Danzeisen v. Selective Ins. Co. of AmericaN.J.Super.A.D.,1997.
Superior Court of New Jersey,Appellate Division.
Denise DANZEISEN, Plaintiff-Respondent/Cross-Appellant,
v.
SELECTIVE INSURANCE COMPANY OF AMERICA, Defendant-Appellant/Cross-Respondent, andSuydam Insurance Agency, Defendant.
Argued Feb. 3, 1997.
Decided March 7, 1997.

Insured brought action against insurer to recover for fire loss. The Superior Court, Law Division, Middlesex County, required payment on replacement cost basis. Appeal and cross-appeal were taken. The Superior Court, Appellate Division, Kestin, J.A.D., held that: (1) insurer was liable for actual cash value, rather than replacement cost; (2) ordinance prohibiting reconstruction rendered loss a constructive total loss; (3) exclusion for loss from enforcement of law or ordinance did not apply; and (4) insured was entitled to prejudgment interest.

Reversed and remanded.
West Headnotes

[1] Insurance 217 2172

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2167 Amount of Insurance
217k2172 k. Replacement. Most Cited Cases
(Formerly 217k506(1))

Amount of insurance for fire loss was actual cash value, rather than replacement cost, since structure was razed, rather than replaced; policy stated that insurer was not responsible to pay on replacement cost basis until lost or damaged property was actually repaired or replaced.

[2] Insurance 217 2176

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2173 Amount of Damage or Loss
217k2176 k. Constructive Total Loss. Most Cited Cases
(Formerly 217k493)

Zoning ordinance prohibiting reconstruction of nonconforming structure destroyed to extent greater than 50% of assessed valuation rendered building constructive total loss after fire, and, thus, insured's loss was not limited to actual cash value of damaged portion of premises, but consisted of actual cash value of property as of time of fire.

[3] Insurance 217 2158

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2158 k. Ordinance or Law. Most Cited Cases
(Formerly 217k421(3))

Exclusion for loss or damage caused by enforcement of any ordinance or law regulating construction, use, or repair of property or requiring tearing down of property did not apply to enhanced loss from fire occasioned by the ordinance prohibiting reconstruction of any nonconforming structure destroyed to extent greater than 50% of assessed valuation; if insurer had sought to exclude responsibility for enhanced losses occasioned by governmental requirement to raze balance of property substantially destroyed by catastrophic occurrence, it could have stated exclusion with greater clarity.

[4] Interest 219 39(2.35)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.35) k. Insurance Matters. Most Cited Cases

Property insurer's failure to pay even amount concededly due 30 days after sworn proof of loss entitled insured to prejudgment interest.

[5] Interest 219 39(2.35)

219 Interest
219III Time and Computation
219k39 Time from Which Interest Runs in General
219k39(2.5) Prejudgment Interest in General
219k39(2.35) k. Insurance Matters. Most Cited Cases

Generally, in absence of special circumstances militating against award of prejudgment interest, it is payable for insurer's failure to pay claim for insured fire loss.

****798 *384** Thomas E. Maloney, Jr., Parsippany, for appellant/cross-respondent (Maloney and Katzman, attorneys; Mr. Maloney, on the brief).
Glenn A. Bergenfield, Princeton, for respondent/cross-appellant.

Before Judges BROCHIN and KESTIN.

The opinion of the court was delivered by
***385** KESTIN, J.A.D.

The trial court granted plaintiff's motion for summary judgment in this action on a commercial insurance policy issued by Selective Insurance Company of America (defendant) covering fire loss. The trial court concluded that plaintiff was entitled to compensation for a total loss on a replacement cost basis. Having determined that the cost of replacing the structure exceeded the $525,000 policy limit, the trial court, *inter alia,* entered an order for judgment in that ****799** amount, while denying plaintiff's application for pre-judgment interest. Both parties appeal, respectively, from these determinations.

