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*SHORT FORM ORDER*

*SUPREME COURT - STATE OF NEW YORK*

*Present:*

*HON. THOMAS P. PHELAN,*

*Justice*

TRIAL/IAS PART 9
NASSAU COUNTY

UNIONDALE REALTY ASSOCIATES,

Plaintiff,

-against-

THE HARTFORD FIRE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, GREENWICH INSURANCE COMPANY, W.H.M. PLUMBING & HEATING CONTRACTING, INC.,

Defendants.

ORIGINAL RETURN DATE: 08/14/06
SUBMISSION DATE: 10/16/06
INDEX No.: 585/06

MOTION SEQUENCE #4,9

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W.H.M. PLUMBING & HEATING CONTRACTORS, INC.,

Third-Party Plaintiff,

-against-

WAX FERRARO & ASSOCIATES, P.C., PULASKI & SIROTA, P&M CONCRETE CORPORATION, and SOIL MECHANICS DRILLING CORPORATION,

Third-Party Defendants.

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W.H.M. PLUMBING & HEATING CONTRACTORS, INC.,

Second Third-Party Plaintiff,

-against-

AUGUSIEWICZ EXCAVATING CORP. and AUGUSIEWICZ CONTRACTING, INC.,

Second Third-Party Defendants.

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The following papers read on this motion:

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| Notice of Motion..... | 1,8 |
| Supporting Papers..... | 9,10,11,12 |
| Answering Papers..... | 3,4,5,14,15 |
| Reply..... | 7,17 |
| Plaintiff's Brief..... | 6,16 |
| Defendant's Brief..... | 2,13,18 |
| Correspondence and Stipulation..... | 19 |

Motion [sequence #4 - improperly labeled a cross-motion] by defendant The Hartford Fire Insurance Company ("Hartford") for an order pursuant to CPLR 3212 granting Hartford summary judgment dismissing plaintiff's complaint as against Hartford and the cross-claims asserted against Hartford by co-defendant W.H.M. Plumbing & Heating Contractors, Inc., ("WHM") is granted.

Motion [sequence #9 - improperly labeled a cross-motion] by defendant Greenwich Insurance Company ("Greenwich") for an order pursuant to CPLR 3212 granting Greenwich summary judgment dismissing plaintiff's complaint as against Greenwich is granted.

This is an action, *inter alia*, to recover upon four (4) insurance policies. Plaintiff Uniondale Realty Associates ("Uniondale") is the owner of commercial property located at 1121 Jerusalem Avenue in Uniondale, N.Y. Defendant Hartford issued an "all risk" policy covering the premises on or about June 1, 2003 and is the primary insurance carrier. Co-defendants Greenwich, Lexington Insurance Company ("Lexington"), and Illinois Union Insurance Company ("Illinois") are alleged to be excess carriers.

By this action, Uniondale seeks to recover for damages sustained when the plumbing system on the property collapsed allegedly due to the improper installation by defendant WHM of the hangers supporting the system. Uniondale's complaint alleges that the damage was discovered on October 21, 2003. In its complaint, Uniondale seeks to recover property damages in the sum of $13,547,350.37 to repair the plumbing system, loss of rental income in the sum of $3,147,297.00, and pollution clean-up costs associated with the system collapse in the sum of $285,000.00.

Uniondale's first, second, and third causes of action are against defendant Hartford. The first cause of action alleges, *inter alia*, that: "Hartford's failure to pay Uniondale's claim, as submitted, constitutes a breach of the aforesaid contract of insurance." The second cause of action alleges, *inter alia*, that: "Hartford did engage in deceptive acts and practices and/or violation of the Unfair Claims Settlements Acts of the New York Insurance Law [i.e., General Business Law § 349; 11 NYCRR Part 216]." The third cause of action alleges, *inter alia*, that: "The actions of Hartford and its attorney constitute a breach of the covenant of utmost good faith contained in the policy of insurance."

Uniondale's fourth and fifth causes of action are against defendants Lexington and Illinois, respectively, and are not in issue on these motions. Uniondale's sixth cause of action is against

defendant Greenwich. This cause of action alleges, *inter alia*, that: "Defendant Greenwich's failure to pay plaintiff's claim, as submitted, constitutes a breach of the aforesaid contract of insurance." Uniondale's seventh, eighth, and ninth causes of action are against defendant WHM and are not in issue on these motions.

