Pichel v. Dryden Mut. Ins. Co., 2014 NY Slip Op 3575, 117 A.D.3d 1267, 986 N.Y.S.2d 268 (N.Y. App. Div., 2014)

117 A.D.3d 1267
986 N.Y.S.2d 268
2014 N.Y. Slip Op. 03575

Michael J. PICHEL, Respondent,
v.
DRYDEN MUTUAL INSURANCE COMPANY, Appellant.

Supreme Court, Appellate Division, Third Department, New York.

May 15, 2014.

[986 N.Y.S.2d 269]

Levene Gouldin & Thompson, LLP, Binghamton (Lauren A. Saleeby of counsel), for appellant.

Bond, Schoeneck & King, PLLC, Syracuse (Katie I. Reid of counsel), for respondent.

[986 N.Y.S.2d 270]

Before: LAHTINEN, J.P., STEIN, GARRY and ROSE, JJ.

STEIN, J.

Appeal from an order of the Supreme Court (Rumsey, J.), entered May 23, 2013 in Tompkins County, which, among other things, granted plaintiff's motion for partial summary judgment declaring that an insurance policy issued by defendant covers certain losses sustained by plaintiff.

Plaintiff owns a four-building apartment complex, which was covered by an insurance policy issued by defendant. While the policy was in effect, two of the buildings sustained substantial water damage when waste water entered the first-floor apartments through, among other things, toilets, bathtubs and condensation drains. After plaintiff timely filed a property loss notice, defendant disclaimed coverage on the basis that the loss fell within multiple exclusions in the policy, including, as relevant here, the "Water Damage" exclusion, which applies to a loss caused by "water which backs up through sewers or drains." Plaintiff thereafter submitted a sworn statement in proof of loss prepared by plaintiff's adjuster, contending that the cause of the loss—specifically, "[a]ccidental [o]verflow/[d]ischarge of a[p]lumbing [s]ystem"—was covered under the policy, and defendant again disclaimed coverage.

Plaintiff subsequently commenced this action for breach of contract and for a declaration that the loss was covered under the terms of the policy. Following joinder of issue and discovery,

plaintiff moved for partial summary judgment on liability and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiff's motion, declared that the loss was covered under the terms of the policy and denied defendant's cross motion. Defendant now appeals.

Initially, we reject defendant's assertion that Supreme Court erred in denying its cross motion for summary judgment dismissing the complaint based on the court's erroneous interpretation of the policy. Defendant relies upon the "Water Damage" exclusion, which applies to, among other things, loss caused by "water which backs up through sewers or drains" (hereinafter the exclusion provision). A second exclusion, also entitled "Water Damage," provides that there is no coverage "for loss caused by repeated or continuous discharge, or leakage of liquids or steam from within a plumbing ... system." However, the latter exclusion also states that defendant *does* "pay for loss caused by the accidental leakage, overflow or discharge of liquids or steam from a plumbing ... system" (hereinafter the coverage provision).[1] While defendant asserts that the exclusion provision is applicable and precludes coverage here, plaintiff contends, and Supreme Court found, that the two provisions are ambiguous and should be reconciled so that the exclusion provision applies to a backup that originates off an insured's property (i.e., in a municipal sewer or drain), while the coverage provision applies to an occurrence originating within the insured's property (i.e., in a property owner's plumbing system).

Where an insurer relies on an exclusion to avoid coverage, it has the burden of demonstrating "that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case"

[986 N.Y.S.2d 271]

(*Continental Cas. Co. v. Rapid–American Corp.,* 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506 [1993];*accord Nova Cas. Co. v. Central Mut. Ins. Co.,* 59 A.D.3d 777, 778, 872 N.Y.S.2d 603 [2009];*see Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143 [2012];*Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302, 307, 880 N.Y.S.2d 885, 908 N.E.2d 875 [2009]). Moreover, we are "obligat[ed] to interpret the exclusion in a manner that gives full force and effect to the policy language and does not render a portion of the provision meaningless" (*Cragg v. Allstate Indem. Corp.,* 17 N.Y.3d 118, 122, 926 N.Y.S.2d 867, 950 N.E.2d 500 [2011];*see Roman Catholic Diocese of Brooklyn v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 21 N.Y.3d 139, 148, 969 N.Y.S.2d 808, 991 N.E.2d 666 [2013];*Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 5 N.Y.3d 157, 162, 800 N.Y.S.2d 89, 833 N.E.2d 232 [2005];*County of Columbia v. Continental Ins. Co.,* 83 N.Y.2d 618, 628, 612 N.Y.S.2d 345, 634 N.E.2d 946 [1994];*Loctite VSI v. Chemfab N.Y.,* 268 A.D.2d 869, 871, 701 N.Y.S.2d 723 [2000]). "While [u]nambiguous provisions of a policy are given their plain and ordinary meaning, where policy language is unclear or subject to multiple reasonable interpretations, such ambiguities are resolved against the insurer" (*Matter of Progressive Ins. Cos. [Nemitz],* 39 A.D.3d 1121, 1122, 834 N.Y.S.2d 394 [2007] [internal quotation marks and citations omitted]; *see Dean v. Tower Ins. Co. of N.Y.,* 19 N.Y.3d at 708, 955 N.Y.S.2d 817, 979 N.E.2d 1143;*City of Elmira v. Selective Ins. Co. of N.Y.,* 83 A.D.3d 1262,

