STATE OF NEW YORK
SUPREME COURT : COUNTY OF CLINTON

CALCOM PROPERTIES, LLC,

Plaintiff,

v.

SECURITY MUTUAL INSURANCE COMPANY,

Defendant.

Index No.: 2019-00020062

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is an insurance breach of contract action in which plaintiff seeks payment of the $65,110.78 balance of the $448,000 limit of its Coverage A—Residence coverage with defendant for the January 5, 2018 fire loss of a five-bedroom, single-family residence in Plattsburgh, New York —rented to upwards of 10 fraternity brothers of the SUNY Plattsburgh chapter of the Pi Kappa Phi fraternity—that plaintiff claims it "replaced" with a multi-parcel, multi-building commercial shopping plaza in Peru, New York.

The outcome of this action comes down to the interpretation and application of one, simple, unambiguous word—replacement. Were the multi-building commercial properties comprising a shopping plaza purchased by plaintiff in 2019 a "replacement" of the insured's single-family, five-bedroom residential rental property that burned in 2018? Security Mutual respectfully submits they were not.

For that reason and based on the undisputed and indisputable material facts found in the record on this motion, this Court may find, as a matter of law, that Security Mutual owes no additional payment to plaintiff and grant summary judgment to it, dismissing the complaint in its entirety and with prejudice.

FACTUAL BACKGROUND

The relevant factual background and procedural history of this action are set forth in the accompanying Statement of Material Facts, attorney affirmation of Roy A. Mura, Esq., dated September 15, 2021 with attached exhibits (the "Mura Affirmation"), and the affidavit of Security Mutual Claims Supervisor Donna Ingalls with attached exhibits (the "Ingalls Affidavit"). The Court's attention is directed to those papers for a review of the relevant facts.

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STANDARD OF REVIEW

CPLR Rule 3212(b) requires a party moving for summary judgment to "recite all the material facts" of the case and demonstrate that "there is no defense to the cause of action or that the cause of action or defense has no merit." *CPLR Rule 3212(b)*. The Court must grant the motion "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party." *Id.* The Court must deny the motion, however, only "if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

The proponent of a motion for summary judgment 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 from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once a party has established a prima facie basis for relief, the burden shifts to the party opposing summary judgment to demonstrate the need for a trial. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "In opposing a motion for summary judgment, it is incumbent upon a nonmoving party to come forward with matters of an evidentiary nature to demonstrate the presence of triable issues. General averments do not suffice." *Bytner v. Capital Newspaper, Div. of the Hearst Corp.*, 112 AD 2d 666, 668 (3d Dept 1985). "Issues must be genuine and substantial to require trial and to warrant denial of a motion for summary judgment." *Id.*

ARGUMENT

I. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT BECAUSE A MULTI-PARCEL, MULTI-BUILDING COMMERICAL SHOPPING PLAZA DOES NOT "REPLACE" A SINGLE-FAMILY RESIDENTIAL PROPERTY

In Google images (which this Court is asked to take judicial notice of pursuant to the recent amendment of CPLR Rule 4511), the sole issue on this motion can be summarized as:

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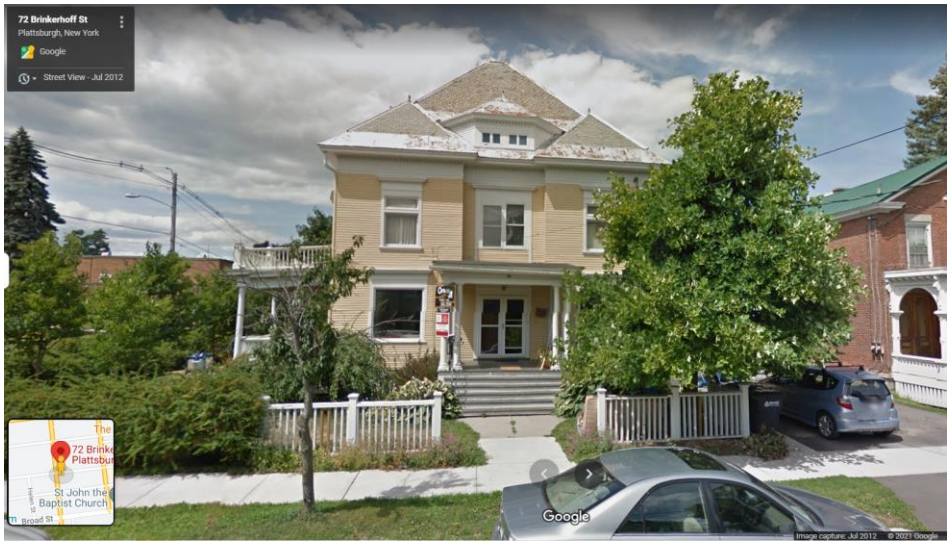
Can it reasonably be argued or said that these multi-parcel, multi-building commercial properties comprising a Tops Friendly Market® store, a wine and liquor store, a hardware store, a Kinney Drugs store, and plaintiff's automatic car wash…

