TO BE ARGUED Matthew Hug
TIME REQ. 15 MIN

Docket No. APL-2023-00141

NEW YORK STATE COURT OF APPEALS

Regina Farage,
Appellant,

v.

Associated Insurance Management Corp., et. al.,
Defendants.

Tower Insurance Company of New York, et. al.,
Respondents.

APPELLANT'S BRIEF

Matthew C. Hug, Esq.
Attorney for Appellant
Hug Law, PLLC
PO Box 14263
Albany, New York 12212
Tel. (518) 283-3288

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PRELIMINARY STATEMENT

By permission of the Hon. Rowan D. Wilson, Chief Judge, granted September 19, 2023, appellant appeals from the Orders of the Appellate Division, First Department, entered November 10, 2022 and March 2, 2023, affirming a Decision and Order of the Supreme Court of New York County (Engoron, J.) rendered July 2, 2021 and November 10, 2021, dismissing appellant's complaint pursuant to CPLR 3211.

QUESTIONS PRESENTED

Did the lower courts err by dismissing appellant's complaint as against the Tower Insurance Company of New York respondents based upon CPLR 3211?

Yes.

Was the Appellate Division's Decision, dismissing all claims as against the Lauria/Bowman respondents erroneous as a matter of law, mandating reversal and remand to Supreme Court for further proceedings as to appellant's claims against them?

Yes.

PROCEDURAL HISTORY

On August 4, 2014, appellant's multi-unit rental property was destroyed by fire. (A. 20-24). She had insured the building for the full replacement value of the property with the same company from 2000 through 2014. Each year she paid the premium which included an additional charge to enhance the value of the limit on coverage by a minimum of 8% per year. (A. 26). After the fire she promptly notified the insurance company and set about trying to rehabilitate the badly damaged building. (A. 19-31). Unfortunately the insurance company acted in bad faith both in frustrating her efforts to complete the restoration (as their obligation to tender full replacement value did not arise until after the building was fully restored) and by slashing appellant's coverage by claiming she was underinsured. (A. 19-31).

After six years of fighting through the insurance company's bad faith efforts stalling repairs, appellant completed the restoration in July 2020 at a personal cost of $1,300,000.00. (A. 19-31). When Tower refused to pay any additional costs beyond the meager $313,000.00 (after their calculation of an underinsurance penalty that reduced her coverage from $691,737 as reflected in her policy) she commenced the within action against both the insurance company (and its dizzying array of affiliates, holding companies and parent companies) as well as against her insurance brokers that failed to ensure that she was properly insured. (A. 19-31).

All respondents filed pre-answer motions to dismiss pursuant to CPLR 3211(a)(1) claiming that a provision in the insurance policy reduced the statute of limitations for commencing an action to two years from the date of the loss. Appellant opposed the motion and argued that since the policy required her to complete all repairs before she could commence an action and since those repairs took more than two years due to their complexity combined with the insurance companies bad faith conduct in frustrating her ability to complete them rendered the truncated statute of limitations unenforceable pursuant to this Court's holding in Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.2d 511 (2014).

In a deeply flawed decision, the New York County Supreme Court (Engoron, J.) did not follow basic black-letter rules that govern pre-answer motions to dismiss (i.e. he openly elected not to presume all facts as alleged by appellant to be true, he did not grant her allegations any favorable inferences, improperly resolved issues of fact, and resolved those issues of fact by favoring unsworn assertions made by counsel in a memorandum of law over the allegations in the complaint), misunderstood the rules related to adjudicating motions to dismiss based upon "documentary evidence" (by concluding that a memorandum of law was documentary evidence, and failing to apply the proper standard) and did not properly apply binding precedent. As a result, Supreme Court erroneously granted the insurance company

respondents' motion to dismiss pursuant to CPLR 3211(a)(1) and denied, solely as moot, the motions to dismiss filed by the insurance brokers. The Appellate Division, First Department erroneously affirmed. This Court granted leave to appeal.

STATEMENT OF FACTS

On August 4, 2014, a fire consumed appellant's six-unit rental property, located at 95-97 Sherman Avenue in Staten Island. (A. 20-24). Six years, to the day, on August 4, 2020, she commenced the within action in Supreme Court, New York County, by filing a summons with notice against the "Tower respondents" (Associated Insurance Management Corp., Tower Insurance Company of New York, AmTrust North America, Castlepoint Insurance Company, Tower Risk Management Corp., Tower Group, Inc., Tower Group Companies, Legion Insurance Group, and Colonia Insurance) and the "Lauria/Bowman" respondents (AXA Global Risks US Insurance Company, Global Facilities, Inc., Morstan General Agency, Inc., E.G. Bowman Co., Inc., and Mark Lauria Associates, Inc.). (A. 13-16). On January 29, 2021, appellant filed a complaint against all respondents raising a total of five causes of action based upon the Tower respondents refusal to pay the full replacement value of her building. (A. 19-31).

In the complaint, appellant alleged that she "contracted with Lauria to procure property insurance at the time she purchased the building in 1998. (A. 24). Initially, the building was insured with the Colonia Insurance Company, and beginning in 2000, Lauria procured appellant's policy from Tower and renewed said policy annually through 2011. (A. 24). In 2011, appellant replaced Lauria with Bowman as her insurance broker, and Bowman renewed the Tower policy each year thereafter

through 2014. (A. 24-25). Appellant alleged that she repeatedly requested both Lauria and Bowman to obtain "coverage for the full replacement value of the property" and made several unfulfilled requests for a complete copy of her insurance policy. (A. 25-26).

