

<b>Gunshor v Liberty Ins. Corp.</b>
2020 NY Slip Op 35016(U)
March 16, 2020
Supreme Court, Westchester County
Docket Number: Index No. 53067/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

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**JOSEPH GUNSHOR and ALEKSANDRA ROZEK,**

**DECISION & ORDER**

Plaintiffs,

Index No.:53067/2018  
Sequence Nos. 1&2

-against-

**LIBERTY INSURANCE CORPORATION a/k/a  
LIBERTY MUTUAL INSURANCE COMPANY,**

Defendant.

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 66-170, were read in connection with the motion for summary judgment by defendant Liberty Insurance Corporation a/k/a Liberty Mutual Insurance Company (“Liberty”) (Seq 1), to dismiss plaintiff’s complaint as against Liberty seeking to recover under a homeowners policy, and to also specifically dismiss plaintiff’s Seventh Cause of Action, claims for attorney’s fees, treble damages and punitive damages, together with the costs and disbursement of this action. Plaintiff also brings a motion for an order pursuant to CPLR 3212 granting summary judgment dismissing Liberty’s Answer as to plaintiff’s First, Third and Sixth Separate Causes of Action; and for an Order pursuant to CPLR 3126 to preclude the introduction of Liberty’s engineering report and deliver a negative or adverse inference charge to the jury in the trial of this matter.

The instant claim is for damages to the residence owned by plaintiffs located at 28 Dogwood Lane in Irvington. According to the complaint, the waste water pipe located beneath the concrete slab of the residence suddenly, accidentally and without warning suffered a circumferential failure and complete separation, releasing raw sewage water from the plumbing system into the environment, rendering the residence unsuitable for human habitation. The Village of Irvington Code Enforcement Officer and Building Inspector performed an inspection of plaintiff's residence, and found several violations of the 2016 New York Property Maintenance Code, including Section 301.2., which does not permit occupation of a residential premise that is not in a sanitary and safe condition. Plaintiffs presented an insurance claim to Liberty under a homeowners' policy for damages to the structure and for additional living expenses, which was alleged to have been caused by the release of water and sewage from their water plumbing system. Based upon Liberty's investigation of the claim, having sent two adjusters to the premises and an engineer, Liberty determined that certain water damage in the house would be covered, as well as the cost to cut through the concrete slab to access the waste pipes, and additional living expense cost to plaintiffs for the time that they needed to live outside the house while the damage was being repaired. However, plaintiffs claims that the costs to remediate their residence is \$80,393.24, plaintiffs loss of use expenses \$6,743.25, Liberty's payments to plaintiffs (\$21,877.93), for an outstanding balance for \$65,258.56.

NOW based upon the foregoing, the motions are decided as follows:

It is well settled that "a 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 the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320,

324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]; Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A breach of contract action is established by demonstrating the existence of a contract between the parties, performance by the plaintiff, breach by the defendant and damages resulting from the breach (JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802, 803 [2d Dept

2010]). “[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, ‘a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms’ ” (Osborne v Williamson Law Book Co., 175 A.D.3d 1311, 1312, [2d Dept 2019]).

The Second Department has found that “in construing policy provisions defining the scope of coverage pursuant to a policy of insurance, courts first look to the language of the policy. The unambiguous terms of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such terms is a question of law for the court. Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent. Generally, the determination whether a contract is ambiguous is a question of law” [internal quotations omitted] (Hudson Shore Assocs., L.P. v Praetorian Ins. Co., 172 AD3d 830, 830–31 [2d Dept 2019]).

Only a couple of months prior to plaintiffs' claims, plaintiffs bought the premises, and hired a home inspection service to inspect the property (NYSCEF Doc No. 75). This inspection was conducted on May 19, 2016. The inspector reported that stains and moisture damage on the subfloor and framing at the front wall in the basement/utility room that should be serviced. He also commented on suspected mold on the floor framing. Also on page 11, under the caption of “Water and Moisture Observations,” the inspector indicates that there is efflorescence, water stains, and suspect mold on the ceiling slab and foundation wall in the basement/utility room and the garage.