The loss occurred on September 24, 1993, from a roof collapse as the result of a fire. The structure was a non-conforming use. In April 1994, after determining that the building had been damaged to an extent greater than fifty percent of its assessed valuation, New Brunswick's Administrative Officer invoked subsection 22-15.1(b)4 of the City's zoning ordinance which provided that “any non-conforming structure destroyed to an extent greater than fifty percent of its assessed valuation shall not be reconstructed.” Accordingly, he denied plaintiff permission to reconstruct and ordered that the remainder of the structure be demolished.

[1] It is clear from the terms of the insurance policy at issue that the carrier has undertaken, *inter alia,* to “[p]ay the value of lost or damaged property[,]” but is not responsible to “pay on a replacement cost basis for any loss or damage: (1) Until the lost or damaged property is actually repaired or replaced; and (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.” Consequently, because the structure was razed rather than replaced either *in situ* or by other property, the trial court was in error to base its determination on replacement cost. *See Ruter v. Northwestern Fire and Marine Ins. Co.,* 72 *N.J.Super.* 467, 472, 178 *A.*2d 640 (App.Div.), *certif. denied,* 37 *N.J.* 229, 181 *A.*2d 12 (1962); *cf.* ***386***Elberon Bathing Co. v. Ambassador Ins. Co.,* 77 *N.J.* 1, 7-9, 389 *A.*2d 439 1978). *See generally* Randy R. Koenders, Annotation, *Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property,* 1 *A.L.R.*5th 817, 848-54 (1992 & Supp.1996); Dag E. Ytreberg, Annotation, *Construction and Effect of Provision of Property Insurance Policy Permitting Recovery of Replacement Cost of Property, In Excess of Actual Cash Value,* 66 *A.L.R.*3d 885, 887-92 (1975).

[2] The remaining substantive question is whether defendant is liable for the actual cash value of only the damaged portion of the premises or whether, by reason of the application of the municipal ordinance, plaintiff is entitled to recover for a “constructive total loss” of the entire building. We have been given no reason to depart from the “general rule” that governs such situations, as applied in *Feinbloom v. Camden Fire Ins. Ass'n,* 54 *N.J.Super.* 541, 149 *A.*2d 616 (App.Div.), *certif. denied,* 30 *N.J.* 154, 152 *A.*2d 172 (1959), widely considered to be a leading case in the field:

[I]f “by reason of public regulations rebuilding is prohibited the loss is total, although some portion of the building remains which might otherwise have been available in rebuilding.” 45 *C.J.S. Insurance* § 913, p. 1008; 6 *Appleman, Insurance Law and Practice,* § 3822, p. 166; 7 *Couch, Cyclopedia of Insurance Law,* § 1772, p. 6029; Annotation, *“Insurers liability as affected by refusal of public authorities to permit reconstruction or repair after fire,”* 49 *A.L.R.* 817 (1927); *Rutherford v. Royal Insurance Co.,* 12 *F.*2d 880, 49 *A.L.R.* 814 (4th Cir.1926). *Cf., City of New York Fire Ins. Co. v. Chapman,* 76 *F.*2d 76 (7th Cir.1935).
[*Id.* at 544, 152 *A.*2d 172.]

We conclude, as we did in *Feinbloom,* that no language of the insurance policy at issue excludes liability for the constructive total loss which plaintiff experienced. *See generally* D.E. Evins, Annotation, *Insurer's Liability as Affected by Refusal of Public Authorities to Permit Reconstruction or Repair After Fire,* 90 *A.L.R.*2d 790 (1963).

[3] To the extent standard fire insurance policy language in this regard was modified subsequent to our decision in *Feinbloom,* as defendant stresses, no contrary result is indicated. The stated exclusion in the policy at issue is:

***387** 1. We will 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.
a. Ordinance or Law
The enforcement of any ordinance or law:
****800** (1) Regulating the construction, use or repair of any property; or
(2) Requiring the tearing down of any property, including the cost of removing its debris.

