At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of May, 2007

P R E S E N T:

HON. BERT A. BUNYAN,
Justice.

----------X

ISAAC KATZ AND ISAAC KATZ A/A/O GENERAL TRADING CORP.,
Plaintiffs,

Index No. 41783/02

- against -

SILBERSTEIN BROKERAGE, INC. AND TOWER INSURANCE COMPANY OF NEW YORK,
Defendants.

----------X

The following papers numbered 1 to 15 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-6
Opposing Affidavits (Affirmations)	7-9
Reply Affidavits (Affirmations)	10-11
Affidavit (Affirmation)	
Other Papers Memoranda of Law (4)	12-15

Upon the foregoing papers in the action to recover for fire damages under an insurance policy, plaintiffs Isaac Katz (Katz), and Isaac Katz a/a/o General Trading Corp. (GTC) (collectively plaintiffs) move for summary judgment, pursuant to CPLR 3212, against defendant Tower Insurance Company of New York (Tower). Tower moves for an order, pursuant to CPLR 3025(b), for leave to file an amended answer to assert a counterclaim

against Katz. By separate notice of cross-motion, Tower cross-moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint.

Facts and Procedural History[1]

On February 19, 2002, Katz purchased property located at 147 Hart Street, in Brooklyn, New York. At that time, Katz applied for fire insurance for the property. Under the "Additional Interest" section of the insurance application, Olympia Mortgage Corp. (Olympia) was listed as the mortgagee. Katz's application was forwarded to Tower on February 20, 2002, which, on March 7, 2002, issued a dwelling fire insurance policy for the time period from February 11, 2002 to February 11, 2003. The policy contained a standard mortgage clause. Such clause provided that if Katz's claim for coverage was denied, that denial would not apply to a valid claim of the mortgagee, and that if the mortgagee was paid for any loss and payment to Katz was denied, the mortgagee could recover the whole principal on the mortgage plus any accrued interest. Following submission of his insurance application, Katz was unable to secure a mortgage from Olympia, and instead, on February 19, 2002, he obtained a mortgage from GTC in the amount of $170,000.

Katz never moved into the subject property and instead, entered into a contract to sell it in March 2002. However, that sale was never consummated due to a fire, which occurred at the property on April 29, 2002. Thereafter, Katz submitted an insurance claim to Tower

---

[1]Various portions of the factual recitation are set forth in and have been taken from *Katz v Silberstein Brokerage, Inc.*, Sup Ct, Kings County, Index No. 41783/02, dated February 8, 2006.

under the fire insurance policy. Tower denied Katz's claim based upon material misrepresentations allegedly made by Katz in his insurance application. Specifically, Tower contended that Katz misrepresented that the property was occupied by him, as the owner, as a primary residence, when, in fact, the property was vacant.

Consequently, on October 9, 2002, Katz commenced an action against Tower and defendant Silberstein Brokerage, Inc. (Silberstein), alleging breach of contract claims (Action #1) (*Katz v Silberstein Brokerage, Inc.,* Sup Ct, Kings County, Index No. 41783/02). He asserted that he was entitled to payment from Tower for the fire damage to his property under the policy, and that if Silberstein made any misrepresentations to Tower in procuring the policy, it was liable to him.

On November 18, 2002, Katz assigned his rights in the proceeds of the claims in Action # 1 and executed an affidavit of confession of judgment in the sum of $193,000 in favor of GTC. On May 4, 2004, Tower moved for summary judgment in Action # 1, and Katz opposed Tower's motion. On June 14, 2004, GTC executed an assignment, in consideration for the confession of judgment, assigning to Katz its right to proceed and demand judgment in Action # 1 in the amount of $193,000 plus interest, pursuant to the standard mortgage clause of the insurance policy issued by Tower. On the same day, Katz cross-moved for reformation of the policy to name GTC as the mortgagee instead of Olympia and for summary judgment based upon the standard mortgage clause contained in the policy. Katz's cross-motion also sought summary judgment in his favor as against

Silberstein. Thereafter, Silberstein cross-moved for summary judgment dismissing Katz's complaint as against it.