Upon the annual renewal of the policy, Tower provided a document entitled "[I]nsuring your building for the full replacement cost – what you should know." (A. 24). This document stated:

> "Your policy provides replacement cost coverage on your building. In the event of a loss, there will be no deduction for depreciation from the claim settlement. Additionally, in the event that your building limit is inadequate to cover your loss, we will pay up to an additional 25% of the building limit shown on your policy." (A. 24).

The document further notified appellant that Tower would conduct an initial "building valuation" (and had the discretion to complete a new valuation annually upon renewal) and that her "building limit may be increased based upon [their] valuation" whether based upon the actual results of the valuation or "based on national statistics for changes in costs of construction and inflation." (A. 24-25). According to these notices, the purpose of this process was to "ensure that you have adequate coverage in the event of a total loss to your building." (A. 26).

This full replacement cost insurance contained "an important caveat" that appellant lacked awareness of due to Lauria and Bowman's

failure to provide her with complete copies of her insurance policy. (A. 24). This "important caveat" provided that "if at the time of the loss, the Limit of Insurance 'is less than 80% of the full replacement cost of the property immediately before the loss,' a co-insurance factor is applied to reduce the coverage below the Limit of Insurance. Specifically, if the property is insured at less than 80% of the actual replacement cost, Tower would only pay a 'proportion of the cost to repair or replace' the property, equal to 'the ratio of the application Limit of Insurance to 80% of the cost of repair, or replacement." (A. 25).

Appellant further alleged that the 2014 renewal certificate indicated that the insurance limit for the building was set at $691,737 with an "auto increase-building limit" set at 8%. Although the policy included an automatic 8% increase, Tower did not apply this increase annually thereby exposing her to a co-insurance penalty in the event of total loss. (A. 26).

In the complaint, appellant blamed Lauria and Bowman and Global Facilities for breaching their contract with her by failing to "ensure that the automatic increase in the Building Limit had been properly applied, or that [the] limit was otherwise kept adequate to provide full coverage for the cost of replacing the property." (A. 26). She also alleged that Tower/AmTrust never notified her – during the 14 years she paid premiums to them – that her building was underinsured, not even when their adjuster inspected it the year before the catastrophic fire. (A. 26).

After the catastrophic fire, appellant "promptly submitted the claim and cooperated with the underwriting process" and sought full replacement coverage. Her complaint alleged that Tower/AmTrust then "set out to deprive her of the full replacement value coverage it had promised." (A. 27). Initially, Tower/AmTrust asserted that the actual replacement cost for the building was $1,462,450.00 and since the Limit of Insurance from the 2014 policy (that Tower/AmTrust had not enhanced) of $691,737.00 was less than 80% of the replacement cost, they applied a coinsurance penalty and reduced her coverage to $313,472.12 (less than half of the Limit of Insurance that had already been deflated by Tower/AmTrust's failure to apply the annual 8% increase in coverage). (R. 488). Appellant alleged that Tower/AmTrust's "application of the co-insurance penalty was a betrayal of its promise to 'provide[] replacement cost protection" and was done in "bad faith." (A. 27-28).

The complaint further alleged that Tower/AmTrust engaged in additional bad faith tactics in order to frustrate her ability to repair the property. According to the complaint, "[t]he restoration of [appellant's] property would have been a multi-year process even if Tower/AmTrust had complied with its obligations" but it became drawn out by their bad faith actions. (A. 22). For example, appellant alleged that Tower/AmTrust "assigned a succession of claims adjusters, none of whom would take responsibility for the claims handling process." (A. 27). Then they

"forbade" her from commencing the repairs until after the property "was inspected by [their] expert" but they "delayed in sending the so-called expert" who displayed "no understanding of the engineering challenges posed by the structural damage" to the building. (A. 27). These tactics "significantly delayed" remediation of the property and deprived appellant of rental income. (A. 27).

Worse, Tower/AmTrust "reneged on its obligation to cover the full cost of replacing the damaged property" which required appellant to obtain more than one million dollars in financing to complete the repairs. (A. 27-28). Financing proved near impossible, because Tower/AmTrust refused to pay invoices submitted by their vendors for the initial remediation work (boarding up windows and removing debris) all of whom placed liens against the property. (A. 28). The imposition of liens frustrated her efforts to obtain secured financing. According to the complaint, due to Tower/AmTrust's bad faith and unfair dealing, appellant was not able to complete the restoration of her property until July 2020 at a personal cost of $1.3 million. (A. 28).

In the first cause of action, appellant alleged that Tower/AmTrust breached the insurance policy contract by refusing to compensate her for "the full replacement cost of the Building, as well as for lost business income and other damaged property." (A. 28-29).

In the second cause of action, appellant alleged that Tower/AmTrust breached the duty of good faith and fair dealing by knowingly

avoiding its obligations to her in bad faith by failing to notify appellant of its purported position that the subject property was underinsured, failing to properly apply the automatic 8% increase to the building limit, failing to pay the full replacement cost of the building, refusing to pay its own vendors that resulted in the imposition of liens against the subject property that impeded appellant's ability to secure financing to complete the repairs that Tower/AmTrust improperly refused to cover. (A. 29).

The third cause of action, alleged that Castlepoint/National General breached the insurance policy by refusing to compensate her for the damage and loss of personal property. (A. 29-30). The fourth cause of action alleged that Bowman and Global Facilities breached their contract with appellant by failing to procure the appropriate insurance policy and for failing to ensure that the automatic increase in the building limit was properly applied. (A. 30). The fifth cause of action alleged that Mark Lauria Associates, breached their contract with appellant by failing to procure an appropriate insurance policy and for failing to ensure that the automatic increase in the building limit was properly applied. (A. 30-31).

