2017 WL 1330494 (N.Y.Sup.), 2017 N.Y. Slip Op. 30691(U) (Trial Order)
Supreme Court of New York.
New York County

**1 MZM REAL ESTATE CORP, Plaintiff,

v.

TOWER INSURANCE COMPANY OF NEW YORK, Defendant.

No. 452741/2015.
April 11, 2017.

Decision and Order

Hon. Shlomo S. Hagler, J.S.C.

Motion Seq. Nos: 001, 002

*1 Motion Sequence Numbers 001 and 002 are consolidated for disposition.

In Motion Sequence No. 001, plaintiff MZM Real Estate Corp. ("MZM") moves for summary judgment in lieu of complaint pursuant to CPLR 3213, based on a January 30, 2015 appraisal award (the "Appraisal Award") in the amount of $170,129.96, together with interest. The Appraisal Award relates to a Commercial Lines Insurance Policy No. CPC 7034987 01, issued by defendant Tower Insurance Company of New York ("Tower") to MZM (the "Policy") (Notice of Motion, Affirmation of Jonathan J. Wilkofsky [Wilkofsky Affirmation], Exhibit "1"; Notice of Cross-Motion, Affirmation of Kevin F. Buckley ["Buckley Affirmation"], Exhibit "9").

Tower opposes the motion and cross-moves to dismiss the subject action, pursuant to CPLR 3211 "based on the suit-limitation provision in the Policy." MZM opposes Tower's cross- **2 motion.

In Motion Sequence No. 002, Tower moves pursuant to CPLR 602 (a) to consolidate this action with an action entitled *MZM Real Estate Corp. v Tower Insurance Company of New York*, Index No. 150690/2016 (the "Second Action"), which was commenced by the filing of a Summons with Notice (the "Summons") (Notice of Motion, Affirmation of Bradley D. Small, Exhibit "2"). The Summons reflects that the Second Action sounds in breach of contract and seeks the same amount of damages as are being sought by MZM in the present action. The motion is unopposed. [1]

BACKGROUND FACTS

This action arises out of a property insurance claim, limited to damages from wind [2] allegedly affecting MZM's property located at 4343 Austin Blvd., Island Park, New York (the "Property"), caused by the weather event that has come to be known as Super Storm Sandy on October 29, 2012 ("Sandy").

**3 The timeline as gleaned from MZM's and Tower's motion papers is as follows. On or about November 4, 2012, MZM submitted a Property Loss Notice to Tower citing "DMG FROM HURRICANE" (Notice of Cross-Motion, Buckley Affirmation, Exhibit "1"). By letter, dated November 20, 2012 addressed to MZM, a Senior Property Field Adjuster of Tower acknowledged receipt of MZM's Notice of Claim and stated "enclosed is the itemization of the damages covered under your policy # CPC7034987. Our settlement check will be forwarded to you under separate

cover" (*Id.*, Exhibit "2").[3] Some time in November 2 012, Tower paid the "undisputed portion" of the claim in the amount of $4,000 (Notice of Motion, Wilkofsky Affirmation; Tr. Oral Argument, dated April 11, 2016 at 3-4).

***2** By letter, dated October 28, 2013 from Mark Milch, President of MZM ("Milch") to Tower, approximately eleven months after Tower's payment of the undisputed portion of the claim and one year after Hurricane Sandy when MZM sustained loss, MZM invoked its right to an appraisal under the Policy (Notice of Cross-Motion, Buckley Affirmation, Exhibit "3").[4] Milch states that he has selected "Mr. Henry Rodriguez, CPAU ("Rodriguez") as [his] ****4** appraiser" *(Id.)*. It is undisputed that Tower appointed Tom Rubino of C.J. Rubino & Co. Inc. ("Rubino") as its appraiser and an umpire was selected on or about February 3, 2014 (Buckley Affirmation in Further Support, dated February 3, 2016, Exhibit "4").

By letters, dated December 9, 2013 and January 13, 2014,[5] Tower informed MZM that the subject claim is not finalized as Tower is awaiting the appraisal (*Id.*, Exhibits "4" and "5"). In both letters, Tower stated that it "reserve[s] each and every right [it has] under the contract and pursuant to the policy of insurance upon which a claim has been made, and shall continue to conduct this investigation subject to this reservation of rights" *(Id.)*.[6] According to Tower, Rubino made several attempts to meet with MZM's appraiser. Tower claims that after MZM's appraiser took no action for several months, an umpire was selected on ****5** February 3, 2014[7] (Buckley Affirmation in Further Support, dated February 3, 2016, Exhibit "4").

