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Docket: **2017-0159-BLS1**
Date: **March 14, 2018**
Parties: **ROCHE BROTHERS SUPERMARKETS, LLC vs. CONTINENTAL CASUALTY COMPANY**
Judge: **Mitchell H. Kaplan**

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

The plaintiff, Roche Brothers Supermarkets, LLC (Roche) was insured under a commercial property insurance policy issued by the defendant, Continental Casualty Company (the Policy and Continental), during the period May 15, 2014 to May 15, 2015. In the winter of 2015 (January through March), Massachusetts experienced record amounts of snow, and, as a consequence, Roche spent more than $800,000 to remove snow from the roofs of its properties at locations throughout Massachusetts. It submitted a claim to Continental under the Policy for payment of its snow removal expenses, which Continental denied. In its Second Amended Complaint (the Complaint), Roche asserts that Continental's denial of this claim constitutes a breach of contract (Count I). It also asserts claims for Declaratory Relief (Count II); Breach of the Covenant of Good Faith and Fair Dealing (Count III); and a violation of G.L. c. 93A, §§ 2 and 11 (Count IV). The case is now before the court on Continental's motion to dismiss the Complaint for failure to state a claim on which relief may be granted pursuant to Mass. R. Civ. P. 12(b)(6). For the reasons that follow that motion is ALLOWED.

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FACTS

For the purposes of this motion, the court will assume that removing the snow from the roofs of its buildings was a very prudent, prophylactic step for Roche to take in the winter of 2015 to avoid possible structural damage to its buildings. The Complaint does not allege that any insured property actually suffered any physical damage as a result of the snow storms, nor that any property located in the buildings was lost or damaged. Roche's claim is only for the preventative expense of snow removal.

As relevant to this case, the Policy provides that it:

> insures against risks of direct physical loss of or damage to property and/or interest described herein at covered Locations.

Section 12 of the Policy is entitled "Valuation" and describes how the amount of a claim for physical loss or damage to covered property will be determined:

> In the event of physical loss or damage to covered property by perils(s) insured against the Company will not pay more than the least of: the limit of liability applicable to the lost or damaged property; the interest of the Insured in the lost or damaged property; the cost to repair the lost or damaged property; the actual expenditure incurred in repairing or replacing the damaged property; or the value of property insured determined as follows [there then follows methods of valuation for specific types of property not-relevant to this case].

DISCUSSION

This is a case which turns entirely on the interpretation of the Policy; no development of the facts underlying the claim is required. The rules governing the interpretation of an insurance policy under Massachusetts law have been well established for many years.

> In this interpretation, we are guided by three fundamental principles: (1) an insurance contract, like other contracts, is to be construed according to the fair and reasonable meaning of its words, Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982); (2) exclusionary clauses must be strictly construed against the insurer so

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as not to defeat any intended coverage or diminish the protection purchased by the insured, Vappi & Co.

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v. Aetna Cas. & Sur. Co., 348 Mass. 427, 431-432 (1965); Bates v. John Hancock Mut. Life Ins. Co., 6 Mass.App.Ct. 823 (1978); Sterilite Corp. v. Continental Cas. Co., 17 Mass.App.Ct. at 321 n. 10; and (3) doubts created by any ambiguous words or provisions are to be resolved against the insurer, Cody v. Connecticut Gen. Life Ins. Co., supra 387 Mass. at 146; Bates v. John Hancock Mut. Life Ins. Co., supra.

Camp Dresser & McKee, Inc. v. Home Ins. Co., 30 Mass. app. Ct. 318, 321-324 (1991). More specifically, with respect to the issue of putatively ambiguous policy terms, an ambiguity exists when "there are two rational interpretations of policy language." See Hazen Paper Co. v. United States Fidelity & Guaranty Co., 407 Mass. 689, 700 (1990). In that case, the court should "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." Id. "However, an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other." Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462m 466 (1995). In determining whether ambiguity exists, "[e]very word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable." Allmerica Financial Corp. v. Certain Underwriters at Lloyd's London, 449 Mass. 621, 628 (2007) (internal quotations and citations omitted).

In the present case, Continental maintains that the Policy is a standard "all risks" commercial property policy, and the coverage provision in question has only a single rational interpretation. The Policy insures against two types of risks: direct physical loss of property and direct damage to property, i.e., coverage exists if property is lost completely or it is damaged. Roche offers the following alternative interpretation: there is coverage for expenses incurred to prevent "the risk that property will be lost or the risk that it will be damaged." The court finds that Roche's interpretation is not a rationale one that flows from a fair and reasonable reading of the words employed in the Policy.

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First, and most importantly, Roche's interpretation does not follow the words of the Policy, but requires the court to read additional coverage terms into it. Simply insuring against the "risk that damage might occur" does not explain what insurance is being provided. If the risk does not materialize, there is no loss to the value of the property insured. What Roche is apparently arguing is that one must read into the Policy the provision that if the insured reasonably believes that there is a risk that property damage will occur, then the Policy covers the cost of eliminating that risk; in other words, preventative maintenance. There is simply no language like that in the Policy. Moreover, Roche's conduct in this case effectively acknowledges that. Being concerned that the snow might cause structural damage, Roche removed it. There are no allegations that Roche contacted Continental when the snow was on the roof to assert a claim so that Continental could assess whether the "risk" of potential damage was sufficient to trigger coverage. It simply cleared the roof.

