

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CLINTON

CALCOM PROPERTIES, LLC,

Plaintiff,

v.

SECURITY MUTUAL INSURANCE
COMPANY,

Defendant.

**STATEMENT OF MATERIAL
FACTS**

Index No.: 2019-00020062

Defendant SECURITY MUTUAL INSURANCE COMPANY (defendant or “Security Mutual”), pursuant to Section 202.8-g of the Uniform Civil Rules For The Supreme Court & The County Court, hereby submits its Statement of Material Facts which Security Mutual contends are undisputed in this action. Security Mutual’s Statement of Material Facts is submitted in support of its motion for summary judgment against plaintiff CALCOM PROPERTIES, LLC (plaintiff or “Calcom”).

For reference, the exhibits referred to herein are the ones attached to the accompanying attorney affirmation of Roy A. Mura, Esq. (the “Mura Affirmation”) and affidavit of Donna Ingalls (“Ingalls”), Claims Supervisor for Security Mutual (the “Ingalls Affidavit”):

1. This is an action for property insurance coverage for a fire loss to a residential structure that occurred on January 5, 2018 at 72 Brinkerhoff Street in Plattsburgh, New York (the “insured premises”). [NYSCEF Doc. No. 1.](#)

2. The insured premises was a single-family residence, reportedly occupied at the time of the fire by 10 members of the SUNY-Plattsburgh Pi Kappa Phi fraternity. Ingalls Affidavit ¶ 16; Mura Affirmation, Exhibit D, p. 28, lines 3-16.

3. Plaintiff is an LLC owned solely by Charles Callioras (“Callioras”). Mura Affirmation ¶ 17, Exhibit D, p.12, lines 4-5.

4. Plaintiff applied for a policy of insurance with Security Mutual in August 2012 via a Landlords Package Application (the “Application”). Ingalls Affidavit ¶ 12, Exhibit B.

5. For “No. of families” the Application listed “1”. Ingalls Affidavit, Exhibit B.

6. In July 2012, the front of the subject premises (according to [Google Street View](#) and pursuant to CPLR Rule 4511[c]) looked like this:



7. On the Application, plaintiff listed a “Nick Callioras” as the sole tenant for the insured premises. Ingalls Affidavit ¶ 14, Exhibit B.

8. Sometime after the policy was issued, Security Mutual learned that plaintiff was renting the insured premises to members of SUNY Plattsburgh fraternity Pi Kappa Phi. Ingalls Affidavit ¶ 15; see, also, Mura Affirmation, Exhibit D, page 17, line 21 to page 18, line 5.

9. It has been reported that at the time of the subject loss, 10 members of the Pi Kappa Phi fraternity were residing in the insured premises. “Fraternity mourns loss of Brinkerhoff house—Ten students have found housing after Plattsburgh blaze” https://www.pressrepublican.com/news/local_news/fraternity-mourns-loss-of-brinkerhoff-house/article_95879ad6-f2a8-59ab-adbd-ee34cd10f421.html (last accessed September 15, 2021).

10. Security Mutual issued a policy of insurance bearing policy number FLP0133031 (the “subject policy”) to plaintiff for the insured residence for the period of July 31, 2017 to July 31, 20218. Ingalls Affidavit ¶ 8, Exhibit A.

11. 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. Ingalls Affidavit, Exhibit A.

12. For Coverage A—Residence, the subject policy provided a limit of \$448,000 in coverage. Ingalls Affidavit, Exhibit A.

13. In pertinent part, Form FL-2 (Ed. 11/79) of the subject policy (Ingalls Affidavit ¶ 11, Exhibit A) provides:

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 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 its 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.

14. Following the fire loss, plaintiff submitted claims to Security Mutual for damage to the residence (Coverage A) and loss of rents (Coverage D). Ingalls Affidavit ¶ 17.

15. Based on the work of an independent adjuster Donna Ingalls had retained, 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. Ingalls Affidavit ¶ 18.

