2018 WL 5261037 (N.Y.Sup.), 2018 N.Y. Slip Op. 32667(U) (Trial Order)
Supreme Court of New York.
New York County

**1 Ian BRENNER, Plaintiff,
v.
HERMITAGE INSURANCE COMPANY, Defendant.

No. 153615/2016.
October 18, 2018.

Decision and Order

Debra A. James, J.S.C.

***1** PART IAS MOTION 59EFM

MOTION DATE ***10/16/2018***

MOTION SEQ. NO. ***003***

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57 were read on this motion to/for *JUDGMENT - SUMMARY*.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment of defendant HERITAGE INSURANCE COMPANY is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant dismissing the complaint, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

****2** ***DECISION***

This court agrees with defendant insurance carrier that the date of loss is determined by the date that the premises suffered damage and not the date that the insured discovered such damage. *See Lichter Real Estate Number Three, LLC v Greater N.Y. Ins. Co.*, 43 AD3d 366 (1st Dept. 2007). The deposition testimony of plaintiff's property manager that the vandalism damage occurred before he signed the hold harmless agreement on April 11, 2014, prima facie establishes defendant's entitlement to summary dismissal of the complaint against it for breach of the insurance policy, which complaint is barred by the two-year limitation clause. *See 155th Street and 8th Ave. Realty Corp. v National Casualty Co.*, 221 AD2d 290 (1st Dept. 1995).

Moreover, plaintiff fails to come forward with any evidence refuting that submitted by defendant that tends to show that the

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loss occurred no later than February 27, 2014. The defendant appends copies of logs that show that on such date, the Town of Hempstead building inspector, determining “the heat, hot water and electricity were not functioning”, posted the 72-hour notice on the premises. Nor persuasive is plaintiff’s argument that the loss was not ascertainable before his property manager signed the hold harmless agreement on April 11, 2014, because the Town of Hempstead had boarded up the premises on March 31, 2014, denying him access. Defendant comes forward with no ****3** written lease that denied him the right to re-enter and duty to repair the premises, let alone any evidence of whether an “oral agreement included a right to re-enter and a duty to repair” (*see Sanchez v Irun*, 83 AD3d 611, 612 [1st Dept. 2011]), before the premises were so boarded.

The court also agrees with defendant that plaintiff’s 34-day delay in providing notice of the loss was unreasonable and unjustified. *See Pandora Industries, Inc. v St. Paul Surplus Lines Ins. Co.*, 188 AD2d 277 (1st Dept. 1992).

10/16/2018

DATE

<<signature>>

DEBRA A. JAMES, J.S.C.

CHECK ONE: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

APPLICATION: ☐ SETTLE ORDER ☐ SUBMIT ORDER

CHECK IF APPROPRIATE: ☐ INCLUDES TRANSFER/REASSIGN ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

End of Document

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