

72 Misc.3d 1206(A)
Unreported Disposition
(The decision is referenced in
the New York Supplement.)

This opinion is uncorrected and will not be
published in the printed Official Reports.
Supreme Court, New York County, New York.

Regina FARAGE, Plaintiff,

v.

ASSOCIATED INSURANCE MANAGEMENT
CORP., Tower Insurance Company of New York,
[AmTrust Financial Services, Inc.](#), AmTrust North
America, Castlepoint Insurance Company, Tower
Risk Management Corp., Tower Group, Inc.,
Tower Group Companies, Legion Insurance
Group, Colonia Insurance Company, AXA
Global Risks US Insurance Company, Global
Facilities, Inc., [Morstan General Agency, Inc.](#),
E.G. Bowman, Co., Inc., Mark Lauria Associates,
Inc., [National General Insurance Company](#),
National General Holdings Corp., Defendant.

Index No. 653590/2020

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Decided on July 2, 2021

Opinion

[Arthur F. Engoron, J.](#)

*1 The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 64, 74, 75, 76, 77, 78, 79, 80, 81, 90, 91, 92, 93, 104, 105 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 54, 55, 56, 65, 82, 83, 84, 85, 86, 87, 88, 89, 94, 95, 96 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 102, 106, 107, 108, 109, 110, 111, 112 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 68, 69, 70, 71, 72, 73, 97, 98, 99, 100, 101, 103 were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents and for the reasons set forth hereinbelow, this Court will dismiss the instant case in its entirety.

Background

The Brokers and the Subject Tower Policy

Plaintiff, Regina Farage, asserts, briefly stated, the following. In 1998 plaintiff purchased a multi-unit rental property (“the Property”) located at 95-97 Sherman Avenue, Staten Island, New York. In or around 1998, Mark Lauria Associates, Inc. (“Lauria”) began acting as plaintiff’s insurance broker. Plaintiff requested that Lauria procure an insurance policy for the Property that would cover full repair/replacement cost(s), as plaintiff depended on rental income from the Property. In or around 2000, Lauria obtained a policy from defendant Tower Insurance Company of New York (“Tower,” collectively with defendants AmTrust Financial Services and AmTrust North America, “Tower/AmTrust”) and assured plaintiff that the subject policy complied with her requests. Plaintiff renewed the subject Tower/AmTrust policy through 2011, when plaintiff replaced Lauria with defendant E.G. Bowman Co. (“Bowman”). Although plaintiff requested that Bowman obtain a policy with a different insurance carrier, Bowman renewed the subject Tower/AmTrust policy through 2014. Bowman, like Lauria, assured plaintiff that the subject Tower/AmTrust policy would cover full replacement cost. Throughout her conversations with Lauria and Bowman, plaintiff communicated that she relied on them to ensure that the subject coverage limit was adjusted annually so that the subject Tower/AmTrust policy would continue to cover the Property for full replacement costs. (NYSCEF Documents 19 and 73.)

Additionally, defendants Castlepoint Insurance Company (“Castlepoint”); National General Insurance Company (“National General Insurance”); and National General Holdings Corp. (“National General Holdings”) (Castlepoint, National General Insurance, and National General Holdings, collectively, “Castlepoint/National General”) issued plaintiff a homeowner policy, effective June 21, 2014, for the Property. (NYSCEF Documents 19 and 73.)

The August 4, 2014 Fire and Plaintiff's Ensuing Claim

*2 On August 4, 2014, a fire severely damaged the Property. Prior to the fire, plaintiff had apparently never received a copy of the subject Tower/AmTrust policy, despite requesting it from the aforementioned brokers on multiple occasions. Plaintiff learned, supposedly for the first time, that the subject Tower/AmTrust policy contained an underinsured penalty clause, stating that, if at the time of a loss, Tower/AmTrust found that the Limit of Insurance “is less than 80% of the full replacement cost of the property immediately before the loss,” it would apply a “co-insurance factor” to reduce coverage below the subject Limit of Insurance.” For the approximately fourteen years prior to the fire, pursuant to conversations with the aforementioned brokers Lauria and Bowman, plaintiff understood that “if the Limit of Insurance proved inadequate to repair or replace the property following a loss, Tower/AmTrust would pay up to 25 percent more — not seize on the deficiency as a pretext to make an even smaller payment.” Additionally, plaintiff, again apparently for the first time, learned that Tower/AmTrust had not applied the 8% automatic increase to the coverage limit annually even though plaintiff had relied on Lauria and Bowman to ensure that Tower/AmTrust adjusted the subject policy properly. Thus, plaintiff asserts that brokers Lauria and Bowman failed to procure the insurance policy that plaintiff had requested and that they had promised to obtain, as the subject Tower/AmTrust policy does not fully cover plaintiff for the subject loss. Additionally, Castlepoint/National General failed to compensate plaintiff for damaged personal property. (NYSCEF Documents 19 and 73.)


