RD Rice Constr., Inc. v RLI Ins. Co.
2020 NY Slip Op 31328(U)
May 7, 2020
Supreme Court, New York County
Docket Number: 651185/2015
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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RD RICE CONSTRUCTION, INC. and AIG PROPERTY CASUALTY COMPANY as assignee/subrogee of ANTHONY and SANDRA TAMER,

Index No.: 651185/2015

Plaintiffs,

-against-

RLI INSURANCE COMPANY,

DECISION/ORDER

Defendant.

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HON. SHLOMO S. HAGLER, J.S.C.:

In this action, plaintiff AIG Property Casualty Company, as assignee/subrogee of Anthony and Sandra Tamer ("AIG"), seeks to recover against defendant RLI Insurance Company ("RLI") on a money judgment (the "Judgment") which AIG obtained against RLI's insured, plaintiff RD Rice Construction, Inc. ("Rice"), in a separate action against Rice in this court (the "subrogation action").[1]

AIG moves for an order granting summary judgment in its favor, and a judgment in the amount of $1,046,405.60, plus interest from March 24, 2017, in order for AIG to recover, pursuant to Insurance Law § 3420,[2] on the Judgment. RLI cross-moves for a

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[1]The subrogation action is captioned *AIG Property Casualty Company as assignee/subrogee of Anthony and Sandra Tamer v RD Rice Construction, Inc.*, Sup Ct, NY County, Index No.: 161853/14.

[2] Insurance Law § 3420 permits an injured party's recovery action against an insurer "under the terms of the policy . . . for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract."

declaration that RLI has no obligation to pay any amounts toward the Judgment, and for dismissal of the complaint, or, alternatively, for additional discovery.

Rice is a construction contractor. Rice's complaint seeks a declaration that RLI has a duty to defend and indemnify Rice in the subrogation action, under a general commercial liability ("CGL") insurance policy issued to Rice by RLI (the "Policy"). Rice, which filed for bankruptcy, has not moved for relief here, or opposed RLI's cross motion.[3]

BACKGROUND AND FACTUAL ALLEGATIONS

It is undisputed that Rice was the general contractor for construction and renovation work performed in the home of Anthony and Sandra Tamer ("Renovation Work" or "Project"), which consisted of gutting and rebuilding two combined residential co-operative units (the "unit"). In March 2013, when the Renovation Work was complete, the Tamers moved back into the unit. In November 2013, in response to the Tamers' complaint of a draft situation, Rice returned and installed additional insulation in the unit (the "Insulation Work"). On January 27, 2014, a HVAC unit pipe located in a wall or wall cabinet broke, causing a water loss (the "Incident") which resulted in damages in the unit, including to the custom flooring installed as part of the Project.[4]

AIG insured the Tamers under a homeowners, or first-party property insurance policy, settled with them for damages, and commenced the subrogation action against

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[3] The bankruptcy court has permitted AIG to continue prosecution of this litigation against Rice, but limited that permission to obtaining a judgment or settlement against Rice's available insurance coverage alone (NY St Cts Elec Filing [NYSCEF] Doc. No. 95).

[4] There is no dispute that the HVAC system plumbing was installed as part of the Project and is within the scope of the Project.

Rice, alleging a single cause of action, labeled as negligence. The facts AIG alleged in the subrogation action were that, in November 2013, the Tamers retained Rice to remedy a draft condition in their apartment, whereupon Rice performed the Insulation Work, which created a cold air condition causing the Incident.

By letter, dated November 13, 2014, RLI disclaimed coverage to Rice for the Incident, describing the Insulation Work as warranty work, and AIG's claim as for damage to Rice's Renovation Work, specifically, the cost of the flooring that Rice installed as part of the Project. In disclaiming, RLI stated that the claims of a customer for damage against its contractor based on allegations of defective workmanship are not caused by an "occurrence" and, therefore, are outside of the scope of CGL policy coverage. RLI also disclaimed based upon exclusions.

On March 3, 2017, in the subrogation action, AIG was granted summary judgment in its favor against Rice and awarded monetary damages in the amount of $814,412.75, with interest. Rice, then a bankruptcy debtor, did not oppose the motion. In granting the motion, the court noted Rice's failure to respond to AIG's notice to admit that Rice had improperly installed insulation, and that this work caused the pipe to burst and the resultant damages. On March 24, 2017, AIG entered the Judgment with the county clerk, for $1,046,405.60. AIG alleges that it is entitled to recover on the Judgment pursuant to Insurance Law § 3420, based upon insurance subrogation principles, and because the Tamers assigned to AIG their rights, remedies and claims against parties who caused or contributed to the loss.

