

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

1804-14 GREEN STREET ASSOCIATES, :	June Term 2006
L.P., :	
Plaintiff, :	No. 1763
v. :	
ERIE INSURANCE EXCHANGE, ET. AL., :	COMMERCE PROGRAM
Defendants. :	
:	

FINDING

AND NOW, this 8<sup>th</sup> day of October 2009, in the court finds in favor of plaintiff 1804-14 Green Street, L.P. and against defendant Erie Insurance Exchange, et. al. in accord with the attached Findings of Fact and Conclusions of Law.

BY THE COURT,

  
HOWLAND W. ABRAMSON, J.

COPIES SENT  
PURSUANT TO Pa.R.C.P. 236(b)  
OCT - 8 2009  
FIRST JUDICIAL DISTRICT OF PA  
USER I.D.: *adp*  
*Wb mm*

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Defendants.	:	
	:	
	:	
	:	

**TRIAL FINDINGS**

1. On or about May 1, 2001, Green Street Associates, L.P. (hereinafter “Green Street”) purchased the real property located at 240 New York Drive, Fort Washington, Pennsylvania (hereinafter “Property”). (Parties Stipulated Facts).
2. The property largely consists of a single-story commercial building (hereinafter “subject property”). (Parties Stipulated Facts).
3. The property occupies 32, 240 square feet. (Parties Stipulated Facts).
4. The property has a flat, modified rubber roofing system. (Parties Stipulated Facts).
5. There are twelve air conditioning and heating units mounted on the roof. (Parties Stipulated Facts).
6. Prior to September 28, 2004, Green Street was a named insured under an “Ultrasure Policy” of insurance issued by Erie Insurance Exchange (hereinafter “Erie”) bearing policy number Q410970052 A (hereinafter “Erie’s Policy” or “the Policy”). (Parties Stipulated Facts).
7. Fletcher-Harlee was a tenant in the property at the time of the Loss. (Parties Stipulated Facts).
8. The building has drains on the roof that channel water down the exterior of the property. (Parties Stipulated Facts).

9. The building also has a number of drains on the roof that channel water down an interior drain using a system of PVC pipes. (Parties Stipulated Facts).
10. The purpose of the interior drains is to remove water from the roof by taking it inside the building and disposing of it. (N.T. 9-22-08 at 10).
11. Prior to September 28, 2004, the interior drains on the roof were covered with caps. (N.T. September 22, 2008 p. 30, 37-38, 56-58, 63).
12. On September 28, 2004, at approximately 6:00p.m., David Fletcher, the President of Fletcher-Harlee, heard a loud bang coming from the interior area of the building. When he came upon the scene, he observed water from the roof pouring into the building in an area that Fletcher-Harlee used as its “print room” (hereinafter “the Loss”). (Parties Stipulated Facts).
13. The Loss was caused when a PVC pipe, located above the ceiling tiles and connected to a drain on the roof, spontaneously dislodged. (Parties Stipulated Fact).
14. At all times relevant hereto, the PVC pipe lead to one of the interior roof drains.
15. No individual employed by Fletcher-Harlee inspected the property’s roof prior to or subsequent to the Loss. (Parties Stipulated Fact).
16. Mr. Fletcher has no knowledge of the condition of the roof drain and the attached pipe prior to September 28, 2004. (Parties Stipulated Facts).
17. On September 29, 2004, Mr. Woidislawsky, a representative of Green Street, and his handyman, Lee Bui, reconnected the PVC pipe to the roof drain. (Parties Stipulated Facts).
18. Neither were licensed plumbers. (Parties Stipulated Facts).
19. The repairs Mr. Woidislawsky and Mr. Bui performed to the PVC pipe were limited to (a) reconnecting the subject drain pipe to the roof by pushing the drain pipe up to the roof drain,

- (b) installing a new clamp to secure the subject drain pipe to a joist to prevent it from separating and (c) installing a 2"x4" piece of wood between the drain pipe and joist. (Parties Stipulated Facts; see also N.T. p. 15 September 22, 2008).
20. Mr. Woidislawsky testified that the PVC pipe dislodged at the point where it connected to the roof drain. (Parties Stipulated Facts).
21. After the loss, Woidislawsky observed that a space of about four to six inches existed between the top of the PVC pipe and the bottom of the roof drain. (N.T. p. 12 September 22, 2008).
22. Mr. Woidislawsky testified that two clamps connected the drainpipe to the roof drain. (N.T. p. 16 September 22, 2008).
23. The bottom clamp was connected to the drainpipe and the top clamp tightened around the roof drain. (N.T. p. 16 September 22, 2008).
24. The top clamp was missing. (N.T. p. 16 September 22, 2008).
25. The remaining clamp was made from a stainless steel material; against rust. (N.T. p. 20 September 22, 2008).
26. Mr. Woidislawsky testified that he did not see any broken clamps sitting on the ground. (N.T. p. 17 September 22, 2008).
27. Mr. Woidislawsky did not inspect the PVC pipe prior to September 28, 2004. (N.T. p. 11 September 22, 2008).
28. Mr. Woidislawsky did not observe any water coming out of the PVC pipe or anything clogging the drain pipe. (N.T. p. 14 September 22, 2008).
29. After the loss, Woidislawsky did not perform any repairs to the top part of the roof surrounding the roof drain. (N.T. p. 19 September 22, 2008).