All respondents (except Global Facilities, Inc., who never appeared in the action) filed pre-answer motions to dismiss pursuant to CPLR 3211(a)(1) and (7). The Tower respondents (comprised of 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) argued that the complaint had to be dismissed in its entirety pursuant to CPLR 3211(a)(1) because the written policy limitations reduced the otherwise applicable statute of limitations from six years to two years measured from the date of the loss. (A. 32-202). Since appellant commenced the action on August 4, 2020, just under six years from the date of the loss, the Tower respondents asserted that the action was time-barred. (A. 32-202).[1] Respondents Lauria and Bowman's motion to dismiss was largely predicated on the same statute of limitations claim made by the Tower respondents. (A. 104-108).[2]

Appellant opposed all motions to dismiss. With respect to the contractually reduced statute of limitations argument, appellant argued that the Tower respondents had failed to establish their entitlement to

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[1] Tower respondents also sought dismissal on several other grounds, none of which are relevant to this appeal, including, that the other named entities (aside from Tower Insurance Company of New York) had no privity of contract with appellant and that the covenant of good faith and fair dealing claim was identical to the breach of contract claim and had to be dismissed. (A. 188-192).

[2] Respondents Lauria and Bowman Tower respondents also sought dismissal on several other grounds, none of which are relevant to this appeal, including, that the six year statute of limitations ran from the first date appellant obtained an insurance policy from them in 2000, that the statute of limitations ran as to them from the date the acquired the policy at issue (June 21, 2014), that the statute of limitations expired under any view by August 4, 2020; that the statute of frauds prohibited her claim against them, that they did not have a contract with appellant to procure "adequate" coverage, that the "duty to read" the policy prohibited appellant's claim and that she should be estopped from bringing her claim because she renewed it annually. (A. 37-39, 104-108, 115-119).

dismissal pursuant to CPLR 3211(a)(1) because she alleged that the rehabilitation work could not be completed within the truncated statute of limitations period rendering it unenforceable in light of this Court's binding precedent in Executive Plaza (a case that could not have been more on point). In that regard, appellant pointed out that the Policy's "Legal Action Against Us" provision prohibited the commencement of any legal action unless "there has been full compliance with all the terms of this insurance" and "the action is brought within two years after the date on which the direct physical loss or damage occurred." (A. 266-314). "Full compliance with all the terms of this insurance" included the caveat that all repairs had to be completed before the insurer was required to make the full replacement value payment. In other words, appellant could not commence an action – pursuant to the terms of the policy –until all repairs were completed. Since the complaint clearly alleged that "given the massive structural damage wrought by the fire" and "the bad faith conduct of Tower/AmTrust" "it was not possible for [appellant] to complete the restoration of the property until July 2020", appellant raised issues of fact regarding whether – in light of the bright line rule laid out by this Court in Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.2d 511 (2014) – the policy's truncated statute of limitations was enforceable. (A. 441-446).

Appellant opposed the Tower respondents' motion to dismiss the breach of the covenant of good faith and fair dealing as "duplicative" as

lacking merit as she clearly asserted that claim to obtain "consequential damages above the policy limits (in the form of lost rental income) arising from Tower/AmTrust's bad faith delays and failure to pay for the replacement cost of the Building." (A. 445). Appellant pointed out that the complaint clearly alleged that "as a result of Tower/AmTrust's bad faith delays and failure to pay the replacement costs, the restoration of the property was delayed by years, depriving [her] of rental income from the building." (A. 445-446). Finally, appellant opposed the Tower respondents' attempt to remove all named defendants, save for Tower Insurance Company of New York, as there were outstanding issues of fact as to whether the other defendant "assumed obligations to [appellant] under the policy. For example, AmTrust North America, Inc., issued partial payments to [appellant] under the policy, and sent correspondence indicating that it was 'administering' her claim, rejecting the claim for replacement costs, and purporting to reserve its rights under the policy." (A. 446-447). Furthermore, Castlepoint "issued a homeowners policy to [appellant] and her claim under that policy for damage to her personal property was ignored." (A. 446-447).

With respect to the Lauria/Bowman respondents, appellant argued that she had sufficiently pleaded her cause of action sounding in breach of contract as against the Lauria/Bowman respondents, by alleging that Lauria/Bowman failed to procure the coverage appellant requested, that they undertook a duty to advise her of the appropriate level of coverage

and to monitor coverage limits overtime as necessary to provide full replacement-cost coverage, that Lauria/Bowman received consideration in return for undertaking these duties, that they breached those duties and appellant suffered damages as a result. (A. 248-264). Appellant argued that the statute of frauds did not apply, because the statute of frauds is limited to contracts that have "absolutely no possibility in fact and law of full performance in one year." (A. 260). Appellant also argued that there were issues of fact related to the "duty to read" defense advanced by Lauria/Bowman, pointing out that she alleged that they refused to tender a complete copy of the insurance policy and that she depended upon their expertise with respect to insurance matters. Furthermore, appellant argued that the "duty to read" defense – as advanced – was not recognized by the courts. (A. 262).