THE POLICY

It is undisputed that the Policy was in effect on the date of the loss,[5] and its insuring agreement provides that:

> "a. [RLI] will pay those sums that [Rice] becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies.
>
> . . .
>
> b. This insurance applies to . . . 'property damage' only if:
>
> (1) The . . . 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'"

(NY St Cts Elec Filing [NYSCEF] Doc. No. 109 at 4, 39 (of 66)]). The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*id.* at 18). "Property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured" (*id.* at 19).

The Policy contains a "Breach of Contract" exclusion, which states, in relevant part, that:

> "This insurance does not apply, nor [does RLI] have a duty to defend any claim or 'suit' for . . . 'property damage,' . . . arising directly or indirectly out of the following:
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> a. Breach of express or implied contract;
>
> b. Breach of express or implied warranty;"

(*id.* at 54) (the "Breach of Contract Exclusion"). The Policy also contains an endorsement entitled "Exclusion - Residential Developments" which states that:

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[5] The Policy's number is CGL0011910, and its effective dates are from November 10, 2013 to November 10, 2014.

> "This insurance does not apply, and [RLI is] not obligated to defend any loss, claim, 'suit' or other proceeding for 'property damage' arising from 'your work' on or 'your products' used in 'residential developments.'
>
> As used in this endorsement
>
> 'Residential developments' includes but is not limited to single and multi-family dwellings (including condominiums), coach houses, driveways, retaining walls, detached garages, sewer and water lines, parking lots, fences, swimming pools, grading of lots and landscaping.
>
> Exceptions:
>
> [RLI] will cover claims arising from 'your work' or 'your product' in the following circumstances:
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> (1) The work is performed on or 'your product' used in 'residential developments,' done for the individual dwelling owners, if the individual dwelling and its improvements were completed and certified for occupancy prior to the commencement of 'your work' or the use of 'your product,' and no more than 50% of the original square footage of that individual dwelling or its improvements is replaced in the course of the project involving 'your work' or use of 'your product' or;
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> (2) 'Your work' is performed on or 'your product' used in apartments. Apartments does not include condominiums or townhouses that have been converted into rental units or are rented to others, nor does it include apartment buildings or complexes if they have been converted into condominiums or co-operatives"

(*id.* at 50]) (the "Residential Developments Exclusion"). RLI disclaimed based upon this exclusion, and the Breach of Contract Exclusion. The Policy defines "Your work" as "'[w]ork or operations performed by [Rice], or on [Rice's] behalf'" (*id.* at 20).

The Policy also contains an exclusion, raised by AIG in reply, for: "'Property Damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard' (*id.* at 8) (the "Your Work Exclusion"). There is an exception to the Your Work Exclusion which states that: "This exclusion does not apply

if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor" (*id.*) (the "Subcontractor Exception").

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). "[O]n a motion for summary judgment, 'facts must be viewed in [a] light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [citation omitted]). Upon the movant's proffer of evidence establishing a prima facie case, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [citation omitted]).

Whether the Incident was an "Occurrence" under the Policy.

The parties dispute whether or not the Policy's coverage includes the Incident as an occurrence. In moving, AIG argues that the Policy's insuring agreement language and definition of occurrence demonstrate that it provides coverage for Rice's legal liability for its negligence in causing property damage to third parties, such as the Tamers. AIG contends that the Incident resulted from Rice's negligence in performing the Insulation Work, for which AIG obtained the Judgment that it may enforce under the Policy as an occurrence. AIG urges that it seeks only to enforce the Judgment for damages caused by the 2014 water loss accident, and not to have RLI pay to remedy work product

defectively performed by Rice or its subcontractors. AIG also submits an affidavit to demonstrate that all of the Project's work was performed by Rice's subcontractors.

In opposition, and in support of its cross motion, RLI contends that, because AIG steps into Rice's shoes, the pivotal issue is the validity of RLI's denial of coverage to Rice. RLI argues that its denial was valid because, under New York Law, CGL policies do not encompass as an occurrence a customer's allegations of defective workmanship against its general contractor if the damage claimed is to the contractor's work product, which consists of all of the work performed as part of the Project. RLI contends that AIG's claim is for Rice's defective Insulation Work, performed as warranty work, which caused damages to other work product installed as part of the Renovation Work, specifically the flooring. Thus, RLI's position is that, except for the Tamers' rug, the Judgment is for the cost to repair damage to work that was installed as part of the Project, damaged by Rice's defective warranty work, that is, the Insulation Work. RLI argues that New York appellate courts have rejected determinations made in other jurisdictions that such claims may be treated as an occurrence.

