



NYSCEF - Chenango County Supreme Court Confirmation Notice

The NYSCEF website has received an electronic filing on 11/04/2019 04:19 PM. Please keep this notice as a confirmation of this filing.

2019-5393

EDWARD DAIRE et al v. HBE GROUP, INC., d/b/a STERLING INSURANCE COMPANY

Assigned Judge: None Recorded

Documents Received on 11/04/2019 04:19 PM

Doc #	Document Type
5	ANSWER to First Amended Complaint

Filing User

Peter Walter Knych | pk@pknychlaw.com | 3154721175
300 South State Street, Suite 404, Syracuse,, Syracuse, NY 13202

E-mail Notifications

An email regarding this filing has been sent to the following on 11/04/2019 04:19 PM:

RONALD R. BENJAMIN - ronbenjaminlaw@stny.rr.com

PETER W. KNYCH - pk@pknychlaw.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

NYSCEF Resource Center, EFile@nycourts.gov

Phone: (646) 386-3033 | Fax: (212) 401-9146 | Website: www.nycourts.gov/efile

STATE OF NEW YORK
SUPREME COURT COUNTY OF CHENANGO

EDWARD DAIRE and ALLISON DAIRE,

Plaintiffs,

vs.

HBE GROUP, INC. and STERLING INSURANCE
COMPANY,

Defendant.

**DEFENDANT
STERLING'S
ANSWER TO
FIRST AMENDED
COMPLAINT**

Index No.: 2019-5393

Defendant *Sterling Insurance Company ("Sterling")*, by its attorneys, Knych & Whritenour, LLC, answers the First Amended Complaint of the Plaintiffs as follows:

1. DENIES KNOWLEDGE or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 5 and 7 of the First Amended Complaint.
2. ADMITS the truth of the allegations contained in paragraphs 2 and 3 of the First Amended Complaint.
3. DENIES the truth of the allegations contained in paragraphs 4 and 6 of the First Amended Complaint.

**AS AND FOR AN ANSWER TO
THE FIRST CAUSE OF ACTION**

4. Repeats and realleges each and every admission and denial of the allegations contained in paragraphs 1 through 7 of the First Amended Complaint as realleged in paragraph 8 with the same force and effect as though fully set forth herein.

5. ADMITS the truth of the allegations contained in paragraph 9 of the First Amended Complaint.

6. With respect to the allegations in paragraph 10 of the First Amended Complaint, ADMITS that Defendant Sterling has denied coverage on the claim and DENIES each and every other allegation contained in that paragraph.

7. With respect to the allegations in paragraph 11 of the First Amended Complaint, ADMITS that Defendant Sterling continues to refuse to pay the claim because the claim is not covered under the insurance policy, and DENIES each and every other allegation contained in said paragraph.

8. DENIES the truth of the allegations contained in paragraphs 12, 13 and 14 of the First Amended Complaint.

**AS AND FOR AN ANSWER TO
THE SECOND CAUSE OF ACTION**

9. Repeats and realleges each and every admission and denial of the allegations contained in paragraphs 1 through 14 of the First Amended Complaint as realleged in paragraph 15 with the same force and effect as though fully set forth herein.

10. DENIES the truth of the allegations contained in paragraphs 16, 17, 18, 19 and 20 of the First Amended Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
(Fails to State a Valid Cause of Action for Exemplary Damages)

11. Upon information and belief, Plaintiffs have failed to set forth a valid cause of action or claim for exemplary damages.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE*(Fails to State a Valid Cause of Action)*

12. Upon information and belief, Plaintiffs' Second Cause of Action fails to state a valid cause of action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE*(Fails to Mitigate Damages)*

13. Upon information and belief, Plaintiffs failed to mitigate all or part of their damages for which they now make claim against Sterling.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

14. Upon information and belief, the policy of insurance upon which this action is brought provides coverage only if the claim falls within one or more of 18 enumerated perils as set forth in policy form FL-2, Ed. 1/92.

15. Upon information and belief, the majority of Plaintiffs' claim does not fall within one or more of the 18 enumerated perils of the policy which must be proven in order for the Plaintiffs to potentially recover under the policy.

16. Upon information and belief, the Plaintiffs are not entitled to insurance coverage for damage that is not caused by one or more of the 18 enumerated perils set forth in the policy.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

17. The policy of insurance upon which this action is brought contains the following exclusion:

EXCLUSIONS THAT APPLY TO YOUR POLICY

We do not pay for loss or damage caused directly or indirectly by any of the following; such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. For other

Exclusions, Limitations and Property Not Covered which may affect *your* policy, see Principal Coverages, Incidental Coverages, and other endorsements added to *your* policy.

