

Ewald v Erie Ins. Co. of N.Y.

2022 NY Slip Op 34600(U)

January 11, 2022

Supreme Court, Onondaga County

Docket Number: Index No. 005950/2020

Judge: Donald A. Greenwood

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This opinion is uncorrected and not selected for official publication.

**At a Motion Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on December 21, 2021.**

**PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice**

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

DANIEL EWALD and REBECCA EWALD,

Plaintiffs,

v.

ERIE INSURANCE COMPANY OF NEW YORK,

Defendant.

**DECISION AND ORDER
ON MOTION**

Index No.: 005950/2020

**APPEARANCES: KELSEY W. SHANNON, ESQ., OF LYNN LAW FIRM, LLP
For Plaintiffs**

**MARCO CERONE, ESQ., OF RUPP BAASE PFALZGRAF
CUNNINGHAM, LLC
For Defendant**

This matter concerns a fire that occurred at plaintiffs' residential property in August of 2020. Defendant had issued an insurance policy on the property and subsequently disclaimed coverage for the loss. The plaintiffs seek a declaratory judgment that they are entitled to coverage in their complaint and now move for partial summary judgment on the issue of liability. Defendant opposes and has cross-moved for summary judgment dismissal. Based upon the foregoing, plaintiffs are not entitled to the relief sought and defendants are entitled to dismissal of the complaint.

The record demonstrates the following. In July of 2020, plaintiffs undertook a primary bedroom renovation project, which included renovations to the primary bathroom. According to

plaintiffs, the day before the loss, their contractors were two weeks into a three week project and were almost all the way completed. On the morning of August 4, 2020, plaintiffs discovered water streaming out of the primary bathroom and throughout the house, which caused severe damage. They reported the claim to the defendant through their insurance agency on the same date. They also called a mitigation vendor, which immediately began mitigation work. Defendant subsequently conducted an investigation of the claim and its investigator concluded that the loss was due to a failure occurring in a glued PEX to PVC connection in a pipe. On September 8, 2020, defendant issued a letter denying plaintiffs' claim for coverage, finding, *inter alia*,¹ that the loss was "caused by, resulting from, contributed to or aggravated by faulty or inadequate ... design, development of specifications, workmanship, construction ... materials used in construction." *September 8, 2020 letter, citing Policy at 6-7.*

The subject policy is an "all-risk" policy, which covers "direct physical loss ... unless the loss is excluded elsewhere under this policy", meaning that it covers all direct physical damage unless specifically excluded. *Policy, at p. 6 (Dwelling Coverage) and p. 8 (Personal Property Coverage).* The relevant terms of the subject policy are as follows:

Perils we insure against - Dwelling and other Structures Coverage ...
"We" pay for direct physical loss to property insured under the Dwelling and other Structures Coverages. "We" pay unless the loss is excluded elsewhere in the policy.
Policy, p. 6.

Exclusions - What We Do Not Cover - Dwelling And Other Structures Coverages "We" do not pay for loss resulting directly or indirectly from any of the following, even if other events or happenings contributed concurrently, or in sequence, to the loss: ... 21) caused by, resulting from, contributed to or aggravated by faulty or inadequate ... b) design, development or specifications, workmanship, construction; c) materials used in construction; ... of or related to property whether on or off the "residence

¹ Defendant cited additional bases for denial but does not argue those bases in opposition to plaintiff's motion or in support of its cross-motion.

premises” by any person, group, organization or governmental body. Any ensuing loss not excluded is covered.

Policy, p.6 and 7.

In moving for summary judgment, plaintiffs argue that there is no dispute that their home suffered a direct physical loss. They argue that under the “faulty workmanship” exclusion, which includes damage from negligent workmanship, that the damage constitutes an “ensuing loss” under the policy and is thus covered. An ensuing loss is one that causes “loss to property” wholly separate from the defective property itself. *See, Fruchthandler v. Tri State Consumer Ins. Co.*, 171 AD3d 706 (2d Dept. 2019). Plaintiffs assert that the defendant’s claim is incorrect that the defective property here is the burst water pipe and that the water damage to the home is wholly separate. Because plaintiffs have initially established a direct physical loss under the all-risk policy, the defendant as the insurer bears the burden of establishing that the exclusions apply and that they are subject to no other reasonable interpretation. *See, Gaetan v. Firemans Insurance Co. of Newark*, 264 AD2d 806 (2d Dept. 1999). Defendant has done so here.

