STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

CALCOM PROPERTIES, LLC,

Plaintiff,

-against-

SECURITY MUTUAL INSURANCE COMPANY,

Defendant.

DECISION AND ORDER

Index No: 2019-00020062
RJI No.: 09-1-2020-0188E

ELLIS, J.

This action for monetary damages was commenced by summons and complaint filed with the Clinton County Clerk on December 24, 2019. The action stems from defendant Security Mutual Insurance Company's alleged failure to perform pursuant to the terms of a fire insurance policy issued to plaintiff Calcom Properties, LLC (hereinafter Plaintiff).

Presently before the Court is Plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, which were heard on submission only, upon consideration of the following e-filed documents, identified as NYSCEF Document #s 22-43,45-70.

Plaintiff's Untimely Cross-Motion

Initially, defendant Security Mutual asks this Court to reject the Plaintiff's cross-motion for summary judgment based upon its failure to comply with the Court's "so ordered" letter, which provided that all dispositive motions in this action are to be filed no later than September 15, 2021. Security Mutual notes that the defendant's cross-motion was filed on September 21, 2021. Notwithstanding the foregoing, it appears that the Court ordered summary judgment motion filing deadline was less than 30 days from the filing deadline of the note of issue, September 9, 2021, in contravention of CPLR § 3212(a). Although no parties objected to the dispositive motion deadline date set by the Court, based upon these circumstances, the Court finds there is good cause to consider the Plaintiff's summary judgment cross-motion.

22 NYCRR 202.8-g

In cross-moving for summary judgment, the Plaintiff did not file a Statement of Material Facts with its motion papers but rather filed the required Statement of Material Facts two days after it filed motion papers. The Defendant ultimately responded to the Plaintiff's Statement of Material Facts. Notwithstanding the defect, and in consideration of the fact that there does not appear to be any prejudice to the Plaintiff, the Court will consider the Plaintiff's Statement of Material Fact.

The Defendant also filed a Statement of Material Fact with its summary judgment motion, however the Plaintiff did not file a reply, in accordance with 22 NYCRR 202.8-g(b). In light of this, the contents of Defendant's Statement of Material Facts are deemed admitted (see 22 NYCRR 202.8-g [c]).

Standard For Summary Judgment

Summary judgment will be granted where the Court has determined that there is no substantial issue of fact in the case (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). To obtain summary judgment, it is necessary that the movant establish, through evidentiary proof in admissible form, its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The Court is thus faced with finding issues rather than determining them. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d at 404). In making this determination, the court must view the evidence in the light most favorable to the non-moving party and accord the non-moving party the benefit of every reasonable inference. (*Negri v. Stop and Shop, Inc.*, 65 NY2d 625 [1985]).

Where the movant meets its burden, the burden then falls on those opposing the motion to demonstrate, by evidentiary proof in admissible form, the existence of facts sufficient to require a trial (*Burton v. Ertel*, 107 AD2d 909, 910 [3d Dept1985]).

Relevant Facts

The relevant facts in this action are not in dispute. On or about January 5, 2018, a fire occurred at a three-story residential structure owned by Plaintiff Calcom Properties, LLC, located at 72 Brinkerhoff Street, Plattsburgh, New York (hereinafter referred to as "the insured premises"). The fire caused significant damage to the insured premises, amounting to a total loss. At the time of the fire, Plaintiff was renting the insured premises to ten SUNY Plattsburgh college students who resided therein, and used the dwelling as a fraternity house.

Security Mutual issued a policy of insurance bearing policy number FLP0133031[1] (the "subject policy") to Plaintiff for the insured premises for the period of July 31, 2017 to July 31, 2018. The subject policy afforded the following first-party property coverages: A. Residence; B. Related Private Structures on the Premises; C. Personal Property; and D. Additional Living Expense and Loss of Rent. For Coverage A—Residence, the subject policy provided a limit of $448,000 in coverage. Of relevance and central to this proceeding, is the replacement cost provision of the subject policy, which reads as follows:

> **"REPLACEMENT COST PROVISION**
> ***(Not Applicable To Mobile Homes***
> ***Whether Or Not On A Permanent Foundation)***
>
> (***Our*** liability under this provision is subject to ***terms*** of How Much We Pay for Loss or Claim in the General Policy Provisions.)
>
> 1. This provision applies only to covered buildings, including additions and built-in components and fixtures, covered under Coverage A – Residence and Coverage B – Related Private Structures on the Premises. The building must have a permanent foundation and roof. – This

[1] Both parties identify the policy number as "FLP0133031" however it would appear upon a review of the submissions that the policy number is actually "FLP0144031".

provision does not apply to
a. mobile homes whether or not on a permanent foundation;
b. domestic appliances;
c. carpeting, curtains and drapes all whether or not permanently installed;
d. detachable building items including screens, awnings, storm doors and windows, and window air conditioners; or
e. outdoor structures (other than buildings) which are not permanent components or fixtures of a building. These include (but are not limited to) swimming pools, fences, paved areas, submersible pumps and sump pumps.