By decision and order dated March 3, 2005, the court found that Tower had demonstrated that it would not have issued the subject policy if it had known that the property was vacant (*Katz v Tower Ins. Co. Of New York*, Sup Ct, Kings County, Index No. 41783/02, p. 6) (citations omitted). It therefore held that Tower had established as a matter of law the materiality of Katz's misrepresentations and granted Tower's motion for summary judgment dismissing Katz's complaint against it (*id.*).

As to Katz's cross-motion, the court found that Katz had failed to plead a cause of action for reformation in his complaint or in two amended complaints by him. The court therefore determined that the issue of reformation was not properly before it (*id.*). In addition, due to conflicting allegations by Katz and Silberstein as to whether Silberstein was negligent in failing to ascertain the correct information about the occupancy of the property, the court denied the respective summary judgment cross- motions by Katz and Silberstein; Action # 1 remains pending as against Silberstein (*id.* at 7).

On May 23, 2005, Katz, as assignee of GTC, commenced an action against Tower. (Action # 2) (*Katz v Tower Ins. Co. Of New York,* Sup. Ct, Kings County, Index No. 15966/05). Action # 2 seeks reformation of the insurance policy issued by Tower so as to name GTC as the mortgagee under the policy and payment to Katz, as GTC's assignee, pursuant to the standard mortgage clause contained therein.

Thereafter, in Action # 2, Tower moved, pursuant to CPLR 3211(a)(5), for an order dismissing Katz's complaint, as assignee of GTC, as against it based upon the alleged ground that it was barred by the doctrine of *res judicata* due to the court's March 3, 2005 decision and order in Action # 1. Katz opposed Tower's motion and moved in Action # 1 for an order, pursuant to CPLR 602(a), consolidating Action # 1 with Action # 2.

By decision and order dated February 8, 2006, the court denied Tower's motion to dismiss on the ground that Katz's complaint was barred by the doctrine of *res judicata*, holding that "the issue of reformation [had] never [been] addressed by the court in its March 3, 2005 decision and order in action # 1" (*Katz v Silberstein Brokerage, Inc.*, Sup Ct, Kings County, Index No. 41783/02, p. 6). In addition, the court held that its March 3, 2005 decision and order "expressly stated that the issue of reformation could not be addressed since it had not been pleaded, and therefore, the issue was not properly before it [and that] . . . [c]onsequently, no final judgment on the merits of Katz's claim, as GTC's assignee, for reformation of the policy or for recovery, as a mortgagee under the standard mortgage clause of the policy, was ever rendered by the court" (citations omitted) (*id.* at 6-7).

The court also addressed Tower's argument, that even if *res judicata* did not bar Katz's claim in Action # 2, GTC was not actually a mortgagee because Katz had only submitted a promissory note in favor of GTC. Specifically, the court held that Katz had "submitted the actual mortgage document, evidencing GTC's status as a mortgagee with respect to the subject property (*id.* at 11)."

In addition, the court addressed Tower's argument that Katz's claim for reformation could not be sustained. Specifically, Tower asserted that the application for insurance submitted to it showed that Katz only requested that Olympia be named as mortgagee, warranting denial of Katz's claim for reformation. The court rejected Tower's argument, holding that it was "readily apparent from the declarations sheet and the insurance policy that Tower intended to insure the mortgagee . . . Tower does not claim that it would have denied coverage if the name of the mortgagee were different; rather it appears that the identity of the mortgagee was relatively unimportant" (citations omitted) (*id.*).

The court also addressed Tower's argument - that the "Suit Against Us" provision, which is applicable to a mortgagee under the standard mortgage clause - required that the action be commenced within two years after the date of loss. In that regard, Tower argued that since Katz, as assignee of GTC, did not commence Action # 2 until May 20, 2005, more than two years after the date of loss on April 29, 2002, it was untimely. The court rejected this argument. It ruled that "[i]t has long been held that the liability of an insurance company to a mortgagee is quite different from its liability to the owner, and . . . the provisions of the policy with respect to the short Statute of Limitations, do not apply to the mortgagee" (internal citations and quotations omitted) (*id.*). The court continued that "[s]ince the Statute of Limitations for a cause of action for reformation based on mistake is six years, action # 2 has been timely brought" (citations and quotations omitted) (*id.* at 11-12).

