At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th of April.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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CAROLYN SHOLOSH,

Plaintiff,

- against -

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA, M REMODELING CORP., NYB BUILDERS INC., DCH CONCRETE INC., 361 MACON STREET LLC, and ABC CORPORATION 1-99 (said names being fictitious, true names presently unknown),

Defendants.

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Index No. 519825/2018

DECISION AND ORDER

MOTION SEQUENCE #5

The following e-filed papers read herein:

	NYSCEF Doc. Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	107-132
Opposing Affidavits (Affirmations)	149-152, 155-156
Reply Affidavits (Affirmations)	161-166

Upon the foregoing papers in this action to recover under an insurance policy for damages to real property, defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") moves (in motion [mot.] sequence [seq.] number [no.] 5) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Carolyn Sholosh ("Plaintiff").

Facts and Procedural Background

This action arises out of Plaintiff's claim for insurance coverage for purported damage to her property, a 6-unit apartment building located at 363 Macon Street, Brooklyn, New York (the premises). National Union issued an insurance policy (number BB080808750-03) (the policy) to Plaintiff for coverage relating to the premises, for the period of October 22, 2016 to October 22, 2017. The damage to Plaintiff's property allegedly occurred during the excavation and construction of a neighboring property located at 361 Macon Street. Plaintiff alleges that negligent construction activities on that adjacent property led to the damage to her property. The Plaintiff avers that specifically on August 2, 2017, and again on September 13, 2017, her property was struck by an excavator operated by one of the defendant contractors in this action, which caused extensive damage.

On May 31, 2018, Plaintiff apparently notified National Union of the two separate incidents that purportedly caused damage to her property. By two separate letters, both dated June 1, 2018, National Union notified the Plaintiff that an adjuster was assigned to review the claims and that claim investigations of both losses would continue under a reservation of rights. National Union further noted that the claims were not received until June 1, 2018 and cited the following provisions of the policy:

> **"E. Loss Conditions**
>
> The following conditions apply in addition to the Common Police [sic] Conditions and Commercial Property Conditions:
>
> **3. Duties In The Event Of Loss Or Damage**

a. You must see that the following are done in the event of loss or damage to Covered Property:

(1) As soon as possible give us a description of how, when and where the loss or damage occurred..." (NYSCEF Doc No. 116).

When National Union received the claim by Plaintiff, it retained engineer Brian Olivieri of Haag Construction Consulting to investigate the causes of the alleged damages. Olivieri apparently inspected Plaintiff's property twice, on June 15, 2018 and August 2, 2018. According to Olivieri's investigation, the damage to Plaintiff's property was not caused by impact from an excavator but inadequate support of the foundation at Plaintiff's property during underpinning activities at the neighboring property. Olivieri explained in his reports, dated August 29, 2018 and September 4, 2018, as well as in his sworn affidavit submitted herein, that he did not observe any scrapes, impact marks or other distress to the northwest corner of Plaintiff's property that were indicative of impact from an excavator. According to Olivieri, the impact from an excavator would not produce ongoing cracks that required monitoring and would not have resulted in continuing settlement. In his September 4, 2018 report, Olivieri stated, in pertinent part, as follows:

> "Our review of site conditions and documents revealed the masonry walls and interior finishes experienced displacement and cracks some of which were about one inch wide between June 22, 2017 and August 2, 2017. It was clear based upon our review of documents that the most significant structural movement was old, occurring prior to August 2, 2017 when the crack monitoring installed but continued to experience displacement to a lesser degree with time. The pattern of damages was indicative of differential settlement of the structure due to ground movement associated with the construction and underpinning operations at 361 Macon St. The owner reported that the west foundation wall was impacted by an excavator on September 13, 2017. Although we cannot rule out minor impact to the foundation wall by the excavator boom or arm our review of available documents and site

> conditions revealed no evidence of any significant excavator impact and certainly no evidence of vehicular impact that would cause structural damage on opposite elevations of the structure.
>
> Our review of site conditions revealed that inadequate support for the Sholosh foundation during the underpinning activities caused damage to the north west and south foundation walls of the Sholosh property that in turn caused structural cracks and displacement of the supported solid brick masonry walls. The west brick masonry wall supported wood framed floors at the four levels of the structure and also supported roof joist. The differential displacement of the foundation and brick walls imparted stresses into the plaster drywall ceiling and wall finishes and caused large cracks to develop at these finishes throughout the areas inspected Inspection revealed that supported floors may have experienced differential displacement and settlement as a result of the foundation movement.

(NYSCEF Doc No. 131 at pg 14)

Olivieri also stated in both reports that he reviewed the records of the New York City Department of Buildings ("DOB") as part of his investigation. According to Olivieri, the DOB found construction violations and assessed civil penalties, but its records fail to mention any of the alleged impact from an excavator.

