SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 39

Index Number : 604415/2005

CASTLE VILLAGE OWNERS

VS

GREATER N.Y. MUT. INSURANCE

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Sept 14, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----------X

CASTLE VILLAGE OWNERS CORP.,

Plaintiff,

-against-

Index No. 590264/07
6604371/06
604415/05

GREATER NEW YORK MUTUAL INSURANCE CO., et al.

Defendants.

----------X

HELEN E. FREEDMAN, J:

In this action, Castle Village Owners Corp. ("Castle Village"), a multi-building residential cooperative (five fourteen story residential towers, two residential cottages and a garage on seven acres) located in the Washington Heights area of upper Manhattan, seeks reimbursement for the major losses sustained as a result of the collapse of a large section of the retaining wall on May 12, 2005 (the"Wall") on the western perimeter of the cooperative, overlooking the Henry Hudson Parkway. The collapse caused substantial debris to fall onto public ways and damage to surrounding property. Castle Village has sued, inter alia, American International Specialty Lines Insurance Company ("AISLIC"), under an excess insurance policy for the cost of repairing and rebuilding the Wall itself. Defendant, AISLIC, provided an Umbrella Liability Insurance Policy with Crisis Response to Castle Village. The AISLIC policy is excess to a policy issued by Greater New York Mutual Insurance Co. ("Greater New York").

The issue to be addressed in this motion is whether the AISLIC Policy covers the approximately $11,000,000 that Castle Village spent to repair the Wall after its primary coverage was exhausted.

Castle Village initially sued a number of defendants including brokers and professional engineers for professional malpractice in December 2005, and in August 2006 amended its complaint to add a declaratory action for insurance coverage against AISLIC. AISLIC moves for summary judgment pursuant to CPLR 3212 dismissing Castle Village's claims against it on the grounds that no coverage exists under the AISLIC policy for the cost of repairing the Wall because it is Castle Village's own property. Specifically, AISLIC invokes the Property Damage Exclusion contained in Section V of the Policy. The Exclusiont states:

> V. E. This insurance does not apply to Property Damage to:
>
> 1. property you own, rent, or occupy including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property. [or]
>
> 6. that particular part of any property that must be restored, repaired or replaced because **Your Work** was incorrectly performed on it.

AISLIC acknowledges that it is liable for clean-up costs incurred by the City of New York for which Castle Village is liable and is likely to be liable for clean-up costs incurred by the State of New York as well as for damage to the property of others. That included some emergency remediation to shore up the lower Walll by the City, for which Castle Village was billed over $2 million. AISLIC is also defending Castle Village in a Bronx County action brought against it by the Triborough Bridge and Tunnel Authority, Index No.403942/05 for lost toll revenues and is prepared to defend and indemnify it for expenses incurred in any other actions brought by third parties. However, AISLIC denies, pursuant to the "owned property" exclusion , that it is liable for any rebuilding or repair of the wall performed by Castle Village, even though

the City specifically demanded that the collapsed portion of the Wall "be permanently repaired and the remaining portion of the wall [shall] be permanently stabilized," and the New York City Department of Buildings (the "DOB") issued an Environmental Control Board violation, presumably based on the collapsed Wall.

Castle Village's Contentions

Castle Village opposes AISLIC's motion for summary judgment and, although it does not specifically cross-move for relief, requests summary judgment in its favor declaring that AISLIC is obligated to reimburse Castle Village for the full cost of remediation work that the City ordered it to perform. Castle Village also asks for an immediate trial to determine the amount of AISLIC's liability to Castle Village to the date of the trial and an order of payment, and seeks trials every three months to determine the amount due since the previous trial. Plaintiff argues that the City's orders and directives and the City's threats to perform the work itself obligates Castle Village to perform remediation work to stabilize the ground slope created by the Wall's failure. Plaintiff avers that the property Exclusion cited above would apply if the only damage were to the Wall itself and to Castle Village's property. However, it contends that once large pieces of the Wall fell onto the sidewalk and highway, and the City itself performed work and ordered Castle Village to perform emergency work, the Exclusion became inapplicable. It further contends that once the DOB and the community became involved with the repair and plaintiff was subject to assessments if it failed to do the work required by the City, the exclusion no longer applied.