Appellant also opposed the numerous statute of limitations defenses advanced by Lauria/Bowman, pointing out that they were based upon a misunderstanding of the calculation of a statute of limitations, that the series of Executive Orders issued by Governor Andrew Cuomo in response to the COVID-19 pandemic tolled all statutes of limitations from March 20, 2020 through November 4, 2020, and that Lauria/Bowman's actions in withholding the complete policy from her concealed their breach of duty thereby equitably tolling the statute of limitations. (A. 262-263). Finally, appellant argued that since her claims also sounded in negligence (based upon her motion to

amend the complaint, discussed below) the statute of limitations of three years did not begin to accrue until the date Tower conclusively rejected her claim for reimbursement of out-of-pocket defense costs on September 1, 2020. (A. 263). Finally, appellant argued that the Lauria/ Bowman respondents lacked standing to seek dismissal of the claim as against Global Facilities as that entity never entered the proceedings. (A. 263-264).

In addition to opposing the pre-answer motions to dismiss, appellant also filed a motion seeking leave to amend her complaint to add negligence claims against Global Facilities, Lauria and Bowman. (A. 203-243). Appellant argued that leave should be granted because the same facts that gave rise to the breach of contract claim supported the negligence claim. (A. 203-243). Given that issue had not been joined, appellant argued that there could be no prejudice suffered by the additional claim. (A. 203-243). Appellant also sought to add Technology Insurance Company, Inc., based upon an email written by Tower respondents' counsel that stated that Technology Insurance Company may have "assumed liability for the policy issued to [appellant]." (R. 564).

The Tower Respondents opposed the amendment of the complaint to add Technology Insurance Company, Inc. based upon their same statute of limitations argument; notably they did not oppose on the ground that they would not be a proper party. (A. 402-413).

Respondents Lauria/Bowman responded to appellant's opposition papers by asserting that the Governor's Executive Order suspending the statute of limitations had no force and effect because the Electronic Filing System was active, and that equitable tolling does not apply apparently as a matter of law. (A. 357-366). The Tower respondents also raised an argument, for the first time in the reply papers, that appellant's claims were barred by her failure to contact them within 180 days of loss pursuant to another clause in the insurance policy. Because it was raised in a reply memorandum of law, appellant did not have an opportunity to demonstrate the speciousness of this argument. (A. 460-477).

The New York County Supreme Court (Engoron, J.) in a decision and order, peppered with resolutions of issues of fact, opined that the "two-year limitation period * * * bars plaintiff's claims herein." (A. 6-11). The lower court erroneously reasoned that Executive Plaza LLC did not apply because, in its opinion, "plaintiff has failed to demonstrate sufficiently that she attempted to repair the Property within those two years" and "did nothing to protect her rights as the suit limitation expired." (A. 6-11). The court failed to offer any basis for this opinion. (A. 6-11). Finally, the court concluded that appellant's allegations that "she promptly submitted the claim" was "completely insufficient when compared to Tower/AmTrust's assertion that plaintiff did not contact Tower/AmTrust within the necessary 180-day period." (A. 6-11). The

court did not address any of Tower's other arguments and dismissed the complaint as against them in its entirety.

The court denied the Lauria/Bowman's motions to dismiss[3] "solely as moot" based upon its statute of limitations finding as to the Tower respondents, and denied, "solely as moot" the motion to amend the complaint. (A. 10-12).

On August 9, 2021, appellant filed a motion to renew/reargue. She contended that the Court erred by latching onto a throw-away line in the Tower respondents' attorney's reply memorandum of law that she had to make a claim within 180 days from the loss. (A. 486-525). Appellant complained that the citation to this provision was not only a gross misreading of the policy and the facts surrounding the controversy, that she had been deprived of responding because it was included for the first time in a reply, and was completely unsupported by any documentary evidence or sworn statements of fact (having, as stated, been slipped into a memorandum of law). As appellant pointed out, the 180-day argument was wholly specious as that provision only applied "if the insured first elects to settle the claim on an actual cash value basis." (A. 489-493). As she never sought to settle the claim on an actual cash basis, the 180 day provision had no applicability. (A. 489-493).

[3] The court quizzically included Global Facilities in its decision, even though they neither filed an answer nor a motion to dismiss and hence defaulted in this action.

In its Decision and Order, the Supreme Court, New York County denied appellant's motion, holding that "[t]he sad but dispositive fact in this litigation is that plaintiff's claim * * * [was filed] many years too late." (A. 12).

The Appellate Division, First Department affirmed Supreme Court's Decision and Order and held that the "Tower defendants conclusively established a defense to the asserted claims as a matter of law by submitting documentary evidence that 'the [subject insurance] policy contains a two-year limitations period and that plaintiffs' action was commenced after the expiration of that period" finding that "plaintiff here failed to alleged that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so." (A. 3-4). Having found the statute of limitations issue dispositive as to the Tower respondents, the Appellate Division did not address any other arguments as to them. That court did, however, reverse Supreme Court's denial of Lauria/Bowman's motion to dismiss. In that regard, the Appellate Division granted their motion and dismissed the claims against them finding that their alleged negligence/breach was not the proximate cause of her damages due to her purported failure to timely commence the action against the Tower respondents. (A. 3-4).

By Order dated September 19, 2023, this Court granted leave to appeal. (A. 2).

ARGUMENT
POINT ONE

THE LOWER COURT ERRED BY DISMISSING APPELLANT'S COMPLAINT AS AGAINST THE TOWER RESPONDENTS BASED UPON CPLR 3211(a)(1) and (7).