2. If the limit of liability on the damaged building is less than 80 percent of is replacement cost at the time of loss, ***we*** pay the larger of the following (in excess of the deductible):
a. actual cash value of the damaged part of the building; or
b. the that proportion of the replacement cost of the damaged part which ***our*** limit of liability on the building bears to 80 percent of the full replacement cost of the building.

3. If the limit of liability on the damaged building is at least 80 percent of its replacement cost at the time of loss, we pay the full cost of repair or replacement of the damaged part without deduction for depreciation. ***We*** pay the smallest of the following amounts:
a. the limit of liability applicable to the building;
b. the cost (in excess of the deductible) to repair or replace the damage on the same premises using materials of equivalent kind and quality, to the extent practicable; or
c. the amount (in excess of the deductible) actually and necessarily spent to replace or repair the damage.

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.

5. ***You*** may make a claim for the actual cash value amount of the loss before repairs are made. A claim for any additional amount payable under this provision must be made within 180 days after the loss"
(bold and italics, original emphasis; square border, Court's emphasis)

Following the fire loss, Plaintiff submitted claims to Security Mutual for damage to the residence (Coverage A) and loss of rents (Coverage D). Based on the work of an independent adjuster, Security Mutual determined the actual cash value ("ACV") of the insured premises to be $340,983.75 and paid that amount to plaintiff on or before June 17, 2018.

Plaintiff did not agree with defendant's determination of the building's ACV and demanded an appraisal of the insured residence's ACV, and replacement cost, debris removal costs and loss of rents under the policy's appraisal condition. The appraisal concluded with a signed award on July 2, 2019, determining the replacement cost and ACV of the insured building to be $1,025,679 and $314,851.85, respectively.

On or about May 7, 20219, Plaintiff's member Charles Callioras (hereinafter Callioras) wrote Donna Ingles of Security Mutual Ins. Co., wherein he notified Security Mutual that he was in the process of purchasing an investment property in Old Saybrook ,CT, to replace the insured premises. In the letter he further stated, "Please advise me how I go about getting the full replacement cost for the fire loss on my policy so I can pay for my new investment purchase. Will you provide me with the total replacement cost of my loss prior to closing, or after I close on the property? Additionally, if the funds will be paid after the closing date, how many days will It take to receive the replacement balance."

By letter dated May 24, 2019, Donna Ingles replied to Callioras, informing him, *inter alia*, that his letter was received, and further stated "As we previously advised we are not in a position to make any comments on the replacement cost nor any further payments until the appraisal process is completed.

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.

By email dated July 29, 2021, Ingles, among other things, notified Callioras that no further payments would be made, as he did not qualify for replacement cost.

Callioras wrote to Ingalls on August 22, 2019, informing her that he had "decided to buy a different investment property" to replace the insured residence, specifically three, adjacent, multi-building commercial properties, namely 1, 2, and 4 Gorman Way, Peru, New York (the "Gorman Properties"). The Gorman Properties are not residential properties, but commercial properties located in a plaza comprising a Tops Friendly Market store, a wine and liquor store, a hardware store, a Kinney Drugs store, and an automatic car wash that plaintiff had already been operating. In the letter, he sought advice, and asked questions about how he was to obtain the balance of his policy representing the replacement cost of the insured premises, so that he may pay for the Gorman Properties.

Having not received a response to his prior letter, on September 25, 2019, Callioras again wrote again to Ingalls, this time to inform her that Plaintiff had closed on its purchase of the Gorman Properties. He further requested that Defendant remit the balance of his insurance policy within 15 days. He also included a copy of the September 1, 2019 Statement of Sale.

On December 24, 2019, having not received a response to the September 25, 2019 letter of Callioras, Plaintiff commenced this action seeking a money judgment against Security Mutual for the replacement cost value of his policy, up to the coverage limits, which Plaintiff has since determined to be $65,110.78[2], plus interest thereon.

