SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 15

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570 SMITH STREET REALTY CORP., GOLD STAR FISH CORP. a/k/a GOLD STAR SMOKED FISH CORP., and INTERNATIONAL GOLD STAR, INC.,

Plaintiffs,

-against-

SENECA INSURANCE COMPANY, INC. and COVERAGE CONCEPTS, INC.,

Defendants.

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Index No. 653296/2014
Motion Sequence Numbers 002, 003, 004 and 005

ORDER AND DECISION

Melissa Crane, J.S.C.,

This order and decision addresses the motions that are assigned sequence numbers 002, 003, 004 and 005 in this action, which involves an insurance coverage dispute.

In the motion assigned sequence number 002 (NYSCEF #142), plaintiffs 570 Smith Street Realty Corp. (Smith Realty), Gold Star Fish Corp. (Gold Star) and International Gold Star, Inc. (International Gold Star, together with Smith Realty and Gold Star, collectively, Plaintiffs) seek an order of the court compelling defendant Seneca Insurance Company (Seneca), the insurer, to comply with Plaintiffs' demand for an appraisal to determine the amount of Plaintiffs' loss. In the motion assigned sequence number 003 (NYSCEF #141), Seneca seeks an order granting partial summary judgment in its favor and dismissing the first, second and third causes of action of the complaint, and declaring that the recovery sought by Plaintiffs is barred by the terms and conditions of the Seneca insurance policy issued to Plaintiffs. In the motion assigned sequence number 004 (NYSCEF #140), defendant Coverage Concepts, Inc. (CCI), the insurance broker, seeks an order declaring that Seneca must afford coverage to Plaintiffs for their damages,

and dismissing Plaintiffs' lawsuit against CCI because it stands in the shoes of Seneca and can rely on Seneca's affirmative defenses. In the motion assigned sequence number 005 (NYSCEF #96), Plaintiffs seek an order dismissing Seneca's tenth affirmative defense asserted in its answer, and granting Plaintiffs partial summary judgment against CCI.

Based upon the reasons stated below, the forms of relief requested in the various motions are granted or denied, as applicable, to the extent set forth herein.

BACKGROUND

The background facts for this action, unless otherwise specified, are based primarily upon the complaint dated October 28, 2014 (NYSCEF #1).

Smith Realty owns two adjoining properties located at 562-570 Smith Street and 250 Lorraine Street in Brooklyn. The properties have an open floor plan whereby they are connected to each other through an interior opening that allows for mutual access. Complaint, ¶¶ 2, 18. During all relevant times, Gold Star and International Gold Star are lessees of Smith Realty, having their principal place of business at 570 Smith Street. *Id.*, ¶¶ 3-8.

Prior to July 2011, Plaintiffs obtained a policy with Max America Insurance Company, that insured the properties in the amount of $2 million, and provided coverage in the event of a flood in the amount of $1 million with a $10,000 deductible (Max Policy). *Id.*, ¶ 16. Through CCI, as a broker, Plaintiffs then procured a policy from Seneca bearing number FTZ1000806 (Policy), to insure the properties in the amount of $2 million, business personal property in the amount of $350,000 and business income in the amount of $1 million, as well as flood insurance coverage in the amount of $1 million with a $25,000 deductible. *Id.*, ¶¶ 13, 15. The initial term of the Policy was July 11, 2011 to July 11, 2012, which was then extended and renewed,

with the effective dates of September 4, 2012 to September 4, 2013. *Id.*, ¶ 14. Prior to issuing the Policy, Seneca's representatives inspected the properties. *Id.*, ¶ 17.

On October 29, 2012, while the Policy was in effect, super storm Sandy struck the New York area and damaged the properties. This resulted in the cessation of Plaintiffs' business operations and the loss of business personal property. *Id.*, ¶ 19. Plaintiffs timely filed a claim seeking reimbursement up to the limits of liability under the Policy. *Id.*, ¶ 21. According to Plaintiffs, even though they have "satisfied all conditions precedent" under the Policy, as of the date of the complaint, Seneca only issued a reimbursement payment in the amount of $35,883.08. *Id.*, ¶ 22. Plaintiffs acknowledge that Seneca made an additional payment on December 20, 2014, in the amount of $33,015.00 (NYSCEF #97, ¶ 16).

