2022 WL 19335553 (W.D.N.Y.) (Trial Motion, Memorandum and Affidavit)
United States District Court, W.D. New York.

SINATRA & COMPANY REAL ESTATE LLC, Plaintiff,

v.

NORTHERN SECURITY INSURANCE COMPANY, Defendant.

No. 1:20-cv-00041.
March 25, 2022.

Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment

Duke Holzman Photiadis & Gresens LLP, Christopher M. Berloth, 701 Seneca Street, Suite 750, Buffalo, New York 14210, (716) 855-1111, cberloth@dhpglaw.com, for plaintiffs.

Hon. Christina Reiss, Presiding.

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PRELIMINARY STATEMENT

Plaintiff Sinatra & Company Real Estate LLC ("Sinatra" or "Plaintiff") submits this Memorandum of Law in opposition to the motion for summary judgment filed by Defendant Northern Security Insurance Company ("NSIC" or "Defendant"). This lawsuit involves an insurance coverage dispute between Sinatra and its insurance carrier, Defendant, for insurance proceeds that remain due and owing under a contract of insurance existing between the parties (the "Policy"). To be clear, the instant matter *does not* involve a dispute whether the Loss is covered. This dispute is over outstanding amounts still owed to Sinatra in excess of what has been paid.

On September 24, 2017, Sinatra suffered a fire loss at an apartment complex it owned and operated at 363 Breckenridge, Buffalo, New York (the "Loss Location" or "Breckenridge Property") (the "Loss"). Sinatra submitted an insurance claim to Defendant for the Fire. Defendant issued Sinatra insurance coverage on an actual cash value basis but withheld $253,630.77 in depreciation/ replacement cost holdback benefits (the "Holdback"). Defendant also refused to pay for Sinatra's business interruption damages.

First, Defendant represented that it would issue the Holdback to Sinatra if and when Sinatra repaired or replaced the property pursuant to the terms of the Policy. Sinatra complied with the Policy terms and replaced the Loss Location, but Defendant refused to issue the Holdback.

Sinatra separately submitted to Defendant two apartment complexes to serve as replacements for the Breckenridge Property. Defendant rejected both properties on the erroneous basis that the properties were not "bona fide" replacements. Defendant's position violates the express terms of the Policy and contradicts well-settled New York law.

Second, Defendant failed to identify any legitimate basis, supported by either law or the Policy, for refusing to pay Sinatra's business interruption benefits. Sinatra submitted its claim and supporting documents, as required under the Policy, and Defendant simply refused to pay.

There are four fatal flaws with Defendant's motion for summary judgment:

(1) Defendant misstates the applicable legal standards and outright omits the precedent case law applicable to this matter;

(2) Defendant omits and ignores the Policy provisions governing this dispute, the most notable of which is a three-prong limitation (which coincidentally rebuts Defendant's motion both on liability and damages);

(3) Defendant completely ignores and fails to address that Plaintiff submitted *two properties* as proposed replacements, both of which Defendant improperly rejected; and

(4) Defendant factually mischaracterizes the "functional similarity" between the Loss Location and the one replacement property it actually addresses.

Simply put, well-established New York case law and the express terms of the Policy demonstrate that Sinatra is entitled to its full and complete insurance benefits. Accordingly, Defendant's motion for summary judgment should be denied and Sinatra's competing motion for summary judgment (*see* Docs. 30 - 30-36) should be granted in its entirety.

FACTS

For a full recitation of the facts and procedural background, Plaintiff respectfully refers to (1) the documents submitted in support Sinatra's motion for summary judgment, including, but not limited to: Plaintiff's statement of facts, dated February 18, 2022 (Doc. 30-1), with exhibits; the declaration of Christopher M. Berloth, Esq., dated February 18, 2022 (Doc. 30-33), with exhibits; the declaration of Nicholas A. Sinatra, dated February 18, 2022 (Doc. 30-34), with exhibits; and the declaration of P. Joe Braunscheidel, dated February 18, 2022 (Doc. 30-35), with exhibits; and (2) the documents submitted in opposition to

Defendant's motion for summary judgment, including, but not limited to: Plaintiff's reply to Defendant's statement of facts, dated March 25, 2022; and the declaration of Christopher M. Berloth, Esq., dated March 25, 2022, with exhibits.

ARGUMENT

LEGAL STANDARDS

A. Motion for Summary Judgment Standard

"Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *O&G Indus. v. Amtrak*, 537 F.3d 153, 159 (2d Cir. 2008). Once the movant has made a prima facie showing, the opposing party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998).

B. Insurance Policy Interpretation Standard

New York substantive law applies to this insurance dispute because there are no federal questions and because New York has the greatest interest in the instant litigation. *See Erie R.R. v. Thompkins*, 304 U.S. 64, 78 (1938); *Employers' Liability Assurance Corp. v. Aresty*, 11 A.D.2d 331, 333 (1st Dept. 1960) (holding that New York law applies in interpreting insurance policies). Under New York Law, "[a]n insurance agreement is subject to principles of contract interpretation." *Universal Am. Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 25 N.Y.3d 675, 680 (2015). "When a dispute arises involving the terms of an insurance contract, New York insurance law provides that an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Parks Real Estate Purch. Grp. v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) (quotations and citations omitted).

