NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
TAMM CONSULTING, PRO SE and EINAR TAMM, PRO SE,

Plaintiffs,

- against -

Index No. **300124/2018E**

THE CINCINNATI INSURANCE COMPANY, TURNER FORENSICS, TURNER ENGINEERING, P.C., DANIEL D. TURNER, TROY MCCLURE, JOHN DOES, JOHN DOE COMPANIES, JOHN DOE INSURANCE COMPANIES,

Hon. **FIDEL E. GOMEZ**
Justice

JOHN DOES, JOHN DOE COMPANIES, AND JOHN DOE INSURANCE COMPANIES ARE PEOPLE AND COMPANIES WHOSE NAMES ARE UNKNOWN AND WHO MADE EVALUATIONS, DECISIONS, AND PAYMENT OR NON-PAYMENT DECISIONS, INCLUDING BUT NOT LIMITED TO CLAIMS, DAMAGE, LIABILITY, SUBROGATION, AND/OR REINSURANCE,

Defendants.
----------X

The following papers numbered 1 to 3, read on this motion, noticed on 7/21/2022, and duly submitted as no. 6 on the Motion Calendar of 7/25/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Plaintiffs Tamm Consulting and Einar Tamm's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 9/27/22

Hon. _____
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED X NON-FINAL DISPOSITION
2. MOTION IS.....	☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT X NEXT APPEARANCE DATE: **November 7, 2022, at 2:00 p.m.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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TAMM CONSULTING, PRO SE and EINAR TAMM, PRO SE,

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DECISION AND ORDER

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Defendants.

----------X

Plaintiffs Tamm Consulting and Einar Tamm ("Plaintiffs") move for an order renewing and rearguing the Court's (McShan, J.) Decision and Order dated January 25, 2022, which dismissed all but the tenth cause of action in the complaint (the "Prior Decision"), and upon renewal and reargument, for an order vacating and/or modifying the Prior Decision and restoring all causes of action in the complaint against Defendant The Cincinnati Insurance Company ("Defendant"). Defendant opposes.

For the reasons which follow, Plaintiffs' motion is granted, in part.[1]

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[1] The parties are advised that papers submitted to the Commercial Division are subject to a 7,000 word limit (Rule 17). The papers must also be double-spaced and contain print no smaller than twelve-point (Rule 6[a]). In the future, any papers which do not comply with these Rules will not be considered by the Court.

BACKGROUND:

On or around July 16, 2018,[2] Plaintiffs commenced the instant action by filing a complaint, alleging causes of action for, *inter alia*, breach of contract.

The complaint alleges that in or around June through July 2015, Plaintiffs leased 4 units at a self-storage building: units #131, 138, 148 and 162 (Compl., ¶ 26-27).

The complaint alleges that Defendant insured Plaintiffs under insurance policy #CAP5221679 for the period commencing on April 26, 2013, and terminating on April 26, 2016 (Compl., ¶ 28). Plaintiffs allege that under the policy, Defendant is required to reimburse Plaintiffs for "loss, damage, repair or replacement of its computer equipment, computer data, computer software, and other property, as well as, among other things, resulting expenses and losses" (Compl., ¶ 31).

The complaint alleges that in the summer of 2015, Plaintiffs suffered two "water intrusion [d]amage [i]ncidents" at the warehouse housing the units, which was undergoing demolition and remodeling (Compl., ¶ 3, 6). Plaintiffs allege that on or around July 16, 2015, Plaintiffs discovered, *inter alia*, water damage, dust/debris damage and contamination of racks of computers and other property, and toxic demolition debris falling from the ceiling (Compl., ¶ 32). Plaintiffs also allege that the damage incidents involved contamination by substances, including lead, lead-based paint, and potential asbestos containing material (Compl., ¶ 35).

Plaintiffs allege that claim #1 "was for water damage from drilled holes, removed walls, chemical stripping of lead paint, sand blasting, pressure washing the intrusions in walls" to locker #138. Plaintiffs allege that claim #2 "was for water damage from burst hose on floor #3 and resulting water damage, dust and debris" to lockers #131, 138, 148, and 162 (Compl., ¶ 137).

Plaintiffs allege that they gave timely notice of their two claims to Defendant (Compl., ¶ 40), and that Defendant made a partial payment in the amount $289,000.00 on claim #1, but has not yet satisfied a $276,000.00 "limited [r]elease with 10% interest note" (the "Release"). Plaintiffs also allege that Defendant has not made any payments on claim #2 (Compl., ¶ 3, 6). Plaintiffs list a number of allegedly unpaid items, which include Valuable Papers and Records ("VPR") and Fine Arts ("FA") proofs of loss ("POLs") (Compl., ¶ 140, 156).

