SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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FORTY EAST BROADWAY CORP.,
Plaintiff,

Index No.: 601072/09

-against-

THE CHARTER OAK FIRE INSURANCE COMPANY, TOWER INSURANCE COMPANY OF NEW YORK and FIRST MERCURY INSURANCE COMPANY,
Defendants.

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HON. SALIANN SCARPULLA, J.S.C:

In this declaratory judgment action seeking first party insurance coverage, defendant Tower Insurance Company of New York ("Tower") moves for summary judgment dismissing the complaint of plaintiff Forty East Broadway Corp. ("FEBC").

Background

This action arises out of a building that was demolished at 89 Bowery ("89 Bowery") after the New York City Department of Buildings ("NYCDOB") issued an Emergency Declaration declaring 89 Bowery a hazardous condition. NYCOB issued the Emergency Declaration because 89 Bowery leaned too far into the construction site at 93 Bowery ("93 Bowery"). The general contractor responsible for the 93 Bowery construction commenced an action against FEBC, and FEBC thereafter filed a third party complaint against the owners of 93 Bowery and its contractors for damages to 89 Bowery (collectively "the underlying action"). In relation to the underlying action, FEBC commenced this declaratory judgment action against Tower and other named insurers seeking coverage for all damages and losses in connection with 89 Bowery and also for defense and indemnification in connection with the underlying action. At various junctures, the parties in the underlying action and the other named insurers in this action have resolved their respective claims and/or defenses, leaving FEBC and Tower the only remaining parties in this action.

Tower issued FEBC property insurance, effective June 29, 2007 to June 29, 2008, which provided coverage for 89 Bowery for certain "Covered Causes of Loss" and in relevant part includes "[v]andalism, meaning willful and malicious damage to, or destruction of, [89 Bowery]." The policy further provides coverage for "loss or damage commencing . . . [d]uring the policy period [i.e., June 29, 2007 to June 29, 2008]."

89 Bowery was demolished in early October 2008 and prior to its demolition, 93 Bowery was in the process of being renovated. 93 Bowery received the necessary permits, hired contractors and engineers to perform the construction, and also contracted with 89 Bowery to set out their relationship during the construction period. Part of the construction project eventually required 93 Bowery to excavate deeper, necessitating calculations for underpinning work of 89 Bowery's north wall to maintain the insured building's structural integrity. Records show that further excavation and underpinning work commenced sometime in June 2008, and that 89 Bowery started to lean around that time.

Records also show that effects related to the underpinning work started surfacing in July, 2008, when 89 Bowery started logging complaints from tenants about various signs of damage. These complaints eventually prompted 89 Bowery's owner to request its engineer, John Nakrosis ("Nakrosis"), to inspect the building. On or around July 31, 2008, Nakrosis noted movement of less than .25 inches, which he believed did not present a dangerous condition to 89 Bowery but should be remediated with additional bracing.

Throughout August, 2008, Nakrosis monitored 89 Bowery's movement and attempted to work with 93 Bowery to ensure that no further movement occurred. Despite those efforts, events precipitously shifted in early September when significant movement took place, *i.e.*, approximately 4 inches of movement, triggering NYCDOB's active involvement. On September 16, 2008, NYCDOB issued an Immediate Emergency Declaration, ordering that 89 Bowery be vacated.

Thereafter, Nakrosis and 93 Bowery's engineers, in conjunction with NYCDOB, discussed remedial measures, which were ultimately unsuccessful. NYCDOB ordered for 89 Bowery's demolition on or around September 30, 2008.

In consolidation with the underlying action, extensive discovery has been completed in this action. The parties do not dispute various expert findings that the loss of 89 Bowery was caused by 93 Bowery's neighboring construction, specifically the failed underpinning work.[1] It is further undisputed that Tower's policy does not provide coverage for any loss or damage caused by negligence or neighboring construction activities.

On February 3, 2009, Tower denied coverage for FEBC's property claim because: 1) the loss was not caused by a named peril; 2) the loss occurred outside the policy period; 3) FEBC failed to timely notify Tower of the claim; 4) and the policy's Ordinance of Law exclusion barred coverage. Tower asserts these coverage denial reasons here, moves for summary judgment for lack of coverage, and also seeks dismissal of FEBC's claim for defense and indemnification of the underlying action.