The complaint asserts five causes of action. The first cause of action (breach of contract), is for Seneca's failure to indemnify Smith Realty's unreimbursed loss in the amount of $1,850,149.81. *Id.*, ¶¶ 23-31. The second cause of action (breach of contract), is for Seneca's failure to indemnify International Gold Star's business personal property loss in the amount of $25,866.76. *Id.*, ¶¶ 32-40. The third cause of action (breach of contract), is for Seneca's failure to indemnify Gold Star's business personal property loss in the amount of $155,964.05. *Id.*, ¶¶ 41-49. Embedded within the first, second and third causes of action, the complaint also alleges that Seneca's repeated delays in settling and indemnifying Plaintiffs' losses constituted a breach of the implied covenant of good faith and fair dealing. The fourth cause of action (reformation), seeks to reform the Policy to provide coverage for both properties, rather than for the property located at the 570 Smith Street address only, because Seneca "mis-described" the property addresses in the Policy. *Id.*, ¶¶ 50-55. The fifth cause of action (negligence),

asserted by Smith Realty against CCI, is for the broker's failure to obtain proper insurance coverage for the properties even though Smith Realty instructed it to duplicate all "existing coverages under the Max Policy." *Id.*, ¶¶ 56-69.

ANALYSIS

Motion Sequence Number 002

In this motion, Plaintiffs seek an order compelling Seneca to comply with their demand for an appraisal, pursuant to the terms of the Policy, which provide a mechanism allowing "the parties to determine the amount of loss, irrespective of other issues." Plaintiffs brief (NYSCEF #154) at 1; a copy of the Policy is annexed as exhibit C (NYSCEF #146) to the motion. As an initial matter, Plaintiffs note that in a conference call with the parties on April 23, 2018, which was held in light of Seneca's objection that Plaintiffs' demand is sought months after the close of discovery, this court directed Plaintiffs to file this motion to "determine the quantum of damages Plaintiffs have suffered as a result of Superstorm Sandy." Plaintiffs brief at 4. Again anticipating Seneca's contention that this motion is untimely because the appraisal demand is sought after their filing of the Note of Issue on January 24, 2018, Plaintiffs argue that applicable case law holds that "elapsed time does not in itself make a demand unreasonable," particularly where as here, the insurance policy does not specify a time limit, and the court is to determine whether the appraisal demand is "exercised within a reasonable time." *Id.* at 5-8 (citing caselaw, and referencing appraisal provision of Policy at 49). Plaintiffs also argue that the "simple passage of time does not constitute waiver of the contractual right to appraisal." They also assert the ultimate test is whether "appraisal is impossible or impractical or that defendant has thwarted the possibility of having an appraisal performed." *Id.* at 8 (citing caselaw).

Both parties agree that the law for determining the reasonableness of the timing for an appraisal demand involves a three-factor analysis: (1) whether the appraisal sought is impractical or impossible; (2) whether the parties engaged in good-faith negotiations over loss valuation prior to the demand; and (3) whether an appraisal is desirable or necessary now. Plaintiffs brief (NYSCEF #154) at 7 and Seneca opposition (NYSCEF #156) at 11; both citing *SR Intl.. Bus. Ins. Co. v World Trade Ctr. Props., LLC*, 2004 WL 2979790 (SD NY 2004).

An analysis of the first factor reveals: the date of loss was more than six years ago; discovery was closed in January 2018 when Plaintiffs filed a Note of Issue and Certificate of Readiness; and there has been replacement and repair of Plaintiffs' equipment and property since the date of loss. Thus, a lengthy time period has elapsed, which makes the current appraisal demand "impractical or impossible." An examination of the second and third factors reveals the following: the parties engaged in negotiations during the claim investigation process, until Plaintiffs commenced this action before the conclusion of that process; Seneca made reimbursement payments to Plaintiffs for the losses after its investigation; negotiations ceased due to huge disparities in the respective experts' coverage and damage assessments; and Plaintiffs' expert passed away in 2014, but they took no action to seek an appraisal until this demand. Therefore, the facts reflect an appraisal is not desirable or necessary now, particularly where the parties hold divergent views in coverage and damage assessments.

Plaintiffs also argue that they did not waive their right to an appraisal under the Policy, because waiver is the "intentional relinquishment of a known right" and a doctrine that "should not be lightly presumed." Plaintiffs brief at 7-8 (citing cases). However, they failed to sustain their burden to establish facts to support their allegation that Seneca "thwarted the possibility of

having an appraisal performed."

Notably, Plaintiffs agree with Seneca's position that an appraisal is inappropriate where there is a dispute regarding the amount of damages and the coverage for such damages. Plaintiffs reply (NYSCEF #224) at 4. Yet, they argue that they were unable to demand an appraisal earlier because Seneca initially took the position that insurance coverage was limited only to the property at 570 Smith Street, rather than for all properties. *Id.* at 1, 4. This argument is unpersuasive because Plaintiffs were not precluded from seeking an earlier appraisal to support their alleged claim loss of "well in excess of the first $500,000 of coverage" (Plaintiffs reply at 4), as well as for a judicial determination of the damage and coverage issues, *before* they filed the Note of Issue in January 2018, which ended discovery in this action.