30. After September 28, 2004, no covers existed on the drains nor was there any evidence of a drain cap on the roof. (N.T. p. 30, 32, 37-38 September 22, 2009).
31. On the day of the loss there were strong winds. (N.T. p. 31 September 22, 2008).
32. In the eighteen (18) hour period prior to the Loss, 0.19 inches of rain fell in the area where the Property was located. No rain fell in the seven (7) hours immediately before the Loss.
33. After the Loss, no remnants of a pipe hanger were found connected to the PVC pipe, the plange or the floor or in the debris at the property. (N.T. September 22, 2008 p. 16, 18).
34. Green Street submitted a claim for the Loss to Erie Insurance Company.
35. Erie retained Rodney Blouch, P.E. a forensic engineering consultant from National Forensic Consultants to inspect the building. (N.T. p. 67 September 22, 2008)
36. Rodney Blouch, P.E. inspected the building on two occasions. (N.T. p. 73 September 22, 2008).
37. First, Blouch inspected the interior portion of the building that was damaged. (N.T. p. 76 September 22, 2008).
38. During the inspection, Blouch noted that the PVC pipe at issue was repaired and new hardware existed on the pipe. (N.T. p. 78 September 22, 2008).
39. Blouch noted that a hanger existed on the pipe that appeared new.
40. Blouch noted the existence of a pronounced stain on the PVC pipe.
41. He testified that the pronounced stain had the same circular impression and width as the hanger that appeared new on the PVC pipe.
42. Blouch testified that the pronounced stain looked like iron rust. (N.T. p. 80 September 22, 2008).

43. Blouch testified that the pronounced stain may be evidence of where the hanger was placed at the time of the loss. (N.T. p. 78 September 22, 2008)).

44. Blouch testified that the opening of the drain dropped away some discernible amount and pinched or skewed such that it was no longer concentric with the opening. (N.T. p. 108 September 22, 2009).

45. Blouch also inspected the exterior of the building and found that there were no other signs of other entry points that could have caused damage. (N.T. p. 83-84 September 22, 2008).

46. Blouch did not see any damage to the roof that was caused by the storm. (N.T. p. 84 September 22, 2008).

47. By correspondence of December 6, 2004, Erie informed Green Street that it was denying its claim for damages relating to the Loss claiming the Loss was caused “by a drain fastener rusting away”.

48. Erie relied upon the wear and tear exclusion and the rain exclusion to deny the claim.

44. Green Street did not engage an engineer or hire a plumber after the Loss.

45. On or about June 1, 2006, Green Street sold the Property.

46. On June 16, 2006, Green Street filed this litigation, by way of a Writ of Summons.

47. On November 16, 2006, a Complaint was filed alleging breach of contract, violations of the Uniform Trade Practices Consumer Protection Law and bad faith.

49. On January 16, 2007, Erie filed an Answer with New Matter to Green Street’s Complaint.

In addition to pleading the wear and tear exclusion and the rain exclusion, Erie also plead the surface water exclusion and the deterioration exclusion as the reasons for denying coverage.

49. On February 2, 2007, Green Street filed a Reply to New Matter, at which point the pleadings were closed.

50. After the parties conducted discovery, they entered into a Stipulation dismissing the claim for bad faith and violation of the Unfair Trade Practices Consumer Protection Law and agreeing that the claim is covered under the Policy, unless Erie is able to meet its burden in proving that it is “excluded under the policy, as informed by the facts and circumstances of the loss and events thereafter, Pennsylvania law or any other law the Court deems to be persuasive[.]”

51. On September 22 and 23, 2008, a two day bench trial occurred before the Honorable Howland W. Abramson.

### **Conclusions of Law**

1. Interpretation of an insurance contract is a question of law for the court. Gamble Farm, Inc. v. Selective Ins. Co., 656 A.2d 142, 143 (Pa. Super. 1995).
2. Clauses in an insurance policy providing coverage are interpreted broadly “so as to afford the greatest possible protection to the insured. Eichelberger v. Warner, 434 A.2d 747, 750 (Pa. Super. 1981).
3. Where an insurer relies upon a policy exclusion to deny coverage, the insurer has the burden of proving that the exclusion applies. Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 575, 280 (1966).
4. An "all-risk" insurance policy extends coverage to risks not generally covered under other insurance policies. Cavalier Group v. Strescon Industries, Inc., 782 F. Supp. 946, 954 (D. Del. 1992). Such policies generally permit recovery for all fortuitous losses in the absence of fraud or misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage. *Id.*; Bd. of Educ. v. International Ins. Co., 292 Ill. App. 3d 14, 684 N.E.2d 978, 981, 225 Ill. Dec. 987 (Ill. App. 1 Dist. 1997), *appeal denied*, 175 Ill. 2d 523, 689 N.E.2d 1137, 228 Ill. Dec. 716; 13A George J. Couch, Couch on Insurance §

