NEW YORK COURT OF APPEALS

Regina Farage,

Plaintiff - Appellant,

- against -

Associated Ins. Management Corp., Legion Ins. Group, Colonia Ins. Co., AXA Global Risks US Ins. Co., Global Facilities, Inc., Morstan General Agency, Inc., National General Ins. Co., National General Holdings Corp.,

Defendants,

- and -

Tower Ins. Co. of N.Y, AmTrust Financial Services, Inc., AmTrust North America, Castlepoint Ins. Co., Tower Risk Management Corp., Tower Group, Inc., Tower Group Companies,
E.G. Bowman Co., Inc. Mark Laurie Associates, Inc.,

Defendants - Respondents,

Mot. No. 2023-281
(Pin No. 80030)

Index No. 653590/2020

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Counsel: Mound Cotton Wollan & Greengrass LLP
Attorneys for Respondents Defendants Tower Ins. Co. of New York, AmTrust Financial Services, Inc., AmTrust N.A., Castlepoint Ins. Co., Tower Risk Management Corp., Tower Group, Inc. and Tower Group Companies

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PRELIMINARY STATEMENT

Respondents-Defendants Tower Insurance Company of New York, AmTrust Financial Services, Inc., AmTrust N.A., Castlepoint Ins. Co., Tower Risk Management Corp., Tower Group, Inc. and Tower Group Companies, (collectively, the "Tower Defendants"), submit this memorandum of law in opposition to the motion filed by Plaintiff-Appellant, Regina Farage ("Plaintiff"), pursuant to CLPR 5602(a), for leave to appeal to the Court of Appeals the November 10, 2022 decision of the Appellate Division, First Department.

Plaintiff's uncontested failure to file suit within two years of the date of loss, as required by the contract, or explain why she could not do so until approximately six years later, was fatal to her claim.

In addition, Plaintiff falls far short of meeting the rigorous standard for leave to appeal set forth in 22 NYCRR § 500.22(b)(4). Despite Plaintiff's contentions to the contrary, the First Department's Decision does not conflict with decisions of any other Department or the Court of Appeals. Rather, as discussed below, this Court's decision is supported by precedent from the Court of Appeals.

The issues in this case are also neither novel nor of public importance, because they involve the application of specific contract language to the unique facts presented in this case. Despite Plaintiff's characterization of the issues, this is a straight-forward contract case with undisputed facts.

In sum, Plaintiff simply would like another opportunity to argue that the unambiguous contract should be re-written by the Court to her benefit. Thus, leave to appeal is unwarranted and this motion should be denied.

COUNTER QUESTION PRESENTED

Where Plaintiff has ignored the Court of Appeals precedent in Blitman Construction Corp. v. Insurance Co. of N. Am., 66 N.Y.2d 820, 823 (1985), which gave specific instructions as to how Plaintiff could "protect itself by either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision," and waited approximately six years to commence suit notwithstanding a contractual two-year suit-limitation period, can she meet standard for leave to appeal set forth in 22 NYCRR § 500.22(b)(4)? No.

COUNTER STATEMENT OF FACTS

This litigation arises out of the claim by Plaintiff for insurance coverage for an August 4, 2014 fire at the Premises (the "Loss").

On February 16, 2021, Plaintiff filed a Complaint against the Tower Defendants, alleging that she is seeking to enforce "her right to insurance coverage [under the Policy] for full replacement value of a multi-level property she owns on

Staten Island, as well as coverage for loss of business income and other damaged property" as a result of a fire that occurred on August 4, 2014. (R. 103-104.) Plaintiff has asserted the following causes of action against the Tower Defendants: (1) First Cause of Action (Breach of Contract Against Tower/AmTrust); (2) Second Cause of Action (Breach of Duty of Good Faith and Fair Dealing Against Tower/AmTrust); and Third Cause of Action (Breach of Contract Against CastlePoint/National General). (R. 112-113.)

On or about March 1, 2021, the Tower Defendants filed a pre-answer motion to dismiss the Complaint on the basis that, inter alia, the Plaintiff failed to commence suit against them within the Policy's two-year suit limitations provision. Specifically, the Policy provides under the Businessowners Special Property Coverage Form at BP 00 02 12 99, p. 14 of 23:

> **E. Property Loss Conditions**
>
> ***
>
> **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.