[2] Plaintiffs allege that this action was originally commenced in the Bronx County Supreme Court on July 16, 2018, but was removed to the United States District Court for the Southern District of New York. At some point thereafter, this case was referred back to the Bronx County Supreme Court.

The complaint alleges, *inter alia*, that the Defendant conspired with Defendants Turner Forensics, Turner Engineering, P.C., Daniel Turner, and Troy McClure (the "Engineering Defendants") to defraud Plaintiffs with a "false" report, which allowed Defendant to deny claim #2 (Compl., ¶ 65, 70). Plaintiffs allege that Defendant failed to conduct a full, fair, prompt and reasonable investigation of the damages (Compl., ¶ 71). Plaintiffs allege that Defendant and the Engineering Defendants have ignored the presence of "lead-containing dust, potential asbestos-containing material, particles, grit, sand, and debris" (Compl., ¶ 82) or "falsely characterized the dust and damage as harmless" (Compl., ¶ 101). The complaint alleges that Plaintiffs were harmed by Defendant and its agents' "misrepresentation and downplaying of lead contamination" in the debris. Plaintiffs allege that Einar Tamm had surgery for nerve damage to his left arm in or around April 2017 (Compl., ¶ 144-145).

The complaint alleges that the "Email Promise to Replace equipment" and the Release are contracts independent of the policy (Compl., ¶ 87-88). Plaintiffs allege that the Release was only for "bodily and personal injury" (Compl., ¶ 150), and does not apply to property damages for claims #1 and #2 (Compl., ¶ 161).

The complaint alleges the following causes of action, denominated as counts, among others, against Defendant: count 1 – breach of contract for failing to pay in full under the policy for damage incident #1; count 3 – breach of contract for failing to pay in full under the policy for damage incident #2; and count 5 – breach of contract of the policy.

On July 29, 2020, Defendant filed a motion to dismiss the complaint. On January 25, 2022, the Court (McShan, J.) issued the Prior Decision, granting the motion, in part. The Court dismissed counts 1, 3 and 5 for breach of contract as time-barred. The only remaining count against Defendant is count 10 for breach of contract for failing to pay in accordance with the Release.

On July 1, 2022, Plaintiffs filed the instant motion to renew and reargue. On July 25, 2022, the motion was marked fully submitted.

DISCUSSION:

Plaintiffs' Motion to Renew:

CPLR § 2221(e) provides that:

> A motion for leave to renew: 1. shall be identified specifically as such; 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would

> change the prior determination; and 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

"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" (*Morrison v Rosenberg*, 278 AD2d 392, 392 [2d Dept 2002]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). However, "[t]he requirement that a motion for renewal be based upon newly-discovered facts is a flexible one" (*Daniel Perla Assocs. v Ginsberg*, 256 AD2d 303, 303 [2d Dept 1998]) and a court, "in its discretion, may also grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made" *(MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 645 [1st Dept 2019]; *Toscani v One Bryant Park, LLC*, 139 AD3d 644, 644 [1st Dept 2016]; *Daniel Perla Assocs.* at 303).

Generally, "leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application. While law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion, the movant must submit supporting facts to explain and justify the default and mere neglect is not accepted as a reasonable excuse" (*Morrison* at 392). However, even in the absence of a reasonable justification, a court may exercise its discretion and grant a motion to renew in the interest of justice (*QBE Ins. Corp. v Hudson Specialty Ins. Co.*, 82 AD3d 595, 596 [1st Dept 2011] ["Although plaintiffs failed to present a reasonable excuse for their delay in obtaining the evidence they presented upon renewal, the IAS court providently exercised its discretion in granting the motion to renew in the interest of justice"]; *Tsioumas v Time Out Health & Fitness*, 78 AD3d 619, 619 [1st Dept 2010] ["Even if we were to find that plaintiff, on his motion to renew, did not offer reasonable justification for not providing his 'new' evidence earlier on his original motion, we would find that renewal should nonetheless be granted so as not to defeat substantial fairness"]; *Garner v Latimer*, 306 AD2d 209, 210 [1st Dept 2003] ["Here, plaintiff's failure to submit a physician's affidavit was inadvertent and, coupled with the fact that defendant has failed to establish any prejudice as a result of the delay, we find that renewal should have been granted"]). Indeed, courts have held that "even if the rigorous requirements for renewal are not satisfied, such relief may still be granted so as not to defeat substantive fairness" (*Rancho Sante Fe Ass'n v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]; *Tishman Const. Corp. of New York v City of New York*,

280 AD2d 374, 377 [1st Dept 2001]; *125 Court Street, LLC v Nicholson*, 67 Misc3d 28, 35 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019]).

