SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Park Plaza Owners

-v-

Admiral Indemnity

INDEX NO. 602017/2009

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1

Answering Affidavits — Exhibits ____ | No(s). 2

Replying Affidavits ____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/24/13

HON. ANIL C. SINGH SUPREME COURT JUSTICE, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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Park Plaza Owners Corp.,

Plaintiff,

Index Number:

-against-

602017/2009

Admiral Indemnity Company,

Defendant.

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Admiral Indemnity Company,

Third-Party Plaintiff,

-against-

Vornado Realty Trust, Bovis Lend Lease, Inc., Laquila Construction Group, Langan Engineering and Environmental Services, Inc., Moretrench American Corporation,

Third-Party Defendants.

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Hon. Anil C. Singh, J.:

Defendant moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint and plaintiff cross-moves, pursuant to CPLR 3211 (b), to dismiss defendant's second and third affirmative defenses.

Parties' Allegations and Procedural Background

Plaintiff states that it was the owner of a 15-story apartment building (the Building), with an underground parking garage, located at 61-15 and 61-25 97th Street, Flushing, New York and that it obtained a commercial property insurance policy,

21231383108 (the Policy) from defendant, for the period from January 15, 2007 through January 15, 2008 (complaint, ¶¶ 5-6). It asserts that, on or about June 13, 2007, the Building suffered damage, including to the underground parking garage, as a result of construction and dewatering activity at the adjacent property (the Rego Park Mall), located at 61-35 Junction Boulevard, Flushing, New York, that it sought coverage for the loss from defendant under the Policy and that, on or about June 18, 2009, defendant sent plaintiff a letter (the Disclaimer Letter) disclaiming coverage (*id.*, ¶¶ 10-11, 13).

On or about June 30, 2009, plaintiff commenced this action against defendant for breach of contract, based upon defendant's failure to make payment under the Policy and alleging damages in the amount of $1,657,000. On or about December 24, 2009, defendant interposed its answer, admitting that it was an insurance company, that it issued the Policy and that it disclaimed coverage of plaintiff's loss by the Disclaimer Letter (answer, ¶¶ 2, 3, 7, 13). Its second affirmative defense asserts that coverage for plaintiff's loss is barred, since the property is purportedly not included as covered property and its third affirmative defense asserts that there is a specific exclusion barring coverage, based upon earth movement causing the loss (*id.*, ¶¶ 17-18, 19-20).

On or about April 8, 2010, plaintiff and Park City Estate

Tenants Corp. (Tenants) commenced an action (the Property Damage Action) in Supreme Court, New York County, index number 105592/2010, against Vornado Realty Trust (Vornado), Bovis Lend Lease, Inc. (Bovis), Laquila Construction Group (Laquila), Langan Engineering and Environmental Services, Inc. (Langan) and Moretrench American Corporation (Moretrench). In the Property Damage Action, plaintiff and Tenants alleged that in May 2007, Vornado, the owner of the Rego Park Mall, contracted with Bovis, Laquila, Langan and Moretrench for construction and dewatering at the Rego Park Mall (the Project) and that, as a result of the work on the Project, the Building suffered damage "including cracking, settlement of garage slab pavement, breakage and other damage" (Property Damage Action complaint, ¶¶ 13-23, 25). On or about August 11, 2010, defendant impleaded the defendants in the Property Damage Action as third-party defendants in this action, seeking indemnity against them, contending that if it was held liable for plaintiff's loss, then they should be responsible since it was their activity on the Project that led to damage to the Building. By order dated November 19, 2010, Justice Peter Sherwood consolidated the Property Damage Action with this action for purposes of joint discovery.

Defendant contends that after it received notice of plaintiff's claim of damage to the Building by "[g]arage floor buckling due to dewatering [at the Rego Park Mall]", it arranged

for an adjuster to investigate and an engineer determined that there was "significant settlement ... [of] the asphalt floor surface of the parking garage [in the Building]" (Vigneaux affidavit, ¶¶ 3-6). Since defendant's investigation determined that the settling of the soil under the garage floor was caused, at least in part, by the Project, it determined that the exclusion from coverage for earth sinking was applicable and it issued the Disclaimer Letter (*id.*, ¶¶ 7-8).

