

WESTERN METAL BED CO., INC.

: COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

Plaintiff,

:

v.

: AUGUST TERM, 2005

: No. 4134

LEXINGTON INSURANCE COMPANY, and
LLOYD'S OF LONDON,

:

Defendants.

OPINION

This matter comes before the Court on Defendant Certain Underwriters' Motion for Summary Judgment. On September 1, 2005, Western Metal Bed Co., Inc.¹ filed a complaint seeking a declaratory judgment against Lexington Insurance Company. On November 9, 2005 Western Metal Bed filed an amended complaint naming Certain Underwriters at Lloyd's, London as an additional defendant. Defendant Certain Underwriters filed its Answer, New Matter, Crossclaim and Counterclaim to the Amended Complaint on January 25, 2006. Defendant Certain Underwriters filed a motion for summary judgment on October 16, 2006. Western Metal Bed filed an answer

¹ Plaintiff Western Metal Bed alleges in its complaint that "[t]he Plaintiff Western Metal Bed Co. is the owner and landlord of real property located within the County of Philadelphia, Commonwealth of Pennsylvania, at 2100 West Allegheny Avenue, Philadelphia Pennsylvania." (Amended Complaint at ¶ 1). However, Western Metal Bed admits in its response to Defendant Certain Underwriters' motion for summary judgment that Bernard Featherman, Daniel Featherman, and Franklyn Featherman are the owners of the real property located at 2100 West Allegheny Avenue and that Western Metal Bed was not a party to the lease on the premises at 2100 West Allegheny Avenue. (Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶¶ 7,8).

to the summary judgment motion on November 16, 2006.² The Court heard oral argument on July 18, 2007.

FACTS

Bernard Featherman, Daniel Featherman, and Franklyn Featherman are joint owners of real property located at 2100 West Allegheny Avenue. In June 1986 the Feathermans entered into a series of lease agreements with S & M Rudnitsky and David Cutler Industries, Ltd., to operate a scrap paper business on the premises at 2100 West Allegheny Avenue. They operated this business until November 2001. In November 2001, Bernard Featherman was advised that the tenants at 2100 West Allegheny Avenue had vacated without notice and had caused extensive damage to the warehouse facility.³

The Feathermans attempted to recover damages directly from lessees S & M Rudnitsky and David Cutler Industries, Inc. On November 26, 2003, the Feathermans filed a complaint against S & M Rudnitsky and David Cutler Industries, Inc. in the Court of Common Pleas, Philadelphia County, November Term 2003, Docket number 3609. (hereinafter referred to as the “Featherman Complaint”). The Featherman Complaint described the property damage as:

- (a) multiple layers of the floor ripped apart in various locations throughout the interior of the premises;
- (b) scratches and surface damage to interior floors, walls and ceilings;
- (c) buckling and structural damage to the ceilings;

² Defendant Certain Underwriters filed a reply brief in support of its motion for summary judgment on November 29, 2006. Western Metal Bed filed a sur reply to defendant’s reply brief on December 18, 2006. Defendant Certain Underwriters filed a response to Western Metal Bed’s sur reply on January 5, 2007.

³ Certification of Bernard Featherman, ¶ 7, Ex. D to plaintiff’s December 18, 2006 sur reply in opposition to Certain Underwriters’ motion for summary judgment.

- (d) buckling and structural damage to exterior windows and framing;
- (e) structural damage to exterior walls and foundation;
- (f) shattered window panes and damaged window frames;
- (g) damaged and nonfunctional external security grates on windows;
- (h) significant amounts of trash, machinery, office furniture and storage boxes remaining at the premises;
- (i) broken elevators and damaged elevator shafts; and
- (j) general disrepair of the building.⁴

On September 1, 2004, a judgment of Non Pros was entered against the Feathermans for “failure to diligently prosecute the matter by failing to effectuate service, failure to comply with the court’s pre-trial order and failure to appear at the rule returnable hearing.”⁵

Two years after discovering the damage, on March 5, 2003, the Feathermans first provided notice to their insurance broker.⁶ Written notice of loss was first forwarded by plaintiffs’ insurance broker to Defendant Certain Underwriters at Lloyd’s on April 9, 2003.⁷ On April 14, 2003, Defendants’ third party claims administrator acknowledged Plaintiff’s notice of claim.⁸

⁴ Featherman Complaint filed against S & M Rudnitsky and Cutler Industries, at ¶ 25.