"[M]oreover, a policy must . . . be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer." *Duane Reade, Inc. v. St. Paul Fire and Mar. Ins. Co.*, 411 F.3d 384, 390 (2d Cir. 2005); *see also Parks Real Estate*, 472 F.3d at 42 ("[i]f the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer."). "Whether a contract is ambiguous is a threshold question of law to be determined by the court." *Duane Reade*, 411 F.3d at 390. "An ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement[.]" *Parks Real Estate*, 472 F.3d at 42 (quotations and citations omitted).

Moreover, "[a]n insurance contract should not be read so that some provisions are rendered meaningless." *County of Columbia v. Cont. Ins. Co.*, 83 N.Y.2d 618, 628 (1994). Rather, "[t]he rules of contract construction require [the Court] to adopt an interpretation which gives meaning to every provision of the contract." *GSI Commerce Sols., Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 214 (2d Cir. 2010).

These governing principals of contract interpretation, as applied to the subject Policy and the undisputed facts, demonstrate that Sinatra is entitled to summary judgment.

POINT I

SINATRA IS ENTITLED TO SUMMARY JUDGMENT FOR ITS REPLACEMENT COST INSURANCE BENEFITS

A. Sinatra Replaced the Loss Location entitling it to the Replacement Cost Holdback.

"It is settled law in New York that replacement cost coverage inherently requires a replacement (a substitute structure for the insured) and costs (expenses incurred by the insured in obtaining the replacement)." *Matos v. Peerless Ins. Co.*, 2017 WL 444687, *11 (W.D.N.Y. Feb. 2, 2017). "Moreover, 'the insured may replace the premises with a property with *similar functionality*.' " *Rutkovsky v. Allstate*, 2019 WL 10248105, *5 (S.D.N.Y. Oct. 29, 2019) (emphasis added) (quoting *Matos*, 2017 WL 444687 *11).

"[F]unctional similarity between the property destroyed and the replacement property is all that [is] required." *SR Intern. Bus. Inc. Co. v. World Trade Center Props., LLC*, 445 F. Supp. 2d 320, 334 (S.D.N.Y. 2006). Thus, "[c]ourts have held that a 'different kind of home' or 'far larger building' at a different location can be a 'functionally similar' replacement." *Rutkovsky*, 2019 WL 10248105 at *5; *SR Intern.*, 445 F. Supp. 2d at 334.

New York law is not an outlier in this regard; states across the Country interpret the applicable replacement cost provision the same way. *See Fitzhugh 25 Partners, L.P. v. KILN Syndicate KLN 501*, 261 S.W.3d 861, 865 (Tex. Ct. App. 2008) (explaining that the insured "was permitted to replace the apartments with different buildings at a different site as long as the new buildings were devoted to the same use. For example, *it could have purchased or built a larger apartment complex at a different location*." (emphasis added)); *Huggins v. Hanover Ins. Co.*, 423 So. 2d 147, 150 (Ala. Sup. Ct. 1982) ("While the new house did not take the place of the fire-damaged house in the same physical location, it did serve the same function as the previous home and might be considered a substitute therefore. The [amount] paid for the new home, then, is the amount actually and necessarily spent to replace the damaged building as provided in subparagraph c.(1)(c)"). These legal standards regarding property constituting a "bona fide" replacement are directly applicable to the instant case and entitle Sinatra, not Defendant, to summary judgment.

1. Defendant erroneously ignores Sinatra's submission of the Lafayette Property.

Defendant's first fatal flaw is that it completely ignores Sinatra's submission of the initial replacement property--101 Lafayette Road, Syracuse, New York (the "Lafayette Property"). On April 9, 2019, Sinatra submitted the Lafayette Property to Defendant as a property to replace the Loss Location. (Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 132:12-133:8, 134:22-135:6, 175:13-176:8; Doc. 30-35, Braunscheidel Decl. ¶49; Doc. 30-34, Sinatra Decl. ¶21; Doc. 30-16 [*Ex. 15*]; Doc. 30-17 [*Ex. 16*]). The Lafayette Property is an apartment complex with over seven hundred (700) units. (Doc. 30-34, Sinatra Decl. ¶24).

Defendant, in violation of well-settled New York law, rejected the Lafayette Property as not a "bona fide" replacement on the sole basis that the Lafayette Property contained more apartment units than the Breckenridge Property. (Doc. 30-35, Braunscheidel Decl. ¶55; Doc. 30-34, Sinatra Decl. ¶25).

It is irrelevant that the Lafayette Property was larger or contained more apartment units than the Breckenridge Property. "Functional similarity between" the two properties "is all that [is] required." *SR Intern.*, 445 F. Supp. 2d at 320. New York law is clear that a "far larger building' at a different location can be a 'functionally similar' replacement." *Rutkovsky*, 2019 WL 10248105 at *5; *SR Intern.*, 445 F. Supp. 2d at 334; *see* Doc. 29-6, p. 11. In fact, in a startling admission in its memorandum of law, Defendant acknowledges this legal standard, which dictates that the Lafayette Property satisfies the replacement condition in the Policy. (Doc. 29-6, p. 11 (acknowledging that "a commercial property owner could spend RCV proceeds on a far larger building at another site.")).

