SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 650308/2015
HOWARD HUGHES CORPORATION
vs
ACE AMERICAN INSURANCE COMPANY
Sequence Number : 001
COMPEL DISCLOSURE

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

is decided in accordance with the annexed decision.

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

Dated: 10/22/15

OK
_____, J.S.C.
CYNTHIA S. KERN
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

THE HOWARD HUGHES CORPORATION,

Plaintiff,

Index No. 650308/15

-against-

DECISION/ORDER

ACE AMERICAN INSURANCE COMPANY and
TORUS SPECIALTY INSURANCE COMPANY,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affirmation in Opposition	2,3
Replying Affidavits.....	4,5
Exhibits.....	6

Plaintiff The Howard Hughes Corporation (hereinafter referred to as "plaintiff" or "HHC") commenced the instant action against defendants Ace American Insurance Company ("Ace") and Torus Specialty Insurance Company ("Torus") seeking a declaratory judgment and asserting a cause of action for bad faith breach of contract. Defendants now move for an Order pursuant to CPLR §§ 3124 and 7601 (i) compelling plaintiff to provide a signed and sworn proof of loss reflecting the current amount of its claim, with documentation supporting that amount, pursuant to the terms and conditions of the insurance policy; and (ii) compelling plaintiff to submit the quantum of its loss to appraisal pursuant to the terms and conditions of the insurance policy. Plaintiff cross-moves for an Order pursuant to CPLR § 3212 granting it partial summary judgment on its first cause of action for a declaratory judgment. Defendants also cross-move for

an Order pursuant to CPLR § 3212 granting them partial summary judgment on their seventh and eighth counterclaims seeking declaratory judgments. For the reasons set forth more fully below, defendants' motion is granted in part and denied in part, plaintiff's cross-motion is denied and defendants' cross-motion is granted in part and denied in part.

The relevant facts are as follows. This lawsuit involves a first-party property insurance dispute concerning coverage and valuation issues arising from damages caused by Superstorm Sandy ("Sandy") to five buildings located at the South Street Seaport in downtown Manhattan (the "Seaport Properties") in October 2012. On the date of Sandy, the Seaport Properties consisted of: (1) the Pier 17 Pavilion at 89 South Street; (2) the Link Building at 89 South Street; (3) the Fulton Market Building at 11 and 1-13 Fulton Street; (4) portions of the Schermerhorn Row at 91 South Street, 93 South Street and 2-18 Fulton Street; (5) portions of the Museum Block at 199-210 Front Street, 19-25 Fulton Street and 133 Beekman Street; and (6) the first floor of One Seaport Plaza at 199 Water Street, commonly known as the Telco building. Plaintiff alleges that due to Sandy, it was forced to evacuate the Seaport Properties on October 28, 2012 and that as a result of Sandy and the flooding and storm surge caused thereby, the Seaport Properties suffered significant property damage (the "Seaport Loss").

Prior to Sandy, the Seaport Properties were operated by HHC, through a subsidiary, as rental properties occupied by numerous retail tenants offering a variety of entertainment, food services and retail sales trades. Plaintiff alleges that prior to Sandy, the Seaport Properties were approximately 96% leased and were generating substantial revenue for HHC. However, plaintiff alleges that after Sandy, as a result of the damage to the Seaport Properties, many of HHC's tenants cancelled their leases and abandoned their premises. Additionally, plaintiff asserts that other leases were cancelled by HHC because of the severity of the damage to certain

buildings, common areas and tenant premises in and around the Seaport Properties and in order to enable repair and remediation without endangering the life or safety of any individuals working at or visiting the severely impacted areas.

At the time of the Seaport Loss, HHC was insured pursuant to a multilayer property insurance program that was underwritten by numerous insurers, including defendants, who subscribed to a base policy form (the "program"). The insurers' policies cover property damage, business interruption, time element loss and extra expenses arising out of "all risk of physical loss or damage." Ace underwrote 20% of the first $200 million of loss in excess of any applicable deductible, as set forth in policy number CXD37838937 (the "Ace Policy"). Torus underwrote 30% of $150 million of loss in excess of $50 million and any applicable deductible, as set forth in policy number 30880B110APR (the "Torus Policy") (hereinafter collectively referred to as the "Policy"). Additionally, HHC maintained insurance coverage in addition to the Policy under the National Flood Insurance Program (the "NFIP"), issued through the Federal Emergency Management Agency ("FEMA") (hereinafter referred to as the "NFIP Policy").