Following its receipt of Olivieri's reports, National Union denied both of Plaintiff's claims by separate letters, each dated September 9, 2018. Both letters referenced the following provisions set forth in the policy:

> "B. Exclusions
>
> 1. We will not pay for loss or damage caused by directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> b. Earth Movement
>
> (4) Earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. Soil conditions include contraction, expansion,

> freezing, thawing, erosion, improperly compacted soil and the action of water under the ground surface." (NYSCEF Doc No. 117)

National Union noted that an investigation of the claims revealed that the losses were caused by "earth movement in relation to the excavation process and not from direct impact from a vehicle or excavator." National Union also set forth the following explanation for its decision to disclaim coverage for Plaintiff's claims:

> "Based on our investigation, the building was built using antiquated methods and the structure experienced age-related deterioration and structural movement prior to any work that commenced on the neighboring property at 361 Macon. There was damage to the north, west and south foundation walls including stone masonry cracks and distress, differential settlement, and interior finish damage as a result of inadequate support for the foundation during the construction and underpinning activities on September 13, 2017. The damages appear to have been a result of inadequate construction, age-related deterioration, and differential settlement. Therefore there would be no coverage that would respond to this claim."

National Union also referenced the policy condition that requires that losses be reported as soon as possible.

Upon receipt of National Union's denial letters, Plaintiff commenced the within action, asserting a breach of contract cause of action against National Union. On February 14, 2019, Plaintiff amended her complaint to add defendant 361 Macon Street, LLC ("361 Macon"), the owner of the neighboring property where the construction activities occurred. In addition, Plaintiff added 361 Macon's contractors, M Remodeling Corp. ("M Remodeling"), NYB Builders, Inc. ("NYB"), and DCH Concrete, Inc. ("DCH") as defendants. National Union thereafter served its Answer to the Amended Complaint, with cross claims against the additional defendants.

Discussion

National Union now moves for summary judgment dismissing the Plaintiff's complaint. In support of its motion, National Union initially argues that the Plaintiff breached the policy condition that requires her to give prompt and timely notice of her losses. Plaintiff and 361 Macon both oppose National Union's motion, and initially argue that discovery is incomplete and, therefore, summary judgment should be denied as premature pursuant to CPLR 3212 (f).

It is well settled that a party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [3d Dept 2016]), and that the failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324). Moreover, summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). However, "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do..." (*Zuckerman*, 49 NY2d at 560).

At the outset, Plaintiff and 361 Macon's assertion that additional discovery may uncover relevant evidence is not sufficient for this court to delay or deny National Union's

motion. The court finds that National Union has tendered sufficient evidence to demonstrate the absence of any material issues of fact related to its denial of coverage under Plaintiff's insurance policy (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The relevant issues herein are whether plaintiff breached the condition of the National Union policy which required prompt notice, and whether the earth movement exclusion contained therein is a bar to coverage. There is ample evidence in the record regarding these issues and Plaintiff and 361 Macon have failed to establish that additional discovery will uncover any new information relevant to the resolution of these issues or that they were unable to investigate the issues themselves. Accordingly, the court will address the merits of National Union's motion.

Notice of the Losses

National Union maintains that the Plaintiff failed to give prompt notice of the alleged damage to her property. In response to National Union's interrogatories and in Plaintiff's document production, Plaintiff indicated that she first learned of the alleged damage to her property in August and September of 2017 when the damage complained of allegedly occurred. Plaintiff indicated that she was aware of the damage but sought to resolve the issues with her neighbor. Plaintiff produced an August 3, 2017 crack monitoring report from Ascan Consulting, which reveals that Plaintiff had crack monitors installed on August 2, 2017 (the date of the first alleged impact). Plaintiff also produced a Temporary License Agreement between herself and her neighbor which grants 361 Macon a license to enter Plaintiff's property to make repairs as of December 28, 2017. Plaintiff

also produced an October 15, 2017 letter in which she granted NYB access to her property to repair the electrical panel in the basement of the premises.

In addition, Plaintiff's building manager at the time of the alleged damage, Marina Sholosh (M. Sholosh), executed affidavits in January and February of 2018, explaining that 361 Macon's contractors attempted to repair the damage they caused to Plaintiff's property while conducting excavation work at 361 Macon. M. Sholosh also testified in her deposition that she was aware of the damage to Plaintiff's property as of August 2, 2017 and September 13, 2017 but did not report it to National Union until June 1, 2018 because she was attempting to recover directly from the neighboring property owner and its contractors. She further stated that significant repairs were made to Plaintiff's property before National Union was notified of any damage. M. Sholosh also testified that she retained P.E.I. Engineering in October 2017 to investigate the cause of the damage to Plaintiff's property. Herman Silverberg, P.E., on behalf of P.E.I. Engineering, inspected the Plaintiff's property on September 3, 2017 and issued a report wherein he opined that the damage to Plaintiff's property was primarily a result of the underpinning activities that took place at the adjacent property at 361 Macon Street. He summarized his findings as follows:

"IV. Findings

> In conclusion, it is my opinion with a reasonable degree of engineering certainty that the cause of the observed structural damage to the building at 363 Macon St., Brooklyn, is due to the improper placement of required underpinning of the side wall which is adjacent to the new construction at 361 Macon St., Brooklyn.