The policy language with which we were confronted in *Feinbloom* provided:“ * * * this company * * * does insure * * * to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality * * * without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair * * *.”
[*Feinbloom, supra,* 54 *N.J.Super.* at 545, 149 *A.*2d 616 (emphasis omitted).]

and“This company shall not be liable for loss by fire * * * caused, directly or indirectly, by * * * order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire * * *.”
[*Id.* at 546, 149 *A.*2d 616.]

Since *Feinbloom* was decided, the general rule described therein has been applied or cited with approval by most courts that have considered the question. *See, e.g., Dugan v. Metropolitan Property and Liab. Ins. Co.,* 853 *F.Supp.* 1103, 1105 (E.D.Ark.1994); *Reliance Ins. Co. v. Orleans Parish Sch. Bd.,* 201 *F.Supp.* 78, 80-81 (E.D.La.1962), *aff'd in part, rev'd in part,* 322 *F.*2d 803 (5th Cir.1963); *Taylor v. Aetna Cas. and Sur. Co.,* 232 *Ark.* 981, 341 *S.W.*2d 770, 771-72 (1961); *Netherlands Ins. Co. v. Fowler,* 181 *So.*2d 692, 693 (Fla.Dist.Ct.App.1966); *Garnett v. Transamerica Ins. Serv.,* 118 *Idaho* 769, 800 *P.*2d 656, 666 (1990); *Hertog v. Milwaukee Mut. Ins. Co.,* 415 *N.W.*2d 370, 372 (Minn.Ct.App.1988); *Stahlberg v. Travelers Indem. Co.,* 568 *S.W.*2d 79, 84-86 (Mo.Ct.App.1978); *Maryland Cas. Co. v. Frank,* 85 *Nev.* 209, 452 *P.*2d 919, 920 (1969); *Stevick v. Northwest G.F. Mut. Ins. Co.,* 281 *N.W.*2d 60, 62-64 (N.D.1979); *Glens Falls Ins. Co. v. Peters,* 379 *S.W.*2d 946, 947-48 (Tex.Civ.App.1964), *rev'd on other grounds,* 386 *S.W.*2d 529 (1965). *Cf.* ***388***Algernon Blair Group, Inc. v. United States Fidelity and Guar. Co.,* 821 *F.*2d 597, 602-03 (11th Cir.1987); *Bering Strait Sch. Dist. v. RLI Ins. Co.,* 873 *P.*2d 1292, 1295 (Alaska 1994); *Starczewski v. Unigard Ins. Group,* 61 *Wash.App.* 267, 810 *P.*2d 58, 62, *review denied,* 117 *Wash.*2d 1017, 818 *P.*2d 1099 (1991); *Gimbels Midwest, Inc. v. Northwestern Nat'l Ins. Co.,* 72 *Wis.*2d 84, 240 *N.W.*2d 140, 147 (1976). *Contra Bischel v. Fire Ins. Exch.,* 1 *Cal.App.*4th 1168, 2 *Cal.Rptr.*2d 575, 581 (1991). Cases involving only a partial loss-with the amount of the cost of repair increased by reason of the requirements of law, ordinance or regulation-embody different considerations leading to different results. *See, e.g., Regency Baptist Temple v. Insurance Co. of N. Am.,* 352 *So.*2d 1242, 1243-44 (Fla.Dist.Ct.App.1977); *Cohen Furniture Co. v. St. Paul Ins. Co.,* 214 *Ill.App.*3d 408, 158 *Ill.Dec.* 38, 573 *N.E.*2d 851, 853 (1991); *Bradford v. Home Ins. Co.,* 384 *A.*2d 52, 54 (Me.1978); *Roberts v. Allied Group Ins. Co.,* 79 *Wash.App.* 323, 901 *P.*2d 317, 318-19 (1995).