…***replace*** this five-bedroom, single-family residence?



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A. The Policy Application

On August 2, 2012, Security Mutual received a singed Landlords Package Application from the plaintiff requesting issuance of a rental dwelling policy (Ingalls Affidavit, Exhibit B). The application checked the "Tenant Occupied" box and listed "Nick Callioras" as the "Tenants [*sic*] Names". The application also listed "1" for "No. of families".

B. The Policy Language

The outcome of this action turns on the interpretation and application of one sentence found in the Replacement Cost Provision of plaintiff's rental dwelling policy with Security Mutual:

> 4. When the cost to repair or replace exceeds the lesser of $1,000 or 5 percent of the applicable limit of liability on the damaged building, ***we*** are not liable for more than the actual cash value of the loss until actual repair or replacement is completed. (Bold and italics in original; underlining added.)

There is no dispute that the cost to repair or replace the insured residence exceeded $1,000 (which is less than $24,400—5% of the policy's residence coverage limit of $448,000). There also is no dispute that Security Mutual has paid in full the actual cash value ("ACV") loss of the insured building. Consequently, and in accordance with the above-quoted policy language, it cannot be said that Security Mutual owes any more money to plaintiff unless a multi-parcel, multi-building commercial shopping plaza can be said to constitute the "replacement" of a five-bedroom, single-family residence.

C. The Loss

On January 5, 2018, while its 10 fraternity brother residents reportedly were home on winter break, the five-bedroom, three-story, single-family residence located at 72 Brinkerhoff Street in Plattsburgh, New York, caught fire and burned:

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Kayla Breen and Lois Clermont, *Fire destroys historic downtown Plattsburgh residence*, Press-Republican, Jan. 5, 2018 (photo credit Kayla Breen/Staff Photo).

D. The Plaintiff's Claims

Following the fire, plaintiff made claims to Security Mutual for payment under the subject policy's Coverage A—Residence and Coverage D—Additional Living Expense and Loss of Rent coverages. When Security Mutual did not pay what plaintiff thought was enough for the building's ACV loss and loss of rents, plaintiff demanded an appraisal of its claims, which Security Mutual agreed to.

E. The Appraisal Award & Security Mutual's Full ACV Payment

On July 2, 2019, the umpire and plaintiff's appraiser signed an appraisal award determining the insured residence's replacement cost and ACV loss to be $1,025,679 and $314,851.85, respectively. Ingalls Affidavit ¶ 21, Exhibit C.

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Upon its receipt of the signed appraisal award, Security Mutual made additional payments to the plaintiff, equaling the full appraisal-determined ACV of the fire-destroyed insured residence.

F. The Insured Residence's Alleged "Replacement"

From the beginning, and contrary to what plaintiff's sole member, Charles Callioras ("Callioras"), reportedly had told the press a few days after the fire[1], plaintiff, by Callioras, made it clear to Security Mutual that he did not intend to rebuild or replace the insured dwelling with another dwelling, but instead wanted to buy an "investment property" that would return in rents (and presumably profits) as much or more rents than plaintiff had been generating from renting the 72 Brinkerhoff Street five-bedroom house to the SUNY Plattsburgh chapter of the Pi Kappa Phi fraternity.

Although plaintiff initially proposed buying an "investment property in Old Saybrook, CT to replace [his] investment loss from the fire at 72 Brinkerhoff"[2], plaintiff ultimately chose and agreed to pay $1,860,000 for commercial properties 1, 2 and 4 Gorman Way in Peru, New York in July 2019 (see pages 4 of 87 through 31 of 87 of NYSCEF Doc. No. 18).

