

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

08-P-680

RICHARD CLEMENS

vs.

VERMONT MUTUAL INSURANCE COMPANY & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

As the result of a boiler breach, subsequent clean-up efforts, and the denial of his insurance claim, Richard Clemens commenced this action against ServiceMaster by Gilmore Brothers, Inc. (ServiceMaster), and Vermont Mutual Insurance Company (Vermont Mutual). On appeal, Clemens claims error in the grant of summary judgment to the defendants. We affirm.

1. Negligence. Clemens contends that the grant of summary judgment to Servicemaster and Vermont Mutual on the negligence claims was improper because the record permits the inference that ServiceMaster's use of high velocity fans during the cleanup process broadcast asbestos throughout the basement of his East Boston property. We conclude that summary judgment was properly entered.²

Even if Clemens can prove that ServiceMaster's high velocity vans dispersed asbestos throughout the basement, he does not have

¹ ServiceMaster by Gilmore Brothers, Inc.

² Because we conclude that the grant of summary judgment was proper on other grounds, we need not decide whether Vermont Mutual would be subject to liability for ServiceMaster's conduct.

a reasonable expectation of proving damages. Although Clemens claims that the price of the property was reduced because of the dispersed asbestos, both the buyer and his agent stated that, while they were aware that the boiler and its piping were insulated by asbestos, they were unaware that any asbestos had been "blown around" the basement.³⁴ A. 464, 55. Even Clemens's listing broker, who averred that the price was reduced because of asbestos in the basement, A. 347, had no record of whether the asbestos "extended to other areas" beyond the boiler and its piping. A. 465. Given these facts, Clemens cannot prove that dispersal of the asbestos by fans impacted price negotiations or otherwise resulted in a reduction in price greater than that caused by the simple presence of the asbestos in the basement.

Because Clemens has no reasonable expectation of proving one or more essential elements of his claim, there was no error in

³ The affidavits of the buyer and the buyer's agent were unrefuted on this point. There is no evidence in the record to indicate that either the buyer or the buyer's agent were aware of the presence of dispersed asbestos. In fact, Clemens testified at his deposition that he did not know what the listing agent had told the buyer and could not recall what the buyer was told about the presence of asbestos in the basement at the closing. A. 182-183.

⁴ The plaintiff argues that the judge should have rejected these affidavits as untimely under Superior Court Rule 9A. As the plaintiff failed to argue pursuant to Mass.R.Civ.P. 56(f), 365 Mass. 825 (1974), that he required additional time to rebut the affidavits, we perceive no abuse of discretion in the judge's acceptance of the affidavits. Compare Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 109 (2008).

granting summary judgment to Servicemaster and Vermont Mutual on the negligence claims. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

2. Violation of G. L. c. 176D and G. L. c. 93A. Clemens also contends that the trial judge erred in granting summary judgment to Vermont Mutual on his claims for unfair settlement practices in violation of G. L. c. 176D, § 3(9), and unfair or deceptive business practices in violation of G. L. c. 93A, § 9. We disagree.

As the trial judge correctly concluded, Clemens committed a material breach of the insurance contract by denying Vermont Mutual's requests to reinspect the boiler, unless it first agreed to remove the asbestos. The insurance policy provides that the insured must cooperate by showing the damaged property "as often as [the insurer] reasonably require[s]." A. 110. "It is well established that under the cooperation clauses generally included in insurance contracts insureds have a general obligation to cooperate with their insurer during any investigation of claims made under such policies . . . and that when an insurer's demand for cooperation is reasonable and the insurer has acted in good faith and with due diligence, an insurer may be relieved of liability for claims in certain circumstances where an insured commits a material breach of a cooperation clause." Hanover Ins. Co. v. Cape Cod Custom Home Theater, Inc., 72 Mass. App. Ct. 331,

Here, Vermont Mutual and its agent requested, on at least seven occasions, that Clemens permit a reinspection of the boiler to determine the cause of loss. A. 256, 258-259, 264, 267-268, 270-271, 276, 278. That the initial inspection, which took place the day after the breach, was not performed by a licensed engineer does not forestall further inspection by the insurer or its agents. Moreover, the insured (Clemens) having warned the insurer about the presence of asbestos on the pipes and the possibility or even probability that it had been dispersed throughout the room, we are aware of no legal justification for the insured's continued refusal to allow the insurer or its agent to inspect the boiler.

Given Clemens's breach of the cooperation clause and failure to permit Vermont Mutual to determine the cause of loss, Vermont Mutual acted in good faith in denying coverage of Clemens's claim. See Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 468 (1995) (insurer entitled to deny coverage based upon a "plausible interpretation of [the] insurance policy"). Vermont Mutual was therefore entitled to summary judgment on Clemens's claims for violation of G. L. c. 176D and

G. L. c. 93A.

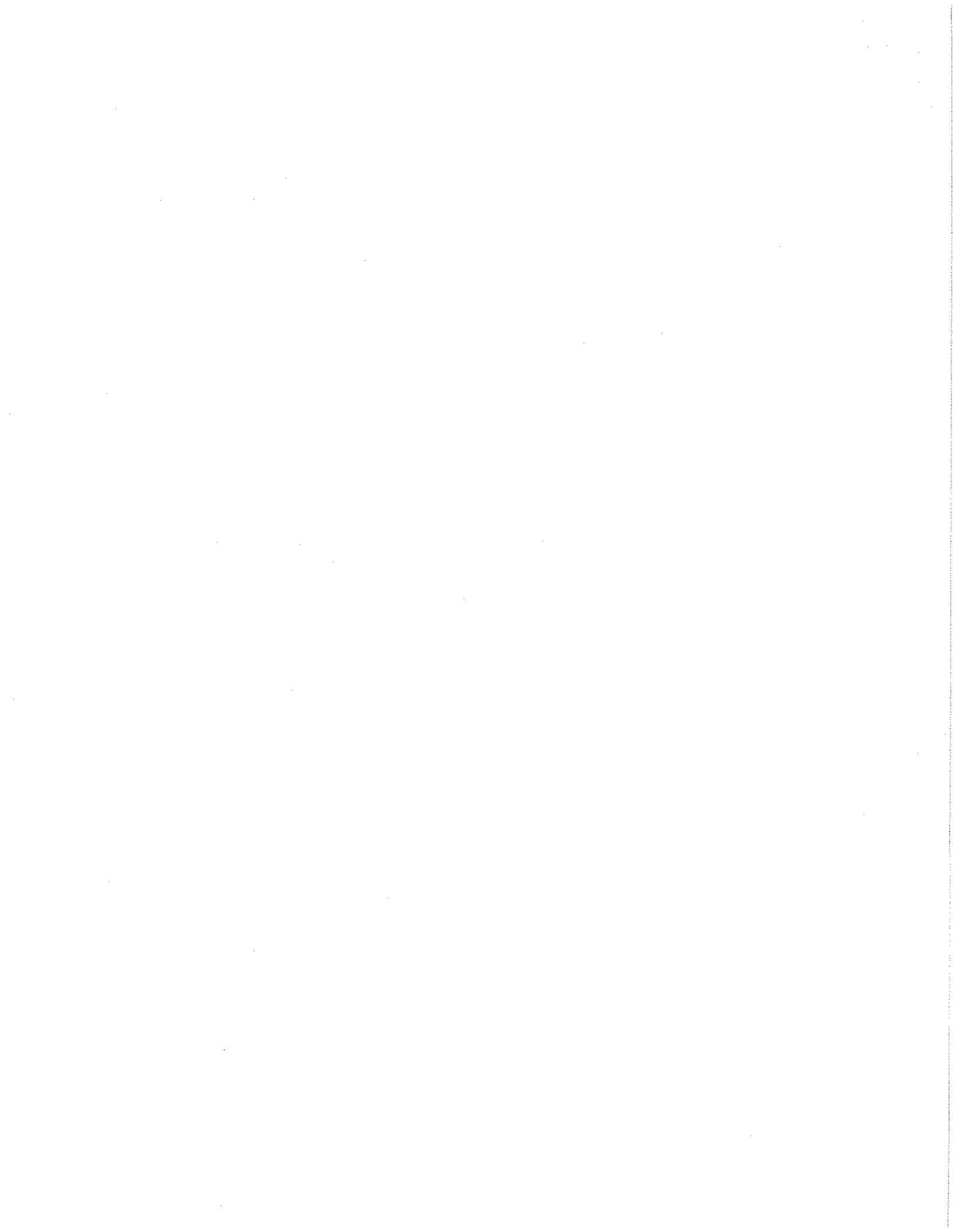
Judgment affirmed.

By the Court (Kantrowitz, McHugh
& Meade, JJ.),

Ashley Meade

Clerk

Entered: July 2, 2009.



Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 08-P-680

RICHARD CLEMENS

vs.

VERMONT MUTUAL INSURANCE COMPANY & another.

Pending in the Superior

Court for the County of Middlesex

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

Ashley Thean

, Clerk

Date July 2, 2009.

NOTE:

The original of the within rescript
will issue in due course pursuant
to M R A P23

APPEALS COURT