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Contract Interpretation

An insurance policy is a contract and, where provisions of a policy are clear and unambiguous, they should be given their plain and ordinary meaning (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). Additionally, an ambiguity in an insurance policy will be construed in favor of the insured, particularly when the ambiguity is in an exclusionary clause (*Cragg v Allstate Indemn. Corp.*, 17 NY3d 118, 122 [2011]). Generally, an insurer has a duty to defend an insured in an underlying action when the allegations of the complaint are within the scope of the risk undertaken and the insurer has the burden of showing that coverage does not exist or that an exclusion applies (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 627 [1994]; *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). However, while ambiguities are construed against the insurer, the court should not disregard the plain meaning to create an ambiguity, since this improperly rewrites the parties' agreement (*United States Fid.*, 67 NY2d at 232; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2d Dept 2007]).

Policy Provisions

The Policy provides (the Coverage Provision), in paragraph A, that defendant "will pay for direct physical loss of or damage to Covered Property ... limited by Property Not Covered." This includes "[b]ridges, roadways, walks, patios or other paved

surfaces" (*id.*, 2 [d]).

The Policy also provides (Causes of Losses-Special Form, paragraph B [1]) (the Exclusion Provision) that the defendant "will not pay for loss or damage caused directly or indirectly ... regardless of any other cause or event that contributes concurrently [sic.] .. to the loss ... [b] [4] Earth Sinking [other than sinkhole collapse], rising or shifting, including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface."

Analysis

Defendant asserts that the Exclusion Provision is addressed to earth movement and that since its investigation pointed to settling of the soil underneath the garage as, at least in part, a cause of the damage to the garage floor (Vignaeux affidavit, ¶¶ 6-7), this provision bars plaintiff's claim under the Policy (*Labate v Liberty Mut. Ins. Co*, 45 AD3d 811, 812 [2d Dept 2007], *lv denied* 10 NY3d 705 [2008]; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 417 [2d Dept 2007], *lv denied* 9 NY3d 818 [2008]). However, in reviewing a virtually identically worded provision that excluded coverage based upon earth movement, the Court of Appeals held that excavation caused by work done next door to an insured's property did not implicate the earth

movement exclusion, since the examples given of earth movement were not the result of intentional conduct such as excavation and since this alternative reading of an exclusion provision was equally reasonable, the court must "adopt the readings that narrow the exclusions, and result in coverage" (*Pioneer Tower Owner Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 308 [2009]; *cf. Bentoria Holdings, Inc. v Travelers Indemn.* Co., - NY3d-, 2012 N Y Slip Op 07141, 2012 WL 5256119 [2012], in which the court applied the exclusion provision for earth movement, since the policy in that case included a clause that stated the exclusion applied to earth movement "whether naturally occurring or due to man made or other artificial means").

Since the Exclusion Provision in this case lacks a clause specifying that earth movement due to man made or other artificial means such as excavation is included within the provision, the court must read the Exclusion Provision narrowly and in a manner favoring coverage (*Cragg*, 17 NY3d at 122; *Pioneer*, 12 NY3d at 308). Therefore, the portion of defendant's motion to dismiss plaintiff's complaint based upon the Exclusion Provision is denied, and the portion of plaintiff's cross-motion to strike the third affirmative defense based upon the Exclusion Provision is granted.

The Coverage Provision is also ambiguous, since the specified noncovered properties, bridges, roadways, walks and

patios are all external to the Building, as opposed to the underground garage in this case, which was inside the Building. The court must read the Coverage Provision in the manner calculated to lead to coverage, since exclusions from coverage are narrowly construed (*id.* at 308; *Seaboard*, 64 NY2d at 311). The portion of defendant's motion to dismiss plaintiff's complaint based upon the Coverage Provision is denied, and the portion of plaintiff's cross-motion that seeks to strike the second affirmative defense based upon the Coverage Provision is granted.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that plaintiff's cross-motion to strike defendant's second and third affirmative defenses is granted.

Dated: 1/24, 2013

ENTER:

J.S.C. HON. ANIL C. SINGH
SUPREME COURT JUSTICE