

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22094
Y/kmg

_____AD3d_____

Submitted - January 15, 2009

A. GAIL PRUDENTI, P.J.
MARK C. DILLON
JOSEPH COVELLO
JOHN M. LEVENTHAL, JJ.

2008-05693
2008-06704

DECISION & ORDER

I & R Realty Management, Inc., et al., appellants,
v Transcontinental Insurance Company, et al.,
respondents.

(Index No. 8169/06)

Scott Baron & Associates, P.C., Howard Beach, N.Y. (Stephen D. Chakwin and
Andrea A. Palmer of counsel), for appellants.

Colliau Elenius Murphy Carluccio Keener & Morrow, New York, N.Y. (Marian S.
Hertz of counsel), for respondents.

In an action, inter alia, for a judgment declaring that certain losses allegedly sustained by the plaintiffs are covered under insurance policies issued by the defendant Transcontinental Insurance Company, the plaintiffs appeal from (1) an order of the Supreme Court, Westchester County (Bellantoni, J.), entered May 29, 2008, which granted the defendants' motion for summary judgment and denied their cross motion for summary judgment on the complaint, and (2) a judgment of the same court entered June 9, 2008, which, upon the order, is in favor of the defendants and against them, dismissing the complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is modified, on the law, by adding a provision thereto declaring that the alleged losses are not covered under the insurance policies issued by the defendant Transcontinental Insurance Company; as so modified, the judgment is affirmed; and it is further,

February 17, 2009

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ORDERED that one bill of costs is awarded to the defendants.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

On their motion for summary judgment, the defendants demonstrated their entitlement to judgment as a matter of law by establishing that the "earth movement" exclusion in the plaintiffs' insurance policies clearly and unambiguously applied to the plaintiffs' alleged losses (*see Labate v Liberty Mut. Ins. Co.*, 45 AD3d 811, 812; *Cali v Merrimack Mut. Fire Ins. Co.*, 43 AD3d 415, 417). In opposition, the plaintiffs failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562). Accordingly, the Supreme Court properly granted the defendants' motion.

The plaintiffs' remaining contention is without merit.

Since this is a declaratory judgment action, the Supreme Court's judgment should have included an appropriate declaration in favor of the defendants (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

PRUDENTI, P.J., DILLON, COVELLO and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court