SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ **PART** 3
Justice

Index Number : 650593/2010
W2001Z/15 CPW REALTY
vs.
LEXINGTON INSURANCE COMPANY
SEQUENCE NUMBER : 001
CUMMARY JUDGMENT

INDEX NO. 650593/2010
MOTION DATE 8/21/2013
MOTION SEQ. NO. 001

The following papers, numbered 1 to 5 **, were read on this motion to/for** Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2,3

Replying Affidavits _____ **No(s).** 4, 5

Cross-Motion ✓ YES ___ NO

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-22-14

E. Lee Branston J.S.C.
HON. EILEEN BRANSTEN
J.S.C.

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☑ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 3

----------X

W2001Z/15 CPW REALTY, LLC,

Plaintiff,

-against-

Index No. 650593/2010
Motion Date: 8/21/2013
Motion Seq. No.: 001

LEXINGTON INSURANCE COMPANY,
ARCH SPECIALTY INSURANCE COMPANY,
ILLINOIS UNION INSURANCE COMPANY,
ZURICH AMERICAN INSURANCE COMPANY,
and XL INSURANCE AMERICA, INC.,

Defendants.

----------X

Eileen Bransten, J.

This matter comes before the Court on Defendants Lexington Insurance Company, Arch Specialty Insurance Company, Illinois Union Insurance Company, Zurich American Insurance Company, and XL Insurance America, Inc.'s motion for summary judgment, seeking dismissal of the complaint in its entirety. Plaintiff W2001Z/15 CPW Realty, LLC opposes and cross-moves for summary judgment in its favor on the complaint. For the reasons that follow, defendants' motion is granted, and plaintiff's cross-motion is denied.

I. Background

In this first-party benefits action, plaintiff seeks insurance benefits pursuant to five substantially similar builder's risk insurance policies (the "policies") issued by defendants to plaintiff. The policies cover 15 Central Park West, a large luxury condominium complex ("complex" or "insured project") located in Manhattan, and owned by plaintiff.

Collectively, the policies, which became known as the completed value builder's risk policy, provide primary coverage of $100 million during the construction of the insured project. In exchange for an additional premium, the policies each include a delay-in-completion endorsement that covers monetary losses sustained by plaintiff as a result of those delays in completion of the construction of the complex that are caused by direct physical loss or direct physical damage to the insured project.

The complex is an 880,000-square-foot project, consisting of 201 condominium units and 29 suites in two buildings, known as the House and the Tower. The complex also includes a fitness center, swimming pool, private movie theater, dining room, commercial kitchen, library, wine cellar, parking garage, and retail space. The House and the Tower share common areas consisting of a lobby, concierge space, and gardens at street level. Prior to June 11, 2007, all the residential units were in contract, selling for an average price of $9.5 million each.

A. *June 12, 2007 Water Damage*

On July 12, 2007, a plumbing joint, known as a compression adaptor fitting, failed, causing water damage to units 4E and 5E in the House. The parties allege that the leak was caused by the faulty workmanship of nonparty KSW Mechanical Services, Inc. ("KSW"), a heating, ventilating, and air conditioning ("HVAC") subcontractor.

Defendants fully compensated plaintiff for the physical damage to the two units, pursuant to the terms of the policies. Plaintiff now seeks to recover additional insurance benefits, consisting of loss of income in the amount of $91,085. This loss of income allegedly was caused by delays in the closings on these units, while the physical damage was being repaired. The closing on unit 4E occurred on November 27, 2007, and the closing on unit 5E occurred on November 15, 2007.

B. *August 14, 2007 Water Damage*

A second water leak occurred on August 14, 2007, when a plumbing joint, known as a sweat joint connection, failed. This sweat joint connection was located in a vertical fan coil unit in the HVAC system in unit 3C, and its failure resulted in water damage to the lobby, foyer, and concierge space shared by the House and the Tower, as well as to units 3C and 3B in the House. Here, again, the parties allege that the joint failure was caused by KSW's faulty workmanship.

Plaintiff hired a contractor, who enclosed the lobby in a tent, and created negative air pressure with high-power fans to remove the moisture. In order to prevent permanent property damage, holes were cut in the millwork to release the water. The drying process lasted about four to six weeks.