As to Katz's application in Action # 1 for consolidation of that action with Action # 2, the court granted the motion, holding that:

> "inasmuch as action # 1 and action # 2 both concern the same insurance policy and Katz's claims thereunder for coverage for the same fire that damaged the same property, they involve common questions of law and fact. . . Additionally, any judgment obtained by Katz as against Silberstein in action # 1 could potentially be offset by a recovery by Katz in action # 2. Therefore, consolidation would avoid the necessity for a reimbursement of funds to Silberstein if a judgment in action # 1 is obtained" (*id.* at 13).

On or about March 23, 2006, Tower served its answer, generally denying the allegations of the complaint. Tower also asserted nine affirmative defenses, including failure to state a cause of action, *estoppel* and unclean hands, *res judicata*, Statute of Limitations, that the transaction in February 2002 between Katz and GTC was not a *bona fide* mortgage transaction, and offset (any recovery by GTC must be offset by any payments made by Katz on the original mortgage). Along with its answer, Tower also served discovery demands upon Katz, including deposition notices for Katz and GTC. Katz did not comply with discovery, yet filed a note of issue and certificate of readiness on or about April 26, 2006.

On May 17, 2006, Tower moved to vacate the note of issue or in the alternative, to dismiss the complaint for failure to comply with discovery and/or to compel discovery from Katz. Katz moved for a protective order, seeking to quash Tower's subpoena to GTC on or about May 31, 2006. On July, 2006, this court held a conference and oral argument to resolve these pending motions.

At that conference, the court set deposition dates for GTC and Katz relative to the mortgagee's claim.

At the time Tower served its cross-motion for summary judgment, neither Katz nor GTC had appeared for deposition. Katz was then deposed on November 9, 2006

Subsequently, Katz moved for summary judgment to recover the amount due under the outstanding mortgage. Tower moved to amend its answer to assert a counterclaim against Katz for subrogation pursuant to the mortgage clause in the subject fire insurance policy.[2] Tower also cross-moved for summary judgment, seeking dismissal of the complaint.

Arguments

In support of the instant motion for summary judgment, Katz argues that this court has already determined that GTC was a mortgagee under the subject insurance policy, and that such finding constitutes the law of the case. Similarly, Katz contends that Tower's affirmative defenses that his claim is barred by the doctrine of *res judicata* and is time-barred, having already been rejected by this court in the February 8, 2006 decision and order. In sum, Katz asserts that since all of the defenses raised in Tower's answer have already been rejected by this court, and since Tower has not and cannot raise any additional defenses, his motion for summary judgment must be granted.

In opposition to Katz's motion, Tower argues that the court's February 8, 2006 decision and order did not determine, on the merits, that GTC was a mortgagee under the

---

[2] The motion to amend was withdrawn as to Silberstein.

subject policy. Specifically, Tower contends that the court's ruling that Katz had "submitted the actual mortgage document, evidencing GTC's status as a mortgagee with respect to the subject property" (*id.* at 11), was merely dicta in support of the court's *res judicata* ruling. Tower further asserts that the evidence to which the court referred constituted unauthenticated photocopied documents; that the court issued the above-quoted passage without consideration of any testimony; and that because the motion was one to dismiss, the court was compelled to assume that the factual allegations made by the non-movant, (plaintiff in this case), were true. Tower therefore argues that since this issue was not decided on the merits, it does not constitute law of the case. Finally, Tower argues that even assuming the court held that GTC possessed a mortgage on the premises, the order does not address whether the mortgage and assignment were legally valid.

Tower also asserts that the court's February 8th decision and order did not determine that GTC was entitled to reformation of the insurance policy since the court did not resolve any questions of fact. Specifically, Tower argues that since Katz does not allege that Tower fraudulently induced him to name Olympia as the mortgagee, and since no mutual mistake was established, there is no basis for reformation of the insurance policy. Tower also argues that Katz's motion for summary judgment should be denied because discovery remains outstanding.

