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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 34

-----X

BRONX 13 PROPERTIES LLC and
2076 CRESTON LLC,

Plaintiff

v.

Index No. 161411/2015

WESCO INSURANCE COMPANY,

Defendant.

-----X

Argument and decision

80 Centre Street
New York, New York
April 4, 2019

B E F O R E:

H O N O R A B L E A L A N C. M A R I N,

Justice

A P P E A R A N C E S:

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Attorneys for Defendant

Reported by: Anthony Armstrong, Official Court Reporter

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1 THE COURT: Bronx Properties 13 LLC and 2076
2 Creston against Wesco Insurance Company. Mr.
3 Armstrong has your cards.

4 Announce your appearances for the record.

5 MR. BUCKLEY: Kevin Buckley of Mound Cotton
6 Wollan & Greengrass for Wesco Insurance Company.

7 MR. CUMMINS: Harry Cummins with Wilkofsky
8 Friedman Karel & Cummins for the plaintiffs.

9 THE COURT: think the issue comes down as to
10 whether this is a collapse or collapse or not and the
11 competing engineers back and forth. There is some
12 testimony that there was visible deterioration. You
13 could see the floors were sloping, et cetera, et
14 cetera. This is motion 008 for defendant summary
15 judgment.

16 Go ahead, sir.

17 MR. BUCKLEY: Yes. Thank you.

18 There are a few bases on which Wesco moved for
19 summary judgment. The first in and easiest fact is
20 prompt notice. The loss allegedly occurred on
21 July 1st. It's undisputed notice was not given
22 until the 28th, 28 days later. We have evidence.
23 It's in the record, photographic evidence of the
24 tenant in the apartment at issue who in May - this is
25 about a month and a half earlier - had taken

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1 photographs of the opened ceiling and floor showing
2 the deteriorated joists.

3 Then on July 1st, allegedly, there was a
4 collapse. The insured plaintiff then notified his
5 engineer, his public adjuster. They came in, they
6 took photographs, they inspected the damage, then they
7 repaired the damage, and then only after all of that
8 was done did they notify Wesco. So all of the
9 evidence proving the damage and the loss was now gone
10 for Wesco's investigators to look at. That in and of
11 itself is a breach of the policies, conditions to
12 provide prompt notice. It's also a breach of the
13 conditions that require the insured to show the
14 property for inspection, proving loss or damage.

15 Now, these -- with regard to prompt notice and
16 the dates of loss, this is very similar to a case I
17 had recently called TD Realty in the Bronx. That's
18 cited in the papers. And in that case, notice was
19 given 14 days later, after the insured decided to rip
20 off and remove its roof and replace it, and then the
21 insurance got to come in and take a look. The judge
22 in that case said you breached the prompt notice
23 condition, and you breached the other condition that
24 requires you to show property proving the loss.

25 We didn't have the same opportunity here to come

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1 in and look at the damage right after the loss
2 occurred, so for those reasons alone, the breach of
3 those conditions, Wesco is entitled to summary
4 judgment.

5 Now I would like to address the mountain of
6 evidence that shows this was not a collapse at all.

7 What happened here was there were water leaks,
8 undisputed, coming for months. The tenants were
9 complaining. The tenant in 34A complained to HUD in
10 May and asked them to come down and take a look.
11 While the superintendent and his workers were in these
12 apartments ripping out the walls trying to correct the
13 water leaks in whatever way they were doing, she took
14 photographs of what was going on in May. HUD -- HPD,
15 I'm sorry, the HPD inspectors finally got into the
16 building on July 1st that morning to take a look at
17 what she was complaining about. They got in and they
18 saw the ceilings were removed. She could see up into
19 the floor at issue that the joists were rotted and
20 deteriorated and in such bad condition they needed to
21 be replaced.

22 She told these workers, who by the way were
23 working without a permit, no building permit pulled on
24 this, she told them you cannot just cover this up.
25 You have to fix this. She said stop what you are

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1 doing. I am going to come back here later this
2 afternoon. Before she did that, she called her
3 supervisor who, by the way, is an architect and came
4 to the same conclusion. This is completely
5 deteriorated. You need to remove this stuff and fix
6 it. You just can't cover it up with sheetrock.