Charles Callioras has maintained, both before and since suing Security Mutual in this action, that the multi-parcel, multi-building, commercial Gorman Way properties are the "replacement" of the 72 Brinkerhoff Street five-bedroom, one-family residence.

Security Mutual respectfully disagrees. Under the policy's explicit and unambiguous language, more than a damaged building's ACV loss is owed only if and after ***the***

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1 See, Bob Bennett and Kayla Breen, *Fraternity mourns loss of Brinkerhoff house: Ten students have found housing after Plattsburgh blaze*, Press-Republican, Jan. 8, 2012 (last accessed Sept. 15, 2021).

2 Realtor.com indicates that plaintiff's purchase price for 72 Brinkerhoff Street in August 2012 was $155,000. https://www.realtor.com/realestateandhomes-detail/72-Brinkerhoff-St_Plattsburgh_NY_12901_M46184-38856 (last accessed Sept. 15, 2021).

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damaged building—which in this case was a rental residence insured under a rental dwelling policy—has actually been repaired or replaced. The record on this motion establishes as a matter of law that there was no such replacement of the rental dwelling with a rental dwelling.

G. <u>The Relevant Case Law</u>

"An insurance agreement is subject to principles of contract interpretation". *Universal American Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675 (2015). "As with the construction of contracts generally, '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.'" *Universal American Corp., supra, citing, Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 (2008).

In *Estate of Hatch v. NYCO Minerals, Inc.* (245 AD2d 746 [3d Dept 1997]), the Appellate Division, Third Department, noted:

> The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first instance (*see, W. W. W. Assocs. v Giancontieri*, 77 N.Y.2d 157, 162). In the interpretation process, the objective is to determine the parties' intention as derived from the language employed in the contract (*see, Chimart Assocs. v Paul*, 66 N.Y.2d 570, 572; *Teitelbaum Holdings v Gold*, 48 N.Y.2d 51, 56). In this regard, a court is duty-bound to adjudicate the parties' rights according to unambiguous provisions and give words and phrases employed their plain meaning (*see, Sanabria v American Home Assur. Co.*, 68 N.Y.2d 866, 868; *Laba v Carey*, 29 N.Y.2d 302, 308).

The word "replacement" is not defined in the subject policy. Therefore, for purposes of this motion, the Court must give the term its plain and generally accepted meaning. *Id.* Webster's Third New International Dictionary defines "replacement" as a "substitution" or "a new fixed asset or portion of an asset that takes the place of a discarded one." Webster's Third New International Dictionary, Unabridged [Merriam-Webster 1993]. Merriam-Webster's Online Dictionary alternately

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defines "replacement" as "the action or process of replacing: the state of being replaced" or "one that replaces another especially in a job or function".

For something to be a "substitution" or "take the place of" the original, it must serve the same function as the original. New York courts that have examined this issue have concluded that the term "replacement" inherently contains the element of functional similarity. *See, e.g., SR Int'l Bus. Ins. Co. Ltd. v World Trade Ctr. Props., LLC*, 445 F Supp 2d 320, 334 (SDNY 2006) (for rebuilt property to be replacement there must be "functional similarity"); *Harrington v Amica Mut. Ins. Co.*, 223 AD2d 222 (4th Dept 1996) (new structure did not "replace" insured's home where insured did not live there); *see, also, Conway v Farmers Home Mut. Ins. Co.*, 26 Cal App 4th 1185 (1994) (term "replace" includes substituting an item that serves same function); *Huggins v. Hanover Ins Co.*, 423 So 2d 147 (Ala 1982) (house was a "replacement" where it served same function as original).

While it appears there are no reported New York state court decisions specifically addressing this the question of whether an commercial retail property can be said to "replace" a residential property, the Texas Court of Appeals applied the above caselaw and found that an insured's purchase of a percentage ownership in the commercial office park did not constitute a "replacement" of a damaged apartment complex within the meaning of his policy because the commercial office park was not "functionally similar" to the apartment complex.

