

2016 WL 3913776 (N.Y.Sup.), 2016 N.Y. Slip Op. 31720(U) (Trial Order)  
Supreme Court of New York.

IA 20  
Bronx County

**\*\*1** TV REALTY, LLC, Plaintiffs,

v.

TOWER INSURANCE COMPANY OF NEW YORK, Defendant.

No. 306589/2013.

July 11, 2016.

**Decision and Order**

Kenneth L. Thompson, Jr., Judge.

\*1 The following papers numbered 1 to 7 read on this motion to dismiss

<b>No On Calendar of February 5, 2016</b>	<b>PAPERS NUMBER</b>
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4
Answering Affidavit and Exhibits	6
Replying Affidavit and Exhibits	7
Affidavit	_____
Pleadings -- Exhibit	_____
Memorandum of Law	5
Stipulation -- Referee's Report -- Minutes	_____
Filed papers	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Tower Insurance Company of New York, (Tower) moves pursuant to CPLR 3212 to dismiss the claims of defendant, TV Realty, LLC, (Realty). Realty claims that Tower breached its contractual obligations to make payment for a covered loss due to wind and rain damage to the roof and interior below the roof in a building owned by Realty. Tower disclaimed coverage on several grounds including failure to promptly notify Tower of the loss and disposing of the damaged property preventing Tower from inspecting the damaged roof materials.

Plaintiff alleges that the damage to the subject roof occurred during a storm with high winds and rain on December 26-27, 2012. It is undisputed that the president of Realty, Victor Miceli, (Miceli), contacted a public adjuster, Ben Gruber, (Gruber), on December 27, 2012 by telephone and informed Gruber that serious damage had been done to the subject

roof. While plaintiff notified its public adjuster on December 27, 2012 of the damage, plaintiff failed to contact Tower until January 10, 2013, and further postponed a scheduled visit of Tower's adjuster to view the damages from January 18<sup>th</sup> to January 24<sup>th</sup> at the behest of plaintiff. When \*\*2 Tower's adjuster appeared for the January 24th appointment the roof was entirely repaired, and the debris from the old roof had been removed from the premises and discarded. These actions breached two sections of the policy, one requiring prompt notice of a loss, and the other to make damaged property available for inspection.

The law is settled that an insurer is not obligated to pay for the loss of its insured in the absence of timely notice in accordance with the terms of the policy (*Security Mut. Ins. Co. v Acker-Fitzsimons Corp.*, 31 NY2d 436; *Power Auth. v Westinghouse Elec. Corp.*, 117 AD2d 336). As the Court of Appeals declared in *Security Mut. Ins. Co. v Acker-Fitzsimons Corp.* (supra., at 440), “[n]otice provisions in insurance policies afford the insurer an opportunity to protect itself ... and the giving of the required notice is a condition to the insurer's liability.... Absent a valid excuse, a failure to satisfy the notice requirement vitiates the policy ... and the insurer need not show prejudice before it can assert the defense of noncompliance”. In *Power Auth. v Westinghouse Elec. Corp.* (supra., at 339), this court noted that “[w]ithout timely notice, an insurer may be deprived of the opportunity to investigate a claim and is rendered vulnerable to fraud.

*Heydt Contracting Corp. v. Am. Home Assur. Co.*, 146 A.D.2d 497, 498 [1st Dept 1989]).

\*2 Plaintiff argues that the delay in notifying Tower was necessitated by the busy schedule of plaintiff's public adjuster. However, the public adjuster and his schedule are irrelevant to plaintiff's obligations to provide prompt notice to Tower of a potential covered loss. There is not a “single valid” excuse for plaintiff's failure to notify Tower of the damages just before or just after notifying plaintiff's public adjuster of the damages. The notice to Tower was required under the policy, notice to plaintiff's public adjuster was merely at the plaintiff's discretion. While it is not required for Tower to show prejudice for failure to give prompt notice, the delay in this case was prejudicial, as Tower never had the opportunity to inspect the damaged roof, or the debris from the roof after the roof was replaced.

\*\*3 Accordingly, defendant's motion is granted and the complaint is hereby dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: JUN 28 2016

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**KENNETH L. THOMPSON J.S.C.**