7 They came back later that evening, about five or
8 six hours later --

9 THE COURT: What date are we on?

10 MR. BUCKLEY: This is all July 1st.

11 On July 1st she sees it. Not only does she
12 sees it, she took photographs also, which are in the
13 record, on the morning of July 1st showing the
14 deterioration of these beams. She comes back later
15 that evening with Department of Building inspectors,
16 and the floor is gone. It's gone not in a collapse
17 state that you would expect. It's a clean, square cut
18 in the floor. You can see in the tiles and you can
19 see in the tiles of the wall. It's a very clean cut.

20 Every engineer who has testified in this case,
21 including plaintiff's engineer, has testified that
22 this is an indication that it was an intentional
23 demolition. Plaintiff's engineer says he cannot rule
24 out the possibility that this floor was removed
25 intentionally. Our engineer has concluded this floor

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1 was removed intentionally. The HUD architect and
2 supervisors who saw it that morning said there was no
3 way this floor would collapse. It was removed
4 intentionally.

5 The tenant of this apartment, who was there all
6 day long and would have heard a collapse, said nothing
7 collapsed. They went in there and they gutted my
8 apartment bathroom. She said she saw them taking the
9 toilet out, taking the bathtub out, putting them out
10 in the hall. And then to conceal this from the
11 Department of Buildings who was going to come back
12 shortly, they took a door and they screwed it on so
13 that no one could open up the door into the bathroom.

14 Judge, getting to the collapse exclusion and why
15 this is relevant.

16 Collapse in this policy is excluded. It's
17 broadly excluded in the coverage section under Section
18 B, collapse exclusion. There is a limited additional
19 coverage collapse provision in Section D. Now, that
20 doesn't overrule the exclusion. What it does is it
21 says that exclusion applies, but in this limited
22 situation you can get collapse coverage.

23 And it's very detailed what has to be proven.
24 First it has to be an abrupt falling down of a
25 building or part of a building, such that it cannot be

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1 used for its intended purposes --

2 THE COURT: Looking from my notes. This is
3 this D, additional coverage collapse?

4 MR. BUCKLEY: Correct.

5 THE COURT: It's on page four?

6 MR. BUCKLEY: Correct. It has to be an abrupt
7 falling down, which again, the tenant herself proves
8 that that did not happen. But aside from that, it has
9 to be caused by one of the listed perils.

10 Now, plaintiff has said it is making a claim
11 under the peril of hidden decay. It is saying it has
12 a collapse because of hidden decay. The provision
13 there says the collapse must be caused by decay that
14 is hidden from view.

15 Now, the photographs from the morning of
16 July 1st, when the floor was intact, clearly show
17 that there was decay and rot in that floor. There was
18 testimony from both of the HPD inspectors, one of
19 which is an architect, saying they saw the rot in that
20 structure that morning before any alleged collapse
21 occurred, so therefore, as a matter of law, it was not
22 hidden from view. Plaintiff takes the wrong turn on
23 the last part of that provision by contending that it
24 needed to know that it was actually decayed before the
25 loss. That's not the case. If it knew of the decay

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1 because the floor was sloping or any other reason,
2 water getting into the floor, then that also bars it
3 from coverage. But merely the fact that it's not
4 hidden from view alone pulls it out of a peril that
5 triggers coverage under Section D.

6 For those reasons, we believe Wesco is entitled
7 to summary judgment in this case.

8 THE COURT: Okay.

9 MR. CUMMINS: Your Honor, initially what hasn't
10 been brought up by counsel is this property was bought
11 approximately nine months before July 1, 2015 by the
12 plaintiff. They had an engineering firm come in and
13 do an exhaustive review and inspection of the
14 building. The building passed with flying colors.
15 There was no visible signs of collapse, no visible
16 signs of hidden decay, et cetera.

17 Further, there's sworn testimony in this case
18 from the plaintiffs' managing agent, as well as their
19 super, that they were not aware of any conditions that
20 would have given them reason to suspect that there was
21 hidden decay in the floors and the wall.

22 Defense made much about sloping floors. Half
23 the buildings in that neighborhood have sloping
24 floors. That doesn't mean that that's evidence --

25 THE COURT: Not just bad neighborhoods.

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1 MR. CUMMINS: No. It's all over the city there
2 are sloping doors.