Castle Village also asserts that by paying for the emergency remediation undertaken by the City and its contractors, AISLIC has already taken the position that the AISLIC Policy

covered all claims by the City including the preventative measures the City now imposes on Castle Village. While most of the directives and bills from the City came immediately after the collapse of the Wall, some came later in 2006, often at plaintiff's behest. Plaintiff avers that most of the work has been done, but at a cost of over $11,000,000 to the Castle Village shareholders, and that various certifications including an engineer's report are still needed. Moreover, plaintiff asserts that AISLIC delayed in disclaiming coverage.

To support its claims, Castle Village cites several insurance coverage cases involving oil spills that threatened ground water contamination and where the policies excluded coverage for property damage to property owned by the insured. In *State of New York v. New York Central Mutual Fire Ins. Co.,* 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dept. 1989), where plaintiff State brought an action pursuant to Navigation Law § 190 directly against the homeowner's insurer for clean-up costs after an oil leak from a heating system, the Court found that an owned property exclusion did not apply because the fuel oil entered the groundwater or threatened to do so. In *Don Clark, Inc. v. United States Fidelity and Guaranty Co.,* 145 Misc. 2d 218, 545 N.Y.S.2d 968 (Sup. Ct., Onondaga Co. 1989), the State first cleaned up petroleum that had leaked into a nearby creek from plaintiff's gasoline and oil business and then sued plaintiff for reimbursement. Plaintiff sought defense and indemnification from its insurer. The insurer invoked the exclusion for damage to the insured's own property, but plaintiff showed that the State had initiated the action because of leakage into a creek and not because of damage upon the property owned by Clark. Thus, the exclusion was held not to apply.

Castle Village also argues that any ambiguity in the AISLIC policy concerning coverage must be resolved in favor of the insured, particularly with respect to an exclusion. See *Westview*

Associates v. Guaranty National Ins. Co., 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000). It argues that "prevention of..... damage to another's property clause" in the Exclusion can be interpreted as only applying where the preventive measures involve work on the insured's property. and not to work designed to prevent damage to third party property.

AISLIC's Contentions

Defendant AISLIC rejects the assertion that the oil spill cases apply on several grounds: First, it contends that in each of those cases there was an imminent threat to the groundwater supply, and the State assumed responsibility for the clean-up pursuant to the Navigation Law. AISLIC has compensated plaintiff for any clean-up performed by the municipality and agrees to compensate for any State claims. Second, the owned property exclusions in those policies were not as broad as the Exclusion here in that they did not include the words "restoration or repair of property for any reason including prevention of injury to person or damage to property of another." Specifically, in *Bankers Trust Co. v. Hartford Accident & Indemnity Co.*, 518 F. Supp. 371 (S.D.N.Y. 1981) *vacated on other gds,* 621 F. Supp. 685 (S.D.N.Y. 1981), where CERCLA imposed clean-up costs to prevent oil seepage from a leaky oil pipe on insured's property to adjoining property and the court found the exclusion did not apply, the exclusion did not contain language concerning prevention of damage to another's property. In that case, the Court reasoned that the clean-up work was performed to prevent damage to third party property, the cost of the work would have been greater if third party property had been damaged, and there was an ambiguity concerning whether the owned property exclusion included work to prevent damage to third parties. Third, there are many oil spill cases that reach the opposite conclusion.

Discussion

The language of the policy quite specifically excludes restoration or repair of property for any reason including prevention of injury to person or damage to property of another. Although ambiguities in insurance policies favor the insured, *Westview Associates v. Guaranty National Ins. Co.,* 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000), there must first be an ambiguity. *Goldman & Sons v. Hanover,* 80 N.Y.2d 986 (1992); *Miccio v. National Sur. Corp.,* 170 A.D.2d 937 (3d Dept. 1992). While plaintiff finds an ambiguity in the phrase "including prevention of insured to person or damage to property of another", such ambiguity is not apparent to this Court.

