

DOCKET NO.: FBT-CV-15-5030346-S : SUPERIOR COURT  
 AMIEL DABUSH DOREL : J.D. OF FAIRFLED  
 V. : AT BRIDGEPORT  
 LLOYDS LONDON : MARCH 1, 2016

2016 MAR 1 A 11:2  
 SUPERIOR COURT  
 THE CLERK

**PLAINTIFF'S OBJECTION TO DEFENDANT, UNDERWRITERS AT LLOYD'S, LONDON MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

The Plaintiff, Amiel Dabush Dorel ("Dorel") in the above captioned matter hereby files this memorandum of law pursuant to Connecticut Practice Book Section 17-44, et seq., and presents a disputed issue of material fact in this case. The Plaintiffs' Memorandum of Law opposes Defendant, Underwriters at Lloyd's, London ("Underwriters") Motion for Summary Judgment regarding the plaintiff's claims.

**A. Preliminary Statement**

This matter arose as a result of a claim for coverage made by Amiel Dabush Dorel on a Dwelling Property insurance policy for 414 Jackson Avenue in Bridgeport, Connecticut. On or about June 20, 2015, Dorel discovered that thieves had removed copper piping from the basement of the Jackson Avenue property. A claim was made on the policy. On or about August 12, 2014 Underwriters informed Dorel that the theft of copper pipes was not covered in policy because of a 60 day vacancy exception. The present action was initiated by plaintiff individually against Underwriters.

**B. Undisputed Facts**

The plaintiff states that the following facts are undisputed.

1. The Plaintiff filed this action by writ, summons and complaint on January 15, 2015, returnable January 20, 2015.
2. The Defendant filed a Motion for Extension of time to Plead on March 4, 2015 (Docket #101).
3. The Defendant filed an Answer and Special Defense on April 6, 2015. (Docket # 102).
4. The Defendant filed its Motion for Summary Judgment on January 25, 2016 (Docket # 103).

**C. Disputed Material Facts**

1. The plaintiff disputes that the property was vacant for 60 consecutive days prior to the loss;
2. The plaintiff argues that the dwelling was "under construction" within 60 days of the loss because it was completing significant repair and renovation due to water damage that occurred 40 days before the loss.

**D. Factual Circumstances of this case**

The plaintiff was the owner of a residential dwelling known as 414 Jackson Avenue, Bridgeport, Connecticut ("Jackson"). (Exhibit A, Deposition Transcript of Amiel Dabush Dorel, p. 63-64). The plaintiff purchased a residential dwelling insurance policy from Underwriters on Jackson that was in full force and effect as of June 20, 2014 (Exhibit B, Underwriter's Policy to Amiel Dabush Dorel on 414 Jackson Avenue, Bridgeport, Connecticut, p. 3). On or about May 10, 2014 there was a water leak discovered which had damaged the flooring, walls and boiler in the basement. The Plaintiff promptly filed an insurance claim with the defendant (Ex. A p. 64-68). The adjusting service retained by the defendant to evaluate the claim, Capstone ISG, in an estimate made on May 24, 2014 described the following work when evaluating the claim: "(1) R&R Laminate – simulated wood flooring (2) detach and reset baseboard – 3 ¼" (3) Seal and

paint baseboard – two coats (4) R&R drywall per LF – up to 2' tall (5) Seal more than floor perimeter w/ latex based stain blocker – one coat (6) Paint the walls – one coat (7) **Final cleaning – construction – residential** (emphasis added) (Exhibit C, Sworn Statement of Loss and Estimate, p. 2). It is essential to note that the Defendant's own contracted adjuster service considered it necessary to account for construction cleaning as part of paying the accepted claim. The Plaintiff hired David O'Hara, LLC, Hondu Contracting, L.L.C. and A&G Mechanical to act as contractors to repair, remediate, and renovate the damage caused by the leak of May 10, 2014 (Ex. A p. 64-68). This included the acts of constructing new flooring and walls. These repairs and construction took place between May 10, 2014 and June \_\_\_\_, 2014. Repairs included, but were not limited to: removal of all damaged and molding dry wall, sheetrock, and flooring, repairs to the boiler and painting. On or about June 20, 2014, it was discovered that copper pipes in several parts of the basement had been forcibly removed from Jackson without Dorel's consent. (Ex. A p. 79-84). The Plaintiff promptly filed an insurance claim with Underwriters for loss coverage under the policy. (Exhibit D, Property Loss Notice p. 1). On or about August 12, 2014 the defendant informed Dorel that the loss as a result of theft of copper pipes was not covered under the policy. The insurance policy states that is does not ensure loss caused by:

