

STATE OF NEW YORK
SUPREME COURT COUNTY OF CHENANGO

EDWARD DAIRE and ALLISON DAIRE,

Plaintiffs,

vs.

HBE GROUP, INC. and STERLING INSURANCE
COMPANY,

Defendants.

**ATTORNEY'S REPLY
AFFIDAVIT IN
OPPOSITION TO
PLAINTIFFS' CROSS-
MOTION AND IN
FURTHER SUPPORT OF
DEFENDANT'S MOTION**

Index No.: 2019-5393

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

PETER W. KNYCH, ESQ., being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York and I am a member of the law firm of KNYCH & WHRITENOUR, LLC attorneys in this action for Defendant Sterling Insurance Company ("Sterling").

2. I make this affidavit in Opposition to Plaintiffs' Cross-Motion and in reply to Plaintiffs' opposition to Defendant Sterling's Motion for Summary Judgment.

3. It is undisputed that the basis of Sterling's motion is as follows: (1) that Plaintiffs admit, (and Sterling concedes for purposes of this motion), that what took place at the property consisting of unapproved alterations were acts of vandalism, (2) that Plaintiffs admit that these acts of vandalism were caused by occupants for whom Plaintiffs gave permission to occupy the building, 3) that Plaintiffs admit that these acts of vandalism by the occupants were dishonest or criminal acts, 4) that Plaintiffs consented to the occupants living in the property

and thus “entrusted” the property to these occupants, and 5) that under these undisputed facts, the Sterling policy’s Entrustment Exclusion (which multiple New York cases have found to be unambiguous) applies to eliminate insurance coverage for the damage caused by these acts of vandalism.

4. Plaintiff, in opposing Sterling’s motion, puts forth no evidence that the vandalism (i.e. unauthorized repairs) was done by anyone or on behalf of anyone other than the occupants to whom Plaintiffs entrusted the property. Sterling has met its initial burden of proof through Plaintiff’s own deposition testimony, that he believes that acts of vandalism (i.e. unauthorized renovations) were caused by the occupants.

5. Plaintiffs, in opposing Sterling’s motion, do not contest or even attempt to distinguish the multiple court decisions applying New York law and finding: 1) that the Entrustment Exclusion is not ambiguous and 2) that an insurer is granted summary judgment based on the Entrustment Exclusion when occupants of a house or building in which the insured landlord has consented to the occupancy, cause damage as a result of unauthorized attempts at renovation or repair. Rather, Plaintiffs make the conclusory assertion, unsupported by any case law, that the entrustment exclusion is ambiguous. Plaintiffs essentially ask this court to disregard and ignore well established case precedent finding the Entrustment Exclusion to be unambiguous.

6. Plaintiffs reliance on the unpublished court decision of *Poole v. United Service Auto Association*, 2014, N.Y. Misc. Lexus 2394 at 2-3 (Sup. Court, Suffolk Co. 2014) is misplaced. In that case, the issue was whether the damage was caused by vandalism (potentially covered under the policy) or defective work/renovation by or on behalf of the

insured (excluded from coverage under the policy). The insured in *Poole* argued that the damage was caused by vandalism and the court found an issue as to whether the damage was caused by vandalism or defective renovations that were not vandalism. In the unpublished *Poole* decision, what was not raised and/or was not at issue was the applicability of the Entrustment Exclusion. The *Poole* decision is therefore totally irrelevant to the issue before this Court wherein Plaintiffs must admit that the unauthorized repairs were acts of “vandalism” in order for them to even potentially have coverage under the Sterling policy.

7. In the case at bar, Sterling concedes for purposes of the motion, that the damage was caused by vandalism. The Daires must argue that the damage was caused by vandalism because under their covered peril policy with Sterling, “vandalism” is the only cause of damage for which they even potentially have coverage.

VANDALISM IS A DISHONEST OR CRIMINAL ACT

8. As stated above, Plaintiffs must admit, and do admit, that all the damage to their property for which they make an insurance claim (whether from unauthorized repair or any other cause) are acts of vandalism potentially covered under the Sterling policy covered peril of vandalism.

9. Plaintiffs seek to avoid summary judgment by contradicting their sworn deposition testimony in admitting that what occurred to their property were criminal acts – and instead on this motion speculating that vandalism is not a “dishonest or criminal act” within the meaning of the Sterling’s Entrustment Exclusion. Plaintiffs’ suggestion that vandalism is not a dishonest or criminal act flies in the face of logic, reason, case law, common sense and their own testimony.

10. First, Plaintiff Daire gave deposition testimony that he filed a police report and that he believed that the occupants that vandalized his house should be criminally prosecuted. Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 67.

11. Second, multiple New York court decisions have held that unauthorized renovations by a tenant are either dishonest or criminal acts. *See* Reply Memorandum of Law.

12. Third, New York's Court of Appeals has recognized that acts of vandalism are not ordinary tortious conduct. *See Georgitsi Realty v. Pennstar Insurance Company*, 21 N.Y.3d 606 (2013).