Initially, the Court notes that defendant WHM does not oppose the dismissal of its cross-claims against either Hartford or Greenwich and Uniondale does not oppose the dismissal of its second and third causes of action against Hartford. Consequently, those cross-claims and causes of action are severed and dismissed. The dismissal of the second and third causes of action includes Uniondale's claims against Hartford for punitive damages, treble damages, and attorney's fees. Insofar as Hartford requests that Uniondale be sanctioned to the extent of compensating Hartford for the motion costs and expenses necessitated by the inclusion of these frivolous causes of action, this request is denied. The Court does not find that these causes of action were frivolously brought.

Defendant Hartford moves for summary judgment dismissing plaintiff's first cause of action for breach of contract on the grounds that the subject loss was not a fortuitous event as required by its policy and as reflected in the multiple policy exclusions. "While sometimes referred to as an 'all-risk' policy this is actually a misnomer since, as here, there are specific exclusions. The purpose of such a policy is to protect against a fortuitous event. This has been defined as 'an event happening by chance or accident' (citation omitted). Or an event 'occurring by chance without evident causal need or relation or without deliberate intention' (citation omitted). Such a policy does not obligate the insurer to pay for loss or damage resulting wholly from the nature and inherent qualities of the property insured (citation omitted)." (**80 Broad Street Co. V. United States Fire Ins. Co.**, 88 Misc.2d 706, 707, affd. 54 AD2d 888)

Hartford moves for summary judgment on the grounds that multiple exclusions apply. Hartford's all-risk policy provides in relevant part as follows:

> "9. PERILS EXCLUDED
>
> This policy does not insure:
>
> . . .
>
> b. against the cost of making good defective design or specifications, faulty materials, or faulty workmanship; however, this exclusion shall not apply to loss or damage resulting from such defective design or specifications, faulty material, or faulty workmanship;
>
> . . .

> g. against ordinary wear and tear, inherent vice, vermin, moths, insects, termites, gradual deterioration, mold, mildew or fungi, insects or termites unless loss or damage from a peril insured against herein ensues and then this policy shall cover for ensuing loss or damage;"

As established by plaintiff's expert, Cawsie Jijina, a structural design engineer, defective work of WHM in installing the J hooks caused the plumbing system to collapse.

Mr. Jijina states that: "The Shop Rite building was built with a pile foundation system, since the building was constructed on a landfill. As such, it was anticipated that the land beneath the slab would settle and compact over time." Mr. Jijina further states that: "Since it was anticipated that the ground would settle, it was necessary to support the underground plumbing system (waste, condensate and grease), with hangers." Mr. Jijina additionally states that: "The plumbing system and the hanger system were two separate systems. Each had a separate purpose, and the hangers were only needed at this site because it was anticipated that the soil would settle over time, and the piping system would thus need to be supported."

Mr. Jijina goes on to state that: "Our investigation revealed that the hanger system, however, was not properly installed in that there was an insufficient number of hangers installed, and they were not spaced close enough to properly support the underground pipes." Mr. Jijina furthermore states that: "The hanger system, as installed, was not at all what was shown on the design drawing." Mr. Jijina also states that: "The design of the hanger support system met the applicable design requirements at the time of construction. The ground settlement was taken into account in the design of the pipe support system and the plumbing system." Mr. Jijina's opinion is that: "If the hangers had been properly installed, there would have been no failure of the pipe system. The hanger system was properly designed and improperly installed. If installed as designed, the hanger system was sufficient to bear the load of the piping system."

As persuasively argued by Hartford, the subject loss was excluded by the policy exclusion for inherent vice. "'An inherent vice is defined by various courts as "any existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time". It is also defined "as a cause of loss not covered by the policy, [which] does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality which brings about its own injury or destruction. The vice must be inherent in the property for which recovery is sought'" (citations omitted). In other words, the question is whether the 'insured property ... contains its own seeds of destruction ... [or whether it] was threatened by an outside natural force' (citations omitted)" (**GTE Corp. v Allendale Mut. Ins. Co.**, 372 F3d 598, 611).

