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SHORT FORM ORDER

INDEX No. 13-63696

SUPREME COURT - STATE OF NEW YORK
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/7/14
ADJ. DATE 8/28/14
Mot. Seq. # 001-MD
Conference: 12/3/14
CDISP - No

JAMES HALPIN, Plaintiff, - against - CHUBB INDEMNITY INSURANCE COMPANY Defendant.	ANDERSON, KILL & ORLICK, PC Attys. For Plaintiff 1251 Avenue of the Americas New York, NY 10020 ROSNER, NOCERA & RAGONE Attys. For Defendant 61 Broadway - Ste. 1900 New York, NY 10006

Upon the following papers numbered 1 to 50 read on this motion to dismiss affirmative defenses; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers ____; Answering papers 28 - 47; Replying papers 48 - 50; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the plaintiff's letter application, dated August 26, 2014, requesting oral argument of the instant motion is denied pursuant to 22 NYCRR 202.8; and it is further

ORDERED that the plaintiff's motion (#001) to dismiss the defendant's second through sixth affirmative defenses is denied; and it is further

ORDERED that the parties are directed to appear at a conference with the undersigned on **December 3, 2014**, at 9:30 a.m., in Part 45 at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

In this breach of contract action, the plaintiff seeks unspecified damages from the defendant, Chubb Indemnity Insurance Company, for allegedly breaching its obligations under a homeowner's insurance policy and failing to pay the policy limit to compensate the plaintiff for his losses. The complaint alleges that he sustained property damage to his second home, located at 5 Lake Way ("the premises"), Westhampton Beach, New York, from Superstorm Sandy on October 29, 2012.

The record reveals that the plaintiff purchased the deluxe house coverage insurance policy in 2002, when he purchased the premises. The policy provides dwelling coverage to limits of $1,030,000 on an extended replacement cost basis as well as a limit to $721,000 for the loss of contents. The policy specifically does not provide coverage for loss caused by, contributed to, or in any way resulting from flood or mudslide and the plaintiff was advised to obtain insurance covering damage from flood through the National Flood Insurance Program. The policy also provided a special 5% wind deductible which applied to each occurrence caused by, contributed to, made worse by, or in any way resulting from a hurricane, ***, and applied to the house, contents and extra coverages of the premises. In addition, the policy provided a standard $20,000 mold remediation expense limit at the premises. A reading of the policy reveals that "a covered loss includes all risk of physical loss to the premises or other property covered under this part of the policy, unless stated otherwise or an exclusion applies" and that the exclusions apply to the deluxe house coverage, including the extra coverages, unless stated otherwise. The extra coverages provisions includes coverage for additional living expenses which is defined of extra living expenses, loss of fair rental value and forced evacuation expenses. "Extra living expenses" is defined as the increase in normal living expenses that is necessary to maintain the usual standard of living of the household while the house or other insured permanent structure is uninhabitable. While not subject to any deductibles, these "extra living expenses" are available only if a covered loss due to property damage is sustained by the insured.

After the storm, the plaintiff notified the defendant that the premises sustained damage to the roof, exterior siding, interior structures, walls and flooring, and contents of the home. Specifically, the plaintiff claimed damage to the pile supported structures, deck skirt and northeast wingwall, the kitchen counter top seam and fireplace brick, cracks in upstairs drywall seams and water intrusion around the skylights, and roof damage. In addition, rain water entered the home causing mold, and the storm allegedly caused twisting damage to the home, which was elevated on pylons. The plaintiff retained a Public Adjuster and a property manager who advised the plaintiff that the premises needed to be elevated on jacks in order to assess and repair alleged twisting damage to the premises and pylons. The plaintiff's Public Adjuster initially sought the payment of $331,698.34, however, upon further inspection, the Public Adjuster concluded that the premises needed to be totally rebuilt and sought the policy limits.

The defendant's inspection of the premises by its engineers revealed that it suffered wind and wind driven rain damages as a result of the storm. However, the defendant determined that a large portion of the plaintiff's loss was not covered, and cited certain exclusions in the insurance policy, such as wear and tear, structural movement, faulty planning, construction or maintenance, and

surface water (flooding). In May 2013, the defendant issued the plaintiff a check in the amount of $148,999.46 which amount represented the undisputed portion of the plaintiff's property damage claim, namely, covered losses attributable to wind and rain intrusion damages in Super Storm Sandy. However, the plaintiff declined to cash the check for these losses that he would be unable to negotiate and recover on the disputed portions of his property damages claims which the defendant stated were excluded under policy exclusions.

