2021 WL 256631 (N.Y.Sup.), 2021 N.Y. Slip Op. 30230(U) (Trial Order)
Supreme Court of New York.
New York County

**1 180 LAFAYETTE CORP., Plaintiff,

v.

WESCO INSURANCE COMPANY, Jordan Barrett, Defendant.

No. 150160/2019.
January 26, 2021.

Decision + Order on Motion

Present: Hon. W. Franc Perry, Justice.

MOTION DATE 02/14/2020

MOTION SEQ. NO. 001

**1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS/SUMMARY JUDGMENT.

In this action, plaintiff seeks to recover damages for property damage, emergency services and business income, allegedly sustained when a toilet overflowed at its premises. Defendant insurer, Wesco Insurance Company ("Wesco") moves for summary judgment pursuant to CPLR § 3212, seeking an order dismissing the complaint on the grounds that plaintiff's damages are excluded from coverage by the policy's water exclusion. Wesco also seeks dismissal of the cross claims asserted against it by defendant Barrett for failure to state a claim. Plaintiff and defendant Barrett oppose Wesco's motion.

BACKGROUND/CONTENTIONS

On January 31, 2018, Wesco issued a commercial general liability insurance policy to plaintiff 180 Lafayette Corp., ("plaintiff" and/or "premises") for a one year term. (NYSCEF Doc. No. 23). The Policy excludes coverage for damage as follows:

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage **2 is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

* * *

WATER EXCLUSION ENDORSEMENT

A. The exclusion in Paragraph B. replaces the Water Exclusion under Section I - Property.

B. Water

* * *

3. Water that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;

(Id., at CP 10 30 06 07 as modified by CP 10 32 08 08).

On June 21, 2018, the premises sustained water damage alleged to be caused by the negligence and carelessness of the fifth-floor tenant, Jordan Barrett. (NYSCEF Doc. No. 29, ¶¶ 13-18). The Property Loss Notice submitted on behalf of plaintiff to Wesco on June 21, 2018, described the damage as: "Tenants [sic] toilet overflowed causing water damage to the floor in that apartment and water damage to several floors below." (NYSCEF Doc. No. 24). Plaintiff alleged that it sustained building damage in the sum of at least $221,908.86, emergency service in the amount of at least $13,612,77 and loss of business income to be determined, for a total loss of at least $235,521.63. (NYSCEF Doc. No. 29, ¶ 9).

On October 24, 2018 Wesco issued a denial of coverage citing the above quoted water exclusion, advising plaintiff that its claim was denied. (NYSCEF Doc. No. 28). Thereafter, plaintiff commenced this action against Wesco alleging breach of contract and alleging negligence against Barrett, seeking damages resulting from the toilet overflow. Wesco now moves for summary judgment and dismissal of Barrett's cross claims contending that it is undisputed that plaintiff's loss was caused by water that overflowed from a toilet at the premises ****3** and is thus, excluded from coverage based on the unambiguous terms of the water exclusion. In addition, Wesco contends that Barrett's cross claims must be dismissed inasmuch as Wesco is not responsible for, nor liable to plaintiff for, the alleged damages and because Wesco owed no duty to defendant Barrett.

***2** In opposition, plaintiff posits that issues of fact exits that preclude summary judgment claiming that the court cannot determine whether its losses are covered under the water damage exclusion in the Wesco policy, because the precise cause of the overflow has not been conclusively determined. (NYSCEF Doc. No. 40, pp. 9-10). Plaintiff quotes the policy's Additional Coverage Extension urging the court to find an ambiguity, claiming that the water damage exclusion and the water damage coverage extension contain overlapping references to sump pumps, creating an ambiguity in the policy's terms that should be construed in favor of coverage. Defendant Barrett adopts and incorporates plaintiff's arguments and exhibits, opposing Wesco's motion and further contends that summary judgment should be denied as discovery is not complete and thus, the motion is premature.

In further support of summary dismissal, Wesco contends that plaintiff relies on distinguishable case law and policy provisions that are simply not present here. Wesco points out that the coverage extension plaintiff relies on is inapplicable because the provision only applies to "covered water or other liquid...damage..." and since water that overflows from a drain or related equipment is excluded from the policy, it is not "covered water", and thus, there is no ambiguity in the policy's provisions and exclusions. Wesco avers that whether the overflow was caused by a malfunctioning toilet handle, tank drain mechanism, the obstruction in the toilet's waste trap, or a combination of these causes is immaterial, because the exclusion here ****4** only requires that there be an overflow of a drain or related equipment which is exactly what happened in this case.

