UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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EDWARD FLANDERS,

Plaintiff,

v.

MEMORANDUM & ORDER
13-CV-1552 (PKC)

FIDELITY NATIONAL PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant.

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PAMELA K. CHEN, United States District Judge:

Plaintiff and Defendant each cross-move for summary judgment pursuant to Federal Rule of Civil Procedure ("FRCP") 56. For the reasons stated below, Plaintiff's motion is granted in part, and denied in part, and Defendant's motion is granted in part, and denied in part. Because there are no genuine disputes of material fact requiring a trial, judgment shall issue in favor of Plaintiff, in an amount to be determined following a damages inquest or by stipulation of the parties.

BACKGROUND

The parties agree that there are no genuine disputes of material fact at issue in this case. (Dkt. 23 at 3; Dkt. 31-17 at 1.) Rather, this case is one of contract, statutory, and regulatory interpretation. The undisputed facts relevant to the interpretation of the disputed insurance policy's provisions and the laws and regulations pertaining thereto are as follows.[1]

[1] The Court takes the following facts from the parties' respective statements pursuant to Local Civil Rule 56.1. For ease of reference, and unless otherwise cited, the Court refers to Plaintiff's statement ("Pl. St.") (Dkt. 25) and Defendant's statement ("Def. St.") (Dkt. 26-1), rather than the underlying exhibit.

In September 2012, Plaintiff Edward Flanders, a New York-licensed attorney proceeding *pro se*[2], applied for a home loan for the purchase of a second home located at 217-41 5th Avenue in Breezy Point, Queens, New York (the "property"). (Dkt. 24 ¶¶ 3, 6, 8.) In connection with that purchase and the execution of a mortgage on the property, Plaintiff's lender required him to obtain flood insurance for the property. (Pl. St. ¶ 3.) On or about October 19, 2012, Plaintiff contacted the Clausen Agency ("Clausen"), to purchase a flood insurance policy. (Pl. St. ¶ 4.) Clausen then obtained a quote for insurance from Defendant Fidelity National Property and Casualty Insurance Company ("Defendant" or "Fidelity"). (Pl. St. ¶ 7.) Plaintiff completed an application for the insurance policy, in which he requested that the insurance policy become effective as of October 22, 2012. (Def. St. ¶ 7.) On October 22, 2012, Fidelity received from Plaintiff both the completed application for flood insurance and full payment of the required premium, $1,707.00. (Def. St. ¶ 8.)[3]

[2] Typically, when a party appears *pro se*, courts will liberally construe that party's pleadings and supporting papers to "raise the strongest arguments that they suggest." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994) (citation omitted). However where, as here, the *pro se* party is an experienced attorney, the Court is not *obligated* to read his pleadings with the degree of liberality given to non-attorney *pro se* plaintiffs. *See, e.g.*, *Muset v. Ishimaru*, 783 F. Supp. 2d 360, 364 n.1 (E.D.N.Y. 2011); *Bliven v. Hunt*, 478 F. Supp. 2d 332, 334–35 (E.D.N.Y. 2007) (citing *Chira v. Columbia Univ*, 289 F. Supp. 2d 477, 482 (S.D.N.Y. 2003)). Nevertheless, although Plaintiff is a licensed, practicing New York attorney, in the Court's view, even a *pro se* attorney may be afforded some degree of deference, especially where, as here, the cause of action appears to be outside the *pro se* attorney's usual practice area. *Cf. Smith v. New York Presbyterian Hosp.*, 254 Fed. App'x 68, 69 (2d Cir. Nov. 15, 2007) (granting non-practicing *pro se* attorney's pleadings liberal construction).

[3] Fidelity operates a system by which independent insurance agents may submit applications on behalf of potential insureds without any input or interaction with agents at Fidelity. For example, Fidelity authorizes agents of insureds to print out temporary declaration pages and provide them to insureds as proof of insurance. (Dkt. 23 at 9; Dkt. 24-2 at 16:3–14.) Additionally, as will be relevant below, Fidelity permits insureds' agents to select "no waiting period" with respect to the effective date of the policy, in connection with a loan, even if closing has yet to occur. (Dkt. 23 at 9–10; Dkt. 24-2 at 45:24–46:20.)

