

**Greater N.Y. Mut. Ins. Co. v Harleysville Worcester  
Ins. Co.**

2020 NY Slip Op 30461(U)

February 21, 2020

Supreme Court, New York County

Docket Number: 151179/2016

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

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**INDEX NO.** 151179/2016

GREATER NEW YORK MUTUAL INSURANCE COMPANY  
and THE INSURANCE COMPANY OF GREATER NEW  
YORK,

**MOTION SEQ. NO.** 006

Plaintiffs,

- v -

HARLEYSVILLE WORCESTER INSURANCE COMPANY,  
TOWER INSURANCE COMPANY OF NEW YORK, INC.,  
CASTLEPOINT INSURANCE COMPANY, ALLIED WORLD  
INSURANCE COMPANY, DONGBU INSURANCE CO.,  
LTD. (U.S. BRANCH), and NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 140

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this declaratory judgment action, plaintiffs Greater New York Mutual Insurance Company (“GNY”) and The Insurance Company of Greater New York (“GNY”) (collectively “plaintiffs”) move, pursuant to CPLR 3212 (e) and CPLR 3001, for partial summary judgment against defendant Dongbu Insurance Co., Ltd. (U.S. Branch) (“Dongbu”). Dongbu opposes the application. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

## FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts in this matter are set forth in this court's prior decision and order dated June 27, 2019 (Doc. 142), familiarity with which is here presumed. For the purposes of the present motion, the relevant facts are as follows.

Nonparty Board of Managers of the Forestal Condominium ("Forestal") is the owner of a condominium building located at 109-33 71st Road, Forest Hills, New York ("the building") (Doc. 114, affirmation of Jonathan A. Messier [Messier], exhibit A, ¶ 8). Nonparty Michael Lago ("Lago"), an employee of nonparty All Area Property Management, is the managing agent for the Building (*id.*, ¶ 9).

GNY issued commercial general liability policy no. 6131M49020 to Forestal, effective from March 22, 2011 to March 22, 2013 (Doc. 122, Messier affirmation, exhibit I at 3). GNY issued commercial general liability policy no. 1131M35842 to Forestal, effective from March 22, 2015 to March 22, 2016 (Doc. 121, Messier affirmation, exhibit H at 3).

### A. The Dongbu Policy

Dongbu issued commercial general liability policy no. NCP 1300214 00 for the policy period beginning March 22, 2013 through March 22, 2014 to "Forestal Condominium All Area Realty Services Inc." as the named insured (Doc. 118, Messier affirmation, exhibit E ["the Dongbu Policy"] at 5). Section II of Commercial General Liability Coverage Form CG 00 01 12 07, paragraph 2 (b) of the Dongbu policy states, in relevant part, that "[a]ny person ... or any organization while acting as your real estate manager" is an insured (*id.* at 26). An endorsement

on Form CG 20 04 11 85 also adds “each individual unit owner of the insured condominium” as an additional insured, “but only with respect to liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that unit owner’s exclusive use or occupancy” (*id.* at 38).

Section I, which discusses coverage for bodily injury and property damage liability, as modified by Form CG 01 63 07 11, reads, in relevant part:

“A. Paragraph 1. Insuring Agreement of **Section I – Coverage A Bodily Injury And Property Damage Liability** is replaced by the following:

**1. Insuring Agreement**

**a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages even if the allegations of the ‘suit’ are groundless, false or fraudulent. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply. We may, at our discretion, investigate any ‘occurrence’ and settle any claim or ‘suit’ that may result. But:

...

**b.** This insurance applies to ‘bodily injury’ and ‘property damage’ only if:

**(1)** The ‘bodily injury’ or ‘property damage’ is caused by an ‘occurrence’ that takes place in the ‘coverage territory’;

**(2)** The ‘bodily injury’ or ‘property damage’ occurs during the policy period; and

**(3)** Prior to the policy period, no insured listed under Paragraph **1.** of Section II – Who Is An Insured and no ‘employee’ authorized by you to give or receive notice of an ‘occurrence’ or claim, knew that the ‘bodily injury’ or ‘property damage’ had occurred, in whole or in part. If such a listed insured or authorized ‘employee’ knew, prior to the policy period, that the ‘bodily injury’ or ‘property damage’ occurred, then any continuation, change or resumption of such ‘bodily injury’ or

‘property damage’ during or after the policy period will be deemed to have been known prior to the policy period”

(Doc. 118 at 35).

The Dongbu Policy defines “bodily injury” as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time” (*id.* at 29). The phrase “property damage” is defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it” (*id.* at 32). Alternatively, “property damage” shall also mean “[l]oss of use of tangible property that is not physically injured” (*id.*). An “occurrence” is “an accident, including continuous or repeated exposure to substantially the same general harmful conditions” (*id.* at 31).

