

Ain v Allstate Ins. Co.
2017 NY Slip Op 30777(U)
March 1, 2017
Supreme Court, Queens County
Docket Number: 706068/13
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

MARTIN J. AND INGRID AIN,

Index No: 706068/13

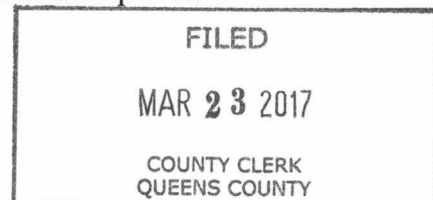
Plaintiffs,

Motion Date: 9/21/16

-against-

Motion Seq. No.: 1

ALLSTATE INSURANCE COMPANY,



Defendant.

The following papers numbered 1 to 11 read on this motion by defendant Allstate Insurance Company (defendant), to dismiss plaintiffs' complaint pursuant to CPLR 3211 (a)(7), or in the alternative, for summary judgment dismissing the complaint pursuant to CPLR 3212.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-8
Reply Affidavits	9-11

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action sounding in breach of contract, seeking coverage under a homeowners' insurance policy for a loss that plaintiffs Martin J. Ain and Ingrid Ain (plaintiffs), sustained as a result of Superstorm Sandy (the storm), on or about October 29, 2012. Plaintiffs' oceanfront home, located at 134 Beach 140 Street, Belle Harbor, New York, was completely destroyed by the storm. At the time of the loss, plaintiffs had in effect three policies covering their home and personal property. One policy was National Flood Insurance Program Policy issued by non-party Federal Emergency Management Agency and administered by defendant. The second policy in effect was an excess flood policy, issued and administered by non-party Pacific Specialty Insurance Company. As a result of the losses that plaintiffs sustained due to the storm, both flood policies were paid in full. The

third policy was a homeowners' insurance policy (the policy), issued and administered by defendant, which is the subject of this action.

Plaintiffs commenced the instant action to recover for losses allegedly sustained to their dwelling and personal property from the policy. Plaintiffs have alleged that defendant breached a valid and binding contract with plaintiffs by failing to perform its obligations under the contract and failing to pay and reimburse plaintiffs under the policy.

Although defendant brought this motion to dismiss plaintiffs' complaint pursuant to CPLR 3211 (a)(7) and CPLR 3212, in light of the fact that both plaintiffs and defendant have deliberately charted a course for summary judgment by submitting evidence in support of, and in opposition to the motion, and both have requested such relief, the court will treat the instant motion solely as one for summary judgment (CPLR 3212 [c]; see *Myers v BMR Bldg. Inspections, Inc.*, 29 AD3d 546 [2d Dept 2006]; *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; see also *John R. Higgitt, Practice Commentaries, McKinney's Cons Laws of NY*, Book 7B, CPLR C3211:43).

In support of its motion, defendant has argued that plaintiffs' claimed loss is excluded under the terms of the homeowners' policy. On this motion for summary judgment, defendant has the initial burden of demonstrating the absence of any material issues of fact (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]). "An insurance policy is a contract between the insurer and the insured. Thus, the extent of coverage ... is controlled by the relevant policy terms ..." (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]; see *Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 143 AD3d 146, 150 [1st Dept 2016]). "As the Court of Appeals has stated, New York law 'recognize[s] the right of each insurer to rely upon the terms of its own contract with its insured'" (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d at 145, quoting *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 373 [1985]).

"An insurance agreement is subject to principles of contract interpretation," (*Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]), and "[g]enerally, courts determine the rights and obligations of parties under insurance contracts based on the specific language of the policies" (*Demetrio v. Stewart Title Ins. Co.*, 124 AD3d 824, 825 [2d Dept 2015], *lv denied*, 25 NY3d 906 [2015]). "As with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015][internal quotes and citation omitted]).

Defendant has relied upon, among other things, a copy of plaintiffs' policy, effective from October 14, 2012, to October 14, 2013. As is relevant here, in "Section I - Your Property," Coverage A provides protection to plaintiffs for their dwelling, including certain attached structures, certain construction materials and wall-to-wall carpeting "fastened" to the dwelling, while Coverage B provides protection for other structures, and Coverage C provides protection for personal property.

The policy excludes, in the section entitled "Losses We Do Not Cover Under Coverages A and B,"

"loss to the property ... consisting of or caused by: 1. Flood, including but not limited to, surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind. 2. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities that backs up through sewers or drains. 3. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, that overflows from a sump pump, sump pump well or other system designated for the removal of subsurface water which is drained from a foundation area of a structure. 4. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, on or below the surface of the ground, regardless of its source. This includes water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, which exerts pressure on, or flows, seeps or leaks through any part of the residence premises... 21. Weather Conditions that contribute in any way with a cause of loss excluded in this section to produce a loss... 23. We do not cover loss to covered property described in Coverage A - Dwelling Protection or Coverage B - Other Structures Protection when: a) there are two or more causes of loss to the covered property; and b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 22 above."

In the section entitled "Losses We Cover Under Coverage C," the policy provides that it will provide coverage for loss of personal property caused by "2. Windstorm or Hail. We do not cover: a) loss to covered property inside a building structure, caused by rain, snow, sleet, sand or dust unless the wind or hail first damages the roof or walls and the wind forces rain, snow, sleet, sand or dust through the damaged roof or walls..."

