

Zimmerman v Leatherstocking Coop. Ins. Co.

2023 NY Slip Op 30314(U)

January 31, 2023

Supreme Court, Saratoga County

Docket Number: Index No. 20192658

Judge: Richard A. Kupferman

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MICHAEL ZIMMERMAN,

Plaintiff,

-against-

**LEATHERSTOCKING COOPERATIVE
INSURANCE COMPANY,**

Defendant.

DECISION & ORDER

Index No.: 20192658

Appearances:

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KUPFERMAN, J.,

Plaintiff's house sustained water damage in the winter due to frozen and burst pipes while Plaintiff was overseas on an extended five-week trip to India (late November to early January). Plaintiff alleges that Defendant breached their insurance contract by disclaiming coverage for the loss. Defendant in contrast alleges that the disclaimer was proper because reasonable care was not taken to maintain heat in the home while Plaintiff was away.

After nine prior motions and three years of discovery, the parties have now filed dueling summary judgment motions. While the parties have raised numerous legal issues, the resolution on these motions essentially boils down to the applicability of the following provision in the policy:

**“CAUSES OF LOSS SECTION-COVERAGES A, B, C AND D
(CAUSES OF LOSS AND REPLACEMENT COST
PROVISION)**

We insure against direct physical loss to property caused by the following causes of loss:

...

18. Freezing of a plumbing, heating, air-conditioning, fire protective sprinkler system or domestic appliance. This does not cover loss on the insured premises while the residence is vacant, unoccupied (including temporary absence) or is under construction and unoccupied. However, this exclusion does not apply if you have used reasonable care to:

- a. maintain heat in the building or manufactured home; or
- b. shut off the liquid supply and completely empty the system or domestic appliance” (ML-2 [Ed. 6/99], P-2, Coverage Number 18 [emphasis added]).¹

There is no dispute (at least not on these motions) that Plaintiff was temporarily absent when the loss occurred, and that the water was not turned off. As such, the applicability of this provision and the exclusion contained therein revolves around one main issue for this Court to determine on these motions, namely, whether an issue of fact exists as to whether Plaintiff used reasonable care to keep the house heated.

Plaintiff asserts that the loss of heat in the house occurred because of a failed electronic device used for the boiler (namely, an integrated control unit) rather than due to any negligence on his part in maintaining heat in the house. He asserts that the failed electronic device did not require any maintenance and that it failed through no fault of his own. He also asserts that the house was

¹ Defendant also relies on other provisions in the policy. To the extent relevant to these motions, these other provisions will be discussed below.

fully renovated pre-loss; that it was in immaculate condition; that the thermostats were set at a temperature of 55 degrees or more; that Plaintiff put his relator in charge of watching the house as part of the “sales process”; that the relator assured him that he would oversee and maintain the house in his absence; that the relator agreed to drive by the house at times, visit the house for showings, be there at least weekly to assess it, and do whatever he could to reasonably keep an eye on it while he was away. He further asserts that the relator and/or his team made multiple visits to the house and that nothing unusual was ever noticed on any of these visits until the date of the loss; that the heat was always on; and that the electricity was working fine.

In contrast, Defendant disputes most, if not all, of these assertions. Defendant asserts that Plaintiff left the property vacant/unoccupied for more than a month prior to the subject loss; that the gas and electric bills indicate that there was insufficient heating at the house; that Plaintiff failed to set the thermostat to a temperature that would maintain heat; that Plaintiff failed to equip the subject premises with an alarm or system (such as a NEST) that would notify the homeowner if the heat fell below a certain temperature; that Plaintiff failed to adequately insulate the subject property; and that Plaintiff knew or should have known that the heat was “uneven,” that parts of the house were drafty, that the seals on the windows were inadequate, and that supplemental heat was required in those sections of the house that were drafty/poorly insulated. Defendant further asserts that based on Plaintiff’s past experience with freezing pipes and water damage in the various properties that he has owned, he knew or should have known of the dangers associated with leaving the house vacant/unoccupied and, as such, he failed to take reasonable measures to ensure that the house would be adequately monitored and failed to take other reasonable measures necessary to ensure that the heat would be maintained.

