J&B Trading Co., Inc. v Leading Ins. Group Ins. Co., Ltd.
2019 NY Slip Op 30942(U)
April 8, 2019
Supreme Court, Kings County
Docket Number: 508951/2016
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 8th day of April 2019.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

----------X

J&B TRADING CO., INC.,

Plaintiff,

Index No.: 508951/2016

DECISION & ORDER

-against-

LEADING INSURANCE GROUP INSURANCE CO., LTD.,

Defendants.

----------X

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

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations)/Memoranda Annexed	25-44, 50-54
Opposing Affidavits (Affirmations)/Memoranda	
Reply Affidavits (Affirmations)/Memoranda	57
Memoranda of Law	45, 55, 59

Introduction

Defendant, Leading Insurance Group Insurance Co., moves by notice of motion, sequence number two, for an order pursuant to CPLR § 3212 declaring that defendant is not obligated to indemnify plaintiff for damages. Plaintiff, J&B Trading Co., Inc., cross moves by notice of cross motion, sequence number three, for summary judgment.

Background & Procedural History

Plaintiff, J&B, operated a wholesale electronics business at 3915 14th Avenue, Brooklyn, New York, a two-story building. J&B operated out of the ground floor while Paytek, an unrelated company, operated on the second floor. According to J&B's president, Benjamin Baumohl (Baumohl), the company was insured by defendant Leading Insurance Group Insurance Co., Ltd. (*see generally,* NYSCEF Doc. # 52, Affidavit of Baumohl).

The Incident

On June 3, 2015, at approximately 7:00 – 8:00 p.m., Baumohl was present at J&B when an employee discovered the water leaking into the rear portion of the company's warehouse. Baumohl personally contacted Mr. Neiman, the landlord of the building who sent AP Construction to perform repairs (*see* Baumohl Affidavit at ¶¶ 9-11). AP Construction determined the source of the water leak to be a cracked drain pipe in the rear portion of the premises (*see id.* at ¶ 13; *see also* NYSCEF Docs. # 37 & 53, AP Construction Invoice).[1] After speaking to an employee of Paytek, Baumohl learned that the second floor experienced water infiltration as well.

Baumohl testified at an examination before trial on May 16, 2018 (*see* NYSCEF Doc. # 36; *see also* Notice of Motion, Exhibit G). Baumohl testified there was no lease between J & B and the landlord, Mr. Neiman. J & B employees cleaned the snow outside the premises and all repairs were Neiman's responsibility, including plumbing, electrical

[1] The AP Construction invoice provides, "WORK COMPLETED AT THE ABOVE ADDRESS: Found problem to be crack in drain, installed tube and flange into drain and resealed".

and roof issues (*see id.* at 15-17). On the night before he noticed a leak, there was a "very strong" thunderstorm (*see id.* at 23-24). He and an employee opened the store the following morning and the employee found the ceiling bubbled and rain dripping in five to eight places in the warehouse (*see id.* at 24, 28). Baumohl was told that the cause of the water was a broken drain pipe (*see id.* at 34). The landlord, Mr. Neiman, called a professional to fix the problem (*see id.*). At the deposition, counsel asked Baumohl if the landlord called a plumber. He testified that the landlord called someone to fix it. An objection was made to the use of the term "plumber" to which Baumohl responded "I don't know. He came with somebody" (*id.* at 35). Baumohl testified that "the drain does not have water running through it all the time" and "[i]t's not like a pipe for sprinkler or plumbing"; "it is a drain for rain water" (*id.* at 44).

The Policy and Denial of Coverage

Plaintiff obtained an insurance policy from defendant for the period of May 3, 2015 to May 3, 2016, policy number 01CPS055050 (*see* NYSCEF Doc. # 52, Affidavit of Benjamin Baumohl at ¶ 7; *see also* NYSCEF Doc. # 29, Affidavit of Ilka Torres at ¶ 3). A copy of the policy is provided herein as NYSCEF Doc. # 35).[2] It is undisputed herein that J&B's warehouse "stock" was covered by the policy (*see* Policy, p 24, "Building and Personal Property Coverage Form (A)(1)(b)(3)). According to Ilka Torres, Claims General Manager for defendant, stock is covered "when damage is caused by or results from a Covered Cause of Loss" (Affidavit of Ilka Torres, NYSCEF Doc. # 29).