Defendants fully compensated plaintiff for the physical damage to the common areas and the two units, pursuant to the policies' terms. Plaintiff now seeks to recover additional insurance benefits, consisting of $5,725,294 in lost income, allegedly incurred because of delays in the closings of 82 units caused by the water leak.

Following the August 2007 leak, plaintiff engaged nonparties Meade Testing Services and Testwell Laboratories to conduct an investigation of the compression adaptors and sweat joints installed on floors three through five of the House in order to prevent similar leaks from occurring in the future. The investigation included taking x-rays of, and performing pressure tests on, the fittings. Plaintiff also directed KSW to remove and replace the adaptors on those floors. The inspection and repair project was completed by September 20, 2007. Plaintiff now seeks to recover insurance benefits equal to the sum of $140,568, the amount that it expended in investigating the August leak and replacing the adaptors.

Plaintiff alleges that it had "effectuated all repairs to the damaged units as well as the damage to the lobby and concierge area. . . . This work was completed by September 21, 2007." (Plaintiff's Rule 19-a St. ¶¶ 39, 40.) Between September 20 and September 28, 2007, plaintiff instructed its attorneys to send out closing notices on 16 units. Defendants contend that the complex was ready for occupancy by October 15, 2007.

By letter dated December 9, 2009, Terry S. Lubin, an executive general adjuster with non-party Daynard & Van Thunen Co., Inc., defendants' insurance adjuster, verified coverage for portions of plaintiffs' claim based on the August 2007 leak, and agreed to pay plaintiff $60,977.07 for the covered delays associated with water damage in units 3C and 3D. Defendants disclaimed the balance of plaintiff's claim, primarily citing the delay-in-completion endorsement and related provisions.

On April 9, 2010, plaintiff responded to the disclaimer and submitted an amended claim, which allegedly eliminates plaintiff's claims both for lost investment income and for delays in the closings of units that were not the result of direct physical damage. In the letter, plaintiff disputes defendants' interpretation and application of the policies' terms. Further, plaintiff argues that, for the purpose of calculating the monetary value of the claims arising from the August 2007 incident, defendants should have used a series of dates, relating to delays in individual closings, rather than calculating all claimed losses based on a single start date, November 7, 2007.

Defendants responded to plaintiff's letter on April 21, 2010, and repeated their disclaimer of portions of plaintiff's claim, including their refusal to cover plaintiff's additional expenses incurred in taking measures to prevent a third leak, citing the faulty workmanship exclusion provision.

C. *The Instant Action*

In June 2010, plaintiff served and filed the instant complaint, asserting causes of action for breach of each of the five policies, and breach of the implied covenants of good faith and fair dealing implied in each policy. Plaintiff seeks to recover $6,409,029 in lost income, allegedly caused by delays in the closings of 84 units, resulting from the July and August 2007 water leaks. Plaintiff also seeks $140,568 in extra expenditures.

In the answer, defendants deny all allegations of misconduct, and assert eight affirmative defenses, most arising out of the policies' delay-in-completion endorsement and faulty workmanship exclusion.

II. Discussion

Defendants now seek summary judgment on the ground that the policies bar plaintiff's recovery, since plaintiff cannot establish (1) that there was a delay in the completion of the insured project as a whole caused by the July and August 2007 water leaks; or, (2) that any delay was caused by direct physical loss or damage to the 80 units not directly damaged by the leaks and for which defendants disclaimed coverage.

In opposition, plaintiff cross-moves for summary judgment in its favor, and contends that defendants have misinterpreted and misapplied the policies' terms, and that the delay-in-completion endorsement covers claims based upon a delay in the closing of

individual units, requiring the use of separate dates for the scheduled date of completion of each unit, rather than the insured project as a whole.

A. *Delay-in-Completion Endorsement*

Builder's risk insurance "is a unique form of property insurance that typically covers only projects under construction, renovation, or repair and insures against accidental losses, damages or destruction of property for which the insured has an insurable interest." *Rhino Excavating Corp. v. Assurance Co. of Am.*, 20 Misc.3d 1107[A], at *4 (Sup. Ct. Nassau Cnty. 2008) (quoting *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009, 1025 (D. Neb. 2006). "The purpose of builder's risk insurance is to compensate for loss due to physical damage or destruction caused to the construction project itself." *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d at 1025; *S. Cal. Edison Co. v. Harbor Ins. Co.*, 148 Cal. Rptr. 106, 111 (Cal. App. 2d Dist. 1978).

