

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

UNIONDALE REALTY ASSOCIATES,

Plaintiff(s),

-against-

LEXINGTON INSURANCE COMPANY, ILLINOIS
UNION INSURANCE COMPANY and W.H.M.
PLUMBING & HEATING CONTRACTING, INC.,

Defendant(s).

ORIGINAL RETURN DATE: 10/16/06
SUBMISSION DATE: 12/15/06
INDEX No.: 585/06

MOTION SEQUENCE #7,8

The following papers read on this motion:

Notice of Motion.....	A,F
Answering Papers.....	C,D,H,I
Reply.....	E,K
Plaintiff's Brief.....	J
Defendants' Brief.....	B,G

Motion [sequence #7] by defendant W.H.M. Plumbing & Heating Contracting, Inc. [W.H.M.] for summary judgment dismissing the complaint and all cross-claims against it on the grounds that the statute of limitations has expired is granted and the complaint and all cross-claims are dismissed as against W.H.M. Motion [sequence #8] by defendants Lexington Insurance Company [Lexington] and Illinois Union Insurance Company [Illinois] for summary judgment dismissing the complaint on the grounds that the excess all risk insurance policies do not provide coverage for the losses asserted by plaintiff Uniondale Realty Associates [Uniondale] is granted and the complaint is dismissed as against Lexington and Illinois. This order concludes this proceeding.

In this action plaintiff Uniondale seeks to recover for the alleged improper installation of a rebar hanger system used to support below grade plumbing at a supermarket located Uniondale New York. Specifically, Uniondale alleges that moving defendant W.H.M. did not properly install the hanger system in that there was "an insufficient number of hangers installed and they were not spaced close enough to properly support the underground pipes". Uniondale alleges that this failure led "to the separation of the underground piping systems, when the ground receded or

settled.” The referenced ground settling was expected, as the subsurface consisted of landfill. Thus the settling of such subsurface would eventually leave the below grade pipes exposed and unsupported in the absence of a hanger system.

In October of 2003 during a renovation project, it was discovered that a grease drain was not connected to the vertical pipe below. Uniondale's investigation revealed that soil had settled and that the “J” shaped rebar had straightened, no longer supporting the plumbing. Uniondale originally commenced suit in October of 2004. The plumbing work however, had been substantially completed in July of 1996, more than eight years earlier. Defendant W.H.M. moves to dismiss based upon the six year statute of limitations for breach of contract (CPLR 213).

Excess carriers Lexington and Illinois also move to dismiss based upon lack of coverage.

With respect to the motion by W.H.M., Uniondale does not dispute that the Seventh Cause of Action for breach of contract and the Ninth Cause of Action for Breach of Warranty are time barred. Instead plaintiff avers that W.H.M. negligently installed the plumbing support system and that the cause of action arose upon injury to the property (CPLR 214), and/or discovery of the damage (CPLR 214-c). As the injury was discovered in 2003, Uniondale argues that commencement of the action in 2004 was timely.

W.H.M. avers that there is no claim for negligence under the doctrine of “law of the case” based upon the court’s order dated August 17, 2006 which dismissed W.H.M.’s claims against third party defendant Clive Samuels & Associates, Inc.

By order dated August 17, 2006 this court dismissed the claims against third party defendants Clive Samuels & Associates, Inc. and Philips International Holding Corp., finding that no cause of action for contribution lies absent a claim in negligence, that couching the complaint in terms of negligent performance does not alter the result, and that plaintiff alleged only “economic damages” due to a breach of contract. “It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (citations omitted)” (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389 [1987]).

Revisiting the issue on this summary judgment motion, as a general rule “breach of a contract is not actionable in tort in the absence of special additional allegations of wrongdoing which amount to ‘a breach of a duty distinct from, or in addition to, the breach of a contract’ (citations omitted) or as recently stated by the Court of Appeals: ‘... This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract ... (citation omitted)’” (*Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 725 F.Supp. 656, 662 [N.D.N.Y. 1989]). Here plaintiff has shown no more than an alleged breach of a contractual duty to install the hanger support system in accordance with the agreement between the parties. The obligation arises solely from the contract.

The nature of damages may alter the outcome if there is property damage, as an action in negligence “seeks to redress injuries to persons or property” (*Id.* at p. 665, quoting *Long Island Lighting Co. v. Transamerica Delaval*, 646 F.Supp. 1442 [S.D.N.Y. 1987]). However, when compensation is sought “for purely economic loss, the usual means of redress is an action for breach of contract, to give the parties the benefit of their bargain” (*Id.*), and economic loss items such as the cost of repair and consequential damages “may not be recovered in an action predicated on negligence” (*Mid-Hudson Mack v. Dutchess Quarry & Supply Co*, 99 AD2d 751, 753 [2d Dept 1984]).