FEBC argues in opposition that Tower improperly denied its coverage claim because: 1) the loss is covered under the policy's vandalism provision; 2) the loss commenced prior to the policy's expiration; 3) FEBC provided timely notice of its claim; and 4) the Ordinance Exclusion does not apply to FEBC's claim. FEBC does not address Tower's argument in support of dismissal of FEBC's claim for defense and indemnification of the underlying action.

Discussion

"On a motion for summary judgment, the moving party [] has the burden to establish 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

[1] Rather, as will be discussed below, the parties dispute how plaintiff characterizes this undisputed cause.

demonstrate the absence of any material issues of fact.'" *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 (2014) (citation omitted) (italics added). Summary judgment is granted "then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" Vega *v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012) (citation omitted).

The insurance policy at issue here provides coverage for "[v]andalism, meaning willful and malicious damage to, or destruction of the described property." FEBC argues that 93 Bowery's conduct during construction constitutes vandalism as provided and covered under the policy. In support, FEBC cites *Georgitsi Realty, LLCI v. Penn-Star Ins. Co.*, 21 N.Y.3d 606, (2013), in which the Court of Appeals held that vandalism "relating to a property insurance policy" may include "malicious damage . . . result[ing] from acts not directed specifically at the covered property" such as "an excavator who is paid to dig a hole, and does so in conscious disregard of likely damage to the building next door." *Georgitsi*, 21 N.Y.3d at 608 - 11.

Here, the damage to and/or loss of the insured building clearly resulted from 93 Bowery's neighboring construction activities, specifically the failed underpinning work to support 89 Bowery. Because 93 Bowery's conduct may constitute vandalism under *Georgitsi Realty, LLCI*, I must determine whether there is a material issue of material fact for trial regarding malice.

"Conduct is 'malicious' for these purposes when it reflects 'such a conscious and deliberate disregard of the interests of others that [it] may be called willful or wanton[.]" *Georgitsi*, 21 N.Y.3d at 611 (citations omitted). This "state of mind is the same that would be required to award punitive damages[.]" *Georgitsi*, 21 N.Y.3d at 609. FEBC proffers three excerpts from Nakrosis' testimony as evidence showing 93 Bowery's malice:

1. Nakrosis testified that around July 30, 2008 when he first recognized that 89 Bowery moved, he met with 93 Bowery's lead engineer to discuss remedial steps, and both

parties agreed that 93 Bowery would insert additional bracing. Despite this conversation and repeated status inquiries thereafter, neither the bracing agreed to nor alternative remedial measures were taken.

2. Nakrosis testified that after noticing further movement on September 9, 2008, he contacted 93 Bowery to discuss stabilizing the building and recommended bracing for the third and fourth floor. Nakrosis further testified that 93 Bowery's lead engineer decided against his recommendation because "it would have interfered with the construction of 93 [Bowery] and would have been too expensive."
3. Nakrosis testified that after receiving NYCDOB's vacate order on September 16, 2008 but before the NYCDOB issued an order to demolish the building on September 29, 2008, 93 Bowery's lead engineer concluded 89 Bowery had to be demolished because it encroached onto 93 Bowery's projected square footage without providing additional objective engineering reasons.

The insurance policy at issue here expired on June 29, 2008. Because all of the testimony FEBC proffers relates to alleged malicious conduct after the policy expired, it is irrelevant to the coverage issue in this action.

Further, after reviewing the submitted affidavits and evidence, none of 93 Bowery's conduct during the policy period constitutes vandalism or raises an issue of material fact regarding vandalism as defined in *Georgitsi.*

When a definition of malice for purposes of a claim of vandalism under an insurance policy, the Court of Appeals in *Georgitsi* cited *Marinaccio v. Town of Clarence,* 20 N.Y.3d 506 (2013) [hereinafter *Marinaccio*]. In *Marinaccio*, the Court of Appeals vacated a punitive damages award involving a developer who intentionally diverted storm water to the landowner's property because the developer "complied with all federal, state and local planning and development laws and

regulations, and worked closely with [government engineers] to secure all required permits and approvals; it hired [experts] to assist in those regards." *Marinaccio,* 20 N.Y.3d at 511.

