NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. ROBERT L. NAHMAN
Justice

IAS PART 19

JEFFREY S. GITTER,

Plaintiff,

- against -

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION and ALLSTATE INDEMNITY COMPANY,

Defendants.

Index No.: 707886-2014

Motion Date: February 23, 2016

Motion Cal. No.: 5 & 6

Motion Seq. Nos.: 2 & 3

Upon the following papers numbered EF21 to EF43, 1-2 read on this motion by defendant New York Property Insurance Underwriting Association (NYPIUA), for summary judgment and the motion by defendant Allstate Indemnity Company (Allstate, to dismiss the complaint pursuant to CPLR §3211(a)(7) and or for summary judgment pursuant to CPLR §3212:

	Papers Numbered
Notices of Motions - Affidavits - Exhibits...	EF21-23,EF26-37
Answering Affidavits - Exhibits.....	EF38-EF43
Reply Affidavits.....	EF45, 1-2

This case involves a first-party insurance coverage dispute wherein plaintiff seeks additional coverage under certain property policies of insurance for losses sustained during Hurricane Sandy, on October 29, 2012. The complaint alleges that plaintiff was the owner of premises located at 131 Beach 135th Street, in Belle Harbor, New York (premises), and maintained an insurable interest in both the building located thereat, as well as the personal property located at the premises. It is further alleged that on October 29, 2012, plaintiff suffered a loss as a result of a "windstorm" both to the premises, as well as to the personal property at the premises. The first cause of action alleges that at the time of the loss, plaintiff had an insurance policy issued by defendant NYPIUA, which insured plaintiff's premises.

While defendant NYPIUA moves to dismiss the complaint pursuant to CPLR §3212, and defendant Allstate moves to dismiss the complaint pursuant to both CPLR §3211(a)(7) for failure to state a cause of action and CPLR §3212, the Court treated the motions solely as those for summary judgment since defendants clearly charted a summary judgment course (*see* CPLR §3211[c]; *Nesenoff v Dinerstein & Lesser, P.C.*, 5 AD3d 746, 747; *Matter of Weiss v. North Shore Towers Apts. Inc.*, 300 AD2d 596; *cf. Rich v. Lefkovits*, 56 NY2d 276).

"Insurance policies are contracts and are therefore interpreted according to the rules of contract interpretation" (*Frazer Exton Dev., L.P v. Kemper Env., Ltd.*, 153 F. App'x 31, 32 (2d Cir.2005) (citing *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 183–84 (2d Cir.2003)). Under New York law, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Morgan Stanley Group Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir.2000).

When interpreting an insurance policy, "the initial question for the court on a motion for summary judgment is 'whether the contract is unambiguous with respect to the question disputed by the parties.' " *SCW West LLC v Westport Ins. Corp.*, 856 F.Supp.2d 514, 524 (E.D.N.Y.2012) (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir.2002)). Ultimately, "[t]he matter of whether the contract is ambiguous is a question of law for the court " (*Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 465–66 (2d Cir.2010).

An ambiguity exists in a contract where its terms "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Int'l Multifoods*, 309 F.3d at 83 (quoting *Morgan Stanley Group Inc. v. New Eng. Ins. Co.*, 225 F.3d at 275). Similarly, because insurance policies are analyzed as contracts generally, "a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading" (*Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 695 (2d Cir.1998). On the other hand, there is no ambiguity where the language of an insurance policy has "a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]; *Hunt Ltd. v Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir.1989). That the parties set forth competing interpretations in litigation proceedings does not render otherwise plain and clear language ambiguous (*see Seiden Assocs. Inc. v. ANC Holdings, Inc.* ., 959 F.2d 425, 428 (2d Cir.1992) (contractual language "is not made ambiguous simply because the parties urge different interpretations.").

Here, the parties' dispute can be distilled to a single question: does the damage caused

to Plaintiff's property fall within the water damage exclusion of the Policy? It is clear, by the plain and unambiguous language of the policy, that the damage does fall within the exclusion, and therefore Plaintiff cannot prevail on his claim for additional coverage.