On February 2, 2 015, MZM served Tower with an Appraisal Award form, signed by Henry Rodriguez, as appraiser for MZM, and Denis Lartin, as umpire on January 30, 2015 (Notice of Motion, Wilkofsky Affirmation at 2; Notice of Cross-Motion, Exhibit "6", [AmTrust Denial] at 2).[8] The Appraisal Award form was not signed by Rubino as the appraiser for Tower. The Appraisal Award form set forth a total award of $170,129.96 for windstorm damage to the Property.[9] The Appraisal Award form provides

***3** "[w]e do hereby award the foregoing sums as our appraisal award. The above award reflects the agreed damages and costs associated with all damages claimed for the Risk. The amounts above are subject to deduction for any previous payments, policy provision, and deductible(s)" (Notice of Motion, Wilkofsky Affirmation, Exhibit "1").

Tower denied MZM's claim on grounds, among others, that the Appraisal Award form failed to "state separately the value of the ****6** property and the amount of loss" under the building coverage provisions, and to "state separately the amount of Net Income and operating expense and the amount of loss" for an business income loss award (Notice of Cross-Motion, Buckley Affirmation, Exhibit "9" [Policy] at CP 01 33 01 11); Notice of Cross-Motion, Buckley Affirmation, Exhibit "6" [AmTrust Denial]). AmTrust also alleges that the Appraisal Award form was signed by an appraiser who was not qualified or impartial, and that the award included amounts for damage not covered by the subject Policy (*Id.*). On June 19, 2015, more than two and one-half years after the October 29, 2012 date of loss, MZM commenced the subject action by filing a motion for summary judgment in lieu of complaint. **The Policy**

The relevant Policy provisions are as follows:
"Commercial Property Conditions

D. **Legal Actions Against Us**

No one may bring a legal action against us under this Coverage Part unless: 1. There has been full compliance with all of the terms of this Coverage Part; and 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

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New York Changes-Commercial Property Coverage Part

H. Except as provided in I below, [10] the Appraisal Condition is replaced by the following:

Appraisal

****7** 1. If we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within 20 days of such demand.

2. If we or you fail to proceed with the appraisal of the covered loss after a written demand is made by either party, then either party may apply to a court having jurisdiction for an order directing the party that failed to proceed with the appraisal to comply with the demand for the appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser selected within 2 0 days of such order.

3. The two appraisers will select an umpire. If they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding.

4. Each party will

a. Pay its chosen appraiser; and

b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim" (Notice of Cross-Motion, Exhibit "9").

DISCUSSION

MZM's Motion for Summary Judgment in Lieu of Complaint

CPLR 3213 entitled Motion for Summary Judgment in Lieu of Complaint provides, in pertinent part:
***4** "[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.

...

If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise."

"[C]ases within CPLR 3213 'have dealt primarily with some variety ****8** of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness.' Where the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable" (*Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996] *quoting Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 154-155 [1975]. A document comes within CPLR 3213 "if a prima facie case would be made out by the instrument and a failure to make the payments

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called for by its terms" (*Interman v R.S.M. Electron Power*, 37 NY2d at 155 [internal citation omitted]). "The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v Sinorm Deli*, 88 NY2d at 444).

"The distinguishing feature in the cases where the statutory procedure has been permitted, in contrast to those where it has been denied, is that, in the former, liability was predicated upon the terms of the writing plus proof of nonpayment establishing plaintiff's prima facie case and thus qualifying for accelerated treatment under CPLR 3213. In the latter situation, however, the document sued upon set forth something more than the simple promise by the defendant obligor to pay a sum of money" (*Maglich v Saxe, Bacon & Bolan*, 97 AD2d 19, 22 [1st Dept 1983]).