Additionally, if the coverage clause is read to insure against expenses incurred in eliminating a "risk that property damage might happen in the future," then there would appear to be no clause in the Policy actually covering property damage itself. Clearly, the Policy is insuring against the risk of loss of or damage to property. See Merriam Webster On Line Dictionary defining "risk" as "possibility of loss or injury." This is further supported by the "Valuation" provision in the Policy that explains

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how loss is to be calculated. There is nothing in the Policy that defines covered preventative maintenance or how the amount of a claim for preventative maintenance will be determined. In other words, coverage is triggered when either risk—loss or injury—materializes.

Somewhat similar arguments to that advanced by Roche have been made by insureds in other cases, unsuccessfully. The most closely analogous case appears to be Tocci Bldg. Corp. v.

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Zurich Amer. Ins. Co., 659 F. Supp. 2d 251 (D. Mass. 2009). There the insured was constructing a hotel in Burlington, Massachusetts. The construction included a substantial retaining wall separating elevated sections of the property from the Middlesex Turnpike. Following a rain storm, a 100 foot section of the wall was damaged. On inspection, the Town of Burlington determined that the entire wall had not been built in accordance with approved plans and issued a stop work order. After negotiations, the insured and the Town agreed to a remediation plan in which the damaged section of the wall would be repaired and the balance of the wall grouted. The insured had a policy that covered "risks of direct physical loss to covered property." The insurer agreed to pay for the repair of the damaged portion of the wall, but not for the grouting or business interruption caused by grouting work. The insured argued that the grouting was covered under the policy because it addressed a "risk of direct physical loss" to the property. The court disagreed:

> it would make no sense to cover an event which creates a risk of physical damage if physical damage was not a triggering event for coverage. . . . It is impossible to read the insurance policy as providing coverage for 'risk' in the absence of 'damage. Since it is undisputed that the grouting was not required due to damage to the retaining wall, there was no loss and hence no coverage. See Pire v. Fed. Ins. Co., 45 Mass. App. Ct. 907, 908 (1998) (lead paint does not constitute physical loss and there is no coverage under the policy which defines a 'covered loss' as including 'all risk of physical loss to your house or other property covered). See also Crestview Country Club v. Sgt. Paul Guardian Ins. Co., 321 F. Supp. 2d 260, 265-65 (D. Mass. 2004) (collecting Massachusetts cases defining 'direct physical loss').

See also Meridian Textiles, Inc. v. Indem. Ins. Co., 2008 U.S. Dist. LEXIS 91371 ©. D. Cal. March 20, 2008) (where the court, applying California law, held that an insurance policy
insuring "against all risks of physical loss or damage from any external cause" required "proof of an actual physical loss" to property before coverage was triggered).[1]

> [11] Continental cites to a number of cases, e.g., The Phoenix Ins. Co., v Infogroup, Inc., 147 F. Supp. 3d 815 (S.D. Iowa, 2015) in which a policy covering physical loss or damage was not triggered by the risk that such damage

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Roche cites only one case as precedent for its interpretation of the insuring or coverage clause in the Policy: Ocean Winds Council of Co-Owners, Inc. v. Auto-Owner, Inc. Co., 350 S.C. 236 (2002). There the policy in question provided that the insurer "will pay for loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of the building caused only by one or more of the following: . . . hidden decay . . . [or] hidden insect or vermin damage." The plaintiff alleged that "its buildings had suffered substantial

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structural impairment as a result of hidden decay and termite damage, but had not yet fallen to the ground." The Supreme Court of South Carolina explained that "the word 'collapse' as used in property loss insurance policies has spawned much litigation. . . The modern trend is to find the word 'collapse' ambiguous and construe it to mean a 'substantial impairment' of the building's structural integrity." After reviewing cases that interpreted policies like this to require an actual building collapse and those that concluded that imminent collapse was sufficient, it held: "We find a requirement of imminent collapse is the most reasonable construction of the policy clause covering 'risks of direct physical loss involving collapse."

The instant case, of course, does not involve a policy covering "collapse" of a building, but rather one covering the "risks of direct physical loss of or damage to property" of a wide variety.[2] In consequence, a case addressing the meaning of the word "collapse" in an insurance policy cannot inform the contract interpretation issue now before the court. Indeed, while it may be possible to determine when substantial structural impairment of a building causes it to be "at

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might happen in the future. However, cases where the word "risk" does not appear in the coverage or insuring section of the policy do not really address Roche's argument that the inclusion of the word "risk" expands coverage to include preventative maintenance, if the insured is concerned that damage might occur.

[2] Coverage extends to all personal property at the locations insured.

imminent risk of collapse,"[3] determining when risk of property damage to a variety of covered property triggers coverage would be considerably more amorphous.[4]

The court finds that the coverage clause here at issue, which states that the Policy insures "against risks of direct physical loss of or damage to property," is unambiguous. The risks being covered are physical loss of property and physical damage to property. Continental properly applied the Policy to Roche's claim for the expense it incurred in shoveling snow from its roofs to protect against the possibility that the snow might cause physical damage to the buildings. In consequence, it has not breached its contract with Roche, nor has it breached a covenant of good faith and fair dealing arising under the contract or violated Chapter 93A.

ORDER

For the foregoing reasons, Continental's motion to dismiss is ALLOWED. Final judgment shall enter dismissing the Second Amended Complaint.

Mitchell H. Kaplan
Justice of the Superior Court

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[3] The Ocean Winds court further held that "We define imminent collapse to mean collapse is likely to happen without delay."

[4] The dissent in Ocean Winds noted that the dictionary definition of collapse is "to fall down or fall to pieces." It observed that the majority opinion "replaces the unambiguous coverage-triggering event, collapse, with the ambiguous phrase 'collapse is likely without delay.'

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