ANALYSIS

“Summary judgment is a drastic remedy and should not be granted unless there are no triable issues” (Michaelis v State of New York, 135 AD2d 1005, 1006 [3d Dept 1987]). The movant bears the initial burden of demonstrating “entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form” (DiBartolomeo v St. Peter’s Hosp. of the City of Albany, 73 AD3d 1326, 1326 [3d Dept 2010]; see CPLR 3212 [b]). “Only if that burden is met does the burden ... shift to [the party opposing the motion] to raise a triable issue of fact” (see DiBartolomeo, 73 AD3d at 1326). Moreover, “[t]he evidence must be viewed in the light most favorable to the nonmovant, and that party must be given the benefit of every favorable inference” (Parris-Kofi v Redneck, Inc., 204 AD3d 1180, 1181 [3d Dept 2022]).

Plaintiff’s Motion Seeking Partial Summary Judgment

Applying these principles to Plaintiff’s motion in the context of this insurance dispute, Plaintiff is “required to prove that a loss occurred and that such loss was a covered event under the terms of the policy” (Place v Preferred Mut. Ins. Co., 190 AD3d 1208, 1210 [3d Dept 2021] [internal quotation marks and citations omitted]). Plaintiff must demonstrate that “no exclusion precluded coverage” and that he “took reasonable care to maintain heat in the home while [away]” (id.; see also CPLR 3212 [b]). If Plaintiff satisfies this initial burden, Defendant, as the nonmoving party, must then “demonstrate [that] a triable issue of fact [exists] that reasonable care was not used to maintain heat in the premises, such that the exclusion would prevent coverage” (Place, 190 AD3d at 1210-1211; see also CPLR 3212[b]).

To support his assertion that the reason for the freeze up of the pipes was the failure of the electronic device, Plaintiff relies primarily on the deposition testimony of an HVAC technician. This witness testified that the device failed and that this could have caused the freeze up. However,

this witness did not opine (especially not to any degree of reasonable certainty) that the malfunction caused the freeze up. Rather, the witness testified that he did not know whether the malfunction caused the freeze up or whether the water damage from the freeze up caused the device to malfunction.²

Plaintiff further misplaces reliance on an email from the device's customer service representative, sent in January 2022, in response to an email inquiry by Plaintiff regarding the device. The email informs Plaintiff that there is no established shelf life for the device, that there are no maintenance requirements for it, and that they were unaware of any known issues that might cause it to fail. The email from the representative, however, is not notarized. Nor is there any indication that the representative examined the malfunctioned device or that the representative considered any details specific to this case.

Plaintiff has also not established that the house was in perfect condition, as he contends. Plaintiff and his husband (both interested witnesses) assert that the house was renovated shortly before it was listed for sale. Plaintiff has also provided photographs of the house (pre-loss) depicting it in good condition. Nonetheless, the house was allegedly built in the mid-1850s. There is little, if any, evidence in the motion papers regarding the pre-loss condition of the house where the pipes burst, the heating system, the insulation, and the maintenance of the boiler and the heating system. Most of the testimony on these issues concerned generalized comments. To the extent

² The technician made clear that he was not acting as Plaintiff's expert and that his analysis was based on his very limited examination and knowledge. He explained that he visited the house on only one occasion, February 27, 2019, almost two months after the loss had occurred. The purpose of the visit was very limited and that he was there for only 30 or 40 minutes. He admitted that he did not inspect any areas on the first or second floors. He also explained that he did not conduct the type of examination of the boiler necessary to adequately determine if it was defective.

details were provided, they mainly concerned references to improvements that occurred years prior to the loss (e.g., the replacement of the boiler in 2006 or the insulation improvement in 2011).