(R. 510.) (Emphasis in original)

On March 22, 2021, Plaintiff filed a Notice of Motion to Amend the Complaint to add Technology Insurance Company as a defendant. (R. 598-638.) On April 8, 2021, the Tower Defendants opposed the Motion on the same grounds as it moved to dismiss – that Plaintiff failed to timely commence suit against Technology Insurance Company within the two-year limitations period. (R. 639-709.) On April 8, 2021, Plaintiff opposed the Motion to Dismiss filed by the Tower Defendants arguing, inter alia, that under Executive Plaza, compliance with the suit limitation was unreasonable. (R. 549-577.) The Opposition included an Affirmation of Bradly Nash, Plaintiff's trial counsel, which attached the Policy, the Denial of Coverage letter, and an email between counsel. (R. 567-577.) The Opposition did not include an Affidavit from Plaintiff. Indeed, she submitted nothing discussing her purported efforts undertaken to comply with the two-year suit limitations period. She submitted no evidence that she allegedly notified the Tower Defendants of her inability to rebuild within that time period. She also did not submit any evidence that she requested an extension of the two-year suit limitations period. (R. 549-577.)

On July 2, 2021, the Trial Court issued its Decision and Order, finding that the Policy's two-year limitation period bars Plaintiff's claim. In particular, the Trial Court noted:

> Notably, plaintiff does not dispute this time-period limitation. Instead, plaintiffs attempt to rely on Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511, 518 (2014) (policy's two-year limitation period unenforceable where the "property cannot 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 Companies assert, Executive Plaza is distinguishable from the instant matter. Unlike in Executive Plaza, "[p]lainiff did nothing to protect her rights as the suit limitation expired." (NYSCEF Doc. 112, at 10).

(R. 37-42.)

On August 9, 2021, Plaintiff filed a Motion to Renew and Reargue. (R. 713-714.) In connection with that Motion, Plaintiff submitted -- for the first time -- an Affidavit by Plaintiff explaining how repairs to the Premises allegedly could not have been completed within two years, and attached email communications that had been in her possession since 2014. (R. 715-749.) On November 10, 2021, the Trial Court denied Plaintiff's Motion to Renew and Reargue. (R. 48.)

Plaintiff's appeal to the First Department followed, which on November 10, 2022, was denied, in part because:

> *Executive Plaza, LLC v. Peerless Insurance Company,* 22 N.Y.3d 511, 517, 982 N.Y.S.2d 826, 5 N.E.3d 989 (2014) is distinguishable, as plaintiff here failed to allege that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so. *See Turner Constr. Co. v. Nastasi & Assoc., Inc.,* 192 A.D.3d 103, 106, 139 N.Y.S.3d 181 (1st Dept. 2020). Moreover, defendant insurer's unrefuted September 1, 2020 letter 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." *Minichello v. Northern Assur. Co. of Am.*, 304 A.D.2d 731, 732, 758 N.Y.S.2d 669 (2d Dept. 2003).

210 A.D.3d 470, 471[1]. Her motion to reargue was also denied, without decision, on March 7, 2023. (See NYSCEF Dck 23. of Appeal # 2022-00209.)

ARGUMENT

POINT I

THE FIRST DEPARTMENT'S DECISION IS IN ACCORD WITH THIS COURT'S EXECUTIVE PLAZA DECISION

A. Plaintiff's Facts Are Distinguishable From Executive Plaza

As the Trial Court observed, the Court of Appeal's decision in Executive Plaza is distinguishable from this matter as "[p]lainiff did nothing to protect her rights as the suit limitation expired." (R. 37-42.) As this Court explained in Blitman Construction Corp. v. Insurance Co. of N. Am., 66 N.Y.2d 820, 823 (1985), "an insured is bound by the terms of the contract whether read or not and

[1] With respect to the appeal of the Trial Court's denial of Plaintiff's motion to "renew or reargue," it was also denied in the same decision, "to the extent appealable." Notably, although characterized as a motion to renew, Plaintiff's motion was solely one for reargument in which she attempted to submit additional evidence that was in her possession when she opposed the original motion to dismiss. She offered no excuse for failing to submit that evidence in opposition to the original motion. Thus, the decision on that motion is not appealable, as the First Department suggested in its decision. See Matter of Serviss v. Incorporated Vil. of Floral Park, 164 A.D.3d 512, 513 (2d Dep't 2018)("A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.")

can protect itself by either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision." Unlike the plaintiff in Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511 (2014), the Plaintiff here did not follow the precedent in Blitman by protecting her rights.

