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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 106212/2008

GOORLAND, MARTIN

vs

NEW YORK PROPERTY INSURANCE

Sequence Number : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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, it is ordered that this motion is decided per attached

FILED

APR 08 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 4/5/11

EMILY JANE GOODMAN, J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17
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MARTIN GOORLAND and JANICE GOORLAND,

Plaintiffs,

Index No. 106212/08

-against-

NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION,

Defendant.

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Emily Jane Goodman, J.S.C.:

In this dispute involving the proceeds of an insurance policy after a covered loss, plaintiffs Martin Goorland and Janice Goorland move, pursuant to CPLR 3212, for partial summary judgment on their action against their insurer, defendant New York Property Insurance Underwriting Association. Although plaintiffs' complaint seeks a sum certain ($139,623.85), this motion appears to seek resolution of the single question of whether payment of the claimed loss should have included depreciation on the cost of replacement of the destroyed property.

I. Background

Plaintiffs Martin Goorland and Janice Goorland were the owners of a building located at 123 Acapulco Street, Atlantic Bach, New York, in which they resided (premises). The property

was insured at all relevant times for, among other things, fire loss, under a named peril property insurance policy issued by defendant New York Property Insurance Underwriting Association (policy). Notice of Motion, Ex B. Under the terms of the policy, "[c]overed property losses are settled at actual cash value at the time of the loss but not more than the amount required to repair or replace the damaged property." *Id.*, ¶ E. "Actual cash value" is not defined in the policy.

On May 25, 2007, a fire occurred on the premises, which partially destroyed plaintiffs' home, the damage mainly to the roof. Plaintiffs retained two parties to provide estimates of what it would cost to repair the premises. Builder R.G. Associates provided a cost estimation of $163,481.41 (Notice of Motion, Ex. C), while International Building Corporation (International) provided an estimate of $241,000. *Id.*, Ex. D. Plaintiffs eventually decided to raze the house, and rebuild from the ground up. The cost of rebuilding exceeded the estimate of International.

Defendant retained Prism General Services (Prism) to provide an estimate to repair the premises. Prism estimated ,$124,107.65 as replacement value. *Id.*, Ex. H. Prism deducted $24,633.62 for depreciation, for a final total of $99,474.03 as "actual cash value." Defendant's final adjustment for the claim was $101,376.15. *Id.*, Ex. G. In defendant's letter to plaintiffs,

defendant indicated that this amount was the "net collectible amount after deductible." *Id.* Subsequent to the alleged settlement of the claim, plaintiffs provided defendant with further estimates to repair windows damaged as a result of protective measures plaintiffs were required to make to the premises under the policy, and for mold remediation.

Plaintiffs claim that defendant should not have considered depreciation in determining "actual cash value" for the repair of the premises. Defendant maintains that the amount due is a jury question, based on a disagreement among the parties' experts, and that its expert was correct in making a determination that the amount due to the plaintiffs must include depreciation on the replacement costs.

Defendant also notes that plaintiff Martin Goorland is now deceased, and argues that a substitution for his estate must be made before the action may continue.

II. Discussion

As an initial matter, this court finds that the action need not be stayed pending a substitution of Martin Goorland's estate. Under CPLR 1015 (b), "[u]pon the death of one or more of the plaintiffs ... in an action in which the right sought to be enforced survives only to the surviving plainitffs ... the action does not abate. The death shall be noted on the record and the action shall proceed." This section has been construed so as to

allow the continuation of an action brought by a joint tenant upon the death of the other tenant, "if the cause of action survives to a coplaintiff ... ." *Bova v Vinciguerra*, 139 AD2d 797, 799 (3d Dept 1988). As such, "the action can proceed without a substitution with the death being simply noted on the record." *Id.* Here, the action continues with Martin Goorland's wife, Janice Goorland, as coplaintiff, and Martin Goorland's death is duly noted on the record. The demise of Martin Goorland "does not affect the merits of [this] case." *Id.*

In the seminal case of *McAnarney v Newark Fire Insurance Company* (247 NY 176 [1928]), the Court noted that

> [i]ndemnity is the basis and foundation of all insurance law. The contract with the insurer is not that, if the property is burned, he will pay its market value, but that he will indemnify the assured, that is, save him harmless or put him in as good a condition, so far as practicable, as he would have been in if no fire had occurred [internal quotation marks and citations omitted].