In further support of Liberty's motion for summary judgment, it offers the Affidavit of William Traas, the adjuster for Liberty. Traas attests that Liberty paid the insureds for the cost to

access the water pipes beneath the lower level slab of concrete. This was paid by Liberty since there was some water damage to carpeting in the lower level, which would be covered under the policy of insurance. The water pipe itself was not covered since the cause of the leak was excluded based upon the exclusions found in the denial letter, including wear-and-tear and deterioration of the water pipe causing the seepage of water. Traas visited the premises on December 1, 2016. He comments that the cause of the damage was seepage, which is excluded in the policy (Amendatory Seepage Endorsement FMHO2265 2e of Section I, page 6 of the main policy. In total, approximately \$35,000 (an amount debated by plaintiffs) was paid to plaintiffs/insureds for the cost of the work, including the cost of the additional living expenses incurred by plaintiffs in having to move to a hotel during the time that the work was being done in their house.

Based upon his inspection, and speaking with the plumber, contractor and others, the engineer found that the rotting of the framing at the exterior of the lower level of the house was the result of long term seepage of outside water and was unrelated to the waste pipe claim. The engineer concluded that the cause of the sewer leakage is severe deterioration and corrosion of the cast iron drain pipes over a period of many years.

In light of Liberty's investigation into plaintiff's residence, on or about December 16, 2016, Traas sent a partial denial letter to plaintiffs as insureds, explaining the reasons for specific denial of portions of the claim which were not covered under the policy and setting forth the specific provisions of the policy (NYSCEF Doc No. 69).

The denial letter referenced that the coverage does not apply to land, including land on which the dwelling is located. Then it referred to the Amendatory Seepage Endorsement, found

at paragraph 2(e) (9) under Coverage A-Dwelling and Coverage B-Other Structures, wherein it states:

“We do not insure for loss caused by seepage, meaning continuous or repeated seepage or leakage of water, steam or fuel over a period of weeks, months or years.

(a) from a plumbing, heating, air conditioning or automatic fire protection system or from within a domestic appliance; or

(b) from within or around any plumbing fixtures, including, but not limited to, shower stalls, shower baths, tub installations, sinks, or other fixtures, including walls, ceilings, or floors” (FMHO 2265)

The denial letter also claims that the deteriorated and rotted exterior wall framing at the lower level rear bathroom is due to exterior surface water seepage over a period of many years, and is unrelated to the sanitary drain leakage.

Additionally, the denial letter references Section 1-Perils Insured Against

#### COVERAGE A-DWELLING and COVERAGE B-OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverage A and B only if that loss is a physical loss to property. We do not insure, however, for loss

2. Caused by

e. Any of the following:

- (1) Wear and tear, marring, deterioration;
- (2) Inherent vice, latent defect, mechanical breakdown;
- (3) smog, rust or other corrosion, mold, wet or dry rot.

The denial letter also refers to:

#### Section 1-Exclusions

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

c. Water Damage, meaning:

- (1) Flood, surface water, waves.....
- (2) Water which backs up through sewers or drains or which overflows from a sump; or
- (3) Water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure. (NYSCEF Doc No. 69).

Liberty also offers the Affidavit of Chester Zaremba, a professional engineer hired by Liberty. As an initial matter, plaintiffs challenge the credentials of Zaremba as an expert, alleging that the engineer lacks the relevant expertise to assess environmental losses and losses related to plumbing systems. However, the court has reviewed this engineers CV, and will consider his Affidavit.

Liberty determined that the damage found at the exterior wall framing at the lower level rear bathroom was due to exterior surface water seepage over a period of many years.

According to plaintiffs, Section 1-2.e(5) of the Policy purchased from Liberty specifically indemnifies plaintiffs for this type of loss. A water line that is part of his plumbing system failed resulting in the discharge of sewage water, a pollutant, that caused direct physical loss to my residence rendering it uninhabitable. However, Liberty would not afford plaintiffs coverage under Section 1-2.e (5) of the policy on the basis that sewage water would not qualify as water. In response to any inquiry form the New York State Department of Financial services, Liberty responded as to the denial of coverage under Section 1-2e (5) stating:

“In this case, the insured claims that the alleged damages was caused by an overflow of a pollutant or sewage, neither of which would qualify as either water or steam and therefore would not be covered under Coverage C of the policy.” (NYSCEF Doc No. 108).