[2] The policy is bates stamped with the initials LIG in the bottom right-hand corner of the document. Any reference to the policy herein will be by the bates stamped page number.

At issue herein is the cause of the leakage and whether that cause is covered by the policy.

After the incident, plaintiff filed an ACORD property loss notice, seeking to be indemnified for the damages sustained (*see* NYSCEF Doc. # 38). This notice listed the loss as the "result of a broken drain line" (*id.*). Defendant, through its adjuster, Long Island Adjustment Corp., hired All Systems Roofing to inspect the roof of the premises. Anthony Fiorenti (Fiorenti) conducted an inspection of the roof on July 1, 2015 and prepared a report dated July 8, 2015 (*see generally* NYSCEF Doc. # 27, Affidavit of Fiorenti; NYSCEF Doc. # 28, Fiorenti Inspection Report). Fiorenti opines,

> 4. I observed the roof to be in a fair to poor condition. I observed cracks and blisters. Further, I observed that many portions of the roof, including the flashing, gravel stop, chimney, vents and gutters, required maintenance and showed signs of wear and tear and long term exposure to the elements. I also observed areas of ponding: ponding water will cause the roof to degrade quicker than areas where ponding does not occur. Preventative maintenance is required to these areas to prevent future water filtration.
>
> 5. There was no evidence of recent damage to the roof caused by a storm or weather event. There was evidence of a recent repair in the center area of the roof. Specifically, a new aluminum drain sleeve appeared to have been recently installed. I could tell that the repair was recent because of the condition of the metal and presence of fresh tar. There was also evidence of older repairs in the area around the drain. From experience, I could tell that there had been two separate attempts at repairing this area.

(Affidavit of Fiorenti).

By letter dated July 15, 2015, defendant denied coverage based on the Cause of Loss Special Form, Subsections (B) and (C) of the policy (*see* Baumohl Affidavit at ¶ 18; *see also* NYSCEF Doc. # 54). The denial letter provides, as follows:

> As part of the investigation, they inspected the roof and found no evidence of storm damage. They also noted at least 2 prior repairs made in the area of a newly installed drain sleeve. Based on their inspection it appears that there are on-going seepage issues as evidenced by the attempted repairs.
>
> . . .
>
> Without limiting this statement, all of the claimed damages were caused by wear and tear and not by a covered cause of loss. As a result coverage for the claimed damages is precluded under the policy by the above exclusions. Accordingly we must respectfully disclaim coverage to you for this loss and decline payment for any damages you have incurred.

(NYSCEF Doc. # 54, Disclaimer Letter).

In the disclaimer letter, defendant relies on the following policy provisions:

> A. Covered Causes of Loss
> When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
> 1. Excluded in Section B,. Exclusions or
> 2. Limited in Section C., Limitations; that follow
>
> B. Exclusions
> 2. We will not pay for loss or damage caused by or resulting from any of the following:
>
> (d)(1) Wear and tear;
> (2) Rust or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself…
> (4) Settling, cracking, shrinking or expansion…
>
> But if an excluded cause of loss that is listed in 2.d(1) through (7) results in a "specified cause of loss" or building

glass breakage, we will pay for the lass or damage caused by that "specified cause of loss" or building glass breakage.

. . .

G. Definitions

2. "Specified causes of loss" means the following: fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire-extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow; ice or sleet; water damage…

c. Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

. . .

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss…

c. Faulty, inadequate or defective:
(1) Planning, zoning, development, surveying, siting;
(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
(3) Materials used in repair, construction, renovation or remodeling; or
(4) Maintenance;
Of part or all of any property on or off the described premises

. . .

