SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ST. GEORGE TOWER AND GRILL OWNERS CORP., Plaintiff, - against - INSURANCE COMPANY OF GREATER NEW YORK, Defendant.	Index No. 651746/12 DECISION AND ORDER Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

St. George Tower and Grill Owners Corp. (St. George) brings this action for breach of contract against Insurance Company of Greater New York (GNY). The two-count complaint asserts causes of action for breach of contract (first cause of action) and attorney's fees (second cause of action). The second cause of action was dismissed, by decision and order dated February 19, 2013, upon the court's determination that GNY's denial of coverage was not made in bad faith as a matter of law.

St. George now moves for partial summary judgment on the issue of liability for its breach of contract cause of action. GNY cross-moves for a declaration that it is not obligated to reimburse St. George for the costs of repairing concrete floor slabs, and for summary judgment dismissing the complaint.

Background

St. George is a cooperative apartment corporation that owns the building located at 101-121 Hicks Street, Brooklyn, New York, 11201 (Building). Stipulation of facts, ¶ 1. It is undisputed that GNY issued St. George a Commercial Package Policy for the period of October 20, 2009 through October 19, 2010, under policy number 6131M09946 (GNY Policy). *Id.*, ¶¶ 1–2.

The GNY Policy's "Causes of Loss – Special Form," which is annexed as Exhibit A to the parties' stipulation of facts, provided, in pertinent part, as follows:

> "A. Covered Causes of Loss
>
> When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
>
> 1. Excluded in Section B., Exclusions;
>
> . . . .
>
> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. **Ordinance or Law**
>
> The enforcement of any ordinance or law:
>
> (1) Regulating the construction, use or repair of any property; or
>
> (2) Requiring the tearing down of any property, including the cost of removing its debris.
>
> This exclusion, Ordinance Or Law, applies whether the loss results from:
>
> (1) An ordinance or law that is enforced even if the property has not been damaged; or
>
> (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property."

Id., Exhibit A at GNY-0080.

Although the GNY Policy contained the above "Ordinance or Law" exclusion (Ordinance or Law Exclusion), among others, it also contained a "Blanket Ordinance or Law Coverage Endorsement" (Endorsement) which provided, in pertinent part, as follows:

> "B. Application of Coverage(s)
>
> The Coverage(s) provided by this endorsement apply only if both B.1 and B.2 are satisfied . . .
>
> 1. The ordinance or law:
>
> a. Regulates the demolition, construction or repair of buildings, or establishes zoning or land use requirements at the described premises; and
>
> b. Is in force at that described premises at the time of loss.
>
> . . .
>
> 2.a. The building described in the Declarations sustains direct physical damage that is covered under this policy and such damage results in the enforcement of the ordinance or law;
>
> . . . .
>
> D. Coverage
>
> . . .
>
> 3. *Coverage C* – INCREASED COST OF CONSTRUCTION COVERAGE
>
> a. With respect to a building described in the Declarations that has sustained covered direct physical damage, we will pay the increased cost to:
>
> (1) Repair or reconstruct damaged portions of that building; and/or
>
> (2) Reconstruct or remodel undamaged portions of that building, whether or not demolition is required;

> when the increased cost is a consequence of enforcement of the minimum requirements of the ordinance or law."

Id. at GNY-0075–76. The Endorsement further provided that:

> "G. Under this Endorsement we will not pay for loss due to any ordinance or law that:
>
> 1. You were required to comply with before the loss, even if the building was undamaged; and
>
> 2. You failed to comply with.
>
> H. B. Exclusions, 1., a. Ordinance or Law of the Causes of Loss – Special Form, Broad Form and Basic Form:
>
> 1. Does not apply to the direct damage losses covered under this endorsement . . . ."

Id. at GNY-0078.

On May 26, 2010, the ceilings and floors in certain apartments of the Building were damaged by a flood. *Id.*, ¶ 3. GNY deemed the flood a covered loss (Covered Loss) and "assumed responsibility for the cost of repairing the damaged apartments to the extent of the coverage provided under the GNY Policy." *Id.*

In connection with the repairs, St. George hired an architect to inspect the affected apartments. *Id.*, ¶ 5. On August 5, 2010, St. George's architect filed an application for a permit to repair the damage caused by the flood, pursuant to Directive 14 of the New York City Department of Buildings. *Id.*, ¶ 5 and Exhibit B. Directive 14 provides that, "[w]here any work is found not in compliance with plans or not in compliance with applicable laws, it shall be corrected and if not corrected, the department shall be notified by the architect or engineer and a violation requiring elimination of the defective work shall be filed." New York City Department of Buildings Directive 14 of 1975.