Despite defendant's argument to the contrary, it is far from clear that modifications in standard policy language since *Feinbloom* betoken a design, apparent to the policyholder, to provide coverage for property losses that is more limited than we determined was required in *Feinbloom.*

When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded “to the full extent that any fair interpretation will allow.”
[*Kievit v. Loyal Protective Life Ins. Co.,* 34 *N.J.* 475, 482, 170 *A.*2d 22 (1961) (quoting *Danek v. Hommer,* 28 *N.J.Super.* 68, 76, 100 *A.*2d 198 (App.Div.1953), *aff'd* 15 *N.J.* 573, 105 *A.*2d 677 (1954)).]

The quest for the significance of language employed in an insurance contract is always engaged in with certain basic tenets in mind. Wherever possible the phraseology must be liberally construed in favor of ****801** the insured; if doubtful, uncertain, or ambiguous, or reasonably susceptible of two interpretations, the construction conferring coverage is to be adopted. And exclusionary clauses of doubtful import are strictly construed against the insurer.
[*Hunt v. Hospital Serv. Plan,* 33 *N.J.* 98, 102-03, 162 *A.*2d 561 (1960).]

***389** *See also Ruter, supra,* 72 *N.J.Super.* at 471, 178 *A.*2d 640; *cf. Longobardi v. Chubb Ins. Co.,* 121 *N.J.* 530, 537, 582 *A.*2d 1257 (1990).

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The exclusion with which we are confronted applies generally to losses resulting from governmental orders to destroy, as where a structure has become unsafe by reason of deterioration or other non-catastrophic causes. If, in the face of the general rule, defendant had sought to exclude responsibility for enhanced losses occasioned by a governmental requirement to raze the balance of property substantially destroyed by a catastrophic occurrence, it could have stated the exclusion with far greater clarity than it did in the policy at issue. We hold, therefore, in accordance with the general rule, that plaintiff was entitled to be compensated for a total loss of the property so destroyed. We remand for a determination of the actual cash value of the property as of the time of the fire, when the loss occurred.

[4][5] We hold also that defendant is responsible for payment of interest on plaintiff's claim in accordance with the payment schedule provided in the policy, *i.e.,* from thirty days after plaintiff submitted her sworn proof of loss. Defendant has made no payment to plaintiff on account of the loss, not even an amount representing what defendant concedes was due and owing on the claim. The general rule in New Jersey is that, in the absence of special circumstances militating against such an award, prejudgment interest is payable for an insurer's failure to pay a claim for an insured fire loss. *Polito v. Continental Cas. Co.,* 689 *F.*2d 457, 461-62 (3rd Cir.1982). *See also* Kristine Cordier Karnezis, Annotation, *Insured's Right to Recover from Insurer Prejudgment Interest on Amount of Fire Loss,* 5 *A.L.R.*4th 126 (1981 & Supp.1996). Our contrary holding in *Feinbloom* was based in large part upon the novelty of the question presented, 54 *N.J.Super.* at 548, 149 *A.*2d 616, no longer a factor since that case was decided. To hold now that plaintiff was not entitled to prejudgment interest would be to reward an insurer for refusing to discharge its clearly established contractual responsibilities.

***390** Whether plaintiff's contract claim is seen as liquidated or unliquidated, a factor of significance in *Feinbloom, see ibid.,* is of no consequence under currently prevailing principles. Where the equities are in the injured party's favor, prejudgment interest can be awarded irrespective of whether the claim is liquidated or unliquidated. *Swatek, Inc. v. North Star Graphics, Inc.,* 246 *N.J.Super.* 281, 286-88, 587 *A.*2d 629 (App.Div.1991) (citing *Ellmex Constr. Co. v. Republic Ins. Co.,* 202 *N.J.Super.* 195, 494 *A.*2d 339 (App.Div.1985), *certif. denied,* 103 *N.J.* 453, 511 *A.*2d 639 (1986)). *See also Performance Leasing Corp. v. Irwin Lincoln-Mercury,* 262 *N.J.Super.* 23, 29-30, 619 *A.*2d 1024 (App.Div.), *certif. denied,* 133 *N.J.* 443, 627 *A.*2d 1148 (1993).

Reversed and remanded.

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