45 Misc.3d 1204(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)
Supreme Court, Rockland County, New York.

The PROVENCAL, LLC, Plaintiff,
v.
TOWER INSURANCE COMPANY OF
NEW YORK and Tower Group Inc. d/b/
a Tower Group Companies, Defendants.

No. 031262/2012.
|
Sept. 18, 2014.

Attorneys and Law Firms

Condon & Associates, PLLC, for Plaintiff.

Mound, Cotton Wollan & Greengrass, Esqs, for Defendants.

Opinion

ROBERT M. BERLINER, J.

***1** Plaintiff commenced this action seeking insurance coverage from defendants for the collapse of a retaining wall in its parking lot and water damage to the interior of its building as a result of a June 23, 2011 rainstorm. Defendants claim that their insurance policy does not provide coverage for these damages and disclaimed. This matter was scheduled for a trial before a jury on May 19, 2014 and the parties agreed that the facts were not in dispute and the court would decide the legal issues involved after submission of trial briefs. The parties stipulated to undisputed facts on May 19, 2014. The court has received submissions from both parties.

The relevant facts stipulated by the parties are the following:

1. A "Commercial Package" insurance policy issued by defendants to plaintiff was in effect on June 23, 2011 for the subject property;

2. On the morning of June 23, 2011 the location of the subject property experienced heavy rains;

3. On June 23, 2011 the subject property suffered interior water damage and the retaining wall located across from the building (across the driveway) collapsed that day;

4. The insured building did not collapse or in any way contribute to the collapse of the retaining wall;

5. There was interior water damage in the building on June 23, 2011;

6. One source of the water damage was water entered the building through the roof drain air vents within the roof drain system;

7. The building's roof and/or walls did not sustain any damage that allowed water to enter;

8. After the loss, plaintiff corrected the non-water tight connections within the roof drain system;

9. On June 23, 2011 water also flowed into the building over the curb and underneath the door saddle;

10. The cause of the retaining wall collapse was the force of runoff water from the neighbor's property against the retaining wall. The large macadam parking area on the neighboring property slopes downward toward the top of the wall and effectively collects water and funnels it into the drainage basin adjacent to the upper wall. The center of the wall failure area coincides with the apex of this funnel where the plywood material was observed to be distorted due to excessive water pressure;

11. Plaintiff timely and properly reported the loss to defendants;

12. Defendants disclaimed coverage pursuant to a letter dated October 3, 2011;

13. As a condition of coverage, plaintiff's policy requires that plaintiff "take all reasonable steps to protect the covered property from further damage ..."

The only remaining factual issue involves the amount of damages caused by the claimed loss. However, the legal issue to be decided is whether the policy provides coverage when these undisputed facts are applied to the language of the policy. Defendants argue that there is no coverage when these facts are applied to the policy and plaintiff argue otherwise.

The construction of terms and conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court when the only issue is whether the terms as stated in the policy apply to the facts. *Briggs v. Allstate Ins. Co.*, 1 AD3d 392. Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. *GEICO v. Kligler*, 42 N.Y.2d 863. An exclusion from coverage must be specific and clear in order to be enforced. *Seaboard Surety Co v. Gillette Co*, 64 N.Y.2d 304. An ambiguity in an exclusionary clause must be construed most strongly against the insurer. *Guachichulca v. Laszlo N. Tauber & Assoc*, 37 AD3d 760.

***2** In this case, there is no coverage for the collapse of the retaining wall in question since it was not the direct result of the collapse of an insured building. Furthermore, the storm water runoff that caused the collapse of the retaining wall is an excluded loss since the policy excludes loss caused directly or indirectly by flood and/or surface water regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Concerning the interior water damage sustained by plaintiff, there is no coverage for this damage since the premises did not suffer any damage from the storm to its roof or walls through which the rainwater entered. Since it is undisputed that the interior wall damage was caused by rainwater and that this rainwater did not enter the premises through damage to its roof or walls, there is no coverage pursuant to the policy's rainwater limitation. Additionally, since the rainwater entered the premises through air vents within the roof drainage system, this damage is further excluded from the policy pursuant to its faulty design exclusion.

Therefore, plaintiff's complaint is dismissed. Defendant is directed to settle a proposed order and judgment in accordance with this decision.

All Citations

45 Misc.3d 1204(A), 998 N.Y.S.2d 308 (Table), 2014 WL 4937936, 2014 N.Y. Slip Op. 51450(U)

End of Document