While it was the settling of the ground that caused the J hooks to separate from the pipes and not some inherent defect in the J hooks, the support system itself was intended to address the anticipated settling. Having failed to properly install the support system, designed to meet a future need once the soil settled, the seeds for destruction of the system were planted within the property itself.

In addition, and again as argued by Hartford, there exists another category of exclusion which forms a separate basis for dismissal of all claims against Hartford.

Recovery of the cost of making good for faulty workmanship is limited to "loss or damage resulting from such ... faulty workmanship" but does not include the cost of making such workmanship "good". Similarly, recovery for an inherent vice is limited to "ensuing loss or damage" while the vice itself is excluded.

Uniondale argues that the hanger system, which supported the plumbing system, is a separate system and that damage to the plumbing system and the cost of its repair is therefore compensable as a resultant or ensuing loss.

In support, plaintiff cites the affidavit of Mr. Jijina wherein he states that: "The two systems were designed by two different engineers and were independent, and independently installed." This argument is not persuasive.

An analogous case is **Holland v Breaux** (2005 U.S. Dist. LEXIS 36504 [ED LA]), which involved a homeowner's insurance policy including similar exclusions. In that case, the Court held (at p 18) that: "The 'ensuing loss' provisions in the policy's exclusions . . . provide coverage for loss that is separate and extraneous from the original damage. The floor of the house, which sagged because of the rotting foundation, would not be covered by the 'ensuing loss' provision because the floor damage is not separable from the damage to the house's foundation. Likewise, the damaged walls and door frames that sagged because of the rotting foundation cannot be analyzed separately from the damaged foundation."

In this case, the collapse of the plumbing system was the original damage. It was not separate and extraneous to the failure of the J hooks, the very purpose of which was to prevent a plumbing system collapse as the soil settled.

Another case on point is **Laquila Constr., Inc. v Travelers Indem. Co.** (66 F Supp 2d 543 [SD NY], affd 216 F3d 1072), cited by Hartford, which involved a virtually identical exclusion for the cost of making good "faulty or defective workmanship or material" with an exception for "physical damage resulting from such faulty or defective workmanship or material." In the **Laquila** case, Laquila Construction, Inc. ("Laquila") contracted with HRH Construction Corp. ("HRH") to provide concrete having a specified minimum strength. During construction, it was discovered that the concrete did not meet that specification. The defective concrete, which was on the fifth floor, was subsequently replaced. Laquila sought insurance coverage from Travelers for the costs of removing and replacing the defective concrete. Laquila also sought to recover "the costs of 'shoring the full height of the building while corrective work on the fifth floor took place' and other trade contractors' having to remove and reinstall their work." (**Laquila**, p 544).

Travelers denied coverage based upon the exclusion for the "cost of making good faulty or defective workmanship or material." Travelers also denied coverage for "any alleged consequential losses, including delays and charge-backs to the plaintiff arising from time delays." (**Laquila**, pp 544-545). The Court held that "plaintiff's claim falls squarely into the exclusion

clause simply as a cost incurred to make good the defective concrete." (**Laquila**, p 545). The Court went on to state that "had the fifth floor slab in HRH's building collapsed and damaged machinery, plumbing and electrical fixtures, or even neighboring property, such losses - - wholly separate from the defective materials themselves - - would qualify as non-excluded 'ensuing losses' under the Travelers' policy. Instead, Laquila's claim for coverage here is no more than an attempt to recover for the excluded costs of making good its faulty or defective workmanship." (**Laquila**, p 546).

In the present case, the plumbing system, which was being held up by the J hooks, cannot be considered "wholly separate" from the J hooks.

Hartford is accordingly granted summary judgment dismissing Uniondale's first cause of action.

Uniondale's sixth cause of action alleges, *inter alia*, that "on or about June 1, 2003, defendant Greenwich, for good and valuable consideration[,] made and issued to plaintiff its certain excess policy of insurance bearing policy number 800401, wherein and whereby it did insure [plaintiff] for all risks of loss with respect to the property located at 1121 Jerusalem Avenue, Uniondale, New York[,] up to an amount of $5,000,000 coverage for loss of rents and business at the premises, as well as coverage for remediation and pollution clean up."