MZM has cited no case, and the Court has not found any, ****9** which holds that an appraisal award in similar circumstances qualifies as an "instrument for the payment of money only" under CPLR 3213. Summary judgment based on an instrument for the payment of money only "does not apply where the contract and the instrument are inextricably intertwined" (*Montecalvo v Cat E.*, LLC, 128 AD3d 783, 784 [2d Dept 2015] *quoting* Vecchio *v Colangelo*, 274 AD2d 469, 471 [2d Dept 2000]). Here, the Appraisal Award is intertwined with the Policy, and cannot be read without reference to the Policy provisions. The face of the Appraisal Award form itself, provides that the amounts "are subject to deduction for any previous payments, policy provisions, and deductible(s)" (Notice of Motion, Wilkofsky Affirmation, Exhibit "1"). Thus, it is clear that the Appraisal Award is subject to the Policy. In turn, the Policy provision setting forth the procedures for obtaining an Appraisal Award, specifically provides "if there is an appraisal, we still retain our right to deny the claim" (Notice of Cross-Motion, Buckley Affirmation, Exhibit "6").

Moreover, the Appraisal Award would not qualify for accelerated treatment under CPLR 3213 as Tower has not "formally and explicitly acknowledged an indebtedness" (*Interman v R.S.M. Electron Power*, 37 NY2d at 155). Here the Appraisal Award, although signed by the appraiser for the insured MZM, and the umpire, is not signed by the appraiser for Tower, or by a ****10** representative of Tower (*Maglich v Saxe, Bacon & Bolan*, 97 AD2d at 21 ["In *Interman*, the Court of Appeals held that an account stated, unsupported by a writing subscribed by the defendant, would not qualify for this accelerated treatment since there was no written instrument by which the defendant obligated itself to make payment"]).

***5** In view of the foregoing, MZM has failed to make a prima facie showing of entitlement to summary judgment in lieu of complaint on grounds that the Appraisal Award is an instrument for the payment of money only. CPLR 3213 provides that "if the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." This Court "orders otherwise" and declines to convert this motion to ordinary form in light of this Court's determination, discussed below, regarding Tower's motion to dismiss. "Nothing in the statute, of course, *obliges* a court, upon denial of summary judgment, to treat CPLR 3213 motion papers as a complaint and answer, regardless of the circumstances. Although the statute provides, that, upon denial of summary judgment, the moving and answering papers shall be deemed a complaint and answer, it also explicitly permits a court to order 'otherwise' " (*Schulz v Barrows*, 94 NY2d 624, 628 [2000]; see *Weissman v Sinorm Deli*, 88 NY2d at 44 5 [upon denial of plaintiff's motion for summary judgment in lieu of complaint, ****11** court can grant summary judgment to defendant]. [11] **Tower's Cross-Motion to Dismiss Pursuant to CPLR 3211**

In support of its cross-motion, Tower contends that MZM's action is untimely under the two year suit limitation provision in the Policy which requires that a legal action be brought within two years "after the date on which the direct physical loss or damage occurred" (Notice of Cross-Motion, Exhibit "9"). [12] As a threshold matter, Tower argues that New York courts have upheld two year suit limitations in insurance policies as reasonable. It is undisputed that the subject loss occurred on October 29, 2012 and MZM commenced this action on June 19, 2015. Tower argues that during the appraisal process, in letters to MZM, Tower always reserved its rights under the Policy and yet MZM never requested an extension of time or waiver of the suit limitation provision.

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In opposition to Tower's cross-motion, MZM contends that its right to sue was conditioned upon full compliance with all the terms and conditions of the Policy's 'Coverage Part' including the two year suit limitation, and that completion of an appraisal ****12** became a condition precedent to suit at the time MZM made a demand for such appraisal. MZM also argues that MZM's demand for an appraisal eleven months after receipt of payment was reasonable, that Tower never objected, and once MZM demanded an appraisal, imposing the two year suit limitation would be unreasonable.

In reply, Tower argues that the appraisal provision in the Policy is elective and in any event, the Policy does not provide that a demand for an appraisal is a condition precedent to commencing suit.

