SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARGARET McGUIRE,

Plaintiff,

- against -

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 850/10
Motion Seq. No.: 02
Motion Date: 09/08/11
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibit	**2**
Reply Affidavit and Memorandum of Law	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR §3212, for an order granting it summary judgment and dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

This is an action for breach of contract. Plaintiff alleges that defendant is obligated to indemnify her pursuant to a policy of insurance for the sum of $23,000.00 in rental costs allegedly incurred when she rented a trailer in which to live following a fire on January 17, 2008, which rendered the insured premises uninhabitable. By letter dated December 29, 2008, defendant, after having reimbursed plaintiff $9,000.00 for trailer rental expenses covering the period of the loss through January 31, 2009, denied plaintiff's request for an additional extension

of Alternative Living Expense ("ALE") coverage under the policy. Plaintiff's Verified Complaint, consisting of a single cause of action, seeks the reimbursement of the trailer rental expenses allegedly incurred by plaintiff beyond the $9,000.00 reimbursed by defendant. Plaintiff commenced the action by filing a Summons and Verified Complaint on or about January 12, 2010. Defendant joined issue on or about March 10, 2010.

Defendant submits that "[p]ursuant to the plain and unambiguous terms of the Policy, coverage for ALE is limited to ALE that an insured incurs over and above their usual and customary pre-loss living expenses due to their temporary inability to reside in their home due to damage suffered to that home that was caused by a covered loss until such time as the insured can reasonably restore their home to its pre-loss condition. That ALE coverage provided by the Policy is intended to serve on as interim, stop gap or floating protection is clear because by its express terms that coverage terminates at the **shortest** of either: (1) the time it takes for an insured to again make their home inhabitable, or (2) the time it takes for the insured to settle their household, *i.e.*, reside on a non-temporary basis, in a different home, or 24 months after the loss.

Defendant argues that, in the instant matter, plaintiff did not simply restore her home to its pre-loss condition, but made significant changes and improvements, including a new second story dormer which created a new master suite and three new bedrooms, as well as improvements on the first floor that included a new family room and expansions of the kitchen and laundry rooms. Defendant submits that plaintiff was not able to complete this project during the time it would have taken to simply restore the home to its pre-fire condition. It contends the fact that plaintiff then had to pay rent for the ten additional months that she continued to live in a mobile trailer home is not the responsibility of defendant under its insurance policy. Defendant further argues that it fulfilled its policy obligations by paying plaintiff's ALE for a year, which was

clearly commercially reasonable given the fact that, once plaintiff became serious about the project, she was actually able to complete it in eleven cumulative months.

In January 2008, defendant had determined and initially advised plaintiff that plaintiff would reasonably need eight months to rebuild and repair the damaged subject premises after defendant had paid plaintiff's claim for the damage to said dwelling. Defendant submits that, "[d]espite having been advised of the eight month restoration period and having cashed the check representing State Farm's payment of plaintiff's Coverage IA dwelling claim in April of 2008, plaintiff did not even get the necessary permits to begin restoring the home until December of 2008, actual work on the home did not even begin until at least March of 2009 and plaintiff did not move back into the home until November of 2009. In a letter dated January 25, 2008, defendant conveyed to plaintiff's retained Public Adjuster, Louis Marando, its initial offer on the Coverage IA building potion of the claim. Said letter was also copied to plaintiff. The letter advised both plaintiff and her Public Adjuster that defendant had determined that plaintiff's insured residence should be restore to a habitable condition within eight months after plaintiff had received payment for the dwelling. *See* Defendant's Hardie Affidavit in Support Exhibit B. After additional negotiations and discussions between defendant and plaintiff's Public Adjuster, on February 21, 2008, defendant made a revised offer under Coverage IA for the subject dwelling and said offer was accepted by plaintiff and her Public Adjuster. On March 25, 2008, defendant received a sworn proof of loss from plaintiff and, in turn, made an actual cash value settlement payment in the amount of $244,236.31, by way of check, to plaintiff and her husband, as well as the mortgagee for the subject premises. Said check was cashed on April 14, 2008. Defendant submits that it was at this point that plaintiff should have had sufficient funds to restore the subject premises to its pre-fire condition.