In support of its motion to amend its answer to assert a counterclaim for subrogation, Tower relies upon the standard mortgage clause in the insurance policy, which, it argues,

subrogates it to all rights of the mortgagee granted under the mortgage. Tower contends that Katz will not suffer any prejudice if the motion is granted since Katz has been aware of the subrogation claim since the summer of 2004, as it was discussed with his attorney, was referred to in court papers, and was the reason why an additional deposition of Tower's underwriter was granted by the court.

In support of its cross-motion for summary judgment dismissing Katz's complaint, Tower advances four arguments: 1) that based upon its proposed counterclaim, (assuming that GTC is entitled to recovery under the insurance policy), it (Tower) is entitled to subrogation or assignment of the mortgage; 2) that no coverage is available to GTC since the insurance policy is void *ab initio* as to Katz; 3) that Katz is barred from seeking the equitable relief of reformation based upon the doctrine of unclean hands; and 4) that GTC cannot recover since it released Katz from its mortgage obligation, thereby extinguishing its insurable interest.

Analysis

Tower argues that assuming GTC is entitled to recover under the insurance policy as mortgagee, the standard mortgage clause in the policy establishes that it is entitled to summary judgment on its proposed counterclaim against plaintiff. The standard mortgage clause at issue provides as follows:

> "The word 'mortgagee' includes trustee.
>
> If a mortgagee is named in this policy, any loss payable under coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one

mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If we deny your claim, that denial will not apply to a valid claim or the mortgagee, if the mortgagee:

a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. pays any premium due under this policy on demand if you have neglected to pay the premium; and

c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If we decide to cancel or not to renew this policy, the mortgagee will be notified at least 10 days before the date cancellation or non-renewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a. we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim" (emphasis added).

As this court held in its February 8, 2006 decision and order, "a standard mortgage clause operates as a separate contract between the mortgagee and the insurer and is intended to protect the interests of the mortgagee from any acts or misrepresentations by the insured which would render him or her ineligible for coverage thereunder (*see United States of Am.*

v Commercial Union Ins. Cos., 821 F2d 164, 166 [2d Cir 1987]; *Wholesale Sports Warehouse Co. v Pekin Ins. Co.*, 587 F Supp 916, 920 [SD Iowa 1984]; *Syracuse Sav. Bank v Yorkshire Ins. Co., Ltd.*, 301 NY 403, 409-410 [1950]; *Goldstein v National Liberty Ins. Co. of Am.*, 256 NY 26, 32 [1931]; *Armstrong v Caliber One Indemnity Co.*, 5 AD3d 413, 414 [2004]; *Vilagy v Associated Mut. Ins. Co.,* 165 AD2d 616, 618 [1991]; *Murphy v Aetna Ins. Co.*, 96 AD2d 99, 101 [1983]; *Grady v Utica Mut. Ins. Co.*, 69 AD2d 668, 673 [1979]; *National Factors v Holford*, 27 AD2d 377, 379 [1967]; *Howe v Mill Owners Mut. Ins. Co. of Iowa*, 241 App Div 336, 337-338 [1934]; *Heilbrun v German Alliance Ins. Co. of New York*, 140 App Div 557, 125 NYS 374, 376 [1910], *affd* 202 NY 610 [1911]; *Meade v North Country Co-op Ins. Co.*, 128 Misc 2d 274, 278 [1985], *affd* 120 AD2d 834 [1986]; *First Trust Union Bank v Aetna Cas. & Sur Co.*, 119 Misc 2d 383, 385-386 [1983]; *National Factors v Waters*, 42 Misc 2d 822, 831 [1964])" (*Katz v Tower Ins. Co. of New York,* Sup Ct, Kings County, Index No. 41783/02, pgs. 8-9). Despite the creation of a separate contract between the mortgagee and the insured pursuant to a standard mortgage clause,

> "this does not mean that the policy containing the [clause] permits two complete recoveries for the same loss. It merely requires that the insurer first make payment of the loss to the mortgagee to the extent of his interest in the property and then pay the balance of the loss, if any, to the mortgagor, so long as the latter is not in default of any of the conditions of the policy (*Grady,* 69 AD2d at 673-674)."

