

DOCKET NO. FBT-CV-15-5030346-S : SUPERIOR COURT
AMIEL DABUSH DOREL : J.D. OF FAIRFIELD
v. : AT BRIDGEPORT
LLOYDS LONDON : January 25, 2016

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

PRELIMINARY STATEMENT

Pursuant to Practice Book § 17-44, *et seq.*, defendants certain Underwriters at Lloyd’s, London (“Underwriters”), incorrectly identified in this action as “Lloyds London”, move for an order directing the entry of judgment in their favor on the ground that there is no material issue requiring trial of the claim asserted by plaintiff. The undisputed facts, as shown in the accompanying Affidavit of Antoine G. Brown, with Exhibits A through C thereto, the Affidavit of William Meehan with Exhibits D through G and plaintiff’s deposition testimony, establish that plaintiff’s insurance claim is not covered under the express terms of the insurance policy. The policy makes clear that there is no coverage for vandalism, malicious mischief or theft loss, or ensuing loss, where the insured dwelling has been vacant for more than sixty days prior to the loss. In this case there is no dispute that the dwelling was vacant during the four month period of plaintiff’s ownership that preceded the loss. Since the undisputed facts establish that the claim alleged in the complaint is not covered by the policy, summary judgment should enter in favor of defendants.

THE FACTS

Plaintiff, Amiel Dabush Dorel, purchased a single family residence known as 414 Jackson Avenue, Bridgeport on February 7, 2014 for investment purposes. Meehan Aff. Ex. D,

Dorel Dep. pp. 63-64,¹ Meehan Aff. Ex. E, Deed. (Pdf pp.19, 39)² Mr. Dorel purchased the property from Ophar Sahir. Mr. Sahir had borrowed about \$170,000 from Mr. Dorel to fix up and “flip” the property. Meehan Aff. Ex. D, Dorel Dep. pp. 63-64. (Pdf p.19) The property was deeded to Mr. Dorel in satisfaction of Mr. Sahir’s debt. The single family residence was never occupied as a residence during Mr. Dorel’s ownership. Id. pp.85-86. (Pdf p.25) Mr. Dorel intended to fix the house up and either sell it or rent it out. Id. p.63.³ (Pdf p.19) For this purpose Mr. Dorel had workers perform various tasks on the premises. Id. pp.89-91. (Pdf p.26) Apart from a card table and chairs placed in the house by Mr. Dorel’s real estate broker, there were no household furnishings in the house. Id. pp.93-94. (Pdf p.27) There was no living room or bedroom furniture to speak of. Id. pp.92-93. (Pdf p.26-27) There was no phone service. Id. p.96. (Pdf p.27) There was no cable service. Id. pp.86-87. (Pdf p.25) There was no food on the premises. Id. p.88. (Pdf p.25) The heating system was gas fueled but the gas service had been disconnected until April of 2014. Id. pp.54-55. (Pdf p.17)

Certain Underwriters at Lloyd’s issued a Dwelling Property insurance policy under certificate number ATR/D/16370 to plaintiff for the 414 Jackson Avenue, Bridgeport premises commencing February 12, 2014. Brown Aff., Ex. A, p.3.⁴ (Pdf p.7) The policy had limits of \$300,000 subject to a \$2,500 per occurrence deductible for theft. Id.

On or about May 10, 2014, water leaked through flashing surrounding a cellar door and into the basement of the premises. The water damaged the flooring and walls in the basement of the premises. The May 2014 loss was reported to Underwriters who settled the claim with a net

¹ A copy of Mr. Amiel Dabush Dorel’s September 29, 2015 deposition transcript is attached as Exhibit D to the Affidavit of William Meehan.

² “Pdf p. ___” refers to the page number appearing in the lower right corner of the cited electronic document.

³ Mr. Dorel did sell the house. Dorel dep. pp.52-53. He closed on the sale of the house in December of 2014. Id.

⁴ “Brown Aff.” refers to the January 11, 2016 Affidavit of Antoine G. Brown filed in support of this motion.

payment of \$2,916.64. Meehan Aff., Ex. D, Dorel Dep. pp. 64-68 (Pdf p.19-20) and Ex. F, Sworn Proof of Loss. (Pdf p.41)

On June 20, 2014, Mr. Dorel discovered that thieves had broken into the house. Meehan Aff. Ex. D, Dorel Dep. pp.79-84. (Pdf p.23-24) Thieves removed copper pipes in several areas of the basement. Water leaked from the copper pipes into the basement. Id. Mr. Dorel made a second claim on the insurance policy. Brown Aff. Ex B, Property Loss Notice. (Pdf p.70) The claim for the damage caused by the theft of the copper pipes is at issue in this lawsuit.