1264, 921 N.Y.S.2d 662 [2011];*Travelers Indem. Co. v. Commerce & Indus. Ins. Co. of Can.,* 36 A.D.3d 1121, 1122–1123, 828 N.Y.S.2d 658 [2007]).

In our view, when the exclusion and coverage provisions at issue here are read together, an ambiguity exists in the insurance policy as to losses resulting from a backup and/or overflow from sewers, drains and/or plumbing systems. Although the resolution of this ambiguity appears to be an issue of first impression in this state, Supreme Court's analysis—that a plumbing system, as referenced in the coverage provision, includes drains that are on the insured's property—is consistent with decisions in other jurisdictions that have interpreted the interplay of competing provisions similar to those in question here (*see Hallsted v. Blue Mtn. Convalescent Ctr., Inc.,* 23 Wash.App. 349, 351–352, 595 P.2d 574 [1979],*review denied*92 Wash.2d 1023 [1979];*Jackson v. American Mut. Fire Ins. Co.,* 299 F.Supp. 151, 156 [M.D.N.C. 1968],*affd.*410 F.2d 395 [4th Cir.1969];*Cheetham v. Southern Oak Ins. Co.,* 114 So.3d 257, 262–263 [Fla. 2013],*review denied*129 So.3d 1069 [2013];*Kozlowski v. Penn Mut. Ins. Co.,* 295 Pa.Super. 141, 146, 441 A.2d 388 [1982];*Haines v. United Sec. Ins. Co.,* 43 Colo.App. 276, 277–278, 602 P.2d 901 [1979]). In short, these cases stand for the proposition that water damage caused by a backup/overflow that originates from a pipe or clogged drain located within the insured's property line comes from the insured's plumbing system and is covered by the policy; conversely, if the cause of the backup/overflow is from outside the insured's property boundaries—such as a clogged municipal sewer that forces water from outside the insured's plumbing system to overflow—the sewer or drain exclusion is applicable (*see also Cantanucci v. Reliance Ins. Co.,* 43 A.D.2d 622, 622–623, 349 N.Y.S.2d 187 [1973],*affd.*35 N.Y.2d 890, 364 N.Y.S.2d 890, 324 N.E.2d 360 [1974] [loss from ruptured sewer line buried below insured's foundation wall was covered loss as sewer pipe was part of plumbing system]; *compare*

[986 N.Y.S.2d 272]

Newlo Realty Co. v. U.S. Fid. & Guar. Corp., 213 A.D.2d 295, 295, 624 N.Y.S.2d 33 [1995] [an exclusion provision applied to blocked bathroom sink drain]).

Significantly, 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 (*see Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302, 307, 880 N.Y.S.2d 885, 908 N.E.2d 875 [2009];*Essex Ins. Co. v. Grande Stone Quarry, LLC,* 82 A.D.3d 1326, 1329, 918 N.Y.S.2d 238 [2011];*Villanueva v. Preferred Mut. Ins. Co.,* 48 A.D.3d 1015, 1017, 851 N.Y.S.2d 742 [2008];*Cantanucci v. Reliance Ins. Co.,* 43 A.D.2d at 622–623, 349 N.Y.S.2d 187). Further, defendant's interpretation of the exclusion provision essentially renders meaningless the coverage for "overflow" of liquids from a plumbing system as provided in the coverage provision (*see generally Cragg v. Allstate v. Indem. Corp.,* 17 N.Y.3d at 122, 926 N.Y.S.2d 867, 950 N.E.2d 500;*County of Columbia v. Continental Ins. Co.,* 83 N.Y.2d at 628, 612 N.Y.S.2d 345, 634 N.E.2d 946).[2] On the other hand, plaintiff's interpretation, as adopted by Supreme Court, accords full effect to both the exclusion and coverage provisions and is consistent with the above delineated case law of other jurisdictions. Accordingly, Supreme Court correctly resolved the ambiguity in plaintiff's favor and denied defendant's cross motion for summary judgment on this ground.[3]