All five policies contain identical delay-in-completion coverage endorsements. These endorsements provide, in relevant part:

> 1. In consideration of the additional premium charged and subject to all terms, conditions, limitations and exclusions of this Endorsement and of the Policy to which this Endorsement is attached, this Policy is extended to indemnify the Insured ... for Delay in Completion Loss, as defined in this Endorsement, incurred during the Delay, and **caused by direct physical loss**

> **or direct physical damage to Insured Property** during the period of insurance, provided such loss or damage is indemnifiable under the Policy to which the endorsement is attached or would have been indemnifiable except for the application of a deductible. . . .
>
> 3. The [carrier] shall also indemnify [plaintiff] for **additional expenditures that are necessarily and reasonably incurred for the purpose of reducing or avoiding the amount for which the [carrier] is liable**, but only to the extent that such loss amount otherwise payable is thereby reduced.

(Affirmation of William D. Wilson ("Wilson Affirm.") Ex. 44 at Z0005038 ¶¶ 1, 3) (emphasis added).

All five policies define "delay" as:

> **the period of time between the Scheduled Date of Completion, as stated in the Declarations, and the actual date on which commercial operations or use and occupancy commenced or should have commenced**; however, not exceeding such delay as would result if the loss or damage were repaired or replaced with the exercise of due diligence and dispatch, but in no event exceeding the PERIOD OF INDEMNITY stated in the Declarations for all indemnifiable Occurrences combined.

Id. at Z0005040 ¶ 3 (emphasis added).

All five policies define the period of indemnity, the period for which delay-in-completion coverage is provided, as:

> the number of calendar days stated in the Declaration of this Endorsement which is in excess of the **WAITING PERIOD DEDUCTIBLE**. The PERIOD OF INDEMNITY begins but for the WAITING PERIOD DEDUCTIBLE, with the date

> upon which, had the loss or damage not occurred, the INSURED PROJECT would have been completed but not prior to the SCHEDULED DATE OF COMPLETION. The PERIOD OF INDEMNITY ends on the earlier of the date on which the INSURED PROJECT is completed but not exceeding the length of time it takes with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property which has been lost or damaged to its condition immediately prior to the occurrence of the loss or damage or the number of calendar days specified whichever is less. The PERIOD OF INDEMNITY hereunder shall not be limited or otherwise affected by the expiration of the policy.

Id. ¶ 5.

Although the five insurance policies are based on a common policy form, and are substantially similar, they contain one relevant difference – the waiting, or deductible, period, with respect to the delay-in-completion coverage. Three of the policies provide for a 30-day deductible period, while two provide for a 45-day period. Thus, coverage, if any, is not triggered until 30 or 45, days after the scheduled date of completion.

The foregoing provisions, when read together and in context, clearly and unambiguously require plaintiff to establish that there was a delay in the completion of the insured project as a whole, and that the delay was caused by a **direct** physical loss or direct physical damage to the insured project. "The interpretation of the policy's terms is a question of law for the court. As with the interpretation of any contract, the unambiguous terms of an insurance policy must be accorded their plain and ordinary meaning." *Seaport Park Condo. v. Greater N.Y. Mut. Ins. Co.*, 39 A.D.3d 51, 54 (1st

Dep't 2007). A builder's risk policy "should be read, if it can be without twisting words and rendering plain meanings nugatory, so as to make the scheme of the policy reasonable and to protect the builder" against a covered loss. *Bushey & Sons v. Am. Ins. Co.*, 237 N.Y. 24, 28 (1923).

Plaintiff admits that the July 2007 leak did not delay the completion of the insured project as a whole, but only small portions of the project, and concedes that all damage caused by the July and August 2007 leaks was fully repaired by, and the House was move-in ready no later than, October 15, 2007. *See* Pl.'s Resp. to Defs.' Rule 19-a St. ¶¶ 13, 31, 32, 44, 45.

However, plaintiff contends that coverage under the delay-the-completion endorsement is triggered by any delay in completion of a particular portion of the insured project. Contrary to plaintiff's contention, nothing in the policies may be interpreted as tying the date of completion to a closing date on a particular unit, rather than the entire insured project. Indeed, the period during which coverage is provided (the "period of indemnity") is tied to the date that the entire insured project would have been completed, had it not been for the loss.

The scheduled date of completion originally set forth in the declarations was January 17, 2007, but was later extended by endorsement several times. The last endorsement issued prior to the 2007 losses changed the scheduled date of completion to

November 7, 2007. *See* Wilson Affirm. Ex. 45. Therefore, after applying the waiting periods, the period for which coverage is provided begins 30 or 45 days after November 7, 2007 – the date that the project was scheduled to have been completed.

Contrary to plaintiff's contention, the inclusion in the policies of a detailed description of the insured project, including the number of units, does not raise a triable issue concerning the parties' intent that a delay in the closing of an individual income-producing unit is a covered event. The policies' description of the insured project is simply that, a description. There are no terms in the policies that might be interpreted as providing additional meaning to that description. Where the insurance policy provisions "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. The policy must, of course, be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer." *U.S. Fid. & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232 (1986) (internal quotation marks and citations omitted); *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978).

Next, defendants contend that, in any event, the alleged delays in the closings were not caused by direct physical loss or direct physical damage to 80 of the individual units, and, therefore, do not come within the scope of the delay-in-completion endorsement.

plaintiff argues that, inasmuch as the lobby and concierge space sustained direct physical loss and direct physical damage from the August 2007 leak – and these areas are common areas in which the unit owners had an undivided use interest – the direct physical loss and damage to the common areas constitute direct physical damage and damage to individual units. Plaintiff further contends that, because the unit owners were not simply moving into their units, but into the 15 CPW luxury complex with all its amenities, the closings on the units could not occur, until the common areas were repaired.

As quoted above, the terms of the delay-in-completion endorsement require plaintiff to establish that the delay in completion of the insured project was caused by direct physical loss or direct physical damage to the insured project. Similar provisions have been enforced in accordance with the plain meaning of these words. *See, e.g., Diamond Beach, VP, L.P. v. Lexington Ins. Co.*, 748 F. Supp. 2d 648, 655 (S.D. Tex. 2010) (deeming supplemental soft costs sought by plaintiff to be consequential damages specifically excluded by insurance policy's property damage part and holding that such costs were not covered under delay-in-completion endorsement inasmuch as they were not caused by direct physical loss or direct physical damage to insured property); *Tocci Bldg. Corp. v. Zurich Am. Ins. Co.*, 659 F. Supp. 2d 251, 259-260 (D. Mass. 2009) (holding that, because grouting to undamaged portion of wall was not necessitated by

direct physical loss or damage to that portion of wall, the cost of grouting and resulting delay in completion of project were not covered under delay-in-completion endorsement).

Here, inasmuch as the only direct physical loss or damage caused by the August 2007 leak was to units 4E, 5E, 3B, and 3C, the lobby and concierge space, the alleged "domino effect" of these losses or damage to the other 80 units is not covered under the policies. Contrary to plaintiff's contention, once the first covered delay occurred, not all subsequent delays were covered, unless that delay was caused by a direct physical loss or direct physical damage.

B. *Permission to Occupy/Operate Extension of Coverage Endorsement*

The parties next dispute the effect of the permission to occupy/operate extension of coverage endorsement, which was added to the Lexington Insurance policy in January 2007. Plaintiff argues that the endorsement was added to make clear that the policy provides delay-in-completion coverage on a unit-by-unit basis, while defendants contend that it merely provides that the entire policy will not lapse, once an individual unit is sold.

The permission to occupy/operate extension of coverage endorsement provides, in relevant part, that:

> This policy is extended to permit partial occupancy/operation of any machinery, facility or other property insured hereunder being a part of the INSURED PROJECT but prior to final acceptance by the Owner and **coverage shall not be reduced**

> **due to such partial occupancy/operation** except as provided in this endorsement provided that the Insured warrants that all fire protection and security systems shall be in service and fully operational prior to and during any such occupancy/operation. It is a condition hereof that [plaintiff], upon such knowledge, shall report any increase in hazard beyond that provided for in the policy and pay additional premium thereon as set forth below and/or bear any increased deductible. . . . If the Delay in Completion Endorsement applies to the policy, coverage thereunder shall be null and void as respects any machinery, facility or other property which is occupied or put into operation.

(Affirmation of Rebecca A. Barrett Ex. B at 48 § IX) (emphasis added).

This endorsement clearly and unambiguously provides that occupancy of individual units will not affect coverage of the insured project as whole. Nothing in it may be interpreted as demonstrating the contracting parties' intention that the individual units are covered on a unit-by-unit basis, or a phased turnover, under that endorsement or the delay-in-completion endorsement.

Contrary to plaintiff's contention, the policies, including the delay-in-completion and permission to occupy/operate extension of coverage endorsements, are clear and unambiguous, and, therefore, there is no need to consider evidence extrinsic to the policies, including various emails exchanged among defendants' underwriters. Summary judgment is appropriate where the policy terms are unambiguous. *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172 (1973).

Moreover, plaintiff's insurance broker, non-party Willis of NY, Inc., which was instrumental in obtaining the policies for plaintiff, advised plaintiff in writing that:

> I understand that a contention is being made that the Builders [sic] Risk policy allows for unit-by-unit phased handover and provided Delay coverage on a unit-by-unit basis. This contention is not consistent with the intent of the placement in January 2005. First and foremost, no Builders [sic] Risk policy that I have seen would allow for that – it would be too cumbersome to quantify on a day-by-day basis what is covered and what is not. Secondly, no anticipated turnover schedule was provided for the original submission. This would be required [if] underwriters were even going to consider a phased handover. Thirdly, the inclusion of the Permission to Occupy argues against a phased handover since that endorsement allows for usage for parts of the project (i.e. units) until the whole project (i.e. 15 CPW as a whole) is completed.

See Wilson Affirm. Ex. 51.

For the foregoing reasons, that branch of defendants' motion for summary judgment on the claims for coverage under the delay-in-coverage endorsement is granted, and these claims are dismissed. That branch of plaintiff's motion for summary judgment in its favor on those claims is denied.

C. *Coverage of Costs Related to the August 2007 Water Damage*

Next, defendants seek summary judgment on plaintiff's claims for coverage of the costs that plaintiff incurred in investigating and repairing the cause of the August 2007

incident, admittedly to prevent a similar occurrence from happening in the future. Defendants argue that coverage is expressly excluded under the policies' faulty workmanship exclusions.

In opposition, plaintiff contends that it is entitled to coverage, pursuant to the protection-of-property provision that requires the insured to protect and repair the building from further damage.

All five policies contain faulty workmanship exclusions that provide, in relevant part, that:

> **[t]his policy shall not pay for loss**, damage or expense caused directly or indirectly and/or contributed to, in whole or in part, by any of the following excluded perils except as specifically allowed in A, B, C, D, F or J below . . .
>
> B. **Cost of making good faulty or defective workmanship or material, unless direct physical loss or damage by an insured peril ensues and then this policy will cover for such ensuing loss or damage only**.
>
> C. Cost of making good default, defect, error, deficiency or omission in design, plan or specification, unless direct physical loss or damage by an insured peril ensures and then this policy will cover for such ensuing loss or damage only.

(Wilson Affirm. Ex. 44 at Z0005024) (emphasis added).

Generally, a faulty workmanship exclusion has been held to apply to "both a flawed product and a flawed process." *BSI Constructors, Inc. v. Hartford Fire Ins. Co.*, 705 F.3d 330, 332 (8th Cir. 2013). Thus, the failure of workmen to exercise proper

judgment in executing their skill or craft, or the negligent execution by workmen of their skill, has been held to constitute faulty or defective workmanship within the meaning of the exclusion. *See, e.g., Kroll Constr. Co. v. Great Am. Ins. Co.*, 594 F. Supp. 304, 307-308 (N.D. Ga. 1984).

Here, the parties agree that the July and August 2007 leaks were caused by the faulty workmanship of KSW, the HVAC subcontractor on the insured project. *See* Pl.'s Resp. to Defs.' Rule 19-a St. ¶¶ 12, 21. Therefore, plaintiff's expenses in investigating and repairing the cause of the leaks are excluded from coverage under the policies.

Plaintiff's reliance on the policies' protection-of-property provisions is misplaced. These provisions provide, in relevant part, that plaintiff "will take reasonable steps to protect, recover or save the property insured and minimize any further or potential loss or damage when: A. The **property insured has sustained direct physical loss or damage by an insured peril.**" *See* Wilson Affirm. Ex. 44 at Z0005032.