> The structural damage is the result of the side wall tilting and settling causing the wall to pull away from its connection with both the rear and front walls.
>
> Further damage to the side wall was due to construction equipment impacting the side wall and crushing a large area of the garden apartment wall in the mid-area of the apartment." (NYSCEF Doc No. 128 at pgs 4-5).

It is well settled that when an insurance policy requires that notice of an occurrence or action be given promptly, notice must be given within a reasonable time in view of all of the facts and circumstances (*see Eagle Ins. Co. v Zuckerman,* 301 AD2d 493, 495 [2d Dept 2003]; *see also Merchants Mut. Ins. Co. v Hoffman,* 56 NY2d 799, 801-802 [1982]). "Providing an insurer with timely notice of a potential claim is a condition precedent, and thus absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy." (*Steinberg v Hermitage Insurance Co.*, 26 AD3d 426, 427 [2d Dept 2006] [internal quotation marks and citations omitted]; *see Security Mut. Ins. Co. of N.Y. v Acker–Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]; *Sayed v Macari,* 296 AD2d 396, 397 [2d Dept 2002]). "Ordinarily, the reasonableness of any delay and the sufficiency of the excuse offered is a matter for trial. In the absence of excuse or mitigating factors, however, the issue poses a legal question for the court and, in such circumstances, relatively short periods have been found to be unreasonable as a matter of law" (*Todd v Bankers Life & Cas. Co.*, 135 AD2d 1066, 1067 [3d Dept 1987]). For example, in *Steinberg v Hermitage Insurance Co.* (26 AD3d 426), the Second Department found a delay of 57 days to be unreasonable as a matter of law (*id.* at 427; *see also Horowitz v Transamerica Ins. Co.*, 257 AD2d 560 [2d Dept 1999] [48 days]; *Government Employees Ins. Co. v. Elman* 40 AD2d 994 [2d Dept 1972] [29 days]; *Vanderbilt v Indemnity Ins. Co. of N. Am.*, 265 AD 495 [2d

Dept 1943] [28 days]).

Here, Plaintiff acknowledges that the dates of the alleged losses (property damage) were August 2, 2017 and September 13, 2017, and concedes that she was aware of such losses on the dates on which they occurred. In addition, Plaintiff does not dispute that she filed a claim with National Union on May 31, 2018 to recover for said losses under its policy. Thus, it is undisputed that the Plaintiff did not provide National Union with notice of her alleged losses until 302 days (approximately 10 months) after she learned of the property damage on August 2, 2017, and 260 days (approximately 8 months) after learning of the damage on September 13, 2017. Under the circumstances presented herein, the court finds that Plaintiff's 10-month and 8-month delay in notifying National Union was unreasonable as she failed to notify her insurer "as soon as possible" as required under the insurance policy (*see Trepel v Asian Pacific Express Corp.*, 16 AD3d 405 [2d Dept 2005]).

Moreover, Plaintiff has failed to proffer a valid reason for the delay in notifying National Union. Contrary to Plaintiff's assertion, her delay is not excused simply because she believed another party was to blame and could do the repairs, or because she did not think she could recover from National Union. Regardless of the circumstances, "the insured still has a duty to notify his insurer of the damage caused by another party" (*Pffefer v Harleysville Group, Inc.*, 502 Fed. Appx. 28, 30 [2d Cir. 2012], citing *Heydt Contracting Corp v. Am. Home Assurance Co.*, 146 AD2d 497 [1st Dept 1989]). In *Heydt*, the First Department held that a delay of only four months was unreasonable as a matter of law when an insured sought to recover from a third-party rather than notify its insurer of its losses, stating:

> "[i]ndeed, plaintiff apparently knew about the fire almost immediately and took no action to inform defendant insurance company for 131 days simply because it was relying upon the carriers of the building owner and/or construction manager for compensation. However, plaintiff's assumption that other parties would bear ultimate responsibility for its property loss is insufficient as a matter of law to excuse the more than four-month delay in giving notice." (*id.* at 499).