Simply put, Sinatra replaced an apartment complex with another apartment complex. Clearly the two are functionally similar. Under the Policy, Sinatra is "permitted to replace the apartments with different buildings at a different site as long as the new buildings were devoted to the same use. For example, *it could have purchased or built a larger apartment complex at a different location*." *Fitzhugh*, 261 S.W.3d at 865 (emphasis added)).

Accordingly, the submission of the Lafayette Property alone entitles Sinatra to judgment as a matter of law. However, Sinatra went a step further. While Sinatra contests, and at all times contested, Defendant's erroneous determination, in an effort to

resolve the dispute, Sinatra also submitted real property located at 197 Summer Street, Buffalo, New York (the "Summer Street Property") as a replacement for the Breckenridge Property. (Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 71:11-17, 137:5-19, 193:22-194:2; Doc. 30-35, Braunscheidel Decl. ¶57; Doc. 30-34, Sinatra Decl. ¶28).

Defendant erroneously focuses its entire motion on the Summer Street Property. While the initial submission of the Lafayette Property entitles Sinatra to the Holdback, the Summer Street Property also entitles Sinatra to its requested relief.

2. The Summer Street Property is also a bona fide replacement and the legal standards set forth by Defendant with respect to the Summer Street Property are miscited and erroneous.

i. *Defendant cites legal standards unsupported by case law and omits the applicable Policy provisions demonstrating that error*.

Defendant erroneously lists five pre-conditions to suit "that an insured must meet in order to recover RCV proceeds." (Doc. 29-6, p. 9, (improperly citing *D.R. Watson Holdings, LLC v. Caliber One Indem. Co.*, 15 A.D.3d 969 (4th Dept. 2005) and *Harrington v. Amica Mut. Ins. Co.*, 223 A.D.2d 222, 226 (4th Dept. 1996)). The only precondition that *D.R. Watson* and *Harrington* can be cited in support of is that repair or replacement costs must be incurred for holdback benefits to be owed. *D.R. Watson*, 15 A.D.3d 969; *Harrington*, 223 A.D.2d at 226.

Certainly, neither case stands for the two main erroneous contentions on which Defendant relies: (1) replacement must be completed "with property of like kind and quality and not on improvements and betterments"; and (2) replacement can include "only necessary repairs." (Doc. 29-6, p. 9). In fact, these two "pre-conditions" (which are really the same condition) are expressly rebutted by case law, including Fourth Department case law. *Kumar v. Travelers Ins. Co.*, 211 A.D.2d 128, 131-32 (4th Dept. 1995); *Fitzhugh*, 261 S.W.3d at 864-65 ("We agree with [the insured's] contention that the policy's limitation on recovery of replacement costs to 'the cost of repair or replacement with similar materials on the same site and used for the same purpose' *is merely a method of calculating damages* . . . .") (emphasis added); *see Plantz v. Wayne Co-op. Ins. Co.*, 5 A.D.3d 1001, 1001 (4th Dept. 2004); *see, e.g.*, *Rutkovsky*, 2019 WL 10248105.

For instance, in *Kumar* (which Defendant cites in its brief but fails to address on these grounds) expressly held in the insured's favor on this issue. 211 A.D.2d at 131-32. The court examined the insured's contention that the requirement of replacement with property of like kind and quality "serves to establish only the theoretical cost to repair or replace the damaged dwelling with like kind and quality at the insured premises." *Id*. The Fourth Department explained, at that time, the only case in New York addressing the issue held that "the replacement cost of that part of the building damaged for equivalent construction and use on the same premises [is] really nothing more than a hypothetical measuring device." *Id*. (quotations omitted). "In fact, no court construing the same or a similar provision has accepted the interpretation urged by [the insurer]." *Id*. Thus, the court held that the insurer's:

> Agreement to pay the full cost to repair or replace the damaged dwelling with equivalent construction on the same premises merely *establishes the limits of coverage* and that replacement cost under the "GUARANTEED REPLACEMENT COVERAGE" provision is measured by what it would cost to replacement the damaged structure on the same premises.

Id. (emphasis in italics and underline added).

This is only further demonstrated by the Policy provisions on which Sinatra relies and which Defendant omits--i.e. the hereinafter defined "Three Prong Limitation." The Policy creates a three-pronged test, which provides that Sinatra is entitled to recover the lesser of the following amounts for replacement cost insurance benefits:

the "First Prong":	The Limit of Insurance under this policy that applies to the lost or damaged property;
the "Second Prong":	The cost to replace, on the same premises, the lost or damaged property with other property: **i.** Of comparable material and quality; and **ii.** Used for the same purpose; or
the "Third Prong":	The amount that you actually spend that is necessary to repair or replace the lost or damaged property.