Plaintiffs also offer the Claim Notes of Justin Barros, claim adjuster for Liberty. Barros was the initial adjuster to inspect the premises on November 28, 2016. His notes seem to somewhat contradict the findings of Liberty’s engineer and second adjuster:

“Original 11/28/2016 2:25PM ‘previous note did not post’ inspected loss with insd, contractor, **plumber present-deteriorated waste line failed and caused sudden rush of waste water in the main legal/base of raised ranch 2 story home.** The ind purchased home a few months ago, inspection was done including moisture readings throughout and no evidence of

leak/seepage was found. Within the last week or so prior to insd reporting claim, they noticed large puddles/pools of water accumulating along side of house in back. This prompted them to contact a plumber/contractor who came out and after series of detection methods determined that waste line was damaged/and water was accumulating under and around house. The water had not been noticeable on the top of carpet in house but upon removal during access work, wastewater stains were noted to the underside of carpetpad and underlayment indicating damage to the property. Upon my insection 1-2 days after emergency access work had started, I noted same damage to carpet that was removed. The contractor had also begun concrete/slab demo and pipe removal. Based on the extent of damage and access/egress work needed this appears to be a large loss. I will review same with TM for possible reassignment”.

Original 11/28/2016 4:50 PM \*\*\*previous note did not post\*\*\*-discussed claim and my inspection findings with TM Mangini (11/23) he agreed with my coverage approval determination. No evidence found of long term leakage/seepage, no evidence of rot/mold, and insd advised the home inspection (including moisture readings) had no indication of water damage; leaks-advised insd of approval for coverage (with normal exclusions for pipe damage/plumbing repair)...

Original 11/29/2016 2:08PM P;.....Waste line suddenly cracked broke causing damage to home and slab.

Plaintiffs also offer the report from plaintiff’s engineer, Steven Costa (NYSCEF Doc No. 16), the report from plaintiffs’s environmental scientist, Bing Liang (“Liang”) (NYSCEF Doc No. 19), and the report from the Village of Irvington Code Enforcement Agent and Building Inspector, Edward Marron (NYSCEF Doc NO. 18).

Plaintiff points out that the conclusion in Zaremba’s report that he is unable to make an engineering determination as to the specific duration of time for which the alleged cast iron plumbing system seepage occurred at plaintiff’s residence.

Plaintiff’s engineer, J.R. Holzmacher demonstrates a waste line that suffered a circumferential failure and complete separation, which is the proximate cause of the incident. Plaintiff’s engineer Costa, notes in his inspection. Through his affidavit, Anthony Andrews, a licensed professional engineer attests that during the time of his investigation of plaintiff’s

residence, he was employed by J.R. Holzmacher P.E., LLC. Based on his investigation, he concluded that the proximate cause of the sanitary pipe failure at plaintiffs' residence, and the resulting damages, was the sudden circumferential failure and complete separation of the below swab water pipe. This failure resulted in large volumes of sewage water flowing freely into the soils below the basement slab (NYSCEF Doc No. 162).

The court is mindful that the burden, a heavy one, is on the insurer (see Continental Cas. Co. v Rapid-Am. Corp., supra at 654), and “[i]f the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer” (Pepsico, Inc. v Winterthur Int'l Am. Ins. Co., 13 A.D.3d 599, 600, [2d Dept 2004]). Based upon this record, the parties' and their experts clearly dispute the cause of the sewage water that was discharged into plaintiff's residence (sudden and accidental versus seepage). Additionally, the parties' dispute if the waste water from a household plumbing system would qualify as water. There is a triable issue of fact whether the exclusions negate the coverage for damage caused by the sewer water from a plumbing system (Hudson v Allstate Ins. Co., 25 A.D.3d 654, 656, [2d Dept 2006]). Accordingly, Liberty failed to establish, prima facie, that the policy did not cover the loss claimed, and therefore was not entitled to summary judgment dismissing the complaint. Liberty also failed to make a prima facie showing that an excluded peril was the dominant and proximate cause of the water damage (Neuman v United Servs. Auto. Ass'n, 74 A.D.3d 925, 926, [2d Dept 2010]). Likewise, plaintiff failed to establish a prima facie case that the policy did cover the loss claimed. Thus, the causes of action in the complaint relating to policy coverage and exclusions are not dismissed, and duly remain.

