2016 WL 5940228 (N.Y.Sup.), 2016 N.Y. Slip Op. 31857(U) (Trial Order)
Supreme Court of New York.
Westchester County

**1 HB HOLDINGS & REALTY MANAGEMENT LLC d/b/a Balsamo Holdings Corp., and 679 East 138th Street Realty Corp., Plaintiffs,
v.
TOWER INSURANCE COMPANY OF NEW YORK, Defendant.

No. 56804/2015.
September 30, 2016.

Decision & Order

Present: Hon. Sam D. Walker, J.S.C.

*1 [This opinion is uncorrected and not selected for official publication.]

Motion Sequence 1

The following papers numbered 1 through 27 were received and considered in connection with the above-captioned matter:

PAPERS	*NUMBERED*
Notice of Motion/Affidavit/Affirmation	1-3
Memorandum of Law in Support	4
Affirmation in Opposition/Exhitit 1-9	5-14
Memorandum of Law in Opposition	15
Reply Affirmation/Exhibits 1-10	16-26
Memorandum of Law in Reply	27

Factual and Procedural Background

This is an action for breach of contract on an insurance policy issued by the defendant, Tower Insurance Company of New York ("Tower") to Balsamo Holding Corp., effective April 1,2013 to April 1,2014, to provide first-patty property insurance for certain properties, including the property located at 679 East 138 th Street, Bronx, New York 10454 ("the premises").

**2 Tower avers that, as a result of damage to the property, the New York City Department of Buildings Emergency Response Team ("DOB") inspected the premises on XX/XX/2014, and issued an ECB violation stating that the roof "sunk down" approximately nine inches. On that same day, the plaintiffs submitted a claim to Tower for damages to the premises described as a roof collapse. Tower assigned an independent adjuster, Winston Ahlers ("Ahlers") and an engineer, John Flynn ("Flynn"), who inspected and photographed the premises with the plaintiffs' public adjuster, Evan Katz ("Katz") on February 28, 2014.

Flynn's inspection determined that the roof had not collapsed, but had sagged and deflected in certain arears due to long term water seepage that had entered the premises in an area where a skylight had been removed and ineffectively sealed over. Based on Flynn's report, Tower denied coverage for the claim by letter dated March 28, 2014, advising the plaintiffs that the loss was not covered because it did not constitute a collapse under the terms of the policy and that the damage was caused by long term wear and tear, deterioration, and faulty maintenance/design, which are specifically excluded by the policy.

On April 21, 2015, the plaintiffs commenced this action by filing a summons and complaint in Supreme Court, Westchester County alleging breach of contract. Tower served and filed an answer on July 1, 2015, joining issue. The parties participated in and completed discovery and the Court (Leftkowitz, J.) so ordered Court Attorney-Referee's Trial Readiness Referee Report, directing that the plaintiff serve and file the note of issue and certificate of readiness within twenty days of entry of the Trial Readiness Order and further directing that any summary judgment motion be served within sixty days following the filing of the notice of issue. Plaintiff filed the note of issue and Tower now timely files **3 the instant motion for summary judgment seeking dismissal of the complaint.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law, *Zuckerman v. City of* N.Y., 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718(1980). "[T]he 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 N.Y.2d 320, 324(1986). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

*2 In a dispute over insurance coverage, the insured bears the initial burden of establishing that the loss claimed falls within the scope of the Policy, *Bread & Butter, LLC v Certain Underwriters at Lloyd's, London* 78 A.D.3d 1099, 913 N.Y.S.2d 246 (2d Dept. 2010). "Once coverage is established, the insurer bears the burden of proving that an exclusion applies" *id.* at 1101.

"In resolving insurance disputes, we look first to the language of the applicable policies," *Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264, 920 N.Y.S.2d 763, 945 N.E.2d 1013 (2011). "If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language"" (*Id.*) "Unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court," **4 *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.,* 10 N.Y.3d 170, 177, 855 N.Y.S.2d 45, 884 N.E.2d 1044 (2008). However, ambiguities in an insurance policy are to be construed against the insurer. *Breed v. Ins. Co. of North America,* 46 N.Y.2d 351, 385 N.E.2d 1260, 413 N.Y.S.2d 352 (1978); *see also Auerback v. Otsego Mut. Fire Ins. Co.,* 36 A.D.3d 840, 829 N.Y.S.2d 195 (2d Dept. 2007).