Arguments

This action centers around paragraph "4." of the "Replacement Cost Provision", which reads as follows:

> "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

[2] $448,000 (policy limit) - $382,889.22 (total paid to date by defendant [$314,851.85 {ACV Appraisal Award} + $19,000.00 {Debris Removal} + $65,110.78 {Additional Debris Removal} – $1,000.00 {deductable}]) = $65,110.78

repair or replacement is completed." (Original emphasis)

Plaintiff claims actual replacement of the insured premises, as contemplated by the above quoted provision, occurred upon the completion of its purchase of the Gorman Properties. Accordingly, as argued by Plaintiff, the defendant breached the terms of the policy by failing to remit the remaining balance of the policy, $65,110.78, upon the completion of the purchase of the Gorman Properties.

In furtherance of its argument, Plaintiff notes that the policy does not specifically state what constitutes a replacement property and the policy fails to define what qualifies as a "functionally similar" replacement property. Plaintiff further argues that the policy was drafted by the Defendant, and any ambiguity should be construed against the Defendant.

Plaintiff, nevertheless claims that the Gorman Properties are functionally similar to the insured premises, as both were being used by Plaintiff as investment properties, rented to multiple tenants.

Plaintiff has also submitted the expert affidavit of Paul J. Heaphy, Jr., a self-employed loss consultant, who opines in pertinent part,

> "I am familiar with adjusting and loss handling practices of insurance carriers writing fire loss policies such as the subject Security Mutual Insurance Company policy in New York State. Accepted adjusting and claims handling practices of insurance companies similarly situated to Security Mutual Insurance Company in this case under its policy of insurance call for the replacement cost loss sustained by Calcom Properties, LLC to be paid. Merely because Security Mutual Insurance Company may not consider plaintiff's purchase of the Gorman Way property to be a replacement property for a multi-rental unit building is not the issue. The issue is what is the applicable industry practice in New York State under these circumstances. ***The answer in New York State is the replacement cost loss should be paid under the policy terms since the replacement property is functionally similar to the destroyed building.***" (This Court's emphasis added)

In other words, Plaintiff's own expert states that the industry practice that should be followed is that the replacement cost loss should be paid when the replacement property is "functionally similar" to the destroyed building.

Defendant argues, in support of its summary judgment motion and in opposition to Plaintiff's cross-motion, that when giving words their plain and accepted meaning, there is no ambiguity in its policy with the Plaintiff. Defendant claims that the Plaintiff has not actually replaced the insured premises, as the Gorman Properties, which Plaintiff claims as a "replacement", are not functionally similar to the insured premises. Based on this, Defendant claims its obligation to provide the defendant with the balance of its fire insurance policy never accrued, as a replacement never occurred.

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 NY2d 157, 162 [1990]; *Estate of Hatch by Ruzow v Nyco Minerals Inc.,* 245 AD2d 746 [3d Dept 1997]). 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 NY2d 570, 572 [1986]; *Teitelbaum Holdings v. Gold*, 48 NY2d 51, 56 [1979]). 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 NY2d 866, 868 [1986]; *Laba v. Carey*, 29 NY2d 302, 308 [1971]). Moreover, "[t]echnical words are to be interpreted as usually understood by the persons in the profession or business to which they relate, and must be taken in the technical sense unless the context of the instrument or an applicable usage or the surrounding circumstances clearly indicate a different meaning" (22 N.Y.Jur.2d, Contracts, § 242, at 299).

Courts must examine the language of an insurance policy and "construe [it] in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect' " (*Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.,* 98 NY2d 208, 221–222 [2002], quoting *Hooper Assoc. v. AGS Computers*, 74 NY2d 487, 493 [1989]; *see Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). The unambiguous provisions of an insurance policy must be given their "plain and ordinary meaning"; their interpretation is a question of law (*White v. Continental Cas. Co.*, 9 NY3d 264, 267[2007]).