By letter dated August 12, 2014, Underwriters advised Mr. Dorel that the June 20, 2014 loss caused by the theft of copper pipes was not covered by the policy. Brown Aff., Ex. C. (Pdf p.72) The insurance policy states that it does not insure for 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 immediately before the loss. A dwelling being constructed is not considered vacant.

Brown Aff., Ex. A, Policy p. 5. (Pdf p.25-26) This lawsuit followed.

PRIOR PROCEEDINGS

Mr. Dorel commenced this suit with service of the summons and complaint. Plaintiff's single count Complaint asserts little more than plaintiff owns the 414 Jackson Avenue premises, that Underwriters issued an insurance policy, that the premises were damaged when copper pipes were stolen and that Underwriters denied plaintiff's claim.

On April 3, 2015, Underwriters answered the complaint. The answer responds to plaintiff's allegations and asserts a number of special defenses. The Third Defense appearing in Underwriters' answer asserts that they have no obligation to plaintiff by reason of the vacancy exclusion in the policy.

STANDARD APPLICABLE TO MOTION FOR SUMMARY JUDGMENT

Practice Book §17-49 provides that summary judgment “shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” “In ruling on the defendant's motion for summary judgment the court's function is not to decide issues of material fact, but rather to determine whether any such issue exists.” *Nolan v. Borkowski*, 206 Conn. 495, 500, 538 A.2d 1031 (1988). A summary judgment motion “is designed to eliminate the delay and expense incident to a trial where there is no real issue to be tried.” *Mac's Car City v. American National Bank*, 205 Conn. 255, 261, 532 A.2d 1302 (1987). It is an attempt to dispose of cases involving frivolous issues in a manner that is speedier and less expensive for all concerned than a full-dress trial.

The moving party has the burden of showing the absence of any genuine issue of material fact and therefore his/her entitlement to judgment as a matter of law. *Brooks v. Sweeney*, 299 Conn. 196, 9 A.3d 347 (2010). The non-moving party must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. *Appleton v. Board of Directors*, 254 Conn. 205, 209, 757 A.2d 1059 (2000). The issue of genuine material fact must be demonstrated by counter-affidavits and concrete evidence. *Pion v. Southern New England Telephone*, 44 Conn. App. 657, 663, 691 A.2d 1107 (1997). “A material fact ... [is] a fact which will make a difference in the result of the case.” *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 560, 783 A.2d 993 (2001). “The existence of the genuine issue of material fact must be demonstrated by counter affidavits and concrete evidence.” (Emphasis omitted; internal quotation marks omitted.) *Walker v. Dept. of Children & Families*, 146 Conn. App. 863, 870, 80 A.3d 94 (2013), cert. denied, 311 Conn. 917, 85 A.3d 653 (2014). Mere statements of legal

conclusions or that an issue of fact does exist are not sufficient to raise issue for summary judgment. Practice Book § 17-49; *see Gould v. Mellick & Sexton*, 66 Conn. App. 542, 785 A.2d 265 (2001), granted in part, 780 A.2d 900, rev'd, 263 Conn. 140, 819 A.2d 216 (2003).

Summary judgment in favor of the defendant is properly granted if the defendant in its motion raises at least one legally sufficient defense that would bar the plaintiff's claim and involves no triable issue of fact. *Serrano v. Burns*, 248 Conn. 419, 424, 727 A.2d 1276 (1999).

ARGUMENT
JUDGMENT SHOULD ENTER IN DEFENDANTS' FAVOR BECAUSE
THERE IS NO COVERAGE FOR LOSS CAUSED BY OR ENSUING FROM THEFT
WHERE THE DWELLING HAS BEEN VACANT FOR MORE THAN 60 DAYS

The undisputed facts and plain language of the insurance policy demonstrate there is no coverage for the loss alleged in the complaint. The insurance policy states:

PERILS INSURED AGAINST

A. Coverage A – Dwelling And Coverage B – Other structures

1. We insure against risk of direct physical loss to property described in Coverages A and B.
2. We do not insure, however, for loss:

...

c. 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 immediately before the loss. A dwelling being constructed is not considered vacant.