The Dongbu Policy did not apply to:

**“a. Expected Or Intended Injury**

‘Bodily injury’ or ‘property damage’ expected or intended from the standpoint of the insured. This exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.

**(j) Damage To Property**

‘Property damage; to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property;

(6) That particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it”

(Doc. 118 at 19 and 21). The Dongbu Policy also contains a “Cross Suits” exclusion on Form DBCP 022 05 12, which reads, in part, that “[t]he following is added to **SECTION I** –

**COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, Paragraph 2.**

**Exclusions** ... [a]ny ‘suit’ by, or including, any insured against any other insured under this policy ...” (*id.* at 133).

**B. The Davydov Action**

In 2015, nonparty Albert Davydov (“Davydov”) commenced an action against Forestal, Lago and others titled *Davydov v Board of Managers of the Forestal Condominium, et al.*, Sup Ct, Queens County, Index No. 5263/2015) (“the *Davydov* Action”) in which Davydov alleged that the two residential units he owned in the building – unit 11B and the penthouse unit – were uninhabitable due to noxious odors, water leaks, and property damage (Doc. 116, Messier affirmation, exhibit C, ¶ 1). The amended complaint described a myriad of construction defects in the building as observed by an engineering firm Davydov had retained. For instance, the building’s central ventilation shafts improperly terminated in the interior of unit 11B; roof exhaust fans and ventilation for the elevator machine room described in the building’s offering plan had not been installed; the ventilation duct for the kitchen in the penthouse had been roofed over; and a metal access panel door to the boiler chimney opened directly into the interior of the penthouse (*id.*, ¶¶ 18-22).

The engineering firm noted there were four “active moisture spots” in the ceiling in unit 11B caused by roof leaks (*id.*, ¶ 23). Additionally, a drain in the northwest balcony adjacent to unit 11B was missing (*id.*, ¶ 24). The firm noted deficiencies with the brickwork, the absence of weep holes and waterproofing, and an improperly installed drain in unit 11B’s southwest terrace (*id.*, ¶¶ 25 and 27). A structural beam in unit 11B terminated without a column or support (*id.*, ¶ 26). Shut off valves at several risers to the water valves in the kitchen and bathroom in unit 11B

were missing (*id.*, ¶ 31). In addition, Consolidated Edison and an inspection company Davydov retained determined that the electricity meter for unit 11B registered electricity use for the entire building, not just that unit (*id.*, ¶¶ 35-36). Davydov also alleged that a test in unit 11B conducted on September 3, 2015 yielded a positive result for the presence of *Aspergillus/Penicillium* (*id.*, ¶ 41). A test of Davydov's urine performed two months later yielded a positive result for the presence of T-2 Toxin Trichothecene (*id.*).

Davydov pleaded the following eight claims denominated as causes of action: (1) breach of the implied warranty of habitability; (2) alleged violations of the building's By-Laws and the Condominium Offering Plan, the Multiple Dwelling Law and the New York City Building Code; (3) recovery of \$160,000 for an electricity meter issue; (4) an order directing Forestal and Lago to undertake remedial work to repair defective elements, deficiencies and omissions in the construction of the building; (5) an order directing Forestal and Lago to correct the electricity meter for unit 11B and the penthouse unit; (6) damages for the defective elements, deficiencies and omissions in the construction of the building; (7) recovery of \$276,365.19 paid by Davydov as monthly maintenance; and (8) damages for personal injury from toxin-producing mold (Doc. 116, ¶¶ 43-59).

In Davydov's verified bill of particulars, dated June 29, 2016, he admitted that he resided in unit 11B from May 31, 2004 until August 2004 and again from October 2008 until December 2010 (Doc. 117, Messier affirmation, exhibit D, ¶ 3). He alleged that he has been disabled since 2009 (*id.*, ¶¶ 20-21, 27), and that he has been confined to his bed and home for two to three days each month since 2013 (*id.*, ¶¶ 16-17).

### C. The Present Action

On August 12, 2015, a claims examiner for GNY forwarded the summons and complaint in the *Davydov* Action to Dongbu (Doc. 123, exhibit J at 1). Dongbu acknowledged receipt and advised that nonparty York Risk Services Group (“York”) would handle the claim (*id.*). By letter dated September 22, 2015, Dongbu, through York, issued a notice of denial to GNY disclaiming any duty to defend or indemnify Forestal based on the “owned property exclusion” in the Dongbu Policy (Doc. 124, exhibit K at 15). The letter indicated that the alleged damages sought in the *Davydov* Action “were caused not due to a sudden occurrence but rather, during the course of construction of the condo and units while in the control of the policy holder” (*id.*). In addition, Dongbu disclaimed coverage “because there was no ‘occurrence’” within the meaning of the Dongbu Policy and because Davydov’s damages may have occurred outside of the policy period (*id.*). Dongbu also predicated its denial of coverage on “the known loss doctrine, late notice, cross-liability exclusions, failure to qualify as an insured, contractual liability exclusion and the expected or intended exclusion” (*id.* at 16).