16. Plaintiff did not agree with Ingalls’ determination of the building’s ACV and demanded an appraisal of the insured residence’s ACV and replacement cost and loss of rents under the policy’s Appraisal condition, appointing Paul Heaphy as its appraiser. Ingalls Affidavit ¶ 19.

17. Security Mutual agreed to and proceeded with an appraisal of plaintiff's claims, appointing Marc Palumbo as its appraiser. Ingalls Affidavit ¶ 20.

18. 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. Ingalls Affidavit ¶ 21, Exhibit C.

19. Although Charles Callioras ("Callioras") had been quoted in a news report days after the fire of having said that "he eventually plans to rebuild" the insured residence (https://www.pressrepublican.com/news/local_news/fraternity-mourns-loss-of-brinkerhoff-house/article_95879ad6-f2a8-59ab-adbd-ee34cd10f421.html) [last accessed September 15, 2021], by letter dated May 7, 2019 he informed Ingalls for the first time that he was not planning on rebuilding the insured residence, but was "in the process of purchasing an investment property in Old Saybrook, CT to replace my investment loss from the fire at 72 Brinkerhoff st Plattsburgh, NY 12901 on 01/05/2018". Ingalls Affidavit ¶ 23, Exhibit D.

20. After receiving the signed appraisal award, Ingalls sent a letter to Callioras on July 26, 2019 along with a check for \$56,716.20, representing the net due from the appraisal award after factoring in previous payments by Security Mutual to plaintiff. Ingalls Affidavit ¶ 26, Exhibit F.

21. In her July 26, 2019 letter, Ingalls noted that the replacement cost of the insured premises had been determined to exceed \$1,000,000, and again quoted the Replacement Cost Provision of the subject policy. Ingalls Affidavit ¶ 27, Exhibit F.

22. The subject policy's Replacement Cost Provision, again quoted in Ingalls July 26, 2019 letter, includes this paragraph:

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.

Ingalls Affidavit ¶ 28.

23. The cost to repair or replace the insured building that plaintiff was renting to members of the Pi Kappa Phi fraternity at the time of the subject loss indisputably exceeded 5% of the policy's Coverage A limit of \$488,000 or \$24,400. Ingalls Affidavit ¶ 29.

24. Under the clear and unambiguous language of paragraph 4 of the subject policy's Replacement Cost Provision, Security Mutual was not obligated to pay *more than* the insured building's ACV—determined by the appraisal process to be \$314,851.85—until plaintiff actually repaired or replaced *the damaged building*. Ingalls Affidavit ¶ 29.

25. After an exchange of a letter and email with Mr. Callioras on July 29, 2019, Ingalls made payment to plaintiff of an additional \$7,184.22, representing full payment as of that date of the appraisal award's \$314,851.85 ACV amount. Ingalls Affidavit ¶ 30, Exhibit G and Exhibit H.

26. Callioras next 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”). Ingalls Affidavit ¶ 31, Exhibit I.

27. 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. Ingalls Affidavit ¶ 32; Mura Affirmation, Exhibit D, page 72, lines 9-13.

28. The Google Maps satellite view of the Gorman Properties is currently (image hyperlinked):



29. On September 25, 2019, Callioras wrote again to Ingalls to inform her that plaintiff had closed on its purchase of the Gorman Properties and to request that she “remit balance of my insurance policy within 15 days.” Ingalls Affidavit ¶ 33, Exhibit J.

30. Security Mutual did not consider plaintiff’s purchase of a multi-parcel, multi-building commercial shopping plaza to be a replacement of a single-family residential structure that plaintiff had been renting to a fraternity and, having already made full payment of the insured building’s appraisal-determined ACV, declined to make any additional payments to plaintiff. Ingalls Affidavit ¶ 34.

31. There are no residential or non-commercial tenants at the Gorman Properties.

Mura Affirmation, Exhibit D, page 73, lines 11-13.

DATED: Buffalo, New York
September 15, 2021

s/Roy A. Mura, Esq.

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