Further, the listing activity report contains contrary feedback from two potential purchasers who viewed the house in early December 2018. One potential purchaser commented that the “[h]ouse does not show as well as the pictures made it look” and that the “[h]ouse needs a lot of updates/renovation.” The other potential purchaser “felt there was still some work to do with all [three] full bathrooms[.]” Defendant’s investigator further obtained a recorded statement from Plaintiff’s tenant who allegedly vacated in or around September 2018. He described the house as “kind of run down and dirty,” “drafty,” “unevenly heated,” and “chilly.” He did not believe the insulation was adequate. He explained that he had an issue once with snow entering through the windowsill of one of the bathroom windows, and that he used space heaters in parts of the house to maintain adequate heat.

These causation and evidentiary issues aside, the motion papers also contain little, if any, testimony regarding the heat and temperature in the house at or around the time of the loss. While the motion papers contain photographs of thermostats, Plaintiff has failed to explain who took the photographs and when they were taken. In addition, the deposition testimony (if any) regarding the heat consisted largely of generalized statements. It is unclear who (if anyone) turned on the heat, which thermostats (if any) were turned on, and whether this was done before the loss.

The letter from the relator from July 2019 (dated months after the loss), moreover, similarly asserts in only a generalized manner that the heat was always on and that they did not notice anything awry. Aside from being vague, the letter is not notarized, and the relator is speaking (at least in part) on behalf of other persons on his team and therefore making conclusions (at least in part) for which he lacks personal knowledge. For example, the letter states that “we” found the

water damage. However, he testified at his deposition that another member of his team found it and that he did not believe that he visited the property after the loss occurred.

Further, while Plaintiff asserts that the relator conducted regular and weekly interior inspections of the house while he was away, the evidence on this issue is inconsistent and largely incomplete for purposes of this motion seeking judgment as a matter of law. The relator, for example, testified that he and his team visited the property several times. However, he could not identify any specific dates during his testimony. The listing activity log further identifies only two showings, one on December 2 and the other one on December 8, 2018. The relator is not listed as attending either showing.

The relator also sent an email to Plaintiff referencing two additional visits that occurred on December 14 and 28. However, it is unclear how he obtained these dates. In addition, it is not clear based on the relator's records and testimony whether he personally visited the property on these dates or whether someone else from his team visited it. Rather, these dates appear (at least in these motion papers) only in the email the relator sent on February 25, 2019, almost two months after the loss. The relator has also apparently not provided any of his text messages or emails regarding the house. He claimed at his deposition that he no longer has access to them.

There is an email in the motion papers from Plaintiff asking the relator to remove an item from the porch (dead mums) on December 25, and a response from the relator on December 27. However, when asked during his deposition about whether the person from his team went inside the property when they went to remove the item, the relator testified that he did not believe she did.

Most critically, the engineer's report indicates that a member of the relator's team entered the house (first floor only) on December 28 and that the house had heat at the time. This was

apparently the last time that anyone visited the house prior to the loss. Plaintiff, however, has not provided any affidavit or other sworn testimony from this person. It is also unclear based on the motion papers what this last visit consisted of, how long it took, and what observations, if any, lead this person to believe that the house had the heat on at the time and that no issues with insulation or cold temperatures existed on the second floor.

The motion papers also call into question the reasonableness of Plaintiff's reliance on the relator and whether such reliance constituted reasonable care. Plaintiff relied exclusively on the relator to maintain the heat in the house during his temporary absence. He admittedly did not make any alternative arrangements for interior inspections or maintenance with any friends, family members, or any professional caretakers. He also admittedly did not install any devices to remotely monitor or control the heat inside the house while they were away.

Notwithstanding his alleged delegation of this important duty, Plaintiff admittedly did not pay the relator for keeping an eye on the property and conducting weekly interior visits. He also did not memorialize his agreement in writing or follow up with the relator about any alleged maintenance/care of the house during the temporary absence. The motion papers also contain only one written exchange between Plaintiff and the relator during the temporary absence. Plaintiff's email, however, did not request any interior inspections or inquire about the heat in the house. Rather, he simply asked the relator to remove an item (dead mums) from the porch.