While Supreme Court couched its decision in terms of dismissal pursuant to CPLR 3211(a)(1) and (7), its reasoning only related to dismissal based upon documentary evidence. CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action against him on the ground that a defense is founded upon documentary evidence." "A party seeking dismissal pursuant to CPLR 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Mazur Bros. Realty, LLC v. State of New York, 59 A.D.3d 401, 402 (2nd Dept. 2009), quoting Sullivan v. State of New York, 34 A.D.3d 443, 445 (2nd Dept. 2006), accord Nevin v. Laclede Professional Prods., 274 A.D.2d 453 (2nd Dept. 2000); See, Leon v. Martinez, 84 N.Y.2d 83, 83-87 (1988).

A motion to dismiss on the ground that the action is barred by documentary evidence * * * may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations,

conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

> "Note the extremism of the burden of proof – that the documentary evidence not only refute the allegations of the plaintiff's complaint, but 'utterly' do so, and that defense not only be established as a matter of law, but that it 'conclusively' do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute." Dillon, McKinney's Practice Commentaries, CPLR 3211 (2021).

In addition to conservatively examining the four corners of the documentary evidence the reviewing court must liberally construe all facts alleged, accept them as true and afford every possible favorable inference drawn in favor of the plaintiff. See, Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Neither Supreme Court nor the Appellate Division followed these fundamental rules which led to an erroneous conclusion.

It is quite clear that section E of the "Business Owners Special Property Form" (the documentary evidence relied upon by respondents) does not utterly refute all of the allegations in the complaint nor does it

conclusively establish that the respondents' are entitled to dismissal stemming from their statute of limitations defense as a matter of law. Section E(6)(d) of the policy, explicitly provides that no claim may be made "until the lost or damaged property is actually repaired or replaced." (A. 165-168). Section E(4) entitled "Legal Action Against Us" reduces the statute of limitations to "2 years after the date on which the direct physical loss or damage occurred." Read together, §§ E(4) and (6)(d) cannot – on their face – utterly refute appellant's claims or conclusively establish that the reduced statute of limitations may be applied. (A. 165-168).

The holding in Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511 (2014) conclusively demonstrates that the lower courts erred in finding respondents were entitled to dismissal pursuant to CPLR 3211(a)(1). In Executive Plaza, the U.S. Court of Appeals for the Second Circuit certified a question to this Court that queried: "if a fire insurance policy contains a provision allowing reimbursement of replacement costs only after the property was replaced and requiring the property to be replaced as soon as reasonably possible after the loss; and a provision requiring an insured to bring suit within two years after the loss; is an insured covered for replacement costs if the insured property cannot reasonably be replaced with two years?" Id. at 517-518. This Court clarified that "the problem with the limitation period in this case is not its duration, but its accrual date. It is neither fair nor reasonable to require a

suit within two years from the date of the loss, while imposing a condition precedent to the suit – in this case, completion of replacement of the property – that cannot be met within that two year period." Id. at 518. The fundamental unfairness of such an insurance scheme led this Court to unanimously accurately characterize it as "not really a limitation period at all, but simply a nullification of the claim." Id.

In light of Executive Plaza, the documentary evidence presented here clearly does not – standing alone – conclusively establish that the Tower respondents are entitled to enforcement of the two year statute of limitations. Based solely upon a reading of §§E(4) and (6)(d), in light of this Court's holding in Executive Plaza, it is impossible to conclude that the reduced statute of limitations is reasonable. By its very terms, the policy requires all damaged property to be actually repaired or replaced before their obligation to pay the replacement value will come into existence. The document does not speak for itself, because its enforceability hinges upon consideration of what was reasonable under the circumstances; a hopelessly fact sensitive issue. Such an issue cannot be resolved by pointing to the documentary evidence. Far from utterly establishing the truth of a matter, the documentary evidence here is the baseline for determining whether it may be enforced. See, Digesare Mechanical, Inc. v. U.W. Marx, 176 A.D.3d 1449 (3rd Dept. 2019).

To the extent that it is required, a review of the allegations contained in the complaint – presumed to be true in every respect, with every possible inference granted in appellant's favor – more that sufficiently dispels any notion that the documentary evidence "utterly refutes" the complaint and conclusively establishes respondents' entitlement to dismissal. Appellant's complaint more than adequately alleged that the repairs could not be completed within two years, that they were made as soon as practicable and all delay was the result of the Tower respondents' bad faith conduct. The list of allegations in this regard are so replete throughout the complaint that it is striking that the lower courts could have missed them.

- "[A]s a direct result of Tower/AmTrust's bad faith conduct set forth below, the restoration work was delayed for years..." (A. 20).
- "Given the massive structural damage wrought by the fire, the restoration of Ms. Farage's property would have been [a] multi-year process under even the best of circumstances." (A. 22).
- "[T]he bad faith conduct of Tower/AmTrust delayed the [restoration] process even longer." (A. 22).
- "Tower/AmTrust shamelessly stalled the claims handling process, passing Ms. Farage from one adjuster to another, none of whom would take responsibility for processing her claim, resulting in months of delay and setting back the restoration process." (A. 22).

- "Even worse, Tower/AmTrust refused to pay invoices submitted by vendors that it insisted be retained to handle initial remedial work (including boarding windows and debris removal). As a result, these vendors placed liens on the property, which prevented Ms. Farage from obtaining much needed financing for the seven-figure restoration costs she was saddled with because of Tower/AmTrust refusal to honor its commitment to provide 'full replacement cost' coverage for the property." (A. 22).
- "In the end, because of Tower/AmTrust's misconduct, it was not possible for Ms. Farage to complete the restoration of the property until July 2020." (A. 22).
- "The resulting damage [from the four-alarm fire] was massive and included structural damage caused both by the fire and the water used by the fire department to extinguish it." (A. 26).
- Tower/AmTrust "forbade Ms. Farage from even beginning the remediation until the property was inspected by the insurer's expert, but delayed in sending the so-called expert, who in fact had no understanding of the engineering challenges posed by the structural damage the Building had suffered." (A. 27).
- "Tower/AmTrust refused to pay invoices submitted by vendors that it insisted be retained to handle initial remediation work (including boarding windows and debris removal). These unpaid vendors placed liens on the property, which made it impossible for Ms. Farage to

obtain loans secured by the property. As a result, Ms. Farage was unable to complete the restoration of the property until July 2020." (A. 28).