Id. at 184; *see also Kramnicz v First National Bank of Greene*, 32 AD2d 1009 (3d Dept 1969).

In *McAnarney*, the Court dealt with a form provision in an insurance contract which called for a recovery of "actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss in damage." *Id.* at 181. Thus, that policy required

that depreciation be considered. *See also Incardona v Home Indemnity Company*, 60 AD2d 749 (4th Dept 1977); *Sebring v Firemen's Insurance Company of Newark, N.J.*, 227 App Div 103 (4th Dept 1929). However, apparently, the industry has changed its form contractual provision, to exclude, as in the present case, any reference to depreciation. *See e.g. Smith v Providence Washington Insurance Company*, 51 AD2d 1074 (3d Dept 1976); *Eshan Realty Corp. v Stuyvesant Insurance Company of New York*, 25 Misc 2d 828 (Sup Ct, Kings County 1960), *mod on other grounds* 12 AD2d 818 (2d Dept 1961), *affd as mod* 11 NY2d 707 (1962).

"[T]he determination of actual cash value is made under a broad rule of evidence which allows the trier of fact to consider every fact and circumstance which would logically tend to the formation of a correct estimate of the loss [internal quotation marks and citations omitted]." *Mazzocki v State Farm Fire & Casualty Corporation*, 1 AD3d 9, 12 (3d Dept 2003), citing to *McAnarney*, 27 NY 176, *supra*; *Cass v Finger Lakes Co-Operative Insurance Company*, 107 AD2d 904, 905 (3d Dept 1985). Although the Court in *Mazzocki* dealt with parties who agreed that "actual cash value" meant "replacement cost minus depreciation" (*id.* at 12-13), other courts have rejected the notion that actual cash value means replacement costs less depreciation.

In *Lazaroff v Northwestern National Insurance Company of Milwaukee, Wis.* (121 NYS2d 122 [Sup Ct, New York County], *affd*

281 App Div 672 [1st Dept 1952]), the court found that the insurer's obligation was to "reimburse the plaintiff for the cost of repairs with materials of the kind and quality damaged without deduction for depreciation."[1] *Id.* at 123; *Eshan Realty Corporation v Stuyvesant Insurance Company* (25 Misc 2d 828, *supra*)(same); *see also Boskowitz v Continental Insurance Company*, 175 App Div 18 (1st Dept 1916)(court called for insurer to pay cost to repair or replace with materials of like kind and quality, and did not require consideration of depreciation).

This court finds that defendant's reliance on a consideration of replacement costs less depreciation is unfounded under the policy language. The policy does not state whether depreciation it is or is not excluded. However, the policy does limit coverage to an amount "not more than the amount required to repair or replace the damaged property" which necessarily excludes a deduction for depreciation. Accordingly, because the policy fails to provide for a deduction for depreciation, where an industry change was made to exclude any references to a deduction for depreciation (*Smith v Providence Washington Insurance Company*, 51 AD2d 1074, *supra*), and because the limit of coverage necessarily excludes a deduction for depreciation, the

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[1]The court notes that the form policy language herein has dropped the phrase "with material of like kind and quality," but does not construe that the provision has changed so as to allow the use of inferior or depreciated materials.

only conclusion which can be drawn is that a deduction for depreciation cannot be made. Therefore, defendant's "have failed to show any legal basis for withholding the sum...which they have characterized as a deduction for depreciation" (*see Hunt v Colonial Coop. Ins. Co.*, 217 AD2d 573 (2d Dept 1995).

Accordingly, it is

ORDERED that the plaintiffs' motion for partial summary judgment is granted to the extent that defendant will not be permitted to rely on replacement costs less depreciation in determining actual cash value for the loss; and it is further

ORDERED that the death of plaintiff Martin Goorland is duly noted on the record; and it is further

ORDERED that the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: April 5, 2011

ENTER:

J.S.C.

EMILY JANE GOODMAN