The facts of this case are essentially undisputed. A concrete driveway and the boardwalk were pushed by wind into the lower level of Plaintiff's house, causing damage to, inter alia, the upper floor. Plaintiff seeks to differentiate damage to the upper floor caused by the concrete driveway and boardwalk, from damage caused by flood waters and avers that the damage done to the upper floor was caused solely by wind and therefore falls outside the provision excluding water damage from coverage under the Policy. The Court is skeptical that this sort of differentiation is truly possible or supported by the record before it but, even if it is, the distinction does not defeat the provision of the Policy excluding coverage for water damage.

The exclusion provision sets forth that the Policy does not cover "any direct *or indirect* loss or damage *caused by, resulting from, contributing to or aggravated by* any of these excluded perils." The Policy then goes on to include an anti-concurrent causation clause which states that "[l]oss from any of these perils is excluded *regardless of any other cause or event contributing concurrently or in any sequence to the loss.*" (Emphasis Added). One of the "excluded perils" in the Policy is "Water Damage," which is defined in part as,

> "[f]lood, including but not limited to, surface water, waves, tidal water or overflow of any body of water, or spray from any of these, *whether or not driven by wind.*"

These terms have a definite and precise meaning when read within the context of the agreement as a whole, in particular when read in conjunction with the various clauses regarding exclusions from the Policy. There is no ambiguity in the relevant portions of the Policy.

The Policy unambiguously excludes any damage "caused by" or "aggravated by" the types of water described in the exclusion provision, regardless of any other contributing causes and whether or not it was "driven by wind." While it appears possible that the concrete driveway and boardwalk may have been driven into the Property by wind, as Plaintiff asserts, it is clear from the record that concrete driveway and boardwalk were driven into the second floor of the house because of storm surge, which means the it was also driven by, water. Even plaintiff' expert —whose affidavit was proffered by Plaintiff to rebut the claim that the damage involved water, as opposed to wind states as much. Specifically, Richard J. Trieste & Associates concludes that tidal surge and wind were the causes of [plaintiff's] loss and he states that the tidal surge was pushed by the winds, causing the flooding and damage.

There is no dispute that water was involved in the damage to the lower part of the house (on which the second floor sat). Even if wind were the main cause of some of the second floor damage , it is indisputable that the damage to the first floor underpinnings on which the second floor was resting at least indirectly caused or aggravated the damage to the second floor of plaintiff's property. Further, the language of the anti-concurrent causation clause means that "where a loss results from multiple contributing causes, coverage is excluded if the insurer can demonstrate that *any* of the concurrent or contributing causes are excluded by the policy"(*ABI Asset Corp. v Twin City Fire Ins. Co.*, No. 96–CV–2067 (AGS), 1997 WL 724568 (S.D.N.Y. Nov.19, 1997) (emphasis in original). Ultimately, it is clear that even if wind was a contributing cause and/or the second floor damage was in some way "driven by wind," the exclusion still applies and thus bars Plaintiff from recovering under the Policy for the damage to his property. Defendants established that the loss was caused by storm surge when the lower level of plaintiff's residence was struck with portions of the displaced concrete driveway and boardwalk. Thus, defendants proved that an excluded peril was the dominant and proximate cause of the water damage (*see, Album Realty Corp. v American Home Assur. Co.*, 80 NY2d 1008; *Kannatt v Valley Forge Ins. Co.*, 228 AD2d 564; *Novick v United Serv. Auto. Assoc.*, 225 AD2d 676; *Casey v General Acc. Ins. Co.*, 178 AD2d 1001).

Plaintiff has failed to identify any genuinely disputed issues of material fact as to whether the policy exclusion applies in this matter, which is the crux of the Plaintiff's entire claim. The unambiguous language of the policy exclusion for water damage clearly excludes the damage caused to plaintiff's property as a matter of law. Thus, defendants' motions for summary judgment are granted.

Dated: April 7, 2016

Robert L. Nahman, J.S.C.

FILED

APR 13 2016

COUNTY CLERK
QUEENS COUNTY

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