

<b>Gateway II LLC v Hartford Fire Ins. Co.</b>
2016 NY Slip Op 30622(U)
April 5, 2016
Supreme Court, New York County
Docket Number: 652294/2012
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7**

GATEWAY II LLC, GAETANO  
DEVELOPMENT CORP.,

Plaintiffs,

-against-

THE HARTFORD FIRE INSURANCE  
COMPANY, CATLIN INSURANCE COMPANY  
INC., THE INTERNATIONAL INSURANCE  
COMPANY OF HANOVER LTD.,  
PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, PUTNAM  
INSURANCE AGENCY, LLC,  
McMILLAN PLUMBING & HEATING  
INC., CONTAGIOUS PLUMBING &  
HEATING INC., J.E. LEVINE BUILDERS  
INC.,

Defendants.

Index No.: 652294/2012  
**DECISION/ORDER**  
Motion Seq. No. 005 and 007

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant  
Catlin Insurance Company Inc.'s (Catlin) and defendant Putnam Insurance Agency, LLC's  
(Putnam) motions for summary judgment.

<b>Papers</b>	<b>Numbered</b>
Defendant Catlin's Notice of Motion .....	1
Defendant Catlin's Affidavit of Alan E. Fidellow in Support .....	2
Defendant Catlin's Affidavit of Rick Lathrum in Support .....	3
Defendant Catlin's Memorandum of Law in Support .....	4
Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion .....	5
Plaintiffs' Affidavit in Opposition to Defendant Catlin's Motion .....	6
Plaintiffs' Memorandum of Law in Opposition to Defendant's Catlin's Motion .....	7
Defendant Catlin's Memorandum in Reply .....	8
Defendant Putnam's Notice of Motion .....	9
Defendant Putnam's Affidavit of John R. Sparano in Support .....	10
Defendant Putnam's Memorandum of Law in Support .....	11
Plaintiffs' Affirmation in Opposition to Defendant Putnum's Motion .....	12
Plaintiffs' Memorandum of Law in Opposition to Defendant's Putnum's Motion .....	13
Defendant Putnam's Affirmation in Reply .....	14
Defendant Putnam's Memorandum in Reply .....	15

*Law Office of Barbara A. Matarazzo, White Plains (Barbara A. Matarazzo of counsel), for  
plaintiffs.*

*Sullivan & Klein, LLP*, New York (Frederick M. Klein and Robert M. Sullivan of counsel), for defendant Putnam Insurance Agency, LLC.  
*Wade Clark Mulcahy*, New York (Michael A. Gauvin of counsel), for defendant Catlin Insurance Company Inc.

Gerald Lebovits, J.

Defendant Catlin Insurance Company Inc.'s (Catlin) motion, sequence 7, and defendant Putnam Insurance Agency, LLC's (Putnam) motion, sequence 5, are consolidated for disposition. Upon the foregoing papers, it is ordered that defendant Catlin's CPLR 3212 motion for summary judgment is granted. Defendant Putnam's CPLR 3212 motion for summary judgment is granted in part and denied in part. Defendant Putnam's CPLR 3211 (a) (10) motion to dismiss is denied.

#### I. Defendant Catlin's CPLR 3212 Motion

Catlin moves under CPLR 3212 for summary judgment to dismiss all claims and cross-claims against Catlin on the ground that Catlin is entitled to judgment as a matter of law.

Catlin's CPLR 3212 motion to dismiss is granted. The damages plaintiffs seek were caused by faulty workmanship and thus are not covered under the insurance policy. For a court to grant a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact about the claim or claims at issue. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) No dispute exists that direct faulty workmanship caused the damages sought in this action. (Defendant Catlin's Affirmation in Support, Exhibit J; Defendant Catlin's Affidavit of Alan E. Fidellow in Support, at ¶ 10.) The Catlin policy contains a Faulty Workmanship Exclusion and an exception: "[W]e will not pay for loss or damage caused by or resulting from any of the following. . . . But if loss or damage by a Covered Cause of Loss results, we will pay for the loss or damage caused by that Covered Cause of Loss." (Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion, Exhibit 2.)

Plaintiffs argue that because of this exception, the damages should be covered under the policy's water-damage coverage. The Catlin policy provides coverage for water damage as a covered loss. The only type of water damage that is excluded is "flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven by wind or not." (Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion, Exhibit 2.)

No coverage exists when the causing loss is directly related to the original excluded risk "where a property insurance policy contains an exclusion with an exception for ensuing loss, courts have sought to assure that the exception does not supersede the exclusion by disallowing coverage for ensuing loss directly related to the original excluded risk." (*Narob Dev. Corp. v Ins. Co. of N. Am.*, 219 AD2d 454, 454 [1st Dept 1995].) The damages sought in this action were caused by faulty workmanship and are therefore not covered under the Catlin policy.