Likewise, the issue of whether a provision is ambiguous is a question of law (see Greenfield v. Philles Records, 98 NY2d 562, 569 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 [1990]). "[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy" (*Matter of Mostow v. State Farm Ins. Cos.*, 88 NY2d 321, 326–327 [1996]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v. Philles Records*, 98 NY2d at 569, quoting *Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

As a general matter, when the provisions of the policy are ambiguous, the ambiguity must be construed in favor of the insured and against the insurer (see *White v. Continental Cas. Co.*, 9 NY3d at 267; *United States Fid. & Guar. Co. v. Annunziata,* 67 NY2d 229, 232 [1986]), especially when the ambiguity is "found in an exclusionary clause" (*Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; see *Cleary v. Automobile Ins. Co. of Hartford, Conn.*, 141 AD3d 501, 502 [2d Dept 2016]). Indeed, "whenever an insurer wishes to exclude certain coverage

from its policy obligations, it must do so 'in clear and unmistakable' language.... [Exclusions or exceptions] are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*Seaboard Sur. Co. v. Gillette Co.*, 64 NY2d at 311 [citations omitted]). Courts, however, are not free to disregard the plain meaning of the policy language to find an ambiguity where none exists (see *Cleary v. Automobile Ins. Co. of Hartford, Conn.,* 141 AD3d at 502; see e.g. *Sanabria v. American Home Assur. Co.*, 68 NY2d 866, 868 [1986]). Moreover, an ambiguity does not arise from an undefined term in a policy merely because the parties dispute the meaning of that term (see *Mount Vernon Fire Ins. Co. v. Creative Hous.*, 88 NY2d 347, 352 [1996]).

Both parties in their submissions agree that, consistent with caselaw concerning this issue, the undefined term "replacement", as contained in paragraph "4." of the Replacement Cost Provision, inherently contains the element of functional similarity (see *Rutkovsky v. Allstate Ins. Co.*, 2019 WL 10248105 [SDNY Oct. 29. 2019]; *SR Int'l Bus. Ins. Co. Ltd. v World Trade Ctr. Props., LLC*, 445 F Supp 2d 320, 334 [SDNY 2006]; *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 *Fitzhugh 25 Partners, LP v. Kiln Syndicate KLN 501*, 261 SW3d 861 [Tex 2008]; *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]). Furthermore, as noted by the Court of Appeals of Texas, Dallas in *Fitzhugh 25 Partners, LP v. Kiln Syndicate KLN 501*(supra)[3], which dealt with a similar issue as that before this Court, "Webster's Third New International Dictionary defines 'replacement' as a 'substitution' or 'a new fixed asset or portion

[3] The Court recognizes this decision is not binding on this Court, and is not treated as such.

of an asset that takes the place of a discarded one.' (See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1925 [1993]). For something to be a 'substitution' or 'take the place of' the original, it must serve the same function as the original"(*Id.*).

Applying the plain meaning of the words in Paragraph "4." of the Replacement Cost Provision, to include the agreed upon interpretation of the word "replacement" as inherently containing the element of functional similarity, the Court cannot find that the provision is ambiguous.

Finally, the proof before the Court is sufficient to decide this action as a matter of law. Plaintiff argues the commercial shopping plaza is "functionally similar" to the destroyed residence, and therefore qualifies as a replacement property. Plaintiff contends that because the commercial shopping plaza is a property with rent-paying tenants, and is being used by the plaintiff as an investment property, it serves as the functional equivalent of the insured premises, a dwelling. Such an interpretation would expand the definition of the term "replacement" far beyond its reasonable meaning. Under Plaintiff's analysis, any form of investment property with tenants could serve as a replacement for the destroyed residence. Plaintiff is focusing on narrow aspects of the property to the exclusion of others to conclude the properties are functionally similar.

Significantly, the insured premises is a dwelling, covered under a residential policy of insurance, which is rented to tenants who reside therein. The Gorman Properties are a multi-parcel, multi-building commercial shopping plaza, containing commercial tenants, who use the property for commercial reasons. Overall, a commercial shopping plaza, which has as its primary function the conduct of shopping, is not functionally similar to a residence, which functions primarily as a place for people to live. The Court therefore finds that actual replacement, as contemplated by the Replacement Cost Provision of the policy has not occurred. Based on such finding, the Defendant

has not breached the contract between the parties by failing to pay the balance of the fire insurance policy. Accordingly, and for the foregoing reasons, it is hereby

ORDERED that the Plaintiff's cross-motion for summary judgment is hereby denied; and it is further

ORDERED that Defendant's motion for summary judgment is granted, and the Complaint is hereby dismissed; and it is further

ORDERED that this original Decision and Order is being uploaded by the Court to NYSCEF, and Counsel for Defendant is hereby directed, ***within 20 days of the date hereof***, to: 1) Serve a copy of this Decision and Order, with notice of entry, on all persons and entities entitled to notice under the law; and 2) File proof of service.

SO ORDERED.

Dated: October 28, 2021
Tupper Lake, New York

HON. JOHN T. ELLIS, J. S.C.