2012 WL 5519614

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford–Norwalk.

UNION STREET FURNITURE
AND CARPET, INC.
v.
PEERLESS INDEMNITY
INSURANCE COMPANY et al.

No. FSTCV085008699S.
|
Oct. 23, 2012.

TAGGART D. ADAMS, Judge Trial Referee.

I. Background

***1** The plaintiff Union Street Furniture and Carpet, Inc. (Union Street) has sued the defendant Peerless Indemnity Insurance Company (Peerless) alleging breach of contract and violation of the Connecticut Unfair Trade Practices Act, General Statutes §§ 42–110a et seq. (CUTPA) for the purported failure by Peerless to pay Union Street's water damage claim in full in accordance with its insurance policy BOP 8274434 in effect May 2, 2007 through May 2, 2008.

Peerless has moved for summary judgment dismissing all of Union Street's claims contending that the water damage claims arose from infiltration of flood and surface water, both of which are excluded causes under the relevant policy and that the policy contains an "anticoncurrent causation clause" that excludes coverage for damage if an excluded source, i.e. flood or surface water, contributed to the damage. Lastly, Peerless argues that it has paid the policy limit ($100,000) for damages caused by backed up sewers and drains, and there is no evidentiary basis to support a CUTPA claim.

In opposition to the motion, Union Street contends that the damage was caused by water which was neither a flood nor "surface water." It also contends the "anti-concurrent causation clause" is unenforceable and that unresolved disputes exist regarding material facts precluding summary judgment.

II. Scope of Review

Practice Book § 17–49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." *Appleton v. Board of Education,* 254 Conn. 205, 209 (2000). Summary judgment "is appropriate only if a fair and reasonable person could conclude only one way." *Miller v. United Technologies Corp.,* 233 Conn. 732, 751 (1985). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to judgment as a matter of law." *Appleton v. Board of Education, supra,* 254 Conn. at 209. "A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *United Oil C. v. Urban Development Commission,* 158 Conn. 364, 379 (1969). The trial court, in the context of summary judgment motion, may not decide issues of material fact, but only determine whether such genuine issues exist. *Nolan v. Borkowski,* 206 Conn. 495, 500 (1988).

"Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact [question] ... a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue." *Maffucci v. Royal Park Ltd. Partnership,* 243 Conn. 552, 554 (1998). "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." *Appleton v. Board of Education, supra,* 254 Conn. at 209.

III. Facts

  

A. Water Damage

***2** The case arises out of the effects of a substantial rainfall that occurred in Stamford, Connecticut on October 11, 2007 severely affecting the area where Union Street operated its warehouse and showroom. Peerless Memo. (Dkt. Entry 143.00) Ex. B, (Bacha Dep.). 14 (waist deep water in parking lot); Ex. C (G. Mimoun Dep.) pasim; G. Mimoun Affidavit (163.00) ¶ 17.

Gadi Mimoun, president of Union Street, presented testimony at a deposition which seems largely to be accepted by Peerless, about what occurred on October 11, 2007 at Union Street's 700–800 square foot rented facility at 48 Union Street in Stamford. Prior to 6:00 p.m. water was dripping down the walls and chimney and skylight. G. Mimoun Dep., 57, 63. This apparently went on for up to two hours and thereafter water flowed into the facility from the parking lot through the loading dock. *Id.,* at 70–71. This sequence is essentially corroborated in Gadi Mimoun's affidavit (164.00) at ¶¶ 12–16. Gadi Mimoun's deposition transcript makes clear that once a carpet is wet it becomes unsaleable. G. Mimoun Dep., 29–30. This was also corroborated by his affidavit and that of his brother. Dkt. Entry 165.00.

As will be discussed later, there are disputes as to how much of the carpeting was touching the warehouse floor and how much was on shelves above the floor. Union Street received $400,000, the full amount of a flood insurance policy not issued by Peerless.

B. Insurance Policy

The Peerless policy covered "business personal property" up to $400,000. It never ceases to amaze this court how tortured in form and verbiage insurance policies are, and how difficult it is to read, much less understand, the contents of what appears to be pretty standard policy provisions. The subject policy appears to exclude insurance coverage for losses caused by water. Peerless Memo. Ex. A: BOP 8274434, "Commercial Protector Coverage Form, Section I.B.1.g.(1). Water is defined as "Flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven by wind or not." This exclusion and its definition is found at page 26 of 60 of Form 44–115, one of over 20 Forms which make up the policy. The policy continues on to say that the above exclusion applies regardless of whether any other cause of loss contributes concurrently or in any sequence to the loss. *Id.,* Section I.B.1. (Page 24 of 60 of Form 44–115.)

VI. Discussion

Peerless contends that the water damage to Union Street's carpets was not an insured loss because the damage was caused by a "flood" or by "surface water." Specifically, it argues that the water that came in through the loading dock was "flood" or "surface water" that covered the warehouse/showroom floor and damaged all of the carpets. There seems to be no doubt, and Union Street does not argue otherwise, that the water that entered the building through the loading dock was flood or surface water. In any event, Union Street has collected insurance proceeds from its flood insurer. The argument of Peerless that the water from the loading dock damaged all, or nearly all, the carpets is based on deposition testimony of Gadi Mimoun who stated that "75 percent [of his inventory] was on the floor ... It was all touching the floor." G. Mimoun Dep. 32–33. In his subsequent affidavit, however, Gadi Mimoun stated:

> ***3** Many of the rolls of carpeting were upright along the back of the warehouse walls. On the left and the right were racks of shelves filled with rolls of carpeting. In the tension of the deposition questioning I did not clearly state that there were racks of large shelves at either side of the warehouse area holding carpets. The pictures I have taken at the time of the incident show the shelves with the carpeting rolls on them.