STANDARD OF REVIEW and ANALYSIS

On a summary judgment motion in a case involving an insurance contract or policy, "[t]he evidence will be construed in the light most favorable to the one moved against" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82, 978 NYS2d 13 [1st Dept. 2013]). The insured, however, has the burden of showing that an insurance contract covers the loss for which the

claim is made (*Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d 779, 780-781, 802 NYS2d 9 [1st Dept. 2005]; *City of New York v Wausau Underwriters Ins. Co.*, 145 AD3d 614, 617 [1st Dept 2016]).

"Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671. 486 NE2d 827, 495 NYS2d 969 [1985]). "[W]ell-established principles governing the interpretation of insurance contracts . . . provide that the unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-131, 832 NYS2d 1 [1st Dept. 2006]).

If, however, an ambiguity exists, that is, where "the language is reasonably susceptible of more than one interpretation" (*Demetrio v Stewart Tit. Ins. Co.*, 124 AD3d 824, 826 [2d Dept], *lv denied*, 25 NY3d 906 [2015]), the insurer bears the burden of establishing that the construction it advances is not only reasonable but also that it is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). "[W]henever an insurer wishes to ****5** exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Seaboard Sur. Co.*, 64. NY2d at 311 [internal quotation marks and citation omitted]). "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*id*. [citations omitted]).

***3** Turning to the policy language in the water exclusion here, it provides that; "[w]e will not pay for loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows or is otherwise discharged from a sewer, drain, sump, sump pump or related equipment;" (NYSCEF Doc. No. 23). The exclusion plainly provides that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (Id.). Upon careful review of the documents submitted in support of Wesco's motion and plaintiff's affidavit submitted in opposition, there can be no doubt that the water exclusion applies to bar coverage for the loss. Indeed, plaintiff admits that the damage was caused by "the toilet on the fifth floor [] continually discharging water and [] causing flooding." (NYSCEF Doc. No. 41, ¶ 4).

The Court finds the water exclusion to be clear and unambiguous. The exclusion is titled "[w]ater" and provides that the policy does not cover "damage caused directly or indirectly by water that backs up or overflows or is otherwise discharged from a ... drain ... or related equipment." (*Newlo Realty Co. v. U.S.F. & G. Corp.*, 213 AD2d 295, 624 NYS2d 33 [1st Dept 1995] [awarding summary judgment finding the exclusion for "water that backs up from a sewer or drain" where the plaintiff suffered damage from water that overflowed from a drain, was not limited to underground pipes]; see also, *193 Hooper Street Condo v. Wesco Ins. Co.*, 2020 N.Y. Slip Op. 30156(U), [N.Y. Sup. Ct., January 10, 2020] [awarding Wesco summary judgment ****6** based on the water exclusion noting that the malfunctioning toilet, constitutes at least "related equipment" within the meaning of said policy exclusion [citation omitted]).

Plaintiff's attempt to create an ambiguity where none exists is unavailing. In arguing that summary judgment should be denied because the cause of the flooding remains unanswered, plaintiff ignores the plain meaning of the policy's exclusion written to exclude "water that backs up or overflows or is otherwise discharged from a drain ... or related equipment" from coverage "regardless of any other cause or event that contributes to the loss". (NYSCEF Doc. No. 23). Indeed, the exclusion only requires that the water backs up or overflows or is otherwise discharged from a drain or related equipment. That is exactly what happened in this case as conceded by the plaintiff in his affidavit and the contractor who inspected the toilet right after the loss who determined that the toilet had in fact overflowed. (NYSCEF Doc. Nos. 33 and 41).

Pichel v. Dryden Mut. Ins. Co., 40 Misc.3d 679, 965 N.Y.S.2d 342 [Sup. Ct., Tomkins County 2013], *aff'd*, 117 A.D.3d 1267, 986 N.Y.S.2d 268 [3d Dept 2014], does not require a different result. In *Pichel*, the insurer denied coverage based on the policy's "Water Damage" exclusion that excluded damage for "water which backs up through sewers or drains", and plaintiff claimed that the cause of the loss was as the result of "[a]ccidental [o]verflow/discharge of a [p]lumbing [s]ystem" which was

covered under the policy. (*id.)* In support of summary dismissal, Dryden relied on an additional water damage exclusion "for loss caused by repeated or continuous discharge or leakage of liquids or steam from within a plumbing system." The latter exclusion also provided that the insurer does "pay for loss caused by the accidental leakage, overflow or discharge of liquids or steam from a plumbing system."