It is also noteworthy that Plaintiffs' delay in seeking judicial relief was reiterated by Seneca's counsel at oral argument held on September 6, 2018: "I want to remind the Court, I have the chronology here. The appraisal [demand] is only after your Honor's ruling that [Plaintiffs] could not submit that late evidence of the $1.8 million, then we get this request for appraisal after [the] Note of Issue." Hearing transcript at 37. Based upon the foregoing, the Court denies Plaintiff's request in motion sequence number 002, to compel Seneca to comply with an appraisal demand.

Motion Sequence Number 003

In this motion, Seneca seeks partial summary judgment dismissing the first, second and third causes of action of the complaint (breach of contract as well as breach of the implied covenant of good faith and fair dealing), and a declaration that Plaintiffs are barred from recovery against Seneca based upon the terms and conditions of the Policy. Plaintiffs and CCI

all oppose this motion.

Plaintiffs' complaint does not identify which provision of the Policy Seneca breached. It merely alleges that Seneca's "failure to completely indemnify" them for their losses "constitutes a breach of contract." Complaint, ¶ 26. In contrast and in support of the motion, Seneca points to the "Other Insurance" provision in the Flood Coverage Endorsement of the Policy. This provision states in relevant part:

> "[i]f the loss is covered under a National Flood Insurance Program (NFIP) policy, or if the property is eligible to be written under an NFIP policy but there is no such policy in effect, then we will pay only for the amount of loss in excess of the maximum limit that can be insured under that policy." Flood Coverage Endorsement, ¶ I (titled "Other Insurance"). The Other Insurance provision further states that it applies "whether or not the maximum NFIP limit was obtained or maintained, and whether or not you can collect on the NFIP policy." *Id.*

Based on this provision, Seneca asserts that the Policy clearly states that coverage for flood damage is only excess to the coverage available to the insured under the NFIP, whether or not the insured purchased a NFIP policy or collected on the policy, so long as the property is NFIP eligible.

It is undisputed that the subject properties are located in a flood zone, are NFIP eligible, and the maximum NFIP coverage is $500,000. Seneca also points out, inter alia, that CCI "did not seek or obtain NFIP coverage for Plaintiffs' properties, or even investigate whether or not the properties … would be eligible for NFIP coverage." Seneca brief (NYSCEF #116) at 14; referencing deposition transcript of Mr. Flannery, a CCI representative (NYSCEF #122) at 137-

138. Seneca further points out that a representative of Plaintiffs testified that "she was unaware of the [NFIP] program until after Hurricane Sandy;" that she understood "some insurance policies require NFIP participation in order to be the primary before any payout is made;" that "she did not have coverage in the Seneca policy;" and that the NFIP issue "was not brought up by [CCI] but by the public adjustor, nonparty Ralph Sampson." Seneca brief at 9; referencing deposition transcript of Ms. Pincow (NYSCEF #121) at 201-203. Relying on the Other Insurance provision and the foregoing deposition testimonies, Seneca argues that because flood coverage under the Policy is considered excess and not primary with respect to the first $500,000 of claimed loss, and because Plaintiffs' claims did not exceed the NFIP maximum coverage limit, even though Seneca paid Plaintiffs' claimed losses, summary judgment should be granted in favor of Seneca dismissing the breach of contract claims. *Id.* at 16.

In opposition, Plaintiffs and CCI argue that there is competing language in the Policy which renders the Other Insurance provision ambiguous, thus precluding a grant of summary judgment in favor of Seneca. More specifically, they argue that the Policy's Flood Coverage Schedule states that the annual flood coverage limit is $1 million with a $25,000 deductible, and that in analyzing Plaintiffs' claimed losses, Seneca's claim adjusters (Samson, Patterson and Crapanzano) applied only the $25,000 deductible (not the $500,000 "super deductible") and approved two payments to Plaintiffs in the amounts of $25,866 and $33,000. Plaintiffs opposition (NYSCEF #187) at 9-10; CCI opposition (NYSCEF #170) at 2-7; referencing deposition transcripts of Seneca's adjusters. Because of the purported ambiguity in the Policy – having a $25,000 and the so-called $500,000 "super deductible" – Plaintiffs assert that the ambiguity must be "construed against the insurer, particularly when [it is] found in an

exclusionary clause." Plaintiffs opposition at 9-10 (citing caselaw).