Abeyance/Tolling of Claims:

Plaintiffs move to renew, arguing that they discovered new evidence which tolled the suit limitation provision as to claim #1. Plaintiffs argue that they were not aware of this evidence, because the three letters regarding the tolling were mailed only to WorldClaim, Plaintiffs' former third-party adjuster, not to Plaintiffs. Plaintiffs argue that although Defendant's motion to dismiss claimed that the deadline for filing suit was July 22, 2017, it did not mention any tolling. Plaintiffs argue that based on these letters, the deadline for filing suit should be pushed back by 1-2 years. Plaintiffs argue that the tolling lasted from June 4, 2016, to August 31, 2018, and that the suit limitation period had not expired by the date of filing of this action on July 16, 2018.

Plaintiffs argue that they have a reasonable justification for failing to submit these documents with their opposition to Defendant's motion to dismiss, as the documents were difficult to locate. Plaintiffs argue that these documents were only discovered after the Decision and Order was filed on March 8, 2022.

Plaintiffs' Exhibit 21 is a letter dated July 20, 2016, from Defendant to Andrew J Fusco ("Mr. Fusco"), Plaintiffs' then adjuster, indicating that there is more information required before the claim can be resolved.

Plaintiffs' Exhibit 23 is a letter dated September 14, 2016, from Defendant to Mr. Fusco, indicating that additional information is required before the claim can be resolved. It states, in relevant part, that: "the proof of loss is being held in abeyance until the investigation is completed". The letter states that Defendant requested a complete inventory of all damaged business personal property with proof of value.

Plaintiffs' Exhibit 27 is a letter dated June 9, 2017, from Defendant to Aline Keiper, Plaintiffs' then adjuster, indicating that additional information is required before the claim can be resolved. It states, in relevant part, that: "the proof of loss' [sic] are being held in abeyance until the investigation is completed." The letter also states that Defendant has requested that Envista supply it with a full estimate to bring the damaged items to their pre-loss condition, and that from that estimate, it hopes to be able to settle the loss.

Plaintiffs' Exhibit 30 is a letter dated August 31, 2018, from Defendant to Plaintiffs, indicating that it had advised Plaintiffs by email and letter dated June 9, 2017 that all POLs would

be held in abeyance pending the completion of Defendant's investigation. The letter also indicates that the claim, including any claims for VPR and FA, was resolved.

Here, Plaintiffs have not demonstrated their entitlement to a renewal of the Prior Decision on this basis. Contrary to Plaintiffs' arguments, the letters that Plaintiffs allegedly did not receive concerning the holding of the POLs in abeyance did not toll the suit limitation period. The letters demonstrate that Defendant indicated that the POLs were being held in abeyance pending the completion of an investigation. Case law is well-settled that "[d]elay by the insurance carrier in completing its investigation of the claim does not excuse the plaintiff from timely commencing an action, since he or she is bound by the terms of the contract to either commence an action prior to the expiration of the limitations period or obtain a waiver or extension of such provision" (*Brown v Royal Ins. of America*, 210 AD2d 279, 279 [2d Dept 1994]; *see also Spirig v Evans*, 26 AD3d 425, 425-426 [2d Dept 2006] ["the plaintiff's conclusory assertion that timely commencement of the action was delayed by the investigation conducted by the appellant's insurance carrier was insufficient to warrant the imposition of equitable estoppel. Similarly, the plaintiff's unsubstantiated claim of ongoing settlement negotiations with the carrier, even if true, does not give rise to an estoppel"]; *Grumman Corp. v Travelers Indem. Co.*, 288 AD2d 344, 345 [2d Dept 2001]; *see also Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d 820, 823 [1985] ["Plaintiff does not, as indeed it could not, suggest that the 12-month limitation period of the policy is invalid. It argues rather that, by reserving to itself 12 months to investigate, the carrier made it 'illogical' and 'commercially unreasonable' for it to institute action while the carrier was still investigating. The short answer is that there is no inconsistency between the two clauses, for an insured is bound by the terms of the contract whether read or not and can protect itself by either beginning an action before expiration of the limitation period or obtaining from the carrier a waiver or extension of its provision"]).

Accordingly, Plaintiffs' motion to renew on this basis is denied.

Change in the Law – 28th St. Superior Hosp., Inc. v The Cincinnati Ins. Co.:

Plaintiffs move to renew, arguing that new law has recently emerged, which would change the determination on the Prior Decision. In support, Plaintiffs cite *28th St. Superior Hosp., Inc. v The Cincinnati Ins. Co.*, 2022 WL 462016 (N.D. Ind. 2022). Plaintiffs argue that the court in *28th St. Superior Hosp., Inc.* found that conduct similar to that of Defendant's conduct in this case could

support a finding of bad faith. As such, Plaintiffs argue that the Court should not have dismissed the bad faith, unjust enrichment and other claims.

