To be Argued by:
KEVIN F. BUCKLEY
(Time Requested: 30 Minutes)

APL-2023-00141
New York County Clerk's Index No. 653590/20
Appellate Division– First Department Appellate
Case Nos. 2022-00209 and 2022-00438

Court of Appeals

of the

State of New York

REGINA FARAGE,

Plaintiff-Appellant,

(For Continuation of Caption See Inside Cover)

BRIEF FOR DEFENDANTS-RESPONDENTS 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

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– against –

ASSOCIATED INSURANCE MANAGEMENT CORP., LEGION INSURANCE GROUP, COLONIA INSURANCE COMPANY, AXA GLOBAL RISKS US INSURANCE COMPANY, GLOBAL FACILITIES, INC., MORSTAN GENERAL AGENCY, INC., NATIONAL GENERAL INSURANCE COMPANY and NATIONAL GENERAL HOLDINGS CORP.,

Defendants,

– and –

TOWER INSURANCE COMPANY OF NEW YORK, AMTRUST FINANCIAL SERVICES, INC., AMTRUST NORTH AMERICA, CASTLEPOINT INSURANCE COMPANY, TOWER RISK MANAGEMENT CORP., TOWER GROUP, INC., TOWER GROUP COMPANIES, E.G. BOWMAN CO., INC., MARK LAURIA ASSOCIATES, INC.,

Defendants-Respondents.

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO 22 NYCRR 500.1(f)

Pursuant to Court of Appeals Rule 500.1(f), Tower Insurance Company of New York states that it was a wholly-owned subsidiary of Tower Group, Inc.

Pursuant to Court of Appeals Rule 500.1(f), AmTrust Financial Services, Inc. states that its parent company is Evergreen Parent L.P. Its subsidiaries, including underwriting companies such as Wesco Insurance Company, are set forth in an addendum. *See infra* Addendum. It also purchased the commercial lines business of Castlepoint Insurance Company, and as such, assumed the obligations under certain policies originally issued by Tower Insurance Company of New York.

Pursuant to Court of Appeals Rule 500.1(f), AmTrust North America states it is a wholly-owned subsidiary of AmTrust Financial Services Inc.

Pursuant to Court of Appeals Rule 500.1(f), Castlepoint Insurance Company states that it was a wholly-owned subsidiary of Tower Group, Inc. Castlepoint Insurance Company, Tower Risk Management, Corp., Tower Group, Inc., and Tower Insurance Company of New York merged with Castlepoint National Insurance Company as the surviving entity. The commercial lines business of Castlepoint National Insurance Company were then sold to AmTrust North America, which assumed the obligations under certain policies issued by

Castlepoint and its predecessors, including Tower Insurance Company of New York and the policy at issue in this litigation.

Pursuant to Court of Appeals Rule 500.1(f), Tower Risk Management Corporation states it administered claims on behalf of Tower Group, Inc.'s wholly-owned subsidiary underwriting companies.

Pursuant to Court of Appeals Rule 500.1(f), Tower Group, Inc. states it was a wholly-owned indirect subsidiary of Tower Group International, Ltd.

Pursuant to Court of Appeals Rule 500.1(f), Tower Group Companies states it was the trade name for Tower Group, Inc.'s subsidiary underwriting companies, when it existed.

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QUESTIONS INVOLVED

1. Where the insurance policy issued by Tower Insurance Company of New York provided a two-year suit limitations provision, the insured premises sustained a fire loss on August 4, 2014, and the Plaintiff failed to commence suit against Tower until August 4, 2020, four years after expiration of the period, was Plaintiff precluded by the contract from bringing suit?

The Trial Court and First Department, Appellate Division, answered this question in the affirmative.

2. Where the Plaintiff submitted new evidence in the form of an Affidavit with attached documentation in support of her Motion to Renew and Reargue the Trial Court's July 2, 2021 Order granting the Motion to Dismiss, which had been in her possession at the time she opposed the Motion to Dismiss, should the Affidavit have been considered?

The Trial Court did not answer this question.

PRELIMINARY STATEMENT

Plaintiff-Appellant Regina Farage (hereinafter "Plaintiff") appeals from the November 10, 2022 decision of the First Department, Appellate Division, which affirmed the Order of the Supreme Court, New York County (Engoron, A. 00003) granting 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' (collectively "Tower Defendants")[1] pre-answer Motion to Dismiss, and denied Plaintiff's Motion to Amend to, inter alia, add Technology Insurance Company, Inc. as a defendant to this action.[2]

In bringing this appeal, Plaintiff seeks to sidestep this Court's precedents in Blitman Constr. Corp. v. Ins. Co. of N. Am., 66 N.Y.2d 820 (1985) and Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511 (2014). Plaintiff seeks recovery in breach of contract for insurance coverage for her commercial rental property for a

[1] As Tower Insurance Company of New York issued the Policy, it is not clear why Plaintiff sued the various entities that are not in privity of contract with Plaintiff, *i.e.*, AmTrust Financial Services, Inc., AmTrust North America, Castlepoint Insurance Company, Tower Risk Management, Corp., Tower Group, Inc. and Tower Group Companies.

[2] Plaintiff contends that the November 10, 2022 decision from the First Department affirmed the decision and order of the Supreme Court of New York County "rendered July 2, 2021 and November 10, 2022." The First Department's decision pertained to the July 2, 2021 decision, and "to the extent appealable," the November 10, 2022 decision of the Supreme Court of New York County, which concerned Plaintiff's motion to "renew and/or reargue." (A. 00003 & 00012.) It is well-settled that reargument motions are not appealable. To the extent that Plaintiff's motion was for "renewal", it was improper as it failed to provide a reasonable explanation for not including the "new" evidence in opposition to the original motion to dismiss. (A. 00486.)

fire that occurred on August 4, 2014 at the premises located at 95-97 Sherman Avenue, Staten Island, New York (the "Premises"). Plaintiff submitted the claim under policy number BOP2154821 issued by Tower Insurance Company (the "Policy"). While she was paid the Actual Cash Value for that claim, many years later, she sought more money under the Policy's replacement cost coverage, which requires that the damaged property be repaired before that additional payment is made. Tower considered her supplemental claim, but denied it as unsubstantiated.

On August 4, 2020 – six years after the fire – and four years after the Policy's suit limitation period expired, Plaintiff filed a Summons with Notice. Plaintiff's failure to commence suit within a two-year period after the fire is a violation of the insurance policy's two-year, contractual suit limitation provision. At no point in time during the relevant two-year period did Plaintiff ever advise the Tower Defendants that she would not be able to complete repairs of the Premises. Moreover, during that two-year period, Plaintiff neither commenced suit, nor requested an extension of the two-year contractual period. These are the options this Court outlined in Blitman when an insured is confronted with the expiration of the two-year suit limitation period, but allegedly cannot complete repairs during that period.

This Court's decision in Executive Plaza provided an exception to Blitman, where the plaintiff commenced suit within the two-year period, but was thwarted

by the insurer's motion to dismiss. The exception provided by Executive Plaza allowing suit after the two-year period was premised on the fact that "the insured property cannot reasonably be replaced within two years" and that the insured had protected itself by "beginning an action before expiration of the limitation period."

In affirming the lower court's dismissal of Plaintiff's action, the First Department unanimously held this case 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." 210 A.D.3d at 471. It is also distinguishable because Plaintiff did not commence suit before the expiration of the limitation period.

In sum, Plaintiff was paid for her loss, ignored the Policy's suit limitation provision, sat on her laurels for years, and after breaching this provision, is now attempting to "shoehorn" her way into an exception to it. Her untimely and conclusory "evidence" does not support an exception to the clear contractual limitations period, and a holding otherwise would undermine the purpose of the provision itself – to protect insurers from ill-timed litigations on claims that were abandoned years ago – and would prejudice insurers' rights to receive timely information as to whether an insured intends to make a supplemental claim for replacement cost coverage. Accordingly, it is respectfully submitted that the First

Department was correct in affirming the dismissal of the Complaint with prejudice against the Tower Defendants.