The lower court found that these two provisions were ambiguous, and that the exclusion provision applied to a backup originating off the insured property (i.e. a municipal sewer), ****7** whereas the coverage provision applied where the occurrence originated within the insured's property (i.e. in the property owner's plumbing system). The Third Department noted that the issue presented was one of first impression in New York and agreed with the lower court's resolution of the ambiguity based upon decisions from other jurisdictions which found coverage for water damage caused by a backup/overflow originating within the insured's plumbing system, while such a backup/overflow from a clogged municipal sewer line outside the insured's system is not covered, but reversed the lower court's grant of partial summary judgment to the plaintiff as the proof did not establish where the backup actually occurred. (*Pichel v. Dryden Mut. Ins. Co.*, 117 AD3d 1270).

***4** Unlike the policy at issue in *Pichel*, here, Wesco's policy plainly excludes coverage for water that "backs up overflows Or is otherwise discharged" from a "drain" or "related equipment". The court in *Pichel* determined that the conflicting provisions concerning coverage for a drain "overflow," could be construed to have different meanings, noting that "defendant has failed to establish that its interpretation--that the loss is excluded from coverage so long as water backs up through a sewer or drain, regardless of where the sewer or drain is located--is the only fair interpretation of the two provisions" and as such, the court held that the ambiguity was to be interpreted in favor of coverage. (*id*.). No such ambiguity is present here.

There is no conflict presented by Wesco's water exclusion and the additional coverage extension for "Water Damage, Other Liquids, Powder or Molten Material Damage", as the extension applies only to "covered water", and water that overflows or is otherwise discharged from a drain or related equipment is excluded by the plain meaning of the water exclusion. As such, unlike the policy provisions at issue in *Pichel*, there is no conflict between the provisions here and thus, there is no ambiguity that would require the court to ignore the plain terms of the ****8** exclusion. (see, *White v Continental Cas. Co.*, 9 NY3d 264, 878 NE2d 1019, 848 NYS2d 603 [2007] [if the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer]). Here, the court finds that Wesco has satisfied its burden of establishing that the water exclusion applies to exempt coverage for the claimed water damage in this case, and that the exemption is subject to no other reasonable interpretation. (see, *Pioneer Towner Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307, 908 NE2d 875, 880 NYS2d885 [2009], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311, 476 NE2d 272, 486 NYS2d873 [1984]). As such, Wesco is entitled to summary judgment.

The cross claims asserted by defendant Barrett seeking contribution and indemnity from Wesco are dismissed. Plaintiff's claim against Wesco asserts breach of contract and to the extent that Barrett's cross claim for contribution derives solely from that claim, it must be dismissed as a matter of law because contribution is not available "between two parties whose potential liability to a third party is for economic loss resulting only from a breach of contract" (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 23, 517 NE2d 1360, 523 NYS2d 475 [1987]; see *Bloostein v Morrison Cohen LLP*, 157 AD3d 432, 66 NYS3d 120 [1st Dept 2018]).

Additionally, Barrett has failed to allege that Wesco owed a duty to him that would support a claim for contribution or indemnification on this record. (see *Raquet v Braun*, 90 NY2d 177, 183, 681 NE2d 404, 659 NYS2d 237 [1997]; *Garrett v Holiday Inns*. 86 AD2d 469, 471, 450 NYS2d 619 [4th Dept 1982], *mod on other grounds* 58 NY2d 253, 447 NE2d 717, 460 NYS2d 774 [1983]). Moreover, indemnification is only available where a party who is vicariously liable seeks to recover from the actual wrongdoer. (*Martin v. Back O'Beyond. Inc.*, 198 AD2d 479, 604 NYS2d 205 [2d Dept 1993]).

**9 Here, Wesco did not cause the water damage to plaintiff's building and as this court has found that Wesco's policy excludes coverage for that damage. Barrett's cross claims seeking contribution and indemnity are dismissed. Accordingly, it is hereby,

ORDERED that the motion for summary judgment of defendant Wesco Insurance Company is granted and the complaint is dismissed against said defendant; and it is further

ORDERED that the cross-claims against said defendant by defendant Jordan Barrett are dismissed; and it is further

*5 ORDERED that the claims against defendant Jordan Barrett are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Wesco Insurance Company dismissing the claims and cross-claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this court.

1/26/2021

DATE

<<signature>>

W. FRANC PERRY, J.S.C.

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