13. Fourth, under New York penal law, acts of vandalism are prosecuted as criminal mischief in either the first, second, third or fourth degree. *See* New York Penal Law §145 *et seq.* attached hereto as Exhibit A.

14. Fifth, that the acts of vandalism are criminal is consistent with the well-recognized definition of vandalism as a "willful or malicious destruction or defacement or damage to property." *See* various dictionary definitions. *See* also Treatises/articles describing vandalism as a crime under New York law, attached hereto as Exhibit B.

15. There is no affidavit from Plaintiffs or any witness submitted to this Court which even attempts to explain or counter Plaintiff Daire's own testimony that the damage to his property from vandalism was other than a dishonest or criminal acts of its occupants.

16. Sterling has met its burden of proof that the unauthorized repairs (which Plaintiff must and does assert constitute acts of vandalism) were dishonest or criminal acts within the meaning of the Sterling policy's Entrustment Exclusion.

**THE ENTRUSTMENT EXCLUSION APPLIES TO ACTS OF VANDALISM
COMMITTED BY OR ON BEHALF OF ALL THE OCCUPANTS TO WHOM
PLAINTIFF DAIRE ENTRUSTED THE PROPERTY**

17. The Plaintiffs seek to avoid summary judgment on the applicability of the Entrustment Exclusion by asserting that the Exclusion does not apply to all the people who Plaintiff Daire claims were responsible for the acts of vandalism upon which he bases his insurance claim, i.e. the tenant Carol Sweet and her adult daughter who resided in the house with Plaintiff Daire's knowledge and consent.

18. Plaintiff Daire testified that he consented to allowing the tenant, Carol Sweet, and her two adult daughters to reside at the property. (Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 28, 29.)

19. Plaintiff Daire testified that each and every act of vandalism (unauthorized repairs) were on behalf of the tenant/occupants to whom he entrusted the property. (See Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 26-27.) Plaintiff Daire claims the vandalism was caused by Carol Sweet or her adult daughter Amber Sweet "without a doubt." (See Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 53 and 64.)

20. Sterling has set forth multiple New York State decisions that the Entrustment Exclusion applies to acts of vandalism caused by occupants of the house or building to whom the insured has consented to their occupancy and has knowledge of that occupancy. Plaintiffs put forth no court decision that supports their contention that the Entrustment Exclusion does not apply under the facts as alleged by Plaintiffs.

21. Plaintiffs put forth no evidence in opposition to Sterling's motion that the acts of vandalism for which they seek coverage (i.e. all unauthorized modifications or repairs, etc.) were done by someone other than the individuals to whom Plaintiff entrusted the property.

22. Sterling has met its burden of proof establishing the applicability of its Entrustment Exclusion and Plaintiffs have not come forward with any proof creating an issue of fact that the exclusion does not apply. This point is made in the accompanying Reply Memorandum of Law.

**IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION TO AMEND
THE COMPLAINT AND IN SUPPORT OF STERLING'S MOTION TO
DISMISS THE NEW YORK GENERAL BUSINESS LAW §349 CAUSE
OF ACTION ALLEGING DECEPTIVE BUSINESS PRACTICES**

23. Sterling asserts that the dismissal of Plaintiffs' breach of contract claim makes moot the Plaintiffs' General Business Law §349 claim which is based on the alleged breach of contract claim. Sterling asserts that even if the breach of contract claim is not dismissed as a matter of law, then in the alternative, the General Business Law §349 claim should be dismissed as a matter of law.

24. Sterling moved to dismiss the General Business Law ("GBL") Section 349 claim pursuant to CPLR 3211 for failing to sufficiently plead that claim. Sterling also moved for summary judgment dismissing that claim pursuant to CPLR 3212 given Mr. Daire's testimony that he knows of no improper conduct by Sterling unrelated to his insurance claim and he knows of no deceptive practices engaged in by Sterling or against the general public. (Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 77.).

25. In response to this part of Sterling's motion, the Plaintiffs have made a cross-motion that makes additional factual allegations in a proposed unverified amended complaint.

26. Plaintiffs' cross-motion seeking to amend the complaint should be denied. Plaintiffs fail to provide any affidavit that establishes or even argues for the merits of their proposed amendment to the complaint. In the absence of an affidavit establishing the merits of their proposed amendment, their cross-motion seeking to amend the complaint should be denied.

27. Defendant's motion seeking the dismissal of the GBL §349 claim should be granted pursuant to CPLR §3211 because Plaintiffs essentially admit that their complaint does not sufficiently plead a GBL §349 violation. Their initial complaint alleges a valid cause of action for a breach of contract but fails to allege conduct that would convert this private contract dispute into one that is consumer oriented and affects the general public at large. Their initial complaint makes no allegations that Sterling's denial of coverage is a consumer oriented practice that affects the general public at large.