Here, Plaintiffs have not demonstrated their entitlement to a renewal of the Prior Decision on this basis. First, Plaintiffs have not demonstrated that there has been a "change in the law" that would change the Prior Decision. Plaintiffs do not refer to any law which the Court relied upon in the Prior Decision that was either controlling or essential to the determination made, and how that law has changed. A review of the Prior Decision demonstrates that the Court dismissed the unjust enrichment cause of action because of the existence of a contract between the parties. As such, *28th St. Superior Hosp. Inc.* has no bearing on that determination. There is no cause of action for bad faith in the complaint. Plaintiffs do not specify any other causes of action to which these arguments are directed.[3]

Moreover, *28th St. Superior Hosp., Inc.* is a case from the Northern District of Indiana, interpreting Indiana law, not New York law. As such, the case is not binding authority in New York.

Finally, the fact that another court in another jurisdiction may have come to a different conclusion on allegedly similar facts does not obligate this Court to follow that court's determination.

Accordingly, Plaintiffs' motion to renew on this basis is denied.

Change in the Law – Liberty Mut. Ins. Co. v Jenkins Bros.:

Plaintiffs move to renew, arguing that there has been a change in the law, which would change the determination on the Prior Decision. Specifically, Plaintiffs argue that the New York County Supreme Court's holding in *Liberty Mut. Ins. Co. v Jenkins Bros.*, 2021 WL 2457046 [Sup Ct, New York County 2021] that inhalation of asbestos fibers or asbestos exposure is a new occurrence under the policy was not rejected by the Appellate Division on appeal.

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[3] The Court notes, however, that the causes of action in which Plaintiffs allege bad faith on Defendant's part were also not dismissed based on the issues being raised in these arguments. Counts 2 and 4, alleging violations of GBL § 349 were dismissed as Plaintiffs failed to allege that Defendant's acts or practices have a broader impact on consumers at large. Count 6 alleging breach of implied covenant of good faith and fair dealing was dismissed as duplicative of the breach of contract cause of action. Count 7 alleging breach of fiduciary duty was dismissed as duplicative of the breach of contract cause of action. Count 20 seeking punitive damages was dismissed as improper because punitive damages are not awarded in a private action.

Plaintiffs argue that since the trigger of coverage is the inhalation of asbestos fibers or exposure thereto, inhalation of and/or exposure to asbestos fibers by Plaintiffs at inspections with Defendant in 2015, 2016, 2017, and 2018 are each separate and new occurrences for coverage, and part of a series of continuing wrongs under the policy. As such, Plaintiffs argue that the Court's holding in the Prior Decision that the damage discovered on July 16, 2015 for claim #1 were merely continuing effects of a single wrong is contrary to *Liberty Mut. Ins. Co.* with regard to the asbestos found in the dust/debris on Plaintiffs' property.

Plaintiffs also argue that the policy covers all risks arising out of physical damage or loss to Plaintiffs' property.

Here, Plaintiffs have not demonstrated their entitlement to a renewal of the Prior Decision on this issue. That the Appellate Division in *Liberty Mutual Ins. Co. v Jenkins Bros.*, 203 AD3d 579 [1st Dept 2022] did not reject the part of the Supreme Court's decision that found that inhalation of asbestos fibers or asbestos exposure was an occurrence under a contract of insurance is not a "change in the law". Rather, the Appellate Division's failure to reject that portion of the decision demonstrates that the law on that issue is as it was before, and the law has not changed.

In any case, the case law and the arguments made by Plaintiffs are irrelevant to this action, as the policy covers property damage, not personal injuries. This is clear from a review of the policy. The policy at issue is titled "Commercial Property Coverage Part". Section A of the "Building and Personal Property Coverage Form" states that: "We will pay for direct physical 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." Section A.1. lists Covered Property. Section A.2. lists Property Not Covered. Section A.3. lists covered causes of loss.

The sub-policy titled "Commercial Articles Coverage Part", under "Commercial Articles Coverage Form" states in Section A. that: "We will pay for 'loss' to Covered Property from any of the Covered Causes of Loss". Likewise, the sub-policy titled "Valuable Papers and Records Coverage Part", under the "Valuable Papers and Records Coverage Form" states that: "We will pay for 'loss' to Covered Property from any of the Covered Causes of Loss". Plaintiffs have not pointed to anything in the policy to indicate that personal injuries are covered.

Accordingly, Plaintiffs' motion to renew on this basis is denied.