G. Mimoun Aff., ¶ 8. According to the affidavit of Haim Mimoun, Gadi's brother, the shelves were three feet off the floor. It is the contention of Union Street that the carpets not on the floor, but on the shelves were not damaged by the flood water that came in through the loading dock, but by the rainwater that came in through the roof. The court finds there are material unresolved facts on this subject that must be decided by a fact-finder other than this court.

Peerless also argues that the water that came through the roof was "surface water" and by the terms of the policy the carpet damage caused by this water is not insured. This position is based on evidence from Gary Tegtmeier, a roofer, who wrote and testified that the roof drains had clogged up in the storm causing a pool of water to form on the roof the weight of which damaged the seams of a recently installed roofing overlay (a "membrane") allowing the water inside the

  

building. Peerless Memo. Ex. G. (Tegtmeier Dep.) 49–50; Ex. F (Tegtmeier Report).

The interpretation of an insurance policy is based on the intent of the parties, that is the coverage that the insured expected to receive coupled with the coverage the insurer expected to provide, as expressed by the entire policy. *Wentland v. American Equity Insurance Co.,* 267 Conn. 592, 600–01 (2004). A provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. *Connecticut Medical Insurance Co. v. Kulikowski,* 286 Conn. 1, 6 (2008). Ambiguities are construed in favor of the insured because policies are drafted by insurance companies. *Id.* Policy exclusions are strictly construed in favor of the insured. *Heyman Associates No. 1 v. Insurance Co. Of Pennsylvania,* 231 Conn. 756, 770 (1995).

Peerless concedes that it has not identified any Connecticut cases interpreting the meaning of surface water. In *Montanaro v. Nationwide Insurance Co.,* Superior Court, judicial district of Fairfield, CV 01 0380448 (February 27, 2003, Doherty, J.) [34 Conn. L. Rptr. 209] the court found that water that backed up from a pipe during a rainstorm and flooded a parking lot and went into a basement was "surface water." Cases and authorities in general agree that surface water includes water from precipitation (rain or snow) flowing on the ground outside of any defined channel. See *Hirshfeld v. Continental Casualty,* 199 Ga.App. 654, 655 (1991); *Casey v. General Accident Ins. Co.,* 178 A.D.2d 1001 (N.Y.App.Div. (4th Dep.1991), see authorities in the Peerless Memo. at 12.

***4** Peerless contends that water accumulated on a roof has been found to be "surface water," citing *Sherwood Real Estate & Ins. Co.,* 234 So.2d 445, 447–48 (1970) which states "In the case of a building erected on land, the roof is to be regarded as an artificial elevation of the earth's surface. When it intercepts the falling rain or snow, it therefore gathers surface water." *Id.,* at 447 (quoting *Bringhurst v. O'Donnell,* 14 Del.Ch 225, 124 Atl. 795 (1934). However, as Union Street points out, *Sherwood* was not followed in a more recent Louisiana case, *Cochran v. Travelers Insurance, Co.,* 606 So.2d 22 (1992) involving rainwater seeping into a building from the roof. In *Cochran* the Louisiana court said the "surface water" policy exclusion is "a body of water that collects and lays on the surface of the ground." *Id.,* at 22. Peerless also cites *Cameron v. USAA Property & Casualty Co.,* 733 A.2d 965 (D.C.App.1999) which involved a snow accumulation on a patio that eventually melted and flowed into a basement. The District of Columbia Court of Appeals held that water accumulating on a patio met the definition of surface waters agreed to by the parties as being "water flowing naturally on the earth's surface." *Id.,* at 967, 969. The court does not necessarily agree that water on a patio is water on the earth's surface, but such disagreement is not necessary to distinguish *Cameron* from this case where the claimed surface is a roof, deliberately built above the ground so as to protect area or space that also may be above, or off, the ground. The most common definition of surface water appears to locate the water on or very close to the earth's surface. See *Black's Law Dictionary* (9th ed.2009). Mindful of the well accepted rules of interpretation of insurance contracts, the court rejects the strained interpretation of surface water offered by Peerless, and concludes that the phrase "surface water" as it occurs in the Peerless policy does not include water collected on a roof.

The court now turns to Peerless' claim that the anti-concurrent causation clause bars Union Street's claim. To repeat, that clause states "loss or damage [from an excluded event, e.g. flood or surface water] is excluded [from coverage] regardless of any other cause or event that contributes concurrently or in any sequence to the loss." In order for this clause to apply there must be evidence that a non-covered event contributed to the loss. In this case that would mean proof that the "flood" that came through the loading dock contributed to the loss of the carpets. In this case there is no evidence that the loading dock water ever came into contact with the carpets on the shelves. At least with respect to carpets damaged only by water from the roof, the motion for summary judgment dismissing the breach of contract count is denied.[1]

Peerless also seeks summary judgment dismissing the CUTPA account. It argues that whether it is successful or not on the breach of contract count, there is no evidence to support the CUTPA count. While Union Street contends that the assertion of the anti-concurrent clause is unconscionable, this argument is mainly directed toward the enforceability of that clause, not toward the actions or business practices of Peerless. The court finds no persuasive evidence that Peerless' partial denial of Union Street's claims arises to a violation of CUTPA. Therefore, summary judgment dismissing the second (CUTPA) count is granted.

**All Citations**

Not Reported in A.3d, 2012 WL 5519614, 54 Conn. L. Rptr. 849

  

Footnotes

1 The court takes no position on whether the anti-concurrent causation clause is unenforceable per se. There might be a case where the injury or damage caused by an excluded event is so minimal in comparison to damage caused by a covered event, that to enforce such a clause would be inimical to accepted notions of fairness. Whether this case presents such a question is left to the trial judge and jury.