In addition, despite Plaintiff's testimony to the contrary, the relator did not recall any arrangement requiring him to check on house on a weekly basis. He testified that he never agreed to act as an uncompensated house sitter or caretaker, and that when he wrote a text message in November about weekly checks on the house, he may have been referring generally to drive-by checks on the outside. He testified that he was not going over to check if windows were closed,

and that he did not have an obligation to go inside to make sure the heat was maintained in the house. The relator did not recall if he ever had a conversation with Plaintiff to discuss what checking on the house would entail.

Based on the motion papers, the Court finds that issues of fact preclude granting the Plaintiff's motion seeking partial summary judgment (see Place, 190 AD3d at 1208; McCabe v Allstate Ins. Co., 260 AD2d 850 [3d Dept 1999]; see also Hukey v Massachusetts Bonding & Ins. Co., 277 App Div 411, 414 [3d Dept 1950] ["The rule is well settled that the credibility of interested witnesses even if their testimony be uncontradicted when contradiction is impossible and its truthfulness or accuracy open to a reasonable doubt, is exclusively for the jury"]).

Defendant's Motion Seeking Summary Judgment

Further, to the extent Defendant seeks to avoid coverage, it has the "burden of establishing that the policy does not cover the loss or that an exclusion or exemption applies, and that the policy provisions are clear and subject to no other reasonable interpretation" (Place, 190 AD3d at 1209 [internal quotation marks and citations omitted]). "Policy provisions must be interpreted according to common speech and consistent with the reasonable expectation of the average insured, and ambiguities are to be construed against the insurer" (id. [internal quotation marks and citations omitted]).

On its motion for summary judgment, Defendant seeks to disclaim coverage based on the provision/exclusion discussed above regarding the freezing of the plumbing system. Defendant also asserts that the policy excludes coverage based on "neglect". "Neglect," as specified in the policy, includes "neglect by an insured to use all reasonable means to save and preserve covered property at and after the time of a loss" and, in addition, it also includes "neglect by any insured

to use all reasonable means to save and preserve covered property when endangered by a covered cause of loss” (General Policy Provisions Agreement, ML-20 [Ed. 6/99], Exclusions, Number 5).

Defendant, however, has not demonstrated as a matter of law that Plaintiff failed to use reasonable care to maintain heat or otherwise engaged in any neglect. Rather, in disclaiming coverage, Defendant relied on the engineer’s reports. The reports, however, are based on numerous assumptions. They also specifically identify and raise several questions of fact, without resolving them. The reports also do not address the issue regarding the malfunction of the electrical device used for the boiler.

Further, when viewed in the light most favorable to Plaintiff, the evidence demonstrates that the house was in good condition, that the heat was turned on, that the relator and his team frequently visited the property and went inside it frequently while Plaintiff was away; and that there were no complaints about the lack of heat in the house (see Place, 190 AD3d at 1208; Matter of Stephenson v Allstate Indem. Co., 160 AD3d 1274, 1276 [3d Dept 2018] [the homeowner “failed to use reasonable care, as a matter of law, to maintain heat in the premises while it was unoccupied for three months during the winter heating season, because it is undisputed that she did not arrange for inspection of the premises or take any other action to ensure that adequate levels of heat were actually maintained during that time period” (emphasis added)]; McCabe, 260 AD2d at 850).

Accordingly, Defendant’s motion seeking summary judgment is denied.

The Accidental Discharge Provision

On these motions, Defendant also relies on a different provision of the policy (ML-2 [Ed. 6/99], P-2, Coverage Number 17) that covers loss for “accidental discharge or overflow of liquids or steam from within a plumbing, heating, air conditioning, or automatic fire protective sprinkler

system or domestic appliance.” That provision excludes coverage “if the residence has been vacant for more than 30 consecutive days immediately before the loss[.]”