Defendant Greenwich concedes that its "Pollution and Remediation Legal Liability insurance policy ... provides coverage for, *inter alia*, pollution clean-up to the extent required by law and any resulting business interruption from the discharge, dispersal or release of pollution conditions." Greenwich contends, however, that there is no evidence of any release of discharge or waste, or indication that a pollution condition exists or existed requiring clean up or shut down so as to trigger coverage.

Counsel for plaintiff argues, on the other hand, that "plaintiff does not have to present evidence of release of waste, pollutant, pollution condition, requiring a clean-up to be covered under this policy, which provides coverage for 'investigation' of a pollution condition. As such, Greenwich has an obligation to defend and indemnify Uniondale in the related Federal action [ WFC-1 Realty Corp. v Uniondale Realty Associates, 03-CV-5983 (United States District Court for the Eastern District of New York)]." Plaintiff's counsel further argues that: "In the WFC-1 action [Greenwich's Exhibit H], Uniondale's tenant, WFC-1, makes a claim that there exists a pollution condition at the site, and claims Uniondale has an obligation to clean it up and abate the rent. As such, this situation fits the definition of a 'claim' under the Greenwich policy, and obligates Greenwich to defend and indemnify Uniondale in that action."

With respect to coverage for an "investigation," the only evidence Uniondale presents in support of its claim for pollution clean-up is a proposal dated March 25, 2004 from an environmental consultant estimating that it would cost between $250,000 to $285,000 to investigate and remediate any contaminants (Greenwich Exhibit O). No actual investigation has, however, taken place and no findings have been made that pollutants or contaminants exist at the premises (see, Greenwich Exhibit P at pp. 143-144 and Greenwich Exhibit Q at pp. 147-148 and 150-152 [deposition transcripts of plaintiff's representatives]).

Further, the investigation report from Uniondale's plumber produced during discovery (Greenwich's Exhibit R) confirms that while the sanitary plumbing lines sunk and separated from the foundation, the lines remained intact laterally without horizontal breaks (see, also, Greenwich's Exhibit S at p.30 (deposition transcript of plaintiff's representatives in Federal Action]). Further, there is no evidence of any sewage spillage requiring clean up (see affidavit of Greenwich's expert Michael Dowger, dated August 2, 2006; see, also, Greenwich's Exhibit P at pp. 125-126, and Greenwich's Exhibit Q at pp. 147-151 [deposition transcripts of plaintiff's representatives]).

Greenwich's evidence as to the absence of any investigation or release of pollutants or contaminants is uncontroverted. The Court therefore holds that defendant Greenwich has made a prima facie showing for the dismissal of Uniondale's $285,000.00 claim for pollution clean up and $3,147,275.00 claim for loss of rents.

With respect to Uniondale's argument that Greenwich has an obligation to defend and indemnify Uniondale in the Federal action, no such relief is sought in Uniondale's cause of action against Greenwich and no application to amend the complaint has been made. Moreover, it is uncontroverted that Uniondale never requested that either Hartford or Greenwich undertake the defense of the Federal action, which has been pending for almost three (3) years. No excuse is offered for failing to request Greenwich to undertake Uniondale's defense in the Federal action. The Court agrees with counsel for Greenwich that "any possible defense obligation on the part of Greenwich, which is excess to Hartford, is subject to denial, and has, in all events, been waived."

Accordingly, Uniondale's first, second, third, and sixth causes of action are hereby severed and dismissed. The cross-claims asserted by co-defendant WHM against Hartford and Greenwich are hereby severed and dismissed as well.

Consistent with the foregoing and in recognition of this court's receipt of a copy of fully executed stipulations by all parties discontinuing both the third-party action and the second third-party action, the title of this action is amended to read as follows:

"UNIONDALE REALTY ASSOCIATES,

Plaintiff,

-against-

LEXINGTON INSURANCE COMPANY, ILLINOIS UNION INSURANCE COMPANY, and W.H.M. PLUMBING & HEATING CONTRACTING, INC.,

Defendants."

Dismissals are without costs.

This decision constitutes the order of the court.

Dated: 12-13-06

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