> C. Limitations
> The following limitations apply to all policy forms and endorsements, unless otherwise stated.
>
> 1. We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section
>
> c. The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, ice, sand or dust, whether driven by wind or not, unless:
> (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow sleet ice, sand or dust enters; or
> (2) The loss or damage is caused by or results from thawing of snow, sleet or ice on the building or structure

(*id.; see also* Policy, Cause of Loss – Special Form [A][1]-[2] at AIG 65; [B][2][d][1]-[2] & [4] at AIG 67; [G][2][c] at 73-74; [B][3][c][1]-[4] at AIG 68; [C][1][c][1]-[2] at AIG 70; *see also* Affidavit of Ilka Torres, NYSCEF Doc. # 29).

Breach of Contract Action

Plaintiff J&B commenced the instant action for breach of contract by e-filing a summons and complaint on May 27, 2016. Defendant joined issue by e-filing an answer on July 14, 2016. Defendant, in support of its motion, contends that the interior damage limitation precludes coverage (*see* Policy, Cause of Loss – Special Form [C][1][c][1]-[2], above). Therefore, "unless J&B establishes that the rainwater infiltration was causally related to damage to the roof due to a covered cause of loss, J&B is not entitled to coverage" (Memorandum of Law in Support, NYSCEF Doc. # 45 at p 12). Defendant maintains that the damage to the roof drain was not caused by a covered cause of loss

(*see id.* at 13). Defendant relies on the inspection and report of their expert roofer and avers that that the proximate cause of the water leak was the faulty and defective condition of the roof. The policy specifically excludes coverage for loss resulting from wear and tear or "settling, cracking, shrinking or expansion" or "faulty, defective or inadequate" maintenance (*see* Policy, Cause of Loss – Special Form [B][2][d][1]-[2] & [4]; [B][3][c][4]). Defendant further contends that the loss did not arise from a fortuitous event and therefore coverage is not triggered from an all-risk insurance policy (*see* Memorandum of Law in Support at p 9-10).

Plaintiff, in opposition to defendant's motion, contends that defendant failed to establish that the loss did not arise from a fortuitous event (*see* Memorandum of Law in Opposition and in Support of Cross Motion, NYSCEF Doc. # 55 at p 6). Plaintiff avers that the defendant's independent adjuster, who conducted his inspection after the pipe was repaired, was speculative in his conclusion that the drain pipe was cracked or broken since he did not actually inspect the broken drain pipe (*see id.*). Plaintiff further maintains that the interior damage limitation is irrelevant, and that defendant failed to establish that a broken drain pipe is excluded from coverage (*see id.* at p 7 & 9).

Plaintiff, in support of its cross motion, maintains that the damage to the store is covered by the insurance policy and that defendant improperly denied coverage. It is undisputed that the drain pipe cracked. Plaintiff argues that even assuming that wear and tear caused the cracked drain pipe and water infiltration, the damage is nevertheless, covered by the policy.

> It is plaintiff's position that the drain pipe that broke was part of the building's plumbing system (which by definition includes a drainage system), or an "other system" located in the subject premises containing water, fitting perfectly within the policy definition. Hence, it matters not, as Defendant desperately argues, that the pipe which causes the damages was a drain pipe; it is covered under the policy. Thus, even if the pipe cracked or broke due to wear and tear, of which there is no evidence in the record *sub judice*, the ensuing water loss is nonetheless covered under the policy

(Plaintiff Memorandum of Law in Support of Cross-Motion, NYSCEF Doc # 55 at p 13). Plaintiff maintains that "water damage" is listed as a "specified cause of loss" and is therefore covered.

Discussion

Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]).

> Such a motion must be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212[b]). To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 507; *see Zuckerman v City of New York*, 49 NY2d 557, 562). Admissible evidence may include "affidavits by persons having knowledge of the facts [and] reciting the material facts" (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965,

> 967; *see* CPLR 3212[b]; *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d at 508).