(6) Vandalism and malicious mischief, theft or attempted theft, and any ensuing loss caused by an intentional and wrongful act committed in the course of the vandalism or malicious mischief, theft or attempted theft, if the dwelling has been vacant for more than 60 consecutive days before the loss. A dwelling under construction is not considered vacant.

(Ex. B, p. 5.). Subsequently, Plaintiff filed this action.

## II. **LAW PERTAINING TO SUMMARY JUDGMENT**

When deciding a motion for summary judgment, the court is obligated to construe the evidence and pleadings in the light most favorable to the nonmoving party. Scrapchansky v. Plainfield, 226 Conn. 446,

450 (1993). Catz v. Rubenstein, 201 Conn. 39, 49 (1986). The moving party is required to demonstrate that there is no genuine issue as to any material fact remaining between the parties and that the moving party is entitled to judgment as a matter of law. Bartha v. Waterbury House Wrecking Co., 190 Conn. 8, 11 (1983). A material fact has been defined as a fact which will make a difference in the case. United Oil Co. v. Urban Redevelopment Commission, 158 Conn. 364, 379 (1969).

Thus, the moving party has the burden of proof with regard to the motion for summary judgment. Mintachos v. CBS, Inc., 196 Conn. 91, 111 (1985). The movant has the burden of demonstrating the absence of any genuine issue as to all the material facts in the case. Id.; D.H.R. Construction Co. v. Donnelly, 180 Conn. 430, 434 (1980).

If the movant's papers are insufficient to discharge its burden of proof, the opposing party need not even produce contravening material. Walker v. Lombardo, 2 Conn. App. 266, 269 (1984). Summary judgment should be denied where the moving party's papers do not affirmatively show there is no genuine issue of material fact as to all of the relevant issues of the case. Id. The failure of the moving party to address all of the factual issues contested in the pleadings requires the Court to deny a motion for summary judgment. Fogarty v. Rashaw, 193 Conn. 442, 445 (1984).

If the movant's affidavits and other evidence fails to deal with any of the factual issues contested in the pleadings, those factual issues remain unresolved and thereby prevent the Court from granting the summary judgment motion. Id.; Plouffe v. New York, N.H. & H.R. Co., 160 Conn. 482, 488 (1971). The failure to address each and every genuine issue of material fact contested in the pleadings is fatal to the motion for summary judgment. Mingachos, *supra*, 196 Conn. At 111; Fogarty, *supra* 193 Conn. at 445.

Litigants have a constitutional right to have issues of fact decided by a jury. Ardoline v. Keegan, 140 Conn. 552, 555 (1954). "[A]s we have noted before, a party has the same right to submit a weak case as he has to submit a strong one." Hunter v. Healey Car & Truck Leasing, Inc., 41 Conn. App. 347, 350 (1996). The failure to permit even a very weak case to go to the jury constitutes 'plain error'. Id.

Therefore, the moving party is held to a strict standard of demonstrating his entitlement to summary judgment. Kakadelis v. DeFabritis, 191 Conn. 276, 281(1983). The standard to be applied is whether a party would be entitled to a directed verdict on the same facts. Dansinger v. Shahnaitis, 33 Conn. App. 6, 9(1993); Cortes v. Cotton, 31 Conn. App. 569, 572-73 (1993). If the moving party does not adhere to the strict standard, the motion for summary judgment must be denied.