Defendants claim that on July 26, 2012, plaintiff received a copy of the subject Tower/AmTrust policy (NYSCEF Doc. 26), and on June 3, 2013, plaintiff received a copy of the subject policy's renewal certificate (NYSCEF Doc. 27). However, plaintiff disputes receiving said documents, reiterating that she did not receive a copy of the subject Tower/AmTrust policy prior to the fire (NYSCEF Doc. 73).

Meanwhile, Tower/AmTrust's conduct apparently delayed restoring the Property. In 2020, after six years and \$1.3 million in costs to plaintiff, the Property was finally fully restored. (NYSCEF Doc 19.) On July 24, 2020, plaintiff submitted an itemized invoice from her contractor (NYSCEF Doc. 73). On September 1, 2020, Tower/AmTrust denied plaintiff's claim (No. 1463955) (NYSCEF Doc. 81).


The Instant Action


On August 4, 2020, plaintiff commenced the instant action, seeking a judgment (1) on her first cause of action, for breach of contract, as against Tower/AmTrust; (2) on her second cause of action, for breach of the covenant of good faith and fair dealing, as against Tower/AmTrust; (3) on her third cause of action, for breach of contract, as against defendants Castlepoint/National General; (4) on her fourth cause of action, for breach of contract, as against defendants Bowman and Global Facilities, Inc. (“Global Facilities”); and (5) on plaintiff's fifth cause of action, for breach of contract, as against defendant Lauria, for compensatory, consequential, and punitive damages in an amount to be determined at trial, plus interest thereon, plus attorney's fees and costs (NYSCEF Doc. 19).

The Instant Motions and Cross-Motion (Sequence Numbers 1 through 4)

Defendant Bowman moves (Motion Seq. No. 001), pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities, Inc. and Lauria (NYSCEF Doc. 40).


Plaintiff cross-moves (Motion Seq. No. 001), pursuant to CPLR 3025(b), to amend the instant complaint to add causes of action for negligence as against defendants Lauria and Bowman (NYSCEF Doc. 90).


Defendant Lauria moves (Motion Seq. No. 002), pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities and Bowman (NYSCEF Doc. 54).

Defendants Tower Insurance Company of New York; AmTrust Financial Services, Inc.; AmTrust North America; Castlepoint Insurance Company; Tower Risk Management Corp.; Tower Group, Inc.; and Tower Group Companies jointly move (Motion Seq. No. 003), pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant action in its entirety, with prejudice (NYSCEF Doc. 57).

Plaintiff moves (Motion Seq. No. 004), pursuant to CPLR 1003 and 3025(b), for leave to serve a second supplemental summons and amended complaint to add Technology Insurance Company, Inc. (“TIC”) as a defendant to the instant action (NYSCEF Doc. 66).

Discussion

 CPLR 3211(a)(1) states that “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence.”

*3  CPLR 3211(a)(7) states that “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action.”

The subject Tower/AmTrust insurance policy states, in pertinent part, as follows:


4. Legal Action Against Us

No one may bring a legal action against us under this insurance unless:


a. There has been full compliance with all of the terms of this insurance; and

b. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

(Emphasis added.) (NYSCEF Doc. 60, at 18.)

The aforementioned two-year limitation period in which plaintiff could commence an action bars plaintiff's claims herein. Plaintiff commenced the instant action six years after the “direct physical loss or damage [here, the fire at the Property] occurred” on August 4, 2014. *See John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d 1010 (2d Dep't 2014) (insurer established summary judgment as a matter of law by submitting a copy of the subject insurance policy demonstrating that a one-year limitation period expired prior to the commencement of the subject action). *See also*  *Roberts v New York Prop. Ins. Underwriting Ass'n*, 253 AD2d 807, 807 (2d Dep't 1998) (“The phrase [“date of loss”] has been held to refer to the date of the catastrophe insured against, and not the date of the completion of the process to determine the loss.”).

Notably, plaintiff does not dispute this time-period limitation.