Defendant's CPLR 3212 motion to dismiss is also granted, in the alternative, because no prompt notice of the loss or damage was given to Catlin. No dispute exists that the Commercial

Inland Marine Conditions of the Catlin policy requires the insured to give prompt notice of the loss or damage. (Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion, Exhibit 2, Commercial Inland Marine Conditions, Loss Conditions C.2.) Plaintiffs were aware as early as January 2011 that the water leaks were causing property damage at the project. (Defendant Catlin's Affirmation in Support, Exhibit J.) Catlin was notified about the damages about 11 months later, on December 19, 2011. (Defendant Catlin's Affirmation in Support, Exhibit W.) No coverage exists when a first-party property insurance policy requires an insured to provide prompt notice of a loss and the insured fails to provide prompt notice. (*US Pack Network Corp. v Travelers Prop. Cas.*, 23 AD3d 299, 300 [1st Dept 2005].)

Plaintiffs argue that Catlin was not prejudiced by the late notice and that Catlin was able to conduct a full investigation. (Plaintiffs' Affidavit in Opposition to Defendant Catlin's Motion, at ¶¶ 21-24.) But an insurer need not show prejudice: "[I]t is settled New York law that the notice provision for a primary insurer operates as a condition precedent and that the insurer need not show prejudice to rely on the defense of late notice." (*Unigard Sec. Ins. Co., Inc. v N. Riv. Ins. Co.*, 79 NY2d 576, 581 [1992].) Insurance Law § 3420, under which liability insurers must demonstrate prejudice when disclaiming coverage based on late notice, "applies only to claims for death and bodily injury." (*Travelers Indem. Co. v Orange and Rockland Utilities, Inc.*, 73 AD3d 576, 577 [1st Dept 2010].) Thus, no prompt notice of the loss or damage was given to Defendant Catlin. There is no coverage for the damages sought for.

Alternatively, Catlin's CPLR 3212 motion for partial summary judgment to Units 2J, 4C, 5C, 5J, and 5K, which are part of premises covered, is further granted. These units are not under the purview of the covered-property clause of the Catlin policy. Covered property is defined as "foundations of a building or structure . . . while in the course of construction . . . and that coverage terminates after the property is accepted by the purchasers or your interest ceases." (Defendant Catlin's Affirmation of Michael Gauvin in Support, Exhibit S.) Coverage exists for damage only when the insured has an interest in the property and for damage caused during the course of construction.

Plaintiffs argue that "for the few units that were already occupied at the time the water damage occurred, the tenants would have viable claims against Plaintiffs, for the costs to repair the property damage from the water emanated from the broken pipes. As such Plaintiffs had an insurable interest in the preservation of the building and the property, whether or not the units were 'sold' or 'occupied' by the resident owner at the time of the water damage." (Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion, at ¶¶ 41, 42.) The Catlin policy does not, however, confer a duty to defend: "3. We may adjust the losses with the owners of lost or damaged property if other than you. If we pay the owners, such payment will satisfy your claim against us for the owner's property. We will not pay the owners more than their financial interest in the covered property. 4. We may defend you against suits arising from claims of owners of property. We will do this at our expense." (Plaintiffs' Affirmation in Opposition to Defendant Catlin's Motion, Exhibit 2.) The language "may defend" conveys that an insurer retains the discretion whether to defend an insured. It does not create a duty on the part of the insurer to defend.

When a provision includes words as above, courts interpret it exactly what it says. (*see e.g. Omega Demolition Corp. v Travelers Prop. Cas. of Am.*, 2015 WL 3857341, at \*2 [ND Ill

June 19, 2015] [holding that a policy provision stating that an insurer “may elect to defend [the insured] against suits arising from claims of owners of property” does not confer a duty to defend]; *Genaeya Corp. v Harco Nat. Ins. Co.*, 991 A.2d 342, 347 [Pa. Sup Ct. 2010] [holding that the phrase “we may elect to defend you against suits arising from claims of owners of property” does not confer a duty to defend]; *Ohio Cas. Ins. Co. v Carman Cartage Co., Inc.*, 262 Neb 930, 936, 636 NW2d 862, 866 [2001] [holding that a Privilege to Adjust With Owner clause providing that the insurer has “the right to provide a defense for legal proceedings brought against you. . . . the expense of this defense will be at our cost” does not confer a duty to defend.) Units 2J, 4C, 5C, 5J, and 5K are not covered property under the Catlin Policy; thus plaintiffs have no insurable interest in these units.

## II. Defendant Putnam’s CPLR 3212 Motion

Defendant Putnam moves (1) under CPLR 3212 to dismiss the fifth, sixth, and seventh causes of action with prejudice against Putnam on the ground that Putnam is entitled to judgment as a matter of law and (2) under CPLR 3211 (a) (10) to dismiss the action for failure to join a necessary party

Putnam’s CPLR 3212 motion to dismiss the fifth and sixth causes of action for negligence and breach of contract are denied because material issues of fact exist. An insurance agency owes a common-law duty to its client “to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so.” (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). An insurance agency “may be held liable for negligence or breach of contract when a client establishes that a specific request was made for coverage that was not provided in the policy.” (*Finch v Steve Cardell Agency*, 136 AD3d 1198, 1198 [3d Dept 2016].)

Putnam has not made a prima facie showing of entitlement to judgment as a matter of law. A dispute exists about whether Putnam, as an insurance broker, advised plaintiffs that their insurance included coverage for faulty workmanship. Plaintiffs assert that they requested that Putnam obtain insurance coverage for general liability for development construction defects and overall protection of the property, as well as Builder’s Risk Coverage and “soft costs” coverage, while the project was under construction. (Plaintiffs’ Affirmation in Opposition to Defendant Putnam’s Motion, Michael Gaetano Affidavit, at ¶ 8.) Plaintiffs also assert that Putnam assured plaintiffs that they could obtain sufficient coverage. Plaintiffs relied on Putnam’s experience and expertise. (*Id.* at ¶¶ 8, 9.) Plaintiffs further assert that Putnam told plaintiffs that the policies with Catlin and defendant Hartford Fire Insurance Company probably covered the resultant water loss but might not cover the actual replacement of the plumbing fixtures themselves. (Plaintiffs’ Affirmation in Opposition to Defendant Putnam’s Motion, Exhibit 12.) Putnam asserts that it is not aware of an insurance product that covers faulty workmanship and that Putnam did not advise plaintiffs that their insurance included coverage for faulty workmanship. (Defendant Putnam’s Affidavit of John R. Sparano in Support, ¶ 5.) Thus, material issues of fact require a trial relating to whether Putnam, as an insurance broker, advised plaintiffs that their insurance included coverage for faulty workmanship.

Putnam’s CPLR 3212 motion to dismiss the seventh cause of action for failure timely and properly to notify the insurance companies is granted because the alleged late notice is not an actual cause of the damages sued for. As decided above, the damages were caused by faulty

workmanship and thus are not covered under the insurance policies. No coverage would exist even if Putnam notified an insurance company timely and properly. Putnam's failure timely and properly to notify an insurance company is not an actual cause of the damages plaintiffs sought in this action.

III. Defendant Putnam's CPLR 3211 (a) (10) Motion.

Putnam's CPLR 3211 (a) (10) motion to dismiss the action for failure to join Gateway Condominium Association as a necessary party is denied. All the damages sought in this action were sustained by the named plaintiffs. Under CPLR 1001, "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." The Gateway Condominium Association was the party responsible for damage or destruction caused by fire or other casualty. (Defendant Putnam's Notice of Motion, Exhibit LL, Declaration of Condominium.) As mentioned above, no dispute exists that faulty workmanship caused the damages for which plaintiffs sued. The named plaintiffs sustained all the damages sought in this action; other than plaintiffs no necessary party exists.

ORDERED that defendant Catlin's CPLR 3212 motion is granted. The complaint as to defendant Catlin is hereby dismissed with costs and disbursements to said defendant upon submission of an appropriate bill of costs, and it is further,

ORDERED that counsel for defendant Catlin is directed to serve a copy of this order with notice of entry upon the plaintiffs and the Clerk of the Court, who is directed to enter judgment accordingly, and it is further,

ORDERED that defendant Putnam's CPLR 3212 motion to dismiss the fifth and sixth causes of action for negligence and breach of contract are denied, and it is further,

ORDERED that defendant Putnam's CPLR 3212 motion to dismiss the seventh cause of action for failure timely and properly to notify the insurance companies is granted, and plaintiffs' seventh cause of action is dismissed, and it is further,

ORDERED that counsel for defendant Putnam is directed to serve a copy of this order with notice of entry upon the plaintiffs and the Clerk of the Court, who is directed to dismiss plaintiff's seventh cause of action against defendant Putnam, and it is further,

ORDERED that defendant Putnam's CPLR 3211 (a) (10) motion is denied.

This constitutes the decision and order of the court.

Dated: April 5, 2016

J.S.C.   
**HON. GERALD LBOVITS**  
 J.S.C.