(Bank of N.Y. Mellon v. Gordon, -- A.D.3d. --, 2019 N.Y. Slip Op. 02306 [2 Dept., 2019])

Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"Generally, 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 A.D.3d 824, 3 N.Y.S.3d 75 [2 Dept., 2015], citing *State of New York v. Home Indem. Co.*, 66 N.Y.2d 669, 671, 495 N.Y.S.2d 969 [1985]).

> Commercial property insurance is generally offered in either an all-risk policy or a named-perils policy (*see Parks Real Estate Purch. Group v. St. Paul Fire & Mar. Ins. Co.*, 472 F.3d 33, 41 [2d Cir.2006]). "Named-perils" covers only specifically enumerated risks, whereas an "all-risk" agreement generally covers all risks of physical loss, except for those perils specifically excluded. Those losses caused by

> fraud or, in some cases, by a fortuitous and unforeseen event are likewise excluded (see 7 Couch on Insurance 3d § 101:7).

(*TAG 380, LLC v. ComMet 380, Inc.*, 10 N.Y.3d 507, 890 N.E.2d 195 [2008]).

"It is well established that[,] [i]n determining a dispute over insurance coverage, we first look to the language of the policy [internal quotation marks omitted]" (*Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 31 N.Y.3d 51, 96 N.E.3d 209 [2018], quoting *Roman Catholic Diocese of Brooklyn,* 21 N.Y.3d at 148, 969 N.Y.S.2d 808, 991 N.E.2d 666 [2013]). "In doing so, we must 'construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' [internal citations and quotation marks omitted]" (*Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139, *supra*, quoting *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 [2002]).

"Exclusions to coverage must be strictly construed and read narrowly, with any ambiguity construed against the insurer" (*Lancer Indem. Co. v. JKH Realty Grp., LLC*, 127 A.D.3d 1032, 7 N.Y.S.3d 492 [2 Dept., 2015], citing *Automobile Ins. Co. of Hartford v. Cook,* 7 N.Y.3d 131, 818 N.Y.S.2d 176 [2006]). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Century Sur. Co. v. All In One Roofing, LLC*, 154 A.D.3d 803, 63 N.Y.S.3d 406 [2 Dept., 2017], *lv denied*, 31 N.Y.3d 909, 106 N.E.3d 750 [2018], quoting *Congregation*

Beth Shalom of Kingsbay v. Yaakov, 130 A.D.3d 769, 13 N.Y.S.3d 518 [2 Dept., 2015]; *see also Dean v. Tower Ins. Co. of New York,* 19 N.Y.3d 704, 955 N.Y.S.2d 817 [2012]).

> Although the insurer has the burden of proving the applicability of an exclusion (*see Seaboard Sur. Co. v. Gillette Co.,* 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272), it is the insured's burden to establish the existence of coverage (*see Lavine v. Indemnity Ins. Co.,* 260 N.Y. 399, 410, 183 N.E. 897). Thus, "[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied" (*Borg–Warner Corp. v. Insurance Co. of N. Am.,* 174 A.D.2d 24, 31, 577 N.Y.S.2d 953).

(*Copacabana Realty, LLC v. Fireman's Fund Ins. Co.*, 130 A.D.3d 771, 15 N.Y.S.3d 357 [2 Dept., 2015]).

In the instant case, defendant met its burden and established that the loss did not occur from a fortuitous event and that the interior damage limitation precludes coverage.[3] The interior damage limitation states, that damage to the interior of a building, including personal property inside the premises, caused by water, is not covered unless it is caused by a "covered cause of loss" (Policy [C][1][c][1]-[2]). In support of its motion, defendant provided the affidavit of Fiorenti, the adjustors inspector, who personally inspected the roof. Defendant further provided the All Systems Roofing report which concludes that the rainwater seepage was the result of a cracked drain pipe and general wear and tear of the roof. Fiorenti further concludes that this loss was not the result of a such as a storm or a one-time weather event. Defendant further provided the affidavit of Ilka Torres,

[3] Although defendant disclaimed based on a number of policy provisions (see NYSCEF Doc. # 41, Disclaimer Letter), this Court will only address those arguments advanced by the parties herein (*see generally, Bank of N.Y. Mellon v. Gordon,* -- A.D.3d --, *supra*).