However:

> "where the mortgagor is in default of any of the conditions of the policy, the insurer is not liable to him thereunder and it need only

> pay the mortgagee up to the extent of the mortgagee's interest. *The standard mortgage clause then provides that the insurer is subrogated to the rights of the mortgagee under the mortgage to the extent of its payment*" (*id.*; *see also Reed v Federal Insurance Co.*, 71 NY2d 581, 589 [1988]; *Crossland Mortgage Corp. v Douglas*, 271 AD2d 933, 934 [2000]; *Knapp v Aetna Life & Cas. Co.*, 104 AD2d 857, 858 [1984]).

Here, as a preliminary matter, this court has already held, contrary to Tower's arguments, that GTC was a mortgagee under the subject insurance policy. In this regard, Tower does not dispute that it originally sought to dismiss GTC's complaint on the basis that GTC only submitted a promissory note as its evidence that it was the mortgagee; that it then argued in its reply papers that GTC failed to issue a *bone fide* mortgage to Katz; and that GTC, in response, included the mortgage note in its supplemental papers, submitted a copy of its mortgage instrument that was recorded with the Kings County City Register, and that Tower had the opportunity to challenge the mortgage note in its supplemental papers, which it failed to do. In any event, this court specifically held that GTC had issued a *bona fide* mortgage to Katz. In this regard, this court stated:

> "Tower additionally argues that even if *res judicata* does not bar Katz's claim in action #2, GTC was not actually a mortgagee because Katz has only submitted a promissory note in favor of GTC. *In response, however, Katz has submitted the actual mortgage document, evidencing GTC's status as a mortgagee with respect to the subject property*" (*Katz v Tower Ins. Co. of New York,* Sup. Ct, Kings County, Index No. 15966/05, p. 10-11) (emphasis added).

As Katz argues, Tower had the opportunity to reargue this branch of the court's decision and order, yet failed to do so. Moreover, Tower presently fails to refute in any manner the

authenticity of the mortgage note and instrument. Accordingly, the ruling that GTC issued a *bona fide* mortgage was one made on the merits, constitutes the law of the case, and cannot now be relitigated by Tower.

Similarly, Tower's argument that this court did not determine, on the merits, that GTC was entitled to reformation of the subject insurance policy, is also rejected. As noted above, this court expressly rejected Tower's assertion that Katz's claim for reformation could not be sustained. Specifically, it held that it was "readily apparent from the declarations sheet and the insurance policy that Tower intended to insure the mortgagee . . . [and] [that] Tower [did] not claim that it would have denied coverage if the name of the mortgagee were different; rather it appear[ed] that the identity of the mortgagee was relatively unimportant" (*id.* at 11). Thus, this finding constitutes law of the case as well.

Even were the court to entertain Tower's arguments regarding reformation, it would find them to be without merit. In this connection, Tower asserts that reformation based upon mutual mistake is inapplicable because any mistake in naming GTC as the mortgagee on Tower's part was absent. "A party is entitled to reformation where 'the writing in question was executed under mutual mistake or unilateral mistake coupled with fraud'" (*Cheperuk v Liberty Mut. Fire Ins. Co.,* 263 AD2d 748, 749 [1999], quoting (*Leavitt-Berner Tanning Corp. v American Home Assur. Co.*, 129 AD2d 199, 201-202 [1997], *lv denied* 70 NY2d 609 [1987]). "Where it is apparent that an innocent mistake occurred with respect to a named insured and it is evident that the parties intended to cover the risk, the error may be deemed

mutual for purposes of reformation even though the insurer was not aware of the error" (*id.*). As Katz asserts, at the time the application was completed, both Katz and Tower intended Olympia to be the named mortgagee. It was only when Katz could not secure financing for the purchase of the subject property that he obtained a mortgage from GTC. Based upon the foregoing, and "[b]ecause the identity of the mortgagee was relatively unimportant . . . under these circumstances, plaintiff[] [is] 'entitled to equitable reformation of the policy to correct the obvious inadvertent misidentification' of the name mortgagee" (*id.,* quoting *New York Cas. Ins. Co. v Shaker Pine,* 262 AD2d 735, 736-737 [1999]). Tower's additional argument that Katz is barred from seeking reformation based on the doctrine of unclean hands is also rejected as it is unsupported by the record. As Katz properly argues, this court did not make a determination as to whether the material misrepresentation made in the subject insurance policy was intentional.