48:141 at 139 (M.S. Rhodes ed. 1982); 43 Am. Jur.2d, Insurance § 505; Annotation, Coverage Under All-Risk Insurance, 30 A.L.R.5th 170 (1995):

5. Erie has failed to satisfy its burden of proving that any exclusions apply to deny coverage.

## **II. Erie has not proven that the Loss is Excluded by the Policy Exclusion for Rain.**

1. The Rain Exclusion states as follows:

### B. Coverages 1, 2 and 3

We do not cover under Building(s) (Coverage 1)... “loss” caused:

...

To the interior of the building or the contents by rain, snow, sand or dust, whether driven by wind or not, unless the exterior of the building first sustains damage to its roof or walls by a covered “loss”.... (P-3 at section 3-Exclusions at p. 4-5).

2. According to this exclusion, in order for Plaintiff to recover for the damage caused to the interior of the building it must first demonstrate that the roof was damaged by a covered loss.
3. The term “Rain” is not defined in the policy.
4. Words of common usage in an insurance policy are construed according to their natural, plain, and ordinary sense. Madison Construction Co. v. Harleysville Mutual Insurance Co., 557 Pa. 595, 735 A.2d 100, 108 (Pa. 1999).
5. We may consult the dictionary definition of a word to determine its ordinary usage. *Id.*
6. The American Heritage Dictionary, Third Edition, defines “Rain” as water condensed from atmospheric vapor and falling in drops.
7. Other jurisdictions have defined “Rain” as water falling from the sky. After it stops falling, one does not say that it is “raining” although there may still be wet sidewalks and streets, puddles of water resulting from the rain, or water running through gutters and elsewhere as a result of the rain. It is not common or usual to say in such instances that it is still raining. Thorell v. Union Ins. Co., 242 Neb. 57, 63 (Neb. 1992).



8. On the day of the Loss no rain fell at any time in the seven hours preceding the Loss.
9. Since no rain was falling at the time of the Loss, the rain exclusion cannot apply.

**III. Erie has not proven that the Loss is Excluded by the Surface Water Exclusion.**

1. The Surface Water Exclusion states:
  - a. Flood, surface water, waves, tidal water or tidal wave, overflow of any body of water or their spray, all whether driven by wind or not;
  - b. By water or sewage which backs up through sewers or drains, or which enters into and overflows from within a sump pump, sump pump well, or any other system designed to remove subsurface water which is drained from the foundation area;
  - c. Water under the ground surface pressing on, or flowing or seeping through:
    1. Foundations, walls, floors or paved surfaces;
    2. Sidewalks or driveways;
    3. Basements, whether paved or not; or
    4. Doors, windows or other openings.

But if Water, as described in 6.a. through 6.c. results in fire, explosion, sprinkler leakage, volcanic action, or building glass breakage, we will pay for the “loss” or damage caused by such perils.

If a “mechanical, electrical or pressure systems breakdown” to a “covered object” results from 6 a., b, or c. then this breakdown will be considered a covered “loss”.

This exclusion does not apply to property being transported. (p. 4)

2. The term 'surface water' means water from rain, melting snow, springs, or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake. Tom Clark Chevrolet v. Pa. Dep't of Env'tl. Prot., 816 A.2d 1246, 1252 (Pa. Commw. Ct. 2003).
3. The water at issue was not surface water and therefore the surface water exclusion does not apply.

**III. The Rust or Corrosion Exclusion and the Deterioration Exclusion do not apply.**

1. The “rust or corrosion” exclusion states:

We do not cover under Building(s) (Coverage1) ... “loss” caused:

By ...

Wear and tear, rust or corrosion, mold or rotting;

...unless a covered "loss" ensues, and then only for ensuing "loss".

2. The deterioration exclusion provides:

We do not cover under Buildings(s) (Coverage 1); Business Personal Property and Personal Property of Others (Coverage 2); and Rental Income Protection (Coverage 3) "loss or damage caused directly or indirectly by any of the following. Such "loss" or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss"

Deterioration or depreciation. (Erie Policy Section II- p.3).

3. The rust or corrosion exclusion does not apply because there is no credible evidence that the pronounced stain on the PVC was rust or corrosion or that the PVC pipe became dislodged from the drain due to the rust or corrosion.
4. Similarly, the deterioration exclusion does not apply because there is no credible evidence that the Loss was caused by deterioration.
5. Green Street is entitled to coverage for the Loss it suffered to its property on September 28, 2004.

Based on the foregoing the court finds in favor of plaintiff 1804-14 Green Street, L.P. and against defendant Erie Insurance Company.

**BY THE COURT,**



**HOWLAND W. ABRAMSON, J.**

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