

**Benevolent & Protective Order of Elks of the United States of Am. v Swiss RE Corp. Solutions Elite Ins. Corp.**

2025 NY Slip Op 34011(U)

October 14, 2025

Supreme Court, New York County

Docket Number: Index No. 651509/2025

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 11M**

*Justice*

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BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF  
THE UNITED STATES OF AMERICA

Plaintiff,

- v -

SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE  
CORPORATION,

Defendant.

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INDEX NO. 651509/2025

MOTION DATE 05/23/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion to dismiss is granted in part.<sup>1</sup>

**Background**

Plaintiff seeks coverage for alleged damage to its property located at 850 Lafayette Street, Cape Coral, Florida which occurred due to a hurricane on or around September 27, 2022.

The relevant insurance policy contract, which was in full force and effect at the time of the alleged damage, contains an “exclusive jurisdiction” clause and a two-year suit limitation condition, which in relevant parts state: “No one may bring a legal action against us [Swiss re] under this Coverage Part unless... [t]he action is brought within 2 years after the date on which the direct physical loss or damage occurred” and “[t]he Laws of the State of New York, without regard to its conflict of laws, rules, that would cause the application of the laws of any other jurisdiction, shall govern the construction and interpretation of this insurance. The parties hereto

<sup>1</sup> The Court would like to thank Geoffrey Shamah for his assistance in this matter.

do irrevocably submit to the exclusive jurisdiction of the Courts of the State of New York and to the extent permitted by law, the parties expressly waive all rights to challenge or otherwise limit such jurisdiction.” NYCEF Doc. # 2 at Page No. 8 of 69 and Page No. 55 of 69.

On March 22, 2024, Plaintiff sued Swiss Re in Case No. 24-CA-002323, Circuit Court, Twentieth Judicial Circuit, Lee County, Florida. There, Plaintiff alleged that Swiss Re breached the Insurance Contract by not paying the full value of the same hurricane-related damage claim at issue here. The complaint was dismissed pursuant to the Exclusive Jurisdiction Clause in the Insurance Contract which expressly requires that any suit be brought in the Courts of the State of New York.

On January 17, 2025, Plaintiff filed action against Defendant in Case No. 1:25-CV-00516 (DEH), United States District Court for the Southern District of New York. By decision on April 8, 2025, the United States District Court for the Southern District of New York, in dismissing the federal action with prejudice to Plaintiff refiling it in any other federal court, instructed that Plaintiff may refile this case in New York State court within fourteen days of the Court’s Order.

Plaintiff filed the present action on March 19, 2025. Notice was served on defendants in or around early April.

### **Discussion**

Pursuant to the terms of the contract, in order for a claim to be timely it must be brought in a Court of the State of New York within two years of the date the damage occurred; here such date would be September 27, 2024. The Florida action would have been timely, being filed on March 22, 2024, however, it was brought in the wrong forum. The SDNY action was already untimely when it was filed on January 17, 2025. The Plaintiff argues that NY CPLR 205 (a) extends the time to commence an action after the termination of an earlier related action, where

both actions involve the same transaction or occurrence or series of transactions or occurrences. Accordingly, they contend, the “deadline” to file should be extended to March 27, 2025 (six months after the September 27, 2024, deadline and two and a half years after the occurrence of the damages). But this is not the case.

First, the tolling of NY CPLR 205(a) does not apply to actions filed out of state.<sup>2</sup> Plaintiff did not file any action in New York, state or federal, that would have been timely by September 27, 2024. Accordingly, they cannot benefit from the six-month extension afforded by 205(a).

Second, even if tolling did apply to out of state actions, it does not “chain” to multiple filings.<sup>3</sup> Accordingly, it is irrelevant that the Florida action commenced within the two-year limitation and the 205(a) extension cannot be benefitted from for all subsequent filings regarding the same transaction.

Lastly, and most importantly, even if tolling was allowed in multiple filings and for out of state filings, Plaintiff’s filing does not fall within the limitation period because it was not served on time. 205(a) not only provides that a claim must be filed within six months but also that service must be effected upon the defendant within the same six-month period. Here, assuming arguendo that the 205(a) extension applies, that would give Plaintiff until March 27, 2025, at the latest, to file in the correct forum of New York *and serve notice upon the Defendant*; notice was not served, however, until April. Therefore, the Plaintiff may not commence a new

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<sup>2</sup> *MRE Technology Solutions LLC v. Smiths Detection, Inc.*, 187 N.Y.S.3d 633, 635 (1st Dep’t 2023) citing *Deadco Petroleum v. Trafigura AG*, 58 N.Y.S.3d 16 (1st Dept. 2017) that “an out-of-state action is not a ‘prior action’ within the meaning of that provision [NY CPLR 205(a)].”

<sup>3</sup> *Ray v. Ray*, 22 F.4th 69, 73–74 (2d Cir. 2021) (applying New York law) “it is unsurprising, then, that both federal and New York courts have consistently described section 205(a) as authorizing a “second” opportunity to file a claim after a “first” or “initial” claim is dismissed on a non-merits final judgment.” The Court held that the statute does not allow litigants to file new actions “in perpetuity.”

action upon the same transaction and the Motion to Dismiss should be granted. While Defendants seeks costs and attorneys' fees for defending this motion due to Plaintiff's breach of the forum selection clause, the Court declines to grant such fees here. Accordingly, it is hereby

ORDERED and ADJUDGED that the motion to dismiss the complaint as untimely is granted, the matter is dismissed, and the Clerk of the Court shall enter judgment accordingly.

  
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10/14/2025  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT  REFERENCE