⁵ September 1, 2004 Docket entry in case November Term 2003, number 3609.

⁶ Ex. G. to plaintiff’s December 18, 2006 sur reply in opposition to Certain Underwriters’ motion for summary judgment.

⁷ Plaintiff’s December 18, 2006 sur reply in opposition to Certain Underwriters’ motion for summary judgment at ¶ 18.

⁸ Ex. I to plaintiff’s December 18, 2006 sur reply in opposition to Certain Underwriters’ motion for summary judgment.

Three months later, defendant Certain Underwriters at Lloyds issued a reservation of rights letter.⁹ On August 27, 2003, defendant Certain Underwriters at Lloyds conducted an inspection of the premises.¹⁰ On April 21, 2004, defendant issued a denial letter denying coverage.¹¹ On September 1, 2005, Western Metal Bed filed suit against Lexington Insurance Company. Four years after discovering damage to the property, on November 9, 2005, Western Metal Bed amended its complaint to name Certain Underwriters as a defendant.

Western Metal Bed is a corporation formed by the Feathermans to manage property.¹² Western Metal Bed does not own the property at 2100 West Allegheny Avenue and was not a party to the leases.¹³

Damage occurred between 1986 and November 2001.

Plaintiff admits that the property damage occurred sometime between July 1986 and November 2001.¹⁴ Plaintiff acknowledges that the damage to the property was first discovered in November 2001. Bernard Featherman, an owner, said:

⁹ Ex. J to plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment.

¹⁰ Plaintiff's December 18, 2006 memorandum of law in support of its sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶ 6.

¹¹ Ex. K to plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment.

¹² Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶ 7.

¹³ Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶¶ 7,8.

¹⁴ Defendant Certain Underwriters' motion for summary judgment at ¶ 12 and Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶ 12.

In or around November 2001, I was advised that the tenants at 2100 West Allegheny Avenue had vacated without notice and had caused extensive damage to the warehouse facility.¹⁵

Paragraph 6 of the amended complaint says:

Lessees vacated the premises on or around November 30, 2001 without notice to Plaintiff of the extensive damage caused by and through the acts and omissions of lessees employees, agents, servants, workmen and/or independent contractors. Lessees vacated the premises without repairing the damage caused to the premises, without notifying plaintiff of the damage to the premises and without otherwise compensating plaintiff for the damage caused to the premises.

The November 2003 Featherman Complaint also says:

5. Defendant S & M Rudnitsky entered into a series of lease agreements with Plaintiffs, beginning June 17, 1986 and extending through at least October 15, 1990 for commercial space at the premises. Upon information and belief said Defendant occupied the premises, under said lease agreements, operating a scrap paper business through the end of November, 2001.

6. Defendant Cutler entered into a series of lease agreements with Plaintiffs, beginning November 1, 1995 and again on November 5, 1998, which said lease agreements extended through the end of November 2001. Upon information and belief Defendant Cutler occupied the premises, under said lease agreements, operating a scrap paper business through the end of November, 2001.

8. During the course of their respective leases, defendants S & M Rudnitsky and/or Cutler by and through the acts and omissions of their employees, agents, servants, workmen and/or independent contractors, caused significant property damage to the premises.

19. Upon information and belief, during the period relevant to this action, Defendants knowingly violated the lease agreements by causing significant damage to the interior and exterior of the leased premises, failing to repair said damage, failing to advise Plaintiff/Landlord of said damage when it occurred and exiting the premises without notifying Plaintiff of said damage.

¹⁵ Certification of Bernard Featherman, ¶ 7, Ex. D to plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment.

26. Defendants, pursuant to their lease agreements were obligated to remedy any damages before vacating the premises. Upon vacating the premises on or about November 30, 2001, the damages remained.