Defendant has provided an affidavit of Scott Phillips, a licensed professional engineer, retained to conduct an investigation as to the cause of the water loss that occurred. His report indicates that the contractors hired by the plaintiffs improperly used a combination of PEX tubing and PVC adapters/elbows. The contractors then applied the PVC cement to connect the PEX tubing and PVC adapters/elbows. According to Phillips, after the municipal water was turned back on at the insured premises, a failure of the PEX tubing and PVC elbow connection occurred, because the PVC cement did not create the proper adhesion between the PVC and PEX materials. He notes that the combination of these materials is not typically used in these applications and opines that the materials were improperly utilized by the plaintiffs’ contractors and that the source of the water which caused the loss emanated from a failed glue connection

located behind a sheetrock wall inside the primary bedroom shower. He also opines that there was evidence of numerous renovations and plumbing methods not typically used in these applications and that incorrect and improper solvent adhesion methods were employed by the contractors hired by the plaintiffs. According to Phillips, the tubing used by the contractors during the renovation was PEX and not PVC, but PVC adapters and elbows were used to connect with various PEX tubing. He notes that PVC adapters and elbows are capable of sustaining municipal water pressure and are made of a chemical solvent that softens and causes adhesion with other pieces of PVC after proper application of PVC cement. However, according to Phillips, PVC cement will not create the proper adhesion between PVC material and PEX tubing. Plaintiffs provided no contrary expert opinion either in support of their motion or in opposition to defendant's cross-motion.

In determining a dispute over insurance coverage, the court must first look to the language of the subject policy. *See, Platek v. Hamburg*, 24 NY3d 688 (2015). The policy must be construed in a way that affords a fair meaning to the language utilized by the parties and it leaves no provision without force and effect. *See, Platek, supra*. Defendant has established that the subject loss is excluded under the unambiguous terms of the policy as it was "caused by, resulted from, contributed to or aggravated by faulty or inadequate design, development or specifications, workmanship, construction and/or materials used in construction." *Policy, p.7*. Insureds are routinely precluded from recovering under an insurance contract when the cause of loss is a construction defect and/or defective workmanship. *See, Baker Residential Limited Partnership v. Travelers Insurance Co.*, 10 AD3d 586 (1st Dept. 2004); *see also, Broome County v. Travelers Indemnity Co.*, 125 AD3d 1241 (3rd Dept. 2015). The clear language in the policy provision provides that there is coverage unless the loss is excluded elsewhere in the policy.

Defendant has shown that the loss clearly is excluded elsewhere as it was unequivocally caused by plumbing techniques not used in construction projects, specifically the PVC cement used to connect the PEX tubing and PVC adapters/elbows. Thus, the plumbing work was improperly completed and the design, construction and the materials used in construction were also improper. Defendant has shown that there is no proof in the record that the loss was caused by anything other than the negligent work of the contractors and their improper use of construction materials and methods. It was determined that the source of water which caused the loss emanated from the primary bedroom shower, the precise location where the contractors were in the process of performing renovations and that the source of the water emanated from a failed glued PEX to PVC connection. Defendant has thus shown that the sole actions of the contractors caused the loss and is thus excluded from coverage under the relevant policy exclusions.

The defendant has also demonstrated that the loss was not an “ensuing loss” as defined in the policy, as plaintiffs contend. An ensuing loss “at least requires a new loss to the property that is of a kind not excluded by the policy ... it [does not] resurrect coverage for an excluded peril.” *Platek, supra*. Where, as here, a policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk. *See, Platek, supra; see also, Narob Dev. Corp. v. Ins. Co. of N. Am.*, 219 AD2d 454 (1st Dept. 1995). Defendant has shown that no new loss occurred here and that plaintiffs have alleged multiple losses when no such multiple losses exist. A failed glued PEX to PVC connection with the failure that caused water to enter and damage the premises was the sole actions of the contractors that caused a single loss to the premises. Plaintiff’s analysis that the burst pipe alone constitutes a loss under the policy and that the water damage qualifies as an ensuing loss is flawed. Under

that analysis, defendant is not required to provide coverage for the damage to the pipe, because it was an excluded loss caused by negligence. Had plaintiffs suffered only a burst pipe, there would be no claim and plaintiffs improperly seek to have the ensuing loss exception supersede the exclusion. *See, Platek, supra; see also, Narob, supra.* In addition, plaintiffs attempt to resurrect coverage for an excluded peril. *See, Paltek, supra.* Plaintiffs' argument puts forth an untenable interpretation that the subject policy provides coverage for the resulting loss of an excluded risk. *See, ITT Indus. v. Factory Mut. Ins. Co., 303 AD2d 177 (1st Dept. 2003).* As a result, plaintiffs are not entitled to coverage inasmuch as the subject loss is excluded and an application of the ensuing loss exception improperly supersedes the exclusion and is contrary to the law. *See, Platek, supra.*

NOW, therefore, for the foregoing reasons, it is

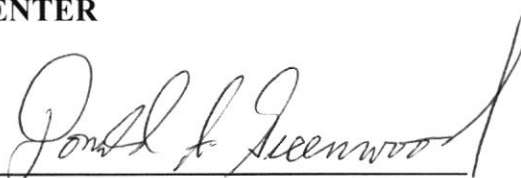
ORDERED, that plaintiffs' motion for partial summary judgment is denied, and it is further

ORDERED, that defendant's motion for summary judgment dismissal is granted, and it is further

ORDERED, that any relief not specifically granted herein is denied.

ENTER

Dated: January 11, 2022
Syracuse, New York


DONALD A. GREENWOOD
Supreme Court Justice