In the section entitled "Losses We Do Not Cover Under Coverage C," the policy excludes loss to personal property

“caused by or consisting of: 1. Flood, including but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind. 2. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities that backs up through sewers or drains. 3. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, that overflows from a sump pump, sump pump well or other system designed for the removal of subsurface water which is drained from a foundation area of a structure. 4. Water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, on or below the surface of the ground, regardless of its source. This excludes water or any liquid or sludge which contains water, whether or not combined with other chemicals or impurities, which exerts pressure on, or flows, seeps or leaks through any part of the residence premises... 13. Weather Conditions that contribute in any way with a cause of loss excluded in this section to produce a loss... 15. We do not cover loss to covered property described in Coverage C - Personal Property Protection when: a) there are two more causes of loss to the covered property; and b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 14 above.”

It is undisputed between the parties that plaintiffs had a homeowners’ insurance policy with defendant which covered the subject premises and that if a loss were to be caused by flood, it would be excluded under the policy. While defendant has argued that plaintiffs are estopped from denying that the damage caused to their property was a result of flood, plaintiffs admit that flood did, in fact, cause some damage to their property, but have argued that portions of the property, including the roof, second and third floor, were damaged by wind and wind-driven rain prior to the heavy flooding, losses which cannot be excluded under the policy.

Defendant has argued that the predominant and proximate cause of the loss was flooding, which was sufficient to trigger the policy exclusions, and that, pursuant to the delineated exclusions in the policy, including exclusions 1, 2, 3, 4, 21 and 23 of Coverage A and B, and exclusions 1, 2, 3, 4, 13 and 15 of Coverage C, plaintiffs’ loss is excluded under the policy. “In order for a policy exclusion to be enforced, the language must be clear and unmistakable, and the carrier must establish that the exclusion applies in the particular case and is subject to no other reasonable interpretation” (*Junius Dev., Inc. v. N.Y. Marine & Gen. Ins. Co.*, 48 AD3d 426, 427 [2d Dept 2008]; see *Vantage of Jackson, LLC v. Everest Nat’l Ins. Co.*, 85 AD3d 900, 901 [2d Dept 2011]). Defendants have relied upon the affidavit of David Britton (Britton), a professional engineer, accompanied by a report from Conestoga-Rovers Associates, dated December 20, 2012, as well as by an addendum to said report,

dated March 5, 2013, and the affidavit of Todd Cormier (Cormier), a professional engineer, accompanied by a report from Halliwell Engineering Associates, dated April 29, 2016.

In his affidavit, Britton stated that an inspection was performed of the subject premises on November 20, 2012. Britton incorporated by reference into his affidavit the report prepared by Conestoga-Rovers Associates, dated December 20, 2012, as well the addendum to said report, dated March 5, 2013, which were prepared in connection with the November 2012 inspection. Britton stated in his affidavit that his inspection of the premises led him to conclude that the walls and roof of the structure had collapsed onto the displaced foundation of the structure, that the majority of the structure was damaged and/or destroyed by flooding, and that the “predominant cause of the loss” was “storm surge and flooding” which occurred as a result of the storm.

In his affidavit, Cormier stated that he incorporated by reference into his affidavit, and referenced, the report from Halliwell Engineering Associates, dated April 29, 2016. He stated that an investigation as to the cause of the damage to the subject premises was conducted on April 29, 2016, that he reviewed Conestoga-Rovers Associates’ report, that he agreed with the findings of Conestoga-Rovers Associates set forth in that report, and he concluded that the “predominant cause of loss” was “the flooding, storm surge and wave action” that occurred during the storm.

In the sections set forth above, the policy unambiguously excludes coverage for a loss that results from “[f]lood, including but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind” or water damage on the surface of the ground. The policy also unambiguously excludes coverage for the structure and personal property contained therein when there “are two or more causes of loss to the covered property” and “the predominant cause[] of loss is [] excluded...” Additionally, the policy clearly excludes coverage for “[w]eather [c]onditions that contribute in any way with a cause of loss excluded in this section to produce a loss...” When the unambiguous language of the policy exclusions are read in conjunction with the policy as a whole, and based upon the evidence presented, defendant has adequately demonstrated that the predominant cause of the loss in this matter was flooding, storm surge and wave action which occurred as a result of the storm. Furthermore, defendant has demonstrated that the storm, an undisputed weather condition, contributed to the loss caused by flooding, storm surge and wave action in this matter. Therefore, defendant has adequately demonstrated that the clear terms of the policy exclusions apply to plaintiffs’ claim and it has satisfied its prima facie burden (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).


In opposition, although plaintiffs have argued that issues of fact remain as to whether the predominant cause of the loss was wind and wind-driven they have failed to raise a

triable issue of fact. Plaintiffs have pointed to an affidavit from Rosen, dated August 11, 2016, and the affidavit of Jeffrey Major (Major), a public adjuster and flood adjuster. Major stated in his affidavit that he performed an investigation into the damage to plaintiff's premises due to the subject storm on August 3, 2016, and concluded that the "roof was dislodged prior to heavy flooding, the second and the third floors of [plaintiffs'] residence and the personal property therein sustained damage caused solely by wind and ensuing rain." In his affidavit, dated August 11, 2016, Rosen concluded that "because the roof was dislodged prior to heavy flooding, the second and third floors of [plaintiffs'] residence and the personal property therein sustained severe damage caused solely by wind and wind-driven rain."

While plaintiffs appear to contend that the second and third floor damage was separate from the loss, they have failed to adequately demonstrate such. The upper floors of the premises rested on the lower level, which was, undisputedly, damaged by flooding, storm surge and wave action. Under these circumstances and after careful consideration of plaintiffs' remaining contentions, none of plaintiffs' arguments or evidence has sufficiently raised a triable issue of fact (*id.*). In light of the above determination, defendant is entitled to summary judgment dismissing the complaint.

Accordingly, defendant's motion for summary judgment is granted.

Dated: March) , 2017



J.S.C.