In certain apartments, the architect discovered damage to the concrete floor slabs, "including open penetrations though the slabs." Stipulation of facts, ¶ 7. It is undisputed that "[t]he aforementioned condition of the concrete floor slab in question was not caused by the Covered Loss." *Id.*, ¶ 8. On December 15, 2010, St. George contacted GNY, notifying it of the damage and advising that the slabs had to be repaired before the remedial work arising from the Covered Loss could continue. *Id.*, ¶ 9. On February 23, 2011, St. George requested that GNY cover the cost of the repairs to the damaged concrete slabs. *Id.*, ¶ 10.

In January 2011, GNY hired the engineering firm WJE Engineers & Architects, P.C. (WJE) to inspect the concrete floor slabs. *Id.*, ¶ 11. On February 4, 2011, WJE's Dr. Glenn Rentschler provided GNY a report, in which he concluded that the distress to the concrete slabs "predated the Covered Loss event and some of the damage may have been the result of improper installation of the concrete or subsequent repair or renovation, and long term corrosion of underlying steel due to moisture and humidity of the Building." *Id.*, ¶¶ 12, 13. By letter dated March 17, 2011, GNY declined coverage for the cost of repairing the concrete slabs because the damage

> "resulted from one or more of the following: (1) wear and tear; (2) rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself; and (3) faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, materials used in repair, construction, renovation or remodeling, and maintenance."

Id., ¶¶ 14, 15, and Exhibit C.

By letter dated May 26, 2011, St. George advised GNY that the denial was in violation of the Endorsement, because repairs were required by the New York City Building Code. *Id.*, ¶ 16 and Exhibit D. In its papers on the instant motion, St. George points to two relevant sections of

the New York City Administrative Code (Building Code). Plaintiff's memorandum of law at 2. Section 27-597 of the Building Code states: "[i]f, upon inspection, it is found that a construction . . . shows open cracks, spallings, or other signs of distress . . . such construction shall be . . . reinforced or rebuilt to be made safe in conformance with the requirements of this code." Section 27-345 provides: "[c]oncealed spaces within . . . floors . . . that would permit passage of flame, smoke, fumes, or hot gases from one floor to another floor . . . shall be firestopped to form an effective draft barrier. . . ."

By letter dated September 8, 2011, GNY reiterated its denial of coverage because: (1) the damage preexisted the Covered Loss; (2) the GNY Policy did not cover losses resulting from deferred maintenance; and (3) WJE "determined that the damage was caused by defective original construction practices and from subsequent defective renovation work as well as long term corrosion of structural steel." Stipulation of facts, ¶ 17 and Exhibit E. In addition, GNY explained that while the Endorsement "negate[d] losses caused by 'direct' damage, it [did] not afford coverage for 'indirect' damage. The loss to the concrete slabs . . . [was] 'indirect' damage because the slabs were not in any way compromised by the water damage occurrence." *Id.*, Exhibit E at 1–2.

By letter dated September 23, 2011, St. George again disputed GNY's denial and sought coverage under the Endorsement, because: (1) St. George "had no notice or knowledge of the latent condition of the concrete slabs and only discovered it as a result of the repairs stemming from the Covered Loss"; and (2) "the condition was not . . . caused by deferred maintenance as such 'maintenance' would require destructive testing to discover the condition." *Id.*, ¶ 18 and Exhibit F. By letter dated November 29, 2011, GNY again reiterated its denial of coverage (*id.*, ¶ 19 and Exhibit G), and, thereafter, St. George incurred expenses repairing the concrete floor

slabs. *Id.*, ¶ 22. On May 1, 2013, St. George's architect certified to the Department of Buildings the completion of the work to repair the flood damage. *Id.*, ¶ 20 and Exhibit H.