To demonstrate that the Insulation work was warranty work, RLI submits a portion of the contract between the Tamers and Rice, and an email from "Doug Rice," stating that Rice itself performed the Insulation Work which was "treated as a service/warranty item" (NYSCEF Doc. No. 108). RLI relies upon the opinion of AIG's expert to demonstrate that the pipe break was caused by Rice's improperly performed Insulation Work, and the $549,746.82 estimate from AIG's restoration company for repair costs to demonstrate that damages were to the unit's floors.

In reply, and in opposition to RLI's motion, AIG contends: (1) that if a CGL policy contains a Subcontractor Exception, it covers an insured contractor's faulty workmanship that causes damage to work performed by a subcontractor; and (2) that a claim against an insured contractor for unexpected and unintended damages to a third-party's property, flowing from faulty workmanship, as distinguished from a claim for the repair or replacement of defectively performed work, is also covered.

Concerning the Subcontractor Exception, AIG contends that the Policy's Your Work Exclusion provision addresses the damages that are not covered under the Policy, but, in the Subcontractor Exception, excepts those damages to a subcontractor's work from an accidental water loss. AIG notes that it does not seek payment for the costs and expenses to repair or replace defectively installed flooring work, but for "consequential damages" to the Tamers' floors, which did not occur until after the Project was complete, and were caused by the unexpected 2014 Incident. AIG argues that the Incident was an accident because it was not expected or intended (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 646, 649 [1993]), and for an interpretation of "accident" that does not depend upon whether the property damaged was part of a contractor's work project. Should this Court determine that the nature of the items damaged controls, AIG requests that it be awarded damages for the contents of the Tamers' home and their living expenses, which were incorporated into the Judgment, plus interest and costs.[6]

[6] AIG states that it reimbursed the Tamers for their living expenses and rug in the amount of $264,665.93, and seeks interest on the Judgment from January 27, 2014, plus $665.00 for costs and expenses awarded in the judgment, and court costs and expenses in this action.

"Insurance Law § 3420 (b) enables a judgment creditor of an insured to 'step[ ] into the shoes of the [insured] tortfeasor' (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]) and to sue the carrier directly to assert any rights the insured might have against it with respect to the judgment [but] the statute does not confer upon such a judgment creditor new rights against the carrier not held by the insured" (*Mt. Hawley Ins. Co. v Penn-Star Ins. Co.*, 151 AD3d 528, 529-30 [1st Dept 2017] [second alteration added]; *see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990] [plaintiff stands in the shoes of the insured and has the same, but no greater rights than, the insured]). "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002]; *Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2d Dept 2009] [same]).

The interpretation of an insurance Policy's provisions "is a question of law for the court," in that unambiguous provisions must be afforded "their plain and ordinary meaning" (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). Any interpretation of policy language must "afford[ ] a fair meaning to all of the language employed by the parties in the contract and leave[ ] no provision without full force and effect" (*Consolidated Edison,* 98 NY2d at 221-222).

Over twenty years ago, the First Department determined that the CGL policy of a general contractor/construction manager did not "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" itself (*George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255, 259 [1st Dept 1994] [*Fuller*]). In *Fuller*, the complaint from the underlying action revealed that a building owner alleged that the defective work of construction manager and general contractor Fuller caused the building's floors to buckle and water infiltration into the building. The Court stated that the trial court had determined that the complaint could be read to allege that, due to Fuller's negligent supervision, the building was exposed to a continuous harmful condition, water infiltration, which constituted an accident under Fuller's CGL policy. However, the Court determined that: (1) the complaint's allegations related to Fuller's failure to meet its contractual obligations; (2) the losses alleged were additional construction costs required and diminution of the building's value; and, (3) the owner's negligence-based claims were for its economic loss sustained due to the contractor's allegedly defective work. The Court opined that "[a] contract default under a construction contract is not transformed into an accident . . . by the simple expedient of alleging negligent performance or negligence construction," and that the policy was not intended to insure the contractor's work product or compliance with its contractual obligations (*id.* at 259-260).