## **ARGUMENT**

**A. The Defendant has not eliminated all issues of material fact as the plaintiff because in the vacancy clause on which the defendant bases its entire motion clearly states that dwelling under construction is not considered vacant. If there is a material dispute as to the definition of “under construction” then summary judgment is not warranted.**

There are significant issues of material fact which remain in this case. Dorel and his contractors were conducting substantial repairs and renovation to the basement during the time period in which the defendant alleges that Jackson was vacant. (Ex. A. p. 64-68) After removal and remediation of all the damaged walls and flooring Dorel and his contractors erected new sheet rock, dry wall and flooring. (Ex A p. 71-75). The defendant's adjusting service produced an estimate for the water damage 26 days prior to the June 20, 2014 loss. (Ex. C, p. 2) Therefore, all of these jobs took place within 60 days of the June 20, 2014 loss. (Exhibit E, Affidavit of David O'Hara p. 1 and Exhibit F, Affidavit of Jose Ermes Lainez Canales p. 1). Accordingly, under the terms that Underwriters drafted the dwelling was not vacant. The Plaintiff's own policy states that a “**dwelling under construction is not vacant.**” (Emphasis added) (Ex. B p. 5) Because of the water damage and mold Jackson was not habitable and therefore needed remediation, repair and construction. It is essential to note that the Defendant's own contracted adjuster service

considered it necessary to account for **construction** cleaning as part of paying the accepted claim from the May 10, 2014 loss. (Ex. C p. 2). If the defendant's own contractor classifies the repairs being done as construction doesn't that raise a question to the meaning of the term "under construction"?

The plaintiff places substantial reliance on New London County Mutual Insurance Company v. Zachem 145 Conn. App. 160, 74 A.3d 525 (2013) in its Motion for Summary Judgment. However, there are important factual distinctions between Zachem and the case at issue. In Zachem, a worker "periodically visited to do remodeling or maintenance work." Id. 163. In the present case, there was consistent, sustained repair, remodel, renovation and construction being done to fix the water damage (Ex. E, p. 1 and Ex. F, p.1). The defendant's contention that the dwelling was empty is plainly incorrect. The defendant in its own Motion acknowledges that there was a water damage claim made on or about May 10, 2014. (Def. Memo of Law p. 2-3.) The renovation, work and construction to fix the water damage was completed sometime between May 10, 2014 and June 20, 2014. At the very least, it is a factual question for a trier of fact to define what constitutes "under construction."

**B. When an insurance contract term is susceptible to two equally reasonable interpretations, then the term at issue likely will be found ambiguous and construed against the insurer.**

In Connecticut, the terms of an insurance policy are to be construed according to general rules of contract construction. Buell Industries, Inc. v. Greater New York Mut. Ins. Co., 259 Conn. 527, 538 (2002). The determinative question is the intent of the parties, that is, what coverage the insured expected to receive and what the insurer was to provide. Id. at 538-39. When an insurance contract term is susceptible to two equally reasonable interpretations, then the term at issue likely will be found ambiguous and construed against the insurer. Heyman Assocs. No. 1 v. Ins. Co. of the State of Penn., 231 Conn. 756, 770

(1995). Certainly, reasonable minds could differ on the meaning of "under construction." The defendant insists that the dwelling was not "under construction" although that position seems to contradict their own adjusting service's determination that the repairs from the May 10, 2014 loss required "residential construction cleanup." In this matter the defendant argues that the "under construction" provision is irrelevant because Jackson had been previously renovated. This belief is misfounded because "[A]ny ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." Stephan v. Penn. Gen. Ins. Co., 224 Conn. 758, 763 (1993). In other words, where there are two reasonable interpretations, the court will choose the one which will sustain the claim and cover the loss. It is certainly a reasonable interpretation that "under construction" could mean putting new sheetrock, drywall and flooring. At the very least, these inferences would be for a trier of fact to decide therefore making it inappropriate to grant summary judgment. Simses v. North Am.Co. for Life & Health Ins., 175 Conn. 77, 84 (1978 "If the extrinsic evidence presents issues of credibility or a choice among reasonable inferences, the decision of the intent of the parties is a job for the trier of fact." Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 255 Conn. 295, 306 (2001). While Connecticut has not defined the term, "under construction" as defined by the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") is to mean, "'construction, alteration, and/or repair, including painting and decorating.'" 29 CFR § 1926.32(g) and 29 CFR § 1910.12(b). Under the OSHA definition David O'Hara and Hondu Contracting, L.L.C. were completing construction work at the dwelling and therefore the dwelling could be considered to be under construction. Where a policy is ambiguous and extrinsic evidence sheds no light on the intent of the parties, courts often apply the doctrine of contra proferentem to construe the ambiguity strictly against the insurer, in favor of the insured. Since the insurer drafts the policy and can prevent mistakes in meaning, doubts arising from an ambiguity are resolved in favor of the insured. Israel v. State Farm Mut. Auto. Ins. Co., 259 Conn. 503, 509 (2002). The defendant drafted the policy. If they wanted to define construction as only "new" construction for the