Flynn, the engineer assigned to inspect the premises reported that the long term nature of the condition was demonstrated by rotting of the header that supported the skylight coaming; severe water staining and rusting of the original steel panel ceiling below this area; heavy rusting of the steel grid that supports the acoustical ceiling tiles; and the presence of a plastic bucket and aluminum pan between the ceiling grid and the roof to catch dripping water. Tower avers that the

photographs taken by Flynn and Ahlers, the independent adjuster assigned, show a worn and deteriorated roof/ceiling system, not a collapse. Tower asserts that Flynn also determined that newer roofing material had been laid over the older roof surfaces, several times, without first removing the older deteriorated material, which created a significant dead load that contributed to the long-term deflection of the roof rafters. He also found that faulty design contributed to the loss because the drainage capacity was inadequate for the size of the roof, resulting in water accumulating on the roof and placing an additional load on it.

Tower argues that the alleged damage does not constitute a collapse. Tower proffers that the policy provides as follows:
2. We will not pay for loss or damage caused by or resulting from any of the following:

k. Collapse, except as provided below in the Additional Coverage for Collapse But if collapse results in a Covered Cause of Loss at the described premises, we will pay for the loss or **5 damage baused by that Covered Cause of Loss

Additional Coverage - Collapse
The term Covered Cause of Loss includes the Additional Coverage Collapse as described and limited in D.1., through D.5. below:

1. With respect to buildings

a. Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose;

b. A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse;

*3 c. A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building;

d. A building that is standing or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or other expansion.

Tower contends that the terms of the insurance policy are clear and unambiguous and that in *Rector St. Food Enterprises Ltd. v. Fire & Cas. Ins. Co. of Conn.*, 35 A.D.3d 177, 827 N.Y.S.2d 18 (1st Dept. 2006); and *Viscosi v. Preferred Mut. Ins. Co.*, 87 A.D.3d 1307, 930 N.Y.S.2d 165 (4th Dept. 2011), the courts upheld the collapse provision in the policy and found that the damage did not constitute a collapse.

Tower further asserts that the damage is barred by the wear and tear and faulty maintenance/design exclusions in the policy, which provides as follows:
2. We will pay for loss or damage caused by or resulting from any of the following:

**6 d.. (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;

(4) Settling, cracking, shrinking or expansion.

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by the Covered Cause of Loss.

c. Faulty, inadequate or defective:

(2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) Materials used in repair, construction, renovation or remodeling; or

(4) Maintenance;

of part or all of any property on or off the described premises.

Policies often contain a "wear and tear" exclusion from coverage and such exclusions often expressly include such conditions or causes of damage as rust, corrosion, and deterioration, 31 N.Y.Prac., New York Insurance Law § 16:44; *Catucci v. Greenwich Ins. Co.*, 37 A.D.3d 513, 830 N.Y.S.2d 281 (2d Dept. 2007).

Lastly, Tower argues that the coverage for the alleged damage is barred by the water seepage exclusion. The policy contains the following exclusion that bars coverage:
2. We will not pay for loss or damage caused by or resulting from any of the following:

f. continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more.

**7 Tower states that the engineer determined that the area of the alleged damage had experienced sagging and long-term water seepage as a result of water that had entered the premises. Tower asserts that the water infiltration was so prevalent that someone had inserted a bucket and aluminum pan between the acoustical ceiling and the roof members, to catch water. Flynn determined that the rotting in the area of the alleged damage would not have existed unless there had been a continuous or repeated seepage for a period of several years. He stated that such rotting of certain structural members reduced the load that they could carry and simultaneously transferred more roof load to other structural members. This, coupled with the increased load placed on the roof by water accumulation from the inadequately designed drainage system, resulted in the cracks that were observed.