Claims General Manager for LIG, who opines that the damage was not a "covered cause of loss" (*see* NYSCEF Doc. # 29). The invoice from AP Construction who performed this repair, "found problem to be crack in drain" (*see* AP Construction Invoice). Plaintiff's own property loss notice described the damage as "the result of a broken drain line" (*see* NYSCEF Doc. # 38, ACORD Property Loss Notice).

Plaintiff, in opposition, raised a triable issue of fact. Plaintiff argues that coverage exists under an exception to the "wear and tear" exclusion (*see* Policy [B][2][d][1]). Under this exclusion, loss or damage caused by wear and tear is not covered unless it results in a "specified cause of loss" (*id.*). A "specified cause of loss", specifically, "water damage", is defined as "the accidental discharge or leakage of water… as the direct result of the breaking apart or cracking of a plumbing… or other system… that is located on the described premises and contains water or steam" (Policy [G][2][c]). Plaintiff concedes that the water infiltrated due to a cracked drain pipe but argues that this is an exception to the exclusion because the drain pipe is considered a "plumbing system" (*see* Memorandum of Law in Opposition at p 9). The policy is silent as to the definition of a "plumbing system" or "other system". Merriam-Webster defines "plumbing" as "the apparatus (such as pipes and fixtures) concerned in the distribution and use of water in a building" or "an internal system that resembles plumbing". However, here, the policy definition does not require the system to be internal. Rather, it merely requires that the system "is located *on* the described premises" and "contains water" (Policy [G][2][c] [emphasis added]). The caselaw is clear that ambiguity in an insurance contract must be construed against the insurer (*see Century Sur. Co. v. All in One Roofing, LLC,* 154

A.D.3d 803, *supra; Lancer Indem. Co. v. JKH Realty Grp., LLC*, 127 A.D.3d 1032, *supra*). Accordingly, plaintiff raised a question of fact as to whether the loss is covered by the policy.

Although plaintiff raised a question of fact sufficient to defeat the defendant's motion, plaintiff failed to meet its burden to establish entitlement to summary judgment on its cross motion. "To make a prima facie showing, the moving party must "demonstrate its entitlement to summary judgment by submission of proof in admissible form" (*Bank of N.Y. Mellon v. Gordon,* -- A.D.3d --, *supra,* citing *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 14 N.Y.S.3d 283 [2015]). In support of its cross-motion plaintiff merely submitted the affidavit of Baumohl, which is insufficient to establish the existence of coverage. As discussed above, a question of fact remains as to whether the loss falls within the "plumbing or other system" exception to the wear and tear exclusion.

Further, this Court finds unpersuasive, plaintiff's argument that the damage cannot be attributable to the poor condition of the roof because rainwater had never previously leaked. It is unclear to this court, without the opinion of an expert, what degree of wear and tear will cause the integrity of a roof to deteriorate such that water would first begin to leak or crack the drain pipe. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense (*L & D Serv. Station, Inc. v. Utica First Ins. Co.*, 103 A.D.3d 782, 962 N.Y.S.2d 187 [2 Dept., 2013]). Based on the foregoing, plaintiff's cross motion is denied.

Conclusion

Defendant's motion and plaintiff's cross motion for summary judgment are denied. A question of fact exists as to whether the "water damage" exception to the "wear and tear" policy exclusion applies.

The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

Lara J. Genovesi
J.S.C.

To:

Lerner, Arnold & Winston, LLP
By: Danielle S. Yamali, Esq.
Attorney for Plaintiff
475 Park Avenue South, 28th Floor
New York, New York 10016

Chartwell Law
By: Linda Fridegotto, Esq.
Attorney for Defendant
1 Battery Park Plaza, 35th Floor
New York, New York 10004