Taken as true, these allegations clearly demonstrate that the restoration of the building could not be completed within two years. Not only do these allegations establish that the restoration was impossible to complete due to the sheer level of devastation, but that the delay was caused by the relentless bad faith behavior by the Tower respondents to frustrate their completion. Taken as true, as they must be, this more than sufficiently establishes that appellant alleged that the repairs were made as soon as reasonably possible after the loss or damage.

Despite the nine separate instances where the complaint alleged that the repairs could not be completed within two years of the damage to the building, Supreme Court ignored its obligation on pre-answer motions to dismiss and baselessly opined that "plaintiff has failed to demonstrate sufficiently that she attempted to repair the property within those two years." (A. 9). First and foremost, Supreme Court was clearly acting under a misunderstanding of the standard of review. The proper standard was whether the documentary evidence, standing alone, "utterly refuted" appellant's allegations which had to be accepted as true along with all possible favorable inferences. Contrary to the lower courts, appellant did not have a burden to "demonstrate sufficiently".

Furthermore, appellant was not required to demonstrate that "she attempted to repair the Property within those two years." The four corners of the documentary evidence, does not state that attempts to repair had to be made within two years, it states that the policy holder could not collect the full replacement value "unless the repairs or replacement are made as soon as reasonably possible after the loss or damage." (A. 9). Thus, the baseline the court used to measure the documentary evidence argument was flawed from the outset.

Even if the documentary evidence established that restoration had to be attempted within two years of the date of loss (a hopelessly fact specific determination inappropriate for pre-answer motions to dismiss), the allegations in the complaint – accepted as true along with all favorable inferences that can be drawn therefrom – amply establish that restoration was undertaken within two years. In that regard, appellant alleged that the Tower respondents prohibited her from immediately commencing restoration work until they inspected the property and that they delayed in sending an inspector; that the Tower respondents demanded that she retain specified contractors to begin the initial clean-up process and that she did so, only to have them refuse to pay the bills; and that the Tower respondents passed her from adjuster delaying her efforts to repair the building. (A. 20-28). To the extent that these direct allegation requires any inference, the clear inference to be drawn is that appellant undertook the efforts to repair the building

immediately after the fire destroyed it. The facts of this case are so clearly on point with this Court's holding in Executive Plaza that the implication from the lower courts' decisions is that they have simply refused to apply precedent.

Supreme Court compounded its erroneous analysis by stating that "Executive Plaza is distinguishable from the instant matter", because "[u]nlike the insured in Executive Plaza here 'plaintiff did nothing to protect her rights as the suit limitation expired. (A. 9). This holding is erroneous on two fronts. First, the court's reliance on respondents' assertion that "plaintiff did nothing to protect her rights as the suit limitation expired" came from an unsworn statement in a memorandum of law submitted by counsel for the Tower respondents. A memorandum of law, however, does not constitute "documentary evidence" and obviously should not have been used to create a basis for deeming the truncated statute of limitations enforceable. In fact, contrary to the lower courts' opinion and respondents' baseless position, the insurance policy does not include any mention of requiring an insured to "protect [their] rights as the suit limitation expired." The policy merely states that they are not obligated to tender payment for the full replacement value of the building "unless the repairs or replacement are made as soon as reasonably possible after the loss or damage."

Supreme Court did not provide any example of what actions appellant was obligated to undertake in order to "protect her rights as

the suit limitation expired" for good reason, it was entirely absent from the documentary evidence. Since the court plucked this obligation from a memorandum of law, it can be inferred that it agreed with the Tower respondent's contention that in order to protect her rights from their bad faith dilatory actions, she was obligated to either commence a premature lawsuit against them that would have been promptly dismissed (see, Executive Plaza, supra) or that she was obligated to "request[] an extension of the limitations period." However, there is nothing in the documentary evidence that obligated appellant to commence a premature lawsuit (in fact the documentary evidence specifically prohibits the commencement of a lawsuit against them unless "[t]here has been full compliance with all of the terms of this insurance" which includes the obligation to complete all repairs before demanding payment for the full replacement cost of the lost building). Moreover, this Court – in Executive Plaza – conclusively rejected this argument. Absent from the documentary evidence is a protocol for extending the limitations period, the Tower respondents self-serving invention in a memorandum of law notwithstanding. Thus, the lower court's basis for concluding that plaintiff was obligated to, but did nothing to "protect her rights" is flatly erroneous.

Another glaring error committed by Supreme Court was its holding that "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, 2014" and that appellant's allegation in the complaint that "she promptly submitted the claim" was a "vague statement" and "completely insufficient when compared to Tower/ AmTrust's assertion that plaintiff did not contact Tower/AmTrust within the necessary 180-day period." (A. 9-10). By so finding, the court was repeating its misunderstanding of the standard of review with respect to a pre-answer motion to dismiss based upon documentary evidence. Second, the court was not considering matters beyond the "documentary evidence", and was pointing to an unsworn memorandum of law submitted by Tower respondents' counsel. Third, the court improperly considered an argument raised, for the first time, in reply papers and did not provide appellant with an opportunity to respond. And, fourth, the court's reading of the 180 day period – as demonstrated above – was incorrect.