In a March 25, 2008 letter to plaintiff, defendant advised her that it had determined that the subject premises should be able to be rendered inhabitable by November 30, 2008 and that defendant would not pay for ALE after that time. In letters sent to plaintiff dated June 3, 2008 and June 23, 2008, defendant reminded plaintiff of the November 30, 2008 restoration period expiration. On October 16, 2008, plaintiff left a voice mail for defendant in which she stated, for the first time, that she had not yet even gotten a building permit for the restoration of the subject premises and that she thought she automatically had two years of ALE. Defendant subsequently agreed to extend plaintiff's coverage for ALE and to pay for the mobile trailer home rental until January 31, 2009, however, refused to extend the ALE coverage beyond that date due to its position that plaintiff's failure to restore the subject premises in a timely manner was a breach of the insurance policy. Defendant asserts that "[s]ince the dwelling could have been repaired in one year had the repairs been initiated in a timely fashion, State Farm Fire & Casualty Company has honored it's (*sic*) obligation to our policyholders under their policy of insurance. Please be advised that a delay in rebuilding the home due to a marital action or improper direction is not a warranted extension."

Defendant argues that, when the terms of an insurance agreement are clear and unambiguous, the Court shall enforce the writing according to the plain meaning of its terms. Defendant further argues that it is entitled to summary judgment as a matter of law because plaintiff's ALE claim for the post-January 31, 2009 mobile trailer home rental does not fall within the terms of the subject insurance policy based upon plaintiff's failure to act within said policy's time constraints. The subject policy states that it provides ALE coverage only for the shortest of the time required to repair the premises, the time it takes the insured to settle elsewhere or twenty-four months. Defendant contends that plaintiff breached the insurance policy and failed to mitigate her damages and increased defendant's exposure under Section IC of the

policy to the prejudice of defendant by delaying the reconstruction of the subject premises. "The fact that the Policy provides for the shortest of the potential periods contained in the Policy clearly expressed the intent that time was of the essence and that the insured was required to act in a reasonably prompt fashion in rebuilding her home."

Defendant submits that, "[u]nder circumstances such as those presented in this case, where the plaintiff breached the insurance contract by acting inconsistent with her obligations thereunder at the expense of and to the prejudice of State Farm, State Farm's denial of coverage for ALE beyond January 31, 2009 was legally proper."

In opposition to the motion, plaintiff argues that "[t]he contract language under dispute in the instant case states: Coverage C—Loss of Use. a. Additional living expense. When a loss insured causes the resident premises to become uninhabitable we will cover the necessary increase in cost you incur to maintain your standard of living for up to 24 months. Our payment is limited to incurred costs for the shortest of: a) the time required to repair of replace the premises: b) the time required for your household to settle elsewhere or: c) 24 months. This coverage is not reduced by the expiration of this policy. While it is admitted that there is standard of reasonableness associated with contracts (which is itself a question of fact), it would be difficult to interpret this language to mean anything other than what it says: coverage will be extended for 24 months or the time it takes to restore the home. It took 24 months to restore the home."

Plaintiff contends that "[s]ince the language of the contract is unambiguous, Defendant is apparently resting their case on the fact that the plaintiff acted in an unreasonable manner in the timely restoration of her dwelling. Defendant then assumes the role of fact finder, answers the question in the negative, and asks this court to follow suit." Plaintiff states that it is for a jury to decide what constitutes "reasonable time" for plaintiff to complete the restoration of the subject

premises. Plaintiff argues that "[t]he evidence provided by defendant in no way legally establishes that the delays in restoration of the property were unreasonable" and that "a thorough reading of the plaintiff's deposition reveals that she took every measure under the available conditions to mitigate the loss to defendant by making every attempt to expedite the process. Whether or not the delays experienced by plaintiff in restoring her home were commercially reasonable are clearly issues of fact to be determined by a jury."