In *Pavarini Constr. Co. v Continental Ins. Co.*, (304 AD2d 501, 502 [1st Dept 2003]), the Court rejected the insured contractor's claim that its customer's alleged damages arose from an occurrence, and that the alleged losses did not fall within the scope of the contractor's policy's exclusions. The Court deemed the customer's underlying arbitration claim to, essentially, sound in breach of contract, and, citing *Fuller*, stated that the claim was for a construction contract default, and, thus, not an

accident. In *Exeter Bldg. Corp. v Scottsdale Ins. Co.* (79 AD3d 927 [2d Dept 2010] [*Exeter*]), the Court looked to the facts of the complaint in the underlying action and described them as stating that Exeter "was responsible for various substantial interior and exterior construction defects" arising from construction work that it and its hired subcontractor had performed, and is seeking damages for faulty/defective workmanship (*id.* at 929). The Court deemed Exeter's claim for insurance coverage as based upon the owner's claim that Exeter's work product was defective, and, thus, not within the scope of CGL policies.[7]

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.* (119 AD3d 103, 107 [1st Dept 2014] [*National Union*]), in the underlying action, the property owner sued its construction company, Turner, for "'defects in the design, fabrication and/or installation of components of Pipe Rail Network,' which was responsible for damage to the building facade" and that could lead to part of the building's exterior falling to the street, as had already occurred (*id.* at 105). The work on the building's exterior had been performed by Turner's subcontractor. In granting the plaintiff insurer a declaration that it was not required to defend or indemnify Turner, the Court, relying on *Fuller*, stated that an owner's allegations of construction defects such as "faulty design, fabrication or installation. . . do not constitute 'occurrences' under a [CGL] insurance policy," and reiterated the general rule that CGL policies provide coverage for property damage and bodily injury, and not for breach of contract or warranty claims (*id.*, at 106

[7] In *Exeter*, the Court also determined that the alleged conduct fell within a policy exclusion, stating that the "damages sought . . . do not arise from an occurrence resulting in damage to property distinct from the work product of Exeter or its hired subcontractors" (79 AD3d at 929).

[citations omitted]). The Court also instructed that an occurrence does not lie under a CGL policy "where faulty construction only damages the insured's own work," opining further that the entire project is the general contractor's work (*id.* at 107; *see also Eurotech Constr. Corp. v QBE Ins. Corp.*, 137 AD3d 605, 606 [1st Dept 2016] [*Eurotech*] [stating that where there were no allegations that the insured construction company caused damage aside from to its own work product, that such damages did "not constitute 'property damage' caused by an 'occurrence' within the meaning of the policy"]).

The *National Union* Court addressed "[t]he requirement of a fortuitous loss [as] a necessary element of insurance policies based on either an accident or occurrence[,]" and determined that the gravamen of the claim was for faulty workmanship and, thus, not fortuitous (119 AD3d at 108 [internal quotation marks omitted], quoting *Consolidated Edison*, 98 NY2d at 220; citing Insurance Law § 1101 [a] [1]).[8] As in *Fuller*, the Court in *National Union* expressed concern with transforming the CGL policy into a performance or surety bond, stating that this was not the nature of the coverage that the owner obtained and declined the insured's suggestion to apply "the reasoning adopted in

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[8] Insurance Law § 1101 provides that:

> "(a) In this article: (1) 'Insurance contract' means any agreement or other transaction whereby one party, the 'insurer', is obligated to confer benefit of pecuniary value upon another party, the 'insured' or 'beneficiary', dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.
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> (2) 'Fortuitous event' means any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party."

other jurisdictions under which faulty work may be treated as an 'occurrence'" (*id.* at 109). RLI relies on these New York cases.

AIG relies on recent cases in which courts have determined that CGL policies which contain a Your Work Exclusion and Subcontractor Exception may encompass as an occurrence claims for faulty or defective workmanship that results in unintended injury to nondefective work product (*Black & Veatch Corp. v Aspen Ins. (UK) Ltd*, 882 F3d 952 [10th Cir 2018] [applying New York law], *cert denied sub nom. Aspen Ins. (UK) Ltd. v Black & Veatch Corp.*, 139 S Ct 151, 202 L Ed 2d 35 [2018];[9] *Cypress Point Condominium Assn, Inc. v Adria Towers, L.L.C.*, 226 NJ 403, 143 A3d 273 [2016]). AIG notes that, in *National Union,* the First Department relied on *Weedo v Stone-E-Brick Inc.* (81 NJ 233 [1979]), which only involved replacement costs flowing from a business risk, rather than consequential damages to nondefective property caused by defective work, did not address a subcontractor exception, and has been distinguished by *Cypress Point*

[9] *Black & Veatch* (882 F3d 952) has been distinguished by the Ohio Supreme Court, which determined that water damages caused to an inn by a subcontractor's faulty work, discovered after the work had been completed, were not accidental in the context of a CGL policy, as those damages were not fortuitous, and, therefore, not within the scope of coverage of the policy (*Ohio N. Univ. v Charles Constr. Services, Inc.*, 155 Ohio St 3d 197, 197-198, 201, 120 NE3d 762, 765, 767 [2018]). While acknowledging the contrasting determination in *Black & Veatch*, and other courts, the Ohio Supreme Court noted that it had previously determined that CGL policies were not intended to insure the risk of an insured causing damages to its own work, but to the insured causing damage to other persons and their property (*id.* at 155 Ohio St 3d at 200, 205, 120 NE3d at 766, 770).

(226 NJ 403, 143 A3d 273).[10] AIG asserts that *Eurotech* and *Exeter* involved injury to defective work product itself, not consequential damages.[11]

RLI replies that consequential damages refer to damages that may be within the scope of a breach of contract claim and is not applicable here, where the issue is not the damages that AIG can recover against Rice, but the damages within the scope of Rice's CGL coverage. RLI contends that the New York cases it cites were not decided on the basis of whether the damage at issue was consequential. RLI argues that New York's occurrence rule addresses only the issue of what property was damaged, and if that property is the contractor's work product, then the claim is not covered by a CGL policy, but that if the damaged property is not part of the contractor's work product, such as the Tamers' area rug, the claim is covered.

The New York cases discussed above demonstrate that CGL policies do not cover as occurrences defective workmanship claims unless the defective workmanship causes

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[10] In *Cypress Point* (226 NJ 403), the court describes consequential damages as not for the repair or replacement of a contractor's defectively performed workmanship, but for negligently caused injury to completed nondefective property within the scope of the construction project. *Cypress Point* also turns on the involved policy's subcontractor exception, and on the court's determination as to fortuity, which included faulty workmanship.

[11] AIG and RLI were both afforded an opportunity to address whether appellate briefs filed demonstrated that arguments concerning the Subcontractor Exception had been previously presented to the Appellate Division. RLI demonstrated that this was the case. AIG's response was conclusory. Some of the cases included claims for damages to nondefective project work caused by defective workmanship (*see e.g.* NYSCEF Doc. No. 125 at 92-96 [of 103] [appellant contractor brief in *Exeter*, in which contractor raised a "your work" exclusion and subcontractor exception, and the underlying complaint alleged water damages to nondefective interior elements of condominium units caused by faulty exterior grading]; *see also* NYSCEF Doc. No. 125 at 80-82 [Turner Construction Corp's brief in *National Union* urging the Court to reconsider an interpretation of CGL policies in order to encompass other jurisdiction's determinations that defective work done as part of a construction project is not an occurrence]).

damages to property that is that is outside of the scope of the insured's construction project. While AIG characterized its claim in the subrogation action as for Rice's negligence, the factual basis for the claim was Rice's defective Insulation Work (*see Exeter*, 79 AD3d at 929 ["[t]he nature of [the] claims asserted in [the] complaint [are] to be determined based upon the facts alleged and not the conclusions which the pleader draws therefrom or upon characterizations applied to a claim by a party"]). However, if the Insulation Work performed does not relate to the original Project, but is an entirely separate project, for which the Tamers' retained Rice under a separate agreement, it follows that the Tamers' floors would not be within the scope of the later work project. In that instance, damages to the floors might be treated no differently than damage to the Tamers' other property, such as their rug.

In the subrogation action, AIG was silent as to the nature of Rice's retention. Here, AIG states only that the Insulation Work was performed after the Renovation Work was complete. In contrast, to demonstrate that the Insulation Work was work performed as part of the Project, Rice provided a contract between Rice and the Tamers and Rice's statement that the Insulation Work was treated as warranty or service work. While AIG addresses the relationship between the Renovation Work and the Insulation Work, it does so only in response to RLI's arguments about the Breach of Contract Exclusion, where it states that the record did not indicate what caused the draft situation which Rice attempted to remedy after the renovation was completed. This does not adequately address the evidence RLI submits stating that the Renovation Work was warranty work or service work, and, thus, originating from the contract for the Project![2]

[12] In a letter to the Court, submitted after oral argument, AIG notes that its expert's report/letter, submitted here by RLI, states that the Renovation Work was not

As discussed above, New York Courts have held that CGL policies are not intended to cover a customer's claims for a contractor's defective work that results in damages to the contractor's work product. AIG's arguments about the Subcontractor Exception, and its role in the interpretation of occurrence, are predicated on cases decided by courts in jurisdictions, by which this Court is not bound. Under New York law, there is no occurrence under the Policy, except as to the Tamers' rug. Thus, AIG's reply argument for reimbursement of the Tamers' living expenses, relating to the repair of the floors and loss of the use of the unit, is unpersuasive. However, AIG raises a valid reply contention that compensation for the Tamers' rug constitutes an occurrence.