Having already determined that GTC is a mortgagee and that GTC assigned its rights as mortgagee to Katz, the court finds that based upon the subject insurance policy, Tower is subrograted to the rights of GTC that were granted under the mortgage on the property (*see Reed v Federal Insurance Co.*, 71 NY2d 581, 589 [1988]). In the alternative, Tower may receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt. In any event, in either case, Katz is not entitled to retain any of the funds paid to him by Tower as GTC's assignee since, based upon Tower's right of subrogration

pursuant to the subject insurance policy, Tower would be able to offset any right Katz, as assigned, might have (*id.* at 589-591).

Specifically, under the insurance policy, Tower is required to pay GTC "the whole principal on the mortgage plus any accrued interest" yet Tower is entitled to step into the shoes of GTC and recover these very same funds from Katz. Stated otherwise, any money Tower may pay to or in favor of GTC pursuant to the insurance policy is recoverable from Katz. Based upon Tower's right of setoff against Katz, is it legally meritless for the court to direct Tower to make any payments to Katz as assignee of the mortgagee's claim.

Relying upon *Kaf-Kaf, Inc. Rodless Decorations, Inc.* (90 NY2d 654 [1997]), Katz and Silberstein argue that Tower is not entitled to subrogation because it did not cause the fire to the subject property. This claim is rejected. *Kaf-Kaf* involves a waiver of subrogration clause in a lease agreement, not a standard mortgage clause in issue here. In addition, *Allstate Insurance Company v Mazzola* (175 F3d 255, 258 [2d Cir. 199]), upon which Katz also relies, is supportive of Tower's cross-motion, since it provides that subrogation is "the right one party [Tower] has against a third party [GTC] following payment, in whole or in part, of a legal obligation that ought to have been met by the third party [Katz]" (*id.*). In any event, as noted above, if Tower pays funds on the mortgagee's claim under the insurance policy, Tower would be subrograted to the rights of mortgagee that were granted under the mortgage on the

property (*Grady,* 69 AD2d at 673-674; *Reed,* 71 NY2d at 589; *Crossland Mortgage Corp.,* 271 AD2d at 934; *Knapp,* 104 AD2d at 858).[3]

As an alternative basis for relief on its cross-motion, Tower argues that *if* GTC gave plaintiff a release and allowed plaintiff to discharge the mortgage and sell the property, GTC's insurable interest pursuant to the subject insurance policy is extinguished. Under these circumstances, Tower contends that no recovery under the mortgage clause is warranted and that it is entitled to summary judgment on this ground as well. Katz argues in opposition that this claim is entirely speculative and unsupported by any documentation, that despite GTC's assignment of its rights to prosecute its claim against Tower to Katz, GTC did not release Katz from his obligations under the mortgage note, and that GTC merely received a confession of judgment from Katz for an amount it was already owed. Tower replies that Katz testified at his deposition that GTC allowed him to sell the subject property in November, 2002, free and clear of GTC's mortgage on the premises. Tower has annexed to its reply "a copy of what [it] believes is the release of the purported mortgage from GTC to Katz. It is unclear from both Katz's deposition testimony and the documentation supplied, unaccompanied by any affidavit

---

[3] As an additional basis for relief on its cross-motion for summary judgment, Tower argues that because the subject insurance policy was rescinded as to Katz, it is void *ab initio*, and that therefore no coverage is available to GTC, the mortgagee. However, as this court held in its February 8th decision and order, "it is well established that a standard mortgage clause operates as a separate contract between the mortgagee and the insurer and is intended to protect the interests of the mortgagee from any acts or misrepresentations by the insured which would render him or her ineligible for coverage thereunder" (*Katz v Tower Ins. Co. of New York,* Sup. Ct, Kings County, Index No. 15966/05, p. 8)(citations omitted). The New York cases cited by Tower to support its position either do not involve a standard mortgage clause or are distinguishable from the instant matter.