With respect to the latter most error, the 180-day period clearly had no relevance. The 180 day period related to insureds that initially made a claim for loss on an actual cash basis but wanted to change their claim to a replacement cost basis, which was never alleged to be the case here. In that regard, the section provided "you may make a claim for loss or damage covered by this insurance on an actual cash value basis instead of on a replacement cost basis. In the event you elect to have loss or damage settled on an actual cash value basis, you may still

make a claim on a replacement cost basis if you notify us of your intent to do so within 180 days after the loss or damage." (A. 167). Appellant did not allege that she ever made a claim for loss on an actual cash value basis, her allegation was that she made a claim on a replacement cost basis, thus this section of the insurance policy has absolutely no application. This wholly irrelevant section certainly does not "utterly refute" the allegations in her complaint.

Tied in with its misunderstanding of the 180-day period, the court also violated the cardinal rule in deciding a 3211 motion; it did not accept the allegations in the complaint as true nor did it afford appellant all favorable inferences. In that regard, that appellant's allegation that she "promptly submitted the claim" had to be accepted as true and conclusively established – for purposes of this motion – that it was. The inference to be drawn from the word "prompt" should be its ordinary definition: Meriam Webster defines the word promptly as: "in a prompt manner: without delay: very quickly or immediately." Instead of following the law, the court deemed it to be a "vague statement" that was "completely insufficient *when compared to Tower/AmTrust's assertion* that plaintiff did not contact Tower/AmTrust within the necessary 180-day period." (A. 10).

Not only did the court fail to deem the allegation as true and draw every favorable inference in appellant's favor, it *compared* her allegations in the complaint to unsworn assertions in an attorney's

memorandum of law to combat them. Manifestly, an attorney's memorandum of law does not constitute "documentary evidence" and cannot be used by a court to resolve issues of fact under any circumstances, let alone on a 3211 motion.

The Appellate Division amplified the error. First, the Appellate Division erroneously subscribed to the same faulty reasoning by concluding that Executive Plaza, LLC did not apply because appellant "failed to allege that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so." The Appellate Division compounded its error by concluding that a letter sent by the Tower respondents on September 1, 2020 "demonstrates that the delay in denial of the claim 'was attributable to the investigation of the claim and [plaintiff's] failure to cooperate in the investigation.'" Again, searching the record for ways to invalidate a complaint is erroneous.

Obviously, a letter written by the proponent of a motion to dismiss does not constitute documentary evidence. Basic concepts of black letter law related to determining a CPLR 3211(a)(1) motion to dismiss do not permit resolution of issues of fact. The conclusion that the documentary evidence presented here fails to utterly refute the allegations in the complaint is inescapable. Here, the lower courts abandoned basic procedure in furtherance undermining this Court's holding in Executive Plaza.

On a pre-answer motion to dismiss, a complaint must be given a liberal construction, all allegations must be accepted as true and the benefit of every possible favorable inference must be provided. The lower courts here did not do so. Moreover, the decisions are in direct conflict with this Court's holding in Executive Plaza as well as the Fourth Department's holding in Baluk v. New York Cent. Mut. Fire Ins. Co., 126 A.D.3d 1426 (4th Dept. 2015). There, the Fourth Department reversed the trial court's decision granting the defendant insurance company's motion pursuant to CPLR 3211(a)(1) and (7) based upon the same flawed reasoning employed by the courts in this case. The Baluk court held that an issue of fact existed as to whether the plaintiffs were able to satisfy the condition precedent (completing repairs) before the two year contractual limitation on suit expired. That is exactly the case here – at the very least – issues of fact remain as to whether the condition precedent could have been met before the expiration of the time to complete the repairs. In this case, while the lower courts were happy to improperly point to statements contained in respondents' memoranda of law to combat allegations contained in the complaint they were oddly silent with respect to respondents' combined decision not to deny the fact that they acted in bad faith to frustrate her ability to repair the building. Indeed, respondents have never asserted that the repairs to appellant's building could have been completed within two years. Instead, they lobbed specious arguments (i.e. the 180-day period) that

were bizarrely credited by the court in granting the respondents' patently meritless motions to dismiss.

Here, the documentary evidence, standing alone, does not conclusively eradicate all issues of fact. Indeed, the lower courts tacitly acknowledged this truism, as it considered facts outside the four corners of the insurance policy in concluding that the truncated statute of limitations was enforceable. See, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582, 590-591 (2005). As the policy required appellant to complete all repairs to the building before she could commence an action, the policy – standing alone – cannot establish that the two-year statute of limitations is reasonable, such a conclusion necessarily requires an examination of facts beyond the document rendering dismissal pursuant to CPLR 3211(a)(1) out of reach. See, Spoleta Const., LLC v. Aspen Ins. UK Ltd., 27 N.Y.3d 933 (2016); Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326-327 (2002) (holding that dismissal pursuant to CPLR 3211[a][1] "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law"); Phoenix Grantor Trust v. Exclusive Hospitality, LLC, 172 A.D.3d 923, 924-925 (2nd Dept. 2019); Attias v. Costiera, 120 A.D.3d 1281, 1282 (2nd Dept. 2014) (stating that "the evidence submitted in support of such motion must be documentary or the motion must be denied"). In Attias, the Court held that the lower court

erred by relying upon statements contained in affidavits and attorney affirmations and should have only focused upon the four corners of the documentary evidence in assessing whether it utterly refuted the allegations made in the complaint. See, id. Finding that the documentary evidence, standing alone, did not do so, Attias reversed the lower court's decision granting the defendant's motion to dismiss pursuant to CPLR 3211(a)(1). Id. at 1282-1283.