The Breach of Contract Exclusion

RLI disclaimed pursuant to the Breach of Contract Exclusion on the ground that all of the alleged damage arose out of work performed for the Tamers by Rice as the general contractor for the Project. RLI contends that the only relationship between the Tamers and Rice was contractual, that the subrogation action was not a tort action, and that AIG's nominal reference to negligence in the subrogation action does not change that a defective workmanship claim is contractual in nature.

In opposition, AIG argues that res judicata bars RLI from raising the Breach of Contract Exclusion, as the only claim asserted in the underlying lawsuit was for negligence, not breach of contract. Relying on *Lang v Hanover Ins. Co.* (3 NY3d 350), AIG contends that because RLI did not defend Rice in the subrogation action, RLI may not challenge the liability or the damages determination. In reply, RLI argues that it is

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defectively performed. However, that letter states that the earlier insulation work was performed correctly except that the exterior brick wall insulation layer was not fully sealed.

not attempting to collaterally attack the judgment, or defend against it by arguing that Rice did not cause the damage, but is entitled to raise all of its coverage defenses under the Policy.

An insurer may rely on policy exclusions that do not depend on facts established in the underlying litigation (*K2 Inv. Group, LLC v American Guar. & Liab. Ins. Co.*, 22 NY3d 578, 585 [2014] [addressing policy exclusions even though insurer admitted to wrongfully refusing to defend and distinguishing *Lang v Hanover Ins. Co.* (3 NY3d 350) as a case in which the Court did not consider insurer defenses based on policy exclusions]). Thus, RLI is not precluded from addressing whether the claim relates directly or indirectly to a breach of contract.

As discussed above, AIG argues that RLI does not offer evidence to support its conclusion that the November 2013 draft situation in the unit was caused by a defect in the Renovation Project, so as to permit a determination that Rice's later Insulation Work, to remedy the draft condition, could potentially be treated as contractual or warranty work. However, this ignores Rice's email stating that the Insulation Work was performed as warranty or service work. AIG submits no evidence to raise a fact issue to dispute that evidence. AIG also has not submitted another contract, between the Tamers and Rice, for the Insulation Work, and does not contend that such a contract existed![13] While AIG claimed, in the subrogation action, that Rice negligently performed Insulation Work, this is a claim that Rice performed that work in a defective manner. AIG's claim

[13] In AIG's August 14, 2019 letter it merely speculates that Rice may have returned to perform the work outside of the renovation contract based upon the extremely large contract price paid for the Renovation Work. However, speculation supported by an attorney argument alone, is insufficient to defeat summary judgment (*Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 521 [1st Dept 2018]).

in the subrogation action is, effectively, for defectively performed work, and RLI has demonstrated that the defective work was performed pursuant to the renovation contract, as warranty or service work, which resulted in the pipe to break and water damage. Thus, the Breach of Contract Exclusion applies and RLI is entitled to the declaration that it seeks concerning all of the property damages incurred. Consequently, it is unnecessary to reach the issue of the application of the Residential Developments Exclusion.

CONCLUSION

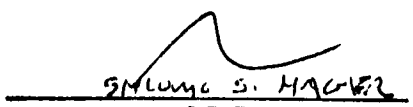
On the basis of the foregoing, it is

ORDERED that the motion of AIG Property Casualty Company as assignee/subrogee of Anthony and Sandra Tamer for summary judgment is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that the cross motion of RLI Insurance Company for summary judgment is granted and it is declared that RLI has no obligation to pay any amounts toward the judgment obtained by plaintiff AIG Property Casualty Company in the underlying subrogation action captioned *AIG Property Casualty Company as assignee/subrogee of Anthony Tamer and Sandra Tamer v. R.D. Rice Construction, Inc.* (Sup Ct NY County., Index No. 161853/2014).

ORDERED, that the clerk shall enter a judgment accordingly.

Dated: May 7, 2020



J.S.C