*4 In opposition, the plaintiffs offer the affidavits of Guy Balsamo ("Balsamo"), the property manage;; Heon Dongkim ("Dongkim"), a tenant of the premises, who witnessed the alleged roof collapse; Jose Escano ("Escano"), manager of a supermarket, which was a tenant at the premises; and Lawrence K. Shapiro ("Shapiro"), an engineer.

Balsamo stated that he testified at his deposition that none of the beams fell to the floor, however, he was never asked whether any of the ceiling tiles fell to the floor and had he been asked that, he would have testified that he saw ceiling tiles that were wet and had fallen to the floor and that channel 12 news reported the incident as a roof collapse and described how the ceiling tiles had fallen to the floor. Dongkim averred that, on February 26, 2014, he saw that the roof of the supermarket collapsed and caved in and when he went to the supermarket that day, he saw that numerous pieces of the roof and ceiling had fallen to the floor. Escano averred that on February 26, 2014, he saw that numerous **8 pieces of the roof and ceiling had fallen to the floor in the area of the supermarket and that he was present when two or three insurance adjusters came to the supermarket and they would have seen that pieces of the roof and ceiling fell to the floor within the supermarket due to the roof collapse.

Shapiro averred that he has reviewed the affidavits of Flynn, Ahlers, Balsamo, Escano, Dongkim, the deposition of Balsamo, the report of Bruce Goldman, P.E. ("Goldman"), photographs of the premises and the vacate order issued by the **DOB.** Shapiro stated that based on his review of the mater**ials,** his training, and his experience, the roof collapse that happened on February 26,2014 was, within a reasonable degree of scientific and engineering certainty, ultimately triggered by the heavy water, ice and snow loadings that collected on the roof. He stated that, although the building was old, the event that most likely caused the roof to collapse was the heavy water and ice load and that his conclusion is consistent with the conclusion of Goldman, who inspected the roof on February 28, 2014 and concluded that "The observations of the roof identified two major depressions that are likely due to a collapse of the roof structural system under heavy snow loadings." Shipiro averred that, while water seepage if it existed, may have weakened the roof, for most collapses to occur, a new load is applied to the structure and in this case, it is his opinion that excessive snow and ice load was applied to the roof and caused the collapse.

Plaintiffs argue that a qualifying falling down event occurred within the policy definition of collapse and that a qualifying caving in event occurred within the definition of the policy, resulting in part of the building not being able to be occupied for its intended purpose. Plaintiffs further argue that the wear and tear clause does not apply to situations ****9** of collapse and also assert that the roof failure was not caused by wear and tear. Plaintiffs also assert that Tower's reliance on a water seepage exclusion is belated and cannot provide a basis for Tower to avoid its coverage obligations under the policy. Plaintiffs allege that Tower failed to adequately raise the defense in response to the plaintiffs' interrogatory questions.

Plaintiffs also argue that the collapse coverage is additional coverage within the policy's causes of loss special form and is what governs the roof failure, not the exclusions listed in section B of the causes of Loss - special form.

***5** Bestowing the benefit of every reasonable inference to the party opposing the motion (*Boyce v. Vasquez,* 249 A.D.2d 724, 726 [3d Dept., 1998]), the Court finds that there are no material issues of fact that preclude summary judgmen.. Tower provided the specific language of the policy to denote what constitutes a collapse. "Collapse is an unambiguous term which denotes a falling in, loss of shape, or reduction to flattened form or rubble." 70 N.Y.Jur.2d Insurance § 1701; *Graffeo v. U.S. Fidelity & Guaranty Co.,* 20 A.D.2d 643, 246 N.Y.S.2d 258 (2d Dept. 1964). Even if the cause of the damage was snow accumulation on the roof, the language of the policy constrains this Court to grant summary judgment in Tower's favor. Tower has shown that no part of the premises fell to the ground, but there was only sagging and cracked roof members. The report by the DOB referred to the roof having sunk down nine inches, not as a collapse and the fallen wet ceiling tiles do not constitute a collapse under the terms of the policy. Therefore, based on the above, the Court grants Tower's motion for summary judgment, dismissing the complaint.

****10** The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York

September 30, 2016

<<signature>>

HON. SAM D. WALKER, J.S.C.

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