The foregoing arguments are unpersuasive. It is well established that an insurance policy is subject to the "principles of contract interpretation," and that "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *The Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321 (2017) (internal quotation marks and citations omitted). Notably, neither Plaintiffs nor CCI argue that the Other Insurance provision of the Policy (on its own) is ambiguous, and this court also discerns no ambiguity. Thus, based on the principles of contract interpretation, the flood coverage under the Policy, as reflected in the Other Insurance provision, is excess with respect to NFIP-eligible properties. Likewise, the allegation that Seneca has presented "two deductibles" ($25,000 and $500,000) in the Policy lacks foundational support. The plain language of the Other Insurance provision does not impose an additional deductible of $500,000, as it simply delineates a limitation of coverage for properties that are eligible for a NFIP policy, which affords a maximum of $500,000 for flood coverage, regardless of whether the insured procures such.

CCI argues in the alternative that, even if the Policy is an excess policy because of the Other Insurance provision, Seneca's handling of Plaintiffs' claims (by applying the $25,000 deductible only) indicated that Seneca "waived its right to rely upon the Other Insurance Clause by directly acting and operating as a primary carrier" (CCI opposition at 13), is equally without merit. The action of Seneca's claim adjusters in attempting to process and pay the "onslaught" of post-superstorm Sandy claims, including those of Plaintiffs, "correct or not, did not create a waiver of the Policy's terms and conditions." Seneca reply (NYSCEF #233) at 5. Also

persuasive are the statements of Seneca's adjusters, such as Jude Samson, that Seneca paid Plaintiffs before Seneca was aware of the Other Insurance provision that rendered the Policy excess with regard to flood coverage. Samson affidavit (NYSCEF #124), ¶ 22. Importantly, the parties do not dispute that it is black-letter law that "[w]aiver is an intentional relinquishment of a known right and should not be lightly presumed." *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 968 (1988). Further, the courts have held that communication or settlement negotiation between an insured and the insurer is insufficient to prove waiver or estoppel, and partial payment on claims does not constitute a waiver or estoppel against the insurer. *Id.* at 968; *Botach Mgt. Group. v Gurash*, 138 AD3d 771 (2d Dept 2016); *New Medico Assoc., Inc. v Empire Blue Cross & Blue Shield,* 267 AD2d 757 (3d Dept 1999). Hence, the payments Seneca made to Plaintiffs, in error, cannot be construed as evidence that Seneca failed to reserve its right to contest Plaintiffs' claims, particularly where the payments were made before Seneca fully completed its investigation at the time Plaintiffs commenced this action. Moreover, in response to Plaintiffs' complaint, Seneca was entitled to raise various affirmative defenses in its answer, including the defense of limitation with respect to flood coverage under the Policy based upon the Other Insurance provision.

Plaintiffs also argue that the Policy underwriter, Carol Muller, could not explain, during deposition, why the premiums for earthquake coverage and flood coverage "would be identical if flood coverage was limited only to damage over and above the first $500,000." Plaintiffs opposition at 7-10. During oral argument, Plaintiffs' counsel elaborated that Muller could not explain why Seneca charged the same $500 premium for earthquake and flood insurance, but the earthquake (as opposed to flood) coverage is not subject to the $500,000 limitation of the Other

Insurance provision. Transcript at 12. This argument is unpersuasive. Based on the United States Geological Survey, which studies seismic conditions nationally, strong earthquakes are "uncommon" in New York City, and according to well-documented historical data, "only two damaging earthquakes with a magnitude of 5.0 or greater have occurred in New York state." https://www1.nyc.gov/assets/em/downloads/pdf/hazard_mitigation/nycs_risk_landscape_chapter_4.8_earthquakes.pdf. On the other hand, unlike the risk of earthquakes, "New York City is highly vulnerable to flooding" because of its "520 miles of waterfront and many low-lying neighborhoods," and due to climate change, "flood risks are projected to increase throughout the city over time, given the city's diverse topography, especially along [coastal neighborhoods]." https://www.arcgis.com/apps/webappviewer/index.html?id=1c37d271fba14163bbb520517153d6d5 (NYC Planning, NYC Flood Hazard Mapper). In addition, it is undisputed that Plaintiffs' properties are located in the coastal flood hazard zone. This readily explains why the flood coverage under the Policy is subject to the $500,000 NFIP limitation, while the earthquake coverage is not, even though the same $500 premium is charged for both risks.

Accordingly, because there is no ambiguity in the Other Insurance provision, the "two deductibles" argument raised by Plaintiff and CCI is without merit. The "waiver" argument raised in the opposition parties, based on Seneca's past payments made to Plaintiffs, also has no merit because Plaintiffs failed to demonstrate that Seneca intentionally relinquished a known right. Therefore, the court grants summary judgment in favor of Seneca dismissing the first, second and third causes of action (breach of contract) of the complaint.

