

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

186

CA 18-00861

PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ.

FRANK VALENTE AND DARLENE VALENTE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

UTICA FIRST INSURANCE COMPANY,
DEFENDANT-APPELLANT-RESPONDENT.

FARBER BROCKS & ZANE L.L.P., GARDEN CITY (SHERRI N. PAVLOFF OF
COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

BARTH SULLIVAN BEHR, BUFFALO (LAURENCE D. BEHR OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court,
Niagara County (Sara Sheldon, A.J.), entered January 26, 2018. The
order, among other things, denied the motion of defendant for summary
judgment.

It is hereby ORDERED that the order so appealed from is
unanimously modified on the law by granting defendant's motion,
dismissing the amended complaint and granting judgment in favor of
defendant as follows:

It is ADJUDGED AND DECLARED that defendant is not
obligated to provide coverage to plaintiffs for the
underlying claim,

and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking, inter
alia, a declaration that defendant is obligated to provide insurance
coverage for damage to plaintiffs' house pursuant to a homeowners'
insurance policy issued by defendant. Defendant appeals and
plaintiffs cross-appeal from an order that denied defendant's motion
for summary judgment dismissing the complaint and for judgment on its
counterclaim for a declaration that defendant is not obligated to
provide coverage to plaintiffs for the underlying claim, granted those
parts of plaintiffs' cross motion seeking leave to amend their
complaint and to be relieved of certain admissions, and denied that
part of plaintiffs' cross motion for a declaration that defendant is
obligated to provide coverage to them for their underlying claim.

We agree with defendant on its appeal that, regardless of whether

we rely upon the allegations in plaintiffs' original or amended complaint, defendant is not obligated to provide coverage for plaintiffs' underlying claim because the insurance policy's earth movement exclusion applies to the damage caused to their home (see *Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16, 21 [4th Dept 1995], lv dismissed in part and denied in part 87 NY2d 953 [1996]). Thus, Supreme Court erred in denying defendant's motion, and we therefore modify the order accordingly. The insurance policy provided that "earth movement" included "earth sinking," "shifting," or "contracting." Even assuming, arguendo, that there was a sinking of the ground underneath the house's foundation as opposed to erosion or washout, we conclude that such sinking nevertheless constituted earth movement that proximately caused the claimed loss (see *id.* at 20). It is irrelevant that the earth movement may have been precipitated by the peril of above-surface downspout water, which is arguably covered by the policy, as opposed to sump pump leakage, which is excluded from coverage, because here it was the earth movement, not the flow of water, that proximately caused the damage to the house (see *Sheehan v State Farm Fire & Cas. Co.*, 239 AD2d 486, 487 [2d Dept 1997]). Thus, we conclude that the earth movement exclusion applies and defendant is not obligated to cover plaintiffs' loss (see generally *Kula*, 212 AD2d at 20-21).

In light of our determination, the parties' remaining contentions are academic.