Brown Aff., Ex. A, Policy p. 5. (Pdf p.25-26)

The impact of this clause is governed by the rules of construction applicable to contracts generally. *Liberty Mutual Insurance Company v. Lone Star Industries, Inc.*, 290 Conn. 767, 795-6, 967 A.2d 1 (2009). “[T]he terms of an insurance policy are to be construed according to the general rules of contract construction.... 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,

as disclosed by the provisions of the policy.... If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning.” Id.

The Appellate Court recently had an opportunity to construe the vacancy clause in a case indistinguishable from the present case. In *New London County Mutual Insurance Company v. Zachem*, 145 Conn. App. 160, 74 A.3d 525 (2013), the homeowners were in the course of refurbishing a residential property intending to list the property for sale. The owners did not reside in the house but a worker “periodically visited to do remodeling or maintenance work.” Id. 163. There was evidence that equipment and materials were stored on the premises but no one was living in the house. Id. As in the present case, an intruder entered the house and stole copper pipes including a copper pipe that connected the house to a propane tank. When the escaping propane ignited, the ensuing fire and explosion destroyed the house.

The insurance policy in *Zachem* provided “[W]e do not insure loss ... caused by ... vandalism and malicious mischief, theft or attempted theft if the dwelling has been vacant for more than [thirty] consecutive days immediately before the loss.” Id. 162. Citing this vacancy exclusion, New London County Mutual asserted it was not liable for *Zachem*’s loss. *Zachem* challenged the insurer’s position contending the insurer applied an overly restrictive definition of the term “vacant.” *Zachem* contended that since workers made daily visits to the premises to obtain business property and to perform maintenance on the premises the property should not be considered “vacant” for purposes of the vacancy clause.

In affirming the judgment in favor of New London County Mutual based on the vacancy clause, the Appellate Court first examined ordinary dictionary definitions of the term “vacant”:

To determine the common, natural, and ordinary meaning of an undefined term, it is proper to turn to the definition found in a dictionary. See *DeCarlo & Doll, Inc.*

v. Dilozir, 45 Conn.App. 633, 648–49, 698 A.2d 318 (1997). Random House Webster's Unabridged Dictionary defines “vacant” as “having no contents; empty” and, with regard to a dwelling specifically, as “having no tenant and devoid of furniture, fixtures.” Random House Webster's Unabridged Dictionary (2d Ed. 2001). Similarly, Webster's Third New International Dictionary defines “vacant” as that term pertains to premises as “premises which are not lived in and from which the furniture and fixtures have been removed.” Webster's Third New International Dictionary (2002). As noted by the trial court, Black's Law Dictionary defines “vacant” as generally meaning “empty; unoccupied.” Black's Law Dictionary (9th Ed. 2009).

(Emphasis added.) *New London County Mutual Insurance Company v. Zachem*, supra, 145 Conn. App. 166. The Court found the dictionary definitions to be consistent with decisions from other jurisdictions construing the vacancy clause. *Id.* While *Zachem* argued that daily visits to the premises demonstrated that the property was not “abandoned” and should therefore not be deemed “vacant”, the Appellate Court rejected this argument determining that:

Viewed in context of the policy as a whole, we conclude that the term “vacant” as used in the vandalism exception is susceptible to only one reading and, therefore, is not ambiguous. Consistent with the intent of the parties, a vacant dwelling is one that is unoccupied and does not contain items ordinarily associated with habitation, such as furniture, fixtures or personal property.

Id., 145 Conn. App. 168. Thus, the Appellate Court affirmed the trial court’s judgment determining that the vacancy clause preclude coverage for *Zachem*’s loss.

The outcome of Mr. Dorel’s claim should be governed by the Appellate Court’s decision in *Zachem*. Like the policy at issue in *Zachem*, Underwriters’ policy is clearly intended to cover a “dwelling” type of property. The policy describes the covered property as:

- A. Coverage A – Dwelling
 - 1. We cover:
 - a. The dwelling on the Described Location shown in the Declarations, used principally for dwelling purposes, including structures attached to the dwelling;
- B. Coverage B – Other Structures
 - 1. We cover other structures on the Described Location, set apart from the dwelling by clear space.
- C. Coverage C – Personal Property

1. Covered Property

We cover personal property, usual to the occupancy as a dwelling and owned or used by you or members of your family residing with you while it is on the Described Location.