Turning to plaintiffs' spoliation claim that the Zaremba engineering report was modified and thus, Liberty's destruction of evidence was both willful and grossly negligent. Plaintiffs request that pursuant to CPLR 3126 this court sanction Liberty by precluding the testimony of Zaremba, precluding admission of the Zaremba report as evidence and delivering an adverse or negative inference charge to the jury in this matter.

Liberty responds that Zaremba states in his Affidavit that the reports are identical and that no changes or modifications have been made to the original report. On this basis, plaintiffs failed to demonstrate any destruction of evidence in connection with the Zaremba's report. Thus, no spoliation charges lie. Any differences in the reports are issues for trial.

The Seventh Cause of Action seeking damages under General Business Law relate to Liberty's refusal to pay plaintiffs' claim. General Business Law §349 prohibits deceptive and misleading business practices and its scope is broad indeed (Wilner v. Allstate Ins. Co., 71 A.D.3d 155, 159–60, [2d Dept 2010]). "In determining what types of conduct may be deceptive practices under state law, this Court has applied an objective standard which asks whether the 'representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances,' taking into account not only the impact on the 'average consumer' but also on 'the vast multitude which the statutes were enacted to safeguard—including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions' " (Wilner v Allstate Ins. Co., 71 AD3d 155, 160 [2d Dept 2010] ). And with regard to matters pertaining to insurance, it has been determined to apply to Coverage & Rates (Wilner v Allstate Ins. Co., 71 AD3d 155, 160 [2d Dept 2010]) Thus, "[t]o state a claim under [General Business Law §349], a plaintiff must allege that the

defendant has engaged 'in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof' (Wilner v Allstate Ins. Co., 71 AD3d at 162. Since the complaint essentially alleges a private contract dispute over policy coverage that is unique to the parties, rather than conduct that affects consumers at large, the complaint fails to state a cause of action pursuant to General Business Law §349 (Korn v First UNUM Life Ins. Co., 277 AD2d 355, 356 [2d Dept 2000]).

As for plaintiffs claim for punitive damages, "An award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness'" (Wilner v Allstate Ins. Co., 71 AD3d 155, 167 (2d Dept 2010). As plaintiffs only seek punitive damages, as well as attorneys fees in connection with the alleged violation of GBL §349, these are also dismissed. With respect to recover treble damages against Liberty pursuant to General Business Law §349, the plaintiff failed to allege that Liberty engaged in deceptive acts or practices that had a broad impact on consumers at large, and these fees are also dismissed (Kantrowitz v Allstate Indem. Co., 48 AD3d 753, 754–55 [2d Dept 2008]).

Finally, whether consequential damages are warranted is a question of fact to be determined by the trial court. Accordingly, in light of the arguments presented, it is hereby

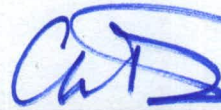
ORDERED, that Liberty's motion for summary judgment (Seq 1) is granted to the extent that the claims for General Business Law §349, and the associated punitive damages, attorneys fees, treble damages are dismissed, and its motion for summary judgment denied otherwise; and it is further

ORDERED, that plaintiffs' motion for summary judgment (Seq 2), and other sought relief is denied; and it is further

ORDERED, that the parties are directed to appear on *May 19, 2020* at 9:15 A.M. in courtroom 1600, the Settlement Conference Part, at the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York 10601 to schedule a trial on damages.

Matters not specifically addressed are herewith denied. This constitutes the Decision and Order of the Court. The Clerk shall mark his records accordingly.

**Dated: March 16, 2020**  
**White Plains, New York**



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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

To: All Parties Counsel by NYSCEF