NATURE OF THE CASE AND OF THE FACTS

This litigation arises out of the claim by Plaintiff for insurance coverage for an August 4, 2014 fire at the Premises (the "Loss"). (A. 20.)

Before the loss, Tower Insurance Company of New York ("Tower") issued policy number BOP2154821 to Plaintiff for a one-year period commencing June 21, 2014 (the "Policy"). (A. 150.) The Policy contained the following "Loss Payment" provision:

> **6. Loss Payment**
>
> In the event of loss or damage covered by this policy:
>
> * * *
>
> **d.** Except as provided in **(2)** through **(8)** below, we will determine the value of Covered Property as follows:
>
> **(1)** At replacement cost without deduction for depreciation, subject to the following:
>
> **(a)** If, at the time of loss, the Limit of Insurance on the lost or damaged property is 80% or more of the full replacement cost of the property immediately before the loss, we will pay the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

(i) The Limit of Insurance under this policy that applies to the lost or damaged property;

(ii) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and
ii. Used for the same purpose; or

(iii) The amount that you actually spend that is necessary to repair or replace the lost or damaged property.

***

(c) 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.

(d) We will not pay on a replacement cost basis for any loss or damage:

(i) Until the lost or damaged property is actually repaired or replaced; and

(ii) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

(A. 00224-00225.)

Even though the policy required Plaintiff to notify Tower within 180 days of the August 2014 loss of the intent to make a claim for replacement cost basis, Plaintiff failed to comply with this provision. (A. 00225.) Further, while Plaintiff sought to recover the $102,898.98 holdback amount for rebuilding, she failed to provide any proof of actual rebuild costs. (A. 00225.)

In addition, the Policy required Plaintiff to keep records related to the claim and provide certain enumerated records while the claim remained outstanding. (A. 00227-00228.) Despite Tower's requests that Plaintiff provide a detailed building claim, including Plaintiff's contractor's repair estimate and architect's report and estimates for recommended structural work, the portion of Plaintiff's 2013 federal tax return relating to the Loss Location, and approved emergency services invoices from ServiceMaster and Harborview since 2014, Plaintiff failed to provide that information. (A. 00228.) Indeed, the contractor's estimate was not provided until July of 2020-six years after it was first requested. (A. 00228.) Plaintiff still failed to provide her tax returns, architect's reports or estimates, or approved emergency services invoices despite Tower's repeated requests for this documentation. (A. 00228.) Plaintiff did not provide notice of certain portions of the loss until 2020. (A. 00228.) Thus, her claim was barred by virtue of her failure to provide the requested documentation, timely notice of additional claimed loss/damage, and to

cooperate with Tower, each of which is in breach of the Loss Conditions section of the Policy. (A. 00228.)

The policy also required an appraisal if the insurer and insured do not agree on the value of the loss. (A. 00228.) To that end, Tower first demanded an appraisal in accordance with this provision on November 17, 2014. (A. 00228.) Tower followed with requests for the name of Plaintiff's appraiser on November 20, 2014, and again on November 25, 2014 (A. 00228). Yet, Plaintiff failed to designate an appraiser. (A. 00229.)

Nevertheless, after filing a summons with notice on August 4, 2020, Plaintiff filed an unverified Complaint against the Tower Defendants on February 16, 2021, 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. (A. 00019-00021.) Plaintiff 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). (A. 00028-00031.)

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. (A. 00182.) Specifically, the Policy provides under the Businessowners Special Property Coverage Form at BP 00 02 12 99, p. 15 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.

(A. 00166.)

On March 22, 2021, Plaintiff filed a Notice of Motion to Amend the Complaint to add Technology Insurance Company ("TIC") as a defendant. (A. 00203-00243.) On April 8, 2021, the Tower Defendants opposed the Motion on the same grounds as it moved to dismiss – that, assuming TIC had any obligation under the Policy issued by Tower, Plaintiff failed to timely commence suit against TIC within the two-year limitations period. (A. 00402-00413.)

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. (A. 00431-00459.) 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. (A. 00449-00459.) The Opposition did not include an Affidavit from Plaintiff. Indeed, she submitted nothing in opposition to the motion discussing her purported efforts undertaken to comply with the two-year suit limitation 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 limitation period. (A. 00449-00459.)

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. (A. 00006-00011.) In particular, the Trial Court noted:

> Notably, plaintiff does not dispute this time-period limitation. Instead, plaintiff attempts 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]laintiff did nothing to protect her rights as the suit limitation expired." (NYSCEF Doc. 112, at 10).

(A. 00009.)

On August 9, 2021, Plaintiff filed a Motion to Renew and Reargue. (A. 00486-00525.) 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. (A. 00488-00522.) On November 10, 2021, the Trial Court denied Plaintiff's Motion to Renew and Reargue. (A. 00012.)

Thereafter, Plaintiff filed an appeal with the First Department, Appellate Division. After considering the record, on November 10, 2022, the First Department held:

> In accordance with the insurance policy's two-year suit limitations provision, plaintiff had until August 4, 2016 to commence an action, yet failed to file the summons with notice until August 4, 2020 and was therefore time-barred from commencing suit against the Tower defendants, or from amending the complaint to add a party to this action. (*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 at 471.[3] Plaintiff's motion to the First Department for reargument was denied by order dated March 2, 2023. (A. 00005.)

This Court granted leave to appeal.

ARGUMENT

POINT I

PLAINTIFF FAILED TO COMPLY WITH THE TWO-YEAR SUIT LIMITATIONS PROVISION

It is well established that suit limitations periods in property insurance policies are enforceable. See, e.g., John v. State Farm Mut. Auto. Ins. Co., 116 A.D.3d 1010 (2d Dep't 2014) (finding that the insurer established summary judgment as a matter of law by submitting the insurance policy, which demonstrated that the one-year limitations period expired prior to the commencement of the action); Beekman Regent Condo. Ass'n v. Greater N.Y. Mut. Ins. Co., 45 A.D.3d 311 (1st Dep't 2007) (finding that the contractual limitations period in the insurance policy barred the insureds' claim); Schunk v. N.Y. Cent. Mut. Fire Ins. Co., 237 A.D.2d 913 (4th Dep't 1997) (finding plaintiff's claims are barred by the failure to commence suit within two-year limitations period in policy); Grumman Corp. v. Travelers Indem. Co., 288 A.D.2d 344 (2d Dep't 2001) (finding that the insured's breach of contract action was barred on the

[3] The Appendix at 00003-00004 does not include a complete copy of the decision.

ground that it was commenced after the expiration of the two year limitations period set forth in the policy); Blanar v. State Farm Ins. Cos., 34 A.D.3d 1333 (4th Dep't 2006) (holding that suit limitations periods are enforceable and dismissing case where plaintiffs failed to commence the action for first-party coverage under their homeowners policy within two years after the occurrence causing the loss or damage). Indeed, in Executive Plaza, this Court observed that it had enforced limitation periods of one year and as little as six months. 22 N.Y.3d at 518.

Under the well-established case law, the two-year suit limitations provision began to run on the date of the loss. See, e.g., Roberts v. N.Y. Prop. Ins. Underwriting Ass'n, 253 A.D.2d 807 (2d Dep't 1998) (finding that the date of loss from which the policy's two-year suit limitations period ran was the date of the fire and not the date of the completion of the loss-determination process); Costello v. Allstate Ins. Co., 230 A.D.2d 763 (2d Dep't 1996) (finding that the two-year suit limitations for property loss is measured from the date of the catastrophe insured against and not from the accrual date of the failure to pay the claim; finding that the plaintiff's action was time barred where it failed to commence suit within two years of the fire).

In this case, relying solely on the allegations in the Complaint, the fire occurred on August 4, 2014. (A. 00020.) Thus, in accordance with the Policy's two-year suit limitations provision, Plaintiff had until August 4, 2016 to commence

suit against the Tower Defendants. Plaintiff, however, did not file a Summons with Notice until August 4, 2020, – four years after the expiration of the two-year limitations period. (A. 00013.) Under the well-established case law, at the time the Summons with Notice was filed, Plaintiff was time-barred from commencing suit against the Tower Defendants, or from amending the Complaint to add TIC as a party to this litigation.

As the First Department recognized under these facts: "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." 210 A.D.3d at 471. This satisfies the requirements of CPLR 3211 (a) (1) because the documentary evidence utterly refutes Plaintiff's purported right to pursue her breach of contract claims. See generally, Goshen v. Mut. Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326-27 (2002). The burden then shifted to Plaintiff to present evidence that would create an issue of fact as to whether an exception to the application of the two-year suit limitation provision should apply, because its application would be unfair under the circumstances. See Kaul v. Brooklyn Friends Sch., 220 A.D.3d 939, 940-41 (2d

Dep't 2023).[4] Plaintiff failed to demonstrate the existence of an existing exception or some crucial fact that would warrant the creation of a new exception.

POINT II

THE EXCEPTION TO THE TWO-YEAR SUIT LIMITATION PROVISION ALLOWED UNDER *EXECUTIVE PLAZA* DOES NOT APPLY

To qualify for an exception to the two-year suit limitation provision, Plaintiff must first show that she attempted to protect her rights, and that the attempt was unsuccessful such that she was forced to commence suit again after the period expired. She must then show that dismissing her untimely suit would be unfair under those circumstances because the evidence suggests repairs could not have been made within the two-year period. The circumstances here miss the mark in every respect.

In the Trial Court's July 2, 2021 Decision, Judge Engoron correctly found that the Executive Plaza case is distinguishable from this matter as "[p]lainiff did nothing to protect her rights as the suit limitation expired." (A. 00009.) That is in essence, the point of this Court's decision in Blitman, 66 N.Y.2d at 823. Plaintiff

[4] While that case deals with a statute of limitations and not a contractual limitation provision, the same principles apply. That court held: "'[O]n a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant 'bears the initial burden of [establishing], prima facie, that the time in which to sue has expired''… 'The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period.'"

did not seek an extension of the suit limitation period or commence suit within the allotted time.

Even if Plaintiff protected her rights, and was obstructed (as were the facts in Executive Plaza), Plaintiff failed in the next step -- to present evidence to create an issue of fact as to whether she could not make the repairs until after the two-year suit limitation provision expired. As the First Department held: "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." 210 A.D.3d at 471.

A. Executive Plaza

In Executive Plaza, 22 N.Y.3d 511, the insured brought an action within its policy's two-year suit limitation period against its property insurer, seeking recovery of replacement cost for its office building that was destroyed by fire, and the insurer moved to dismiss. Plaintiff had a $1 million policy that gave the insured a choice between the payment of the actual cash value of the loss, or replacement cost -- if the damaged property is actually repaired or replaced and done so as soon as reasonably possible after the loss. The insurance company paid in excess of $750,000 for the actual cash value of the loss, and the insured notified the insurer of its intention to make repairs and collect the $242,000 "holdback" amount (the difference between the actual cash value of the loss and the actual cost to make repairs). Id. at 517.

Prior to the building being repaired, the insured sued on February 23, 2009, on the last day of the two-year period. Id. The defendant insurer, after removing to federal court, successfully moved to dismiss on the ground that the action was premature since the insured had not finished rebuilding the building. Id. Thereafter, the building was replaced in October 2010 -- eight months after the expiration of the two-year limitations period -- but when the insured submitted its "holdback" claim, it was denied because the two-year limitations period had expired. Id. The insured then commenced another action, and the defendant insurer, after removing to federal court, moved to dismiss on suit limitations grounds. The federal district court granted the motion, and the Second Circuit certified to the Court of Appeals the following question: whether a two-year suit limitation provision is enforceable with respect to replacement cost holdback coverage if the insured property cannot be reasonably replaced within two years. Id. at 516.

This Court began by noting that "there is nothing inherently unreasonable about a two-year period of limitation," and in fact cited to cases that have enforced contractual limitations periods of shorter durations. Executive Plaza, 22 N.Y.3d at 518 (citing to, inter alia, Blitman Constr. Corp. v. Ins. Co. of N. Am., 66 N.Y.2d 820 (1965) (upholding a 12 month period of limitations); Cont'l Leather Co. v. Liverpool, Brazil & River Plate Steel Nav. Co., 259 N.Y. 621 (1932) (enforcing a

sixth month limitations period)). This Court then stated in view of the facts of that particular case, where suit was originally commenced and dismissed, it was not reasonable to require suit be commenced within two years from the date of loss while also imposing a condition precedent to suit – that the property be rebuilt within two years – where "that cannot be met within that two-year period." Id. at 518.[5]

[5] In essence, the Executive Plaza case was remanded for discovery because sufficient facts were plead, that if accepted as true, would warrant avoidance of the suit limitation condition due to the impossibility of performance under the circumstances. See Herter v. Mullen, 159 N.Y.28 (1899) ("There are many cases where the courts have implied a condition in a contract to the effect that a party is relieved from its terms where its performance has, without his fault, become impossible.") This Court has explained that "once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome…" Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902 (1987). The defense of impossibility has "been applied narrowly, due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract." Id. (citing 407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 (1968) (explaining that "the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, Vis major, or by law" and holding that financial burdens that rise to the level of insolvency or bankruptcy do not warrant the impossibility defense). See also Pomilla v. Great Am. Ins. Co., 14 N.Y.2d 567, 567 (1984) (affirming dismissal of complaint for failure to bring the action within the suit limitation provision of the policy, determining that the insured's impossibility of performance did not apply). Here, impossibility only arises after an insured has taken the precautions directed in Blitman – commence suit or obtain an extension or waiver. Only when an insured is prevented from enforcing the insurance policy notwithstanding taking the prescribed protective actions might the doctrine of impossibility come into play, as was the case in Executive Plaza. Even then, it is the insured's burned "to allege or demonstrate that she reasonably attempted to repair the Property within the two years, but was unable to do so." (See A. 00009.)

1) Allegations in Executive Plaza

In Executive Plaza, No. 2:11-cv-01716-JS-WDW at Doc. No. 1 Ex. A (Verified Complaint), the plaintiff made the following pertinent allegations in its federal court Complaint supporting its contention that the property could not be repaired within the two-year limitations period:

> 14. Plaintiff proceeded with the replacement of the building which had been on the Property, and promptly took all reasonable steps to hire an architect, prepare architectural drawings, surveys, drawings, applications and other documents necessary to secure building permits from the Town of Hempstead and the Village of Island Park.
>
> 15. On or about June 19, 2007, Plaintiff's architect filed plans with the Department of Buildings of the Village of Island Park for the erection of a two-story commercial building intended to replace the fire damaged building.
>
> 16. Because the Property had been improved with a nonconforming building which would not be permitted under current zoning regulations, the Village of Island Park determined that a zoning variance would be required in order for Plaintiff to replace the fire damaged building with a new and similar building.
>
> 17. Plaintiff promptly filed for and pursued such zoning variance applications and they were granted by the Village of Island Park Zoning Board of Appeals in or around October 25, 2007.
>
> 18. Thereafter, construction drawings were filed with the local Building Department.

> 19. Thereafter, on or about December 17, 2007, the Department of Buildings refused to issue building permits until the Nassau County Department of Public Works had issued site plan approval for the proposed construction.
>
> 20. Two days later, on December 19, 2007, plaintiff filed an application with the Nassau County Department of Works for such site plan approval.
>
> 21. Thereafter, on June 23, 2008, the Nassau County Department of Public Works issued its approval, and on July 14, 2008, the Department of Buildings of the Incorporated Village of Island Park issued building permits to Plaintiff for the foundations to be installed.
>
> 22. On or about November 26, 2008, following additional review by the Department of Buildings, full building permits were issued.
>
> 23. Plaintiff has commenced reconstruction of the building and is actively in the process of completing such work pursuant to the approved plans and permits.

Indeed, in certifying its question to the Court of Appeals, the Second Circuit specifically noted, based upon the allegations in the Complaint, that because zoning laws had changed, "[t]o rebuild, Executive needed a variance and other forms of consent from local governmental entities" and that "[d]espite first submitting its application for review in June 2007, a final building permit was not granted until November 2008, seventeen months later." Executive Plaza, LLC v. Peerless Ins. Co., 717 F.3d 114, 115-16 (2d Cir. 2013).

2) Fair and Reasonable, in View of the Circumstances

In answering the certified question as to whether the two-year limitations period was unreasonable if an insured is unable to rebuild within that timeframe, this Court held that "the period of time within which an action must be brought … should be fair and reasonable, in view of the circumstances of each particular case" such that the "circumstances, not the time, must be the determining factor." Executive Plaza, 22 N.Y.3d at 519 (internal citations omitted).

Based upon the facts presented with the certified question in Executive Plaza -- that the "property cannot reasonably be replaced in two years" and that the insured commenced suit within the two year period, but the insurer "successfully argued that the action was brought too soon," -- this Court found that the two-year suit limitation was unreasonable to enforce when the subsequent suit was brought.

In cases discussing Executive Plaza, courts have recognized that the case stands for the proposition that the reasonableness of a suit limitation provision should be examined under the facts of a particular case. See, e.g., Endemann v. Liberty Ins. Corp., 390 F. Supp.3d 362 (N.D.N.Y. 2019) (dismissing complaint on suit limitations grounds where the allegations failed to establish that plaintiff was required to satisfy a condition precedent before bringing an action to recover the additional damages to his home); Zannini v. Phenix Mut. Fire Ins. Co., 234 A.3d 269, 276 (N.H. 2019) (finding that the policy's one-year suit limitations provision

applicable where there was nothing in the record that showed that the plaintiff could not comply with the policy provisions within the one-year period).

B. Applying The Suit Limitation Provision Is Fair And Reasonable Under The Circumstances Here -- Where Plaintiff Neither Commenced Suit Within Two Years, Nor Alleged That She Reasonably Attempted To Repair The Property Within That Period But Was Unable To Do So.

Here, unlike in Executive Plaza, Plaintiff did not "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," as was directed by this Court in Blitman, 66 N.Y.2d at 822. It was only once the circumstances in Executive Plaza have occurred -- where that plaintiff took affirmative steps to "protect itself," and yet was prevented from reaping the benefits of that protection because the insurance carrier in that case was successful in both dismissing the case as premature, and in dismissing the next case as untimely once the repairs were completed -- that the Court should consider the reasonableness of enforcing the suit limitation period in an untimely action.

1) Plaintiff Failed To Protect Her Rights To Suit

Unlike in Executive Plaza, here, Plaintiff failed to protect her right to commence suit as the suit limitation period expired. She never told Tower she could not complete repairs within the two-year period, nor asked Tower to extend or waive the suit limitation period because of that. Indeed, she never even told

Tower she intended to pursue her claim on a replacement cost basis within 180 days of the loss, which is a precondition to this coverage. (See A. 00288.)[6] As demonstrated in the Tower Defendants' denial letter, she failed to provide the documentary evidence or identify an appraiser which would have given notice to the Tower Defendant that she intended to pursue replacement costs. She also did not commence suit prior to the expiration of the two-year limitations period (and thus the Tower Defendants never moved to dismiss before the period expired).

i. Plaintiff Failed To Commence Suit Within Two Years of the Damage, But Could Have

It is undisputed that Plaintiff did not commence suit within two years of the fire. She now speculates that Tower would have moved to dismiss as premature any action filed before the period expired, but there is simply no evidence to suggest that. (See Pl's Br. 32.) This is especially speculative since, as discussed below, several of her causes of action had nothing to do with whether or not she

[6] One of the distinguishing facts of Executive Plaza was that the "Plaintiff [in Executive Plaza] notified defendant that it would be making a replacement cost claim up to the $1 million policy limit." Executive Plaza, 22 N.Y.3d at 517. A review of the underlying Complaint in Executive Plaza makes clear that that plaintiff made an allegation that "[u]pon substantial completion of the Building, Plaintiff made written demand upon Peerless by letter dated October 5, 2010 for payment of the withheld replacement cost value due under the Policy." Executive Plaza, No. 2:11-cv-01716-JS-WDW at Doc. No. 1 (Verified Complaint at ¶ 33.) Unlike in Executive Plaza, here, the Complaint does not assert that Plaintiff advised the Tower Defendants in writing of her intent to seek replacement cost coverage. (A. 00019-00031.) This argument was raised in the motion to dismiss reply papers in direct response to Plaintiff's assertion that the Executive Plaza case was factually similar and applicable in this instance.

repaired the damaged property, and would not have been premature had she timely commenced suit.

Unlike in Executive Plaza, the Complaint here 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 under her insurance policy 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. (A. 00009 at ¶ 1, A. 00028 at ¶ 34.)

Likewise, Plaintiff claims "Tower/AmTrust refused to pay invoices submitted by vendors that it insisted be retained to handle initial remediation work." (A. 00022 at ¶ 8) But if this allegation is true, and it is a breach of Tower's obligations under the Policy, then there was 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." (A. 00028 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.

In her Summons with Notice, Plaintiff claims there was a "dispute that the policy included full replacement cost coverage." (A. 00016.) That dispute as to whether the Policy "included" this coverage did not require the property to be repaired before commencing suit to obtain a determination. Plaintiff claims there was a "dispute [about] the dollar amount and time duration of business interruption coverage." (Id.) That dispute also did not require the property to be repaired before commencing suit. She claims "the defendants are attempting to assert an underinsurance penalty, claiming that the building was not properly insured before the fire." (Id.) Again, this dispute did not require that the property be repaired before commencing suit.

Moreover, the replacement cost coverage provision does not prevent plaintiff from filing suit, but instead, merely states that Tower "will not pay on a replacement costs basis for any loss or damage: (i) until the lost or damaged property is actually repaired or replaced." (A. 00167 ¶ (d).) Plaintiff could have filed a declaratory judgment claim with regard to the amount she expected to be due under that provision once the damage was repaired. Certainly, if she attempted to make repairs "as soon as reasonably possible," she would at least have had a contract with a construction company within two years of the loss setting forth the

total replacement cost to allege in such an action.[7] Indeed, Plaintiff's suit, which commenced in August 2020, was not based on her actual expenditures to make repairs, but rather, her "best estimate of the total damages…," which she could have alleged in a pleading before the suit limitation period expired. (A. 00016.) Plaintiff claims she "could not commence an action – pursuant to the terms of the policy – until all repairs were completed" (Pl.'s Brief at 16), which seems to suggest that there could be no breach of Tower's obligations to pay until that time. Under that logic, however, Tower is still not in breach. Tower has no obligation to issue any payment until 30 days after Plaintiff submits a sworn proof of loss and either Tower reaches an agreement with her on the amount of the loss, or an appraisal award is issued. (A. 00168. ¶ g.) Neither of those events occurred, nor were they alleged to have occurred, when Plaintiff commenced suit on August 4, 2020.[8] Indeed, Plaintiff claimed in her Summons with Notice that "the insurer has not rejected the claim." (A. 00016.) Myers v Schneiderman, 30 N.Y.3d 1, 11 (2017) (While facts alleged in the complaint are presumed true and accorded every possible favorable inference, "'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'"). Nevertheless, that did not prevent her from

[7] Tower had asked for this information since 2014. (A. 00228.)

[8] Indeed, Tower demanded an appraisal on November 17, 2014, November 20, 2014, and November 25, 2014, but the requests were ignored by Plaintiff. (A. 00228.)

commencing suit at that time. In sum, Plaintiff could have commenced suit against the Tower Defendants within the two-year limitations period to protect her rights, as the insured did in Executive Plaza.[9]

ii. Plaintiff Failed To Request An Extension Or Waiver Of The Suit Limitation Period, But Could Have

Filing litigation within two years of the loss was not Plaintiff's only option to protect her rights. Indeed, this Court identified two options an insured may take in the first instance to protect its rights when a suit limitation period is expiring – commence suit or request from the insurer an extension or waiver of the suit limitation period. Blitman, 66 N.Y.2d at 823. Thus, knowing that it would allegedly take multiple years to rebuild the Premises, Plaintiff could have requested from Tower an extension of the suit limitations provision.[10] That simple request would have required little effort and no expense on Plaintiff's part. Indeed, she had the wherewithal to commence the action *pro se* by filing a Summons with Notice. She could have also explained her unsuccessful efforts to make the repairs

[9] Indeed, Plaintiff is a sophisticated litigant, who prior to commencing this action, had been engaged in numerous litigations, including those involving a statute of limitations and numerous appeals. See, e.g., Farage v. Ehrenberg, 124 A.D.3d 159 (2d Dep't 2014); Farage v. Lewis, 142 A.D.3d 706 (2d Dep't 2016); Farage v. Bloom, 38 Misc.3d 146(A) (Sup. Ct. Kings Cty 2013); Brandon v. Farage, 43 Misc.3d 144(A) (App. Term 2d Dep't 2014); Farage v. Angiuli, Poznansky & Katkin, 291 A.D.2d 479 (2d Dep't 2002); Farage v. Johnson-McClean Techns., Inc., 2002 WL 1067824 (S.D.N.Y. 2002). Thus, she should have been well aware of the ramifications for not commencing suit timely.

[10] As recognized in Blitman, the suit limitation provision is a Condition to coverage that Tower could modify by extending it, or it could waive it, as it has the right to waive any Conditions to coverage. See generally Carroll v. Charter Oak Ins. Co., 10 Abb.Pr.N.S. 166, 171 (1868).

before the period expired in her request for an extension. If rejected, which is speculation, it would have bolstered Plaintiff's right to commence suit at that time.

The court in Consol. Rail Corp. v. Aspen Specialty Ins. Co., 2019 WL 2417704, at *6 (D.N.J. 2019) (applying NY law) explained the significance of failing to preserve one's right to commence suit:

> Even if Conrail is correct that it could not have brought any action, including a declaratory judgment action, against Hudson until Conrail rebuilt the bridge and its damages became known—a questionable proposition—Conrail still failed to request any extension of the limitation period from Hudson… Put simply, the limitation period at issue here in no way nullified Conrail's claims. Because Hudson's policy does not impose an impossible-to-meet perquisite before Conrail may sue and because Conrail failed to take any action to protect itself, the Court finds that the one-year limitation is not unreasonable or unenforceable under Executive Plaza.

In this case, the Complaint does not allege that Plaintiff requested an extension or waiver of the limitations period, or that she was refused such by the Tower Defendants. (A. 00019-00045.) Unlike in Executive Plaza, Plaintiff has not demonstrated that she took any action whatsoever to preserve her rights under the Policy.

2) Plaintiff Failed To Submit Evidence, Sufficient To Create An Issue Of Fact, That Repairs Could Not Be Completed Within Two Years

Plaintiff failed to satisfy the prerequisite to seeking an exception to a contractual suit limitation provision – protecting her rights by "either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision." See Blitman, 66 N.Y.2d at 823. Only after taking that step, and being unsuccessful, do the circumstances become analogous with Executive Plaza and warrant a consideration of whether a prerequisite to receiving a replacement cost payment "cannot be met within that two year period."

Notably, this Court did not overrule Blitman in the Executive Plaza decision, but instead held that Blitman supports its decision. 22 N.Y.3d at 519. Thus, these decisions must be read in harmony. Blitman provided the bright-line rule that an insured must sue within the suit limitation period or obtain a waiver or extension of the provision. In Executive Plaza, this Court recognized that if an insured adheres to the bright-line rule, but is still barred from suing by the enforcement of the suit limitation provision, the provision itself may be unreasonable under those circumstances.

Noting the bright-line rule in Blitman was followed, but under those circumstances led to an inequitable result, this Court held in Executive Plaza that the defendant insurance company then "may not insist on a 'limitation period' that

renders the coverage valueless when the repairs are time-consuming." 22 N.Y.3d at 518.[11] That is, the insurance company cannot "have its cake and eat it too" – have a suit dismissed as premature, and once "matured," have it dismissed as untimely.

Unlike in Executive Plaza, where the insured set forth numerous and specific factual allegations regarding the efforts it made on specific dates to repair the property within the two-year period (see No. 2:11-cv-01716-JS-WDW at Doc. No. 1 ¶14-23), the Plaintiff's Complaint here simply alleges in a conclusory fashion: "restoration of Ms. Farage's property would have been a multi-year process even if Tower/AmTrust had complied with its obligations" and "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. 00022, 00027 at ¶ 9, 31.) These conclusory statements are not supported by any facts or any efforts made by Plaintiff, or the dates any such efforts were made to repair the property within the two-year suit limitation period. Without more, these conclusory allegations are insufficient to defeat a motion to dismiss. See generally, Consol. Rest. Operations,

[11] With respect to the "time-consuming" repairs, the Executive Plaza decision was based on a certified question that assumed "the insured property cannot reasonably be replaced within two years." 22 N.Y.3d at 518. Nevertheless, that fact was not established in the federal case that certified the question. Instead, following the decision from this Court, the Second Circuit remanded the case to the federal district court "to address the factual questions of whether Executive could reasonably replace the damaged property within two years and whether it replaced the property 'as soon as reasonably possible.'" 745 F.3d 615, 616 (2d Cir. 2014).

Inc. v. Westport Ins. Corp., 205 A.D.3d 76, 86 ("A complaint "cannot be vague and conclusory"), aff'd, 2024 WL 628047 (2024).

Notwithstanding the defects in the pleadings that failed to allege any facts suggesting that repairs could not be completed before the two-year suit limitation period expired, Plaintiff still had an opportunity in opposing the motion to dismiss by submitting evidence to create a factual issue on this point – a point that Plaintiff bears the burden to prove. Nevertheless, Plaintiff failed to include an Affidavit in opposition to the Motion to Dismiss, or in connection with her Motion to Amend, demonstrating the efforts undertaken during the two-year period and the reasons the Premises could not be repaired within that timeframe. (A. 00449-00459.)

Despite Plaintiff's contention that it was improper for the Trial Court to require that she provide sufficient evidence that the two-year contractual deadline was unreasonable in connection with a motion to dismiss, case law is clear that a court will consider an affidavit in opposition to a motion to dismiss, and will not turn the motion into one for summary judgment. See Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634-35 (1976) ("[u]nder CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss," and the motion will not be converted into a one for summary judgment; dismissing complaint where the affidavit submitted by defendants established that plaintiff had no cause of action).

Unlike the pleadings in Executive Plaza, the Trial Court here correctly found that Plaintiff failed to allege or demonstrate that she reasonably attempted to repair the Property within the two years, but was unable to do so. (A. 00009.) The First Department agreed. 210 A.D.3d at 471 ("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 also 120 Lexington Ave. Corp. v. Wesco Ins. Co., 2024 N.Y. Slip Op. 02004, 2024 WL 1625001 (1st Dep't Apr. 16, 2024) (" There are no allegations in the Complaint explaining plaintiff's delay in commencing this action nor any explanation in the record of the steps undertaken to obtain the Certification and the timing such steps were undertaken.").[12]

Thus, even if Plaintiff had tried and failed to maintain a suit that was commenced within the two-year suit limitation period, her failure to allege any facts that she reasonably attempted to repair the property within the two-year limitations period but was unable to do so, is fatal to her suit commenced six years after the loss.

[12] In addition to considering whether it was possible to commence suit within the two-year period, it is respectfully suggested that the Court should also consider whether filing suit when Plaintiff did, six years after that date of the fire, frustrates the purpose of the suit limitation provision. That is, is it reasonable that once an insured establishes that it cannot make repairs within a two year period, for it to then be allowed to commence suit at any time thereafter, regardless of when repairs could have been made. The answer is no. The factual allegations, if true, need to both establish that repairs could not be made within the two-year period, and were completed reasonably close to the date suit was commenced.

POINT III

CONTRACTUAL SUIT LIMITATION PROVISIONS SHOULD BE ENFORCED AS WRITTEN

Limiting the initiation of legal proceedings to a reasonable period after the event pursuant to a contractual suit limitation provision is a bargained for right that serves worthwhile purposes. As time goes on, important evidence may be lost, the memories of witnesses can grow foggy, prices for repairs increase, etc. This is especially true with respect to suit limitation provisions in insurance policies. These provisions enable insurers to "close the books" on a claim after a reasonable amount of time, which allows insurers to reallocate capital reserves that may have been set aside to resolve such claims, which in turn allows insurers to put that capital to work insuring other risks – increasing the supply of available insurance to the public.

Indeed, over a century ago the United States Supreme Court upheld the enforceability and validity of suit limitations provisions. In Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386 (1868), the Court upheld a policy provision that required the insured to commence a suit within twelve months of the date of loss. In its decision, the Court stated:

> The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper

> tribunal, whilst the transaction is recent, and the proofs respecting it are accessible.

The principals set forth by this Court in the Blitman and Executive Plaza decisions accomplish the goal of the suit limitation provision, including providing either some finality to a claim, or notice to the insurer that the claim is not resolved through the commencement of suit. It is only after there has been compliance, by either suit or obtaining a waiver or extension of the provision, that a court should consider whether it is reasonable to apply the suit-limitation provision to a later-filed suit, by examining the factual allegations suggesting that repairs could not been completed earlier.

In Executive Plaza, after timely filing the first suit, the factual allegations in the second complaint of plaintiff's attempts to complete the repairs within the suit limitation period were contained in at least ten paragraphs of the complaint, that referenced six separate dates. If true, those facts may have provided a reasonable excuse for the timing of the second suit outside the suit limitation period – warranting the case to be remanded for discovery. Moreover, since that plaintiff commenced the first action, its insurer was on notice that the claim was not abandoned or resolved as the two-year period passed.

Here, Plaintiff did not provide such factual allegations – in the Complaint or in an affidavit in opposition to the motion to dismiss. Instead, she asserted just her conclusion that she could not have complied. Putting aside the fact that she did not

first attempt to protect her rights within the suit limitation period, as Biltman directs, if this Court finds Plaintiff's conclusory allegations are sufficient to avoid a motion to dismiss, it would undermine the purpose of all contractual suit limitation provisions because untimely lawsuits could avoid dismissal by simply asserting similar, factually vague and conclusory, allegations that compliance with the suit-limitation provision was either impossible or obstructed by defendant. The Tower Defendants respectfully suggest that more should be required for an insured to circumvent this provision.

POINT IV

PLAINTIFF MAY NOT RELY ON HER AFFIDAVIT TO ARGUE THE UNREASONABLENESS OF THE SUIT LIMITATIONS PROVISION IS IMPROPER

Plaintiff may not rely on her Affidavit and documents attached thereto as exhibits to demonstrate the unreasonableness of the two-year suit limitations provision as they were included only in support of her Motion to Renew and Reargument and not in opposition to the Motion to Dismiss of the Tower Defendants. (A. 00488-00522.)

A motion for leave to renew must be based upon new or additional facts which, although in existence at the time of the original motion, were not made known to the party seeking renewal, and, therefore, were not known to the court.

Matter of Shapiro v. State of New York, 259 A.D.2d 753 (2d Dep't 1999). Although leave to renew may be granted in the Trial Court's discretion even where the additional facts were known to the party seeking renewal at the time of the original, leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted in connection with the original application. Matter of Shapiro, 259 A.D.2d at 753-754 (denying leave to renew where the claimants failed to provide the court with any reason as to why the affidavit of the professional engineer had not previously been brought to the attention of the court). "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." Matter of Serviss v. Inc. Vil. of Floral Park, 164 A.D.3d 512, 513 (2d Dep't 2018).

Plaintiff's Affidavit and numerous emails to/from Plaintiff and representatives of the Tower Defendants attached thereto, were submitted for the first time with her reargument/renewal motion in order to argue the unreasonableness of the suit limitation provision in the Policy. While these documents in no way suggest the suit limitation period was unreasonable under the circumstances, Plaintiff admits that this evidence was submitted, not in connection with her papers in opposition to the Tower Defendants' Motion to Dismiss, but only in connection with her renewal/reargument motion. (A. 00488 "in support of

my motion to renew and/or reargue…"). Specifically, in her Affidavit, Plaintiff lists for the first time the items that allegedly had to be completed in connection with restoring the Premises. That list, however, fails to state that these tasks were actually performed, the dates that construction work in connection with these items was commenced and completed, or the efforts undertaken by the Plaintiff to complete these items within the Policy's two-year suit limitation period. (A. 00494.) Further, the documentation attached to her Affidavit was known to Plaintiff at the time that her opposition papers were filed since the documentation consists of email communications with Plaintiff that were written back in 2014 and 2017, prior to the commencement of the litigation. Although this "evidence" does not support Plaintiff's argument, she also failed to provide a reasonable justification for not presenting both her Affidavit and the attached documentation in her original opposition to the motion to dismiss.

Plaintiff's failure to provide any justification for failing to include her Affidavit and these known emails in her opposition papers warranted denial of Plaintiff's Motion to Renew/Reargue. Cioffi v. S.M. Foods, Inc., 142 A.D.3d 526, 530 (2d Dep't 2016) (explaining that where the party seeking renewal fails to provide a reasonable justification for not presenting the new facts on the prior motion, the court lacks discretion to grant renewal and explaining that reasonable justification does not exist where "the new evidence consists of documents which

the [moving party] knew existed, and were in fact in his [or her] own possession at the time the initial motion was made") (internal citations omitted).

CONCLUSION

In sum, Plaintiff had the opportunity to commence suit for breach of contract and/or declaratory judgment within the two-year suit limitation period, or request that Tower either waive the suit limitation provision or extend it. Ignoring the direction this Court provided in Biltman, she did neither. Thereafter, she commenced suit four years after the suit limitation period expired, but failed to allege why she could not complete repairs and commence suit within the two-year period. Thus, there was no basis for the Trial Court or Appellate Division to conclude the suit limitation provision was unreasonable under the circumstances.

For the foregoing reasons, the Tower Defendants, respectfully request that this Court affirm the November 10, 2022 Decision and Order of the Appellate Division, First Department, and that the Court grant such other and further relief as it deems appropriate.

Dated: New York, New York
April 18, 2024

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Tower Risk Management, Corp.,
Tower Group, Inc. and Tower Group
Companies

Addendum

EX-21.1 5 exhibit211listofsubsat1231.htm EXHIBIT 21.1 LIST OF SUBSIDIARIES

EXHIBIT 21.1

SUBSIDIARIES LIST

Entity Name	Jurisdiction of Incorporation or Formation
1262 East 14th Purchaser, LLC	New York
10909 McCormick Road LLC	Delaware
17771 Cowan LLC	Delaware
360 Market Place, LLC	Delaware
3925 Brookside Parkway LLC	Delaware
400 Executive Boulevard Southington, LLC	Delaware
4455 LBJ Freeway LLC	Delaware
7125 West Jefferson LLC	Delaware
723 St. Nicholas Holdings LLC	New York
800 Superior, LLC	Delaware
800 Superior NMTC Investment Fund II LLC	Ohio
AA Gadget Repair Limited	Ireland
Advantage Comp, Inc.	New Jersey
AFS Realty Holdings, LLC	Delaware
AFS Realty Member, LLC	Delaware
Agent Alliance Reinsurance Company, Ltd.	Bermuda
AII Insurance Management Limited	Bermuda
AII Investment Holdings Ltd.	Bermuda
AII Reinsurance Broker Ltd.	Bermuda
AmCafe LLC	Delaware
AmCom Insurance Services, Inc.*	California
AMT Agency Holdings, Inc.*	Delaware
AMT Capital Holdings, S. A.	Luxembourg
AMT Capital Holdings III S.A.	Luxembourg
AMT Chronos S.A.	Luxembourg
AMT Consumer Services, Inc.	Delaware
AMT Corporate Member Holdings Limited	England
AMT Direct Services Holdings LLC	Delaware
AMT Direct Title, LLC	Delaware
AMT Exchequer Court Limited	England
AMT Exchequer (Jersey) No. 1 Limited	Jersey
AMT Exchequer (Jersey) No. 2 Limited	Jersey
AMT Global Realty Holdings LLC	Delaware
AMT Global, LLC	Delaware
AMT Home Protection Company	California
AMT Investments LLC	Delaware

AMT Mortgage Insurance Limited	United Kingdom
AMT Mortgage Services Limited	United Kingdom
AMT NY Realty Holdings, LLC	New York
AMT Plutus S.A.	Luxembourg

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

Entity Name	Jurisdiction of Incorporation or Formation
AMT RE NY Holdings LLC	Delaware
AMT Road Services Corp.*	Delaware
AMT Ventures Holdings LLC	Delaware
AMT Warranty Corp.*	Delaware
AMT Warranty Corp. of Canada, ULC*	Alberta, Canada
AMT Warranty Solutions, Inc.*	Delaware
AMTCS Holdings, Inc.	Delaware
AmTrust Agency Holdings LLC	Delaware
AmTrust Agriculture Insurance Services, LLC	California
AmTrust at Lloyd's Limited	England
AmTrust Bermuda I Ltd.	Bermuda
AmTrust Bermuda II Ltd.	Bermuda
AmTrust Bermuda III Ltd.	Bermuda
AmTrust Bermuda IV Ltd.	Bermuda
AmTrust Captive Solutions Limited	Luxembourg
AmTrust Cayman Reinsurance Company, Ltd.	The Cayman Islands
AmTrust Central Bureau of Services Ltd.	England
AmTrust Claims Management SrL.	Italy
AmTrust Corporate Capital Limited	England
AmTrust Corporate Member Limited	England
AmTrust Corporate Member Two Limited	England
AmTrust E&S Insurance Services, Inc.	Delaware
AmTrust Equity Solutions, Ltd.	Bermuda
AmTrust Europe Legal, Limited	England
AmTrust Europe Limited	England
AmTrust France SAS	France
AmTrust Gestion Bolivia S.R.L.	Bolivia
AmTrust Gestion Paraguay S.A.	Paraguay
AmTrust Gestion Peru S.A.C.	Peru
AmTrust Holdings Luxembourg S.à.r.l.	Luxembourg
AmTrust Insurance Agency Italy S.r.L.	Italy
AmTrust Insurance Company of Kansas, Inc.	Kansas
AmTrust Insurance Luxembourg S.A.	Luxembourg
AmTrust Insurance Services Norway AS	Norway
AmTrust Insurance Services Sweden AB	Sweden
AmTrust Insurance Spain, S.L.U.	Spain
AmTrust International Bermuda Ltd.	Bermuda
AmTrust International Insurance, Ltd.	Bermuda
AmTrust International Limited	England
AmTrust International Underwriters DAC	Ireland
AmTrust Ireland Holdings Limited	Ireland
AmTrust Ireland Holdings II Limited	Ireland
AmTrust Italia S.R.L.	Italy

AmTrust Lloyd's Holdings Limited	The Cayman Islands
AmTrust Lloyd's Holdings (UK) Limited	United Kingdom

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. "Subsequent Events."

Entity Name	Jurisdiction of Incorporation or Formation
AmTrust Management & Consultancy (China) Co., Ltd.	China
AmTrust Management Services Limited	England
AmTrust Management Services Ireland Limited	Ireland
AmTrust Mobile Solutions India Holdings Private Limited	India
AmTrust Mobile Solutions India Private Limited	India
AmTrust Mobile Solutions Malaysia Holdings Sdn Bhd	Malaysia
AmTrust Mobile Solutions Malaysia Sdn Bhd	Malaysia
AmTrust Mobile Solutions Philippines Inc.	Philippines
AmTrust Mobile Solutions Singapore PTE, LTD	Singapore
AmTrust Netherlands Holdings B.V.	Netherlands
AmTrust Nordic Holding AB	Sweden
AmTrust Nordic, AB	Sweden
AmTrust North America, Inc.	Delaware
AmTrust North America of Florida, Inc.	Florida
AmTrust North America of Texas, Inc.	Delaware
AmTrust Revive Limited	United Kingdom
AmTrust Search and Production LLC	Delaware
AmTrust Syndicate Holdings Limited	England
AmTrust Syndicate Services Limited	England
AmTrust Syndicates Ltd.	England
AmTrust Title Insurance Company	New York
AmTrust Underwriters, Inc.	Delaware
AmTrust Underwriting Limited	England
AmTrust Warranty Holdings LLC	Delaware
AMTS Holding Corp.*	Delaware
AmVenture Insurance Agency, Inc.	Delaware
AmVenture Marketing Services, Inc.	Delaware
ANV Corporate Name Ltd.	United Kingdom
ANV Global Services Inc.	New York
ANV Global Services Ltd.	United Kingdom
ANV Holding B.V.	Netherlands
ANV Holdings (UK) Ltd.	United Kingdom
ANV International B.V.	Netherlands
ANV MGA Services B.V.	Netherlands
ANV Risk B.V.	Netherlands
ANV Services US, Inc.	Delaware
ANV Syndicate Management Ltd.	United Kingdom
Arc Legal Assistance Limited	United Kingdom
ARI Casualty Company	New Jersey
ARI Holdo Inc.	Delaware
ARI Insurance Company	Pennsylvania
Associated Industries Insurance Company, Inc.	Florida
Assure Space, LLC	Delaware
Automotive Assurance Group, LLC*	Florida

Boca NW65, LLC	Delaware

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

Entity Name	Jurisdiction of Incorporation or Formation
Builders & Tradesmen's Insurance Services, Inc.*	California
Builders Insurance Services, LLC	Delaware
BusinessBlocks Technologies, Inc.	Delaware
Canada Warranty Solutions, LLC*	Washington
Canyon State Auto Insurance Services, Inc.	Arizona
Capital Alpha Holdings, LLC	Delaware
Capital Oakland Holdings, LLC	Delaware
Car Care Pension Trustees Limited	England
Car Care Plan do Brasil Participacoes LTDA	Brazil
Car Care Plan GmbH	Germany
Car Care Plan (Holdings) Limited	England
Car Care Plan Limited	England
Car Care Plan Management Services Limited	England
Car Care Plan Turkey Danişanlik Anonim Şirketi	Turkey
Caravan Security Storage Limited	England
CLE Investments Limited	United Kingdom
CNH Industrial Canada Insurance Agency Ltd.*	Alberta, Canada
CNH Industrial Insurance Agency, Inc.*	Delaware
Collegiate Insurance Brokers Limited	England
Collegiate Limited	England
Collegiate Management Services Limited	England
Commercial Care Plan Limited	England
Composite Assistance Limited	United Kingdom
Composite Holdings Limited	United Kingdom
Composite Legal Expenses Limited	United Kingdom
Composite Legal Services Limited	United Kingdom
Cord Holdings LLC	Delaware
CorePointe Insurance Agency, Inc.	Michigan
CorePointe Insurance Company	Delaware
CPP Direct, LLC	Delaware
CPP Florida, LLC	Florida
CPP Travel, LLC	Delaware
CPP Warranties, LLC	Delaware
Dent Wizard Ventures Limited	United Kingdom
Dent Wizard (UK) Limited	United Kingdom
DWV Smart Repair Solutions Limited	United Kingdom
Developers Surety and Indemnity Company	California
Direct Reinsurance, Ltd.	Turks and Caicos Islands
Dore & Associates Holdings Limited	England
Dore Underwriting Services Limited	England
Eagle General Agency, Inc.	Texas
East Ninth & Superior, LLC	Delaware

Finagra Grains Limited	United Kingdom
Finagra Group Limited	United Kingdom
Finagra USA Inc.	Connecticut

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

Entity Name	Jurisdiction of Incorporation or Formation
First Nationwide 1031 LLC	New York
First Nationwide Title Agency LLC	New York
First Nationwide Title Agency of Texas, LLC	Texas
First Nonprofit Companies, Inc.*	Illinois
First Nonprofit Insurance Agency, Inc.	Illinois
First Nonprofit Insurance Company	Delaware
FSO2 LLC	Delaware
Gadget Repair Solutions Limited	England
Gadget Repair Solutions PTE LTD	Singapore
Georgia Dealer Consulting, Inc.*	Georgia
Heritage Indemnity Company	California
Heritage Mechanical Breakdown Corporation*	Delaware
I.G.I. Administration Services Limited	England
I.G.I. Intermediaries Limited	England
Indemnity Company of California	California
Insco Insurance Services, Inc.	California
Integrated Alpha, LLC	Delaware
LAE Insurance Services, Inc.*	California
Lion Capital Alpha, LLC	Delaware
Lion Capital Beta, LLC	Delaware
Mayfield Agency Bidco Inc.	Delaware
Mayfield Agency Borrower Inc.	Delaware
Mayfield Agency Midco Inc.	Delaware
Mayfield Agency Parent Inc.	Delaware
Mayfield Holdings LLC	Delaware
Mayfield WarrantyCo Bidco Inc.	Delaware
Mayfield WarrantyCo Borrower Inc.	Delaware
Mayfield WarrantyCo Midco Inc.	Delaware
Mayfield WarrantyCo Parent Inc.	Delaware
Milford Casualty Insurance Company	Delaware
Mobile Repair Solutions Malaysia SDN BHD	Malaysia
Motors Insurance Company Limited	England
N.V. Belegging-en Beheermaatschapij	Netherlands
National Home Surety Inc.	Delaware
Nationale Borg Reinsurance N.V.	Curaçao
Nationale Waarborg B.V.	Netherlands
NJ Realty Partners, LLC	Delaware
Northcoast Warranty Services, Inc.	Delaware
Northcoast Solutions of Canada, ULC	British Columbia, Canada
Oakwood Village Ltd.	England
Oryx Insurance Brokerage, Inc.*	New York
OwnerGUARD Agency*	California
OwnerGUARD Corporation*	California

OwnerGUARD University*	California
PBOA, Inc.	Florida

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

Entity Name	Jurisdiction of Incorporation or Formation
PDP Group, Incorporated*	Maryland
PDP Holdings, Inc.*	Maryland
Pedigree Livestock Insurance Limited	England
Pitcher & Doyle, ULC*	Canada
Plutus Holdings Gamma LLC	Delaware
Primero Seguros, S.A. de C.V.	Mexico
PT AmTrust Mobile Solutions Indonesia	Indonesia
PT AmTrust Mobile Solutions Indonesia Holdings	Indonesia
REAF Holdings LLC	Delaware
Redray Pte. Ltd.	Singapore
Republic Companies, Inc.	Delaware
Republic Diversified Services, Inc.	Delaware
Republic Fire and Casualty Insurance Company	Oklahoma
Republic Group No. Two Company	Missouri
Republic Lloyds	Texas
Republic Underwriters Insurance Company	Texas
Republic-Vanguard Insurance Company	Arizona
Right2Claim Limited	England
Risk Services-Arizona, Inc.*	Arizona
Risk Services (Bermuda) Ltd.*	Bermuda
Risk Services (Hawaii), Ltd.*	Hawaii
Risk Services, LLC*	Virginia
Risk Services-Nevada, Inc.*	Nevada
Risk Services-Vermont, Inc.*	Vermont
Rochdale Insurance Company	New York
Rock Run South, LLC	Delaware
Rocklin Sierra College, LLC	Delaware
RS Acquisition Holdco, LLC*	Delaware
RS-AIF LLC	Delaware
Security National Insurance Company	Delaware
Sequoia Indemnity Company	Nevada
Sequoia Insurance Company	California
Shanghai First Response Service Co. Ltd.	China
Signal Acquisition LLC	Delaware
Signal Service Solutions, LLC	Delaware
Southern County Mutual Insurance Company	Texas
Southern Insurance Company	Texas
Southern Underwriters Insurance Company	Oklahoma
Technology Insurance Company, Inc.	Delaware
Tecprotec AVA Sdn Bhd	Malaysia
Tecprotec LLC	Russia
The CPP Insurance Agency LLC	Delaware
The Finest Service Organization LLC	Delaware

Therium Capital Management Limited	England
Therium Finance ICC	Jersey

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

Entity Name	Jurisdiction of Incorporation or Formation
Therium Group Holdings Limited	Jersey
Therium Inc.	Delaware
Therium Luxembourg Sarl	Luxembourg
Tiger Capital, LLC	Delaware
TMI Solutions, LLC*	Washington
TN Investment LLC	Delaware
ToCo Warranty Corp.	Delaware
Total Program Management, LLC*	New York
Unified Grocers Insurance Services	California
Vemeco, Inc.*	Connecticut
Vista Surety Insurance Solutions, LLC	California
Warrantech Automotive, Inc.*	Connecticut
Warrantech Automotive of Canada, Inc.*	Ontario, Canada
Warrantech Automotive of Florida, Inc.*	Florida
Warrantech Caribbean, LTD.*	Grand Cayman Islands
Warrantech Consumer Product Services, Inc.*	Connecticut
Warrantech Corporation*	Nevada
Warrantech Direct, Inc.*	Texas
Warrantech Home Assurance Company*	Florida
Warrantech Home Service Company*	Connecticut
Warrantech International, Inc./Chile/Limitada	Chile
Warrantech International, Inc.	Delaware
Warrantech Management Company*	Delaware
Warrantech Peru SRL	Peru
Warranty Solutions Administrative Services, Inc.*	Florida
Warranty Solutions Management Corporation*	California
WCPS of Florida, Inc.*	Florida
Wesco Insurance Company	Delaware
Westlake Insurance Company (Bermuda), Ltd.	Bermuda
Westport Reinsurance Limited	Turks and Caicos Islands
Westside Parkway GA, LLC	Delaware
WHSC Direct, Inc.	Texas
WS Aftermarket Services Corporation*	Delaware

*Majority interest transferred effective February 28, 2018. For additional information, see Note 28. “Subsequent Events.”

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT EXPRESS**
COUNTY OF NEW YORK	)		**MAIL**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On April 18, 2024

deponent served the within: **BRIEF FOR DEFENDANTS-RESPONDENTS 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**

upon:

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Attorneys for Appellant
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KEIDEL WELDON & CUNNINGHAM LLP
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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on April 18, 2024

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 328984