter the New York City Department of Buildings (DOB) issued a stop work order for the hotel construction. On July 12, 2007 93 Sereter formed plaintiff and purchased the subject building in order to stabilize it so that the stop work order would be lifted and work on the hotel could continue. On June 2, 2009 the DOB issued an Emergency Declaration for the subject building. The Emergency Declaration noted that the structural integrity of the subject building was compromised due to defective lintels at the front and rear facades. On June 30, 2009 Dubinsky Consulting Engineers, P.C. inspected the subject building for plaintiff and recommended the issuance of an order to vacate the subject building as well as periodic monitoring to determine if additional measures were needed to prevent collapse. In a property loss notice dated July 2, 2009 plaintiff notified New York Marine that the subject building had sustained structural damage caused by the excavation of the property at 93 Bowery. On July 9, 2009 plaintiff submitted an application for property insurance for the subject building to Tower. On July 12, 2009 Tower issued a commercial lines policy, effective July 12, 2009 to July 12, 2010, providing first-party property coverage for the subject building. On July 13, 2009 Tower performed a loss prevention survey of the subject building. On July 15, 2009 Tower

issued a notice of cancellation, effective August 16, 2009, because of the increase in hazard. On August 7, 2009 the DOB issued another Emergency Declaration that the subject building was structurally compromised and was in imminent danger of collapsing and needed to be demolished. In a property loss notice dated August 6, 2009 plaintiff notified Tower that the construction at 93 Bowery had caused structural damage to the subject building and that the DOB had ordered the that the subject building be taken down. Tower's engineer inspected the subject building and determined that the damage to the subject building had occurred prior to July 2009. Tower then disclaimed coverage on the grounds that the loss did not occur during policy period and was caused by excluded causes of loss.

In support of its motion, Tower argues that (1) loss at issue occurred before the inception of its insurance policy; (2) the loss at issue, the demolition of the subject building, is specifically excluded from coverage; (3) the policy's collapse coverage does not apply as the subject building did not abruptly fall down; and (4) the policy is void from inception due to material misrepresentations made by plaintiff in its application for insurance. Tower submits an affidavit by Michael Walsh (Walsh), an engineer, who inspected the subject building on Tower's behalf on August 11 and August 28, 2009 to determine the cause of the demolition order issued by the DOB. Walsh contends that the signs of long-term deterioration he observed in the subject building, including cracking, timber shoring, dry rot, prior repairs and evidence of local fire and water damage, and which led to the issuance of the demolition order, all occurred prior to July 2009.

Tower also submits and affidavit from Natalia Jones (Jones), an underwriter, who claims that plaintiff represented in its application for insurance that the subject building had not suffered any loss in the prior five years. According to Jones, had Tower been aware that plaintiff put New York Marine on notice of structural damage to the subject building on July 2, 2009 Tower would not have issued a policy to plaintiff.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, 404 NE2d 718, 427 NYS2d 595 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]).

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptableexcuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept

2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686, 465 NE2d 30, 476 N.Y.S.2d 523 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 386 NE2d 258, 413 NYS2d 650 [1978]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). The key to such procedure is issue-finding, rather than issue-determination (*id.*).

Here, a question of fact exists as to whether the damage that led to the DOB's issuance of a demolition order occurred prior to the inception of Tower's policy. Plaintiff's engineer, Eli R. Dubinsky, contends that the construction at 93 Bowery, and the failure to properly brace the subject building, was the proximate cause of the structural damage and that the structural damage progressively worsened since the construction as the construction proceeded. New York Marine's engineer, Sorin Moisi, although he agrees with Walsh that much of the damage to the subject building was caused by long-term deterioration, contends that a determination cannot be made at this time as to when all of the damages occurred or what caused those damages. Where, as here, the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution (*Lee v Fenton*, 2014 NY Slip Op 2765 [2d Dept]).

Moreover, to the extent Tower relies upon plaintiff's answers to certain interrogatories wherein plaintiff admitted that the damage to the subject building was caused by adjoining construction activities occurring before July 12, 2009, interrogatories that call for opinions and interpretations are impermissible (*see Vancek v International Dynetics Corp.*, 78 AD2d 842 [1st Dept 1980]). While plaintiff's manager, Simon Wong (Wong), confirmed plaintiff's interrogatory answers at his deposition, there has been no showing that Wong possesses the requisite education and experience to provide an expert engineering opinion as to when the damages that led to the demolition order occurred. Thus, the interrogatory answers do not satisfy Tower's prima facie burden of proving that the loss occurred before the inception of its insurance policy.

Tower, as the movant, also bears the burden of demonstrating prima facie that an exclusion in its policy defeats plaintiff's claim (*Moneta Dev. Corp. v Generali Ins. Co.*, 212 AD2d 428 [1st Dept 1995]). The Emergency Declaration ordering the demolition of the subject building served merely as a confirmation of the circumstances regarding the actual cause of plaintiff's loss (*Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 Ad2d 66 [1st Dept 1998]). When the Emergency Order was issued on August 7, 2009 whatever damage resulted in the need to demolish the subject building had already been caused. Since, as discussed above, there is a question of fact as to whether that damage was long-term deterioration that preexisted the inception of Tower's policy, as Walsh claims, or damage that was made progressively worse as a

result of the construction at 93 Bowery and occurred partially within Tower's policy period, a finding as a matter of law that Tower's ordinance or law exclusion applies to plaintiff's property loss claim cannot be made (*see Ho v Greenwich Ins. Co.*, 104 AD3d 601 [1st Dept 2013]).

Finally, in response to Tower's prima facie showing that it would not have issued its insurance policy had it know the of the loss submitted by plaintiff to New York Marine (*East 115th St. Realty Corp. v Focus & Struga Bldg. Developers LLC* 85 AAAAAD3d 511 [1st Dept 2011]), plaintiff raises a triable issue of fact through the affidavit of its insurance broker. While plaintiff's application for insurance is dated July 9, 2009 and makes no mention of the July 2, 2009 loss notice plaintiff sent to New York Marine, plaintiff's insurance broker contends that the application for insurance was actually submitted to an insurance agent on June 17, 2009, before plaintiff had sent the loss notice to New York Marine, in response to a notice of non-renewal from New York Marine effective July 12, 2009 . Plaintiff's broker claims that the insurance agent then forwarded plaintiff's application to Tower, which never requested a loss report prior to the insurance agent's binding request on July 9, 2009. Tower's underwriter, Jones, submits and affidavit in reply but does not dispute or even address the claims made by plaintiff's insurance broker.

The court has considered Tower's remaining contentions and finds them to be without merit.

In light of the foregoing the court need not address New York Marine's cross-motion for summary judgment as it was expressly conditioned upon a finding that the loss at issue did not occur during Tower's policy period.

Accordingly, it is hereby

ORDERED that Tower's motion and New York Marine's cross-motion for summary judgment are denied; and it is further

ORDERED that the parties are to appear for a status conference on July 15, 2014 at 9:30 a.m. in Part 10, Room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that movant Tower is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

George J. Silver, J.S.C.

Dated: MAY 20 2014

New York County

HON. GEORGE J. SILVER