Plaintiffs also allege, in effect, that even if Seneca did not breach the terms and conditions of the Policy, it breached the implied covenant of good faith and fair dealing that is

inherent in every contract under New York law. Plaintiffs opposition at 11-12, citing caselaw, particularly *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194 (2008) (implicit in the contracts of insurance is a covenant of good faith and fair dealing, such that a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims [internal citations and quotation marks omitted]). More specifically, Plaintiffs allege that Seneca's "failure to timely adjust" and "repeated delays in adjusting" their claims constituted a breach of the implied covenant under *Bi-Economy*. That case ruled, inter alia, that an insurer's excessive delay or improper denial of an insured's claim entitled the insured to additional damages, such as loss of benefits and/or consequential damages, even though the underlying policy expressly excluded coverage for consequential damages. Plaintiffs opposition at 12-13 (citing *Bi-Economy*, 10 NY3d at 196).

Plaintiffs' reliance on *Bi-Economy* is misplaced because the facts in this action are distinguishable. First, in *Bi-Economy*, the insured failed to adjust promptly and pay the loss. This resulted in the collapse of the insured's business. 10 NY3d at 195. Here, Plaintiffs were able to resume business operations without any loss of income. Seneca reply at 5, citing Samson affidavit, ¶¶ 13-14, exhibits D and I (NYSCEF #124, 128 and 133). Seneca also notes that, unlike in *Bi-Economy*, Plaintiffs have recovered funds not just under the Policy, but also from the Starr Indemnity Marine policy, that paid Plaintiffs "hundreds and thousands of dollars" for loss of "products, supplies and some equipment." *Id.* at 5-6, referencing exhibits E and H (NYSCEF #129 and 132). Seneca also contends that, unlike in *Bi-Economy*, the alleged delay here was "not solely" due to Seneca because "Plaintiffs shoulder blame by not providing Seneca with requested documents and proof of damages for many [six] months after Seneca made its

investigation requests." Plaintiffs' adjuster, Ralph Sampson, who "demanded more time to produce the requested documentation." *Id.* at 5, referencing Samson affidavit and exhibit E. This six-month delay should be contrasted with the two-month delay Plaintiffs alleged that arose due to "the lack of responsiveness" from Seneca's adjusters and expert. Plaintiffs opposition at 8-9, referencing Cohen affirmation, exhibits L and M (NYSCEF #173, 185 and 186). Indeed, the foregoing contention is contained in Seneca's fourth affirmative defense in its answer to the complaint (NYSCEF #118, ¶ 74; Plaintiffs failed to timely exhibit evidence or proof of loss). Therefore, Plaintiffs' allegation that Seneca breached the implied covenant of good faith and fair dealing by failing to timely adjust and pay their claimed loss is unpersuasive.

Significantly, in *Bi-Economy*, the Court of Appeals noted that, "the party breaching the contract is liable for those risks foreseen," and the non-breaching party may recover special or consequential damages that do not directly flow from the breach only in limited circumstances. 10 NY3d at 192-193 (internal citations and quotation marks omitted). Here, as explained above, Seneca did not breach the contract. Accordingly, under *Bi-Economy*, Plaintiffs are not entitled to recover special or consequential damages.

Motion Sequence Number 004

By this motion, CCI, the insurance broker, seeks an order of this court, pursuant to CPLR 3212, declaring that Seneca must afford coverage to Plaintiffs for their claimed loss under the Policy. CCI also requests, that if this court determines that Seneca can rely on its affirmative defenses to bar Plaintiffs' recovery, CCI, as broker, can step into Seneca's shoes and rely on these defenses.

In support of its motion, CCI argues, for the same reason it articulated in connection with

its opposition to Seneca's summary judgment motion (sequence number 002), that the Policy language is ambiguous because it purportedly includes "two deductibles applicable to claims resulting from [Plaintiffs'] flood loss," and the ambiguity should be construed against Seneca, as the drafter of the policy language. CCI brief (NYSCEF #95) at 3-8. CCI also argues that Seneca has waived its right to rely upon the Other Insurance provision in the Policy, or pursuant to the estoppel doctrine be estopped from relying upon the Other Insurance provision, because Seneca has paid Plaintiffs' claims by applying only the $25,000 deductible, rather than $500,000 deductible or coverage limitation of a NFIP policy. *Id.* at 8-12 and 13-15. For the reasons articulated above in the determination of motion sequence 002, these arguments have no merit.

In addition, CCI argues that Seneca owes coverage to Plaintiffs because it failed to issue a "conditional renewal notice" to Plaintiffs in accordance with Insurance Law § 3426. This provision precludes an insurer from changing the terms of an existing policy upon renewal, unless it timely provides written notice to the insured indicating its intention to condition renewal upon a change or reduction in coverage or the addition of an exclusion. *Id.* at 15-18 (citing caselaw at 18-19). Specifically, CCI alleges that the terms for flood coverage under the renewal 2012-2013 Policy were "changed or modified," as compared with the initial 2011-2012 Policy, in that the renewal policy did not "properly notify" Plaintiffs that "policy form BE-23 would be changed or altered with the deletion of any reference to flood coverage, including the applicable deductible amount for losses resulting from blood claims being $25,000." *Id.* at 20; referencing exhibit Q (initial policy and exhibit U (renewal policy) (NYSCEF #87 and #91). CCI argues that Seneca's non-compliance with the statute mandates this court to issue an order requiring Seneca to afford coverage to Plaintiffs for their claimed loss. *Id.* at 21.

CCI's argument is unavailing. First, CCI does not refute the applicable law that "if there is no reduction or change in coverage, there is no requirement that the insurer comply with Insurance Law § 3426." *Farmbrew Realty Corp. v Tower Ins. Co. of N.Y.*, 289 AD2d 284, 284 (2d Dept 2001). Seneca argues that, because there was no reduction or change in coverage under the renewal policy, there was no need for Seneca to give the statutory notice to Plaintiffs. Seneca also argues that CCI "erroneously claims" that Seneca violated the statute by alleging that the 2011 BE 23 form mentioned both flood and earthquake risks while the 2012 BE 23 form only mentioned earthquake risk. Seneca opposition at 15. Seneca explains that CCI failed to mention that the renewal policy contains a "detailed Flood Coverage Schedule that confirmed the $25,000 deductible" with a $1,000,000 coverage limit, as well as the Flood Coverage Endorsement and the Other Insurance provision. These provisions were always present in the policy. *Id.* at 15-16. Because CCI does not dispute that coverage under the initial and renewal policies was the same, it was unnecessary for Seneca to provide a statutory notice to Plaintiffs under Insurance Law § 3426.

In an attempt to avoid liability to Plaintiffs, CCI argues that, as a broker, it "stands in the shoes of" the insurer and can rely upon the coverage defenses available to Seneca, thus entitling CCI to seek dismissal of Plaintiffs' lawsuit against it, based on the same defenses. CCI brief at 21-23 (citing cases). Notably, these cases stand for the proposition that the broker may not be held liable for the insured's loss that fell outside the ambit of coverage if the policy was "properly procured," and only in such case would the broker "stand in the shoes of the insurer as concerns liability to the insured." *Chase Manhattan Bank, N.A. v Lloyds*, 258 AD2d 1, 4 (1st Dept 1999). Here, it is a disputed question of material fact as to whether CCI properly

procured. This precludes summary judgment in CCI's favor. Further, Seneca also contends that it "never authorized" CCI to act as its agent, and that it was CCI who failed to "carefully review the Seneca policy prior to binding that led to Plaintiffs' dissatisfaction with the flood coverage," including the Other Insurance provision. Seneca opposition at 16-17. CCI does not dispute that the law requires an insurance broker to exercise reasonable care when placing insurance for a customer, and if the broker is unable to make a placement, it must timely notify the latter to afford it the opportunity to procure insurance elsewhere. *Baseball Off. of the Commr. v March & McLennan, Inc.*, 295 AD2d 73, 79-80 (1st Dept 2003). The law also states that an insured should "look to the expertise of its broker with respect to insurance matters." *American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 736 (2012).

Based upon the foregoing, and because CCI failed to respond to Seneca's opposition arguments, CCI's request for summary judgment relief premised on the "shoe stepping" proposition of law is denied.[1]

Motion Sequence Number 005

In this motion, Plaintiffs seek, pursuant to CPLR 3211 (b), an order dismissing Seneca's tenth affirmative defense. In the alternative, if this court holds that Seneca's tenth affirmative defense eliminates its obligation to pay Plaintiffs for their flood damage, they seek an order, pursuant to CPLR 3212 (b), granting partial summary judgment in their favor and against CCI, as a result of CCI's alleged failure to duplicate Plaintiffs' prior flood insurance coverage and/or

1 In its reply, CCI argues that Plaintiffs waived their right to oppose its motion for summary judgment seeking dismissal of the complaint against it because "Plaintiffs have yet to file any opposition papers." CCI reply, ¶ 5. While it is true that Plaintiffs did not file an opposition to CCI's motion, they request entry of a partial summary judgment against CCI in motion sequence number 005, an analysis of which is set forth below.

to procure NFIP flood insurance.

In its answer, Seneca's tenth affirmative defense states that the Other Insurance provision "excludes and/or limits coverage for loss as a result of flood and this action is accordingly barred and/or is subject to dismissal in whole or part." Answer, ¶¶ 84-85. Despite the clarity of the language in the Other Insurance provision, Plaintiffs argue that the "competing deductibles" (i.e. $25,000 deductible and $500,000 NFIP "super deductible") render the provision ambiguous and should be construed against Seneca. Plaintiffs brief (NYSCEF #114) at 10. As explained earlier, this argument has no merit. Next, Plaintiffs assert that this defense should be dismissed because "the parties *mutually intended* that the only setoff for payments under the subject Policy was the $25,000 flood deductible." *Id.* at 11 (emphasis added). They also assert that Seneca's underwriter and claim adjusters understood that the Policy contains only a single $25,000 deductible, and approved payments to Plaintiffs for the flood loss by applying only the $25,000 deductible. *Id.* at 11-12. They further assert that "a court may reform an unambiguous policy if, due to a *mutual mistake,* the writing does not reflect the *mutual intention* of the parties at the time of the agreement." *Id.* at 12 (quoting caselaw; emphasis added).

Plaintiffs' allegation of a "mutual mistake" or "mutual intention" is unsupported by the record, and they have not cited to any deposition transcript or written statement by Seneca's representatives that admitted a mutual mistake or mutual intention. Indeed, in their affidavits, Seneca's claims representatives, such as Greg Crapanzano and Jude Samson, stated that Seneca's payments to Plaintiffs were made "without awareness of the Other Insurance clause," and that these payments were made without waiving Seneca's right to assert defenses against Plaintiffs' claims. Crapazano affidavit (NYSCEF #207), ¶¶ 15-16; Samson affidavit (NYSCEF #124), ¶ 22.

While the payments Seneca made to Plaintiffs were in error, they are not evidence of a "mutual mistake." Such payments apparently reflected Seneca's attempt to process and pay the numerous claims filed by its insureds, including Plaintiffs, in the aftermaths of the monumental super storm. Further, any argument that Seneca's underwriter committed a "scrivener's error" in drafting the Policy language is also without merit. The law is well-settled that the burden on a party seeking contract reformation based upon an alleged mutual mistake is heightened, because the party must offer "clear, positive and convincing evidence." *Amend v Hurley,* 293 NY 587 (1944). Here, neither Seneca nor its underwriter has ever indicated that the Policy language, including the Other Insurance provision, was written in error. Therefore, Plaintiffs' assertion that the unambiguous Other Insurance provision should somehow be reformed now to reflect an alleged "mutual mistake" or "scrivener's error" is unavailing.[2]

Plaintiff's alternative request for summary judgement against CCI based on its alleged failure or negligence (fifth cause of action of the complaint) to duplicate all insurance coverages under the prior Max Policy and its failure to discuss with Plaintiffs about obtaining NFIP flood coverage for the properties fares no better. CCI argues that, even if it failed to discharge its duty to Plaintiffs, unless its actions or inactions were the "proximate cause" of the damages suffered by Plaintiffs, it cannot be liable. CCI opposition (NYSCEF #171), ¶ 23 (citing various caselaw). Specifically, CCI argues that, because it has "absolutely nothing to do with" or did not play "any role in connection with Plaintiffs' ongoing dispute with Seneca" relative to the

2 It is noteworthy that the complaint does not plead a cause of action for reformation of the Policy based on mutual mistake or scrivener's error. Indeed, the fourth cause of action in the complaint seeks "reformation" of the Policy to provide insurance coverage for all properties, rather than for the 570 Smith Street property only. That cause of action is moot or academic, because the parties seemed to have agreed that the Policy does provide coverage for all properties, and they have not mentioned or briefed this cause of action in their papers.