We nonetheless conclude that Supreme Court erred in granting plaintiff's motion for partial summary judgment. As the movant, plaintiff was required to prove that a loss occurred and that such loss was a covered event under the terms of the policy (*see Park Country Club of Buffalo, Inc. v. Tower Ins. Co. of N.Y.*,68 A.D.3d 1772, 1773, 893 N.Y.S.2d 408 [2009];*Potoff v. Chubb Indem. Ins. Co.*, 60 A.D.3d 477, 477, 874 N.Y.S.2d 124 [2009];*DePaolo v. Leatherstocking Coop. Ins. Co.*, 256 A.D.2d 879, 880, 681 N.Y.S.2d 686 [1998];*see also United States Dredging Corp. v. Lexington Ins. Co.*, 99 A.D.3d 695, 696, 952 N.Y.S.2d 60 [2012];*Gongolewski v. Travelers Ins. Co.*, 252 A.D.2d 569, 569, 675 N.Y.S.2d 299 [1998],*lv. denied*92 N.Y.2d 815, 683 N.Y.S.2d 174, 705 N.E.2d 1215 [1998];*Vasile v. Hartford Acc. & Indem. Co.*, 213 A.D.2d 541, 541, 624 N.Y.S.2d 56 [1995]). Inasmuch as plaintiff failed to proffer sufficient admissible evidence to demonstrate the absence of any factual issues as to whether he suffered a covered loss (*see generally Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, ——, —— N.Y.S.2d ——, —— N.E.2d ——, 2014 N.Y. Slip Op. 02098, *6, 2014 WL 1237421 [2014];*Alvarez v. Prospect Hosp.*,68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]), the motion should have been denied.

[986 N.Y.S.2d 273]

In that regard, plaintiff offered, among other things, his sworn statement in proof of loss—which declared the origin of the loss to be the "[a]ccidental [o]verflow/[d]ischarge of a[p]lumbing [s]ystem"—and the deposition testimony of Peter Bentkowski, plaintiff's property manager. According to Bentkowski, after multiple tenants reported that there was water coming into their apartments through toilets, bathtubs, drains for air conditioning units and grates that are located on the floor of the laundry rooms, the water to the applicable buildings was shut off, the municipality was notified and Roto–Rooter was called. Bentkowski testified that Roto–Rooter snaked out a clean-out valve leading to the waste line and removed foreign objects. However, those efforts did not resolve the problem and Bentkowski did not know how the problem was ultimately rectified. Significantly, Bentkowski admitted in an affidavit that he had "no knowledge of anyone who has conducted an investigation of the problem leading to the [backup] of water which investigation was able to determine the location of the problem" and disclaimed any knowledge as to what caused the backup, whether there was a clog and, if so, where it existed. To the extent that plaintiff also relies on Bentkowski's testimony regarding comments made by a claims adjuster and engineer with respect to the origination of the backup, such comments were "inadmissible hearsay [and] ... insufficient to support the motion for summary judgment" (*Ulster County, N.Y. v. CSI, Inc.*, 95 A.D.3d 1634, 1636, 945 N.Y.S.2d 480 [2012];*see Birch v. McGhee*, 79 A.D.3d 1296, 1297, 916 N.Y.S.2d 241 [2010]). Thus, when we view plaintiff's proof in the light most favorable to defendant (*see Jacobsen v. New York City Health & Hosps. Corp.*, 2014 N.Y. Slip Op. 02098 at *6;*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [2012];*DePaolo v. Leatherstocking Coop. Ins. Co.*, 256 A.D.2d at 881, 681 N.Y.S.2d 686), we find that the dearth of admissible evidence showing "the actual cause of the damage" warranted denial of plaintiff's motion for partial summary judgment on the issue of liability (*DePaolo v. Leatherstocking Coop. Ins. Co.*, 256 A.D.2d at 881, 681 N.Y.S.2d 686).

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted plaintiff's motion for partial summary judgment; motion denied; and, as so modified, affirmed.

LAHTINEN, J.P., GARRY and ROSE, JJ., concur.

Notes:

[1] Importantly, the insurance policy does not define the terms sewer, drain, plumbing system, backup or overflow.

[2] Defendant's argument that an "overflow"—as included in the coverage provision—refers to water escaping from a plumbing system from a cracked or exploded pipe does not give that term meaning independent from a "leakage" or "discharge."

[3] Defendant also points out that the coverage provision begins with the phrase, "Except as provided above," and argues that this language refers to the preceding exclusions, including the exclusion provision at issue here. Plaintiff counters by arguing that this phrase refers to the language immediately preceding the coverage provision, which excludes coverage for the "repeated or continuous discharge, or leakage of liquids or steam from within a plumbing, heating or air-conditioning system, or other equipment." Considering the reasonableness of both interpretations, we find that this language creates a further ambiguity that must be resolved in plaintiff's favor.