

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated Term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the
3 31st day of May, two thousand seventeen.
4

5 Present: PIERRE N. LEVAL,
6 ROSEMARY S. POOLER,
7 PETER W. HALL,
8 *Circuit Judges.*
9

10
11 THE CINCINNATI INSURANCE COMPANY,
12

13 *Plaintiff-Counter-Defendant-Appellee,*
14

15 -v.-

16-2511-cv

17 ROY'S PLUMBING, INC.,
18

19 *Defendant-Counter-Claimant-Appellant.*¹
20

21
22 Appearing for Appellant: Robert E. Knoer, Buffalo, NY.
23

24 Appearing for Appellee: Daniel G. Litchfield (Vincent J. Velardo, *on the brief*), Litchfield
25 Cavo, LLP, New York, NY.
26

27 Appeal from the United States District Court for the Western District of New York
28 (Skretny, *J.*).
29

¹ The Clerk of Court is respectfully directed to amend the caption as above.

1 **ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED,**
2 **AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED.**
3

4 Defendant-Counter-Claimant-Appellant Roy’s Plumbing, Inc. appeals a June 10, 2016
5 order granting Cincinnati Insurance Company’s motion for summary judgment, and the
6 judgment order of June 13, 2016, both entered by the United States District Court for the
7 Western District of New York (Skretny, J.). The district court ruled that the Cincinnati Insurance
8 Company (the “insurer”) had no duty to defend or indemnify Roy’s Plumbing in underlying state
9 court litigation related to chemical contamination at Love Canal near Niagara Falls, New York.
10 We assume the parties’ familiarity with the underlying facts, the procedural history, and the
11 issues presented for review.
12

13 “In New York, an insurer’s duty to defend is ‘exceedingly broad’ and distinct from the
14 duty to indemnify.” *Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 140-41 (2d Cir.
15 2014) (quoting *Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006)). “The duty to
16 defend insureds . . . is derived from the allegations of the complaint and the terms of the policy.”
17 *Technicon Elecs. Corp. v. Am. Home Assurance Co.*, 74 N.Y.2d 66, 73 (1989). “Where, as here,
18 the insurer seeks to be relieved of its duty to defend on the basis of a policy exclusion, it bears
19 the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly
20 within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that
21 there is no possible factual or legal basis upon which the insurer may eventually be held
22 obligated to indemnify the insured under any policy provision.” *City of Kingston v. Harco Nat’l*
23 *Ins. Co.*, 848 N.Y.S.2d 455, 457 (3d Dep’t 2007) (internal quotation marks and brackets
24 omitted).
25

26 “The narrower duty to indemnify arises only if the claim for which the insured has been
27 judged liable lies within the policy’s coverage.” *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 115 (2d
28 Cir. 2005) (citing *Frontier Insulation Contractors, Inc. v. Merchs. Mut. Ins. Co.*, 91 N.Y.2d 169,
29 178 (1997)). “Thus, while the duty to defend is measured against the possibility of a recovery,
30 the duty to pay is determined by the actual basis for the insured’s liability to a third person.” *Id.*
31 (internal quotation marks omitted). This question may be amenable to summary judgment where
32 no genuine question exists as to whether the policy covers the insured’s actions. *See Servidone*
33 *Constr. Corp. v. Sec. Ins. Co. of Hartford*, 64 N.Y.2d 419, 425 (1985).
34

35 The insurer has met its burden of showing that the allegations in the underlying state
36 action fall within the insurance policy’s pollution exclusion. The parties agree that the policy
37 excludes “[b]odily injury or property damage which would not have occurred in whole or part
38 but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release, escape
39 or emission of pollutants at any time.” App’x at 180 (internal quotation marks omitted). And the
40 policy language gives “pollutant” a broad definition, covering both “substances which are
41 generally recognized in industry or government to be harmful or toxic to persons, property or the
42 environment” and “any solid [or] liquid . . . irritant or contaminant, including . . . waste.” App’x
43 at 144. Here, the state-court suit claims damages related to personal injuries, as well as damages
44 from contamination of property, caused by toxic chemicals. Although the parties dispute whether
45 the complained-of chemicals include sewage, and Roy’s Plumbing contends that sewage may not

1 constitute a “pollutant,” we have no doubt that sewage is “generally recognized in industry or
2 government to be harmful or toxic to persons.” App’x at 144.

3
4 Roy’s Plumbing contends also that the state-court complaint speaks of “pressure,” and it
5 may thereby be seeking damages from harm caused by the force of liquids permitted to build
6 within the sewer rather than by chemical toxicity. Read in context, however, the relevant passage
7 of the state-court complaint clarifies that pressure was merely the mechanism allowing chemicals
8 to escape from the sewer. App’x at 345. It is not alleged as an independent cause of damage.

9
10 Roy’s Plumbing suggests that the pollution exclusion is overbroad, and therefore creates
11 ambiguity, because if read literally it would deny coverage for most damages due to plumbing
12 work and thereby create tension with those parts of the policy clearly covering such work. New
13 York courts, however, limit the reach of pollution exclusions to “those cases where the damages
14 alleged are truly environmental in nature, or where the underlying complaint alleges damages
15 resulting from what can accurately be described as the pollution of the environment.” *Belt*
16 *Painting Corp. v. TIG Ins. Co.*, 742 N.Y.S.2d 332, 336 (2d Dep’t 2002), *aff’d*, 100 N.Y.2d 377
17 (2003). This construction eliminates the overbreadth that Roy’s Plumbing fears.

18
19 Because the allegations in the state-court complaint fall within the pollution exclusion,
20 the insurer has no duty to defend Roy’s Plumbing against those allegations, or to indemnify
21 Roy’s Plumbing for damages caused by the particular acts alleged in the complaint.

22
23 We have considered all additional arguments made by Roy’s Plumbing and determine
24 them to be without merit. The district court’s order and judgment are therefore **AFFIRMED**.

25
26 FOR THE COURT:
27 Catherine O’Hagan Wolfe, Clerk
28