Here, Tower has established a defense as a matter of law by demonstrating with documentary evidence that the subject policy included a two year suit limitation period and that MZM commenced this action after expiration of that period (*Beekman Regent Condominium Assn. v Greater N. Y. Mut. Ins. Co.*, 45 AD3d 311, 311 [1st Dept 2007]; *see John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d 1010, 1011 [2d Dept 2014]). It is well established that parties to a contract may agree on a shorter period to commence action than is provided in the applicable statute of limitations *(Id.)*. It is uncontroverted that contractual limitation of two years after loss for the commencement of suit on a policy of insurance is enforceable (see ****13** *Beekman Regent Condominium Assn. v Greater N. Y. Mut. Ins. Co.*, 45 AD3d at 311; *generally Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511 [2014]. [13]

***6** MZM cites no authority and the Court has not found any to support the proposition that under facts similar to this case, once an appraisal is demanded, the completion of the appraisal serves as a condition precedent to the commencement of an action.

In Executive *Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511 [2014]), relied upon by MZM, plaintiff made a claim under a policy covering replacement of property, but was unable to complete the replacement of its damaged building before the second anniversary of the two year limitations period. The certified question from the Second Circuit required the assumption that the building could not be replaced within the two year suit limitation period. The Second Circuit held that, while such a suit limitation clause, and even ones of shorter duration, are reasonable on their face, the issue of enforceability depended upon whether measuring the accrual date of the limitation period from the date of the physical loss was "fair and reasonable, in view of the circumstances of each particular case.... The circumstances, not the time, must be the determining factor [internal quotation marks and citation omitted]" (*Id.* at 519).

****14** In that case, the defendant insurer informed the insured that in order to make a replacement cost claim, the insured would need to provide "documentation verifying the completion of repairs" (*Id.* at 517). The insurer successfully moved to dismiss as premature a declaratory judgment action brought by the insured on the last day of the limitation period in federal court to hold the insurer liable for replacement costs up to the policy limits. Plaintiff insured later commenced action after the property was replaced which was past the two year limitations period. The Court held that it was "neither fair nor reasonable to require suit within two years from the date of the loss while imposing a condition precedent to suit--in [that] case, completion of replacement of the property-that cannot be met within the two-year period" (*Id.* at 518).

Here, MZM failed to commence suit before the subject two year limitations period expired, and there is no mandatory requirement in the Policy that provides, that upon demand for an appraisal, the appraisal process must be completed before an action can be commenced. In fact, the appraisal provision in the Policy is elective and can be invoked by either party.

It is also uncontroverted that MZM never requested a waiver of the limitation period or an extension of time. An insured "can protect itself by either beginning an action before the expiration of the limitation period or obtaining from the carrier ****15** a waiver or extension of its provision" (*Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d at 823). [14]

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Further, MZM presents "no evidence from which a clear manifestation of intent by [Tower] to relinquish the protection of the contractual limitations period could be reasonably-inferred. Nor do the facts show that [Tower], by its conduct, otherwise lulled [MZM] into sleeping on its rights under the insurance contract" (*Gilbert Frank Corp. v Federal Ins*. Co., 70 NY2d at 968 [internal citations omitted]). In fact, MZM commenced an action in federal court for breach of contract on or about November 21, 2012, before the subject Appraisal Award was issued. Having commenced said action in federal court before the appraisal process was complete, MZM directly undermines its own argument that the completion of the appraisal process is a condition precedent to bringing suit. As such, it is clear that MZM was not "lulled into sleeping on its rights" *(Id.)*. MZM also fails to present evidence that it was "induced by fraud, misrepresentation or deception to refrain from commencing a timely action" (*John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d at 1012 [internal quotation marks omitted]).

***7** In addition, Tower consistently reserved its rights under the Policy as provided in the submitted letters from Tower to MZM ****16** (Notice of Cross-Motion, Buckley Affirmation, Exhibits "4" and "5"). Moreover, the Appraisal provision in the Policy itself specifically allows for either party to make an application to a court in certain circumstances.

