STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

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MARK SQUAIRS and MARY SQUAIRS,

Plaintiffs,

v.

**DECISION**

SAFECO NATIONAL INSURANCE COMPANY,
A LIBERTY MUTUAL COMPANY,

Index No. 2013EF3660
RJI No. 33-14-4070

Defendant.

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APPEARANCES:

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By: Marshall T. Potashner, Esq.
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MURPHY, J.

In this action, Plaintiffs Mark Squairs and Mary Squairs (the "Squairs") seek a declaration that Defendant Safeco National Insurance Company, a Liberty Mutual Company ("Safeco") has breached its obligation under a homeowner's insurance policy issued to the Squairs for the period of May 12, 2012 to May 12, 2013, to pay for loss and damage occurring on May 9, 2013. The Squairs, by Notice of Motion e-filed on November 28, 2014, request an Order granting summary judgment establishing Safeco's coverage for all items of property damage of the Squairs, and setting the matter down for trial on the issue of damages only. Safeco, by Notice of Motion e-

filed on December 1, 2014, also seeks an Order granting summary judgment in its favor declaring that there is no coverage under Safeco's policy for the Squairs' alleged loss and dismissing the Squairs' Complaint in its entirety.

The Complaint dated June 24, 2013, alleges that prior to May 9, 2013, Safeco issued a policy of insurance to the Squairs that was in effect on May 9, 2013. *See,* Complaint, ¶ 3. The Complaint further alleges that on May 9, 2013, the Squairs' property, a single family home located at 8920 Michigan Avenue, Cicero, New York, was damaged and partially destroyed by a "collapse" and other perils as set forth in the policy. *Id.*, ¶ 5. The Squairs allege that they gave proper notice of the collapse to Safeco and that Safeco has failed and refused to comply with the requirements of the policy of insurance, and have refused to pay the damage due to the Squairs in the approximate sum of $50,000.00.

The facts show that Mark and Mary Squairs purchased the home in 2010. Mark Squairs described the house as having a large second story addition and deck that partially overhangs the home's walls which are supported by four exterior posts. *See,* Affidavit in Opposition of Marshall T. Potashner, sworn to on the 7th day of January, 2015 (Document No. 35), Exhibit C, Deposition Transcript of Mark Squairs, pp. 33-34 (Document No. 37); Exhibits E and F, Photos (Document Nos. 39 and 40). The home's master bedroom on the second floor is structurally attached to the first floor deck. Squairs Tr., p. 34. Mr. Squairs testified that in May, 2013, he noticed two cracks in the first floor ceiling located below his master bedroom. Squairs Tr., p. 25. Mr. Squairs immediately hired Robert Palucci, a licensed New York State structural engineer, who inspected the damage to the house and discovered hidden decay and rot in the four support beams that held up the deck attached to the second floor master bedroom. After learning that the

exterior posts were damaged, Mr. Squairs hired a contractor to brace the house, specifically bracing the home under the master bedroom. He was advised by the bracing contractor that the house moved vertically and that the decking had shifted. Squairs Tr., pp. 30-33; 36-37. Immediately thereafter, the Squairs gave notice of the collapse and damage to Safeco.

Subsequently, Safeco denied their claim against the insurance policy by letter dated May 23, 2013, wherein Safeco stated:

> Based on the engineer's findings, the support beam issues are due to long-term wear and tear, rot over a period of time. These causes of loss are not covered perils on your policy.

*See*, Notice of Motion and Affidavits, Exhibit C (Document No. 11).

At issue is the interpretation of the insurance policy issued by Safeco. Section I of the policy titled "Property Coverages" states in pertinent part:

> We cover:
>
> 1. the dwelling on the residence premises shown in your Policy Declarations used principally as a private residence, including structures attached to the dwelling other than fences, driveways or walkways.

*See*, Notice of Motion and Affidavits, Exhibit D, Insurance Policy, p.1 (Document No. 12). The policy covers "accidental direct physical loss to property" . . . except as limited or excluded.

The next applicable provision titled "Building Property Losses We Do Not Cover" states in pertinent part that Safeco does not "cover loss caused directly or indirectly by any of the following excluded perils." Paragraph 6.a. of this provision excludes "wear and tear, marring, scratching, deterioration." Paragraph 6.e. of this provision also excludes "settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundations, walls, floors, roofs, ceilings, swimming pools, hot tubs, spas or chimneys."

