SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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ALLA KORMILITSYNA, ANDREW BARES and
REALTY WORKS, LLC,

Plaintiffs,

-against-

Index No.
650769/2013

EVEREST NATIONAL INSURANCE COMPANY,

Defendant.

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Singh, J.:

Plaintiffs Alla Kormilitsyna, Andrew Bares and Realty Works, LLC move, pursuant to CPLR 3212, for summary judgment on their complaint, declaring that defendant Everest National Insurance Company (Everest) is obligated to provide plaintiffs with insurance coverage for their losses, including property damages and loss of rent, and finding Everest in breach of the insurance contract for denying coverage. Everest cross-moves, pursuant to CPLR 3212, for summary judgment dismissing all claims against it.

This action arises from a claim for insurance coverage for damages to a residential building located at 438 West 20th Street, New York, New York (the Building), pursuant to a commercial policy, policy number 7300011601-001

issued by Everest for the policy period of October 31, 2009 to October 31, 2012 (the Policy). Plaintiffs claim that the Building suffered covered damage because of construction work performed at the adjacent premises located at 436 West 20th Street, New York, New York (Adjacent Premises) which shares the east wall with the Building. Everest contends that plaintiffs fail to demonstrate when the damage occurred or what caused it, and are seeking coverage for age-related cracks and settlement and wear and tear of the Building which are excluded under the Policy. Everest also urges that plaintiffs failed to give timely notice of their claim.

BACKGROUND

The Building is a four-story, nineteenth century brownstone which plaintiffs Kormilitsyna and Bares purchased in 2003 (affidavit of Alla Kormilitsyna, dated Sept 25, 2014 [Kormilitsyna aff in support], ¶ 4; exhibit A to affirmation of David J. Pfeffer, dated Sept 24, 2014 [Pfeffer affirmation], complaint, ¶ 6). The Building contained four rental units, which were all fully occupied by tenants (Kormilitsyna aff, ¶ 5). On October 31, 2009, plaintiffs purchased the Policy from Everest to provide commercial property insurance coverage for loss or damage to the property, including business loss coverage for loss of rent (*id.*).

In early 2011, plaintiffs assert that they noticed certain structural damage was occurring to the Building, which they claim was caused by the renovation of

the Adjacent Premises (exhibit A to Pfeffer affirmation, complaint, ¶ 10). These damages included: (i) severe structural damage; (ii) severe cracking and deterioration of the bricks and brownstone; (iii) severely damaged masonry; (iv) shifting of windows and door frames so as to be out of plumb with walls; (v) separation and cracking of stairs; (vi) cracking of ceilings; (vii) exposure of wall gaps; and (viii) sloping of floors (*id.*, ¶11). They also claimed rental income losses as a result of tenant complaints, dangerous living conditions, and they eventually allowed the various leases to expire and the tenants to leave, and sought to repair the Building (Kormilitsyna aff, ¶ 8).

On June 1, 2011, plaintiffs submitted a notice of their alleged loss with Everest, asserting that the Building was damaged on April 27, 2011 by construction on the Adjacent Premises (exhibit C to Kormilitsyna aff). On June 28, 2011, plaintiffs sent to Everest copies of all their leases to document their lost rent damages (Kormilitsyna aff, ¶ 9). Between June and August 2011, plaintiffs hired Node Engineering & Consulting, P.C. (Node) to provide a property damages assessment report (exhibit D to Kormilitsyna aff). In its report, in the repairs and replacement summary table, Node found that the east foundation was in "serious" condition, needing "Underpinning and Enlargement Below Addition," had "Cracked along the east wall," the east party wall was in "poor" condition,

requiring "Major Brick Replacement" and the lintels needed "80% Replacement, and the windowsills needed "60% Replacement" (*id.* at 8). It stated in the "Notes" to that table that the

> "east wall settlement caused rotation of the wood joist framing and the building floors sloping, cracking of the partition walls and distortion of the openings right angles. In order to correct these deficiencies, it will be necessary to replace all floor framing that means that all partition walls, stairs, kitchens' equipment, bathrooms' accessories, portion of rough plumbing and electrical work, in addition to the east wall foundation underpinning and enlargement, and the exterior walls repairs"

(*id.*). In the executive summary, Node stated that the Building's "east party wall exhibited settlement that cause development of wide cracks in the north, south and east exterior walls and in the partition walls" (*id.* at 7). It also stated that "the settlement caused sloping of the all floors (sic), distortion of right angles at all openings and cracking of the basement slab on grade" (*id.*). Node further stated that the "cause of the settlement is not apparent" (*id.*).

