

**589 7th St LLC v Certain Underwriters at Lloyd's,
London**

2021 NY Slip Op 32792(U)

December 21, 2021

Supreme Court, New York County

Docket Number: Index No. 653089/2021

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 42

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589 7TH ST LLC and MAJOR B CORP,	INDEX NO. <u>653089/2021</u>
Plaintiffs,	MOTION DATE <u>10/21/2021</u>
- v -	MOTION SEQ. NO. <u>001</u>
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. XB523180093 and CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 10268L170143,	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

In this action, the plaintiffs seek insurance coverage for damage caused to their historical residential building in Brooklyn, allegedly by deficient work performed by the defendants' insured, non-party Vema-P, LLC (Vema-P). The defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7). The plaintiffs oppose the motion and cross-move for leave to amend the complaint pursuant to CPLR 3025. The defendants oppose the cross-motion. For the following reasons, the defendants' motion is granted and the plaintiffs' cross-motion is denied.

II. BACKGROUND

The plaintiff 589 7th St, LLC (589 7th St), is the owner of a brownstone townhouse located at 589 7th Street in a New York City Landmarks Preservation district in Brooklyn (the

building). The plaintiff Major B Corp. (Major B) is 587 7th St's parent company. In March 2017, the plaintiffs and Vema-P entered into a scope of work contract wherein the plaintiffs retained Vema-P to restore the building's façade and remove loose and spalling brownstone. The contract provided, *inter alia*, that "[a]ll work and safety must meet [New York City Department of Buildings (DOB)] and [New York City Landmark Preservation Commission (LPC)] standards." On March 17, 2017, the LPC issued a permit for the repair work. The permit prohibited the use of any coating on the building's façade, as coating is not an approved masonry methodology for buildings in landmarked districts. Vema-P was aware of the prohibition. Nonetheless, when it started work in August 2017, Vema-P violated the prohibition by applying a coating to the building's façade. On October 19, 2017, the DOB issued a violation for façade work performed in noncompliance with the LPC's permit.

Though Vema-P thereafter attempted to remove the coating, it was unable to remove all of it. The plaintiffs allege that the building was left with "an irregular, non-uniform façade which is not a Landmarks approved condition." Additionally, the plaintiffs state that Vema-P's inadequate work has resulted in ongoing construction and the continued presence of scaffolding over the building, which they aver has diminished the rental value of the property. The plaintiffs have had to hire a new contractor to repair the building's façade and return it to a Landmarks approved condition.

The defendants are the underwriters for two general liability insurance policies issued to Vema-P, covering April 8, 2017, through April 8, 2018 (Policy No. 10262L170143), and May 8, 2018, through May 8, 2019 (Policy No. XB52310180093), respectively. The plaintiffs claim that they are named as additional insured under the policies on a primary and non-contributory basis with a waiver of subrogation. The plaintiffs attach the subject policies, only the first of which is

applicable to the claims herein, to their complaint. The applicable policy affords additional insured coverage to persons or organizations for whom Vema-P is performing operations when those parties have agreed in writing that the person or organization be added as an additional insured on the policy. Further, “[s]uch person or organization is an additional insured only with respect to liability for ‘bodily injury,’ ‘property damage’ or ‘personal and advertising injury.’” As relevant here, “[p]roperty damage” is defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property” or “[l]oss of use of tangible property that is not physically injured.” However, “property damage” is only covered if it is caused by an “occurrence.” An “occurrence” is defined in the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

The subject policy includes certain enumerated exclusions:

- Exclusion 2(a) provides that the policy does not cover “bodily injury” or “property damage” expected or intended from the standpoint of the insured.
- Exclusion 2(b) provides that the policy does not cover “bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.
- Exclusion 2(j) provides that the policy does not cover “property damage” to property on which the insured is performing operations, if “property damage” arises out of those operations, or to property that must be restored, repaired or replaced because the insured’s work was incorrectly performed on it.
- Exclusion 2(m) provides that the policy does not cover “property damage” to “impaired property” or property that has not been physically injured arising from, *inter alia*, a defect, deficiency, inadequacy, or dangerous condition in the insured’s “product” or

“work.” The insured’s “product” includes any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by the insured. The insured’s “work” includes work or operations performed by the insured and materials furnished in connection with such work or operations. “Impaired property” is tangible property other than the insured’s product or work that cannot be used or is less useful because (a) it incorporates the insured’s product or work that is known or thought to be defective, deficient, inadequate, or dangerous, or (b) the insured has failed to fulfill the terms of a contract or agreement.

- Exclusion 2(n) provides that the policy does not cover damages claimed for losses, costs, or expenses incurred for the loss of use, repair, replacement, removal, or disposal of an insured’s product or work, or “impaired property,” if such product, work, or property is withdrawn or recalled because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

Initially, the plaintiffs filed suit against Vema-P and its insurance agent, Ovation Risk Planners, Inc., in an action captioned 589 7th St LLC and Major B Corp. v Vema-P LLC and Ovation Risk Planners, Inc., in the New York State Supreme Court, New York County, under Index No. 654709/2018. The defendants disclaimed coverage as to Vema-P or any additional insureds on October 26, 2018. On August 9, 2019, the court (Borrok, J.) granted a default judgment in the plaintiffs’ favor as against Vema-P and dismissed the action as against Ovation Risk Planners, Inc. Judgment was not entered by the Clerk until June 9, 2021. Prior to such entry, on May 10, 2021, the plaintiffs commenced this action stating a single cause of action sounding in breach of contract and breach of insurance coverage.