Furthermore, the lower courts erred by dismissing appellant's claim against the Tower respondents for breach of the duty of good faith and fair dealing. It is presumed, given the lack of additional discussion by either of the lower courts, that it was dismissed based upon the same erroneous application of the shortened statute of limitations as the breach of contract. To the extent that the court applied the Tower respondent's argument that it had to be dismissed based upon their characterization that it mirrored the breach of contract claim, it too would have been erroneous. The two claims were separate and distinct, one alleged a breach of the contract for failing to pay the claim and the breach of the implied covenant of good faith and fair dealing was based upon bad faith actions taken by Tower to delay appellant's efforts to complete the repairs. "This distinction (between delay and pay) is enough to preclude dismissal at the pleading stage on an argument of duplicative claims." Hochfelder v. Pacific Indemnity Company, 1:22-CV-2012 (MKV) (SDNY Mar. 3, 2023).

Moreover, the breach of the implied covenant of good faith and fair dealing was not covered by the reduced statute of limitations and neither of the lower courts addressed the issue. Here, the lower courts decisions should be reversed and the matter remitted to the Supreme Court, New York County for further proceedings.

POINT TWO

THE APPELLATE DIVISION'S DECISION DISMISSING ALL CLAIMS AS AGAINST THE LAURIA/BOWMAN RESPONDENTS MUST BE REVERSED AND THE MATTER REMANDED TO SUPREME COURT FOR FURTHER PROCEEDINGS.

The Appellate Division's decision dismissing all claims as against the Lauria/Bowman respondents must be reversed and remanded for further proceedings. That court held that "[t]he reason that plaintiff did not receive insurance proceeds is not because the terms of her policy were unfavorable but because she failed to sue within the limitations period. Thus, any negligence or breach of contract by plaintiffs' brokers is not the proximate cause of plaintiff's alleged damages." (A. 6-11). This holding is problematic on several fronts.

Primarily, the application of the statute of limitations in the policy with the Tower respondents does not absolve the Lauria/Bowman respondents of the claims as against them. As pled, Lauria/Bowman breached their agreement with appellant by not ensuring that appellant was fully insured. Had Lauria/Bowman not breached their duty (or negligently failed to protect appellant) Tower respondents would not have had the grist for stifling appellant's ability to complete the restoration work by declaring that she was underinsured. The delay in the completion of the repairs, due in large part to the Tower respondents' bad faith actions, were only made possible by the Lauria/

Bowman's negligence/breach of their duty under the contract in opening the door to this avenue by not providing the product appellant purchased and advising her of the need for alterations to her policy.

Had the Lauria/Bowman respondents not breached their duty to appellant, the Tower respondents would not have had the ability to declare that she was underinsured and thereafter refuse to finance the repair of the building. This added years of delay and personally cost appellant $1,300,000.00 to make up the difference. The original sin here was caused by the Lauria/Bowman respondents and their liability to appellant has nothing whatever to do with whether the Tower respondents are directly liable to her. As appellant more than sufficiently pleaded breach of contract actions against Lauria/Bowman that have no bearing on the enforcement of the statute of limitations clause in the policy with Tower respondents, it was improper for the Appellate Division to dismiss her claims on this ground.

Further illustrating the fallacy of the lower court's decision is the fact that the statute of limitations issue applied to the Tower respondents only, and was not a dismissal on the merits. Had Supreme Court not erroneously dismissed appellant's claims as against them pursuant to a CPLR 3211(a)(1), the action would have proceeded with a determination of whether the policy limits on coverage and the underinsurance penalty appropriately assessed. At the same time, appellant's claims against Lauria/Bowman would have proceeded on the

issue of whether they breached their contract with her for exposing her to an underinsurance penalty by failing to procure the appropriate insurance and for misadvising her. Obviously, appellant would not have been able to obtain a double-recovery (the full replacement value of the building from the Tower respondents *and* the full replacement value of the building from the Lauria/Bowman respondents). Indeed, the very fact that the Tower respondents have avoided liability is the basis for the claims against Lauria/Bowman. It was incongruous for the Appellate Division to find that since the Tower respondents managed to avoid liability by using an underinsurance assertion (that was available to them due to the Lauria/Bowman's negligence/breach of contract) to delay the repair of the building in order to run out the clock on the truncated statute of limitations, that somehow "any negligence or breach of contract by plaintiffs' brokers is not the proximate cause of plaintiff's alleged damages." Quite clearly, the proximate cause of appellant's loss – caused by the Tower respondents ability to avoid liability through the underinsurance claim – falls at the feet of the Lauria/Bowman respondents.

By failing to treat all of appellant's allegations therein as true and for failing to afford appellant's allegations with every favorable inference, the Appellate Division improperly granted the Lauria/Bowman's motion to dismiss.

CONCLUSION

The Decision and Order of the Appellate Division, First Department should be reversed, all motions to dismiss denied and the matter remanded for further proceedings, including consideration of the motion to amend the complaint.

Respectfully submitted,

Dated: December 11, 2023
Albany, New York

By: _____

Matthew C. Hug, Esq.
Hug Law, PLLC
PO Box 14263
Albany, New York 12212
Tel. 518-283-3288

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