

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2  
Justice

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YAT-SAINT CHIANG,

Plaintiff,

-against-

PUBLIC SERVICE MUTUAL INSURANCE  
COMPANY,

Defendants.

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Index No: 7888/08

Motion Date: 10/1/08

Motion Cal. No.: 3

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendant and cross-motion by plaintiff for summary judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits ....	5 - 8
Replying Affidavits.....	9 - 10

Upon the foregoing papers it is ordered that the plaintiff's cross-motion is denied. The defendant's motion for summary judgment is granted and it is declared that the defendant owes no insurance coverage under the subject policy for the claims arising on or about November 8, 2006 and asserted by the plaintiff in this case.

The defendant, Public Service Mutual Insurance Company (hereinafter PSM), issued a named-peril Dwelling Policy covering 43-36 162nd Street, Flushing N.Y., a three family residential property owned by the plaintiff. It is undisputed that the plaintiff's property was damaged during excavation and construction work being performed at the lot adjoining the plaintiff's property due to the failure provide proper shoring and/or bracing. Plaintiff claims that the lack of underpinning resulted in the cracking and collapse of a third of the width of the driveway, cracking of the foundation and several interior walls and ceilings of the building. Plaintiff submitted a loss claim under the subject policy for the damages to her property. PSM disclaimed coverage on the ground that "Earth Movement" is not a covered peril and that the loss claimed is not a covered

loss since it is not a collapse of a building resulting from a named peril. Plaintiff commenced this action for breach of the insurance contract and seeks, inter alia, a judgment declaratory that PSM is required to provide coverage under the policy and pay for the property damage.

It is the court's responsibility to determine the rights and obligations of parties under an insurance contracts based on the specific language in the policy ( Cali v. Merrimack Mut. Fire Ins. Co., 43 AD3d 415,416 [2007], lv denied 9 NY3d 818 [2008]; see Cali v. Merrimack Mut. Fire Ins. Co., 43 AD3d 415 [2007], lv denied 9 NY3d 818 [2008]). In interpreting an insurance policy, the policy should be read as a whole ( see MDW Enters., Inc. v. CNA Ins. Co., 4 AD3d 338, 341 [2004]) and unambiguous provisions must be given "their plain and ordinary meaning" ( United States Fid. & Guar. Co. v. Annunziata, 67 NY2d 229, 232 [1986], quoting Government Empls. Ins. Co. v. Kligler, 42 NY2d 863, 864 [1977]). The insurance contract may not be construed so as to extended coverage beyond its plain meaning to include perils not specifically covered (see In re Matco-Norca, Inc., 22 AD3d 495, 496 [2005]; see also Harrigan v. Liberty Mut. Fire Ins. Co., 170 AD2d 930 [1991]; Moshiko, Inc. v. Seiger & Smith, 137 AD2d 170 [1988], 175, aff'd 72 NY2d 945 [1988]).

Generally, it is the insured burden to establish coverage and it is the insurer's burden to prove that an exclusion in the policy applies to defeat coverage ( see Northville Indus. Corp. v. National Union Fire Ins. Co., 89 NY2d 621, 634 [1997]; Technicon Elec. Corp. v. American Home Assur. Co., 74 NY2d 66, 73-74 [1989]).

Although defendant disclaimed based in part on the earth movement exclusion in the policy, both parties seek summary judgment relying on the section of the policy entitled "Other Coverages: Collapse".

Section "Other Coverages: Collapse" provides in pertinent part that the defendant "insure[s] for risk of direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:" listing as one of the covered causes item "(f). use of defective material or methods in construction \*\*\*if the collapse occurs during the course of the construction \*\*\*" however, "Loss to \*\*\* pavement, \*\*\* foundation, retaining wall, \*\*\* is not included under items \*\*\* (f) unless the loss is the direct result of the collapse of a building. "Collapse" is also specifically defined as not including settling, cracking, shrinkage, bulging or expansion.

In support of its motion, defendant asserts that the

plaintiff's loss is not a covered loss as it did not involve the collapse of a building caused by an enumerated cause, specifically, defective construction on the insured premises. Defendant asserts that there is no ambiguity in the policy and the words should be interpreted in their plain, ordinary and generally understood sense.

Plaintiff argues that two ambiguities exist in this section. First, plaintiff maintains that the term collapse is ambiguous. Plaintiff contends that New York courts have found a "substantial impairment of the structural integrity of the building" to be a collapse without the need for the building to actually fall down. The second ambiguity asserted is that the policy does not define where the defective construction, a named cause of a collapse, must take place to trigger coverage.

The court finds no ambiguity in the term "collapse" in this case inasmuch as the policy specifically defines collapse as not including settling, cracking, shrinkage, bulging or expansion. The plaintiff's building did not "collapse" for purposes of coverage under the additional coverage for collapse provision of the policy. The only damage to the building reported by plaintiff's expert are cracks in the foundation and interior walls (see Graffeo v. U.S. Fidelity & Guaranty Co., 20 AD2d 643 [1964], lv to appeal dismissed 14 NY2d 685 [1964]).

Even deeming the term collapse to be ambiguous and accepting plaintiff's argument that a substantial impairment of the structural integrity of the building can constitute a collapse of a building (see Royal Indem. Co. v. Grunberg, 155 AD2d 187, 188-190 [1990], there is no evidence of such impairment. Nowhere in the plaintiff's expert's report is there any claim that the structural integrity of the building is impaired much less that it is "substantially" impaired. While the plaintiff's expert reports that a portion of the driveway collapsed such a collapse is not the collapse of a building. In addition, the policy expressly excludes loss to pavement unless caused by the collapse of a building. The damage to the driveway was not the result of the collapse of a building.

Inasmuch as the court has determined that the plaintiff's property did not sustain a collapse, the issue of whether an ambiguity exists as to the location of the construction which causes a collapse is irrelevant.

Dated: December 4, 2008  
D# 36

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J.S.C.