3 THE COURT: What are we talking about in the
4 damages? There is the bathroom in 34A and the
5 bathrooms below it.

6 MR. CUMMINS: Basically, first of all, after
7 this event occurred, immediately after this occurred,
8 there was an emergency situation where shoring had to
9 go in immediately to protect the building. There was
10 no time to wait. HPD required that that shoring go
11 up. That was done. There's also an obligation under
12 the policy -- I just want to mention this and I will
13 respond to your Honor directly.

14 There is an obligation under the policy for an
15 insured to protect and reserve its property from
16 further damage that the plaintiff did. All the late
17 notice cases that defendant cites, they are all in
18 excess of 28 days. With the exception of about two or
19 three, they are almost hundred.

20 THE COURT: Your thing is 27 days?

21 MR. CUMMINS: Yes. The law says it's all
22 circumstantial and it depends on the particular facts
23 of the case.

24 Your Honor is asking about damages.

25 After the event occurred and after the emergency

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1 work was done, and with no insurance monies
2 forthcoming because Wesco chose not to pay anything,
3 our client incurred in excess of \$600,000 to research
4 that line of apartments. Defendant has suggested,
5 well, we are claiming maintenance and ancillary
6 repairs.

7 The language in the collapse coverage says that
8 we will pay for direct physical loss or damage to
9 cover property caused by an abrupt collapse of
10 building or any part of the building. The case law
11 also says that if -- the collapse impacts on other
12 aspects of the building that are not in a state of
13 collapse, if those repairs have to be made, then it's
14 a covered loss.

15 THE COURT: Consequential damages in the
16 contract. I note the reply by the defendant says not
17 only is it not a collapse, but -- I think they say
18 there is an issue of whether you can segregate the
19 costs of the repairs --

20 MR. CUMMINS: We did.

21 THE COURT: -- elsewhere in the building.

22 MR. CUMMINS: We did. We provided in discovery
23 a full packet of invoices. We had a general
24 contractor who did all of this research work. We
25 provided all those invoices to the loss-related

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1 repairs. Repairs were all done. The tenants were --
2 I'm sorry. Go ahead, Judge.

3 THE COURT: If we get there, would a jury get
4 questions, you know, was repair to Apartment 34B part
5 of this? Is the repainting of this section of the
6 hallway part of the direct damage?

7 MR. CUMMINS: We will have testimony that will
8 support occurrence-related damages. The tenants were
9 all back in the building in about 18 months.

10 THE COURT: What's this thing with the cutout
11 in the bathroom that was not --

12 MR. CUMMINS: There are photographs that show
13 what appears to be what defendants claim it is. There
14 has been no testimony from anyone saying this what was
15 been done. It's similar to the speculation about
16 sloping floors being evidence of hidden decay. That's
17 a lot of speculation.

18 I also want to mention that one engineer's
19 opinion they didn't mention was Mr. Fuentes from the
20 city who opined that to him this looked like a
21 collapse. Now, There Was some qualifying testimony
22 afterwards. He was not paying paid by anybody here.
23 He is a city employee. He came in and inspected. He
24 acknowledged and conceded that this appeared to be a
25 collapse.

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1 We believe there are questions of fact here,
2 your Honor, which would mitigate in favor of the
3 denial of this motion.

4 MR. BUCKLEY: Judge, let me start with Mr.
5 Fuentes. He inadvertently said he showed up because
6 someone reported a collapse. He did not opine that
7 this was a collapse. In the testimony, I clarified
8 with him numerous times, which I cited in my brief the
9 exact page and line number, where he said I did not
10 form an opinion in any way about whether or not this
11 is a collapse.

12 And then I went through the physical evidence
13 with him. He agreed with me that if a collapse had
14 occurred, you would find the bathtub in 34A done in
15 the bathroom below. You would find the toilet down in
16 the bathroom below. You would not find plastic
17 covering of pipes of these removed fixtures in 34A,
18 which is normally done in construction, when you
19 remove a fixture intentionally. We went through all
20 the physical evidence.

21 He said he did not form an opinion, nor was it
22 his job to form an opinion as to whether a collapse
23 occurred or whether this was intentionally removed.

24 THE COURT: Counsel, are you saying that your
25 people went in right away to maintain the building,

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1 that was your duty, and that's why there may be
2 evidence of some construction work rather than --

3 MR. CUMMINS: They were under orders to
4 immediately shore the building. The building wasn't
5 completely repaired and all damage hidden by
6 July 28th. They did what they were required to do
7 by law.