Plaintiffs' Motion to Reargue:

Timeliness of the Motion:

On January 25, 2022, the Court (McShan, J.) issued the Prior Decision. On March 8, 2022, the Prior Decision was filed on NYSCEF.

On March 16, 2022, Defendant filed the Prior Decision with Notice of Entry and an affidavit of service of the Prior Decision with Notice of Entry on NYSCEF.

On March 18, 2022, Plaintiffs filed a notice of appeal of the Prior Decision.

On April 15, 2022, Plaintiffs filed a notice of motion to renew and to reargue the Prior Decision. The notice indicates that the return date of the motion would be June 10, 2022, and states that an affidavit of Einar Tamm dated April 15, 2022 and exhibits are attached. No affidavit or exhibits were filed with the Court. Defendant contends that none were served.

On May 25, 2022, Plaintiffs filed an amended notice of motion to renew and to reargue the Prior Decision. The notice indicates that the return date of the motion would be July 11, 2022, and states that an affidavit of Einar Tamm and exhibits are attached. No affidavit or exhibits were filed with the Court. Defendant contends that none were served.

On July 1, 2022, Plaintiffs filed a second amended notice of motion to renew and to reargue the Prior Decision.[4] The notice indicates that the return date of the motion would be July 21, 2022, and states that an affidavit of Einar Tamm and exhibits are attached. No affidavit or exhibits were filed with the Court. Defendant contends that none were served.

On July 7, 2022, Plaintiffs filed supporting exhibits. On July 8, 2022, Plaintiffs filed an affidavit in support. On July 15, 2022, Plaintiffs filed a corrected affidavit in support.[5]

To the extent that Plaintiffs only filed supporting documents in support of their motion after the second amended notice of motion was filed, only the motion and documents filed on and after July 1, 2022, will be considered.[6]

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[4] The Court notes that the second amended notice of motion was marked returned for correction on NYSCEF.

[5] Only the affidavit e-filed on July 15, 2022 was considered, as it is denoted as the "corrected" affidavit.

[6] The Court has also considered Defendant's sur-reply, as Plaintiffs' papers in support of their motion were not timely filed with their second amended notice of motion.

CPLR 2221(d) provides, in relevant part, that: "A motion for leave to reargue: 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry."

A review of Court records evinces that Defendant filed an affidavit of service of the Prior Decision, with Notice of Entry, on Plaintiffs on March 16, 2022, via NYSCEF. As such, Plaintiffs had until April 15, 2022, to file their motion to reargue.

Here, the second amended notice of motion, the only notice of motion with supporting papers, albeit delayed by a week, was filed on July 1, 2022.[7] Clearly, the motion was not timely filed. However, since Plaintiffs timely filed a notice of appeal of the Prior Decision, and it does not appear that the appeal has been submitted or determined, this Court may consider the motion (*Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 [1st Dept 2004]; *Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 638 [2d Dept 2005] ["The Supreme Court had jurisdiction to reconsider its prior order '[r]egardless of statutory time limits concerning motions to reargue'. In addition, the defendant's appeal taken from the Supreme Court's prior order was still pending and unperfected as of the time that the motion for reargument was made. Under these circumstances, the Supreme Court was not bound to deny the defendant's motion to reargue merely because the motion to reargue was made beyond the 30-day limit defined in CPLR 2221(d)(3)"]).

Accordingly, the Court has considered Plaintiffs' motion to reargue.

Estoppel/Waiver of the Suit Limitations Provision:

Plaintiffs move to reargue, arguing that there is an issue of fact as to whether Defendant waived the suit limitation provision or is estopped from asserting it. Plaintiffs argue that they reasonably relied on Defendant's holding of the POLs in abeyance to mean that the POLs were tolled and Defendant extended the time for filing suit. In other words, Plaintiffs argue that the suit limitation provision was tolled until the conclusion of Defendant's investigations. Plaintiffs also argue that they were lulled into not filing suit by Defendant's statements, payments and other conduct.

CPLR 2221(d) provides, in relevant part, that:

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[7] CPLR 2214(b) provides that: "A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard". Here, Plaintiffs' corrected affidavit in support of their motion was filed on July 15, 2022, only six days prior to the return date, July 21, 2022. However, the Court has considered the corrected affidavit in the interests of justice, as Defendant has had the opportunity to submit a sur-reply, which the Court has also considered.

> A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

"A motion for leave to reargue is addressed to the sound discretion of the Supreme Court" (*Rides Unlimited of New York, Inc. v Engineered Energy Solutions, LLC*, 184 AD3d 695, 695 [2d Dept 2020]; *Bueno v Allam*, 170 AD3d 939, 940 [2d Dept 2019]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application. It may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion. . . . 'A motion for reargument is not an appropriate vehicle for raising new questions'" (*Foley* at 567-568; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005] ["Reargument is not available where the movant seeks only to argue 'a new theory of liability not previously advanced'"]).