30. Upon information and belief, during the lease periods in question, by and through the carelessness, recklessness, and/or negligence of the defendants herein, through their agents, servants, workmen, and/or employees, consisted of the following:

- (a) improper loading and unloading of debris and paper;
- (b) improper operation of moving equipment;
- (c) unsafe storage of debris and product;
- (d) storing an unreasonable amount of paper products and processing machinery on the premises;
- (e) failing to properly instruct and supervise personnel;
- (f) carelessly moving heavy machinery throughout the premises;
- (g) improper removal of product, debris and furniture; and
- (h) being otherwise negligent under the circumstances.¹⁶

The question presented herein is whether there are any factual questions to be resolved to determine if there is coverage for this loss.

Summary Judgment Standard

In a motion for summary judgment the moving party has the burden of proving the non-existence of any genuine issue of material fact. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.¹⁷

Pennsylvania Rule of Civil Procedure 1035.2 provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

¹⁶ Featherman Complaint filed against S & M Rudnitsky and Cutler Industries, at ¶¶ 5-30.

¹⁷ Pa. R. Civ. P. 1035.2.

- (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury.

Policy terms:

Western Metal Bed is the Named Insured on defendant's insurance policy.¹⁸ The Certain Underwriters policy is an "all risk"¹⁹ replacement cost occurrence policy applicable to all losses occurring between January 8, 2001 through January 8, 2002. The policy provides a \$450,000.00 occurrence limit of liability.²⁰ The policy contains a \$10,000.00 deductible. The Building and Personal Property Coverage Form provides:

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

Coverage under the policy is of course subject to the terms, exclusions and limitations set forth in the policy. The policy limits coverage to loss or damage commencing during the policy period:

(H) POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Part:

We cover loss or damage commencing:

- (a) During the policy period shown in the Declarations.

¹⁸ "Bernard Featherman, Franklyn Featherman, Daniel Featherman, A Partnership" is listed as and additional named insured on the policy.

¹⁹ In contrast to a "named perils" policy which specifically names the risks covered, an "all risk" policy covers all risks not explicitly excluded.

²⁰ Coverage Limits: We will pay no more than \$450,000 (building limit) for any one occurrence at Perm Bldg. No. 01 (masonry structure located at 2100 West Allegheny Avenue)

The policy also contains a suit limitation clause under the following Commercial

Property Condition:

(D) LEGAL ACTION AGAINST US

No one may bring a legal action against us under this coverage part unless;

1. There has been full compliance with all of the terms of this coverage part; and
2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Finally, the policy sets forth a policyholder's duties in the event of a loss:

(E) LOSS CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

(3) Duties in the Event of Loss or Damage

(a) You must see that the following are done in the event of loss or damage to Covered property:

- (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.

The interpretation of an insurance contract is a question of law.²¹ In construing an insurance policy, unambiguous terms are to be given their plain and ordinary meaning.²²

Burden of Proof

The policyholder has the burden to prove that their claim falls within the coverage of an insurance policy. It is scarcely more than a legal platitude to say that in a suit on an insurance policy the primary requisite for recovery is proof by the plaintiff that the claim

²¹ Hamilton Bank v. Insurance Company of North America, 557 A.2d 747, 750 (Pa. Super. Ct. 1989).

²² Pennsylvania Manufacturers Association Co. v. Aetna Casualty & Surety Co., 233 A.2d 548, 551 (Pa. 1967).

comes within the general coverage of the policy.²³ Even in an “all risks” policy, the plaintiff must demonstrate that the property damage was the result of an occurrence during the policy period and that it was a covered cause of loss. “While policies of insurance will be construed most strongly against [the] insurer (citation omitted) it is a necessary prerequisite to recovery upon a policy for the insured to show a claim within the coverage provided by the policy.”²⁴ Only after the policyholder has shown that the policy covers its claim, does the burden of proof shift to the insurance company to establish an exclusion.²⁵ In this matter the Court is being asked to rule on coverage, not an exclusion.

Defendant Certain Underwriters’ policy only covers loss or damage which occurred during the policy period. Pennsylvania courts have held that “an occurrence [for purposes of determining insurance coverage] happens when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury.”²⁶ Thus, plaintiff Western Metal Bed must establish that the property damage to the premises at 2100 West Allegheny Avenue did not occur before January 8, 2001 when the policy of insurance began. Western Metal Bed alleges that the damage

²³ Fullmer v. Farm Bureau Mut. Auto. Ins. Co., 350 Pa. 451, 39 A.2d 623 (1944).