Thereafter, in June and July of 2013, the defendant tendered, and the plaintiff accepted, two payments of "additional living expenses" attributable to his rental of a house used as a substitute summer home that summer under a lease approved by the defendant. However, the parties could not negotiate a settlement of the disputed property damages claims which the plaintiff claims rendered the house uninhabitable and in need of razing. This action was commenced when the defendant declined to pay out the full policy limits of $1,030,000.00.

The verified complaint contains one cause of action which seeks compensatory and consequential money damages from the defendant insurance company by reason of its purported breach of the insurance policy it issued to the plaintiff. The answer contains general denials and eight affirmative defenses. The plaintiff now moves pursuant to CPLR 3211(b) for an order striking the defendant's second through sixth affirmative defenses, which are as follows: the second affirmative defense asserts that the defendant's liability is subject to and limited by the policy's applicable limits of coverage, policy deductible amounts and exclusions; the third through sixth affirmative defenses relate to the following separate policy exclusions: gradual or sudden loss; faulty planning, construction or maintenance; structural movement; and surface water. In each of these defenses, the defendant relies upon policy exclusions in an effort to defeat the plaintiff's claims for recovery of damages due to the defendant's purported breach of its policy.

In support of his motion, the plaintiff submits an affirmation of its counsel, a copy of the insurance policy, and correspondence related to inspections of the property and subsequent negotiations of the covered damages in the form of email transmissions and letters. The plaintiff contends that the defendant waived the exclusions or should be estopped from relying upon them because of its inconsistent positions in paying out monies for covered property damage and additional living expenses, to which the policy exclusions applied, while relying on those policy exclusions to deny coverage for what the plaintiff claims are otherwise covered losses. This conduct is also alleged to constitute "admissions" on the part of the defendant that coverage exists for the rest of the damages claimed. For the reasons stated below, the motion is denied.

CPLR 3211(b) authorizes a plaintiff to move, at any time, to dismiss a defense "on the ground that a defense is not stated or has no merit" (CPLR 3211[b]; see ***Butler v Catinella***, 58 AD3d 145, 868 NYS2d 101 [2008]). The motion should be granted where "the plaintiff can demonstrate that the "defenses are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense" (***Bank of America, N.A. v 414 Midland***

Ave. Assoc., LLC, 78 AD3d 746, 749, 911 NYS2d 157 [2d Dept 2010]; *quoting* ***Tenore v Kantrowitz, Goldhamer & Graifman***, 76 AD3d 556, 557–558, 907 NYS2d 255 [2d Dept 2010]). Where the motion is premised upon a failure to state the defense, the court should apply the same standard as it applies to motions to dismiss pursuant to CPLR 3211(a)(7) in which the facial sufficiency of the defense is challenged and the factual assertions underlying the defense are generally accepted by the court to be true (*see* ***Bank of America, N.A. v 414 Midland Ave. Assoc., LLC***, 78 AD3d 746, *supra*; ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]; *see also* Siegel, N.Y. Prac. § 269, at 449 [4th ed.]).

When moving to dismiss or strike an affirmative defense on the ground that such defense has no merit, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (CPLR 3211[b]; *see* ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2006]). The governing standard on such a motion is thus akin to CPLR 3211(a)(7) motions in which evidentiary material is submitted and considered by the court so as to ascertain whether the defendant has a defense not whether one has been stated (*see* Siegel, N.Y. Prac. § 269, at 449 [4th ed.]), and "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... dismissal should not eventuate" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1997]; *see* ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, 955 NYS2d 402 [2d Dept 2012]; ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; ***Jannetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]). Once the plaintiff establishes, in the first instance, that the targeted defense is without merit, the burden falls on the defendant to come forth with sufficient evidence to raise an issue of fact with respect to the defense (*see* ***Coyle v Lefkowitz***, 89 AD3d 1054, 934 NYS2d 216 [2d Dept 2011]; ***Becker v Elm Air Conditioning Corp.***, 143 AD2d 965, 533 NYS2d 605 [2d Dept 1988]; ***Leonard v Leonard***, 31 AD2d 620, 296 NYS2d 375 [1st Dept 1968]). "If there is doubt as to the availability of a defense, it should not be dismissed" (***Chestnut Realty Corp. v Kaminski***, 95 AD3d 1254, 945 NYS2d 708 [2d Dept 2012]; ***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, *supra*; ***Duboff v Board of Higher Educ.***, 34 AD2d 824, 824, 312 NYS2d 726 [2d Dept 1970]).