The cases cited by MZM (most over one-hundred years old) in support of its contention that a demand for an appraisal is a condition precedent to the commencement of an action, do not stand for such a proposition, and as such are misplaced [15] (*see Silver v Western Assur. Co.*, 164 NY 381 [1900] [MZM's quote of condition precedent language from the case was provided out of context; court held that the insured in that case acted in bad faith in completing an appraisal]; *President of Delaware & Hudson Canal Co. v Pennsylvania Coal Co.*, 50 NY 250 [1872] and *Seward v City of Rochester*, 109 NY 164 [1888] [both cases concern arbitration not appraisal]; *The United States, Plaintiffs in Error v Robeson*, 34 US 319 [1835] [contract case with no reference to the issue of appraisals]; Matter *of Delmar Box Co. (Aetna Ins. Co.)*, 309 NY 60, 65 [1955] [case analyzed the application of arbitration procedure to fire insurance appraisals; in dicta which in fact supports Tower's position, the court stated "if the defaulting party happened to be the insurance company, the insured could disregard the appraisal ****17** provisions and present all the issues for determination in an action at law upon the policy"]; *Peck v Planet Insurance Company*, 1994 WL 381544 *3 [SDNY 1994] [court held that in the context of the case, defendant insurer did not waive its rights to an appraisal even though it waited to exercise that right until after the insured commenced action; insurer's delayed demand for an appraisal was reasonable and valid]; Duane *Reade Inc. v St. Paul Fire and Marine Insurance Company*, 411 F3d 384, 390-391 [2d Cir 2005] [regarding business-interruption insurance coverage, neither party was required to submit to an appraisal until the insured filed a proof of loss, which had not accrued; in that case, the law suit had to precede the appraisal]; *Chainless Cycle Mfg. Co. v Security Ins. Co.*, 169 NY 304, 310 [1901] ("the contract [made] an appraisal a condition precedent to recovery, only when one 'has been required' by the insurer;" insurer waived its right to appraisal where insurer waited until property had been sold and law suit commenced]). [16]

MZM's remaining arguments are likewise without merit. MZM's reliance on Insurance Law Section 3408(c) regarding the appraisal process is inapposite as it is applicable to fire insurance. MZM ****18** also argues that unconfirmed appraisal awards are entitled to *res judicata* effect. However, in support MZM cites *Jacobson v Fireman's Fund Insurance Company*, 111 F3d 261, 267 [2d Cir 1997][internal quotation omitted], which held that res judicata applies "where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award." Here, unlike Jacobson where there was a prior state court determination, there has been no prior disposition on the merits.

***8** In addition, MZM argues that (1) pursuant to Insurance Regulation § 216.6(f), Tower was obligated to pay the appraisal award within five days; (2) pursuant to the Policy, Tower was obligated to pay the award within thirty days; and (3) CPLR § 7511 required Tower to make payment within ninety days. First, MZM fails to demonstrate how the Appraisal Award constitutes an "amount finally agreed upon in settlement of all or part of any claim" within the meaning of Insurance Regulation § 216.6(f). Secondly, the Policy provision cited by MZM, by its terms, is only effective after Tower receives a Sworn Proof of Loss from MZM, which Tower claims it never received. In addition, the appraisal provision in the Policy clearly provides that if there is an appraisal, Tower retains its rights to deny the claim (Notice of

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Cross-Motion, Buckley Affirmation, Exhibit "9" at CP0010000, p. 8-9 of 13). Finally, MZM's reliance on CPLR § 7511 is misplaced. Article 75 of the CPLR pertains to arbitrations, ****19** and as such, is inapplicable to the instant matter.

Tower's Motion to Consolidate

In light of the above determination, Tower's motion to consolidate the subject action with *MZM Real Estate Corp. v Tower Insurance Company*, Index No. 150690/16, is denied as moot.

CONCLUSION

Accordingly, it is

ORDERED, that the motion of plaintiff MZM Real Estate Corp. for summary judgment in lieu of complaint, pursuant to CPLR 3213 (Motion Sequence No. 001), is denied; and it is further

ORDERED, that the cross-motion of defendant Tower Insurance Company of New York, to dismiss pursuant to CPLR 3211, is granted; and it is further

ORDERED, that the motion of Tower Insurance Company of New York to consolidate this action with *MZM Real Estate Corp. v. Tower Insurance Company of New York*, Index No. 150690/16 (Motion Sequence No. 002) is denied as moot; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: April 7, 2017

ENTER:

<<signature>>

J.S.C.

Footnotes

1 In a letter to the Court, dated March 28, 2016, MZM's counsel states that the Summons had not yet been served upon Tower, and was "filed to preserve [MZM's] rights for an action for breach of contract should [MZM] not be successful on the first action." As such, MZM's counsel argues that Tower's motion to consolidate is inappropriate. MZM's counsel further states that the Summons will not be served until there is a determination in this action. By letter, dated March 28, 2016, in response, Tower's counsel argues that as MZM is seeking two opportunities to litigate the same issues, involving the same parties and identical damages, the actions should be consolidated to prevent a waste of judicial resources.