Also during June to August 2011, plaintiffs obtained from ABR G.C., a contractor experienced with pre-war brownstones in New York City, an estimate of the cost of repair of the Building in the amount of $1.9 million, and with overhead, insurance, general conditions, and profit, an estimated total cost of

$2,166,000.00 (exhibit E to Kormilitsyna aff).

Everest's third-party administrator, Brownstone Agency, Inc., assigned an adjuster to investigate plaintiffs' claim (see exhibit C to defendant's notice of cross motion [notice of cross motion], defendant's interrogatory answer 3). WJE Engineers & Architects, P.C. (WJE) was retained to assess and determine the cause of the alleged damages, and it visited the Building and installed crack monitors between June and November 2011 (affirmation of Michael J. Smith in support of cross motion [Smith affirmation], ¶¶ 6-7). WJE issued a report dated November 28, 2011 (exhibit E to notice of cross motion). In its report, WJE found that "[b]ased on our investigation, a significant amount of distress currently present in the [Building] appears to have been present prior to the recent adjacent construction work" (exhibit E to notice of cross motion at 1). It also found that "[c]racking of gypsum wallboard and plaster was noted within the building, primarily on and immediately adjacent to the party wall with [the Adjacent Premises], that may be somewhat recent," and that recent cracking on the upper three floors and on the upper two levels of the rear brick masonry facade "could have been caused by vibrations related to the adjacent construction work" (*id.* at 2). WJE further noted that "the wall also showed evidence of older cracking that had been repaired" (*id.*). It concluded that, based on its preliminary investigation,

the only damages that could be associated with the construction on the Adjacent Premises were:

> "interior cracks in plaster/dry wall on the 436/438 party wall and on perpendicular walls that frame into these walls . . . cracks in the east brick masonry party wall that . . . may have been made larger by the adjacent construction . . . cracks in the brick masonry of the rear facade . . . [and] stairway step distress on the interior stairway leading to the basement"

(*id.*). Everest also retained a contractor, C.J. Rubino & Company, Inc., to estimate the cost of repairing any damages identified by WJE that may be associated with the adjacent construction, and it concluded that it would cost approximately $30,000.00 to fix the damage (exhibit F to notice of cross motion).

On December 22, 2011, Everest requested that plaintiffs submit a form "Sworn Statement in Proof of Loss," which plaintiffs submitted on January 19, 2012 (exhibits J and K to notice of cross motion; exhibit H to Kormilitsyna aff). In the January 19, 2012 proof of loss, plaintiffs stated that the loss occurred "prior to May 2011 and continuing," it was caused by, upon information and belief, the construction at the Adjacent Premises, the "actual cash value" of the Building, the "whole loss and damage," and the "amount claimed" exceeded the $2 million Policy limits (exhibit H to Kormilitsyna aff). On January 31, 2012 and February 27, 2012, Kormilitsyna and Bares were examined under oath with regard to the

claim (exhibits P and Q to notice of cross motion). By letter dated February 2, 2012, Everest informed plaintiffs that it was rejecting their sworn statement in proof of loss for several reasons, including failing to state the alleged date of loss, and failing to set forth the actual cash value of the premises, and the whole loss and damage (exhibit L to notice of cross motion). Plaintiffs then submitted two new sworn proofs of loss stating that the loss occurred "prior to and including March 2011 through May 2011 and possibly earlier dates to be determined by engineers," and stated that the "whole loss and damage" for repairs was $1,870,740.00, the deductible was $1,000.00 so the "amount claimed" under the Policy was $1,869,740, and added a loss of business income of $181,517.00 (exhibits M and N to notice of cross motion). By letter dated February 28, 2012, Everest again rejected plaintiffs sworn proofs of loss (exhibit O to notice of cross motion).