of merit explaining its significance, that GTC released Katz from his mortgage obligations. Moreover, while Katz was not deposed until after Tower served its memorandum of law in support of its cross-motion for summary judgment, Tower has improperly annexed the purported release of the mortgage from GTC to Katz for the first time in its reply papers, which the court declines to consider (*Savage v Franco*, _ AD3d_, 2006 NY Slip Op 9448, *3 [2d Dept, Dec. 12, 2006]).

In any event, based upon the determination that Tower would be entitled to offset any right Katz, as assigned, might have by Tower's concurrent right to subrogation against Katz, Tower's motion to amend its answer to assert a counterclaim against Katz for subrogation under the subject insurance policy and Tower's cross-motion for summary judgment are granted, and the complaint against Tower is dismissed. With respect to Tower's motion to amend, it is well-settled that "[l]eave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment" *(Maloney Carpentry, Inc. v Budnik*, __ AD3d __, 2007 NY Slip Op 1267 [2d Dept, Feb. 13, 2007], citing CPLR 3025[b]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]; *Adams v Jamaica Hosp.*, 258 AD2d 604, 605 [1999]; *Nissenbaum v Ferazzoli*, 171 AD2d 654, 655 [1991]). Here, the court has already determined that the proposed counterclaim is meritorious. Moreover, Katz cannot claim prejudice or surprise since the proposed counterclaim arises out of the same facts as those underlying the

action brought by him (*id.*). Moreover, Katz does not dispute that he has been aware of the subrogration claim for several years, and that he has already asked for and received the opportunity to take a second deposition of a representative of Tower's underwriting department to specifically explore the subrogation issue. In addition, contrary to Katz's arguments, based upon the record before the court, and inasmuch as the facts of the counterclaim were within the knowledge of Tower's attorney, Tower's failure to submit an affidavit of merit with its cross-motion to amend the answer is not fatal to the proposed amendment (*English v Ski Windham Operating Corp.*, 263 AD2d 443, 445 [1999]). Katz's additional contention that the motion to amend warrants denial because it is untimely is without merit. The motion was not untimely and in any event, mere delay does not warrant denial where, as here, there is no surprise or prejudice to the opposing party (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]).

With respect to Tower's cross- motion for summary judgment, Katz argues that it cannot be granted since the counterclaim has not been formally pleaded. This claim is also rejected. " A summary judgment is sometimes entertained on the basis of a defense not formally pleaded, but only when 'reliance upon that defense neither surprises nor prejudices the plaintiff', as when the plaintiff knows the score from other sources in the case, such as motion papers" (Siegel, New York Practice, § 280, [4th ed.]). Here, as indicated above, Katz has suffered no surprise or prejudice. He does not dispute that he has known of the subrogation issue since as early as July 2004, or that he has been on notice through pleadings, discussions

at the July 9, 2006 Court Conference, and through Tower's motion for leave to file an amended answer.

Finally, in his affirmation in further support of his motion for summary judgment and in opposition to Tower's cross-motion for summary judgment, Katz asserts that his motion for summary judgment is in fact a motion to strike those affirmative defenses alleged by Tower that its claim is barred by the doctrine of *res judicata* and the statute of limitations. To the extent that Katz is arguing that the court made determinations, on the merits, with respect to these claims, Katz is correct. To the extent that Katz is arguing that he has moved to strike other of Tower's affirmative defenses, the claim is rejected as it is not supported by the record.

Based upon the foregoing findings, Katz's motion for summary judgment is also denied.

In sum, the motion of Katz for summary judgment is denied. The motion of Tower to amend its answer to assert a counterclaim for subrogation against Katz is granted and the cross-motion of Tower for summary judgment dismissing Katz's complaint is also granted.

This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

HON. BERT A. BUNYAN
JUSTICE N.Y.S. SUPREME COURT