purposes of the vacancy clause then they had that opportunity. Since the policy language is ambiguous, a genuine issue of material fact exists and therefore summary judgment is not appropriate. Again, because "under construction" is an ambiguous and undefined term it should be left to a trier of fact to determine the intent behind the language.

#### IV. CONCLUSION

According to Practice Book § 17-49, summary judgment is appropriate if "the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact." In passing on a motion for summary judgment, the trial court is to determine whether any issue of fact exists and if such an issue of fact does exist, the court may not try that issue. McColl v. Pataky, 160 Conn. 457, 459 (1971). The moving party has the burden of showing the absence of any genuine issue as to all material facts; and, the burden to show that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Dougherty v. Graham, 161 Conn. 248, 250. There is a dispute as to the material facts regarding the plaintiff's insurance policy with the defendant clearly showing a substantial genuine issue of material fact. In order for summary judgment to be granted the defendant would have to show that there is no genuine dispute regarding the definition of the term "under construction." Therefore, summary judgment is not warranted for the defendant.

**WHEREFORE**, the Plaintiff respectfully requests that the court deny the Defendant's Motion for Summary Judgment and sustain the Plaintiff's Objection thereto.

THE PLAINTIFF,  
AMIEL DABUSH DOREL.

BY: \_\_\_\_\_

**CERTIFICATION**

I hereby certify that a copy of the above was mailed first class, postage prepaid, on this \_\_\_\_ day of March, 2016 to all counsel and/or pro se parties of record, as follows:

William Andrew Meehan  
396 Danbury Road  
Wilton, CT 06897

---

Notary Public  
Commissioner of the Superior Court

**EXHIBIT A**

DOCKET NO.: FBT-CV-15-5030346-S : SUPERIOR COURT  
AMIEL DABUSH DOREL : J.D. OF FAIRFIELD  
V. : AT BRIDGEPORT  
LLOYDS LONDON : MARCH 11, 2016

**PLAINTIFF'S OBJECTION TO DEFENDANT, UNDERWRITERS AT LLOYD'S, LONDON MOTION FOR SUMMARY JUDGMENT**

Pursuant to Practice Book Sec. 17-49, et. Seq., the Plaintiff, Amiel Dabush Dorel objects to the Defendant, Lloyds London, Motion for Summary Judgment. The Plaintiff's cause of action against defendant, presents a material dispute of fact regarding the definition of language in the insurance policy at issue. Therefore, the defendant is not entitled to judgment as a matter of law.

The Plaintiff attaches hereto its memorandum of law and supporting documentation in opposition to the defendant's Motion for Summary Judgment.

WHEREFORE, the Plaintiff, Amiel Dabush Dorel requests that the defendant's Motion for Summary Judgment be DENIED and that the Plaintiff's Objection thereto be SUSTAINED.

THE PLAINTIFF,  
AMIEL DABUSH DOREL

BY: \_\_\_\_\_

**ORAL ARGUMENT REQUESTED  
TESTIMONY NOT REQUIRED**

**ORDER**

The foregoing Objection having been heard by this Court, it is hereby ORDERED:

**SUSTAINED / OVERRULED**

---

JUDGE

**CERTIFICATION**

I hereby certify that a copy of the above was mailed first class, postage prepaid, on this 11 day of March, 2016 to all counsel and/or pro se parties of record, as follows:

William Andrew Meehan  
396 Danbury Road  
Wilton, CT 06897



Notary Public  
Commissioner of the Superior Court