Here, Plaintiff contends that the City has ordered it to shore up the slope on which the Wall rests, which is not just part of plaintiff's own property. However, AISLIC has agreed to cover any costs incurred by or imposed by the City and the State, and has participated in negotiations about those costs. AISLIC has also agreed to cover any injuries to third parties, as was the issue in the oil spill cases cited by plaintiff. What plaintiff seeks here is the cost of fully repairing the Wall after the emergency repairs needed to prevent injury or damage to adjacent property were made. Plaintiff has been compensated for those repairs.

In *R & D Maidman Family L.P. v Scottsdale Insurance Company,* 4 Misc.3d 728, 783 N.Y.S.2d 205 (Sup. Ct. New York Co. 2004), the trial court interpreted a similar exclusion for damage to property that the insured owned. *Maidman* involved the costs of repairing falling brick or masonry from the facade of the insured's building and the necessity of erecting a scaffold or sidewalk bridge to do the work. The insurer covered damage to an adjacent building, but denied coverage for the work to the building itself even though plaintiff argued that the work was done to comply with a Notice of Violation issued by the New York City DOB. The insurer

claimed that the DOB had issued numerous violations and that lack of maintenance and deterioration caused the bricks to fall. The Court in *Maidman* concluded that the insured's alleged "duty to remediate" did not arise from either a legal or contractual obligation so as to render the remedial work involuntary. Rather the duty arose at most from the DOB Notices of Violation which did not compel plaintiff to bear remedial costs. The Notices of Violation for failure to maintain the building were not clearly issued because of the prior brick falling incident, and thus summary judgment was granted to the insurer. Although Judge Edmead may have modified her decision in *Maidman* later, that is not relevant here.

The cases cited by plaintiff, for the most part, involve pollution or contamination of sites that had actually harmed or threatened immediate harm to third parties. The decision in the In *State of New York v. New York Central Mutual Fire Ins. Co.,* 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dept. 1989) was based on the fact that the water whose safety was entrusted to the State by its citizens was in jeopardy rather than the insured's own property. Additionally, it was the State suing directly for clean-up that it performed on behalf of the insured. In related cases, however, courts have found that the owned property exclusion barred coverage. In the case of *Yale University v. CIGNA Ins. Co.,* 224 F. Supp.2d 402 (D.Conn. 2002), the court granted summary judgment to the insurers for claims involving lead and asbestos abatement. The court found that the owned property exclusion applied to such costs, rejecting the insured's contention that there was actual or imminent harm to third parties. The Court found that a state agency's finding that the insured had not followed mandated methods for controlling asbestos emissions was not enough to infer danger to third party property. In *E.I. du Pont de Nemours & Co. v. Allstate Insurance Co.,* 686A.2d 152 (Del. 1996), the Delaware Supreme Court interpreted the owned

property exclusion broadly even where the New Jersey Department of Environmental Protection ordered the clean-up of fourteen toxic waste sites that threatened the health of the community at large.

AISLIC's alleged delay in disclaiming coverage is inapplicable because AISLIC was the excess carrier and it had no duty whatever until the primary coverage was exhausted. See *K. Bell & Assoc. Inc. v. Lloyd's Underwriters,* 1997 U.S. Dist. LEXIS 241719 (S.D.N.Y). Moreover, AISLIC reserved rights under the policy Exclusion in a letter dated October 4, 2006, before the primary coverage was exhausted.

Based on the broad and clear language of the Exclusion contained in the AISLIC umbrella policy, summary judgment is granted to AISLIC to the extent that it does not have to reimburse Castle Village for reconstruction of that part of the Wall that was neither repaired by the City nor repaired by Castle Village as part of the immediate emergency following the Wall's collapse.

Settle Order On Notice

Dated: September 6, 2007

Enter:

Helen E. Freedman

Helen E. Freedman, J.S.C.