(Doc. 30-2 [*Ex. 1-Policy*] at Policy019; Doc. 30-35, Braunscheidel Decl. ¶23).

Again, these prongs serve as the measure of damages, not preconditions to coverage. *Kumar*, 211 A.D.2d at 131-32 (4th Dept. 1995); *Fitzhugh*, 261 S.W.3d at 864-65.

ii. *Defendant factually mischaracterizes the functional similarity between the Loss Location and the Summer Street Property.*

Defendant also improperly rejected the Summer Street Property, claiming it was both (i) too large to serve as a "bona fide" replacement because it "possesses additional square footage over and above" the Breckenridge Property and (ii) "is for different use" because it contained a commercial space in addition to the apartment units. (Doc. 30-3 [*Ex. 2-Denial Letter*]). In its memorandum of law, Defendant misstates the applicable legal standards and mischaracterizes the "functional similarity" between the Loss Location and Summer Street Property.

There is no dispute that Sinatra purchased the Summer Street Property to serve as an apartment complex--indeed, Sinatra is undertaking substantial renovations to be able to utilize the Summer Street Property as a replacement apartment complex. (Doc. 30-34, Sinatra Decl. ¶¶31, 34; Docs. 30-25 - 30-26 [*Exs. 24-25*]). Defendant's entire argument is contingent upon an additional "commercial unit", which, according to Defendant, renders the entire property as not serving the "same" function as the Loss Location. However, the cases upon which Defendant relies contradict the razor-thin line Defendant attempts to draw. The legal standard is "similar functionality", not identical functionality, and the necessary examination is the "primary," not exclusive, function of the replacement property. *See Fitzhugh*, 261 S.W.3d at 865.

For instance, the *Fitzhugh* court explained that an insured is "permitted to replace the apartments with different buildings at a different site as long as the new buildings were *devoted* to the same use." 261 S.W.3d at 865 (emphasis added). While the court did confirm that coverage was properly denied to the insured in that instance, it was because that insured's replacement property, "an office park, which has as its *primary function* the conduct of business, [was] not *functionally similar* to an apartment complex, which *functions primarily* as a residence for individuals and families." *Id*. (emphasis added).

Unlike the *Fitzhugh* insured, Sinatra is not contending that the Summer Street Property is the functional equivalent to the Loss Location because they are both investment properties rented to tenants generally. Rather, the purpose for both the Summer Street Property and the Loss Location is to "function[] primarily as a residence for individuals and families." *Id*. Defendant's attempt

to deny coverage on the sole basis that the Summer Street Property happens to have one commercial unit overlooks Sinatra's entire reason for purchasing the property and ignores the "primary function" analysis.

This is consistent with the decisions applying New York law. *See SR Intern.*, 445 F. Supp. 2d at 334 ("[F]unctional similarity between the property destroyed and the replacement property is all that [is] required."). *Rutkovsky*, 2019 WL 10248105 at *5 ("[c]ourts have held that a 'different kind of home' or 'far larger building' at a different location can be a 'functionally similar' replacement."). For instance, in *Rutkovsky*, the Southern District of New York held that an insured's replacement of his home with a condominium was sufficient to serve as a bona fide replacement. *Id*.

The court focused on the functional similarity of the two properties in determining, as a matter of law, that the insured was entitled to "the depreciation holdback." *Id*. The Southern District's decision is consistent with the "primary function" analysis. The insured purchased a new property with the primary function of serving as his personal residence. The insurer's qualms with different components, or that it was not the exact "same" as what the insured previously owned, was of no consequence. *Id*.

Accordingly, Defendant's refusal to issue any insurance proceeds on a replacement cost basis, despite Sinatra submitting two bona fide replacement properties, is in clear violation of the Policy and New York law. Accordingly, Sinatra is entitled to an Order awarding it a judgment for the $253,630.77 Holdback, plus interest, as a matter of law.

B. The value of the Replacement Cost Holdback cannot be disputed.

1. Sinatra is entitled to the Holdback under the Three Prong Limitation.

Sinatra's entitlement to the Holdback of $253,630.77 is subject to the following "Three Prong Limitation" Policy provision:
6. Loss Payment

. . .

d. Except as provided in (2) through (8) below, we will determine the value of Covered Property as follows:

(1) At replacement cost without deduction for depreciation, subject to the following:

(a) If, at the time of loss, the Limit of Insurance on the lost or damaged property is 80% or more of the full replacement cost of the property immediately before the loss, we will pay at the cost to repair or replace, after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

(i) The Limit of Insurance under this policy that applies to the lost or damaged property;

(ii) The cost to replace, on the same premises, the lost or damaged property with other property:

i. Of comparable material and quality; and

ii. Used for the same purpose; or

(iii) The amount that you actually spend that is necessary to repair or replace the lost or damaged property.

(Doc. 30-2 [*Ex. 1-Policy*] at Policy019; Doc. 30-35, Braunscheidel Decl. ¶23). Defendant cites absolutely no Policy provisions or case law in support of its bizarre, and wholly unsubstantiated, damage "calculation." (*See* Doc. 29-6, p. 16-18).