In reply to plaintiff's opposition, defendant submits that "[p]laintiff has admitted that she was, and still is under the mistaken impression that she automatically had two years to do whatever she wanted. However, plaintiff's mistaken impression is insufficient as a matter of law to expand or change the unambiguous terms of the Policy." Defendant adds, "[c]ontrary to counsel for plaintiff's assertion in his affirmation in opposition, plaintiff did not take 24 months to 'restore' her home, or to return it to its pre-fire condition, plaintiff took 22 months to make substantial additions and improvements to her home that included including a new second story dormer creating a new master suite and three new bedrooms as well as improvements on the first floor that included the construction of a new family room and expansions of the kitchen and laundry rooms that took a significantly longer time to plan and construct than had plaintiff simply rebuilt her home to its pre-fire condition. The position asserted by plaintiff's counsel in his affirmation to this motion is thus inconsistent with his client's testimony at deposition where she testified that at the time she was upgrading her house, she believed that she automatically had 24 months of ALE coverage and conducted herself accordingly." Defendant further states, "[a]t her deposition, plaintiff attempted to explain her delay in rebuilding and improving her home after the fire in at least three different ways. Plaintiff testified that it was always her belief that the Policy automatically provided her with two years or 24 months to make her home habitable....Plaintiff's counsel does not mention this excuse in his affirmation in opposition to

State Farm's motion for summary judgment even though his client admitted under oath admitted (*sic*) to this excuse. Alternatively, plaintiff testified that her delay was purposeful and was based upon the advise of her counsel in this action who was also representing her in a matrimonial proceeding....Plaintiff's counsel also fails to mention this excuse in his affirmation in opposition to State Farm's motion for summary judgment even though his own client admitted under oath admitted (*sic*) to this excuse. In addition to the two excuses/admissions discussed above, plaintiff also testified that her delay was caused by problems she encountered with both the architect and general contractor she originally retained but then discharged. This excuse appears to be the one upon which plaintiff's counsel is hanging his hat to the exclusion of his client's other excuses/admissions in order to argue that an issue of fact exists which precludes the granting of summary judgment. It is respectfully submitted that the three excuses offered by plaintiff are factually and legally inconsistent....Where as here, plaintiff has proffered inconsistent deposition testimony plaintiff may not rely upon that inconsistent testimony to feign the existence of a question of fact in order to defeat State Farm's motion for summary judgment."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition

transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Based upon the evidence and legal argument provided in their motion as detailed above, the Court finds that defendant has established *prima facie* entitlement to judgment as a matter of law.

As previously stated, since defendant demonstrated a sufficient *prima facie* showing, the burden shifts to plaintiff to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.*

Where a party, in opposing summary judgment, makes a statement that flatly contradicts

his or her previous statements in the case, the Court is likely to regard the latter statement as an attempt to create an issue of fact solely to defeat summary judgment and therefore reject the statement. *See Gomez v. Rodriguez*, 31 A.D.3d 497, 818 N.Y.S.2d 579 (2d Dept. 2006); *Israel v. Fairharbor Owners, Inc.*, 20 A.D.3d 392, 798 N.Y.S.2d 139 (2d Dept. 2005); *Ortiz v. Smith*, 8 A.D.3d 250, 77 N.Y.S.2d 654 (2d Dept. 2004); *Mestric v. Martinez Cleaning Co.*, 306 A.D.2d 449, 761 N.Y.S.2d 504 (2d Dept. 2003). As argued by defendant, plaintiff has proffered inconsistent deposition testimony and may not rely on said inconsistent testimony to feign the existence of a question of fact in order to defeat defendant's motion for summary judgment. The Court finds that the three excuses offered by plaintiff in her deposition testimony are indeed factually and legally insufficient.

Accordingly, defendant's motion, pursuant to CPLR §3212, for an order granting it summary judgment and dismissing plaintiff's Verified Complaint alleging breach of contract is hereby **GRANTED.**

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
October 18, 2011