Plaintiffs thereafter commenced this action seeking a judgment declaring that defendants are obligated to defend and indemnify Forestal and Lago in the *Davydov* Action and that the exclusions in defendants’ respective policies do not bar coverage.<sup>1</sup> Plaintiffs also seek reimbursement for defendants’ proportionate share of the defense costs, as plaintiffs are presently defending Forestal and Lago in the *Davydov* Action (NYSCEF Doc No. 114, ¶ 19). Defendants have all interposed answers to the complaint. Plaintiffs now move, pursuant to CPLR 3001 and 3212, for partial summary judgment on their eighth and ninth causes of action against Dongbu.

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<sup>1</sup> Defendants Harleysville Worcester Insurance Company, Tower Insurance Company of New York, Inc., Castlepoint Insurance Company, Allied World Insurance Company, and National Union Insurance Company of Pittsburgh, PA had also issued commercial general liability policies to Forestal covering different policy periods from 2006 to 2011 and from 2014 to 2015. They, too, disclaimed coverage.

## THE PARTIES' CONTENTIONS

Plaintiffs argue that Dongbu has a duty to defend Forestal and Lago in the *Davydov* Action because the allegations in Davydov's complaint fall squarely within the bodily injury and property damage liability provisions in the Dongbu Policy.

Dongbu advances several arguments in opposition. First, Dongbu submits that the events described in the *Davydov* Action do not allege bodily injury or property damage caused by an occurrence during the period in which the Dongbu Policy was in effect. Rather, Davydov seeks injunctive relief and monetary damages caused by construction defects and breaches of the building's offering plan. Dongbu further contends that plaintiffs cannot demonstrate that the alleged personal injury Davydov sustained occurred during the Dongbu Policy period. Next, Dongbu argues that the "known loss defense" bars the present action because the "active moisture spots," noxious odors, and other building issues detailed in Davydov's complaint were known to Forestal prior to the commencement of the Dongbu Policy period. Dongbu also maintains that the allegations in the Davydov complaint fall within the "cross-liability" exclusion. Last, Dongbu submits that plaintiffs' motion is premature because plaintiffs have not responded to its discovery demands, including a request for the operative pleadings in the *Davydov* Action. Because plaintiffs never tendered the amended complaint to Dongbu, Dongbu has not been given notice of Davydov's personal injury claim.

In reply, plaintiffs maintain that Davydov's claims of property damage and personal injury constitute an "occurrence" because they are predicated on the building's negligent maintenance and repair, as opposed to faulty construction, because neither Forestal nor Lago were engaged in construction. Plaintiffs further assert that the pleadings in the *Davydov* Action allege injury and damage during the period in which the Dongbu Policy was in effect. Further, plaintiffs allege that

the “known loss doctrine” and the other exclusions referenced in Dongbu’s disclaimer letter are inapplicable.

### LEGAL CONCLUSIONS

The movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212 [b]*). The movant’s “failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

CPLR 3001 provides, in part, that the “court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” “A declaratory judgment is a discretionary remedy” (*Bower & Gardner v Evans*, 60 NY2d 781, 782 [1983]), and relief is limited to a declaration of the parties’ legal rights based upon the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

“[I]t is well settled that an insurer’s duty to defend [its insured] is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest ... a reasonable possibility of coverage” (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks and citation omitted]). Where there is a dispute over

coverage, the court must “first look to the language of the applicable policies” (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011] [internal quotation marks and citation omitted]). “[W]here the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement” (*Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 [1977]). Thus, an insurer must provide a defense when the facts and allegations in the complaint “bring the claim even potentially within the protection purchased” (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal quotation marks and citation omitted]; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991] [stating that an insurer has a duty to defend even though “facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered”]). However, “[i]f the allegations interposed in an underlying complaint allow for no interpretation which brings them within an insurance policy’s provisions, then no duty on the part of the insurer to defend exists” (*Atlantic Mut. Ins. Co. v Terk Techs. Corp.*, 309 AD2d 22, 29 [1st Dept 2003]).

Ordinarily, commercial general liability policies do “not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product” (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]). Indeed, the ““purpose of a commercial general liability policy . . . is to provide coverage for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product . . . is not what the damaged [party] bargained for”” (*Bonded Concrete, Inc. v Transcontinental Ins. Co.*, 12 AD3d 761, 762 [3d Dept 2004], quoting *Hartford Acc. & Indem. Co. v Reale & Sons*, 228 AD2d 935, 936 [3d Dept 1995]).