Here, Plaintiffs have not demonstrated that the Court overlooked the facts or the law on the issue of whether Defendant waived the suit limitation provision or is estopped from asserting it. Plaintiffs do not explain how the Court misapplied the facts or the law. Instead, Plaintiffs reiterate some of the arguments that were previously made in their opposition to Defendant's motion to dismiss. To the extent that these same arguments are made on this motion, they may not be considered. To the extent that Plaintiffs make new arguments not previously advanced in their prior opposition, those arguments may also not be considered, as "[a] motion for reargument is not an appropriate vehicle for raising new questions" (*Foley* at 567-568).

Accordingly, Plaintiffs' motion to reargue this issue is denied.

Replacement Cost Coverage:

Plaintiffs move to reargue, arguing that the Court overlooked the fact that Plaintiffs filed for replacement cost coverage within the 180-day period required by the policy. Plaintiffs also argue that the Court overlooked the fact that they had started replacement of the damaged property in June 2017. Plaintiffs argue that Defendant's payment of $12,341.88 for replacement of property confirms that replacement was underway within 2 years of the loss. Plaintiffs also argue that the Court's determination that they did not act quickly or reasonably to replace the property in 2 years or have it underway is not realistic or reasonable, because the delays were caused by Defendant.

Here, Plaintiffs have not demonstrated entitlement to reargument of this issue, as Plaintiffs' arguments have no bearing on the Court's determination on the applicable suit limitation provision in the policy. In the Prior Decision, the Court determined that the suit limitation period applicable to this action is set forth in Section D of the Commercial Property Conditions of the policy. Section D provides, in relevant part, that: "No one may bring a legal action against us under this Coverage Part unless: . . . 2. The action is brought within 2 years after the date on which the direct physical 'loss' occurred". The Court determined that since the claim #1 loss was discovered on July 16, 2015, and the claim #2 loss occurred on June 26, 2015, counts 1 and 3, alleging breach of contract of claims #1 and #2, are time-barred, because the instant action was commenced on July 16, 2018, more than two years later (Prior Decision, p. 12).

The Court went further to discuss Subsections 3[c] and 3[d] of Section F. Optional Coverages of the policy to determine whether those sections render the two-year suit limitation provision unenforceable. Subsection 3[c] provides that: "You may make a claim for 'loss' 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' settled on an 'Actual Cash Value' basis, you may still make a claim for the additional coverage this Optional Coverage provides if you notify us of your intent to do so within 180 days after the 'loss'." Subsection 3[d] provides, in relevant part, that: "We will not pay on a replacement cost basis for any 'loss': (1) Until the lost or damaged property is actually repaired or replaced with other property of generally the same construction and used for the same purpose as to the lost or damaged property; and (2) Unless the repairs or replacement have been completed or at least underway within 2 years following the date of 'loss'." The Court found that the suit limitation provision was not rendered unenforceable by these sections, because they do not require that the replacement be completed within two years, but only that it be "at least underway within 2 years following the date of loss". Significantly, nothing in the latter sections expressly

limits the applicability of the suit limitation provision prescribed by the former. As the Court (McShan, J.) noted, "Subsections [3][c] and [3][d] of Section F. Option Coverages are fair and reasonable", because they trigger Defendant's obligation to pay before the expiration of the suit limitation period prescribed by Section D of the policy, namely the commencement of repairs within 2 years from the date of loss.

Although it is true that the Court stated that "there is nothing in the plaintiffs' Complaint or affidavit in opposition to suggest that they notified Cincinnati within 180 days after the loss on July 16, 2015 of their intent to seek 'replacement cost basis for any 'loss'' as required by Subsection 3(d) above" and that "[t]here is nothing in the plaintiffs' Complaint to suggest that they are seeking replacement cost basis for any loss or that they acted reasonably to replace the damaged property" (Prior Decision, p. 14), such language does not alter the holding that the two-year suit limitation period in Section D of the Commercial Property Conditions applies, and that it has not been nullified by the replacement coverage section.

Accordingly, Plaintiffs' motion to reargue this issue is denied.

Claims for VPR and FA – Time within which to file for VPR claims vs. Suit-Limitation Provision and Other Arguments:

Plaintiffs move to reargue, arguing that there is a conflict in the policy between the provision which provides for 3 years to file a claim for VPR loss, and the two-year suit limitation provision. Plaintiffs also argue that because the VPR claims are covered by 2 sub-policies, the Commercial policy and the InLand Marine Policy, there is an overlap which triggers a Special Endorsement, where the definition of Occurrence is expanded to cover series of losses. Plaintiffs argue that since the occurrence has yet to end, their time to file suit has not expired. Plaintiffs further argue that their claims are not time-barred, as there was a tolling of over 1 year.