28. Moreover, Sterling's motion for summary judgment seeking dismissal of the GBL §349 claim should be granted. As set forth in Sterling's initial motion papers, Plaintiff Daire admits that he knew of no improper conduct by Sterling unrelated to this insurance claim and he knows of no deceptive practices engaged in by Sterling. (*See* Knych 7/13/20 Affidavit, Ex F, Edward Daire depo, p. 77.)

29. In addition, Plaintiffs Daire do not oppose Sterling's motion for summary judgment on the GBL §349 claim by putting forth in this motion any affidavit that offers any proof of any deceptive business practices by Sterling directed at the general public at large.

Plaintiffs Daire were compelled to come forward with proof supporting their GBL §349 claim in order to avoid summary judgment and they have come forward with no proof evidencing that Sterling has engaged in deceptive business practices relative to the general public.

30. Finally, Sterling has presented this Court with multiple New York State court decisions which under facts nearly identical to Plaintiffs Daire's claims, Courts have upheld the insurer's assertion of an Entrustment Exclusion to deny coverage when an occupant residing in the property damages property by performing unauthorized attempts at repair or modification of the building structure. *See* Reply Memorandum of Law.

31. As set forth earlier in this affidavit, Plaintiffs argue that the insurance policy is ambiguous: that Sterling has wrongfully denied coverage – and that this Court should disregard multiple New York State court decisions that have upheld the validity of a denial based on this exclusion for facts identical to those upon which Plaintiffs Daire's claim is made.

32. Given the case law that supports Sterling's denial of coverage, it is beyond logic or reason for Plaintiff to claim that Sterling (which followed applicable case law in denying Plaintiffs' claim) should be held potentially liable for what Plaintiffs call an act of "deliberately and repeatedly misinterpreting and relying on the so-called 'entrustment exclusion'." *See* proposed unverified amended complaint, para 23.

33. If Sterling misinterpreted the Entrustment Exclusion, and it vigorously argues it did not, then so have multiple New York State courts in reported decisions and this fact, standing alone, warrants dismissal of the GBL §349 claim for alleged deceptive acts and practices. *See Stutman v Chemical Bank*, 95 N.Y.2d 24 (2000) (GBL §349 does not afford a private cause of action where the claims arise from a private contract dispute unique to the

parties.) *See also Rocanova v. Equitable Life Assurance Society*, 83 N.Y.2d 603 (1994). GBL §349 and alleged bad faith claims handling should be dismissed where there is no showing of a “extraordinary showing of disingenuous or dishonest failure to carry out a contract.” *Gordon v. Nationwide Mutual Insurance Co.*, 38 N.Y.2d 427 (1972); *Sukup v. State*, 19 N.Y.2d 519 (1967).

**SETTLEMENT DISCUSSIONS BETWEEN
STERLING AND PLAINTIFF DAIRE**

34. Settlement discussion between Sterling and Daire after Sterling disclaimed coverage and after Daire threatened litigation do not evidence bad faith claims handling.

35. After Sterling disclaimed coverage by a letter of May 7, 2019, Mr. Daire threatened to sue Sterling. In order to avoid the expense of litigation, Sterling offered \$2,000 in settlement of Mr. Daire’s alleged \$63,000 damage claim. Mr. Daire stated that he would accept \$5,000 to settle his alleged \$63,000 damage claim.

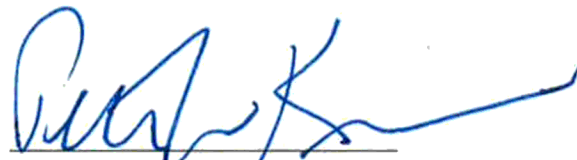
36. It is disingenuous for Plaintiffs to suggest that settlement discussions that took place after Sterling disclaimed coverage and after Mr. Daire threatened to sue Sterling should constitute some evidence of bad faith claim handling. It clearly does not. *See* Affidavits of Sterling Claims Manager, Michael Downie and Sterling Independent Adjuster, Patrick Dorner.

**OTHER NEW YORK COURTS HAVE FOUND THE ENTRUSTMENT
EXCLUSION TO APPLY UNDER THE FACTS SIMILAR TO
THOSE ALLEGED BY PLAINTIFFS DAIRE**

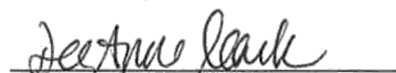
37. Other New York courts have upheld the Entrustment Exclusion under facts similar to those alleged by Plaintiffs Daire. Attached as Exhibit C is the unpublished court decision of Gerald A. Keene, Acting J.S.C, Sup. Ct. Tompkins Co., upholding the insurance coverage denial based on the Entrustment Exclusion.

WHEREFORE, your deponent respectfully requests that the Complaint be summarily dismissed in its entirety and in the alternative that the General Business Law cause of action/claim be summarily dismissed and Plaintiffs' cross-motion to amend the complaint be denied.

By:


Peter W. Knych, Esq.

Sworn to before me this 20th
day of August, 2020.


Notary Public

DEANNE CLARK
Notary Public in the State of New York
Qualified in Onondaga County
No. 01CL5037470
My Commission Expires May 21, 2023