The insurance policy, however, does provide coverage for any resulting loss found in ¶ 6.a. or 6.e. above "unless the resulting loss is itself excluded under Building Property Losses We Do Not Cover in this Section." In other words, any loss caused by any peril set forth above in ¶ 6.a. or 6.e. would be covered based on the fact that the Squairs' specific homeowners policy declaration affirmatively provides coverage for all perils as set forth in Section I of the policy. *See*, Homeowners Policy Declarations, Exhibit D, pp. 1 and 2 (Document No. 12).

The next applicable provision in the insurance policy, found on page 8, provides for "Additional Property Coverages," including those coverages listed in ¶ 10 of this Section described as "Fungi, Wet or Dry Rot, or Bacteria." The policy states that Safeco will pay for "the direct physical loss to covered property caused by fungi, wet or dry rot, or bacteria." *See*, Homeowners Policy, Exhibit D, p. 9, ¶ 10. Safeco will further pay "the cost to tear out and replace any part of the building or other covered property as needed to gain access to the fungi, wet or dry rot, or bacteria." *Id.*, ¶ 10.c.

The insurance policy provision providing for "Additional Property Coverages" clearly provides coverage involving the collapse of a dwelling. Paragraph 11, titled "Collapse," defines a collapse as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose." The insurance policy, however, will not provide coverage "for a building or any part of a building that is in danger of falling down or caving in" . . . . *Id.*, ¶ 11.a. (1).

Contrary to the provision at paragraph 11.a. recited above, Section 11.b. affirmatively provides insurance for "direct physical loss to covered property involving collapse of the dwelling or any part of the dwelling if the collapse was caused by one or more of the following: : . . (2) decay that is hidden from view, unless the presence of such decay is known to an insured prior to collapse." *Id.*, ¶ 11.b. (2), p. 10.

It is well settled that in an insurance claim, a party asserting a right to coverage has the burden of proving its entitlement to coverage. *See, Fernandes v. Allstate Insurance Company*, 305 A.D.2d 1065 (4th Dept. 2003). The burden, however, is on an insurer to prove that an exclusion in the policy is in full force when attempting to disclaim coverage. *See, Pioneer Tower Owners Association v. State Farm*, 12 N.Y.3d 302 (2009); *see also, Pichel v. Dryden Mutual Insurance Company*, 117 A.D.3d 1267 (3d Dept. 2014). An insurer can avoid liability through an exclusion "only where the exclusion is stated in clear and unmistakable language and is subject to no other reasonable interpretation. *See, RJC Realty Holding Corp. v. Republic Franklin Insurance Company*, 2 N.Y.3d 158 (2004).

Under New York law, the terms in insurance policies should be given their plain, ordinary meaning by the courts. *See, Caporino v. Travelers Insurance Company*, 62 N.Y.2d 234 (1984). The tests to be applied in construing an insurance policy are common speech, . . . and the reasonable expectation and purpose of the ordinary businessman. *See, Ace Wire & Cable Co., Inc. v. Aetna Casualty and Surety Company*, 60 N.Y.2d 390 (1983); *see also, Wangerin v. New York Central Mutual Fire Insurance Company*, 111 A.D.3d 991 (3d Dept. 2013), wherein the Third Department affirmed Supreme Court's judgment declaring that the plaintiffs' loss, caused by insect infestation that damaged the home's sill plate and caused the floors to drop four inches, was covered under their homeowners' insurance policy. *Id.* The policy covered "'physical loss . . . involving *collapse* of a building or any part of a building,' but only if such collapse is caused by . . . 'hidden insect or vermin damage,'" and stated that "'collapse does not include settling, cracking, shrinking, bulging or expansion.'" *Id.* The Court pointed out that although "collapse" was not defined, the "'clear modern trend is to hold that collapse coverage provisions . . . which

define collapse as not including cracking and settling – *provide coverage* if there is substantial impairment of the structural integrity of the building or any part of a building (emphasis added).'" *Id.*

In support, the Squairs submit the Affidavit of their expert, Robert Palucci, sworn to on November 19, 2014, who examined the insured premises and discovered that the support posts to the rear of the premises were decayed. Mr. Palucci states that the support posts were covered or clad in aluminum siding that concealed the decay that caused the partial collapse of the Squairs' building that was supported by the decayed posts. He stated that the second floor bedroom was supported by the decayed posts which he determined were rotted through hidden decay, and that the structural integrity of the building was substantially impaired, unsafe and uninhabitable until repaired. He opined that the collapse damage to the Squairs' building was sudden and caused by hidden decay in the rotted beams that were clad in aluminum. Palucci Aff., ¶ 9.