Here, Plaintiffs have not demonstrated entitlement to reargument of these issues. Plaintiffs reiterate some of the arguments that were previously made in their opposition to Defendant's motion to dismiss. To the extent that these same arguments are made on this motion, they may not be considered. To the extent that Plaintiffs make new arguments not previously advanced in their prior opposition, those arguments may also not be considered, as "[a] motion for reargument is not an appropriate vehicle for raising new questions" (*Foley* at 567-568).

Accordingly, Plaintiffs' motion to reargue these issues is denied.

Claims for VPR and FA – Different Suit Limitation Provisions:

Plaintiffs move to reargue, arguing that the suit limitation provision in the Commercial Property sub-policy is based on "direct physical loss" that "occurred", but the suit limitation provisions in the two InLand Marine sub-policies are based on "knowledge of the loss". Plaintiffs argue that the VPR losses were discovered in 2017 and 2018 for claim #1, and that the VPR and FA losses were discovered in 2018 for claim #2 (Compl. ¶ 140). Plaintiffs argue that the Prior Decision did not address the VPR and FA coverage available under the InLand Marine sub-policies with suit limitation provisions based on "knowledge of the loss". Plaintiffs argue that the Court did not explain why the suit limitation provision based on "occurrence" controlled, while the suit limitation provisions based on "knowledge" of the loss did not. Plaintiffs argue that the Court's reliance on *Ely-Cryikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399 [1993] overlooks the parties' contracted for suit limitation provisions based on knowledge of the loss.

Here, the majority of Plaintiffs' arguments reiterate the arguments already made in their opposition to Defendant's motion to dismiss. As such, those arguments do not warrant a reargument of the Prior Decision. However, Plaintiffs' argument that the Court should not have relied on *Ely-Cryikshank Co., Inc.* to determine that "knowledge of the loss" does not toll the statute of limitations merits reargument.

In the Inland Marine sub-policy which applies to FA claims (Commercial Articles Coverage Form Section A.1.c.), the policy provides a different suit limitation provision from that found in the main Commercial policy. Specifically, the Inland Marine Conditions provides that: "No one may bring a legal action against us under this Coverage Part unless: 1. There has been full compliance with all the terms of this Coverage Part; and 2. The action is brought within 2 years after you first have **knowledge of the 'loss'**." (Commercial Inland Marine Conditions, General Conditions Section B) (emphasis added).

In the Inland Marine sub-policy which applies to VPR claims, the policy provides the same suit limitation provision found in the Commercial Inland Marine Conditions for FA claims (Commercial Inland Marine Conditions, General Conditions Section B).

The Court's reliance on *Ely-Cryikshank Co., Inc.* in the Prior Decision was in error, as the case concerns accrual of causes of action for breach of contract based on the statutory statute of limitations period. It does not address contractual suit limitation provisions in a policy, such as the one at issue in this action.

It is well-settled that parties may contract to a shorter limitations of suit (CPLR § 201 ["An action . . . must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement."]; *Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 [2014]; *Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014]; *Krohn v Felix Industries, Inc.*, 226 AD2d 506, 506 [2d Dept 1996]). In fact, parties may contract for different suit limitations provisions in different sections of a policy (*See Blanar v State Farm Ins. Companies*, 34 AD3d 1333, 1334 [4th Dept 2006] [finding that there was no ambiguity in a policy that had one limitations period for first-party coverage and a different limitations period for third-party coverage]). Moreover, parties may provide for a provision for accrual of a cause of action in a policy (*See generally*, *Medical Facilities, Inc. v Pryke*, 62 NY2d 716, 717 [1984] ["A cause of action against an insurer will accrue on the date of the fire if the policy so provides, but in the absence of any provision regarding accrual in the contract of insurance the Statute of Limitations for breach of contract generally begins to run upon breach"]). It is also well-settled that "[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreements they wish, no matter how unwise it might appear to a third party" (*Koren-DiResta Const. Co., Inc. v New York City School Const. Authority*, 293 AD2d 189, 195 [1st Dept 2002]; *Hollander v Lipman*, 65 AD3d 1086, 1087 [2d Dept 2009]).

Here, by making its determination based on *Ely-Cryikshank Co., Inc.*, the Court failed to address the parties' contracted for suit limitation provisions, which provide for different suit limitation periods with possibly different accrual dates.