Here, Plaintiff's opposition to the motion (as well as the opposition of 361 Macon) neither controverts the relevant facts asserted by National Union nor offers a valid excuse for her delayed notice. Thus, National Union was not obligated to cover Plaintiff's losses under the policy due to Plaintiff's failure to notify it within a reasonable amount of time.

Earth Movement Exclusion

Furthermore, National Union has made a *prima facie* showing that the "earth movement" exclusion contained in the policy bars coverage for Plaintiff's claims. In particular, the policy states that National Union will not pay for loss or damage due to earth movement even when there are other causes attributed to the loss or damage caused by earth movement, and that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The policy further states that the earth movement exclusion applies, "regardless of whether any of the above, in paragraphs (1) through (5), is caused by an act of nature or is otherwise caused." Even if the damage to Plaintiff's property was, in part, caused by impact from an excavator, as Plaintiff argues, National Union contends it is not liable for the loss because the earth movement exclusion applies. Plaintiff and 361 Macon both oppose this branch of National Union's motion arguing that the exclusion is inapplicable because any earth movement that may have taken place was caused by man-made conditions, namely the impact of an

excavator.

To deny coverage based on the exclusion, the insurer must show that the exclusion is stated in clear and unambiguous language, is not subject to any other reasonable interpretation, and applies to the plaintiff's claim (*see Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009]; *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). Exclusions must be strictly and narrowly construed and may not be extended by interpretation (*see Incorporated Vil. of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293, 298 [1996], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

The court finds that National Union has met its initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that the exclusion clearly and unambiguously applies to the Plaintiff's property loss (*see Bentoria Holdings, Inc. v Travelers Indem. Co.*, 20 NY3d 65, 68 [2012][Court of Appeals held that a policy exclusion that applies to earth movement "whether naturally occurring or due to man made or other artificial causes" bars recovery for damages due to excavation on adjacent lots]; *Harleysville Ins. Co. of New York v Potamianos Properties, LLC*, 108 AD3d 1110 [4th Dept 2013] [similarly-worded water loss exclusion, "regardless of whether [the loss] is caused by an act of nature or is otherwise caused," precluded coverage to water damage to basement]; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 417 [2d Dept 2007]).

The plain language of the exclusion herein was to relieve National Union, as the insurer, from loss or damage to covered property caused directly or indirectly by earth movement, including "earth sinking . . ., rising or shifting including soil conditions which

cause settling, cracking or other disarrangement of foundations or other parts of realty . . . ." In addition, the policy unambiguously states that losses due to "earth movement" are excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Here, both parties' engineers opined that the damage to Plaintiff's property was caused, at least in part, by earth movement. Since Plaintiff's losses were, at least partially, attributable to the resultant earth movement, such damage falls within the ambit of the earth movement exclusion provision of the policy. Although there is evidence that some damage to Plaintiff's property may have been caused by impact from an excavator, there is no proof in the record that the damage was caused solely by the excavator (*see Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 515 [2d Dept 2007]). Therefore, even though the cause of the earth movement beneath the Plaintiff's structure may have been a "covered peril" under the policy, there is no ambiguity that the policy excludes coverage for earth movement regardless of the cause (*see Labate v Liberty Mut. Ins. Co.*, 45 AD3d 811 [2d Dept 2007) [granting summary judgment for insurer where "[t]he defendant's expert and the plaintiff's own engineers . . . all opined that the property damage was caused directly or indirectly by earth movement and settlement"]; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415 [earth movement exclusion barred coverage for damage to house when "concrete slab foundation . . . settled, sank, and cracked"); *Kula v State Farm Fire & Cas. Co.*, 212 AD2d 16 [2d Dept 1997]). The Plaintiff has failed to raise an issue of fact (*see Rego Park Holdings, LLC v Aspen Specialty Ins. Co.*, 140 AD3d 1147, 1149 [2d Dept 2016]). Accordingly, National Union has demonstrated its entitlement to judgment as a matter of law by establishing that the policy does not provide coverage

for the plaintiff's losses.

The court has considered the remaining contentions of the parties and finds them to be without merit.

Conclusion

It is therefore,

ORDERED that National Union's motion (mot. seq. no. 5) for summary judgment is granted, and the action as against National Union is dismissed.

The new caption shall read as follows:

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CAROLYN SHOLOSH, Index No. 519825/2018

Plaintiff,

- against -

M REMODELING CORP., NYB BUILDERS INC., DCH CONCRETE INC., 361 MACON STREET LLC, and ABC CORPORATION 1-99 (said names being fictitious, true names presently unknown),

Defendants.

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All relief not herein granted is denied.

This constitutes the decision, order and judgment of the court.

ENTER:

Carl J. Landicino, J.S.C.

2022 APR 27 AM 9:23

COUNTY CLERK'S OFFICE FILED