III. DISCUSSION

a. Defendants' Motion to Dismiss

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint or counterclaim, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). On a motion to dismiss pursuant to CPLR 3211(a)(1), dismissal is warranted only when the documentary evidence submitted “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d at 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014).

It is well-settled that a commercial general liability insurance policy containing an “occurrence” prerequisite analogous to that in the policy assigned to Vema-P “does 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 U.S. Fidelity and Guar. Co., 200 AD2d 255, 259 (1st Dept. 1994); see National Union Fire Ins. Co. of Pittsburgh, PA v Turner Const. Co., 119 AD3d 103 (1st Dept. 2014); I.J. White Corp. v Columbia Cas. Co., 105 AD3d 531 (1st Dept. 2013); Baker Residential Ltd. Partnership v Travelers Ins. Co., 10 AD3d 586 (1st Dept. 2004). Thus, such a policy is not “a surety for the performance of” contemplated work and cannot be interpreted as insuring a party’s work product or compliance with contractual

obligations. George A. Fuller Co. v U.S. Fidelity and Guar. Co., supra at 260; see Pavarini Const. Co., Inc. v Continental Ins. Co., 304 AD2d 501 (1st Dept. 2003).

Here, the complaint does not allege an “occurrence” resulting in “property damage” as contemplated by the general liability policy at issue. The only property damage the plaintiffs allege “occurred to the property upon which the contractor performed the work—that is, to the work product itself.” I.J. White Corp. v Columbia Cas. Co., supra at 532. The plaintiffs’ allegations that as a result of Verna-P’s defective work, the building’s value has been diminished, similarly reflect damage only to the plaintiffs’ economic interest in the building and inherent in the such defective work. See George A. Fuller Co. v U.S. Fidelity and Guar. Co., supra at 259-260. The cases cited by the plaintiffs in opposition to the defendants’ motion, including I.J. White Corp. v Columbia Cas. Co., supra, do not support the plaintiffs’ argument. Rather, the cases support the court’s conclusion inasmuch as each involved property damage to something *other than* work product.

Moreover, while the plaintiffs repeatedly aver that they have been damaged by Verna-P’s “poor,” “negligent,” and “shoddy” work, the complaint makes manifestly clear that the asserted claims arise exclusively out of a contract dispute between the plaintiffs and Vema-P. The sum and substance of that dispute is the plaintiffs’ contention that Vema-P failed to perform the contemplated façade renovation work in compliance with DOB and LPC standards, as promised. “A contract default under a construction contract is not transformed into an ‘accident, including continuous or repeated exposure to substantially the same general harmful conditions’ by the simple expedient of alleging negligent performance or negligent construction.” George A. Fuller Co. v U.S. Fidelity and Guar. Co., supra at 259-260; see Pavarini Const. Co., Inc. v Continental Ins. Co., supra at 502 (“[A] contract default under a construction contract is not to be equated

with an ‘accident, including continuous or repeated exposure to substantially the same general harmful conditions’ under the subject policies.”). Accordingly, the claims asserted in the complaint are not covered by the subject insurance policy. Even if they were, they would fall within the exclusions to the policy referenced above.

Exclusion 2(a) is applicable because “property damage” caused by Vema-P’s application of coating, which Vema-P was allegedly aware was prohibited, would have been “expected or intended” from the standpoint of Vema-P. Exclusion 2(b) is applicable because the “property damage” claimed herein resulted from Vema-P’s assumption of an obligation under its contract with the plaintiffs to perform its work in a specified manner. Exclusion 2(j) is applicable because the “property damage” claimed herein was to property directly worked on by Vema-P and arose from Vema-P’s work. Further, that exclusion bars coverage for damages to property that must be restored, repaired, or replaced because work was incorrectly performed, as the plaintiffs allege here. Exclusion 2(m) is applicable because the “property damage” claimed herein includes damage to “impaired property” or property that has not been physically injured arising from defects in Vema-P’s work. Exclusion 2(n) is applicable because the plaintiffs claim damages for losses and expenses caused by the loss of use, replacement, removal, and disposal of Vema-P’s defective work on the building’s façade. The plaintiffs do not contest the applicability of any of the foregoing exclusions in their opposition papers.

For the foregoing reasons, the defendants’ motion to dismiss the complaint is granted. The court does not reach the defendants’ remaining arguments in favor of dismissal.

b. Plaintiffs’ Cross-Motion to Amend

The plaintiffs seek to amend the complaint to add a second cause of action in which they aver that they are entitled to insurance coverage for at least \$200,000.00 in property damage

caused by Verna-P's improper coating of the building. Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). Here, the plaintiffs' proposed claim simply repeats the substance of the allegations in their first cause of action and is palpably insufficient for the same reasons that their first cause of action is subject to dismissal. Therefore, the plaintiffs' cross-motion is denied.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the plaintiffs' cross-motion to amend the complaint pursuant to CPLR 3025 is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

DATED: December 21, 2021



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON