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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB *Justice* PART 15

THE SEAPORT PARK CONDOMINIUM,

Plaintiff,

- v -

GREATER NEW YORK MUTUAL INSURANCE COMPANY, DJM RESTORATION, INC., and MATCO SERVICE CORPORATION,

Defendants.

INDEX NO. 117645/2004

MOTION DATE 3/23/05

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

This constitutes the decision and order of the court.

Dated: 6/17/05

WALTER B. TOLUB, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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THE SEAPORT PARK CONDOMINIUM,

Plaintiff,

Index No. 117645/04
Mtn Seq. 001

-against-

GREATER NEW YORK MUTUAL INSURANCE COMPANY, DJM RESTORATION, INC., and MATCO SERVICE CORPORATION,

Defendants.

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WALTER B. TOLUB, J.:

By this motion, defendant Greater New York Mutual Insurance Company (GNY) seeks to dismiss the instant action pursuant to CPLR 3211(a)(1) and (a)(7). The motion is denied.

Plaintiff Seaport Park Condominium (the building) is an apartment building located at 117 Beekman Street in Manhattan. The building's premises were insured by defendant Greater New York Mutual Insurance Company (GNY), who issued Business Owner Policy 6131M08340.

During the winter of 2003/2004, plaintiff hired DJM Restoration, Inc. (DJM) to repair and replace the existing roof of the building. Plaintiff contends that at some point during the course of these repairs, DJM negligently disrupted the electricity servicing the building's cooling tower, causing the cooling tower pipes to freeze and eventually burst, causing damage to the building. The damage, as alleged by plaintiff, was discovered during the Spring of 2004, at which time plaintiff placed its

insurance carrier on notice, asserting its claim.

At some point after discovering the damage, plaintiff retained defendant Matco Service Corp. (Matco) to produce and install a new cooling tower. Matco was additionally responsible for removal of the damaged cooling tower. However, prior to the removal of the cooling tower, GNY retained Prestige Adjustment, Inc. (Prestige) to adjust plaintiff's claim. On May 18, 2004, Prestige inspected the site, and after inspecting the cooling tower determined that it required an expert to determine the extent and nature of the damage. Prestige then retained the services of Levine Group, Inc. (LGI), experts in HVAC systems, who inspected the cooling tower on site on May 24, 2004. Although no affidavits are submitted by Prestige, GNY alleges that LGI was unable to determine the cause of the cooling tower leaks upon the conclusion of this inspection.

A second inspection of the cooling tower was conducted by LGI on June 1, 2004. Also in attendance were Mark Weil, the Executive Vice president of Akam Associates, Inc. (AKAM), the managing entity of the building; Jennifer Granda, the managing agent employed by Akam for the building; David Popp from defendant Matco; Steve Krause, plaintiff's public adjuster for the claim; several Matco employees who were there to enable the LGI representative to inspect the cooling tower; and George Stiefel, plaintiff's General Counsel. Again, while no affidavit has been submitted by LGI, plaintiff asserts that at the conclusion of the inspection, LGI's

representative indicated to all parties present that while he "believed that there were burst pipes within the cooling tower, until he was unable to make a more complete examination, he would not be able to render a final report" (Affirmation (in Opposition) of George Stiefel). Mr. Stiefel and Ms. Granda further assert that it was then agreed by all parties present that Matco would remove and replace the damaged cooling tower, store the tower in a safe place, inform the parties of the cooling tower's location, and make arrangements for further inspection of the tower (see, Affirmation (in Opposition) of George Stiefel; Affidavit of Jennifer Granda). Matco's position however, as stated by its president James Turrisi who was not in attendance at the June 1 inspection, was that there was no written obligation that Matco preserve the cooling tower for inspection (Affidavit of James Turrisi).

In any event, Matco removed the damaged cooling tower, which was then scrapped, preventing LGI from conducting any further metallurgical studies on the cooling tower pipes. GNY subsequently denied plaintiff's claim, and in December, 2004, plaintiff commenced the instant action. Defendant GNY now moves to dismiss the action pursuant to CPLR 3211(a)(1) and (a)(7).

Discussion

Accepting all of plaintiff's allegations contained within the complaint as true and affording plaintiff all favorable instances

to be drawn from them, this court, on a motion to dismiss, is required to determine whether on any reasonable view of the facts, plaintiff can succeed on its assertions (*Campaign for Fiscal Equity, Inc. v. State of New York*, 86 NY2d 307, 318 [1995]; *People v. New York City Transit Authority*, 59 NY2d 343, 348 [1983]). The role of the court is therefore limited to determining "only whether the facts as alleged fit within any cognizable legal theory" (*Leon v.* Martinez, 84 NY2d 83, 87-88 [1994]).

Where a defendant moves to dismiss an action pursuant to CPLR 3211(a)(1), the defendant is required to demonstrate that the documentary evidence, standing alone, disposes of the claim (*Leon*, 84 NY2d 83). If the evidence presented demonstrates "that a material fact alleged by the plaintiff to be true is not a fact at all or that no significant dispute exists regarding it" (*Kelly v Schwend*, 15 AD3d 723, 724 [2nd Dept 2005]), the motion may be granted.

In the motion before this court, defendant GNY contends that it has no obligation to cover plaintiff's loss because of plaintiff's failure to comply with the terms of the insurance policy with respect to the provisions for "Loss Conditions", namely those provisions that required preservation of and unfettered access to any damaged property for investigation and testing (Order to Show Cause, Exhibit A (document CP 00 17 10 00, section 3(a)(6))). Plaintiff's position is that the only reason the

cooling tower was destroyed is because defendant Matco failed to preserve the tower as agreed between the parties on June 1, 2004. Matco however, contends that while there was a written agreement between plaintiff and Matco to remove and replace the old tower, there was nothing in writing that obligated them to preserve and/or store the old tower.

In light of the fact that there are no documents, affidavits or reports from LGI indicating any findings, or the necessity to continue investigating the cooling tower in issue, coupled with the fact that there are issues surrounding whether or not Matco had an obligation to preserve the cooling tower once it was removed from the building, this court cannot, at this juncture, dismiss this action. Accordingly, it is

ORDERED that the motion by GNY to dismiss the instant action is denied.

Counsel for the parties are directed to appear for a Preliminary Conference in this matter on Friday, August 12, 2005, at 11:00 a.m. in IA Part 15, Room 335, 60 Centre Street, New York New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/15/05

HON. WALTER B. TOLUB, J.S.C.