8 And also, just regarding notice of hidden decay,
9 there has been no testimony as to when this alleged
10 construction started. All indications point to that
11 day or maybe the day before. My client -- even if
12 that's the case, my client wouldn't have had time to
13 come in and somehow be aware, oh, they are aware of
14 the hidden decay because it was revealed the day
15 before and somehow that bars coverage. I don't
16 believe the case law supports that either, your Honor.

17 But in any event, they were making those
18 emergency repairs. The shoring went in. The shoring
19 contractor was brought in immediately because they
20 were required.

21 THE COURT: What fell from 34A, the floor
22 opened up?

23 MR. CUMMINS: The floor opened up and bathroom
24 appliances fell through. They were found down below.

25 THE COURT: How many apartments in the line

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1 below? How many floors down did it go?

2 MR. CUMMINS: I believe it was from the fourth
3 floor to the third to the second and then the ground
4 floor.

5 THE COURT: The floors between the first and
6 the third floor, did they collapse? Did they go
7 through as well?

8 MR. CUMMINS: Yes.

9 THE COURT: I know it's a close call. When we
10 think of a collapse, we think of the entire building
11 goes down and that's the end of it.

12 MR. BUCKLEY: Judge, can I --

13 THE COURT: Sure.

14 MR. BUCKLEY: -- get back to the physical
15 evidence?

16 The evidence -- first of all, what they are
17 claiming is not the floors below. They are claiming
18 the two floors above and the floors below. They are
19 claiming essentially the damage that was caused by the
20 water leaks for the months before, of them taking out
21 the rot and redoing this whole thing. There was no
22 damage to the floors below. In fact, there was damage
23 to other apartments to the left and right due to water
24 leaks. That's all encompassed in their engineer's
25 report.

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1 With regard to the damage --

2 THE COURT: Does your policy cover water damage
3 only when it's coming from the outside, from hurricane
4 or some other storm?

5 MR. BUCKLEY: Correct. Getting back to the
6 notice issue here.

7 He is contending that they needed to come in and
8 do shoring. It's not the shoring that they did which
9 disturbed the conditions, Judge. They came in and
10 they fixed the entire floor. By the time our
11 engineers got in, the floor was repaired. They had
12 no --

13 THE COURT: Do me a favor. We have all of
14 this -- do you have all the pictures there?

15 MR. BUCKLEY: I have them right here.

16 THE COURT: Come up.

17 Off the record for a second.

18 (There was an off-the-record
19 discussion.)

20 THE COURT: I don't think notice is an issue.
21 I don't think the 28 days is an issue. Looking at
22 these photographs, it just doesn't look like a
23 collapse. We are interpreting a contract. I believe
24 that's a question of law not a question of fact.

25 Motion 008 is granted for summary judgment. Do

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a short form order. Counselor, I respect your
position. If the Appellate Division reverses me, God
bless you.

(Proceedings concluded.)

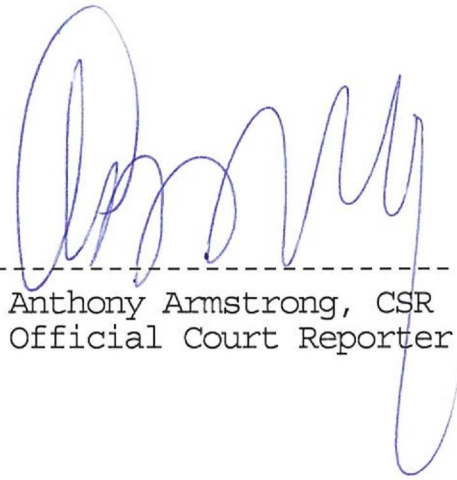
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C E R T I F I C A T E

I, ANTHONY ARMSTRONG, a Senior Court Reporter,
do hereby certify that the foregoing is a true
and accurate transcript of the testimony as taken
stenographically by and before me at the time, place and
on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative
nor employee nor attorney nor counsel of any of the parties
to this action, and that I am neither a relative nor
employee of such attorney or counsel, and that I am not
financially interested in this action.

(Not certified unless signed in blue ink.)



Anthony Armstrong, CSR
Official Court Reporter