This Court did not overturn its decision in Blitman when it issued the Executive Plaza decision. Rather it specifically said that "*Blitman [66 NY2d 820]* also supports our holding here," clearly indicating that Blitman is still the law in New York. Only when an insured follows this Court's guidance in the Blitman decision to "protect itself," but is prevented from doing so (such as were the facts in Executive Plaza), does the exception to the two-year suit limitation period apply as a matter of equity. That is the holding of Executive Plaza and is the reason the Trial Court and First Department found the decision distinguishable from the facts here.

As the First Department noted in Turner Constr. Co. v. Nastasi & Assoc., Inc., 192 A.D.3d 103, 106 (1st Dep't 2020), "[t]he relevant question when deciding whether a limitations period is enforceable is whether and when the damages were objectively ascertainable." Plaintiff's damages from the fire were ascertainable shortly after the fire, but certainly within two years thereafter.[2] Nevertheless,

[2] There were no facts alleged in the pleadings or in the opposition to the motion to dismiss to reasonably suggest that Plaintiff could not ascertain her damages until

"Plaintiff here failed to allege that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so." Farage v. Associated Ins. Mgmt. Corp., 210 A.D.3d 470 (1st Dep't 2022).[3]

Missing from Plaintiff's pleadings or opposition to the motion to dismiss is any indication that the accrual date for her causes of action began only after two years had passed following the fire. There are certainly no facts to suggest that it did not accrue until six years after the fire, which is when she finally commenced suit. This excessive delay is also a distinguishing fact from the cases Plaintiff cites.

Further, unlike in Executive Plaza, the Complaint makes multiple allegations that were unquestionably actionable within two years after the loss, such that Plaintiff could have sued before the limitations period expired. For example, Plaintiff complains that she was not paid for alleged loss to "personal property" and "substantial business income losses," but there is no allegation that Plaintiff could not sue on those damages earlier, or that she was somehow prevented from commencing suit to recover those damages within two years of the fire. (R. 119 at

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six years after the loss, and thus, there is no reasonable explanation in the Record for her waiting this long to commence suit.

[3]Notably, the facts concerning the attempts to repair an insured's property would be within the insured's exclusive knowledge and control, not its insurer. An insurer is simply not privy to the actual obstacles and delays that may be faced in any particular repair project as it is not involved in the actual repair. Thus, it is only reasonable for an insured, here Plaintiff, to allege those facts, if they exist.

¶ 1, R. 127 at ¶ 34.) Likewise, Plaintiff claims "Tower/AmTrust refused to pay invoices submitted by vendors that it insisted be retained to handle initial remediation work" (R. 121 at ¶ 8), but if this allegation is true, and it is a breach of Tower's obligations under the Policy, there is no reason Plaintiff could not have sued to recover for this "initial" work when Tower allegedly refused to pay -- within two years after the loss. Plaintiff also claims that she "incurred $1.3 million in repair and restoration costs, which she promptly submitted to Tower/AmTrust. However, Tower/AmTrust has refused to pay for any of these costs." (R. 127 at ¶ 33.) If Plaintiff incurred costs to repair the structure, which she "immediately" submitted to Tower, but those costs were denied – there is no reason Plaintiff could not have commenced suit within two years after the loss to recover those amounts too.

B. Decisions Relied On By Plaintiff Are Distinguishable

In support of her position, Plaintiff relies on D & S Restoration, Inc. v. Wenger Construction Co., Inc., 160 A.D.3d 924, 926 (2d Dept. 2018); Digesare Mechanical, Inc. v. U.W. Marx, Inc., 176 A.D.3d 1449 (3d Dept. 2019); Baluk v. New York Cent. Mut. Fire Ins. Co., 126 A.D.3d 1426 (4th Dept. 2015); however, these cases are readily distinguishable. For example, in Digesare, no part of the claim had yet accrued, but as noted below, the Complaint here asserted multiple allegations actionable within two years after the loss. Therefore, commencing suit

within the two-year period would not have been premature. Moreover, Plaintiff's insurance claim accrued when the fire occurred. She made a claim within the two year period and was paid. D&S Restoration is another case where the suit limitation period expired before any part of the claim could accrue. In Baluk, unlike here, the facts established that the repairs were "not completed within two years after the date of loss," but that decision also misconstrues the interplay between the Blitman decision and Executive Plaza, which again, did not overturn Blitman.

Again, in Blitman, this Court instructed insureds to either seek to obtain an extension on the time to commence suit from the insurance carrier, or commence suit if repairs are not yet completed within two years. In Executive Plaza, that guidance was followed as "the insured did begin an action on the last day of the limitation period." Id. at 519. It was only because that case was dismissed notwithstanding compliance with the Blitman directives, because the cause of action arguably had not yet accrued, did the facts warrant the workaround created by Executive Plaza. Plaintiff did not avail herself of the protections outlined in Blitman, and therefore, cannot rely on Executive Plaza.

Plaintiff also relies on Bakos v. New York Cent. Mut. Fire Ins. Co., 83 A.D.3d 1485 (4th Dept. 2011), a split decision in which the insured did exactly what this court instructed in Blitman – it asked the insurance company to waive the

two year contractual limitation period because repairs had not yet been completed. Id. at 1488. Apparently the insurance company in that case refused to extend the period, which created facts analogous to Executive Plaza.

At the heart of the Blitman decision is the principle that contractual limitation period should be enforced, and insureds have at least two options to protect their interests before the period expires. It is only when those protections are thwarted by the later actions of the insurance company that courts look to Executive Plaza as a basis to deem a subsequent suit timely.

Enforcement of this suit limitation provision as envisioned by the Blitman decision is not, as Plaintiff may argue, form over substance. It brings finality to the insurance adjustment process, controls costs, and in turn, controls prices consumers pay for insurance. The Blitman decision provides insurance companies with the protections contemplated by the suit limitation terms of their contracts, which in turn, allows them to set appropriate reserves for claims that have not been resolved, or reallocate reserves on claims where insureds have not sought additional replacement cost coverage. By freeing up these reserves, it allows insures to issue policies to their other customers at lower premiums. Blitman also protects insureds by providing at least two options when they believe their claim is not fully resolved by the expiration of the suit limitation period.

In contrast, allowing Plaintiff's claim to go forward would establish a system where insurers may never know when a claim has concluded, and would require companies to maintain excessive reserves and charge higher premiums. In Plaintiff's view, a claim for replacement cost coverage can be made six or more years after a loss, with no notice that additional funds would be sought. The uncertainty and unnecessary costs of such an open-ended approach is rectified by the approach taken in Blitman, and only when that fails, by that in Executive Plaza.

In sum, the process is simple. An insured needs to either commence suit, or seek and extension, and if both fail to protect its interests, and it has not completed repairs, it has the protection afforded by Executive Plaza. Based on the allegations, Plaintiff cannot establish compliance with part one of this process and therefore, cannot rely on Executive Plaza.

POINT II

THIS CASE DOES NOT WARRANT REVIEW BY THE COURT OF APPEALS

As set forth in 22 NYCRR § 500.22(b)(4), cases that merit review by this Court present "issues that are novel or of public importance, present a conflict with prior decisions of this court, or involve a conflict among the departments of the Appellate Division." This basic contractual insurance dispute presents none of the criteria that would warrant review by this Court.

Plaintiff attempts to frame this as a novel case with far reaching implications for the insurance industry in New York. It is not. The law is clear from an examination of the facts at issue and law applied in both Blitman and Executive Plaza – which the First Department properly applied here. In sum, Plaintiff's misunderstanding of the law and failure to timely put before the Trial Court evidence that might support its position simply does not warrant review by this state's highest court.

CONCLUSION

For the reasons discussed above, the Tower Defendants respectfully request that the Court deny Plaintiff's Motion for Leave to Appeal, and award such other relief as the Court deems just.

Dated: New York, New York
April 24, 2023

MOUND COTTON WOLLAN & GREENGRASS LLP

By: _____

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Jacob Mendelsohn, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, New York.

That on the April 21, 2023, deponent served the within, **Opposition to Motion for Leave to Appeal** upon:

Hug Law PLLC
21 Everett Road Extension
Albany, NY 12205

Keidel, Weldon & Cunningham
925 Westchester Avenue
White Plains, NY 10604-3507

the addresses designated by said attorneys for that purpose via Federal Express

Jacob Mendelsohn

Sworn to before me this
21st day of April, 2023

Notary Public

ROSA C. BLOOM
Notary Public, State of New York
No. 01BL6076191
Qualified in Richmond County
Commission Expires October 30, 2026