Discussion

St. George argues that it is entitled to summary judgment on its breach of contract cause of action because the Endorsement does not require a direct causal link between the Covered Loss and the increased cost of complying with the Building Code, and to the extent it does, such a causal link exists. First, St. George contends that, pursuant to the "*Coverage C* – Increased Cost of Construction Coverage" provision of the Endorsement, GNY must pay increased costs where: (1) a covered cause of loss has occurred; (2) the insured has incurred increased costs to reconstruct the damaged and undamaged portions of the Building; and (3) the increased cost was a consequence of the enforcement of the Building Code. According to St. George, all three elements have been satisfied and nothing more is required under the Endorsement. St. George argues that to require a direct causal connection between the Covered Loss and the repair costs would render this provision meaningless. In addition, St. George claims that the Covered Loss resulted in the discovery of the damaged concrete slabs, thereby triggering compliance with the Building Code. St. George argues that, therefore, it has satisfied any causal requirement in the Endorsement. GNY counters that the cost of repairing the concrete slabs is not an "increased cost" incurred as a "consequence of enforcement of the minimum requirements of the ordinance or law" (*id.*, Exhibit A at GNY-0076), but an indirect loss not proximately caused by the Covered Loss.

Pursuant to CPLR 3212 (b) "the 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). Upon such a showing, summary judgment will be granted unless the opposing party "show[s] facts sufficient to require a trial of any issue of fact." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980) (internal quotation marks and citation omitted).

"[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and . . . the interpretation of such provisions is a question of law for the court." *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 (1st Dept 2006). "Generally, the court will construe the limitations of an insurance contract in the light of the speech of common [people] and any ambiguities will be resolved against the insurer, as drafter of the policy." *Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 (1st Dept 1998) (internal quotation marks and citations omitted). A provision is ambiguous if its language is "susceptible of two reasonable interpretations." *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 (1985). Where no ambiguity exists, "courts should refrain from rewriting the agreement." *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864 (1977). In addition, when "construing an endorsement to an insurance policy, the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 (1994). "An insurance contract should not be read so that some provisions are rendered meaningless." *Id.*

GNY has made a prima facie showing demonstrating that there is no coverage under the Endorsement as a matter of law. The "*Coverage C* – Increased Cost of Construction Coverage" provision does not require a causal link between the Covered Loss and the increased cost of construction resulting from the enforcement of an ordinance or law. Stipulation of facts, exhibit A at GNY-0075–76. However, this provision is contingent on the satisfaction of the

Endorsement's "Application of Coverage(s)" provision, which requires that: (1) the ordinance or law regulating the repair of buildings is in force at the Building at the time of loss; and (2) the Building "sustains direct physical damage that is covered under this policy and such damage *results in* the enforcement of the ordinance or law." *Id.* at GNY-0075 (emphasis added). Thus, the plain language of the Endorsement requires a causal link between the "direct physical damage that is covered" and "the enforcement of the ordinance or law." *Id.* Here, it is undisputed that the Covered Loss did not cause the damage to the concrete slabs that resulted in the enforcement of the Building Code. *Id.*, ¶ 8. Therefore, GNY has shown, prima facie, that St. George is not entitled to coverage under the Endorsement.

St. George argues that to deny coverage would render the language of "*Coverage C* – Increased Cost of Construction Coverage" meaningless. That provision states that that GNY will pay the increased cost to "[r]econstruct or remodel undamaged portions of that building . . . when the increased cost is a consequence of enforcement of the minimum requirements of the ordinance or law." *Id.*, Exhibit A at GNY-0076. This interpretation makes sense only if the court reads the "*Coverage C*" provision in a vacuum. The reference to coverage for "undamaged portions of [the] building," when read together with the Endorsement's requirement that the covered physical damage "result[] in the enforcement of the ordinance or law," clearly refers to portions of the Building undamaged by the covered cause of loss that nevertheless require reconstruction or remodeling as "a consequence of enforcement of the minimum requirements of the ordinance or law." *Id.* at GNY-0075–76; *see Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 43 AD3d 23, 28 (1st Dept 2007) ("'[u]ndamaged'as used in this provision refers to a lack of damage from a covered cause of loss"). Nothing contained in the Endorsement suggests that GNY agreed to insure against St. George's failure to maintain the Building in compliance

with the Building Code, or to cover losses unrelated to a covered loss. St. George's interpretation would "misallocate the ordinary costs of doing business from the [corporation] to the insurer." *Markwest Hydrocarbon, Inc. v Liberty Mut. Ins. Co.*, 558 F3d 1184, 1192 (10th Cir 2009).