Sinatra incurred costs sufficient to entitle them to be paid the Holdback under the express provisions of the Three Prong Limitation. In other words, Sinatra is entitled to recover the lesser of the following amounts for replacement cost insurance benefits:

the "First Prong":	The Limit of Insurance under this policy that applies to the lost or damaged property;
the "Second Prong":	The cost to replace, on the same premises, the lost or damaged property with other property: **i.** Of comparable material and quality; and **ii.** Used for the same purpose; or
the "Third Prong":	The amount that you actually spend that is necessary to repair or replace the lost or damaged property.

(Doc. 30-2 [*Ex. 1-Policy*] at Policy019; Doc. 30-35, Braunscheidel Decl. ¶¶ 24-25).

The value of the First Prong (the Policy limit for the Loss Location) is not in dispute. (Doc. 30-35, Braunscheidel Decl. ¶26; Doc. 30-5 [*Ex. 4-Proofs of Loss*]; Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 80:17-21, 81:15-23, 187:20-188:3). The policy limit exceeds $868,498.00. *Id*.

The value of the Second Prong (the Replacement Cost) is also not in dispute as it was agreed upon by Sinatra and Defendant. (Doc. 30-35, Braunscheidel Decl. ¶28; Doc. 30-5 [*Ex. 4-Proofs of Loss*]; Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 106:12-20, 131:21-132:11, 152:7-21, 173:7-12). The Second Prong Replacement Cost value was agreed upon by all parties to be $747,368.59 (the "RCV"). (Doc. 30-35, Braunscheidel Decl. ¶34; Doc. 30-5 [*Ex. 4-Proofs of Loss*]; Doc. 30- 11 [*Ex. 10-Allaire Tr.*] at 121:18-23, 130:11-23, 151:15-23, 159:18-160:18, 172:13-23, 190:18-191:11, 191:23-192:12). For instance, Defendant's representative testified as follows:

Q. Mr. Allaire, do you see where it says the cost to replace, on the same premises, the lost or damaged property with other property of comparable material and quality and used for the same purpose? Do you see that?

A. Yes.

Q. In this particular case, did [Defendant] come to a value that was the cost to replace on the same premises the lost or damaged property with property of comparable material and quality and used for the same purpose?

MR. GRENKE: Object to the form of the question. John, if you know, go ahead and answer.

THE WITNESS: Yes.

BY MR. BERLOTH:

Q. And what was that value?

A. Including the board up, it was around seven hundred and forty-seven thousand and change.

. . .

Q. And then the building gross replacement cost is listed at seven hundred and forty-seven thousand three hundred and sixty-eight dollars and fifty-nine cents, is that correct?

A. That's correct.

Q. Is that the number you were referring to?

A. Yes.

(Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 191:23-192:12).

The value of the Third Prong (the amount spent by Sinatra on the replacement property(ies)) is also not in dispute. Sinatra paid over $57 million to purchase the Lafayette Property. (Doc. 30-35, Braunscheidel Decl. ¶51; Doc. 30-34, Sinatra Decl. ¶24; Doc. 30-21 [*Ex. 20*]; Doc. 30-22 [*Ex. 21*]). Sinatra incurred over $2.8 million to purchase and renovate the Summer Street Property. (Doc. 30-35, Braunscheidel Decl. ¶58; Doc. 30-34, Sinatra Decl. ¶34; Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 137:30-138:9, 192:14-193:8; Docs. 30-23 - 30-26 [*Exs. 22-25*]). Regardless of whether the Lafayette Property or Summer Street Property are deemed the bona fide replacement (both satisfy this requirement), the Third Prong is no less than $2.8 million.

Accordingly, the lesser value of the Policy's Three Prong Limitation, as applicable to Sinatra's claim for replacement cost benefits, is indisputably the agreed-upon RCV of $747,368.59. (Doc. 30-35, Braunscheidel Decl. ¶66; *see* Doc. 30-2 [*Ex. 1-Policy*] at Policy019; *and compare* Doc. 30-5 [*Ex. 4-Proofs of Loss*]; *with* Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 106:12-20, 131:21-132:11, 137:30-138:9, 152:7-21, 173:7-12, 192:14-193:8). Thus, since Defendant already issued a portion of the RCV as actual cash value benefits, the withheld portion of that RCV (the $253,630.77 Holdback, plus interest) are the damages Sinatra is entitled to recover for its replacement cost in this case.

The foregoing analysis is consistent with well settled law on the issue. *See Rutkovsky*, 2019 WL 10248105 at *2; *see also Bartholomew v. Sterling Ins. Co.*, 34 A.D.3d 1157, 1158-59 (3d Dept. 2006); *Harrington*, 223 A.D.2d at 226.

As previously discussed, the *Rutkovsky* matter is directly analogous to the instant case. *Rutkovsky*, 2019 WL 10248105 at *2. There, the insured was also challenging the insurer's denial of coverage on the basis that a replacement property was not a "bona fide" replacement. *Id*. The Southern District examined a virtually identical policy provision as the Three Prong Limitation contained in this Policy. *Id*. at *1-2.