...

6. Faulty, Inadequate or Defective:

- a. Planning, zoning, development, surveying, siting;
- b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- c. Materials used in repair, construction, renovation or remodeling; or
- d. Maintenance of part or all of any property on or off the *insured premises*.

FL-20, p. 4-5, Ed. 1/92.

18. Upon information and belief, if Plaintiffs prove all or some of the damage was caused by one or more of the 18 enumerated perils of the Policy (Sterling asserts there is not sufficient proof) then Exclusion 6 stated above applies to eliminate coverage for all or part of Plaintiffs' claim for damages.

19. Pursuant to Exclusion 6, Defendant has no obligation to pay all or part of Plaintiffs' claim.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

20. The policy of insurance upon which this action is brought contains the following Exclusion:

EXCLUSIONS THAT APPLY TO *YOUR* POLICY

We do not pay for loss or damage caused directly or indirectly by any of the following; such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. For other Exclusions, Limitations and Property Not Covered which may affect *your* policy, see Principal Coverages, Incidental Coverages, and other endorsements added to *your* policy.

...

13. **Wear and Tear**-means damage caused by:
- Wear and tear, marring, scratching, or chipping;
 - Inherent vice, latent defect, deterioration or mechanical breakdown;
 - Rust or corrosion, mold, mildew, wet or dry rot, contamination, pollution or smog;
 - Dampness or dryness of atmosphere, changes in or extremes of temperature; or
 - Birds, vermin, rodents or insects.

FL-20, p. 5, Ed. 1/92.

21. Upon information and belief, if Plaintiffs prove all or some of the damage was caused by one or more of the 18 enumerated perils of the Policy (Sterling asserts there is not sufficient proof) then Exclusion 13 stated above applies to eliminate coverage for all or part of Plaintiffs' claim for damages.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

22. The policy of insurance upon which this action is brought contains the following exclusion:

EXCLUSIONS THAT APPLY TO *YOUR* POLICY

We do not pay for loss or damage caused directly or indirectly by any of the following; such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. For other Exclusions, Limitations and Property Not Covered which may affect *your* policy, see Principal Coverages, Incidental Coverages, and other endorsements added to *your* policy.

...

4. **Dishonest or Criminal Acts**-means loss caused by or resulting from any dishonest or criminal act by *you*, any of *your* partners, employees, directors, trustees, authorized representatives or anyone, to whom *you* entrust property for any purpose:

- Acting alone or in collusion with others; or
- Whether or not occurring during the hours of employment. This is [sic] exclusion does not apply to

acts of destruction by *your* employees, but theft by an employee is not covered.

FL-20, p. 4, Ed. 1/92.

23. Upon information and belief, if Plaintiffs prove that all or some of the damage was caused damage caused by one or more of the 18 enumerated perils set forth in the policy, the damage resulting from that covered peril is not covered under the Sterling policy because that damage was caused by or resulted from a dishonest or criminal act of the Plaintiffs' tenants or some other third party to whom Plaintiffs entrusted the property.

24. Pursuant to Exclusion 4, Sterling has no obligation to pay all or part of Plaintiffs' claim.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

25. The policy of insurance upon which this action is brought contains a \$500 deductible on any claim covered under the policy.

26. Upon information and belief, if Plaintiffs prove damage caused by one or more of the 18 enumerated perils in the policy, and if that damage is not excluded from coverage, then the claim so proved is subject to a \$500 deductible and Sterling is not liable for damages in excess of the policy's \$500 deductible.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

27. Upon information and belief, none of the Plaintiffs' damages or loss that make up their insurance claim is covered under the terms and conditions of the Sterling policy.

WHEREFORE, Defendant Sterling Insurance Company demands judgment including the following:

1. An Order dismissing the First Amended Complaint in its entirety;
2. The costs and disbursements of this action;
3. Such other and further relief as the Court deems just.

Dated: November 4, 2019

KNYCH & WHITTENOUR, LLC

By: 

Peter W. Knych, Esq.
Attorneys for Defendant
Sterling Insurance Company
One Park Place, Suite 404
300 South State Street
Syracuse, New York 13202
Telephone: (315) 472-1175

TO: Ronald R. Benjamin, Esq.
Law Office of Ronald R. Benjamin
Attorney for Plaintiffs
126 Riverside Drive, P.O. Box 607
Binghamton, New York 13902-0607
Telephone (607) 772-1442