SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 25
NASSAU COUNTY

HIX BRIX LLC,

Plaintiff,

-against-

AMGUARD INSURANCE COMPANY,

Defendant.

MOTION # 01
INDEX # 600249/18
MOTION SUBMITTED: JUNE 5, 2018

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3
Memoranda of Law.....4, 5

Defendant, AmGuard Insurance Company (AmGuard) moves pursuant to CPLR 3211(a)(1) to dismiss the complaint on the grounds that defendant properly denied plaintiff's claim pursuant to the endorsements, exclusions and coverage provisions in the insurance policy issued by AmGuard.

Background

On February 1, 2016, AmGuard issued a business-owner insurance policy to plaintiff. On December 6, 2016, plaintiff reported a claim to AmGuard for water that backed up and overflowed into the basement at the insured property. The basement flooded when a clogged pipe broke. AmGuard investigated the claim and provided an initial report to plaintiff indicating that the damage and repair estimate was approximately $4,948.61, which plaintiff paid.

Plaintiff alleges that the cost of the repairs exceeded $60,000. Plaintiff further alleges that AmGuard breached its obligation under the Insurance Policy to properly adjust, settle and pay plaintiff's claim with regard to plaintiff's alleged loss and damage that occurred at the insured property.

The subject policy contains the following exclusion language:

B. **Exclusions**
g. Water

...

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

Plaintiff also purchased a special endorsement for this policy entitled "Water Back-Up and Sump Overflow" that provided up to $5,000.00 in coverage for a loss that results from:

1. Water or waterborne material which backs up through or overflows or is otherwise discharged from a sewer or drain; or
2. Water or waterborne material which overflows or is otherwise discharged from a sump, sump pump, or related equipment, even if the overflow or discharge results from mechanical breakdown of a sump or its related equipment.

Defendant's Contentions:

Defendant contends that while the water back-up was excluded under the policy, it fell within coverage under the "Water Back-Up and Sump Overflow" Endorsement purchased by Plaintiff and AmGuard paid plaintiff $5,000.00 pursuant to the limit of the Endorsement. Defendant argues that based upon the clear and unambiguous language in the Policy and Endorsement, AmGuard properly paid the claim up to the stated $5,000.00 coverage limit.

Plaintiff's Contentions:

Plaintiff contends that the clog that caused the water overflow was in the interior of the premises and that the policy is ambiguous corcerning claims of this nature. Plaintiff contends that because AmGuard used the word "plumbing" in an exclusion for "frozen plumbing" then they should have used that same term in the water damage exclusion if the intention was to exclude leaks from internal plumbing. Plaintiff asks the court to recognize a distinction between the terms "plumbing" and "sewers and drains," the plumbing being on the plaintiff's property and the sewers and drains being off the premises. Defendant contends that because defendant did not include the term "plumbing" in the water exclusion, the backup of water through the insured's internal plumbing system is a covered loss.

Discussion

An insurer can be relieved of its duty by establishing, as a matter of law, that there is no possible factual or legal basis upon which it might eventually be obligated to indemnify the insured. If the allegations on their face do not bring the case within the coverage of the policy, there is no duty to defend or indemnify (*see Tartaglia v. Home Ins., Co.*, 240 AD2d 396 [2nd Dept 1997], *Sears, Roebuck and Co.v. Reliance Ins. CO.* 654 F2d 494 [7th Cir 1981], *Campoverde v. Fabian Builders, LLC*, 83 AD3d 986 [2nd Dept 2011]).

Generally, as with the construction of contracts, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court. A policy is read as a whole and in construing an endorsement to an insurance policy, the endorsement, its exclusions and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement (*see Cty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 634 N.E.2d 946 [1994]). An insurance contract should not be read so that some provisions are rendered meaningless (*see also Golden v. Tower*, 1 AD3d 586 [2nd Dept 2003]).

It is well established that where an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the insured against the insurer (*Lavanant v. Gen. Accident Insurance Co.*, 79 NY2d 623; *Mazzuoccolo v. Cinelly*, 245 AD2d 245, 246-247). Rather than give a fixed meaning to ambiguous terms, the courts look to the intent of the parties at the time the contract was made which necessarily requires that the circumstances of each case be considered in construing the meaning of the terms at issue (*Sekulow v. Nationwide Mutual Insurance Co.*, 193 AD2d 396, 396; Foley v. Foley, 158 AD2d 666, 669).

"The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds" (*Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302, 306, 880 N.Y.S.2d 885, 908 N.E.2d 875 [2009]). An exclusion must be specific and clear, and will be narrowly construed and enforced only when the insurer establishes that the pertinent language is "subject to no other reasonable interpretation" (*Essex Ins. Co. v. Grande Stone Quarry, LLC*, 82 A.D.3d 1326, 1327, 918 N.Y.S.2d 238, 240 (2011), *citing, Seaboard Sur. Co. v. Gillette Co.,* 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272 [1984]; *see Pioneer Tower Owners Assn. v. State Farm Fire & Cas. Co.,* 12 N.Y.3d at 307, 880 N.Y.S.2d 885, 908 N.E.2d 875; *Automobile Ins. Co. of Hartford v. Cook,* 7 N.Y.3d 131, 138, 818 N.Y.S.2d 176, 850 N.E.2d 1152 [2006]).

Both parties cite to *Pichel v. Dryden Mut. Ins. Co.*, 117 AD3d 1267 [3d Dept. 2014]). "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' " (*Pichel v. Dryden Mut. Ins. Co.,* 117 A.D.3d 1267, 1268, 986 N.Y.S.2d 268, quoting *Continental Cas. Co. v. Rapid–American Corp.,* 80 N.Y.2d 640, 652, 593 N.Y.S.2d 966, 609 N.E.2d 506). *Pichel* opined that the defendant insurer failed to establish that its interpretation of the water exclusion, 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. The court in *Pichel* found that the coverage provision and the exclusion provision together were ambiguous and should be "reconciled so that the exclusion provision applies to a backup that originates off an insured's property" (*Id.* at 1268).

In the instant case, an ambiguity regarding the exclusionary clause exists. The language excluding damage from "sewer, drain, sump pump or related equipment" is not specific and clear with respect to internal plumbing. Defendant has not established that the pertinent language is subject to no other reasonable interpretation (*see, Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d, Id). For example, the leak may have been caused from an internal building pipe in which case it is not backup from a sewer, drain, sump pump or related equipment.

ORDERED, defendant's motion is **denied**. Counsel for both parties are directed to appear for a Preliminary Conference on October 4, 2018 at 9:30 AM, lower level, Supreme Court, Nassau County.

ENTER

DATED: September 13, 2018

HON. JACK L. LIBERT
J. S.C.

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ENTERED
SEP 17 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE