STATE OF NEW YORK
SUPREME COURT COUNTY OF CHENANGO

EDWARD DAIRE and ALLISON DAIRE,

Plaintiffs,

vs.

HBE GROUP, INC. and STERLING INSURANCE COMPANY,

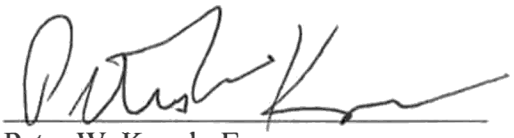
Defendant.

NOTICE OF ENTRY

Index No.: 2019-5393

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Honorable Joseph A. McBride, J.S.C., Chenango County Supreme Court, dated October 21, 2020, and entered in the Chenango County Clerk's Office on October 21, 2020, stamped with proof of entry. A copy of the Order is attached.

Date: October 23, 2020.

By: 

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Chenango County Courthouse, Norwich, New York, on the 24th day of August 2020.

PRESENT: HON. JOSEPH A. MCBRIDE
Justice Presiding
STATE OF NEW YORK
SUPREME COURT : CHENANGO COUNTY

EDWARD DAIRE and ALLISON DAIRE

Plaintiff(s),

-vs-

HBE GROUP, INC. and STERLING INSURANCE COMPANY,

Defendant(s).

DECISION AND ORDER

Index No. 2019-5393

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JOSEPH A. MCBRIDE, J.S.C.

The case at hand follows a complaint alleging breach of contract and deceptive business practices against Defendants by failing to pay an insurance pay-out following Plaintiffss claim. On this motion, Defendants, HBE Group Inc., d/b/a Sterling Insurance Company ("Defendants") seek summary judgment pursuant CPLR §3212 against Plaintiffs, Edward and Allison Daire (collectively "Plaintiffs"). Plaintiffs filed a response in opposition, and each party appeared through counsel for oral argument on August 24, 2020, via Skype for Business. Court received and reviewed said motions and decided; as discussed below. [1]

BACKGROUND FACTS

Plaintiffs own a single-family dwelling at 2895 State Route 7, Harpursville, NY ("the property"). Plaintiffs secured an insurance policy with Defendants for the property including coverage for criminal vandalism with an express entrustment exclusion. In 2015, Plaintiffs rented the property to Carole Sweet. By verbal agreement, the understanding was that Ms. Sweet would rent-to-own the property over a 10-year period. While Ms. Sweet was renting, she could make no repairs or changes to the property. Plaintiffs allowed Ms. Sweet to change the locks, but never inspected the premises to determine the condition. In 2017, with Plaintiffs' knowledge and consent, Ms. Sweet allowed her two daughters and one infant granddaughter to stay at the property. At some point in 2017 or 2018, Plaintiffs claim Ms. Sweet's daughter, Amber Stack "threated" to destroy or damage the property in retaliation to "teach [Plaintiff] a lesson." In approximately November 2018, Plaintiffs initiated an eviction proceeding for failure to pay rent. For some unknown reason, the eviction did not become effective until March 2019. When Plaintiff gained access to the house in April 2019, he found substantial damage to the property in what has been described as unauthorized renovation repairs. While Plaintiffs cannot be sure who performed the damage, he is "99% sure it was the tenants trying to renovate" which he reports was expressly prohibited. Plaintiffs reported the damage to the police claiming it was unauthorized changes/ renovations to the structure of the property. No arrests were made.

[1] All the papers filed in connection with this motion are included in the electronic file maintained by the County Clerk and have been considered by the Court.

Upon receiving an estimate to repair the damage, Plaintiffs filed a claim with Defendants for approximately $63,000.00 due to "vandalism" claiming the damage was performed by the "intentional acts" by the occupants. Defendants denied the claim citing the entrustment exclusion barred recovery in this situation. Pursuant the entrustment exclusion, if the vandalism is done by someone the party entrusted, like a tenant, acting alone or in concert with others, the Policy excluded coverage for that damage. It should be noted that unauthorized repairs or negligent renovations are not covered by this policy.

After the coverage was denied, Plaintiffs initiated this lawsuit for breach of contract and deceptive business practices. Plaintiffs claim that Defendant's "ambiguous language" of the entrustment exception is deceptive and caused Plaintiffs injury. Defendants filed the current motion for summary judgment claiming that there is no question of fact and the case should be dismissed as a matter of law as the entrustment exclusion bars recovery. In opposition, Plaintiffs argue that Defendant's summary judgment motion should be denied as there is a question of fact as to the definition of vandalism and whether the damage is vandalism or faulty workmanship. At oral argument, Plaintiffs claim Defendants should be responsible for the damage suffered by this out of possession landlord. Defendants submit the clear language of the insurance policy.

LEGAL DISCUSSION AND ANALYSIS

Pursuant CPLR §3212(b), the motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of either party. When seeking summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (Ct. of App. 1985); Zuckerman v. New York, 49 N.Y.2d 557 (Ct of App. 1980). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (Ct. of App. 1986); Winegrad, 64 N.Y.2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [Ct. of App. 1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the

benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." Boston v. Dunham, *274* AD2d 708, 709 (3rd Dept. 2000); see, Boyce v. Vazquez, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." Haner v. DeVito, 152 AD2d 896, 896 (3rd Dept. 1989); Asabor v. Archdiocese of N.Y., 102 AD3d 524 (1st Dept. 2013). Mere conclusions and expressions of hope are insufficient to conquer a motion for summary judgement and the defendant must submit admissible evidence when stating their defense. See Zuckerman, 49 N.Y.2d 557. Finally, it "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (Ct. of App. 2012).

In the case at bar, Defendants, as the moving party, must establish a *prima facie* case that the undisputed facts bar recovery as a matter of law. Case law depicts that "construing an unambiguous contract is a function of the court, rather than a jury" where "the Court must give a plain and unambiguous provisions their ordinary meaning." United Specialty Ins. Co. v. Barry Inn Realty, Inc., 130 F. Supp. 3d 834, 838 (USDC for SDNY 2015); citing Teitelbaum Holdings, Ltd. V. Gold, 48 NY2d 51, 56 (Ct. of App. 1979). Further, the Court of Appeals directs that "an insurance contract's language 'must be given its ordinary meaning,' and 'common words' in a policy such as entrusted are not 'used as words of art with legalistic implications'." Lexington Park Reality LLC v. National Union Fire Ins. Co. of Pittsburgh, PA, 120 AD3d 413, 414 (1st Dept. 2013); quoting Abrams v. Great Am. Ins. Co., 269 NY 90, 92 (Ct. of App. 1935). It is well established in New York that the term "entrust" means possession of the premises with confidence that the property would be used consistent with the controlling element being the design of the owner. See United Specialty Ins. Co., 130 F. Supp. 3d at 839; citing Abrams 269 NY at 92. Therefore, the "entrustment exclusion in an insurance policy applies to persons whose status is created or accepted by the assured as a result of a consensual relationship between the parties." United Specialty Ins. Co., 130 F. Supp. 3d at 839.

As an initial matter, the Court finds that whether the damages were performed by the hands of Ms. Sweet, her daughters, or a hired contractor the entrustment exclusion applies. Plaintiffs entrusted Ms. Sweet with the property. In the scope of that entrustment it is the duty of the person in possession to maintain the premises consistent with the design of the owner. See

United Specialty Ins. Co., 130 F. Supp. 3d at 839. While the scope of the agreement was by oral contract only, the undisputed understanding is that there were not to be any renovations to the property during Ms. Sweet's tenancy. Further, the Court finds that it is undisputed that Plaintiffs knew Ms. Sweets daughters were living in the property with his knowledge and consent. By extension, the daughters were too entrusted with the property.

Moreover, looking at the relevant insurance policy, Plaintiffs are covered by 18 enumerated perils, including vandalism, and not including negligent repair or unauthorized modification of the building. If Plaintiffs argue that Ms. Sweet engaged in unauthorized repairs, they would not be covered, and the complaint would be dismissed as a matter of law. If Plaintiffs argue that the daughters engaged in criminal vandalism, the entrustment exception would apply as the vandalism was performed by the occupants of the premises to whom Plaintiffs entrusted.

Therefore, the Court finds the Defendants met their burden establishing a *prima facie* defense that the reported claim falls outside the scope of the insurance policy. Now, the burden shifts to Plaintiffs to establish a material question of fact. Plaintiffs fail to point to one single item in the record that raises a material issue of fact. Initially Plaintiffs claim that there is a question of fact as to the definition of vandalism. The Court is unpersuaded by this notion. Giving the insurance policy the ordinary meaning of common words, vandalism is defined as with criminal intent. Further, Plaintiffs themselves clearly characterize the incident as vandalism with a criminal intent. Plaintiffs filed a police report claiming vandalism with criminal intent. Plaintiffs filed their claim with the Defendants claiming vandalism with criminal intent. Therefore, The Court finds the record is devoid of a single disputed question of fact and the Plaintiffs are barred form insurance coverage in this situation based on the policy they secured for the property.

Therefore, looking at the facts in the light most favorable to the Plaintiffs and giving every reasonable inference, the Plaintiffs fail to defeat the motion for summary judgment by failing to provide admissible evidence that raises material questions of fact. The Defendant's motion for summary judgment is GRANTED.

CONCLUSION

Based on all the foregoing, the Court finds that both Defendants' motions for summary judgment must be GRANTED and the matter is dismissed.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this **DECISION AND ORDER** by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: 10/21, 2020
Norwich, New York

HON. JOSEPH A. MCBRIDE
Supreme Court Justice