valuation or settlement of claimed damages, which is the central issue in this litigation, "Plaintiffs should not have the ability to seek recovery from [CCI] simply resulting from Plaintiffs being dissatisfied with the amounts that Seneca is willing to pay under the policy." *Id.*, ¶¶ 25 and 36. Moreover, CCI argues that absent a specific request for coverage not already in a client's existing insurance policy, an insurance broker "has no duty to advise, guide or direct a client to obtain additional coverage," unless a special relationship exists between the broker and the client. *Id.*, ¶¶ 41-42; citing, inter alia, *Murphy v Kuhn*, 90 NY2d 266 (1997); *Freundlich v Pacific Indem. Co.*, 137 AD3d 967 (2d Dept 2016). While CCI concedes that Plaintiffs had requested CCI to obtain replacement coverage similar to the Max Policy, CCI told Plaintiffs it was unable to obtain identical coverage, but "Plaintiffs nevertheless elected to proceed with the procurement of insurance with Seneca" and "were interested in obtaining similar coverages, but with a lower premium cost." *Id.*, ¶¶ 45-47. CCI also asserts that the entire Max Policy was not provided to it, and that Plaintiffs only gave the declaration pages of the Max Policy. *Id.*, ¶ 48. Finally, CCI argues that it had "no obligation" to advise Plaintiffs regarding the need to procure NFIP flood coverage because Plaintiffs did not make a specific request for such coverage, and that there was "no special relationship" between the parties that would "warrant a heighted level of duty" on the part of CCI to advise Plaintiffs regarding an NFIP policy. *Id.*, ¶ ¶ 51-52; citing *L.C.E.L. Collectibles, Inc. v American Ins. Co.*, 228 AD2d 196 (1st Dept 1996).

In their reply to CCI's opposition, Plaintiffs contend, without citing any caselaw in support of their position, that "CCI breached its fundamental duty to Plaintiffs when it not only failed to obtain 'equal or better' insurance, but utterly failed to inquire about procuring flood

insurance from [NFIP] or reviewing the Subject Policy to determine whether the Flood Insurance only contained a $25,000 deductible." Plaintiffs' reply (NYSCEF #228) at 11.

Plaintiffs' contention is unavailing. As noted by CCI, in the *Murphy* case, the Court of Appeals set forth the law governing disputes where there is an allegation that the broker failed to advise the insured of possible additional insurance coverage needs. *Murphy*, 90 NY2d at 268. The *Murphy* Court stated that brokers or agents "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage," absent a special relationship between the parties. *Id.* at 271 (citations omitted). The Court also noted that an additional duty to advise exists in "exceptional circumstances," such as: (1) the agent receives compensation for consultation apart from payment of the premiums or commissions; (2) there were discussions regarding coverage issues, with the insured "relying on the expertise of the agent," and (3) "there is a course of dealing over an extended period of time which would have put objectively reasonable agents on notice that their advice was being sought and specially relied on." *Id.* at 272 (citations omitted). *See also Freundlich,* 137 AD3d at 968-969 (broker's motion to dismiss was denied because the complaint specifically alleged that broker was retained to provide insurance brokerage and risk management services, and broker negligently failed to advise plaintiff to obtain worker's compensation insurance after being told that plaintiff hired workers at his home); *L.C.E.L. Collectibles*, 228 AD2d at 197 (plaintiff's request for "best and most comprehensive" coverage did not trigger duty on the part of defendant-broker to determine whether plaintiff's property was near a flood plain or relieve plaintiff of its obligation to read the policy containing an exclusion

for flood loss).

Here, Plaintiffs have not alleged a "special relationship" with CCI. Nor have they pleaded an "exceptional circumstance" that would warrant a higher duty of advisement on CCI's part. Also, they do not dispute CCI's assertion that only the declaration pages of the Max Policy, as opposed to its entirety, were provided to CCI to enable it to undertake a more comprehensive comparation or evaluation of insurance coverage for Plaintiffs' properties. Moreover, Plaintiffs failed to satisfy the legal standard for obtaining summary judgment, as they must establish the cause of action (negligence in this case) sufficiently to warrant the directing of judgment in their favor as a matter of law, and "unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman* v City of New York, 49 NY2d 557, 562 (1980). Therefore, the requested relief of a partial summary judgment against CCI is denied.

CONCLUSION

Based upon all of the foregoing, it is hereby

ORDERED that, with respect to motion sequence number 002, the relief requested by plaintiffs in the motion (demand for an appraisal) is denied; and it is further

ORDERED that, with respect to motion sequence number 003, partial summary judgment in favor of defendant Seneca Insurance Company Inc. (Seneca) is granted, and the first, second and third causes of action of the complaint are dismissed as against Seneca; and it is further

ORDERED that, with respect to motion sequence number 004, the requests by defendant Coverage Concepts Inc. (CCI) for summary judgment declaring that Seneca must afford insurance coverage to plaintiffs, and dismissing plaintiffs' lawsuit against CCI because it

purportedly stands in Seneca's shoes and can rely on Seneca's coverage defenses for the dismissal, are denied; and it is further

ORDERED that, with respect to motion sequence number 005, the requests by plaintiffs to dismiss the tenth affirmative defense asserted by Seneca in its answer, and to grant partial summary judgment in their favor against CCI, are denied.

DATED: 4-4, 2019

J.S.C.
HON. MELISSA A. CRANE
J.S.C.