Instead, plaintiff attempts to rely on  *Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 (2014) (policy's two-year limitation period unenforceable where the


“property cannot reasonably be replaced within two years”). However, plaintiff has failed to demonstrate sufficiently that she attempted to repair the Property within those two years. Additionally, as defendants Tower/AmTrust, Castlepoint, Tower Risk Management, Corp., Tower Group, Inc., and Tower Group Companies assert, *Executive Plaza* is distinguishable from the instant matter. Unlike the insured in *Executive Plaza*, here, “[p]laintiff did nothing to protect her rights as the suit limitation expired” (NYSCEF Doc. 112, at 10).


Furthermore, plaintiff has failed to demonstrate that she notified Tower/AmTrust and/or any other defendant herein that she intended to submit a claim for coverage within the contractual 180 days after the subject loss, namely by January 31, 2015 (NYSCEF Doc. 112). Plaintiff did not submit an invoice from her contractor to Tower/AmTrust until July 24, 2020, almost six years after the subject fire at the Property (NYSCEF Doc. 73). In the operative complaint, plaintiff asserts that she “promptly submitted the claim” (NYSCEF Doc. 19, at 9). However, this vague statement is completely insufficient when compared to Tower/AmTrust's assertion that plaintiff did not contact Tower/AmTrust within the necessary 180-day period.

The Court has considered plaintiff's other arguments and finds them to be unavailing and/or non-dispositive.

Therefore, this Court will rule as follows.

The Court will grant the joint motion (Seq. No. 003) by defendants Tower/AmTrust; Castlepoint; Tower Risk Management Corp.; Tower Group, Inc.; and Tower Group Companies, pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant complaint in its entirety, with prejudice.

*4 The Court will deny, solely as moot, defendant Bowman's motion (Seq. No. 001), pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities, Inc. and Lauria.

The Court will deny, also solely as moot, defendant Lauria's motion (Seq. No. 002), pursuant to  CPLR 3211(a)(1) and (7), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities and Bowman. The Court notes in passing that, as plaintiff replaced Lauria with Bowman as plaintiff's insurance

broker in 2011, Lauria was not responsible for the amount of coverage that plaintiff had at the time of the subject fire. Furthermore, as plaintiff failed to assert her claim in time, and this Court is precluding her request for insurance reimbursement/coverage, any negligence via the broker(s) would not be a proximate cause of plaintiff's subject loss.

The Court will deny, as moot, plaintiff's cross-motion (Seq. No. 001), pursuant to [CPLR 3025\(b\)](#), to amend the instant complaint to add causes of action for negligence as against defendants Lauria and Bowman.

Likewise, the Court will deny, as moot, plaintiff's motion (Seq. No. 004), pursuant to [CPLR 1003](#) and [3025\(b\)](#), for leave to serve a second supplemental summons and amended complaint to add TIC as a defendant to the instant action.

Conclusion

Thus, for the reasons stated hereinabove, this Court rules as follows.

The Court hereby grants the joint motion (Seq. No. 003) by defendants Tower Insurance Company of New York; AmTrust Financial Services, Inc.; AmTrust North America; Castlepoint Insurance Company; Tower Risk Management Corp.; Tower Group, Inc.; and Tower Group Companies, pursuant to [CPLR 3211\(a\)\(1\) and \(7\)](#), to dismiss the instant complaint of plaintiff, Regina Farage, in its entirety.

The Court hereby denies, solely as moot, defendant E.G. Bowman Co.'s motion (Seq. No. 001), pursuant to [CPLR 3211\(a\)\(1\) and \(7\)](#), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities, Inc. and Mark Lauria Associates, Inc.

The Court also hereby denies, solely as moot, defendant Mark Lauria Associates, Inc.'s motion (Seq. No. 002), pursuant to [CPLR 3211\(a\)\(1\) and \(7\)](#), to dismiss the instant action as against it; and to dismiss the causes of action as against co-defendants AXA Global Facilities and E.G. Bowman Co.

The Court hereby denies, as moot, plaintiff's cross-motion (Seq. No. 001), pursuant to [CPLR 3025\(b\)](#), to amend the instant complaint to add causes of action for negligence as against defendants Mark Lauria Associates, Inc. and E.G. Bowman Co.

The Court also hereby denies, as moot, plaintiff's motion (Seq. No. 004), pursuant to [CPLR 1003](#) and [3025\(b\)](#), for leave to serve a second supplemental summons and amended complaint to add Technology Insurance Company, Inc. as a defendant to the instant action.

Accordingly, the Clerk is hereby directed to enter judgment dismissing the instant case in its entirety.

All Citations

Slip Copy, 72 Misc.3d 1206(A), 148 N.Y.S.3d 680 (Table), 2021 WL 2908692, 2021 N.Y. Slip Op. 50653(U)