Brown Aff. Ex. A, Policy p.1, (Pdf p.21)

There is no substantive difference between the policy language at issue in this case and the policy language applied by the *Zachem* Court. Underwriters' policy provides that it does not cover loss caused by "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 immediately before the loss." (Emphasis added.) Brown Aff. Ex. A, Policy at p.6. (Pdf p.26)

The undisputed facts establish that the 414 Jackson Avenue dwelling was not occupied during plaintiff's ownership of the premises. Mr. Dorel purchased the property as an investment property. Meehan Aff. Ex. D, Dorel Dep. p.63. (Pdf p.19) He testified that he did not reside in there. Id. p.85. (Pdf p.25) He intended to sell it or rent it. Id. p. 63. (Pdf p.19) He did not have any tenants. Id. p. 85. (Pdf p.25) During the entire period of Mr. Dorel's ownership of the house nobody resided there. Id. pp. 85-86. (Pdf p.25) There were virtually no furnishings in the house. The house was emptied of furnishings before Mr. Dorel took title in February of 2014. Id. pp. 94-95. (Pdf p.27) Although the house is a three bedroom home, there were no beds in the house. Id. p. 92-93. (Pdf p.26-27) There were no bed linens or clothing. Id. There was no living room furniture. Id. There was no television, cable service or landline phone service. Id. pp. 86-87, 96. (Pdf p.25, 27) The only personal property Mr. Dorel identified as in the house were items related to his efforts to sell the house (a card table and chairs placed there by the real estate broker; coffee for an open house staging). Id. 88, 93-94. (Pdf p.25, 27)

Mr. Dorel testified that during his ownership workers went to the house to perform a list of tasks that Mr. Dorel's real estate broker recommended as beneficial in selling the house. Id. p.89-91. (Pdf p.26) The tasks involved items such as landscaping chores and fixing a broken tile. The workers did not reside in the house. Id.

Mr. Dorel's deposition testimony is confirmed by the police report of the incident. Meehan Aff. Ex. G. (Pdf p.56) The police report was identified at Mr. Dorel's deposition and states that Officer Novia responded to the report of the theft. Mr. Dorel testified that he called the police when he discovered the copper theft and he spoke with the police officer. Meehan Aff. Ex. D, Dorel Dep. pp. 79-84. (Pdf p.23-24) The police report states that Officer Novia:

spoke with the complainant [Amiel Dabush-Dorel] who stated that the home is currently unoccupied. He says the home has been recently remodeled and is now for sale ... Amiel states that the suspect entered through a basement window in the rear of the home which is now secured with plywood. He says the home was last inspected on 06/13/14 and the break took place between then and 1000 hrs today [06/20/14].

Meehan Aff. Ex. G, Police Report. (Pdf p.50)

Mr. Dorel's testimony establishes the dwelling at 414 Jackson Avenue had been vacant for the entire period of his ownership. Mr. Dorel's testimony makes clear that from February through June of 2014, the 414 Jackson Avenue property was being prepped for resale. Nobody resided in the house. Although workers may have visited the house to perform tasks and the real estate broker may have shown the house for sale, the house was devoid of items ordinarily associated with habitation. Given these facts, the dwelling at 414 Jackson Avenue was "vacant" as that term was been defined by the Appellate Court in construing nearly identical policy language in *Zachem*. Since the 414 Jackson Avenue dwelling at issue in this case was vacant for "for more than 60 consecutive days" prior to the June 20, 2014 the copper theft, the loss is not covered by Underwriters' insurance contract.

Lastly, the vacancy clause provision that relates to a dwelling that is “under construction” has no bearing on this case. The provision appearing at the end of the vacancy clause states “A dwelling being constructed is not considered vacant.” However, Mr. Dorel admits that the 414 Jackson Avenue dwelling was not under construction at the time of the loss. In fact, Mr. Dorel testified that the “house was completely renovated” by Mr. Sahar before Mr. Dorel purchased it in February of 2014. Dorel Dep. p. 30. (Pdf p.11) Mr. Dorel further testified that “the property was kind of pretty much set ... there was no need to do anything like ... [m]aybe small thing here and there, but not something significant.” Id. p. 57. (Pdf p.18) None of the work performed during his ownership required any municipal permits. Id. Clearly the 414 Jackson Avenue dwelling was not “a dwelling being constructed.” The vacancy clause precludes coverage in this instance.

CONCLUSION

Defendants respectfully submit that summary judgment should be entered in their favor and against plaintiff together with such other and further relief as to the Court seems just and proper.

Dated: Wilton, Connecticut

Defendants,
Certain Underwriters at Lloyd’s, London

By: /s/ William A. Meehan
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CERTIFICATION

This is to hereby certify that a copy of the foregoing was mailed on January 25, 2016 to counsel and all pro se parties of record as follows:

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