The Court explained that the property was a bona fide replacement and that the insured, by purchasing a replacement property, complied with that policy's Three Prong Limitation. *Id*. at *6. Since the Second Prong in *Rutkovsky* was the least of the three prongs, the insured was awarded, *as a matter of law*, the full amount of the depreciation holdback. *Id*.

This case is consistent with the legal standards set forth by the New York Appellate Divisions in the Fourth and Third Departments. *See Bartholomew*, 34 A.D.3d at 1158-59; *Harrington*, 223 A.D.2d at 226. While the *Harrington* and *Bartholomew* decisions are factually distinguishable, the legal standard contained therein is directly applicable here. *See id*.

In *Harrington*, the Fourth Department examined the insured's version of the Three Prong Limitation and applied it exactly as Sinatra submits this Court should:

[T]he replacement cost provisions of the policy set forth three measures of coverage, one of which is not applicable here because the parties agree that the policy's limit of liability [] is not the lowest of the three figures. Of the remaining two, plaintiff can recover the replacement cost or the "necessary amount actually spent to repair or replace the damaged building", whichever is less. Payment is due when the repair or replacement is complete.

See Harrington, 223 A.D.2d at 223. Unlike Sinatra, that insured did not incur replacement cost expenses greater than the policy limit. *See id*. However, the Fourth Department examined the Three Prong Limitation exactly as Sinatra submits here.

The same is true for *Bartholomew*, where the Third Department dismissed an insured's complaint for failing to prove that it incurred the costs to repair. *Id*. Conversely in this case, Sinatra indisputably proved it incurred the costs to repair. The Third Department went on to discuss the policy language in a way that is directly supportive of Plaintiffs' position:
the Replacement Cost Provision states that defendant will pay the smallest of three amounts: (1) the policy limit, (2) "the cost . . . to repair or replace the damage on the same premises using materials of equivalent kind and quality," or (3) "the amount . . . actually and necessarily spent to replace or repair the damage."

Id. This is the same type of provision at issue here. (Doc. 30-2 [*Ex. 1-Policy*] at Policy019).

Coincidentally, counsel for Sinatra and counsel for Defendant recently litigated this exact issue in New York Supreme Court in a matter captioned *Hall v. New York Cent. Mut. Fire. Ins. Co.*, Monroe County Index No. E2019011076. (*See* Ex. 32 [*Hall Order & Decision*]). The court granted the insured summary judgment, holding that the insured "established that $220,181.59 under prong two of the replacement cost provisions of the policy is the least amount the defendant has to pay under all three prongs." *Id*.

New York's well-established law is further supported by cases across the country. *See Hess v. North Pacific Ins. Co.*, 122 Wash. 2d 180, (Wash. Sup. Ct. 1993) ("This particular limitation does not require repair or replacement of an identical building on the same premises, but places that rebuilding amount as one of the measures of damage to apply in calculating liability under the replacement cost coverage. The effect of this limitation comes into play when the insured desires to rebuild either a different structure or on different premises. In those instances, the company's liability is not to exceed what it would have cost to replace an identical structure to the one lost on the same premises. Although liability is limited to rebuilding costs on the same site, the insured may then take that amount and build a structure on another site, or use the proceeds to buy an existing structure as the replacement, but paying any additional amount from his or her own funds."); *Conway v. Farmers Home Mut. Ins. Co.*, 26 Cal. App. 4th 1185, 1190 (Cal. Ct. App. 1994) (quoting and agreeing with *Hess*).

Strangely, Defendant's argument now seems to hinge exclusively on the idea that if Sinatra's position is accepted (which it already has been and is the well-established legal standard, *see supra*), "an insured could replace [a] one bed-room, single story suburban home with a lakefront mansion, the Taj Mahal, or the Palace of Versailles." (Doc. 29-6, p. 17). Yet, earlier in its memorandum, Defendant acknowledges that that is *exactly* what could happen and is permitted under these *replacement cost* policies. (Doc. 29-6, p. 11 ("a commercial property owner could spend RCV proceeds on a far larger building at another site.")). Defendant's argument unravels because it incorrectly asserts that an insured would gain a "windfall" and "make a profit from the Loss." *Id*. The Three Prong Limitation prevents any purported inequity from occurring.

Case law is very clear that an insured can in fact go out and replace damaged property with "far larger" property. *See supra*. However, if an insured decides to replace a one-bedroom home with the Taj Mahal, the insurer's "liability is limited to rebuilding costs on the same site[.]" *Hess*, 122 Wash. 2d 180. "The insured may then take that amount and build a structure on another site, or use the proceeds to buy an existing structure as the replacement, *but paying any additional amount from his or her own funds*." *Id.* (emphasis added). Accordingly, there is no windfall to the insured, as the insured's recovery is still subject to the express terms of the Policy.