Plaintiff attempts to come within the law of negligence alleging damage to its property from pollution and the attendant cost of cleanup. However, plaintiff has made an informal admission that it has suffered no such damage, and has failed to offer any evidence that such pollution exists. “Informal judicial admissions are recognized as ‘facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit [T]hey are not conclusive, though they are ‘evidence’ of the fact or facts admitted” (*Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 NY2d 94, 103 [1996]). In a related federal action between plaintiff and its supermarket tenant, *WFC-1 Realty Corp. v Uniondale Realty Associates*, Docket #03-CV-5983, Uniondale’s expert Joseph R. Amato, a licensed professional engineer, provided a sworn statement in which he declared:

In October 2003, I learned that the condensate lines at the premises, which are different than the sanitary waste lines, had failed. Thereafter, I personally observed the premises and I learned that the sanitary waste lines are no longer functioning. No sewage or hazardous materials was observed on the floor or anywhere else outside the premises.

...

There is no apparent condition that exists on the premises that requires the closing of the store. I am award of no summons or notices that have been issued to the defendant by any municipality as a result of the failure of the sanitary waste lines or condensate lines or any potential spillage therefrom.

Notwithstanding this admission, Uniondale attempts to raise a factual issue with the submission of a document from a company called “Tradewinds” dated March 25, 2004. The document is unsigned and purports to be an estimate of the cost to investigate soil conditions around the sanitary sewer line and the grease lines to ascertain whether the collapse “resulted in contaminants entering the subsurface environment.” Tradewinds has not conducted the investigation to date. Thus plaintiff has provided no evidence to controvert that submitted in the federal action.

In contrast, W.H.M. has offered the affidavit of Michael Dowger, a geoenvironmental consultant and professional engineering geologist, dated August 2, 2006, in which he stated:

I . . . inspected a series of test pits within the building that were excavated through the floor slab and into the underlying soils. . . . I saw no evidence of a release of a pollution condition and no evidence of visible sewage or sewage smell in any of the test pits or anywhere else throughout the store, including in the test pits directly beneath the toilet where the vertical piping carrying toilet waste to the sanitary waste plumbing line was reportedly detached. I . . . noted no pooling of sewage, wetness, or any indication of previous sewage leaks such as toilet paper or other wastes one might expect to see if waste was flowing directly from the toilets into the subbase. In sum, I noted no affect to sub foundation soils from sewage whatsoever.

Dowger noted that the subsoils consisted of “very permeable sand and gravel such that any sewage or other liquids would percolate away much like a natural septic system” and that he was not aware that there ever was a claim of sewage flowing into the ground and that if it did occur “any waste would have likely dissipated promptly in these soil conditions . . .” Dowger noted that there were no breaks in the horizontal gravity feed waste pipes.

Uniondale has failed to offer any evidence in this matter establishing that contaminants were dispersed or evidence that damages were caused to its property by the latent effects of exposure to contaminants. Accordingly, the complaint is dismissed as against W.H.M. based upon the defense of the statute of limitations for breach of contract, and failure to provide evidence of property damage supporting a cause of action in negligence.

Addressing the carriers’ motion, by order dated December 13, 2006, this court dismissed Uniondale’s cause of action against primary carrier Hartford Fire Insurance Company [Hartford]. Hartford’s all risk policy did not provide coverage for “the cost of making good a defective design” and did not provide coverage for “inherent vice”. Based upon the report of Uniondale’s expert structural design engineer Cawsie Jijina, it was held that there was no design defect and that under the “inherent vice” exclusion of Hartford’s policy there was no coverage for the damage to the hanger and plumbing system (*see GTE Corp. v. Allendale Mut. Ins. Co.*, 372 F3d 598, 611 [3d Cir. N.J. 2004][Inherent vice is defined as “any existing defects . . . which will cause [the property] to deteriorate with a lapse of time” or a loss which “does not relate to an extraneous cause but to a loss entirely from internal decomposition or some quality which brings about its own injury or destruction.”]).

Plaintiff then, as now, also argued that the hanger system and plumbing system were separate and that damage to the plumbing system and its repair was compensable. The argument was rejected, and it was held that the damage to the plumbing system was the “original damage” and that the it “was not separate and extraneous to the failure of the J hooks, the very purpose of which was to prevent a plumbing system collapse as the soil settled.” Accordingly, the complaint was dismissed as against Hartford for lack of coverage.

As Hartford was the primary carrier for Uniondale and there is no coverage under its policy, there can be no excess coverage, particularly as the coverage of the two excess carriers "follows the form". i.e. is based upon, coverage of the primary carrier. It is well settled that excess insurance coverage does not apply "until the coverage of the primary insurance carrier [i]s exhausted" (*Allcity Ins. Co. v. Sioukas*, 51 AD2d 525, *affd on opinion at Appellate Division* 41 NY2d 872 [1977]). Even a failure to disclaim would not result in coverage, as there is no coverage to disclaim where the primary carrier's policy is not exhausted (*Id.*).

Having dismissed the complaint as against the primary carrier, Hartford, its coverage cannot be exhausted and there can be no excess coverage based upon that policy. The complaint is accordingly dismissed as against excess carriers Lexington and Illinois.

It is noted that this order reflects the correct caption as amended by the order dated December 13, 2006.

Dismissal is without costs.

This decision constitutes the order and judgment of the court.

Dated: 1-16-07

HON THOMAS P. PHELAN

[Handwritten signature]

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

RE: UNIONDALE v. LEXINGTON, et al.

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