Here, the plaintiff's submissions include evidentiary materials as do the submissions of the defendant in opposition to the plaintiff's motion. The governing standard for determination of this motion is thus whether the defendant has legally sufficient defenses not whether it has stated them, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all, and, unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (***Guggenheimer v Ginzburg***, 43 NY2d 268, *supra*; ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*; ***Cucco v Chabau Café Corp***., 99 AD3d 965, supra; ***Bua v Purcell & Ingrao, P.C.,*** 99 AD3d 843, *supra*; ***Jannetti v Whelan***, 97 AD3d 797, 949 NYS2d 129 [2d Dept 2012]; ***Bokhour v GTI Retail Holdings, Inc***., 94 AD3d 682, 941 NYS2d 675 [2d Dept 2012]).

Upon its review of the record, the court finds that the moving papers failed to demonstrate that the defendant's conduct in May of 2013 in paying out $148,999.46 in satisfaction of the undisputed portions of the plaintiff's property damage claim under the wind/rain intrusion damage provisions of the policy and its two payments of additional living expenses in June and July of 2013, at which time the house was uninhabitable, did not constitute admissions of coverage or a waiver of its right to contest the remaining portions of the plaintiff's property damages claim for which coverage was disclaimed under the various policy exclusions asserted in the affirmative defenses that are the targets of this motion. Nor did such conduct give rise to an estoppel which would operate to preclude the defendant from asserting such policy exclusions in defense of the plaintiff's claims for payment on the contested portions of his property damages claim. The defendant has demonstrated that it was mandated to pay the undisputed portions of the plaintiff's property damages claim, namely, the losses attributable to wind damage, under the terms of the regulations promulgated under the Insurance Law (*see* 11 NYCRR 216.6[e]). The defendant further demonstrated that under the subject insurance policy, the covered loss for wind/rain intrusion damage triggered coverage for the additional living expenses that were incurred in renting the substitute house in the summer of 2013, as there was a covered loss under the policy for wind damage and the insured structure was then uninhabitable.

The case authorities relied upon by the plaintiff in his reply brief to support his claim of waiver are inapposite as they relate to waivers arising from an insurer's failure to include an asserted exclusion in its disclaimer letter (*see* ***Adames v Nationwide Mut. Fire Ins. Co.***, 55 AD3d 513, 866 NYS2d 210 [2d Dept 2008]; ***Agoado Realty Corp. v United Int'l. Ins. Co.***, 260 AD2d 112, 699 NYS2d 335 [1st Dept 1999]). The plaintiff's claims of admissions giving rise to an estoppel, equitable or otherwise fail for want of the element of reliance (*see* ***Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt.***, 7 NY3d 96, 817 NYS2d 606 [2006]; ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 184, 451 NYS2d 663 [1982]; ***Lynn v Lynn***, 302 NY 193, 205, 97 NE2d 748 [1951]). The record is thus devoid of an uncontroverted showing that on the part of the plaintiff that material facts asserted by the defendant in its second through six affirmative defenses, which rest on policy exclusions, are not facts at all and that no dispute exists with respect thereto (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, *supra*; ***Weill v East Sunset Park Realty, LLC***, 101 AD3d 859, *supra*). The court thus finds that the plaintiff failed to demonstrate that the defendant's second through six affirmative defenses are subject to dismissal for lack of merit.

In view of the foregoing, the plaintiff's motion (#001) to dismiss the defendant's second through sixth affirmative defenses is denied.

Dated: 10/30/14

THOMAS F. WHELAN, J.S.C.