Consequently, the Court finds that the Squairs have met their initial burden of showing that the incident causing damage to their building was a "collapse" within the meaning of the insurance policy issued by Safeco. *See, Fernandes, supra.* Therefore, the Squairs have met the requirements of Section 11 (b) of the insurance policy. The structural integrity of the building was substantially impaired by the collapse rendering it uninhabitable until properly supported. *See, Royal Indemnity Company v. Grunberg*, 155 A.D.2d 187 (3d Dept. 1990). *See, Nemier v. Liberty Mutual Fire Insurance Company*, 289 A.D.2d 1053 (4th Dept. 2001), where the Fourth Department concluded that plaintiff established that the living room "collapsed" when a corner of the room sank several inches. *See, Nemier,* at 1054.

In opposition and in support of Safeco's motion, Safeco argues that even if the Squairs' structure "collapsed," coverage under the policy is excluded where the damage was caused by normal "wear and tear," and where the "presence of decay is known to an insured prior to the collapse." *See*, Insurance Policy, Section 11 (b)(2), p. 10. Selective argues that the exterior posts and beams in the Squairs' residence rotted due to long-term pervasive exposure to the elements and further argue, without any proof, that the Squairs had knowledge of the decay.

It is well settled that the law governing the interpretation of an exclusionary clause in insurance policies is highly favorable to insureds. *See, Seaboard Surety Company v. The Gillette Company*, 64 N.Y.2d 304 (1984). Additionally, exclusions are enforced only where they have been found to have a definite and precise meaning, unattended by dangers of misconception and concerning which there is no reasonable basis for a difference of opinion. The exclusion must unambiguously remove the event from the policy's coverage. *See, Pioneer, supra; see also, Cone v. Nationwide Mutual Fire Insurance Company*, 75 N.Y.2d 747 (1989), where the Court stated that exclusions from coverage are construed strictly against the insurer. *See also, Breed v. Insurance Company of North America*, 46 N.Y.2d 351 (1978), where the Court stated that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause.

Here, Safeco's expert, Sean Kealey, a Professional Engineer, inspected the subject property on May 21, 2013, to review the structural damage to the Squairs' property. Mr. Kealey states that the exterior wooden posts, which were wrapped in sheet metal, were severely rotten, and that "the base and top of all sheet metal sleeves are buckled, consistent with the effects of the posts crushing under axial load and/or their weight." Mr. Kealey goes on to further state that "it

was noted that the posts had two separate applications of sheet metal, suggesting the *home's prior owner* added a second layer after the first showed signs of distress (emphasis added)." *See,* Affidavit of Marshall T. Potashner, sworn to on the 1st day of December, 2014, Exhibit C, Response to Demand for Bill of Particulars, Exhibit C (Document No. 18). Mr. Kealey does not dispute the fact that the rotted and decayed beams were visually hidden from view as they were cased in aluminum. While Mr. Kealey attempts to blame the decay on wear and tear, and the elements, his testimony actually supports the Squairs' version of the events in that they were unaware that the beams and posts were decayed and were in fact hidden from view. Finally, any blame placed by Safeco on "wear and tear," or "deterioration" for the collapse is not applicable as the Squairs' declaration sheet specifically covered all perils set forth in Section I, including ¶¶ 6.a. and 6.e.

Accordingly, based on the foregoing, the Court finds that Safeco failed to meet its burden showing that the exclusion is applicable under the terms of the policy. Consequently, the Court denies Safeco's motion for summary judgment seeking a declaration that they have no obligation to provide coverage for the Squairs' loss and damage as a result of a collapse of their posts and beams in the subject premises.

Based on all of the foregoing, the Court grants the Squairs' motion for summary judgment and hereby determines and declares that Safeco breached its obligation under the fire insurance policy issued to the Squairs to pay for loss and damage occurring on or about May 9, 2015. The Court further finds that, upon the Squairs' filing of a Trial Note of Issue, the Court shall schedule a date for an Inquest to determine damages.

The above constitutes the Decision of the Court. The Squairs' attorney shall submit a proposed Order to the Court, on notice to Safeco's attorney, within fifteen (15) days of the date of this Decision.

Dated: April 9, 2015

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James P. Murphy
Justice of the Supreme Court

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