Similarly, here FEBC has not submitted evidence to show that *during the policy period*, 93 Bowery failed to comply with applicable laws and regulations; or failed to work collaboratively with 89 Bowery or the NYCOB; or inappropriately withheld information from the NYCDOB: or failed to hire experts to assist with construction; or even that 93 Bowery's construction activity was performed in a malicious manner.

In contrast, 93 Bowery submits an expert loss investigation report showing that 1) a preconstruction survey of 89 Bowery's condition was completed; 2) geotechnical investigation of 93 Bowery was completed; 3) 93 Bowery hired a third party to monitor 89 Bowery's wall movement; 4) 93 Bowery retained engineer firms to design and calculate the underpinning and bracing work for 89 Bowery; 5) those engineers were responsible for the diligent discharge of their duties and communicating with the NYCDOB. "Clearly, those measures were ultimately unsuccessful in preventing damage to surrounding property" and certainly 93 Bowery's conduct in relation to FEBC's property after the Tower policy period was not ideal. *Marinaccio,* 20 N.Y.3d at 511. However, this planning shows that "[93 Bowery'] actions [during the policy period] could not be considered 'wanton and reckless or malicious.'" *Marinaccio,* 20 N.Y.3d at 511.

In opposition, FEBC argues that covered loss or damage commenced during the policy period because movement occurred as soon as underpinning work started in June, which relates, however remote, to the vandalism issues FEBC raises after the policy period expired.[2] "Under New York law, [however,] the loss date is the date of 'the *occurrence of the casualty or event insured against.*" *Lichter Real Estate Number Three, L.L.C. v. Greater New York Ins. Co.*, 43 A.D.3d 366,

[2] FEBC cites no case law to support this construction.

(1st Dept't 2007) (emphasis added); *see also Margulies v. Quaker City Fire & Marine Ins. Co.*, 276 A.D.695, 700 (1st Dep't 1950) (concluding that "'[i]nception means the beginning, the *commencement*, the origination . . . [and] 'inception of the loss' [means] the *occurrence of the casualty insured against*[.]") (emphasis added).

The fact that the insured building marginally moved during the Tower policy period only shows damage or loss caused by ordinary negligence at best, and the standard here must "serve to distinguish between acts that may fairly be called vandalism and ordinary tortious conduct." *Georgitsi Realty, LLCI v. Penn-Star Ins. Co.*, 21 N.Y.3d 606, 611 - 12 (2013). The conduct and related loss or damage, if any, that occurred and commenced during the policy period does not constitute or stem from malicious conduct, as that term is defined in *Georgitsi*.

Looking at the applicable policy provisions "in the light of the obligation as a whole and the intention of the parties as manifested thereby . . ." leads me to reach the same conclusion. *William C. Atwater & Co. v. Panama R. Co.*, 246 N.Y. 519, 523 (1927); *see also Schloss v. Fidelity Mut. Life Ins. Co.*, 193 Misc. 121, 122 (Sup. 1948), judgment aff'd 274 A.D. 924 (1st Dep't 1948) (stating that "[i]n construing the contracts of insurance [], every part of the policies should be considered in arriving at a proper interpretation."). Because the insurance policy will provide coverage "for direct physical loss of or damage to [89 Bowery] . . . caused by or resulting from [vandalism]," the policy period, in turn, similarly limits coverage to vandalism that causes "loss or damage commencing . . . [d]uring the policy period." To give it any other meaning would convert insurance against vandalism "into approaching general coverage for property damage." *Georgitsi*, 21 N.Y.3d at 612.

Because no vandalism "commenc[ed] [d]uring the policy period" and because the damage that did commence during the policy period, if any, was caused at best by ordinary negligence, which is not a covered cause of loss, there is no coverage for the loss and damage under this

insurance policy. FEBC in opposition has failed to raise an issue of fact regarding vandalism *during* the policy period, thus Tower's motion for summary judgment dismissing the action is granted. FEBC's claim for defense and indemnification in the underlying action is moot in light of underlying action's dismissal. Further, in light of the foregoing, I do not reach Tower's alternate grounds for dismissal.

In accordance with the foregoing, it is

ORDERED that the motion for summary judgment, pursuant to CPLR § 3212, by defendant Tower Insurance Company of New York (motion seq. no. 005) is granted.

Settle judgment.

Dated: January 20, 2017

ENTER

HON. SALIANN SCARPULLA
J.S.C.