²⁴ Warner v. Employers' L. Assur. Corp., 390 Pa. 62, 133 A.2d 231 (1957).

²⁵ Erie Insurance Exchange v. Transamerica Insurance Company, 516 Pa. 574, 580, 533 A.2d 1363, 1366 (1987) (quoting Miller v. Boston Insurance Company, 420 Pa. 566, 570, 218 A.2d 275, 277 (1966)); Keystone Automated Equipment Company Inc. v. Reliance Insurance Company, 369 Pa. Super. 472, 477, 535 A.2d 648, 650 (1988), allocatur denied, 519 Pa. 654, 546 A.2d 59 (1988) (citing Miller v. Boston Insurance Company, supra).

²⁶ D'Auria v. Zurich Insurance Co., 352 Pa. Super. 231, 507 A.2d 857, 861 (Pa. Super. 1986)(emphasis in original). See also Consulting Engineers, Inc. v. Insurance Company of North America, 710 A.2d 82, 1998 Pa Super. Lexis 547 (Pa. Super. Ct. 1998). Keystone Automated Equipment Co. v. Reliance Insurance Co., 369 Pa. Super. 472, 535 A.2d 648 (Pa. Super. 1988)(the time when damages arise, that is, the time of ultimate injury, is the time that must be examined to determine if the claim falls within policy limitations).

was only discovered when the lessees vacated the premises in November 2001.

However, Western Metal Bed has not presented any evidence whatsoever as to when the damage actually occurred, or any distinct aspect of the damages claimed, such as broken elevators and damaged elevator shafts.. Indeed, Western Metal Bed admits that the property damage may have occurred as early as July 1986.²⁷ Western Metal Bed has failed to prove, by way of documentary evidence, affidavit, or otherwise that the property damage to the premises at 2100 West Allegheny Avenue commenced during the policy period. Therefore summary judgment must be granted in favor of defendant.

Suit Limitation Clause:

According to the terms of the suit limitation provision, Western Metal Bed is required to bring an action against defendant within two years after the date on which the direct physical loss or damage occurred.²⁸ While Western Metal Bed has not presented any evidence whatsoever as to when the damage actually occurred, the amended complaint alleges that the damage to the property occurred no later than November 2001. The amended complaint naming Certain Underwriters as a defendant was filed on November 9, 2005, almost four years after the property damage was discovered. Western Metal Bed failed to bring any legal action against the defendant within the two years required by the policy. Western Metal Bed's claims are time barred and summary judgment is granted on this basis as well.

²⁷ Defendant Certain Underwriters' motion for summary judgment at ¶ 12 and Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶ 12.

²⁸ Policy provisions limiting an insured's right to sue his insurer have been upheld uniformly by our courts. General State Authority v. Planet Insurance Co., 464 Pa. 162, 165-66, 346 A.2d 265, 267 (1975)

Late Notice:

Defendant's policy required Western Metal Bed to provide prompt notice of the loss or damage. Additionally, the policy required Western Metal Bed to provide, as soon as possible, a description of how, when and where the loss or damage occurred.

Although the damage to the property was discovered by November 2001, the Feathermans first provided notice to their insurance broker in March 2003.²⁹ Written notice of loss was first forwarded by plaintiffs' insurance broker to Defendant Certain Underwriters at Lloyd's on April 9, 2003.³⁰

Where an insurance company seeks to be relieved of its obligations under an insurance policy on the ground of late notice, the insurance company is required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position.³¹ While defendant has argued that it has been prejudiced by the fifteen month gap between Western Metal Bed's discovery of property damage and subsequent notice of loss, there is no proof of record that it has actually been prejudiced. It is conceivable that defendant could produce a fact or expert witness to demonstrate at trial that defendant was prejudiced by the timing of Western Metal Bed's notice, however, this issue is not ripe for summary adjudication.

²⁹ Ex. G. to plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment.

³⁰ Plaintiff's December 18, 2006 sur reply in opposition to Certain Underwriters' motion for summary judgment at ¶ 18.

³¹ Brakeman v. Potomac Insurance Company, 472 Pa. 66, 371 A.2d 193 (1977)

Accordingly, for the reasons set forth above, summary judgment is granted.

Date: August 29, 2007

Mark I. Bernstein, J.