At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of August, 2014.

P R E S E N T:
HON. MARK I. PARTNOW,
Justice.

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ANGELA BARBAROVICH AND VADIM BARBAROVICH

Plaintiff,

- against -

TOWER GROUP, INC. AKA TOWER GROUP COMPANIES AND CASTLEPOINT INSURANCE COMPANY AKA CASTLEPOINT MANAGEMENT CORP.,

Defendant.

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Index No.:504083/2012

DECISION AND ORDER

Mot. Seq. #1

	Papers Numbered
Notice of Motion/Cross Motion	1
Affidavits (Affirmations) Annexed	2,3
Reply Affidavits (Affirmations)	4
Memorandum of Law	5-8

Upon the foregoing papers, defendant Tower Group, Inc., a/k/a Tower Group Companies, and Castlepoint Insurance Company a/k/a Castlepoint Management Corp., move pursuant to CPLR 3211(a)(5), for an order granting dismissal of plaintiffs complaint because the action was allegedly commenced after the expiration of the statute of limitations.

Background

Plaintiffs Vadim and Angela Barbarovich own a house located at 2356 Royce Street, Brooklyn, New York 11234. On March 13, 2010, the premises allegedly sustained wind and rain damage. The premises were insured by defendant Castlepoint/Tower under a policy that contained a provision that any lawsuit arising out of its coverage must be brought within one year of the occurrence. On May 26, 2010, defendant Castlepoint Insurance Company learned that the plaintiffs were seeking coverage and notified the plaintiffs by a letter dated June 29, 2010 that the loss was not covered by their policy, thereby disclaiming coverage. The plaintiffs commenced the instant action on November 26, 2012, more than two years after the premises sustained damage.

The first cause of action is for the payment of one million dollars under the terms and conditions of the homeowner's insurance policy. The second cause of action is for breach of contract, asserted against the defendants for failure to pay the plaintiffs' claim. The third cause of action regards the defendants failure to conduct a competent investigation regarding plaintiffs' claim. The fourth cause of action alleges that as a general business practice, Castlepoint misrepresents facts, refuses to pay claims, and does not act in good faith when investigating insurance coverage. The plaintiffs seek a total of four million dollars along with reasonable attorney fees in litigating this matter.

Contentions

Defendants contend that the action is time-barred pursuant to either the one year statute of limitations provided for in the policy or that if the two year statute of limitations provided for in Insurance Law 3404(e) applies, the plaintiffs suit was commenced after the two years expired. Plaintiffs assert that Insurance Law 3404(e) does not apply to the current action because this action allegedly concerns a wind and rain damage claim and 3404(e) only applies to fire insurance claims. Plaintiffs argue that assuming Insurance Law 3404(e) does apply, the defendants are prohibited from relying on the

two-year statute of limitations since they did not use the express language required under 3404(e). Plaintiffs alternatively contend that the six-year statute of limitation provision pursuant to CPLR 213 is applicable. Lastly, Plaintiffs claim that the policy, property loss notice, and disclaimer letter attached to Mr. Tippett's affidavit are inadmissible because they are unauthenticated and the policy was not delivered.

Discussion

CPLR 3211(a)(5) states that a party may move to dismiss one or more causes of actions based on statute of limitations. In deciding a CPLR 3211 motion to dismiss, "a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (Sabadie v. Burke, 417 A.D. 3d 913, 914, 549 N.Y.S.2d 440). "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is time-barred, the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (Cimino v. Dembeck, 61 A.D.3d 802, 803, 876 N.Y.S.2d 893). In order to make a prima facie showing, the defendant must establish when the plaintiffs action accrued (id.). Once the defendant establishes that the time in which to sue has expired, the burden shifts upon the plaintiff to "raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether they actually commenced the action within the applicable limitations period" (Jalayer v. Stigliano, 94 A.D.3d 702, 703, 941 N.Y.S.2d 243).

Under CPLR 213, an action based upon a contractual obligation must be commenced within 6 years. CPLR 201 provides that parties may agree in writing to a shorter period. "It is well settled that parties to a contract may agree that a lawsuit must be commenced within a shorter period than that prescribed by law" (Renee Knitwear Corp. v. ADT Security Sys., 277 A.D.2d 215, 216, 715 N.Y.S.2d 341). Furthermore, a party who signs a written contract is presumed to know its contents and assent to

them (id.). The signer of such contract is bound by its terms unless there is a showing of fraud, duress, or some other wrongful act on the part of any party of the contract (id.).

Insurance Law 3404(e) provides that the form of the standard fire insurance policy of the state of New York shall contain a provision that "no suit or action on this policy for recovery of any claim shall be sustainable...unless commenced within twenty-four months next after inception of the loss" (see Insurance Law §3404[e], lines 157-161). "Where a policy of fire insurance provides for a shorter period of limitations than permitted by the standard fire insurance policy...the policy is enforceable as if it conformed with the statutory standard" (1303 Webster Ave. Realty Corp. v. Great Amer. Surplus Lines Ins. Co., 63 N.Y.2d 227, 231, 471 N.E.2d 135, 136, 481 N.Y.S.2d 322, 323 (1984)."The inclusion of an express period of limitations, even though erroneous, precludes a determination that the insurer intended to waive any but the general statutory six-year period with respect to actions upon a contractual obligation" (id.).

Insurance Law 3404 (f)(1)(A) states that a policy which insures against the peril of fire in combination with other kinds of insurance need not comply with subsection (e) of section 3404 provided the policy, with respect to the peril of fire, contains terms and provisions no less favorable to the insured than those contained in the standard fire policy. If the policy in question is a multi-peril policy, it can contain a shorter limitation period which may be enforceable against non-fire loss claims (Dockweiler v. Allstate Ins. Co., 222 A.D.2d 482, 634 N.Y.S.2d 774).

In this case, it is undisputed that homeowners insurance policy HOP2122963 was issued by the defendants to the plaintiffs and was effective on the date of the alleged loss. Mr Tippett, the Vice President of property claims for Castlepoint, provides an affidavit which states that he had "personal knowledge of the facts stated herein through a review of records maintained in the ordinary course of

CastlePoint's business" (See Tippett's affidavit, ¶1, p. 1). Such affidavit is sufficient proof of the policy under CPLR 4518(a). Footnote one in the affidavit states that a full and complete copy of policy number HOP2122963 is attached to the moving papers as Exhibit 1. As stated in plaintiffs complaint, "the defendants herein, in consideration of the payment...did issue and deliver herein a policy and contract of insurance as aforestated duly insuring the plaintiffs... (Complaint ¶10, p.5). Therefore, plaintiffs' claim that they did not receive the policy is baseless as they acknowledged receipt of the policy in the complaint.

The policy at issue is a multi-peril policy because it insures the plaintiffs for direct physical loss to property caused by fire or lighting, windstorm or hail, explosions, theft and a host of other perils. The policy provides that "no action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss" [Section I- Conditions, at Form HO00020491, ¶8 Suit Against Us, p.9]. The words "date of loss" in an insurance policy "have consistently been held to refer to the date of the catastrophe insured against, and *not* to the accrual date of the plaintiffs' claim against...failure to pay. (Costello v. Allstate Ins. Co., 253 A.D.2d 807, 807, 577 N.Y.S.2d 621, 622). As indicated by the policy, the statute of limitations begins to accrue from the date of loss, which occurred on or about March 13, 2010. The current action was commenced on November 26, 2012, more than two years and eight months after the date of loss.

The policy expressly limits the statute of limitations to one year. Although the standard fire policy in Insurance Law 3404(e) contains a statute of limitation of two years, that limitation applies only to fire insurance claims. The plaintiffs claim for recovery is based on damage caused by wind and rain. Since the policy at issue is a multi-peril policy and the claim is not based on fire damage, the one year statute of limitation is applicable. Plaintiffs do not dispute that the policy expressly limited the statute of limitations to one year. Rather, plaintiffs incorrectly claim that the provisions of the standard fire

insurance policy should apply to non-fire insurance claims covered by the policy. It is clear from the applicable case law that the statute of limitations provided in the policy applies to all non-fire perils.

Assuming arguendo that the statute of limitations provided in the policy was not applicable and was governed by Insurance Law 3404(e), the matter would still be time-barred as the time within which to sue has elapsed. Plaintiffs argument that the statute of limitations period should be six years is not supported by the applicable case law. The law is clear that when a fire insurance policy *does not* contain a statute of limitations, it will be governed by a six year statute of limitations. The cases relied on by the plaintiffs deal with policies that do not contain a statute of limitation provisions or do not include express terms as to the time in the statute of limitation provisions.. see Med. Facilities, Inc. v. Pryke, 62 N.Y.2d 716, 465 N.E.2d 39, 476 N.Y.S.2d 532 (1984) (where the insurance policy did not include any reference to a limitations period for bringing an action), Wal-Mart Stores, Inc. v. U.S. Fid. & Guar. Co., 11 A.D.3d 300, 301, 784 N.Y.S.2d 25, 26 (2004) (where policy only generally stated that suit "shall not be barred if commenced within the time prescribed therefor in the statutes of the State of New York"); see also, Teitelbaum v. New York Prop. Ins. Underwriting Ass'n, 126 Misc. 2d 240, 241, 481 N.Y.S.2d 855 (1984) (where it was undisputed that plaintiff did not receive a copy of the home insurance policy and therefore was not on notice of any statute of limitation provision within).

Insurance Law 3404(e) designates a two-year statute of limitation for fire insurance policies. The insurance policy in this case expressly limited the time to bring suit to one year after the date of loss. Contrary to plaintiffs argument, where the period of limitations in the policy is shorter than the two year limitations provided for by statute, the policy will be enforced as if it conformed with the statutory standard. Plaintiffs policy in this action included an express one year statute of limitation period giving the plaintiffs notice of a shortened time to file suit than the general six-year period for contracts. Since this policy contained a shorter limitation period than provided by statute, it is deemed to conform to the

statutory standard. This action was commenced more than two years after the inception of loss and would be time-barred even if the fire insurance limitation period was applied.

The defendants have established, prima facie, that the applicable statute of limitations period is one year, that the action accrued on the date of loss, and that the time in which to sue has expired. Conversely, the plaintiffs have not met their burden in defeating this motion to dismiss. Since the statute of limitations provided for in the policy for all non-fire insurance claims is one year, the defendants motion to dismiss is granted and the suit is dismissed as it is time-barred.

Accordingly it is hereby ORDERED that Defendants' motion to dismiss is granted in its entirety; and

The Court having considered the parties' remaining contentions, finds them to be without merit. All relief not expressly granted herein is denied.

This constitutes the decision and order of this Court.

Date: August 12, 2014
Brooklyn, New York

ENTER:

Mark I. Partnow
J.S.C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

FILED
KINGS COUNTY CLERK
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