Therefore, simply put, based on well-established law and the express provisions of the Policy, Sinatra is entitled to the least of the following values:

Prong 1 - Policy Limit	> $868,498.00

Prong 2 **- RCV with materials of like kind and quality**	**$747,368.59**
Prong 3 - Amount actually spent	> $2,800,000.00

Sinatra actually spent amounts greater than the RCV in connection with the replacement of the Loss Location, and thus, Sinatra is entitled to the lesser amount of the RCV, set by the Second Prong: $747,368.59. Reducing the amount of the Second Prong by the amounts of actual cash value previously paid, the amount Sinatra is entitled to is the $253,630.77 Holdback, plus interest.

Therefore, Sinatra, not Defendant, satisfies its prima facie burden and demonstrates it incurred the necessary costs to replace the Loss Location, entitling it to summary judgment and issuance of the full Holdback amount. Defendant has not satisfied its prima facie burden and is not entitled to summary judgment; as such, its motion should be denied.

2. Sinatra reasonably expected to be paid the full Replacement Cost Value.

Based on the Policy's replacement-cost provision and Defendant's RCV of $747,368.59, Sinatra reasonably expected to be paid the entire RCV, including the Holdback, once it incurred amounts equal to or greater than the RCV in replacing the Loss Location. In fact, Sinatra relied on Defendant's agreed upon RCV and purchased two separate properties in an attempt to replace the Loss Location in the amount not less than $2.8 million (but possibly as high as $57 million). (*See* Doc. 30-34, Sinatra Decl. ¶¶ 16, 37).

"Under th[e reasonable expectations] doctrine, if an ambiguity arises that cannot be resolved by examining the parties' intentions, then the ambiguous language should be construed in accordance with the reasonable expectations of the insured when he entered into the contract." *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697 (2d Cir. 1998) (citations omitted).

In New York, "[a]ny interpretation of an insurance contract implicates as a standard 'the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract.' " *In re Liquidation of Midland Ins. Co.*, 269 A.D.2d 50, 59 (1st Dept. 2000) (citation omitted). *See also Binghamton Precast & Supply Corp. v. Liberty Mutual Fire Ins. Co.*, 182 A.D.3d 721, 737 (3d Dept. 2020); *Atlantic Cement Co. v. Fidelity & Cas. Co. of N.Y.*, 91 A.D.2d 412, 418 (1st Dept. 1983), *aff'd*, 63 N.Y.2d 798 (1984); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (court read insurance policy in light of "common speech" and the "reasonable expectations of a businessperson"); *U.S. Underwriters Ins. Co. v. Affordable Hous. Found., Inc.*, 256 F. Supp. 2d 176, 181 (S.D.N.Y. 2003) (court must construe insurance policy language "in accordance with the reasonable expectations of the average insured individual, reading the policy and employing common language skills.").

The doctrine of reasonable expectations is seen as a corollary to the "contra-proferentem rule," also favoring policyholders in insurance contract interpretation. *Haber*, 137 F.3d at 697. According to the contra-proferentem rule, "where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer." *Id*. Similarly, the reasonable expectations doctrine interprets ambiguities in favor of coverage and against the insurance carrier.

Defendant's issuance of the Policy, and agreeing to the RCV estimate instilled a reasonable expectation in Sinatra that if Sinatra incurred the full RCV amount, the Policy would provide coverage for replacement costs and Defendant would pay the entire Holdback. Defendant provided the RCV estimate to Sinatra and Sinatra relied upon that amount when purchasing replacement properties. As such, Defendant's refusal to release the full Holdback is contrary to the reasonable expectations of the parties, and must be disfavored.

Based on the foregoing, Sinatra established that it reasonably expected to be paid the entire Holdback upon incurring the agreed upon RCV. As set forth in Point 2(B)(1), *supra*, Sinatra actually spent amounts greater than the agreed upon RCV in replacing the Loss Location. Accordingly, Sinatra is entitled to summary judgment.

POINT II

SINATRA IS ENTITLED TO RECOVER EXTRA CONTRACTUAL CONSEQUENTIAL DAMAGES PURSUANT TO *BI-ECONOMY*

Sinatra's entitlement to extracontractual consequential damages ("ECC Damages") is set forth and governed by well-established Court of Appeals law. *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 194-95 (2008). To date, Defendant failed to issue timely and complete payments to Sinatra for (a) the Holdback and (b) its loss of business income resulting from the Fire. As explained by the Court of Appeals, the purpose of insurance is not simply to pay for losses--it is to pay insurance proceeds promptly. *Id.*

Indeed, when evaluating a case similar to the instant case, the Court of Appeals explained as follows:
The purpose served by business interruption coverage cannot be clearer--to ensure that [the insured] had the financial support necessary to sustain its business operation in the event disaster occurred. . . .

Furthermore, contrary to the dissent's view, *the purpose of the contract was not just to receive money, but to receive it promptly so that in the aftermath of a calamitous event*, as [the insured] experienced here, the business could avoid collapse and get back on its feet as soon as possible. Thus, *this insurance contract included an additional performance-based component: the insurer agreed to evaluate a claim, and to do so honestly, adequately, and--most importantly--promptly*. The insurer certainly knew that failure to perform would (a) undercut the very purpose of the agreement and (b) cause additional damages that the policy was purchased to protect against in the first place. . . .