Although not binding on this court, in *DEB Assoc. v Greater N.Y. Mut. Ins. Co.* (407 NJ Super 287, 970 A2d 1074 [App Div 2009]), the court addressed a provision identical to section D. 3. a. (2) of the Endorsement, in an unrelated action where GNY was a defendant. In *DEB Assoc.*, "a windstorm sheared off most of the brick façade, the concrete block perimeter wall, and the windows, on the north side of the [plaintiff's] building's seventh floor facing Route 38." *Id.* at 289. Upon inspection of the damage, local code officials "discovered that the walls had been secured to the concrete flooring with mortar, but not steel fasteners known as 'angle irons,'" and "further inspection revealed that this was the case throughout the entire building, and that the walls were no longer securely attached to the flooring." *Id.* As a result, the municipal code official concluded "that the building would be unsafe unless brought up to current code standards," and "required that the walls on floors two through eight, and the roof, be secured to the structure with angle irons, so as to comply with the then-current State construction code." *Id.* at 290. GNY, as the plaintiff's insurer, agreed to pay for repairs of the initially-discovered damage, but "it refused to cover the cost of installing angle irons on the second through sixth and eighth floors, and the roof." *Id.*

In *DEB Assoc.*, the parties agreed that:

> "the clause would apply to undamaged portions . . . which must be brought up to code in the course of repairing the damaged portion. For example, if a portion of a wall collapses, and as result, code officials require the entire wall to be reconstructed using code-compliant materials, there is coverage."

Id. at 292–93. The parties disputed "whether the clause applies where the damage to one portion of a building causes code officials to require repairs to separate, undamaged portions of the building." *Id.* at 293. The court held that GNY was required to cover the repairs to the "undamaged portions" of the plaintiff's building, because there was "a clear causal connection between the collapse of the seventh floor wall and the code official's mandate that plaintiff bring the remaining floors into compliance to prevent them from collapsing." *Id.* at 300.

In contrast, in the instant action, it is undisputed that the distressed concrete floor slabs were discovered only upon inspection and repair of the Building's unrelated flood damage. Stipulation of facts, ¶¶ 4–8. In *DEB Assoc.*, the court reasoned that "[t]here was a direct connection between the covered damage and the additional work required to the building" (407 NJ Super at 300), whereas in the instant action, it is undisputed that the "condition of the concrete floor slab in question was not caused by the Covered Loss." Stipulation of facts, ¶ 8. The court finds the reasoning of *DEB Assoc.* persuasive and consistent with New York law, and, therefore, adopts it here as support for the conclusion that denying coverage would not render the language of "*Coverage C* – Increased Cost of Construction Coverage" meaningless. Rather, in order for section a. (2) of this provision to apply, there must be "a direct connection between the covered damage and the additional work required to the building." *DEB Assoc.*, 407 NJ Super at 300. As discussed above, St. George admits that no such connection exists in the instant action. Stipulation of facts, ¶ 8.

St. George contends that the Covered Loss led to the discovery of the damaged concrete slabs, thus resulting in the enforcement of the Building Code. This argument was implicitly rejected in *DEB Assoc.*, and for the same reason it is unpersuasive here. 407 NJ Super at 300 (declining to define "the precise outer reaches of coverage under the clause at issue," because

"this was not a case in which the local inspector happened to be in the building because of the wall collapse and fortuitously discovered one or more unrelated code problems").

Moreover, while this court was unable to locate authority interpreting the precise phrase "results in," the First Department's interpretation of the phrase "'caused by or resulting from'" is instructive. *See Home Ins. Co. v American Ins. Co.*, 147 AD2d 353, 354 (1st Dept 1989). When the phrase "'caused by or resulting from'" is used "in reference to an excluded peril," the insurer must prove that the excluded peril was "the proximate cause of the loss." *Id.* Applying similar reasoning to the language at issue, St. George must demonstrate that the "direct physical damage that is covered under this policy" proximately caused "the enforcement of the ordinance or law." Stipulation of fact, exhibit A at GNY-0075. "[T]he question of whether the covered event was sufficiently proximate to the loss to require that the insurer compensate the insured will depend on whether it was the dominant and efficient cause." *Throgs Neck Bagels*, 241 AD2d at 69. In the context of insurance policies, "[t]he concept of proximate cause . . . . is a limited one," and "the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings." *Home Ins. Co.*, 147 AD2d at 354 (internal quotation marks and citations omitted). Although the damage to the concrete floors would not have been discovered but for the Covered Loss, it is the cracked concrete slabs that resulted in the enforcement of the Building Code, rather than any damage caused by the flood. The Covered Loss "merely set the stage for that later event, and therefore, the [Covered Loss] was the remote and not the proximate cause of the loss." *Id.*

St. George relies on *City of Elmira v Selective Ins. Co. of N.Y.* (83 AD3d 1262 [3d Dept 2011]), which addressed an insurance policy's "Ordinance or Law" provision that provided, in pertinent part, as follows:

> "(1) If a Covered Cause of Loss occurs to covered Building property, we will pay:
>
> (a) For Loss or damage caused by enforcement of any ordinance or law that:
>
> (i) Requires the demolition of parts of the same property not damaged by a Covered Cause of Loss; . . .
>
> (c) The cost to demolish and clear the site of undamaged parts of the property caused by enforcement of the building, zoning or land use ordinance or law."