On or about October 30, 2012, HHC notified defendants and the other insurers in the program of its claim for losses and began the process of repairing and restoring the Seaport Properties. For several months after HHC notified its insurers of the Seaport Loss, the insurers began requesting information concerning the Seaport Loss. HHC alleges that it attempted to comply with these demands in good faith by providing thousands of pages of documents and establishing an on-line database to which McLarens, the adjuster appointed on behalf of all of the insurers, was given access in plaintiff's efforts to make the overall claim adjustment an efficient and collaborative process. HHC further asserts that it has provided the insurers with all of the existing information in HHC's possession relevant to, and necessary for, the insurers' adjustment of its claim.

In or around August 2013, HHC sent the insurers a Sworn Statement of Proof of Loss ("POL") related to its Seaport Properties claim. The POL estimated the amount of the loss to be $86,210,476, including $42,983,090 in loss of real and personal property, $26,227,832 in business interruption, remediation and other incurred expenses and $16,999,554 in extra expenses. Additionally, the cover letter to the POL stated that "[w]e reserve the right to increase this loss to the extent we uncover any additional damages related to the claim throughout the adjustment process."

Over approximately the next ten months, HHC and defendants, along with the other insurers in the program, continued to correspond to attempt to find common ground with respect to a settlement of the Seaport Loss. However, limited progress was achieved so the parties agreed to hold a day-long settlement meeting in New York City on June 11, 2014. In connection with that meeting and in reliance upon an agreement executed by HHC and defendants, HHC prepared a revised Executive Summary to its POL to reflect certain adjustments to the calculation of HHC's claim in an effort to resolve the Seaport Loss, in which it identified the total Seaport Loss to be $84,800,287. However, plaintiff asserts that said Executive Summary was a document for settlement purposes only. Defendants and other insurers who had not yet paid their coverage limits at that time, asserted that the total loss was only $41,265,431, but no insurer demanded appraisal.

Plaintiff alleges that as of the June 11, 2014 settlement meeting, the insurers still had not assessed any value for numerous elements of the Seaport Loss, including, but not limited to, base building repairs, business interruption during HHC's extended period of restoration, the costs of developing and implementing SEE/Change, a program to bring visitors back to the Seaport, leasing commissions and tenant allowances to re-let the Seaport Properties, increased insurance premiums as a result of Sandy, additional corporate expenses, emergency remediation costs and

industrial hygienist costs. Instead, plaintiff alleges that defendants and the other insurers insisted that even though some value should be assessed for all of the unassessed elements of the Seaport Loss, they would not assess any value until plaintiff provided them with additional documents, documents which HHC continually explained do not exist.

Two of the four insurers who attended the June 2014 settlement meeting have since valued the Seaport Loss as being at least $50 million in excess of any applicable deductible and they have paid their full remaining policy limits. Over the next eight months, through February 2015, the parties attempted to close the gap between HHC's valuation and defendants' valuation of the Seaport Loss. In or around January 2015, the parties participated in a day-long mediation but no compromises were reached. Thereafter, HHC commenced the instant action against defendants seeking a declaratory judgment as to the proper interpretation and application of the Policy's language as it relates to any applicable deductible and HHC's NFIP recovery. By letter dated February 11, 2015, defendants agreed to accept service of the complaint and notified HHC that it would be receiving a letter demanding an updated POL and an appraisal to determine the amount of the Seaport Loss. Defendants' adjuster wrote to HHC notifying it that the adjustment of the claim could not be completed without documents supporting the POL and provided HHC with an updated Request for Information. In the letter, the adjuster, on behalf of defendants, formally requested a POL reflecting HHC's "current claim" and demanded an appraisal. Additionally, defendants' adjuster included in the letter a revised estimate of the Seaport Loss at $42,443,367 in gross before reduction by defendants' deductible calculation and HHC's NFIP recovery.

In or around March 2015, defendants filed their answer with counterclaims. On or about March 6, 2015, counsel for HHC wrote to defendants' counsel and adjuster noting that defendants had put the valuation of the Seaport Loss at issue in this action, that HHC had already

provided a POL in August 2013, that defendants failed to explain what was improper with said POL and thus rejected their demand for a new POL and that the demand for appraisal was deemed abandoned pursuant to the Policy language. HHC then filed an amended complaint in this action asserting a second cause of action against defendants for bad faith breach of contract, which defendants answered. Additionally, the amended complaint alleges that to date, the insurers in the program have paid $46,786,625.19 to plaintiff, of which Ace has paid $6,786,625.10 and Torus has paid nothing. Further, it is undisputed that plaintiff received approximately $1 million from the NFIP Policy.

The court first turns to defendants' motion for an Order (i) compelling plaintiff to provide a signed and sworn POL reflecting the current amount of its claim, with documentation supporting that amount, pursuant to the terms and conditions of the Policy; and (ii) compelling plaintiff to submit the quantum of its loss to appraisal pursuant to the terms and conditions of the Policy. As an initial matter, that portion of defendants' motion seeking to compel plaintiff to provide a signed and sworn POL is denied. Regarding a POL, the Policy states as follows:

> **26. PROOF OF LOSS**
>
> The Insured, at the request of the [Insurer] will render a signed and sworn proof of loss to the [Insurer] or its appointed representative stating: the place, time, cause of the loss, damage, or expense; the interest of the Insured and of all others; the value of the property involved in the loss; and the amount of loss, damage, or expense.

A proof of loss is a formal statement of the claim, which must be submitted to the insurer upon demand together with the supporting documentation required by the insurers. *See Harris v. Allstate Ins. Co.*, 83 F.Supp.2d 423 (S.D.N.Y. 2000). Indeed, it is well-settled that in New York, an insured's failure to submit a sworn POL to the insurer constitutes a breach of a condition precedent to coverage under the policy and is an absolute defense to an action to

recover on an insurance policy. *Igbara Realty Corp. v. New York Property Ins. Underwriting Assoc.*, 63 N.Y.2d 201 (1994).

In the instant action, this court finds that defendants are not entitled to an order compelling plaintiff to provide defendants with a signed and sworn POL on the ground that plaintiff has already provided defendants with a signed and sworn POL. It is undisputed that in August 2013, approximately ten months after Sandy and unsolicited by defendants, plaintiff provided defendants with a POL signed and sworn to by HHC's Chief Operating Officer. Indeed, defendants do not deny receiving said POL. The POL, titled "Sworn Statement In Proof of Loss," sets forth the time, origin and cause of the Seaport Loss; the damages and expenses incurred as part of the Seaport Loss; and the interest of HHC in the Seaport Loss. As plaintiff has complied with the provision in the Policy requiring it to provide defendants with a signed and sworn POL, defendants are not entitled to a second POL.

Any assertion by defendants that the August 2013 POL is insufficient on the ground that it was provided prior to defendants' demand for a POL is without merit. The parties agree that if defendants had requested a signed and sworn POL, plaintiff would have to provide such document. However, nowhere in the Policy does it state that a POL may only be provided *after* the insurer requests one. Indeed, defendants have not cited any case law or provided any evidence that demonstrates that an insured is prohibited from providing a signed and sworn POL without being prompted to do so. Thus, the fact that the August 2013 POL provided to defendants was unsolicited by defendants is immaterial.

Additionally, defendants assertion that the August 2013 POL is insufficient on the ground that it was "unaccompanied by documents or financial information supporting HHC's alleged damages" is without merit. Nowhere in the Policy does it state that such documentation is required in connection with a POL. However, even if it did, it is undisputed that along with the

August 2013 POL, plaintiff included an Executive Summary and also provided defendants with numerous documents together with the on-line database which was always available to the insurers which detailed plaintiff's claim. Further, defendants have not specified what documents, if any, they are still missing in relation to the POL. Additionally, plaintiff has affirmed and notified defendants that it has no further documents responsive to defendants' requests.

Defendants' assertion that the August 2013 POL is insufficient on the ground that it is out-of-date as "the amount of HHC's claim has changed since the August 12, 2013 Proof of Loss was issued" is without merit. Specifically, defendants are referring to the unsworn and unsigned Executive Summary that plaintiff submitted to the insurers at the settlement meeting on June 5, 2014 pursuant to which defendants allege that plaintiff revised its claimed damages from $86,210,476 to $84,800,270. However, plaintiff has affirmed and it is clear from the circumstances of this case, that the updated Executive Summary was not a revision of its claim but rather was submitted in connection with settlement negotiations, and that the number suggested on the Executive Summary was ultimately rejected by defendants. Indeed, HHC has affirmed that it has not revised its claim since it submitted the August 2013 POL and that the claim "remains as stated in the Proof of Loss."

Additionally, this court finds that defendant Torus is not entitled to an order compelling plaintiff to submit the quantum of its loss to appraisal on the ground that its demand for appraisal was untimely under the Policy. It is undisputed that regarding appraisal, the Policy states as follows:

> **30. APPRAISAL**
>
> If the Insured and the [Insurer] fail to agree on the amount of the loss, each, upon written demand of either the Insured or the [Insurer] made within 60 days after receipt of proof of

> loss by the [Insurer], shall select a competent and disinterested appraiser.

As this court has determined that HHC provided defendants with a signed and sworn POL in August 2013, Torus' February 11, 2015 demand for appraisal was untimely under the terms of the Policy.

However, this court finds that defendant Ace is entitled to an order compelling plaintiff to submit the quantum of its loss to appraisal on the ground that its demand for appraisal was made within a reasonable period of time based on the circumstances of this case. "New York courts have long recognized the role of appraisals in resolving disputes between an insurer and insured where the disagreement is over the value or amount of loss." *Indian Chef, Inc. v. Fire & Cas. Ins. Co.*, 2003 WL 329054, at *3 (S.D.N.Y. Feb. 13, 2003)(internal citations omitted). Indeed, "New York public policy favors an appraisal proceeding over a trial on damages." *SR Intern. Business Ins. Co., Ltd. v. World Trade Center Properties*, 2004 WL 2979790, at *3 (S.D.N.Y. Dec. 1, 2004). "Where...an insurance policy does not specify a time limit for an appraisal demand, the court must determine whether the demand was 'exercised within a reasonable period, depending upon the facts of the case.'" *SR Intern. Business Ins. Co., Ltd.*, 2004 WL 2979790, at *3 (citing *Peck v. Planet Ins. Co.*, 1994 WL 381544, at *2 (S.D.N.Y. July 21, 1994)). New York courts have found the following three factors to be relevant in determining whether a demand for appraisal was exercised within a reasonable period: "(i) whether the appraisal sought is 'impractical or impossible' (that is, whether granting an insurer's appraisal demand would result in prejudice to the insured party); (ii) whether the parties engaged in good-faith negotiations over valuation of the loss prior to the appraisal demand; and (iii) whether an appraisal is desirable or necessary under the circumstances." *Id.* (citing *Peck*, 1994 WL 381544, at *2-3). "[E]lapsed time does not in itself make [the insurer's] demand unreasonable under the

circumstances." *Peck*, 1994 WL 381544, at*2. Further, if a case is, at its core, "a dispute over the value of plaintiff's losses," appraisal is generally warranted. *Peck*, 1994 WL 381544, at *3.

Here, Ace is entitled to an order compelling plaintiff to submit the quantum of its loss to appraisal on the ground that Ace's demand for appraisal was made within a reasonable amount of time. Endorsement No. 4 to the Ace Policy states, in pertinent part, as follows:

> NEW YORK CHANGES
>
> It is agreed that:
>
> 4. ...[T]he Appraisal condition of the policy is deleted and replaced by the following:
>
> APPRAISAL
>
> If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss....

Thus, as the Ace Policy does not specify a time limit for the right to demand appraisal, defendant Ace will only be entitled to appraisal if its demand was reasonable under the three-factor test set forth in *SR Intern. Business Ins. Co., Ltd.*, 2004 WL 2979790, at *3. Initially, there is no evidence that the appraisal sought is "impractical or impossible" or that granting Ace's appraisal demand would result in prejudice to HHC. Further, it is clear that the parties engaged in several good-faith negotiations over valuation of the loss prior to the demand for appraisal. Indeed, in June 2014, the parties met in good faith to try to resolve the valuation disputes in this case but they failed to come to a resolution. Thereafter, in January 2015, the parties again attempted to reach a resolution via mediation but they were unable to reach an agreement on the valuation of plaintiff's losses. Additionally, it is undisputed that since Ace received plaintiff's August 2013 POL, it has requested certain documentation from plaintiff in order to properly value the claim. Courts have held that when the parties were continually negotiating and working toward an agreement on the amount of loss, it was not unreasonable for the insurer to wait over a year after

the loss to demand an appraisal. *See Peck*, 1994 WL 381544, at *3. Finally, it is clear that an appraisal is desirable and necessary under the circumstances as it is the most efficient way to resolve the parties' dispute over the amount of the Seaport Loss. Indeed, although this action involves coverage issues, it also involves a dispute over the value of plaintiff's losses, which courts have found is most efficiently addressed through the appraisal process. *See id.* ("[t]he delays and disparity in valuation are most efficiently addressed through the appraisal process.")

The court next turns to the two cross-motions for summary judgment. As an initial matter, the court notes that defendants' cross-motion for partial summary judgment is procedurally improper as a cross-motion may only be made against the party who made the original motion and not against a party who has cross-moved in the same motion sequence. Here, defendants were the original movants and have subsequently cross-moved based on plaintiff's cross-motion for summary judgment, a procedure which the CPLR does not allow. However, the procedural issues with defendants' cross-motion for summary judgment are immaterial as CPLR § 3212(b) provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion." Thus, the court may *sua sponte* grant summary judgment to defendants on its seventh and eighth counterclaims if it finds that defendants are entitled to such relief.

The court first addresses plaintiff's cross-motion for summary judgment on its first cause of action for a declaratory judgment that defendants are contractually obligated to pay their respective proportionate share of the Seaport Loss pursuant to the Policy and without any deduction or limitation based upon either (a) the deductible contained in Section 4(2) of the Policy (the "Special Flood Deductible"); or (b) the Other Insurance clause contained in Section 18 of the Policy. On a motion for summary judgment, the movant bears the burden of

presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

As an initial matter, this court finds that plaintiff has failed to establish its *prima facie* right to summary judgment on its first cause of action for a declaratory judgment that defendants are contractually obligated to pay their respective proportionate share of the Seaport Loss without any deduction or limitation based upon the Special Flood Deductible contained in the Policy and *sua sponte* grants summary judgment to defendants on this issue. Paragraph 4 of the Policy states as follows:

> **4. DEDUCTIBLES**
>
> All losses, damages or expenses arising out of any one occurrence shall be adjusted as one loss, and from the amount of such adjusted loss shall be deducted $100,000 except:
>
> **Special Flood Deductible** - - The following sum(s) shall be deducted from any adjusted loss due to Flood:
>
> (1) With respect to locations wholly or partially within Special Flood Hazard Areas (SFHA), area of 100-year flooding, as defined by the Federal Emergency Management Agency (if the locations are not excluded elsewhere in this policy with respect to the peril of flood), the deductible shall be 5% of the total values at the time of loss at each location involved in the loss per unit of insurance, subject to a minimum of $1,000,000 for any one occurrence;
>
> (2) With respect to Named Storm ("Named Storm" means a storm that has been declared and named by the National

> Weather Service), the deductible shall be 5% of the total values at the time of the loss at each location involved in the loss per unit of insurance, subject to a minimum of $1,000,000 for any one occurrence.
>
> (3) With respect to any other flood loss, the deductible shall be $100,000 any one occurrence.

Based on the plain reading of the Policy, it is clear that both sections (1) and (2) of the Special Flood Deductible apply as the parties do not dispute that the Seaport Loss was caused by flood and storm surge as a result of a named storm – Superstorm Sandy – and that the Seaport Properties were within the Special Flood Hazard area. Thus, pursuant to subsections (1) and (2) of the Special Flood Deductible, the deductible amount applicable to HHC's claim is "5% of the total values at the time of the loss at each location involved in the loss per unit of insurance subject to a minimum of $1,000,000 for any one occurrence."

Plaintiff argues that the Special Flood Deductible is inapplicable to the Seaport Loss based on the definition of "flood" as provided in Paragraph 13 of the Policy (the "Flood Occurrence Provision"), which states that "[f]lood does not mean Flood and Storm Surge as a result of a named storm." However, this court declines to interpret the Policy as plaintiff suggests on the grounds that such interpretation would eviscerate the Special Flood Deductible provided in the Policy as it could never be triggered and that such interpretation is contrary to the well-settled principles of contract interpretation. Indeed, "[a]n insurance contract should not be read so that some provisions are rendered meaningless." *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 628 (1994). It is well-settled that courts should read an insurance policy to avoid ambiguities and give effect to all of the policy's provisions. *See Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157 (2005). Additionally, New York law requires that insurance policies be interpreted as written and that courts should place particular emphasis on reading words or clauses in relation to those nearby words or clauses in

the policy with which they may logically be associated. *See Metpath, Inc. v. Birmingham Fire Ins. Co.*, 86 A.D.2d 407 (1st Dept 1982); *see also County of Columbia*, 83 N.Y.2d 618.

In the instant action, the court finds that the definition of "flood" in Paragraph 13 of the Policy, on which plaintiff relies, is only to be used to define "flood" within that Paragraph. The entirety of Paragraph 13 of the Policy reads as follows:

> **13. EARTHQUAKE AND FLOOD**
> FLOOD
> With respect to the peril Flood, any and all losses from this cause within a 72-hour period shall be deemed to be one loss insofar as the Limit of Liability and Deductible provisions of this policy are concerned. The Company shall not be liable for any loss caused by any Flood which commences before the effective date and time of this policy, however, the Company will be liable for any loss occurring for a period of up to seventy-two (72) hours after the expiration of this policy provided that the first flood damage occurs prior to the date and time of the expiration of this policy. The term "flood," as used herein, shall mean surface water, waves, tide, or tidal water and the rising (including overflowing or breaking of boundaries) of lakes, ponds, reservoirs, rivers, streams, harbors and similar bodies of water. The term "surface water," as insured hereunder, shall mean seepage, leakage or inflex of water (immediately derived from natural sources) through sidewalks, driveways, foundations, walls basements or other floors, or through doors, windows or any other openings in such sidewalks, foundations, walls or floods.
>
> Flood does not mean Flood and Storm Surge as a result of a named storm.

It is clear from the wording of the Flood Occurrence Provision that "flood" is defined within said provision solely for purposes of determining the 72-hour limitation period. Indeed, the term "flood" is defined in the Flood Occurrence Provision so that an insured can determine whether the flood damage it sustained "prior to the date and time of the expiration of this policy" triggers coverage for 72 hours after the Policy period has expired. Moreover, the Flood Occurrence Provision defines "flood" "as used herein," meaning that the definition of "flood" shall be used

solely within the Flood Occurrence Provision and not elsewhere in the Policy.

Moreover, with respect to defendant Ace, Endorsement No. 6 to the Ace Policy makes clear that the Ace Policy's definition of "flood" encompasses the storm at issue here. Specifically, Endorsement No. 6 to the Ace Policy states as follows:

> GENERAL CHANGE ENDORSEMENT
>
> DEFINITIONS OF FLOOD...
>
> 1. The following definition is added to this policy and supersedes and replaces any provision to the contrary in this policy, including, but not limited to, any other definition of the term "flood or "Flood";
>
> "Flood" means the temporary condition of partial or complete inundation of normally dry land areas from:
>
> 1. the overflow of inland waters, tsunamis, tidal waves, or storm surges...
>
> all whether driven by wind or not.
>
> "Flood" includes any "FEMA 100-Year Flood" and "Named Windstorm Flood."

Thus, as the Ace Policy defines "flood" as including storm surges, the Special Flood Deductible is applicable to the Seaport Loss.

Plaintiff argues that the Special Flood Deductible, as amplified by the general deductible section in the Policy, is unenforceable because it is in direct conflict with Paragraph 40 of the Policy. However, the court finds that there is no conflict between the two provisions of the Policy. Paragraph 40 of the Policy states that "[t]he values and schedule of property declared to the [Insurer] at the inception of the policy are for premium purposes only and shall not limit the coverages provided by this policy." In other words, Paragraph 40 provides that the insured may not be limited in its coverage by the value of its property that it initially provided to the insurer when it entered into the Policy. The general deductible section of the Policy states as follows:

> The values to be used when calculating the deductibles for the above [including the Special Flood Deductible] shall be those as specified for each unit of insurance as shown in the most recent Statement of Values on file with the Company. If the Values are not itemized for each unit of insurance or if the property damaged is a building in the course of construction or renovation, the values will be determined at the time of loss.

Thus, the general deductible section acknowledges that in order to calculate a deductible, the insurer will use the value of the property as stated in the most recent Statement of Values that has been provided by the insured, which the insured can update at any time. Thus, the insured is not bound by the value of the property it provided to the insurer at the time it entered into the Policy. Moreover, the Special Flood Deductible specifically discusses valuing the deductible "at the time of loss" and defendants are not taking the position that they plan to calculate the deductible based on the value of the Seaport Properties at any time other than at the time of loss. Based on the foregoing, this court finds that there is nothing conflicting about the general deductible provision in the Policy and Paragraph 40 of the Policy.

The court next turns to that portion of plaintiff's motion for summary judgment on its first cause of action for a declaratory judgment that defendants are contractually obligated to pay their respective proportionate share of the Seaport Loss pursuant to the Policy without any deduction or limitation based on plaintiff's recovery under the NFIP Policy and finds that it must be denied on the ground that plaintiff has failed to establish its *prima facie* right to summary judgment on this issue. Specifically, defendants seek to reduce plaintiff's recovery by $1 million, the amount plaintiff received from the NFIP Policy, based upon the Other Insurance clause contained in the Policy. Paragraph 18 of the Policy provides, in pertinent part, as follows:

> **OTHER INSURANCE**
>
> Except for insurance described by the...the underlying insurance

> clause, this policy shall not cover to the extent of any other collectible insurance, whether directly or indirectly covering the same property against the same causes of loss. This Company shall be liable for loss or damage only to the extent of that amount in excess of the amount recoverable from such other collectible insurance.

However, Paragraph 17 of the Policy provides as follows:

> **UNDERLYING INSURANCE**
>
> A. Underlying insurance is insurance on all or any part of the deductible and against all or any of the causes of loss covered by this policy....The existence of such underlying insurance shall not prejudice or affect any recovery otherwise payable under this policy.

Here, the only evidence submitted by plaintiff in support of its motion is an affirmation of its counsel affirming that plaintiff purchased the NFIP Policy as insurance on the flood deductible in the Policy, which if true, would not prejudice or affect any recovery otherwise payable by defendants and the Policy's Other Insurance provision would not apply. However, as a counsel's affirmation alone is insufficient to make out a *prima facie* entitlement to summary judgment and as plaintiff has failed to provide an affidavit of someone with personal knowledge of the facts of the case, plaintiff's motion for summary judgment on this issue is denied.

Additionally, this court finds that defendants' motion for summary judgment on their counterclaim which seeks a declaratory judgment that the NFIP Policy constitutes "other collectible insurance" and, therefore, plaintiff's recovery of $1 million under the NFIP Policy should be applied to plaintiff's claim, reducing defendants' liability by $1 million must also be denied as defendants have failed to establish their *prima facie* right to summary judgment on this issue. Specifically, defendants assert that plaintiff's claim must be reduced by the $1 million it recovered for the Seaport Loss under the NFIP Policy because the NFIP Policy was not insurance on the Policy's flood deductible but was rather general flood insurance and therefore, is not "underlying insurance" as set forth in the Policy. In support of this assertion, defendants

point to the NFIP Policy which does not provide that it is insurance on the Policy's deductible and which states that it is a "Standard Flood Insurance Policy" issued pursuant to the National Flood Insurance Program through FEMA. Specifically, the insuring agreement in the NFIP Policy states that FEMA "will pay [HHC] for direct physical loss by or from flood to your insured property...." Additionally, defendants assert that FEMA, the entity through which HHC purchased the NFIP Policy, was created by Congress to, *inter alia*, administer a national flood insurance program for those without such insurance, not to indemnify or reimburse a private real estate conglomerate for the deductible of a separate commercial insurance policy. Further, defendants assert that based on FEMA's website, NFIP flood insurance is mandatory for real properties located in the FEMA Zone AE, as are the Seaport Properties. However, such evidence is insufficient to establish a *prima facie* right to summary judgment on this issue. Indeed, the fact that the NFIP Policy does not state that it is insurance on the Policy's flood deductible is not dispositive evidence that it is not such insurance. Further, neither the FEMA website nor defendants' bare assertion is dispositive evidence that the NFIP flood insurance was mandatory for the Seaport Properties.

Accordingly, the motions are resolved as set forth herein. This constitutes the decision and order of the court.

Dated: 10/22/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.