NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

NEW YORK MART AVENUE U 2ND INC.,

Plaintiff,

- against-

NEW YORK ADJUSTMENT BUREAU, DOE CORPORATION, INC. D/B/A NEW YORK ADJUSTMENT BUREAU, NAUTILUS INSURANCE GROUP, NAUTILUS INSURANCE COMPANY, GREAT DIVIDE INSURANCE COMPANY, ROE CORPORATIONS, INC. 1-5 D/B/A NAUTILUS INSURANCE GROUP, NAUTILUS INSURANCE COMPANY, GREAT DIVIDE INSURANCE COMPANY,

Defendants.

Index No. 717221/17

Motion Date March 30, 2021

Motion Cal. No. 16

Motion Seq. No. 8

The following papers numbered EF182 to EF225 read on this motion by defendants, Nautilus Insurance Group, Nautilus Insurance Company, Great Divide Insurance Company, Roe Corporations, Inc. d/b/a Nautilus Insurance Group, Nautilus Insurance Company, and Great Divide Insurance Company (collectively, "Nautilus defendants"), for summary judgment in their favor, dismissing the complaint as against them, pursuant to CPLR 3212; and cross motion by defendant, New York Adjustment Bureau ("NYAB"), for summary judgment in its favor, dismissing the complaint insofar as asserted against it, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF182-219
Notice of Cross Motion - Affirmation - Exhibit	EF220-222
Reply Affirmation by Nautilus Defs	EF223
Affirmation in Opposition by plaintiff to motion	EF224
Affirmation in Opposition by plaintiff to cross motion	EF225
Reply Affirmation by Nautilus Defs	EF226
Reply Affirmation by Def. NYAB	EF227

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action for money damages for breach of contract between plaintiff, defendant, New York Adjustment Bureau ("NYAB") and defendant, Nautilus Insurance Company. The action against NYAB sounds in tort, as well, based upon negligent discharge of its public adjuster duties to plaintiff. The cause of action against the Nautilus defendants is for the failure to pay a water damage claim. NYAB was retained to represent plaintiff in the adjustment of a property loss to premises. In the complaint, plaintiff alleges that NYAB negligently failed to fully satisfy the requirements of submission under the insurance policy issued by the Nautilus defendants, and that the Nautilus defendants breached the contract by failing to pay on the claim.

The Nautilus defendants move for summary judgment. NYAB opposes the motion and cross moves for summary judgment. Plaintiff opposes the motion and cross motion.[1]

Facts

By application dated June 13, 2014, plaintiff applied for commercial property coverage with the Nautilus defendants ("Application"). The Application contains no disclosure of the water damage loss. Defendant, Nautilus Insurance Company issued a commercial property insurance policy to plaintiff for the policy period of June 13, 2014 to June 13, 2015 ("the Policy"). By endorsement, the expiration date was extended to July 4, 2015, and the Policy was then non-renewed due to claims activity.

By written Notice of Claim, dated October 9, 2014, Anthony LuParello of NYAB, acting as the public adjuster for plaintiff, advised the Nautilus defendants of an incident described as "pipe break, water damage" that took place at the loss location on September 17, 2014. Nautilus defendants issued an acknowledgment letter dated October 9, 2014, reserving their rights under the conditions in the policy, including the insured's "Duties In The Event Of Loss Or Damage." Nautilus defendants assigned Engle Martin to adjust the claim. Engle Martin retained Callan Salvage and Appraisal Company ("Callan") to inventory and evaluate the damaged stock and determine any potential salvage. Engle Martin also retained Peter Vallas Associates ("Peter Vallas") to investigate the cause of loss. Peter Vallas determined the cause of the loss to be water leaking from the roof and not a pipe break, as originally reported by defendant, NYAB.

In the interim, Engle Martin requested that defendant, NYAB provide documents relating to the loss (i.e., inventories, plumber's report, insured's tax returns, leases, and property maintenance records), as well as access to the roof to further investigate the cause of loss. No representative from NYAB attended the inspection, although they were requested to do so.

---

[1] The court notes that plaintiff's opposition papers were untimely filed. In any event, the opposition papers, consisting only of counsel's Affirmation in Opposition, failed to raise a triable issue of fact.

Engle Martin followed up with defendant, NYAB for additional information on multiple occasions. Defendant, NYAB provided no further information despite these requests. By letter to defendant, NYAB dated November 12, 2014, Nautilus defendants requested plaintiff's full cooperation in providing specific information required to complete their investigation of the claim, again advising of the insured's express obligations under the "Duties In The Event Of Loss Or Damage" section of the Policy. Nautilus defendants sent a similar communication on December 8, 2014.

Subsequently, by letter dated December 22, 2014, addressed to both plaintiff and defendant, NYAB, Nautilus defendants sent a blank proof of loss form with a specific request that the completed form be submitted within sixty (60) days, as required by the conditions of the Policy. The December 22, 2014 correspondence was prepared and mailed according to the Nautilus defendants' established protocols for preparing and mailing such correspondence, including enclosing the blank sworn proof of loss form and mailing a copy directly to the insured. The December 22, 2014 letter mailed to plaintiff and defendant, NYAB, was never returned to the Nautilus defendants, and they were never provided any information that said correspondence was not received. By fax dated February 15, 2015, defendant, NYAB requested a 60-day extension of the time to respond to the demand for a sworn proof of loss. By letter dated March 3, 2015, Nautilus defendants greed to a 30-day extension. Having received no further information, Nautilus defendants denied coverage by letter dated May 8, 2015, addressed to both plaintiff and defendant, NYAB. The coverage denial was based on the insured's failure to comply with the conditions of the Policy.

By e-mail dated March 26, 2016, defendant, NYAB provided certain documents to Nautilus defendants, including the insured's tax return, a plumber's report, inventory of damaged items, repair bills, and the lease for the loss location. No sworn proof of loss was provided, however, and Nautilus defendants reiterated the denial of coverage by letters dated April 25, 2016 and April 28, 2016.

Plaintiff commenced this action on December 13, 2017. On May 30, 2018, the Nautilus defendants answered with cross-claim against defendant, NYAB. On October 15, 2020, Shunyu She testified as a witness on behalf of plaintiff, hat there was a prior claim for water damage in May or June 2014, before inception of the Policy, and testified about e-mails with defendant, NYAB relating to such prior claim.

Motion

The Nautilus defendants established their *prima facie* entitlement to judgment as a matter of law by demonstrating that plaintiff failed to submit a sworn proof of loss statement within 60 days after receiving a demand to do so, accompanied by a blank proof-of-loss form (*see* Insurance Law § 3407 [a]; *Going 2 Extremes, Inc. v Hartford Fin. Services Group, Inc.*, 100 AD3d 694 [2d Dept 2012]). Nautilus defendants denied coverage to plaintiff based on the insured's failure to provide a sworn proof of loss in conformity with the requirements of the

Policy. Plaintiff opposes their motion on the sole basis that defendant, NYAB failed to convey information requests to plaintiff.

The record reflects that plaintiff failed to comply with express conditions precedent to recovery under the Policy, including its duty to cooperate with Nautilus defendants in the investigation of a claim. "To effectively deny coverage based upon lack of cooperation, an insurance carrier must demonstrate (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his or her cooperation was sought, was one of willful and avowed obstruction" *(Allstate Ins. Co. v United Intl. Ins. Co.*, 16 AD3d 605, 606 [2d Dept 2005]; *see Utica First Ins. Co. v Arken, Inc.*, 18 AD3d 644, 645 [2d Dept 2005]). "[M]ere inaction by an insured, by itself, will not justify a disclaimer of coverage on the ground of lack of cooperation" (*New York State Ins. Fund v Merchants Ins. Co. of N.H.*, 5 AD3d 449, 451 [2d Dept 2004]).

In the case at bar, plaintiff does not dispute the Nautilus defendants' efforts to obtain the insured's cooperation, which is established by evidence of no fewer than five letters (plus additional e-mail communications and multiple written communications with Engle Martin on the Nautilus defendants' behalf) to plaintiff and defendant, NYAB, reasonably requesting specific information needed to evaluate the claim, as well as in person inspection of the premises by investigators on behalf of the Nautilus defendants. This demonstrated that the Nautilus defendants diligently sought the insured's cooperation by means reasonably calculated to obtain that cooperation, and that the insured's non-cooperation consisted of willful and avowed obstruction (*Preferred Mut. Ins. Co. v SAV Carpentry, Inc.*, 44 AD3d 921, 922-23 [2d Dept 2007] (multiple letters and two investigators deemed "reasonably calculated to obtain the insured's cooperation"); *West Street Properties, LLC v American States Inc. Co.*, 150 AD3d 792 [2d Dept 2017] (multiple letters, telephone calls, and visit to insured's location deemed "reasonably calculated to obtain the insured's cooperation").

The Nautilus defendants also established that plaintiff violated the misrepresentation, fraud and concealment provision of the Policy, that the violation was willful and intentional, and that, accordingly, the Policy was properly voided (see *Otsego Mut. Fire Ins. Co. v Dinerman*, 161 AD3d 409, 410 [1st Dept 2018]; *Latha Rest. Corp v Tower Ins. Co.*, 38 AD3d 321 [1st Dept. 2007], *lv denied* 9 NY3d 803 [2007], *cert denied* 552 U.S. 1010 [2007]). The Policy provides that the commercial property coverage is "void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact. The record indicates that, in the Application, plaintiff failed to disclose the prior water damage loss at the insured premises. Therefore, the Nautilus defendants are entitled to summary judgment for voiding the policy based on concealment of material facts.

Finally, summary judgment is also awarded to the Nautilus defendants based on certain policy exclusions, specifically, damages based on wear and tear. The engineering expert retained on behalf of the Nautilus defendants in connection with the investigation of the

damage, opined to a reasonable degree of engineering certainty, that the water damage was not caused by a leaking pipe but rather by leakage from the roof. Although Shunyu She testified there was a broken pipe, and cited invoices issued by Liba HVAC & Construction, Inc. ("Liba") to substantiate this, the invoices in question establish that Liba was present and performed work at the loss location, beginning on September 8, 2014, more than a week before the date of loss, and are silent regarding any broken pipe. Despite multiple requests, no plumber's report was ever provided, and there is no evidence that a plumber attended the site after the date of loss, as would presumably would occur if indeed there had been a pipe break (notably in this regard, Liba is an HVAC contractor, not a plumber). Also, plaintiff concedes that leakage of water occurred over a period exceeding two weeks. On these facts, there is no question that coverage is precluded by the "wear-and-tear" exclusion in the Policy, particularly as there is undisputed evidence of a prior water loss at the same premises. Since the cause of plaintiff's loss is expressly excluded from coverage, none of the resulting damages are covered by the Policy.

Accordingly, the motion for summary judgment by the Nautilus defendants, is granted and the complaint and cross claim, are dismissed as against them.

Cross Motion

An insurance agent or broker can be held liable in negligence if he or she fails to exercise due care in an insurance brokerage transaction (*Broecker v Conklin Prop., LLC*, 189 AD3d 751 [2d Dept 2020]). Indeed, a plaintiff may seek to hold a defendant broker liable under a theory of either negligence or breach of contract (*id.*; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 793–794 [2d Dept 2007]).

Plaintiff retained defendant, NYAB to process its insurance claim for the water damage and sent NYAB all the information that NYAB requested of plaintiff. According to witness Shunyu She, the notice of water damage claim was prepared and presented to NYAB for forwarding to Nautilus defendants. It was defendant, NYAB's responsibility to process the claim to Nautilus defendants. Shunyu She testified that plaintiff provided NYAB all that was asked for in processing the claim and that he did not know what NYAB did with the information it was given. Shunyu She further testified that he received Nautilus defendants' letter setting out the required information, which was the information plaintiff provided to NYAB, that he did not know why NYAB may not have sent it to Nautilus defendants, and that he called NYAB weekly seeking progress on the claim, without success.

In relation to Nautilus defendants' claim that the loss is due to wear and tear, Shunyu She testified that he went to the site while the loss was ongoing and stated that the water came from broken pipes, (not wear and tear) and that the water was not coming through the ceiling. Shunyu She further testified that at no time did defendant, NYAB warn plaintiff that it was missing a sworn proof of loss, such that would imperil plaintiff's claim. Shunyu She was only aware that NYAB was seeking an extension to collect and file certain documents. In any event, there appears to be a question of fact for a jury as to whether Shunyu She's testimony that a broken pipe caused the water damages was sufficient to establish coverage.

Moreover, in cross moving for summary judgment, defendant, NYAB merely pointed to gaps in the plaintiff's proof, rather than affirmatively demonstrating the merit of its defense, and therefore, defendant, NYAB failed to carry its burden as the movant seeking summary judgment (see *Vittorio v U-Haul Co.*, 52 AD3d 823 [2d Dept 2008]; *Pappalardo v Long Is. R.R. Co.*, 36 AD3d 878 [2D Dept 2007]).

Accordingly, the cross motion by defendant, NYAB for summary judgment in its favor, is denied.

The caption shall be amended as follows:

NEW YORK MART AVENUE U 2ND INC.,

Plaintiff,

- against-

NEW YORK ADJUSTMENT BUREAU, and DOE CORPORATION, INC. D/B/A NEW YORK ADJUSTMENT BUREAU,

Defendants.

IT IS ORDERED that Nautilus defendants shall serve a copy of this order with notice of entry within 30 days of entry upon all parties and the Clerk of Queens County. Upon such service, the Clerk of Queens County shall amend the caption of this action. Any future motions shall contain the amended caption.

Dated: Oct 8 2021

DARRELL L. GAVRIN, J.S.C.

FILED & RECORDED
10/14/2021
3:20 PM
COUNTY CLERK
QUEENS COUNTY