Id. at 1264.

In that case, a windstorm had caused a portion of the southern wall of the insured's building to collapse, due to mortar deterioration that weakened the wall. *Id.* at 1262. Such deterioration existed in other parts of the building, which was found to be in violation of the New York State Property Maintenance Code and had to be demolished. *Id.* at 1263. The insurer paid only for the original wind damage and refused to cover the cost of demolishing the undamaged portions of the building, arguing that the "Ordinance or Law" provision could not be invoked because the windstorm did not cause the enforcement of the Property Maintenance Code. *Id.* at 1264–65. The court held that:

> "the clear and unambiguous language of the Ordinance or Law provision required only that a covered cause of loss occur, and that plaintiff incur costs to demolish and clear the site of undamaged parts of the property as a result of the enforcement of an ordinance or law. Thus, the only causal link required under that provision [was] that the costs to demolish the undamaged portions of the building be caused by enforcement of an ordinance or law."

Id. at 1265. However, in *City of Elmira*, it was undisputed that the "Covered Cause of Loss" of the damaged portion of the building (that is, mortar deterioration), was also the subject of the coverage the plaintiff sought for the undamaged portion of the building. *Id.* at 1263–64. Here,

conversely, it is undisputed that the "condition of the concrete floor slab in question was not caused by the Covered Loss." Stipulation of facts, ¶ 8. In addition, the Endorsement at issue in the instant action explicitly requires a causal link between the Covered Loss and the enforcement of the ordinance or law. Accordingly, *City of Elmira* is distinguishable on its facts.

For the foregoing reasons, St. George fails to raise a factual issue to rebut GNY's prima facie showing. Accordingly, GNY's cross motion for summary judgment is granted.

GNY's notice of cross-motion seeks a declaration that it is not obligated to reimburse St. George for the costs of repairing the concrete floor slabs. However, the parties fail to address the request for declaratory relief in their briefs and supporting papers. Nor do either of the parties' pleadings request declaratory relief. Nevertheless, the parties' pleadings contain allegations concerning the applicability of the Endorsement (complaint, ¶¶ 22–28; answer, ¶¶ 54–56), and the parties have fully briefed this issue, which is at the heart of their dispute. "Under these circumstances, pursuant to CPLR 103 (c) any defects of form in the pleadings will be disregarded, and the parties are deemed to seek declaratory . . . relief." *Matter of New York City Asbestos Litig.*, 194 Misc 2d 214, 220 (Sup Ct, NY County 2002) *affd* 6 AD3d 352 (1st Dept 2004). Having "fully briefed the issues at hand" and "proceeded as if the action[] sought declaratory relief," the parties will not be prejudiced. *Id.* For the reasons stated in this decision, GNY's cross motion for declaratory relief is granted.

Accordingly, it is hereby

ORDERED that plaintiff St. George Tower and Grill Owners Corp.'s motion for partial summary judgment is denied; and it is further

ORDERED that the branch of defendant Insurance Company of Greater New York's cross-motion which seeks a declaratory judgment with respect to the subject matter of the

complaint is granted with costs and disbursements to defendant as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that defendant is not obligated to reimburse St. George Tower and Grill Owners Corp. for the costs to repair the concrete floor slabs of the building located at 101-121 Hicks Street, Brooklyn, New York, 11201; and it is further

ORDERED that the branch of defendant's cross-motion which seeks summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety; and it is further

ADJUDGED that defendant, Insurance Company of Greater New York, having an address at 200 Madison Avenue, New York, New York, 10016, do recover from the plaintiff, St. George Tower and Grill Owners Corp., having an address at c/o Akam Associates, Inc., 8 West 38th Street, New York, New York, 10018, costs and disbursements in the sum of $_____ as taxed by the Clerk, and defendant have execution therefor.

Dated: May 29, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER