SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN B. LOBIS Justice PART 60

Index Number : 151435/2014
RICHARD AVEDON FOUNDATION
vs.
AXA ART INSURANCE CORPORATION
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION + ORDER

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

Dated: 2/4/15

JOAN B. LOBIS, 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
NEW YORK COUNTY: IAS PART 6

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THE RICHARD AVEDON FOUNDATION,

Petitioner/Plaintiff,

Index No. 151435/2014

- against -

Decision and Order

AXA ART INSURANCE CORPORATION,

Respondent/Defendant.

----------X

JOAN B. LOBIS, J.S.C.:

This is an insurance-related dispute regarding photographer Richard Avedon's renowned work "The Chicago Seven, September 25, 1969" ("the Work"). Currently the Court has before it the petition/action of The Richard Avedon Foundation ("the Foundation"), sequence number 3, for an order declaring that respondent/defendant AXA Art Insurance Corporation ("AXA") has breached the insurance agreement and violated General Business Law section 349 – and, in addition, is bound by its judicial admissions that the Work is worth $2.5 million and must pay this amount to the Foundation along with attorney's fees, punitive damages due to AXA's allegedly deceptive conduct, and other damages; or, in the alternative, an order directing AXA's appraiser to work with the Foundation's appraiser to select an umpire and retaining jurisdiction of the matter in case the Court must appoint an umpire under Insurance Law section 7601. In response, AXA has made a pre-answer motion to dismiss the petition/complaint and the Foundation has cross-moved for partial summary judgment and sanctions.

For the reasons below, the Court denies the petition as premature, as AXA has not answered the amended pleadings. It grants the motion to the extent of severing and dismissing the third cause of action in part and the fourth cause of action in entirety, and otherwise denies the motion. It grants the prong of the cross-motion seeking a declaration that the petition/action is timely and denies the prong of the cross-motion seeking sanctions. Finally, it directs AXA to serve and file its answer to the amended petition/complaint.

The Foundation protects the legacy and encourages the study of the photographer's work through exhibitions, outreach, and the distribution of original prints and archival materials. Around August 31, 2011, the parties entered into an agreement pursuant to which AXA agreed to insure various property of the Foundation. The Foundation stored the Work, a life-sized tryptich of the seven antiwar activists who were tried for conspiracy to incite a riot during the 1968 Democratic National Convention, at Fortress Fine Art Storage ("Fortress"). AXA insures the Foundation's work at Fortress, and the parties do not dispute that the Work is covered by the policy. In December of 2011, the Work sustained significant water damage to one of its panels, and the Foundation timely notified AXA of its claim.

In the course of its investigation, AXA hired Edward Yee of Penelope Dixon & Associates Inc. to value the work both prior to and after its damage. Mr. Yee inspected the damaged panel in early 2012 at Peter Mustardo's conservation studio, and on April 23, 2012, he submitted an 8-page report to AXA, which contained his "professional opinion of value" ("the Yee report"). The Yee report states, in paragraph 1, that it "does not constitute an appraisal as defined by the

Uniform Standards of Professional Appraisal Practice (USPAP), nor will it be any guarantee of what the property will bring if put up for sale." According to the Yee report, the Work was worth $1.99 million on December 8, 2011, the date it sustained the damage. After the conservation work was complete Mr. Yee revisited the Work at Fortress. On June 10, 2013, Mr. Yee provided an addendum to his earlier report ("the Yee addendum") in which he set forth what he called his "professional opinion as to the fair market value of the print after conservation." The Yee addendum "concluded that the loss in value from an initial fair market value" was $398,000.00. Mr. Yee based his conclusion on his belief that remaining damage to the panel did not render the Work unsaleable but simply resulted in a discount to its value. He relied pointed to the relative diminution in value of other renowned works and pointed to one piece, "Moonrise Over Hernandez," which lost half of its value, or $25,000, following a "flawless restoration."[1] He then used two methodologies in order to determine a proper discount for the work.

The Foundation hired an appraiser, Sarah Morthland of Archive Consulting and Management Services, LLC. Ms. Morthland valued the work on May 29, 2013, and issued her 43-page report on July 3, 2013. Her appraisal ("the Morthland report") assessed the value of the work as $2.5 million and concluded that the triptych was worth only $50,000.00 after its damage and conservation. The Morthland report based the pre-damage value on the purchase prices of two other large-scale, high quality murals of Richard Avedon and on the $2.5 million asking price for the second edition of the Chicago Seven triptych, which was in "less pristine" condition than the

[1] AXA states that it provided both of these reports to the Foundation as a courtesy. According to the Foundation, it only received the Yee addendum.

Work had been prior to the water damage. According to the Morthland report because of the damaged panel, the triptych as a whole was no longer saleable. It assessed the value at $50,000, however, because conservation techniques might develop that could improve the Work's condition in the future, because the other two panels might be usable to restore the second edition of the triptych if it sustained damage, and because of the Work's educational value. In her appraisal, she stated that she had not "performed services, as an appraiser or in any other capacity, within the three year period immediately preceding the acceptance of this appraisal assignment."

A flurry of correspondence followed the issuance of the reports. On July 10, 2013, Laura Avedon of the Foundation wrote to Colin Quinn of AXA protesting that the Morthland report was accurate. She challenged the Yee addendum's conclusion that the Work only lost $398,000 in value. If AXA did not agree to reconsider its valuation, Ms. Avedon asked that the parties appoint an umpire in accordance with clause B of the contract ("Clause B"), which states,

> If [AXA] and [the Foundation] disagree on the value of the property or the amount of "loss", either may make written demand for an appraisal of the "loss". In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. . . . The appraisers will state separately the value of the property and amount of "loss". If they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will be binding. . . .

A November 6, 2013, letter from the Foundation's attorney formally invoked the procedures set forth in Clause B.

In response, on December 9, 2013, AXA's counsel stated that the parties "need to proceed with the appraisal process" and that it considered the November 6 letter to be the Foundation's "formal demand for appraisal." In December of 2013, AXA reiterated by letter that it wished to appraise the Work and asked that the Work be moved from the Fortress to a location at which AXA could access it frequently. The Foundation replied, among other things, that AXA already had appraised the Work and that moving it would risk additional damage to it. However, it stated that the Work was available to AXA at the Fortress. AXA responded that Mr. Yee's evaluation of the work did not constitute a formal appraisal and therefore selection of an umpire and/or settlement talks were premature. The Foundation's January 31, 2014, letter stated in part that it looked forward to proceeding with "the contractually mandated umpire and appraisal process," and the parties disputed whether this was a demand for an umpire or for an appraisal. The correspondence continued along these lines. A phone discussion between Mr. Yee and Ms. Morthland was equally fruitless.

The parties additionally mention that, in April of 2013, through a different law firm, AXA commenced a subrogation action against Fortress. AXA Art Insurance Corporation a/s/o Richard Avedon Foundation v. Fortress Fine Art Storage a/k/a Fortress New York Holdings, Inc., Index No. 152982/2013 (Sup. Ct. N.Y. Cnty. 2013) ("the subrogation action"). In the complaint in the subrogation action, AXA stated that it had sustained damage "in the sum of at least $2,500,000, with the precise amount to be determined at the trial . . . ." Finally, AXA notes that in 2010 Ms. Morthland reviewed the triptych and other Richard Avedon works, and valued each panel of the triptych at only $100,000.

On February 18, 2014, the Foundation filed a petition against AXA. The petition stated that the Foundation received the Yee addendum and not the Yee report in June 2013. It referenced the Morthland report, which it states is in conformance with all applicable appraisal standards. The petition referenced the July 10, 2013, letter, which contained the Foundation's demand for an umpire pursuant to Clause B. Although AXA stated that it had to conduct an appraisal of the work prior to the selection of an umpire, the petition alleges that Mr. Yee already had inspected and appraised the work. Moreover, the petition claims, AXA's request to move the Work to another location was unreasonable and AXA did not avail itself of the opportunity to conduct an inspection at the Fortress in January of 2014. The petition detailed numerous and futile attempts by the Foundation to compel AXA to select an umpire. In the petition, the Foundation accused AXA of improperly obstructing the umpire-selection and appraisal process. As relief, it sought an order that compelled to AXA participate in the umpire selection process pursuant to its obligations under Clause B.

In response, AXA moved to dismiss the petition. It relied on C.P.L.R. section 7601, the provision of the law that allows for special proceedings to enforce an agreement to appoint an appraiser. AXA stated that because it had not conducted an appraisal of the Work yet, Clause B had not been triggered. AXA stated that the Yee report was not an appraisal, but a preliminary report, and it pointed to language in the report that allegedly supported its position.

In addition, AXA challenged the Morthland report's status as an appraisal. In particular AXA pointed to the $50,000 post-damage valuation of the Work. According to AXA, the three stated reasons for this value were invalid and were motivated by Ms. Morthland's desire to assist the Foundation. AXA explained that if the Work were declared a total loss the insurance contract would require the Foundation to relinquish it altogether, and posited that Ms. Morthland assigned a minimal value to the Work to enable the Foundation to retain it and still recover almost its full pre-damage value. AXA asserted this established that Ms. Morthland violated the ethical mandate that she remain unbiased.[2] Finally, it challenged Ms. Morthland's statement in her report that she had not evaluated the work previously. In support, it submitted the affidavit of Vivian Ebersman, the director of art expertise at AXA, in which Ms. Ebersman stated that she examined a 2010 appraisal of the Work by Ms. Morthland in connection with the initial insurance policy's valuations of all covered artwork. This misstatement, AXA contended, constitutes another ethical violation by Ms. Morthland. Due to these problems, AXA argued, the Morthland report is not a formal appraisal and thus another condition precedent to the appointment of an umpire had not been satisfied.

[2] Moreover, citing Compania Maritima Astra, S.A. v. Archdale, 134 N.Y.S.2d 20, 25 (Sup. Ct. N.Y. Cnty. 1954), AXA's answer argues that because the provisions in question appear in the Commercial Inland Marine Conditions, any loss over 50% results in a finding of constructive total loss and therefore the Morthland report requires relinquishment of the Work to AXA. The Foundation stated that the case is not controlling because it relies on a marine policy rather than a marine inland policy. The Court does not address this argument, which is not critical to the issues at hand.

The Foundation responded to this motion on July 21, 2014, with opposition and a cross-motion for attorney's fees. According to the Foundation, it was frivolous and in bad faith for AXA to argue that the dispute was unripe "two and one-half years after the Foundation notified AXA of the loss and more than one year after it was clear that the parties disagreed on the amount of the Foundation's loss." It mentioned the subrogation action and AXA's statement in its complaint that the damage to the Work was at minimum $2.5 million, and, citing Morgenthow & Lathan v. Bank of New York Co., Inc., 305 A.D.2d 74 (1st Dep't), lv denied, 100 N.Y.2d 512 (2003), it claimed that AXA's statement in the subrogation action constituted a binding informal judicial admission. The Foundation restated that all the prerequisites to the umpire-selection process had been satisfied. The 2013 Morthland report was not invalid or in violation of ethical standards, it stated. In 2010, the Foundation explained, Ms. Morthland did not conduct a full appraisal of the Work. Instead, she performed a fair market value appraisal in which she did not personally view the Work but "evaluated [it] from the description in the Foundation's inventory database" for tax purposes. It annexed her 2010 report on the methodology she employed, and also included the page of the report which listed the triptych. The Foundation concluded that because of AXA's frivolous motion practice and conduct, sanctions including attorney's fees were warranted.

On July 23, 2014, the Foundation filed an amended verified petition/complaint ("the petition/complaint") which supersedes the original petition and is currently before the Court. AXA therefore withdrew its motion. Under the impression that the Foundation did not withdraw its cross-motion, AXA submitted a brief reply in which it challenged the application for sanctions.

In a decision dated August 13, 2014, the Court ordered that the motion was withdrawn and marked the entire motion, sequence number 2, as "decided."

The petition/complaint reiterates the allegations in the original petition but adds causes of action. It refers to the April 2, 2013, subrogation action against Fortress and states that it only became aware of the action when Fortress, citing the pending litigation, did not allow the Foundation to view the Work on July 15, 2014. In its first cause of action the petition/complaint seeks a declaration that AXA is bound by its judicial admission in the subrogation action and that therefore the Foundation's covered loss is at least $2.5 million. The second and third causes of action both seek $2.5 million plus damages, consequential damages, and prejudgment interest based on breach of contract. The second cause of action alleges that AXA breached the contract by failing and delaying payment of the claim despite its alleged admission of value in the subrogation action. The third cause of action alleges that the failure to disclose the existence of the subrogation action and the alleged admission, and AXA's attempts to thwart the Foundation's efforts to enforce Clause B, are breaches of the covenant of good faith and fair dealing. Consequential damages allegedly are due under this cause of action including "prejudgment interest on the amount owed under the Policy, and the attorneys' fees, costs and disbursements incurred by the Foundation in enforcing its rights and as a consequence of AXA's bad faith delays in paying the Foundation's claim." The fourth cause of action seeks punitive damages under General Business Law section 349 on the ground that AXA engaged in a pattern of deceptive conduct in order to delay payment of the Foundation's valid claim of loss, and that it did so

pursuant to standard form language in the policy which appears in the policies of "many art owners, dealers, collectors and galleries in New York and elsewhere." It claims that the manner in which AXA has applied this language would injure these other policyholders if AXA treated them similarly. It points to the subrogation action, the existence of which AXA did not disclose, as evidence of AXA's misconduct. Finally, the fifth cause of action asks as alternative relief that the Court enforce the appraisal provision of the contract pursuant to C.P.L.R. 7601 and compel AXA to comply with the contract and engage in the umpire selection process.

AXA has responded to the petition/complaint with a pre-answer motion to dismiss under CPLR section 3211(7). AXA repeats the arguments it asserted in its cross-motion to dismiss the original petition. In challenging the complaint, it points out that the insurance policy states:

> No one may bring a legal action against us under this coverage unless:
>
> 1. There has been full compliance with all the terms of coverage;
> 2. The action is brought within 2 years after you first have knowledge of the loss.

AXA contends that the petition/action is untimely under the two-year contractual limitations period and that the Foundation did not comply with the condition precedent to its right to institute a lawsuit because it did not comply fully with the terms of coverage. AXA additionally contends that waiver or estoppel does not apply here as the Foundation cannot show a deliberate intent by AXA to cause the Foundation to relinquish a known right.

AXA contends that the matter also should be dismissed because the Foundation violated Clause C of the "Duties in the Event of Loss" section of the insurance agreement, which states, to the extent relevant to this argument,

> [The Foundation] must see that the following are done in the event of "loss" to Covered Property:
>
> . . . 4. Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damaged property aside and in the best possible order for examination. . . .
>
> 6. Permit us to inspect the property and records proving "loss". . . .
>
> 10. Cooperate with [AXA] in the investigation or settlement of the claim.

According to AXA, the Foundation failed to cooperate when it wrongfully obstructed its attempts to examine the work in the course of obtaining a formal appraisal, and attempted to select an umpire prematurely. It points to the background, in particular the Foundation's letters to AXA, and states that "the Foundation has acted as though it is entitled to obeisance from AXA and [acted] with feigned outrage when reminded of its obligations under the policy." It argues that in light of the statement in the Yee report that it was not an appraisal, the Foundation always was on notice of this fact. It relies on the Foundation's November 6, 2013, letter, which stated that "to the extent necessary" it was a "formal demand for appraisal," as evidence that the Foundation did not view the Yee report and addendum as an appraisal.

AXA challenges the petition/complaint's arguments that 1) AXA is bound by the reference in the subrogation complaint to damages of $2.5 million and 2) it deliberately concealed the existence of the subrogation action. As for the first point, AXA submits the affirmation of Jeffrey Rubinstein, who represents AXA in the subrogation action, who states that the Fortress demanded that AXA file a complaint, that the original summons with notice sought $350,000, and that the statement that included the increased amount of damages is not an admission that it was damaged by at least $2.5 million. It submits the affidavit of John Cahill, counsel in this action, who states that he was unaware of the subrogation action and did not deliberately conceal its existence. Additionally it annexes a letter by the Fortress' counsel to the justice presiding over the subrogation action, which indicates that "with great surprise and frustration" the Fortress received a communication from AXA's counsel in the petition/ complaint notifying it of the case before this Court. According to Fortress' counsel's letter, AXA's failure to disclose the dispute with the Foundation demonstrated a lack of good faith and a lack of due diligence despite AXA's lack of awareness of the petition/complaint.

AXA's motion challenges several of the complaint's causes of action on their merits and seeks dismissal on that basis as well. AXA does not discuss the second cause of action explicitly, but implicitly relies on its general challenges to the complaint and on its contention that its statement in the subrogation action has no weight. As for the claim that there was a breach of the covenant of good faith and fair dealing, AXA contends it is duplicative of the breach of contract claim. Bostany v. Trump Org., LLC, 73 A.D.3d 479, 481 (1st Dep't 2010). Relying on Brody Truck

Rental, Inc. v. Country Wide Insurance Co., 277 A.D.2d 125 (1st Dep't 2000), it states that because the insurance contract does not provide for consequential damages, the Foundation cannot seek them in this action. It argues that the claim the Foundation asserts under General Business Law section 349 fails as a matter of law because this is a private contract dispute and the Foundation cannot show an impact on consumers at large. It also claims that this cause of action is duplicative of its contract claims. Its challenges to the fifth cause of action, which seeks a declaration that AXA must proceed with the appraisal process, are essentially the same as its challenges to the petition.

The Foundation not only opposes the motion but cross-moves for partial summary judgment, seeking a declaration as to the action's timeliness and seeking sanctions against AXA for its allegedly frivolous conduct. In support of its application for a declaration that the action is timely, the Foundation argues that the contractual provision on which AXA relies does not start the clock when the Foundation knew of its loss, but when its right to sue accrued. It notes that under the insurance contract there must have been full compliance with the terms of coverage, and that it might not be possible, under those circumstances, to bring an action within 2 years. In light of this fact, the Foundation states the two provisions are in conflict and therefore must be interpreted against AXA, which drafted the contract. It states that AXA is estopped from arguing that the statute of limitations is a bar because of AXA's alleged misrepresentation that the Yee report and addendum together comprised an appraisal, as a result of which purportedly the Foundation purportedly believed the process was underway and there was no need to litigate. It

argues that estoppel is appropriate because AXA deliberately concealed information about the subrogation action and its complaint in that action, and therefore the Foundation did not know AXA allegedly had conceded the amount of the loss. It notes that it amended the petition to include allegations based on the subrogation action within days of its discovery of its existence. It claims that AXA's demand for a new appraisal was a stall tactic to delay both litigation and settlement.

In addition, the Foundation challenges AXA's remaining arguments in favor of dismissal. It states that AXA has not supported its assertion that the Foundation has failed to cooperate with AXA's investigation of the claim. It notes that the Court must accept the petition/complaint's allegations as true, and states that the allegations are sufficient to show that the Foundation fulfilled this and its other contractual obligations, and that AXA's "often unsupported, frequently irrelevant, and universally disputed assertions to the contrary," are insufficient to merit dismissal at this juncture. It points to Interested Underwriters at Lloyd's of London v. Church Loans & Investments Trust, 432 F. Supp. 2d 330, 332 (S.D.N.Y. 2006), in support of its argument that the failure of an insurance company to pay benefits under the standard terms of its policy can constitute a violation of General Business Law section 349.[3] It contends that this is true even if the plaintiff does not show that the insurer has committed the complained-of acts on a repeated basis. Next, according to the Foundation there is a viable claim based on breach of the duty of good faith and fair dealing because the alleged misconduct on which the

[3] The Foundation also cites Jonannou v. Blue Ridge Ins. Co., 298 A.D.2d 531, 532 (2nd Dep't 2001), but the Court was unable to locate this opinion.

Foundation bases this claim is not expressly prohibited by the complaint but deprives the Foundation of its contractual benefits. Citing Peery v. United Capital Corp., 84 A.D.3d 1201, 1203-04 (2nd Dep't 2011), it states that under these circumstances, the claims do not overlap and both therefore are permissible. The Foundation challenges AXA's assertion that the Foundation cannot seek consequential damages, stating that AXA has misconstrued the applicable case law. It argues that instead, if parties to a contract contemplate such damages then they are awardable under the contract. Under this principle, the Foundation states, consequential damages are permissible.

Finally, the Foundation reiterates its arguments in favor of the appointment of an umpire, and contends that AXA's challenges to Ms. Morthland's competence and impartiality lack merit. It argues that AXA's conclusion that Ms. Morthland assigned the Work some residual post-damage value simply in order to enable the Foundation to retain it is baldly speculative and ignores critical provisions of the insurance contract. The Foundation argues that Ms. Morthland's statement that she did not appraise the work during the three years prior to her appraisal is accurate, as 1) she evaluated the Work and 30 % of the Foundation's collection as part of a valuation process for the purpose of an IRS Form 990-PF filing, and she did not conduct an appraisal, and 2) she evaluated the work between March 23 and March 25, 2010, for her June 25, 2010, report, more than three years prior to the May 29, 2013, viewing and July 3, 2013, appraisal at issue here. Any other problems with the Morthland report, the Foundation states, should be resolved by the appointment of an umpire. Finally, reiterating its allegations relating to the subrogation action and challenging allegedly purposeful misstatements in AXA's motion, it states that sanctions including

attorney's fees and costs are warranted. The allegedly false statements include the assertion that the Foundation did not cooperate with AXA's investigation of the insurance claim and that Ms. Morthland's report included "deliberate falsehoods." Though it maintains that the Yee report and addendum comprise an appraisal, it states that this is not critical here. Citing the language in Clause B, it notes that the provision is triggered when the parties disagree on the property's value and/or the amount of the loss, not on the submission of two formal appraisals. Thus, even if Mr. Yee merely provided a valuation, the Foundation states, Clause B applies and compels the parties to appoint appraisers who will select an umpire.

AXA replies to the opposition and opposes the cross-motion. It reiterates its argument relating to untimeliness and to several of the Foundation's causes of action. It states the insurance policy is not ambiguous as to the statute of limitations and the Foundation's arguments to the contrary are unavailing. It argues that estoppel does not apply because there is no distinction between waiver and estoppel in this context and AXA never indicated that it waived the limitations clause. It denies all allegations that it engaged in delay tactics or attempted to lull AXA into any misconceptions about its intentions. It points out that the Foundation filed the original petition months before the subrogation action and again denies that AXA attempted to hide the fact of the action's existence. It alleges that the Foundation sets forth no evidence indicating the parties contemplated an award of consequential damages when they entered into the insurance contract, and therefore the Foundation's arguments opposing dismissal of this claim has no merit. Finally, it argues that the Foundation's request for sanctions including attorney's fees is duplicative of its

original cross-motion for sanctions, see supra at pp. 8-9, which AXA contends is still before this Court, and as a substantive challenge it asserts that the Foundation has not shown misrepresentations or false claims by AXA.

In considering a pre-answer motion to dismiss under C.P.L.R. section 3211(a)(7), the court must "accept as true each and every allegation made by plaintiff and limit [its] inquiry to the legal sufficiency of plaintiff's claim." Davis v. Boheim, 24 N.Y.3d 262, -- (2014)(citation and internal quotation marks omitted). In addition, the court must give the plaintiff the benefit of any possible favorable interest and decide whether the allegations fit any cognizable legal theory. Mill Financial, LLC v. Gillett, 122 A.D.3d 98, 103 (1st Dep't 2014). When the motion relies on documentary evidence, unless the evidence refutes the complaint's allegations altogether dismissal appropriate. Id. If the documentary evidence disproves an essential part of the case, however, dismissal is proper even if plaintiff's allegations, standing alone, could withstand a C.P.L.R. section 3211(a)(7) motion. Id.

When a defendant moves for dismissal based on the statute of limitations, C.P.L.R. section 3211(a)(5), the defendant must "establish, prima facie, that the time in which to sue has expired." Island ADC, Inc. v. Baldassano Architectural Group, P.C., 48 A.D.3d 815, 816 (2nd Dep't 2008). The court evaluates the motion treating the complaint's allegations as true and resolves all inferences in plaintiff's favor. Lake v. New York Hosp. Medical Cent. of Queens, 119

A.D.3d 843, 843 (2nd Dep't 2014). If the defendant satisfies this burden, the plaintiff must set forth evidentiary facts that either establish or raise an issue of fact as to the action's timeliness. The plaintiff can do this by showing that the statute is tolled or that an exception to the statute is applicable. Id.

The Court notes that it shall consider the Foundation's current cross-motion for sanctions. AXA argues that the cross-motion is duplicative of the Foundation's earlier cross-motion for sanctions, which the Foundation did not expressly withdraw when AXA withdrew its underlying motion. See supra at pp. 8-9. When AXA withdrew its earlier motion in light of the amendment of the petition, however, the Court marked the entire motion, which included the Foundation's cross-motion, as disposed. In the interim, no party has sought to vacate the disposition as to the cross-motion. Therefore, the current cross-motion for sanctions is the only such application before the Court.

Next, the Court turns to the parties' arguments based on the statute of limitations. As AXA notes, a contract that shortens the limitations period is enforceable. John v. State Farm Mt. Auto. Ins. Co., 116 A.D.3d 1010, 1011 (2nd Dep't 2014). AXA argues that because the insurance agreement requires the Foundation to commence an action within two years of its knowledge of the loss, the complaint is untimely. However, the Foundation has pointed out that the limitations clause in the contract not only sets forth the two-year limitations period but requires

the insured to satisfy all conditions precedent to the lawsuit. Recently, in considering two such clauses in another insurance agreement, the Court of Appeals concluded that "[i]t is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit . . . that cannot be met within that two-year period. A two-year 'limitation period' that expires before suit can be brought is not really a limitation period at all, but simply a nullification of the claim." Executive Plaza, LLC v. Peerless Ins. Co., 22 N.Y.3d 511, 518 (2014). In reaching this conclusion, which it noted was the first to address this precise issue, the court quoted the dissenting opinion in Continental Leather Co. v. Liverpool, Brazil & Riv. Plate Steam Nav. Co., 259 N.Y. 621 (1930), which stated that the limitations period "'must be fair and reasonable, in view of the circumstances of each particular case . . . The circumstances, not the time, should be the determining factor.'" Executive Plaza, 22 N.Y.3d at 519 (quoting Continental Leather, 259 N.Y. at 622-23).

Applying these principles, the Court determines that the petition/complaint is timely. The original petition was filed on February 18, 2014, just over 2 years and 3 months after December 8, 2011, the date of the damage. In the particular circumstances of this case, there were obstacles to the claims process from the outset – beginning with the fact that the Work had to be appraised following its conservation, so the Yee addendum was not available until June of 2013, and the Morthland report and the first demand for an umpire did not exist until July of 2013, and continuing throughout the dispute over the Yee report and the appointment of an umpire. I addition, the Foundation contends that it amended the petition to include the complaint because

the subrogation action, which was not even commenced until after the limitations period expired. The Foundation amended the petition within a few months of its discovery of the existence of that other action. Because the statute of limitations is not a bar for the above reasons, the Court does not address the additional arguments on this issue.

The petition and the fifth cause of action both seek an order directing the parties to proceed with the appraisal process so the Court considers them together. Under C.P.L.R. section 7601, upon which the Foundation relies, a party may commence a special proceeding to enforce an agreement that a person named or to be selected conduct an appraisal. The Court concludes that relief is premature as AXA has not answered the petition/complaint yet, and it denies the cross-motion to dismiss these claims.

In support of dismissal, AXA continues to argue that the Foundation's insistence of compliance with Clause B demonstrated a failure to cooperate and thus bars this case. The documentary evidence establishes that Yee report and the Yee addendum, both individually and considered together, do not constitute an official appraisal. According to the Appraisal Foundation, which promulgates the Uniform Standards of Professional Appraisal Practice (USPAP), an appraisal may vary but should include a signed certification which states, among several other things, that the appraiser is not biased and has no present or prospective interest in the work in question. The Appraisers Association of America's guidelines state that a detailed signed certification is a requirement of a correctly prepared appraisal, and lists a cover page, table of

contents, disclaimers and limiting conditions page as necessary elements of the basic appraisal report. Neither the Yee report nor the Yee addendum contain a signed certification, a cover page, a table of contents or a disclaimer and limiting conditions page. Moreover, the Yee report included language that specifically indicated it was not an appraisal. Though the Foundation argues that Mr. Yee did, in fact, appraise the Work, it relies primarily on its own characterization of the valuation and submits no persuasive countervailing evidence.

Nonetheless, the Court concludes that, as the Foundation asserts, a formal appraisal is not a necessary prerequisite to the initiation of the procedures outlined in Clause B. The clause indicates that the parties should select their own appraisers, who in turn shall select a neutral umpire, if they "disagree on the value of the property or the amount of loss." The disagreement as to the value of the property and the amount of the loss triggers Clause B, and the action/proceeding is not barred on this basis.

AXA also challenges the first cause of action, and to the extent applicable other causes of action that seek to bind it to the statement of value in the subrogation action's complaint. Where, as here, a party has not secured formal judgment, the doctrine of judicial estoppel does not apply. Carr v. Caputo, 114 A.D.3d 62, 71 (1st Dep't 2013). However, the statement in the pleading in the subrogation action is an informal judicial admission. Morgenthow & Lathan, 305 A.D.2d at 79. Unlike formal judicial admissions, informal ones are not conclusive but merely provide

evidence of the facts admitted. Baje Realty Corp. v. Cutler, 32 A.D.3d 307, 310 (1st Dep't 2006). AXA's statement raises an issue of fact, and the affidavits of counsel and the letter the Fortress submitted in the subrogation action are not documentary evidence and are not sufficient to resolve the issue as a matter of law.

AXA's motion includes an application to dismiss the third cause of action, which is based on a breach of contract and in particular its covenant of good faith and fair dealing. AXA relies on Bostany, 73 A.D.3d at 481, which states that there is not an independent cause of action if the breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract." See Board of Managers of Soho North 267 West 124th St. Condominium v. NW 134 LLC, 116 A.D.3d 506, 507 (1st Dep't 2014)(affirming trial court's denial of leave to amend to assert a claim for breach of the covenant). However, where the claim is duplicative, dismissal is proper. See Grazioli v. Encompass Ins. Co., 40 A.D.3d 696, 697 (2nd Dep't 2007). The Foundation contends that, contrary to AXA's position, the claim is not duplicative of its breach of contract claim. However, a look at the pleadings persuade the Court that AXA has satisfied its burden and shown that the Foundation has not stated an independent, and sustainable, cause of action. The allegation that AXA wrongfully failed to disclose existence of the subrogation action is encompassed by the second cause of action for breach of contract and therefore this part of the third cause of action is duplicative. The other part of the third cause of action -- that AXA wrongfully delayed the payment process – does state a violation of AXA's obligation to act in good faith, which is implicit in the contract. See Educational Center for New Americans, Inc. v. 66th Ave. Realty Co., 40 Misc. 3d

1222(A) (Sup. Ct. Queens Cnty. July 24, 2013)(avail at 2013 WL 3984438, at *2). As this is not encompassed by the second cause of action's breach of contract claim, this portion of the third cause of action is not duplicative.

The Foundation's fourth cause of action relies on section 349 of the General Business Law, and AXA cross-moves to dismiss this cause of action as well. To state a claim under the General Business Law section 349, which declares a business' deceptive acts or practices to be unlawful, a plaintiff must show "that the defendant has engaged in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." Feld v. Apple Bank for Savings, 116 A.D.3d 549, 551 (1st Dep't 2014). The alleged violations must "have a broad impact on consumers at large." Plaza PH2001 LLC v. Plaza Residential Owner LP, 98 A.D.3d 89, 104 (1st Dep't 2012). "Single-shot contractual transactions" are not cognizable under this provision. Green Harbour Homeowners' Ass'n, Inc. v. G 307 A.D.2d 465, 468-69 (3rd Dep't 2003). As a threshold matter, a plaintiff's case must show both that the contract has a broad dispute not limited to the unique dispute between the parties, and that defendant has engaged in a deceptive practice. New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 320 (1995)("New York University"). If, accepting the facts as alleged and according to the plaintiff the benefit of all favorable inferences, the complaint does not show consumer-oriented conduct, dismissal is appropriate. See Air & Power Transmission, Inc. v. Weingast, 120 A.D.3d 524, 525-26 (2nd Dep't 2014).

Here, as the Court stated earlier, the Foundation's General Business Law section 349's claim alleges that AXA engaged in deceptive practices pursuant to standard form language in the policy which appears in the policies of "many art owners, dealers, collectors and galleries in New York and elsewhere," and that other policyholders would be injured if AXA treated them similarly. It further relies on AXA's allegedly deceptive practices in not disclosing the existence of the subrogation action. The Court concludes that, as AXA contends, the Foundation recites facts that are individual to AXA's dealings with it, and has not set forth facts that, if true, show an impact on the public at large. Regarding the broader impact, it states merely that the manner in which AXA interpreted the insurance contract here "*would* affect apply to and injure all of its policy holders with similar policy language that suffer losses to their art and bring coverage claims to AXA expecting fair and good faith treatment" (emphasis supplied). This is too speculative and hypothetical to state a valid claim of injury to the public, as it does not allege that a pattern or practice currently exists. See Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 345 (1999)("deceptive practices are based on deceptive business *practices*, not deceptive contracts"(emphasis in original)). It is not sufficient to assert that AXA acted improperly pursuant to the contract, or every breach of contract claim or allegation of bad faith under a contract would give rise to a General Business Law section 349 cause of action. See Schlessinger v. Valspar Corp., 21 N.Y.3d 166, 172-73 (2013). Thus, AXA has satisfied its burden under C.P.L.R. section 3211. See Merin v. Precinct Developers LLC, 74 A.D.3d 688, 689 (1st Dep't 2010).

AXA's motion additionally argues that as a matter of law the complaint does not support a claim for consequential damages. The Foundation is correct that if the parties contemplated the possibility of consequential damages but did not explicitly ask for them, they are still awardable. See Mutual Ass'n Administrators v. National Union Fire Ins. Co. of Pittsburgh, PA, 118 A.D.3d 856, (2nd Dep't 2014)(breach of covenant of good faith and fair dealing). The party who breaches the contract bears responsibility for risks reasonably foreseeable when it entered into the agreement. Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York, 10 N.Y.3d 187, 192-93 (2008). As AXA correctly notes, the Foundation has not effectively set forth facts demonstrating that the consequential damages it seeks were contemplated at the time of the contract. However, this is a pre-answer motion for default judgment, and therefore the burden is on AXA to show that as a matter of law consequential damages are improper – not on the Foundation to submit factual evidence in support of this aspect of its damages claim. If, as here, a plaintiff alleges that it sustained consequential damages that the parties contemplated when they entered into the insurance contract, that plaintiff states a prima facie case even if it may not prevail at trial. See Red Oak Fund, L.P. v. MacKenzie Partners, Inc., 90 A.D.3d 527, 528-29 (1st Dep't 2011); see also Coppersmith v. Blue Cross and Blue Shield, 177 A.D.2d 373, 374 (1st Dep't 1991)(attorney's fees incurred by insured due to insurer's failure to defend were deemed recoverable as consequential damages). Because AXA has not satisfied its burden of showing there is no issue of fact, the Court denies AXA's application to dismiss the petition/complaint's request for consequential damages.

The Court next addresses AXA's argument that the petition/complaint should be dismissed due to the Foundation's failure to cooperate during its attempt to investigate and process the underlying insurance claim, and the Foundation's application for sanctions based on AXA's alleged misconduct during the investigation and in the context of this lawsuit. It is clear that both parties have fought hard in this matter. Both parties rely on the same letters in support of their arguments. These letters demonstrate only that the parties grew increasingly adversarial. In the court papers, each side frequently accuses the other of misconduct, deception, and frivolity, among other things. As each party has a different view of the occurrences, AXA has not satisfied its burden for dismissal under C.P.L.R. section 3211. As for sanctions, there is insufficient evidence that AXA deliberately hid the fact of the subrogation action from the Foundation. Instead, the letter in the subrogation action and the affidavits of counsel opposing sanctions show, as the Fortress suggested, a surprising lack of due diligence. Its stance that the umpire selection process had not been triggered does not show bad faith because until the Foundation's reply papers here both parties appear to have misinterpreted Clause B and argued according to the same misinterpretation. Given the conduct of both parties, the Court further exercises its discretion and does not assess sanctions against AXA.

Finally, as this matter remains active, the Court directs AXA to answer the petition/complaint. C.P.L.R. section 404(a).

Accordingly, it is

ORDERED that the prong of the motion seeking to dismiss the third cause of action is granted in part, and the portion of the cause of action alleging AXA breached the contract by litigating the value of the Work here despite AXA's admissions in the subrogation action is severed and dismissed; and it is further

ORDERED that the prong of the motion seeking to dismiss the fourth cause of action is granted, and the fourth cause of action is severed and dismissed; and it is further

ORDERED AND DECLARED that the prong of the cross-motion seeking a declaration that the petition/action is timely is granted and the cross-motion is otherwise denied; and it is further

ORDERED that AXA shall have 20 days from service of a copy of this decision and order with notice of entry to file its answer, and the Foundation shall serve any reply 5 days thereafter; and it is further

ORDERED that the parties shall appear for a preliminary discovery conference in Part 6, 60 Centre Street, room 690, at 2:00 p.m. on Tuesday, February 17, 2015.

Dated: 2/4/15

ENTER:

JOAN B. LOBIS, J.S.C.