Defendant did not disclaim coverage based on this provision. Nor is this provision asserted as a defense in the answer. Plaintiff further objects to the interjection of this defense at this stage on grounds of surprise and prejudice, and Defendant has not provided any argument or legal authority to the contrary. The Court is therefore not inclined to consider it for purposes of these motions.³

Nonetheless, even if the Court were to consider this provision, the Court has already determined that issues of fact justify denying Plaintiff’s motion. The issue is therefore academic for purposes of Plaintiff’s motion seeking partial summary judgment. Further, to the extent Defendant relies on this provision to obtain judgment in its favor, the provision is inadequate. Specifically, it is ambiguous and does not specify that it applies to cases involving water damage due to frozen and burst plumbing. In contrast, coverage number 18 expressly applies to cases involving the freezing of a plumbing system. In addition, the plain language of these provisions (coverage numbers 17 and 18) does not identify them as being mutually exclusive. Considering these ambiguities, the Court declines Defendant’s invitation to preclude coverage based on the vacancy exclusion contained within the “accidental discharge” provision (see Place, 190 AD3d at 1209).

The Affirmative Defenses and Damages

On these motions, the parties also seek additional relief. Plaintiff seeks dismissal of several of the affirmative defenses for failure to state a claim. Plaintiff, however, has not addressed these

³ The Court is also not inclined to interject this exclusion into the trial unless Defendant provides (in advance of the trial) legal authority authorizing it to rely on this exclusion at this stage of the proceedings and addressing the arguments raised by Plaintiff regarding surprise and prejudice.

defenses on the motion except to assert broadly in his memorandum of law that they are duplicative and/or inapplicable. In addition, Defendant seeks to preclude Plaintiff from claiming certain types of damages at the trial.

Nonetheless, Defendant has also agreed to withdraw certain affirmative defenses. In addition, Plaintiff has agreed that it will not seek certain damages. Considering the circumstances, the Court finds that the resolution of these remaining issues is more appropriate for a stipulation by the parties or, alternatively, for this Court to determine in connection with any motions in limine and/or during the trial proceedings.

Defendant's Motion Seeking Permission to Submit Supplemental Materials

Defendant has also filed a motion seeking permission to submit a supplemental affirmation and further proof in support of its motion seeking summary judgment. The Court has reviewed the supplemental affirmation and further proof. However, the Court does not find that they are sufficient (either by themselves or when considered with the entire record) to justify granting summary judgment in favor of Defendant. The motion is therefore denied as academic.

It is therefore,

ORDERED, that Plaintiff's motion seeking partial summary judgment or alternatively dismissal of affirmative defenses is **DENIED**; and it is further

ORDERED, that Defendant's motion seeking summary judgment dismissing the complaint or alternatively an order regarding damages is **DENIED**; and it is further

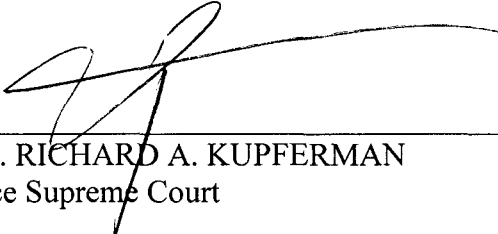
ORDERED, that Defendant's motion seeking an Order granting leave to submit a supplemental affirmation and further proof in support of its summary judgment motion is **DENIED** as academic; and it is further

ORDERED, that no later than **March 1, 2023, by 5:00 p.m.**, the parties' attorneys are directed to e-file on NYSCEF an exhibit list, a witness list, and a statement of the issues for trial; and it is further

ORDERED, that the parties' attorneys are further directed to appear for an in-person conference at the Saratoga County Supreme Court, 30 McMaster Street, Ballston Spa, New York 12020, on **March 16, 2023, at 10:00 a.m.**, for the purpose of discussing settlement and selecting trial dates. The parties and/or their representatives should appear with their counsel in person or be available by telephone.

This shall constitute the Decision & Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. Counsel is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Dated: January 31, 2023
at Ballston Spa, New York



HON. RICHARD A. KUPFERMAN
Justice Supreme Court