Thus, “construction defects such as faulty design, fabrication or installation do not constitute ‘occurrences’ under a commercial general liability insurance policy” (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103, 105 [1st Dept 2014] [citations omitted]; *see also Eurotech Constr. Corp. v QBE Ins. Corp.*, 137 AD3d 605, 606 [1st Dept 2016] [granting the insurer’s motion to dismiss because an allegation that an insured’s own work was damaged “does not constitute ‘property damage’ caused by an ‘occurrence’ within the meaning of the policy”]; *Baker Residential Ltd. Partnership v Travelers Ins. Co.*, 10 AD3d 586, 586 [1st Dept 2004] [declaring that the defendant insurer had no duty to defend or indemnify where the allegations in the complaint in the underlying action pleaded “a classic faulty workmanship/construction contract dispute”]).

A review of the amended complaint filed in the *Davydov* Action reveals that the allegations in the first seven causes of action appear to implicate faulty construction, which does not constitute an “occurrence” as defined in the Dongbu Policy. However, Davydov also complained about the “existence and growth of ... toxin producing molds ... fostered by the moisture conditions in Unit 11B caused by the roof leaks and by the effusion of all ventilation into Unit 11B” (Doc. 116, ¶ 57). Additionally, Davydov complained of moisture spots, water leaks and defective ventilation, all of which contributed to mold growth, and a missing drain in the northwest balcony that has caused a leak under the balcony door saddle in unit 11B. Thus, Davydov does not seek to recover solely for the faulty work but for the damage caused to his property from these alleged defects (*see I.J. White Corp. v Columbia Cas. Co.*, 105 AD3d 531, 532 [1st Dept 2013] [concluding that a third-party’s claim for damage to that party’s food products because of an alleged defect in a freezer system it had purchased from the insured was “precisely the kind [of damage] that plaintiff’s CGL policy contemplated, and therefore, the complaint properly alleges an ‘occurrence’ within the

meaning of the policy”]). Further, it appears that Davydov seeks to recover for property damage to his apartment caused by the allegedly defective construction.

Nevertheless, plaintiffs have not established their prima facie entitlement to summary judgment. One of the conditions which must be met before coverage is triggered under the Dongbu Policy is a showing that the alleged bodily injury and property damage occurred during the policy period. Here, plaintiffs have not demonstrated that the claimed injuries took place between March 22, 2013 and March 22, 2014. For instance, one of the allegations in the amended complaint relates to the electricity meter for unit 11B, which an inspector had determined, as early as April 28, 2010, registered electricity use for the entire building (Doc. 116, ¶ 36). Likewise, Davydov alleged that he first noticed the noxious odors in both units in 2004 (*id.*, ¶ 14), nine years before the Dongbu Policy became effective. Davydov claimed that he suffered respiratory problems, among other maladies and symptoms, as a result of the mold infestation (*id.*, ¶ 14). However, the Dongbu Policy expired in March 2014, and neither the complaint nor the verified bill of particulars specifies when Davydov first experienced any symptoms arising from the mold infestation so as to trigger coverage, especially since Davydov claims that he has been unable to work since 2009. Davydov also claimed that Forestal and Lago had “[c]onstructive notice of the mold condition ... from late 2014” (Doc. 117, ¶ 13) despite the fact that he had moved out of the unit five years earlier.

Without determining the applicability of the policy exclusions cited in Dongbu’s disclaimer letter, Dongbu has raised a triable question of fact regarding whether plaintiffs tendered copies of the two amended complaints served in the *Davydov* Action. Section IV, paragraph 2 of the Dongbu Policy requires that it be “notified as soon as practicable of an ‘occurrence’ or an offense which may result in a claim” (Doc. 118 at 27). The original complaint filed in that action, and tendered

to Dongbu in 2015, makes no mention of a mold infestation in unit 11B or of Davydov’s claim for bodily injury. Moreover, in view of the lack of discovery in this matter, the motion must be denied as premature (see *Somereve v Plaza Constr. Corp.*, 31 NY3d 936, 937 [2018]; *50 Gramercy Park N. Owners Corp. v GPH Partners LLC (Sponsor)*, 149 AD3d 635, 635 [1st Dept 2017]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiffs Greater New York Mutual Insurance Company and The Insurance Company of Greater New York for summary judgment (motion sequence no. 006) is denied without prejudice to renew the same upon the close of discovery; and it is further

ORDERED that the parties are directed to appear for a previously scheduled status conference on March 24, 2020 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of the court.

2/21/2020

DATE

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KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE