

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote IAS TERM, PART 33
Acting Supreme Court Justice

-----x
Joseph Brady, et al, Index No: 14938/14
Plaintiff,
-- against -- Motion Date: 06/06/16
Tower Group Companies, et al, Seq. No: 1
Defendants.
-----x

The following papers numbered 1 to 21 read on this motion by defendant for an order dismissing Plaintiff's Verified Complaint against Tower pursuant to CPLR §3212; and the cross-motion by plaintiffs for summary judgment.

| | <u>PAPERS</u> <u>NUMBERED</u> |
|---|----------------------------------|
| Notice of Motion, Affirmation, Affidavits and Exhibits..... | 1-4, 5-8 |
| Answering Affirmations, Affidavits and Exhibits..... | 9-11 |
| Reply Affirmations, Affidavits and Exhibits..... | |
| Other..... | |

Upon the foregoing papers, the motion is granted and the cross-motion is denied.

On October 29, 2012, plaintiffs' oceanfront home in Breezy Point, New York, was destroyed by Superstorm Sandy. Defendants, plaintiffs' property insurer, disclaimed coverage on the grounds that the damage was caused by flooding, which is excluded by the contract. Plaintiffs commenced this breach of contract action alleging that the damage was caused by wind, which is not excluded by the insurance contract.

Summary judgment is a drastic remedy that should only be employed when there is no doubt as to the absence of any triable issues of a material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2nd Dept 2005]). "Issue finding, rather than issue determination is the courts function. If there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]). "In the context of a motion for summary

judgment, the court is obliged to draw all reasonable inferences in favor of the non-moving party, and may not pass on issues of credibility" (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 2005]).

The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact (CPLR Section 3212(b); *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Megafu v. Tower Ins. Co. of New York*, 73 A.D.3d 713 [2d Dept 2010]). However, once the moving party has satisfied this obligation, the burden then shifts; "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action" (*Zuckerman v. City of New York*, *supra*).

Issues of credibility cannot be determined on a motion for summary judgment. (*S.J. Capelin Associates, Inc. V. Globe Manufacturing Corporation*, 34 NY 2d 338 [1974]).

In support of the motion, defendants submit the affidavit of Paul J. Angelides, P.E. Angelides affidavit is sufficient to meet the defendants' initial burden of establishing entitlement to summary judgment. In opposition, plaintiffs submit the affidavit of Stanley H. Fein, P.E.

Fein concludes that the damage to the house was caused solely by the wind. However, the Court finds Fein's affidavit deficient in several respects.

First, Fein states that "the photos which were taken after the storm do not indicate any water damage on the front, sides or rear of the premises." The uncontroverted evidence that house was inundated in 4.5 to 6.5 feet of flood water. Absent a Moses-like parting of the waters, this assertion is highly improbable. Furthermore, Fein offers no basis for that conclusion. On the other hand, Angelides based his conclusion on the fact that the house sustained extensive damage close to the ground and was relatively intact on its upper areas. In addition to its common-sense appeal, Angelides supports his conclusion with reference to American Society of Civil Engineers publications. Fein offers no explanation for the lack of damage to the upper area of the house.

An expert affidavit may be disregarded where it is speculative, conclusory, fails to set forth foundational facts, assumes facts not supported by the evidence, or fails to recite

the manner in which the engineer came to his conclusions (see, *Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930, 931 [2d Dept 2005]). In the instant case, the Fein affidavit fails to address contrary evidence, rendering the conclusions speculative. Furthermore, the affidavit fails to offer scientific data for the conclusion that a gust of wind lifted the house off its foundation and moved it. Thus, the Fein affidavit lacks any probative value.

Furthermore, the plaintiffs offer no legal basis for their assertion that the policy should be excluded from evidence due to the defendants alleged failure to mail plaintiffs a copy upon renewal.

Accordingly, the motion is granted, the cross-motion is denied and the action is dismissed.

This constitutes the Order of the Court.

Dated: September 22, 2016

.....
Leonard Livote, A.J.S.C.