2 MZM's counsel avers that for purposes of its application under CPLR 3213, MZM is seeking to recover on the amount allegedly awarded for wind but not flood damage (Notice of Motion [Wilkofsky Affirmation] at 2; *see also* Notice of Cross-Motion, Exhibit "6" [Letter, dated April 14, 2015, from AmTrust North America, Administrator of Commercial Claims made Under Policies Issued by Tower, to the President of MZM] ("AmTrust Denial") at 1-2).

3 Both parties fail to attach a copy of said itemization of damages, or the check that was puportedly sent by Tower to MGM.

4 Milch stated "[p]lease be informed that I am not satisfied with either the way my claim has been handled nor am I satisfied with the amount which I have been paid for the damages my property sustained as a result of tropical storm Sandy" (Notice of Cross-Motion, Buckley Affirmation, Exhibit "3").

5 The January letter contains a typo and is incorrectly dated January 13, 2013 (Notice of Cross-Motion, Buckley Affirmation, Exhibit "5").

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6 On or about November 21, 2014, more than two years after the October 29, 2012, loss occurred, MZM commenced an action against the Tower Group, Inc. and The Standard Fire Insurance Company alleging breach of contract with respect to the subject loss in NYS Supreme Court, Nassau County which was removed to the United States District Court, EDNY on or about April 3, 2015. Tower Group, Inc. filed a motion to dismiss, based in part on the two year suit limitation provision in the Policy. On June 30, 2015, MZM filed a Notice of Voluntary Dismissal Without Prejudice as to Tower Group, Inc. in US District Court, EDNY (Notice of Cross-Motion, Buckley Affirmation, Exhibits "7" and "8"; Tr. Oral Argument, dated April 11, 2016 at 6-8).

7 Tower submits emails, dated, June 17, 2014, June 18, 2014 and July 7, 2014 from Rubino to Rodriquez setting forth proposed meeting times. Rubino made several attempts to meet with Rodriguez, which occurred prior to the expiration of the two year suit limitation period set forth in the Policy (Buckley Affirmation in Further Support, dated February 3, 2016, Exhibit "4").

8 The AmTrust Denial incorrectly refers to the date Tower was provided with the Appraisal Award form as February 2, 2014 (Notice of Motion, Buckley Affirmation at 2, ¶ 9).

9 The Appraisal Award form provides Property Loss-Replacement amounts of $129,000 for "Coverage A", $41,000 for "BI With Extra Expense" and $129.96 for 'BPP'. The Appraisal Award form further states that flood damages were not appraised (Notice of Motion, Wilkofsky Affirmation, Exhibit "1").

10 Section "I" sets forth a similar appraisal provision relating to "Business Income" claims.

11 Although not dispositive, at no point did MZM's counsel suggest that the moving and answering papers be converted to ordinary form in the event this Court denies MZM's Motion for Summary Judgment in Lieu of Complaint.

12 Tower's notice of cross-motion to dismiss states that the motion is based on CPLR 3211, without specifying a subdivision. This Court will treat the cross-motion as a motion pursuant to CPLR (a) (1), and CPLR 3211 (a)(5) based on a defense grounded upon documentary evidence, and statute of limitations, respectively.

13 One year suit limitation periods have also been upheld (*see Gilbert Frank Corp v Federal Ins*. Co., 70 NY2d 966, 967-968 [1988]; *Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d 820 [1985]; *John v State Farm Mut. Auto. Ins. Co.*, 116 AD3d at 1011).

14 In fact, MZM waited eleven months after Tower paid the sum it deemed owed under the Policy before demanding an appraisal.

15 Cases are cited in the order discussed or cited by MZM in its "Supplemental Brief Pursuant to Order."

16 MZM also cites cases from Connecticut (*Conte v Town of Weston*, 211 A2d 706 [Court of Common Pleas of Connecticut, Fairfield County, at Bridgeport 1965]), Illinois (*Reilley et al. v Agriculture Ins. Co of Watertown, N. Y.*, 37 NE2d 352 [Appellate Court of Illinois, Fourth District 1941) and a lower court New York case (*Maimes v Auto. Ins. Co.*, 112 Misc 656 [Monroe Special Term 1920] which have no precedential value.

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