In *Fitzhugh 25 Partners, LP v Kiln Syndicate KLN 501* (261 SW3d 861 [Tex. 2008]), the insured's apartment complex in Dallas, Texas was damaged by fire, and the defendant underwriting insurers paid $283,460.21 as the actual cash value of the property. The insured subsequently purchased a 28.87% interest in an urban commercial office park in Houston, Texas and sought to recover the $207,692.78 replacement cost ("RC") holdback. According to the insured, its purchase of the interest in the commercial office park constituted a "replacement" of the apartment

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complex as contemplated by the "replacement cost" provisions of the policy. Specifically, the insured argued the commercial office park was "functionally similar" because the office park was a property with rent-paying tenants, serving as the functional equivalent of the apartment complex. *Fitzhugh 25 Partners, LP v Kiln Syndicate KLN 501,* 261 SW3d 861 (Tex. 2008). The Texas Court of Appeals disagreed with and rejected the insured's argument, holding:

> Such an interpretation would expand the definition of the term "replacement" far beyond its reasonable meaning. Under Fitzhugh's analysis, any form of property with tenants could serve as a replacement for the apartment complex. Fitzhugh is focusing on one aspect of the property to the exclusion of others to conclude the properties are functionally similar. This type of analysis would allow an insured to replace a house with an apartment complex because they are both "residential" or to replace an office building with a hospital because they both involve the rendition of professional services to the public. Overall, an office park, which has as its primary function the conduct of business, is not functionally similar to an apartment complex, which functions primarily as a residence for individuals and families. *Id.*

The facts in the instant case mirror those in *Fitzhugh.* Plaintiff purchased commercial properties and is attempting to obtain replacement cost coverage for his lost residential property. Plaintiff certainly could have purchased another residential property as its "replacement" for the insured premises, but instead chose to purchase the Gorman Way properties, and is attempting the same argument as was tried (and failed) in *Fitzhugh.* A commercial property with professional tenants is not functionally similar to a residential home being rented out to college students. There are no facts that require a trial by jury to determine, and this Court has the authority to grant summary judgment as a matter of law on this policy issue.

Although plaintiff has never alleged or argued that the undefined word "replacement" in the above-quoted paragraph 4 of the subject policy's Replacement Cost Provision, the Court may look the policy's other uses of the words "replace" and "replacement" for its contextual meaning. For

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example, the subject policy's FL-20 Ed. 11-79 form (see Ingalls Affidavit, Exhibit A, PDF page 17 of 36) states, under the **Our Options** paragraph of the **PAYMENT OF LOSS OR CLAIM** section, that Security Mutual has the option to "1) pay the loss in money; or 2) rebuild, repair or replace with property of equivalent kind and quality, to the extent practicable, within a reasonable time." (Underlining added.) Clearly, the subject policy contemplates that replacement property will be equivalent in "kind and quality" to the damaged property.

The language of the subject policy is clear that the insured premises must be actually *repaired* or *replaced* in order to trigger additional coverage beyond the actual cash value of the loss. There is no dispute between the parties regarding the insured premises being repaired. The issue here concerns the attempt by plaintiff to argue that a commercial retail property (or properties, in this case) can constitute the "replacement" of a residential property within the meaning of the subject policy. Plaintiff misperceives and erroneously argues that simply because both properties generated rental income and were its "investment properties", the Gorman Properties were the "replacement" of the 72 Brinkerhoff Street five-bedroom, single-family residential property. As the *Fitzhugh* court (*supra*) observed, "such an interpretation would expand the definition of the term 'replacement' far beyond its reasonable meaning." Such an interpretation is both unwarranted and unreasonable.

CONCLUSION

For the foregoing reasons, Security Mutual respectfully requests that the Court grant its motion for summary judgment and dismiss plaintiff's complaint in its entirety, with prejudice. Plaintiff applied for and received a rental dwelling policy, and plaintiff chose to replace the damaged dwelling not with another dwelling, but with a multi-parcel, multi-building commercial retail shopping plaza.

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DATED: Buffalo, New York
September 15, 2021

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22 NYCRR § 202.8-b Word Count Certification

The total number of words in the foregoing Memorandum of Law, exclusive of the caption, table of contents, table of authorities, and signature block, as calculated by the word-processing system used to prepare the document, is **2,651**.

I certify that that the document complies with the word count limit of 22 NYCRR § 202.8-b(a).

Dated: September 15, 2021 s/Roy A. Mura, Esq.

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