The provision is not applicable here. The property insured at issue here, the compression fittings, did not sustain direct physical loss or damage from an insured peril. Builder's risk policy language "'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state. . . . other cases finding liability under a Builder's Risk policy did so only where defective workmanship 'led to a discrete event that a reasonable person would call an

accident.'" *Fireman's Fund Ins. Co. v. Sneed's Shipbuilding, Inc.*, 803 F. Supp. 2d 530, 535 (E.D. La. 2011) (quoting *Trinity Indus., Inc. v. Ins. Co. of N. Am.*, 916 F.2d 267, 270 (5th Cir. 1990). The record demonstrates that most of the compression fittings were determined to have been properly installed; therefore, there was no loss with respect to those fittings. With respect to the fittings that were improperly installed, they had never reached an initial satisfactory state; therefore, there was no external event that changed them into an unsatisfactory state. In either event, coverage was not triggered. *See N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833-835 (Tex. Ct. App. 1996).

To hold otherwise would be to effectively render meaningless the faulty workmanship exclusion, and permit an insured to circumvent the exclusion by simply alleging that it was protecting property against a possible future loss, whenever it incurred costs in correcting defective workmanship.

> [I]t is . . . an established rule of construction that an insurance policy must be construed to effectuate the intentions of the parties. A construction which would defeat the expressed intentions of the parties must be rejected. [W]here the terms of the policy are plain and explicit, the court will indulge in no forced construction so as to cast liability upon the insurance company which it has not assumed.

S. Cal. Edison Co. v. Harbor Ins. Co., 148 Cal. Rptr. at 112 (internal quotation marks and citation omitted).

Therefore, that branch of defendants' motion for summary judgment on the claims to recover costs associated with the investigation and repair of the causes of the July and August 2007 leaks is granted, and these claims are dismissed. That branch of plaintiff's motion for summary judgment in its favor on these claims is denied.

D. *Consequential Damages*

Last, defendants' seek summary judgment on plaintiff's consequential damages claims for breaches of the implied contractual duties of good faith and fair dealing by defendants' alleged improper repeated delays in adjusting, settling, or fully indemnifying plaintiff for its losses.

An insured is entitled to recover consequential damages as a result of an insurer's breach of the implied covenants of good faith and fair dealing only when such damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Kenford Co. v. Cnty. of Erie*, 73 N.Y.2d 312, 319 (1989); *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187, 192 (2008); *Panasia Estates, Inc. v. Hudson Ins. Co.*, 10 N.Y.3d 200, 203 (2008).

Plaintiff has failed to identify any consequential damages that it sustained, other than the damages that are part of its delay-in-completion endorsement claims. Plaintiff's consequential damages claims are premised on defendants' alleged breaches of the

policies, and plaintiff has not established that it sustained any damages separate and apart from the damages that are a part of its breach of contract claims. Plaintiff has not attempted to quantify those damages, and, therefore, has failed to establish their existence, or that such damages were within the contemplation of the parties at the time of contracting.

In addition, plaintiff has also failed to identify any conduct by defendants that might be held to constitute a failure to act in good faith. An insurer's failure to pay a claim in its entirety, when based on a difference in interpretation of the policy terms, does not constitute bad faith. *Goldmark, Inc. v. Catlin Syndicate Ltd.*, 2011 WL 743568, at *3 (E.D.N.Y. 2011); *Simon v. Unum Grp.*, 2009 WL 2596618, at *8 & n.107 (S.D.N.Y. 2009). As held above, defendants properly disclaimed coverage, based on rational interpretations of the policies' terms. The court notes once again that plaintiff's broker advised plaintiff in writing that no coverage exists for the delay-in-completion claims that plaintiff asserts here.

Therefore, that branch of defendants' motion for summary judgment on the consequential damages claims is granted, and these claims are dismissed. That branch of plaintiff's motion for summary judgment in its favor on these claims is denied. While summary judgment is a drastic remedy, it is warranted where, as here, no genuine triable issues of material fact exist.

See Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974); CPLR 3212.

III. Conclusion and Order

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed with costs and disbursement to defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
January 22, 2014

ENTER

Hon. Eileen Bransten, J.S.C.