Plaintiffs alleged that the full extent of the losses on claim #1 were not known until June 2017 (Affidavit in Opp. to Motion to Dismiss, ¶ 130) and that losses were discovered for claim #2 in 2018 (Affidavit in Support, ¶ 122; Compl., ¶ 140; Affidavit in Opp. to Motion to Dismiss, ¶ 129). On a motion to dismiss, the allegations in the complaint and the affidavit in opposition must be taken as true (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Dixon v 105 West 75th Street, LLC*, 148 AD3d 623, 626-627 [1st Dept 2017]; *Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 682-683 [2d Dept 2017]). As such, to the extent that counts 1 and 3 encompass claims for VPR and FA, those portions of those counts should not have been dismissed. By alleging that there are different suit limitation provisions applicable to VPR and FA claims, Plaintiffs raised an issue of

fact as to which suit limitation provision applies to the VPR and FA claims, and whether these claims are barred.[8]

Although Defendant argued in reply in support of the prior motion and in opposition to the instant motion that Plaintiffs' claims were only submitted under the main Commercial Property Coverage Part and that the suit limitation provision under that section is the only one that applies, Defendant submitted no affidavit or documents demonstrating as such. Defendant submitted only counsel's affirmation, and counsel does not purport to have personal knowledge regarding this matter. Moreover, although Plaintiffs did not list VPR or FA claims under counts 1 and 3 in the complaint, the complaint sufficiently alleges that VPR and FA claims may exist (Compl., ¶ 139, 140; *see also* Affidavit in Opposition to Motion to Dismiss, ¶ 11).

Accordingly, Plaintiffs' motion to reargue is granted to the extent that the portions of counts 1 and 3 which pertain to Plaintiffs' VPR and FA claims should be revived.[9]

Damage from Smoke/Dust:

Plaintiffs move to reargue, arguing that the Court "too narrowly focused solely on water damage" and overlooked damage caused by "dust and debris, windstorm, falling objects, smoke (dust), explosion, and leakage from fire extinguishing equipment". Plaintiffs argue that the evidence of demolition dust should have independently led to coverage under claim #2.

Here, Plaintiffs have not demonstrated entitlement to reargument on this issue. Plaintiffs do not explain how the Court's alleged narrow focus on water damage affected the determination of Defendant's motion to dismiss.

Accordingly, Plaintiffs' motion to reargue this issue is denied.

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[8] The Court need not determine at this stage of the litigation whether these suit limitation provisions are valid and enforceable. Although an agreement which shortens the statute of limitations is enforceable, provided it is in writing, an agreement which waives or extends the statute of limitations prior to the accrual of a cause of action for breach of contract is unenforceable as against public policy (*Deutsche Bank Nat'l Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 155 [2018]; *John J. Kassner & Co. v City of New York*,46 NY2d 544, 550-551 [2008]). Whether the suit limitation provisions at issue were intended by the parties at the inception of the contract and before the contract had been breached to postpone accrual of a breach of contract cause of action to a subsequent uncertain date and thereby serve to extend the statute of limitations, rendering the provisions unenforceable, is not an issue raised or litigated by the parties in the prior motion or on this motion. However, the Court notes that Plaintiffs' arguments that losses were discovered in 2017 and 2018 do not extend the statute of limitations beyond the statutory 6-year statute of limitations.

[9] The Court notes that the Release appears to have settled all of the claims for claim #1. However, Defendant did not move to dismiss on this basis.

The Release:

Plaintiffs move to reargue, arguing that the Court misunderstood that the Release was for bodily and personal injuries and hospital and medical charges, not property damages.

Here, Plaintiffs have not demonstrated entitlement to reargument on this issue. Plaintiffs do not explain how the Court's alleged misunderstanding affected the determination of Defendant's motion to dismiss.

In any case, the Court did not misunderstand the nature of the Release. The Release, attached as exhibit D to the complaint, states, in relevant part, that:

> That the Undersigned, . . . for the sole consideration of . . .($$276,877.99) to the undersigned in hand paid, receipt whereof is hereby acknowledged, do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns release, acquit and forever discharge THE CINCINNATI INSURANCE COMPANIES . . . of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensations whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries ***and property damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred on or about the 22ND day of JULY, 2015***, at or nearby Webster, NY.

(Compl., Ex. D) [emphasis added]). Clearly, the Release was for the release of all claims and actions, including property damage.

Accordingly, Plaintiffs' motion to reargue this issue is denied.

It is hereby

ORDERED that the Clerk revive counts I and III of the complaint, to the extent that they relate to Plaintiffs' VPR and FA claims on claims #1 and #2; and it is further

ORDERED that this matter is scheduled for a **Preliminary Conference** on **Monday, November 7, 2022, at 2:00 p.m.**; and it is further

ORDERED that Defendant serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 9/27/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**