SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

DOCKETED

---X PART 4

STATE FARM AND CASUALTY COMPANY
a/s/o ROBERT BREIER AND SABINE BREIER,

Plaintiffs, INDEX NO. 5524/13

-against- MOTION DATE: 021/09/16
SEQUENCE NO.: 004
XXX

HOMESITE HOME INSURANCE,

Defendant.

---X

Notice of Motion, Affm., Memo of Law & Exhs......................1
Affirmation in Opposition, & Exhs......................2
Reply Memo of Law......................3

Upon the foregoing papers, the motion of the defendant, Homesite Home Insurance (hereinafter "Homesite"), which seeks, an order pursuant to CPLR Rule 3212, granting judgment in favor of the defendant dismissing the plaintiff's action, is determined as follows.

The within action is brought by State Farm Casualty Company as subrogee of Robert Breier and Sabine Breier (hereinafter "State Farm"), to recover a portion of the costs incurred by State Farm in remediating a fuel oil spill that occurred at the Breier's residence. It is alleged by State Farm that in the summer of 2008 the Breiers decided to convert their home heating system from fuel oil to natural gas. A 275 gallon underground fuel oil tank that was located at the Breier's residence and at the time of the conversion, it was discovered that the underground fuel oil tank had developed corrosion leaks. As a result of the leaks fuel oil had leached into the ground. State Farm was the Breier's homeowner's insurance carrier in 2008 and the Breier's made a claim against State Farm for the damages caused by the leaking underground tank. State Farm alleges that it incurred costs in the sum of $56,132.31 to remedaie the fuel oil spill.

Homesite had issued a homeowner's insurance policy to the Breiers which was in effect from May 1, 2002 to July 13m 2006. State Farm alleges that it's "investigation" of the fuel oil tank and the soil area surrounding the tank which was impacted by the spill, determined that the leak in the tank existed for "5.9 years prior to the date of discovery or on or about February 5, 2003". The aforesaid period coincided with the effective dates of Homesite's homeowner's insurance coverage. Based upon this investigation State Farm seeks to recover in this action Homesite's pro rata share of the cost to remediate the fuel oil spill, for the period May 1, 2002 to July 13, 2006.

In moving for summary judgment, Homesite argues, *inter alia,* that State Farm's action is barred, since Homesite's policy provided that no action can be brought unless the policy provisions have been complied with and the action is commenced within two (2) years after the date of loss. Homesite argues that the policy in question requires that the insured "give prompt notice to us or our agent" of a possible claim. In the present case the Breiers were aware of the fuel oil tank leak and notified State Farm on September 29, 2008 (this fact is set forth in State Farm's answer to defendant's interrogatories, question 4, annexed as an Exhibit to the motion). Thereafter, State Farm mailed a letter dated March 26, 2009 to "GMAC Homeowner's Claims Dept." (hereinafter "GMAC"), advising GMAC of a potential claim. An examination of the subject insurance policy (Exhibit 1 to defendant's motion) indicates that "GMAC Insurance Homeowner's Program" is listed at the top of the first page of the policy. The first page of the policy also states that the policy is "issued by Homesite Insurance Company of New York". Homesite argues that this letter, addressed to GMAC, is not notice to Homesite and that Homesite only received notice of the claim by virtue of a letter dated January 31, 2012, sent by State Farm's attorneys to Homesite. This notice comes over three (3) after State Farm was notified of the loss.

Additionally, the Homesite policy provisions limit the time within which to commence a lawsuit under the policy, to two (2) years after the date of loss.

The provisions of CPLR§ 214-c, provide for a three (3) year Statute of Limitations within

which to commence an action based upon "latent effects of exposure to any substance...within property" and the three years begins to run "from the date of discovery of the injury by the plaintiff...".

Whether the two (2) year period of the policy, or the three (3) year period of the statute, is used to calculate when the lawsuit could be brought, this Court finds that the lawsuit is untimely. State Farm was first aware of the loss on September 28, 2008 and the lawsuit against Homesite was not commenced until May 7, 2013, a date clearly beyond the more generous three (3) limitation period. State Farm, in it's own internal claim file notes (which are annexed as an exhibit to defendant's motion), acknowledges that "there is the need to file suit to preserve SF [State Farm] right to recover **statute tolls 9/29/11**".

Finally, the Homesite policy in question specifically states that it does "not insure however, for loss...2. caused by...(5) Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril insured Against under Coverage C of this policy". The fuel oil leak from the underground fuel tank falls within the above exclusion.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *(Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986]).* Only after the movant has demonstrated a *prima facie* showing of entitlement to judgment, does the burden shift to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action *(Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.s.2d 595 [1980]).*

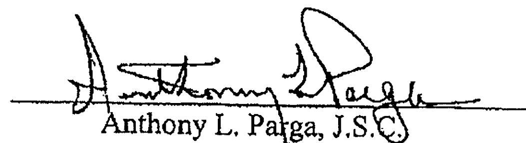
In this case the defendant has tendered evidence sufficient to establish a *prima facie* showing of entitlement to summary judgment dismissing the plaintiffs' claims. In opposition the plaintiff has failed to submit evidence to raise a factual question so as to preclude summary judgment.

Accordingly, the motion by the defendant for summary judgment, pursuant to CPLR

3212, dismissing the plaintiff's action, is granted and the action is dismissed.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: April 6, 2016



Anthony L. Parga, J.S.C.

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