When an insured in such a situation suffers additional damages as a result of an insurer's excessive delay or improper denial, *the insurance company should stand liable for these damages*. This is not to punish the insurer, but to give the insured its bargained-for benefit.

Id. (internal citations omitted) (emphasis added). In short, the Court of Appeals affirmatively stated that in the context of business owner's insurance policy, the "insurance contract include[s] an additional performance-based component: the insurer agree[s] to evaluate a claim, and to do so honestly, adequately, and--*most importantly--promptly*." *Id.* (emphasis added).

Further, contrary to case law cited by Defendant, the current precedent case law, post *Bi-Economy*, makes clear that a cause of action for ECC damages "is not duplicative of a cause of action sounding in breach of contract to recover the amount of the claim." *Tiffany Tower Condo., LLC v. Ins. Co. of the Greater N.Y.*, 2018 N.Y. Slip Op. 05886 *2 (2d Dept. 2018); *D.K. Property, Inc. v. Nat. Union Fire Ins. Co.*, 168 A.D.3d 505, 507 (1st Dept. 2019). Moreover, "[h]ere, the defendant failed to make a prima facie showing that the consequential damages sought by the plaintiff were not within the contemplation of the parties when they executed the insurance policy." *Pandarakalam v. Liberty Mut. Ins. Co.*, 137 A.D.3d 1234, 1236 (2d Dept. 2016) (denying the defendant-insurer's motion for summary judgment on the issue of consequential damages). At any rate, even if Defendant somehow satisfied its prima facie burden, genuine issues of fact exist regarding the Defendant's failure to investigate, evaluate, and pay Sinatra's claim "honestly, adequately, and--most importantly--promptly." *Bi-Economy*, 10 N.Y.3d at 194-95.

The Fire Occurred on September 24, 2017. (Doc. 30-34, Sinatra Decl. ¶8). On April 9, 2019, Sinatra submitted the Lafayette Property to Defendant as a property to replace the Loss Location. (Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 132:12-133:8, 134:22-135:6, 175:13-176:8; Doc. 30-35, Braunscheidel Decl. ¶49; Doc. 30-34, Sinatra Decl. ¶21; Doc. 30-16 [*Ex. 15*]; Doc. 30-17 [*Ex. 16*]). Rather than honestly, adequately, or promptly evaluating the bona fide replacement, Defendant forced Sinatra to submit an additional property as a proposed replacement. (Doc. 30-11 [*Ex. 10-Allaire Tr.*] at 71:11-17, 137:5-19, 193:22-194:2; Doc. 30-35, Braunscheidel Decl. ¶57; Doc. 30-34, Sinatra Decl. ¶28; Doc. 30-19 [*Ex. 18*]). Defendant waited until October 8, 2019, six months after the Lafayette Property was initially submitted and over two years after the date of loss, to deny coverage for the Holdback. (Doc. 30-3 [*Ex 2-Denial Letter*]).

New York Insurance Law § 2601, which governs unfair claims settlement practices, expressly identifies "failing to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies" as one of the acts that can constitute unfair claims settlement practices. In this case, Defendant did not comply with those requirements. That unexplained and unreasonable delay constitutes a breach by Defendant. That is particularly true in this case, which involves undisputed facts relating to the Fire, the undisputed existence of coverage, and a claim for business interruption coverage by Sinatra.

As alleged in the complaint, and based on the facts set forth herein, Defendant breached the insurance contract by unreasonably delaying its investigation and failing to timely and completely pay Sinatra for its insurance proceeds. Therefore, Defendant's motion must be denied, because (1) Sinatra's entitlement to seek recovery for ECC Damages was properly plead in the complaint and (2) even assuming Defendant satisfied its prima facie burden to dismiss these damages, which it has not, genuine issues of fact exist regarding Defendant's improper investigation, evaluation, and delay with respect to Sinatra's insurance claim.

CONCLUSION

For the foregoing reasons, Plaintiff Sinatra & Company Real Estate LLC respectfully requests that this Court grant its motion for summary judgment in its entirety and enter an Order:

1. Granting Plaintiff judgment as a matter of law as to liability on all its causes of action;

2. Granting Plaintiff judgment as a matter of law as to its damages, including:

a. On Plaintiff's first cause of action, for breach of contract, for damage to Plaintiff's building, in the amount of $253,630.77, plus interest; and

b. On Plaintiff's second cause of action, for breach of contract, for business interruption damages, in the amount of $35,156.00, plus interest.

3. Awarding Plaintiff pre-judgment, statuary interest on the foregoing causes of action and damages, accruing from the following date through the present:

a. September 24, 2017--i.e. the date of Loss; or

b. In the alternative, and at the latest, April 9, 2019-- i.e. the date the Lafayette Property was submitted to Defendant as a bona fide replacement; and

4. Awarding such other and further relief as this Court deems just and proper.

Dated: Buffalo, New York March 25, 2022

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By: /s/ Christopher M. Berloth

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