By letter dated May 8, 2012, Everest denied the plaintiffs' claim for coverage under the Policy based on several grounds, including that they failed to provide prompt notice of loss; they filed incomplete sworn proofs of loss which were untimely; they submitted a fraudulent claim, misrepresenting the date of the loss, how the loss occurred, the amount of damages, including the amount of the loss of rental income; they failed to protect the property from further damage; the

Policy excludes coverage for damages caused by settling, cracking, shrinking or expansion; and the loss occurred prior to the inception date of the Policy (exhibit S to notice of cross motion at 4-5).

In March 2013, plaintiffs brought this action asserting three claims: the first for a judgment declaring that Everest was obligated to provide coverage in accordance with the Policy; the second for breach of the insurance contract; and the third for breach of the implied covenant of good faith for failing to adequately investigate the claim and waiting a year to deny coverage (exhibit A to Pfeffer affirmation). In April 2013, Everest answered the complaint, denying the material allegations, asserting 30 affirmative defenses, and a counterclaim asserting that coverage does not exist for plaintiffs' claim because there was no covered cause of loss; the plaintiffs failed to provide a prompt description of loss, take reasonable steps to protect covered property in the event of a loss, provide timely notice and proof of loss, and cooperate in the investigation; and the claim is excluded for loss caused by wear and tear, and for loss caused by settling, shrinking or expansion (exhibit B to Pfeffer affirmation). Plaintiffs replied, denying the material allegations, and asserting a number of affirmative defenses (exhibit C to Pfeffer affirmation).

Plaintiffs now move for summary judgment, contending that the Policy

language is unambiguous and covers the property damage to the Building. They urge that it is undisputed that the property damage occurred as a result of the construction on the Adjacent Premises, pointing to their engineer's report (exhibit D to Kormilitsyna aff). They also urge that the Policy also covers them for loss of rent under the Policy's Business Income Coverage Form, in which the Policy provides that "[w]e will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.' The 'suspension' must be caused by direct physical loss of or damage to property at premises" (exhibit A to notice of cross motion, Business Income Coverage Form at 1 at EV001071). Even if the Policy was ambiguous, plaintiffs argue that any ambiguities must be interpreted in their favor. On the issue of late notice, plaintiffs argue that Everest must show prejudice, which they cannot. Everest's denial based on purported fraudulent misrepresentations is without basis, because plaintiffs have given Everest all the information and documents they had regarding the loss. As to the exclusions relied upon by Everest, plaintiffs argue that Everest must show that the exclusions apply in the case and that they are subject to no other reasonable interpretation.

Everest contends that its investigation revealed that the alleged damage was caused by the settlement, cracking and long-term distress of a 150-year old

building, not the adjacent construction. It urges that neither plaintiffs nor their engineer could establish when the alleged damage occurred or what caused it, as Node clearly stated in its report that "[t]he cause of the settlement is not apparent" (exhibit D to Kormilitsyna aff at 7). Everest submits a handwritten statement from Christine Suarez, a former tenant of the Building, who stated that there were sloped stairs and floors, and cracks in the plaster in her apartment and over the six years that she was there more appeared, but that she "chalked it up to natural settling" (exhibit G to notice of cross motion at EV000135). Everest points to the conclusions in WJE's report based on its multiple inspections that "a significant amount of distress currently present in the [Building] appears to have been present prior to the recent adjacent construction work" (exhibit E to notice of cross motion). WJE found that regarding the "considerable racking (sic) of doors and windows," the "lack of cracking . . . suggests these distortions occurred a long time ago, prior to the adjacent construction, and are unrelated to this work" (*id.* at 1). As to the basement stairs, WJE noted that the "presence of shims and trim that was cut to accommodate preexisting distress in the stairs to the basement indicate that some attempts were made years ago to correct movement that happened prior to the last three years" (*id.*). It concluded that "the only damage to [the Building] that could be associated with the recent adjacent construction" could be addressed

by modest repairs of spackling, painting, and replacing some cracked bricks (*id.* at 2). Everest urges that the alleged damages are precluded by the unambiguous Policy exclusions for settling and cracking, and for wear and tear. Everest also argues that coverage is precluded to plaintiffs because they misrepresented the amount and scope of their damages based on the various dates and amounts of loss on the three sworn proofs of loss. With respect to loss of rent, Everest maintains that plaintiffs fail to prove that tenants complained, or that the units were rendered uninhabitable. It further contends that because of the late notice of the claim, its investigation was materially impacted. It also argues that plaintiffs failed to mitigate their damages. Finally, it contends that the declaratory judgment and bad faith claims are duplicative of the breach of contract.

In their opposition to Everest's cross motion and in support of their reply, plaintiffs submit the affidavit of Thomas Vail, an architect, who attests that he was retained in 2012 to review the "damage which occurred to the Premises as a result of the construction project at the Adjacent Premises and to determine how best to renovate the Premises" (affidavit of Thomas Vail, dated November 24, 2014 [Vail aff], ¶ 6). He stated that during his inspection, he determined that the Adjacent Premises was undergoing construction involving its foundation and the east party wall that was shared with the Building (*id.*, ¶ 7). He states that "it is clear that

damage occurred to the Premises as a result of the construction project at the Adjacent Premises," and lists the various categories of damage, including severe structural damage, severe cracking of the bricks and brownstone, severely damaged masonry, shifting of windows and door frames, separation and cracking of the stairs and ceilings, exposure of wall gaps, sloping floors, and other structural damage (*id.*, ¶ 8). Vail also stated that he disagreed with WJE's findings that a significant amount of the distress at the Building appeared to have been present prior to the construction (exhibit E to notice of cross motion), and found that the damage was "not merely 'distress' from age but rather damage that could only result from the type of construction activities taking place at the Adjacent Premises." (*id.*, ¶ 9). Vail also disagreed with Node's conclusion that "[t]he cause of the settlement is not apparent," and again stated that it was from the construction activities at the Adjacent Premises (*id.*, ¶ 10). Plaintiffs further submitted the affidavit of a former tenant, Eric Warner, who affirmed that he lived in several different apartments in the Building from 2001 to 2011, and that during his occupation of the apartment on the second floor, the Adjacent Premises began to undergo construction, he noticed terrible vibrations, and, as a result of those vibrations, cracks in his walls began to develop, the floors began to buckle/slope, and his doorway adjusted so that it was difficult to close the apartment front door,

and that these damages were not pre-existing (affidavit of Eric Warner, dated Nov 24, 2014 [Warner aff], ¶¶ 1-5). Plaintiffs point to WJE's report as proof that it also recognized that cracks were made larger by the adjacent construction, that there were cracks in the party wall between the two premises and on perpendicular walls that framed into those walls, and that its investigation was only preliminary (exhibit E to notice of cross motion at 1-2). With regard to the settlement exclusion, plaintiffs urge that it does not bar coverage where the settlement and/or cracking results from construction on an adjacent premises (citing *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100 [1st Dept 2006]). Plaintiffs also argue that while they admittedly may not have been certain about the exact date they first noticed the damages, the time periods all occurred within the Policy period. They deny that they made any fraudulent misrepresentations with respect thereto, and the discovery of the nature of the loss was based on when they visited the premises. In any event, they assert that Everest fails to show any prejudice from the slightly different dates or any prejudice from any purported untimeliness of notice. On the issue of lost rent, plaintiffs contend that they could not secure new tenants as a result of the damages and they had to remediate the problems prior to attempting to re-lease. Finally, on the Policy mitigation exclusion, plaintiffs urge that it is inapplicable, particularly where they were accommodating

Everest's engineer for months starting right after they sent notice to Everest, providing it access and allowing it to place crack monitors to check the vibrations from the Adjacent Premises.

In its reply, Everest urges that the Vail affidavit, submitted for the first time in reply, contains only conclusory statements, fails to explain why he rejects the conclusions of WJE and Node, and never actually states when the damage first occurred or why he concluded that the damage could only be caused by the adjacent construction. Everest also maintains that Warner's affidavit is similarly based on conclusory statements, and simply presents an untested factual dispute among lay witnesses (Warner and Suarez) that effectively results in a wash. It argues that plaintiffs fail to sufficiently rebut the misrepresentations they made in their proofs of loss, to prove that they were entitled to loss of rent or any damages, to excuse their late notice or their failure to mitigate damages.

DISCUSSION

Plaintiffs' motion for summary judgment is denied, and Everest's cross motion for summary judgment is granted only to the extent of dismissing the first and third causes of action as duplicative.

An insurance contract is a contract that is interpreted by the same general rules governing construction of any written contract and enforced according to the

parties' intent as expressed in the policy language (*see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). The insured has the burden of showing that a valid policy was in effect and that it incurred a covered loss. Once it meets this burden, the burden shifts to the insurer to prove that an exclusion in the policy bars the claim (*see Throgs Neck Bagels v GA Ins. Co. of N.Y.*, 241 AD2d 66, 71 [1st Dept 1998]; *Moneta Dev. Corp. v Generali Ins. Co. of Trieste & Venice*, 212 AD2d 428, 429 [1st Dept 1995]). To deny coverage based on the exclusion, the insurer must show that the exclusion is stated in clear and unambiguous language, is not subject to any other reasonable interpretation, and applies to the plaintiff's claim (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009]; *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). Exclusions must be strictly and narrowly construed and may not be extended by interpretation (*Incorporated Vil. of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293, 298 [1996], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

Initially, the court must determine whether the plaintiffs' losses were caused by a covered event so as to bring the losses within the ambit of the insurance policy. Here, the Policy states, in the "Brownstone Building and Personal Property Coverage Form," that Everest "will pay for direct physical loss of or

damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss" (exhibit A to notice of cross motion, Policy at EV001114). "Covered Causes of Loss" are defined, in the "Brownstone Causes of Loss-Special Form," as "Risks of Direct Physical Loss" unless the loss is "(1) excluded in Section B., Exclusions or (2) limited in Section C., Limitations" (*id.* at EV001138). The limitations described in Section C are not relevant to the claim at issue. The limit of insurance is in the amount of $2 million for property damage, and $180,000 for Business Income, with coinsurance, and a deductible of $1,000 (*id.* at EV001036). The loss must have occurred during the Policy period which began on October 31, 2009 and continued to October 31, 2012 (*id.* at EV001034). The Policy requires the insured to give "prompt notice of the loss or damage," and "as soon as possible, give us a description of how, when, and where the loss or damage occurred," to take all reasonable steps to protect the covered property, and to send Everest a signed, sworn proof within 60 days of its request and cooperate in the investigation (*id.* at EV001074 [Business Income Coverage Form], EV001119-1120 [Brownstone Building and Personal Property Coverage Form], EV001155 [Common Policy Provisions]).

The Section B exclusions, under the "Brownstone Causes of Loss-Special Form," included, in section B (2) (d):

"(1) wear and tear;

. . . .

(4) Settling, cracking, shrinking or expansion;"

(*id.* at EV001139). The Policy also excludes coverage, under that same coverage form, under section B (2) (m) for "[n]eglect of an insured to use all reasonable means to save and preserve property from further damage at and after the time of loss" (*id.* at EV001140). Finally, the Policy excludes coverage if the insured intentionally concealed or misrepresented a material fact regarding the coverage, the covered property, the insured's interest in the covered property, or a claim, and no coverage is provided to the insured who had made any fraudulent statements or engaged in any fraudulent conduct in connection with any loss (*id.* at EV001079 [Commercial Property Conditions], EV001163 [New York Changes-Fraud]).

To demonstrate a prima facie case of coverage, plaintiffs, here, must show, pursuant to the Policy's terms, "direct physical . . . damage," i.e. the settling, cracking, and shifting of the bricks, masonry, floors, walls, and stairs "caused by or resulting from any Covered Cause of Loss," that is, "Risks of Direct Physical Loss," unless the loss is excluded. Plaintiffs have met this burden with the submission of the Vail affidavit in opposition to Everest's cross motion in which Vail clearly stated that "damage occurred to the Premises as a result of the

construction project at the Adjacent Premises," and that the damages "are not merely 'distress' from age but rather damage that could only result from the type of construction activities taking place at the Adjacent Premises" (Vail aff, ¶¶ 8-9). Plaintiffs further support this with the former, long-time tenant Eric Warner's affidavit in which he stated that "in early 2011, I started to notice terrible vibrations that were affecting the Premises and coming from the construction activities at the Adjacent Premises - particularly, the shared party wall to the east was experiencing a lot of vibrations and cracking from the construction at the Adjacent Premises," and that this caused cracks in the walls to develop, floors to buckle/slope, and the doorway to adjust so that it was difficult to close the front door (Warner aff, ¶ 4). Everest's submission of WJE's report fails to demonstrate, as a matter of law, that the damages were not caused by the construction at the Adjacent Premises. In fact, WJE recognized that "[t]hese cracks could have been caused by vibrations related to the adjacent construction work," and listed various repairs for the damages from that construction (exhibit E to notice of cross motion at 2). The report by Node, plaintiffs' engineer, does not resolve this issue as it simply found that the "cause of the settlement is not apparent" (exhibit H to notice of cross motion at 7). Based on these submissions, the court finds triable issues of fact as to the cause of the damages to the Building, and the extent to which the

damages were a result of the construction at the Adjacent Premises. Therefore, summary judgment to either party on the claim for breach of the insurance contract is inappropriate.

Plaintiffs claim that they are entitled to lost rent under the Business Interruption Coverage under the Policy is subject to the same issue of fact identified above. The "loss or damage must be caused by or result from a Covered Cause of Loss" (exhibit A to notice of cross motion at EV001071 [Business Income (without Extra Expense) Coverage Form A. 1]).

With respect to Everest's contention that plaintiffs fail to show that the damage occurred during the policy period, based on the statement in their sworn proof of loss that the damage began "prior to and including March 2011 through May 2011 and possibly earlier dates to be determined by engineers" (exhibit M to notice of cross motion), this contention is rejected. The Policy period commenced on October 31, 2009 and continued to October 31, 2012, thus, the dates of damage fall within that period, and it is clear that plaintiffs were unable to state a single, specific date because of the nature of the damage, though they clearly specified "March 2011 through May 2011" (exhibits M and N to notice of cross motion). Plaintiffs present proof that shortly after they discovered the damage by inspecting the premises, they contacted Everest about their claim.

Next, assuming plaintiffs were able to show that the damages were caused by the construction, to succeed in avoiding coverage based on an exclusion, Everest must show that its interpretation of at least one of the two exclusions upon which it relies, "settling, cracking, shrinking or expansion" and "wear and tear," is the only reasonable reading of the exclusion and that the exclusions applies (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103 [1st Dept 2006], citing *Sincoff v Liberty Mut. Fire Ins. Co.*, 11 NY2d 386, 390 [1962]). The exclusions in Section B (2) (d) include "[w]ear and tear;" "[r]ust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;" "[s]mog;" "[s]ettling, cracking, shrinking or expansion;" "[n]esting or infestation;" "[m]echanical breakdown, including rupture or bursting caused by centrifugal force;" and loss to personal property caused by "[d]ampness or dryness of atmosphere;" "changes in or extremes of temperature;" or "[m]arring or scratching," almost all of which share a common characteristic of a naturally occurring event. This identical insurance policy language was interpreted by the First Department in *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.* (31 AD3d at 104), which held that the "settling or shifting of a building caused by the adjoining owner's improper underpinning and shoring activities does not fall within the exclusion for damage caused by 'settling, cracking, shrinking or

expansion.'" Instead, based on basic rules of construction that words in a series of words are determined "by the company [they] keep[]," the court held that the exclusion "should be limited to damage caused by natural phenomena" (*id.* at 103-104 [quotation marks and citation omitted]). Moreover, the Court determined that the plaintiff also alleged damages for the shifting of the building, and the "'settling, cracking' exclusion would not apply to damage caused by the 'shifting' of the premises" because those words have distinct and different meanings (*id.* at 104; *see also Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d at 307-308 [interpreting both the earth movement and settling or cracking exclusions to not apply to damages indisputably caused by excavation and underpinning work in progress on lot next door]).

Similarly, here, the settling, cracking, and shifting of windows and door frames, and sloping of the floors allegedly caused by the construction on the Adjacent Premises does not fall within the exclusion for damage caused by "[s]ettling, cracking, shrinking or expansion;" or "[w]ear and tear" which should be limited to damage cause by natural phenomena, not by construction on adjoining property (*see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d at 103; *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d at 308). In addition, the shifting of windows and door frames is not

encompassed in the word "settle" which has a separate meaning, and if Everest intended to exclude such damage caused by shifting, it could have included that word in the exclusion (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d at 103). Thus, to the extent that plaintiffs are able to show that the damages to the Building were caused by the construction on the Adjacent Premises, these damages would not be subject to the exclusions relied upon by Everest.

Everest's contention that coverage is precluded, as a matter of law, based on plaintiffs' misrepresentation of the amount and scope of the alleged damages and the date of loss, is unavailing. As discussed above, the variation in the dates the damage occurred stated in plaintiffs' sworn proofs of loss were based on the nature of the continuing damage, and the time periods were all within the same time frame, and were all within the Policy period. As to the amount of the loss, the fact that plaintiffs initially stated on the first proof of loss that the amount of the damage exceeded the $2 million Policy limit, and then made a more specific damage claim in their later proof of loss when Everest required them to provide such a specific number, could hardly constitute an intentional misrepresentation. Moreover, contrary to Everest's arguments, plaintiffs appeared to be cooperating and timely complying with Everest's requests for more detailed and specific proofs of loss.

Everest's defense that plaintiffs failed to give timely notice of loss as required by the Policy, is dismissed. Everest fails to present proof as to how it was prejudiced by any alleged late notice. Effective January 17, 2009, Insurance Law § 3420 (a) (5) and (c) (2) (A) requires the insurance company to show prejudice if it seeks to deny coverage based on late notice of claim if the insured's notice is provided within two years of the time it was due. Therefore, in order for Everest to deny coverage based on plaintiffs' purported late notice of claim, it also must show how the late notice prejudiced it, that is, that it materially impaired its ability to investigate the claim (*see* Ins Law § 3420 [c] [2] [C]). Here, Everest fails to meet its burden of proving prejudice from plaintiffs' alleged delay in providing notice.

Finally, while Everest asserts that plaintiffs failed to perform any repairs (exhibit P to notice of cross motion, Alla Kormilitsyna examination under oath at 92), contact the owner of the Adjacent Premises, apprise him of the damage being caused, ask him to stop construction, or to contact the Department of Buildings (*id.* at 60, 63; exhibit Q, Andrew Bares examination under oath at 45, 80), plaintiffs contend that they could not perform repairs while simultaneously providing access to Everest's engineer to review the damages, install crack monitors, and monitor the cracks and vibrations. This raises an additional triable

issue of fact.

The branch of Everest's cross motion seeking dismissal of the declaratory and breach of the duty of good faith causes of action (the first and third causes of action), however, is granted. The declaratory judgment claim is identical to plaintiffs' breach of contract claim, and, therefore, is duplicative (*see Wells Fargo Bank, N.A. v GSRE II, Ltd.*, 92 AD3d 535, 536 [1st Dept 2012] [plaintiff cannot seek a declaratory judgment when other remedies such as breach of contract are available]; *Apple Records v Capital Records*, 137 AD2d 50, 54 [1st Dept 1988] [declaratory judgment claim dismissed where it merely paralleled breach of contract claim and sought declaration of same obligations that would be determined under contract claim]). Similarly, the breach of the duty of good faith and fair dealing claim is redundant of the breach of contract claim as they both arise from the same facts and seek identical damages for the alleged breaches (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010] [where the conduct complained of is also a predicate for the breach of contract claim and seeks same damages, there is no independent breach of the duty of good faith claim]). The allegations in the breach of the duty of good faith claim that Everest failed to adequately investigate and waited almost a year to improperly deny coverage are subsumed into the breach of contract claim (the

second cause of action).

Accordingly, it is

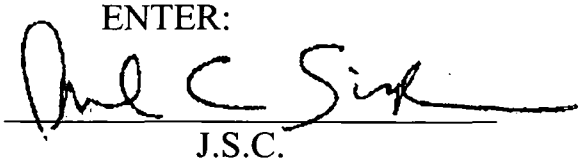
ORDERED that plaintiffs' motion for summary judgment is denied; and it is further

ORDERED that defendant's cross motion for summary judgment is granted only to the extent that the first and third causes of action are dismissed and is otherwise denied; an it is further

ORDERED that the parties shall appear for a compliance conference on July 14, 2015 at 10:100 am in Part 45.

Dated: June 4, 2015

ENTER:



J.S.C.

ANIL C. SINGH