On October 22, 2012, Fidelity issued to Plaintiff a flood insurance policy for the property (the "Policy"). (Def. St. ¶ 10.) The Policy, as reflected in the Flood Declarations Page tendered to Plaintiff, provided coverage in the amount of $250,000.00, with a $5,000.00 deductible. (Dkt. 26-9.) The effective date of the Policy, as set forth in the Flood Declarations Page, was that day, October 22, 2012. (Def. St. ¶ 10; Dkt. 24 ¶ 8; Dkt. 24-5; Dkt. 26-9.) It is undisputed that Defendant issued the Policy to Plaintiff with the October 22, 2012 effective date:

> Based on Plaintiff's SFIP application and premium payment, on October 22, 2012 Fidelity issued to Plaintiff SFIP bearing policy number 314400537112 for the property located at 21741 5th Ave., Breezy Point, NY 11697, which provided building coverage in the amount of $250.000.00, subject to a $5,000.00 deductible, and with an effective date of October 22, 2012.

(Def. St. ¶ 10.)

Plaintiff had arranged to complete closing on the property for some time after October 22, 2012. (Dkt. 24 ¶ 8.) However, due to intervening events, closing did not occur as scheduled.[4] On October 29, 2012, the meteorological event commonly known as "Hurricane Sandy" made landfall, causing significant damage to the Greater New York area, including the property, which is located in one of the areas hardest hit by Hurricane Sandy. (Dkt. 24 ¶¶ 11, 12.) After Hurricane Sandy and the resulting damage to the property, Plaintiff contacted Clausen to submit a claim under the Policy. (Dkt. 24 ¶¶ 5, 13.) Upon receipt of notice of Plaintiff's claim, Fidelity investigated. Because the flood damage to the property had occurred within 30 days of the effective date of the Policy, Fidelity, pursuant to guidelines promulgated by the Federal Emergency Management Agency ("FEMA"), sought to confirm the effective date of the

[4] Although neither parties' 56.1 Statement indicates whether Plaintiff ever purchased the property, at the oral argument regarding the applicability of a provision in the National Flood Insurance Program Flood Insurance Manual, *see infra* at 5, Plaintiff stated that he eventually closed on the loan and purchased the property, notwithstanding the damage to it, because he was still under contract to buy it.

Policy by consulting the loan closing documents prepared in anticipation of the purchase of the property. (Def. St. ¶ 15.) Through its investigation, Fidelity discovered that Plaintiff had not closed on the loan prior to Hurricane Sandy. (Dkt. 26-3 ¶¶ 14, 16.) Because the loan had not been closed prior to the event giving rise to Plaintiff's claim, Fidelity informed Plaintiff that, absent confirmation that closing had occurred, Plaintiff's insurance claim would be denied pursuant to the National Flood Insurance Program ("NFIP") guidelines promulgated by FEMA. (Def. St. ¶ 18.) The basis of Fidelity's denial was that the general waiver of the applicable 30-day waiting period was invalid because the waiver applies only where the policy is obtained in connection with the *closing* of a mortgage loan for a new property purchase. (Def. St. ¶ 18.) Because Plaintiff had not yet closed on the loan, Fidelity cancelled the original insurance policy, and reissued to Plaintiff a flood insurance policy with the effective date of November 21, 2012. (Def. St. ¶ 17.)

On December 4, 2012, Plaintiff appealed the denial of his flood loss claim to FEMA. (Def. St. ¶ 19.) On January 10, 2013, Fidelity again informed Plaintiff that his flood claim was denied because a loan closing had not occurred, and the 30-day waiting period remained in effect at the time he obtained the Policy and when Hurricane Sandy struck New York. (Def. St. ¶ 20.) On March 15, 2013, FEMA notified Plaintiff that it concurred with Fidelity's denial of the claim because the 30-day waiting period applied in the absence of a loan closing. (Def. St. ¶ 21.) Plaintiff timely initiated this lawsuit on March 25, 2013. (Dkt. 1.)

The parties' summary judgment motions were fully briefed on November 20, 2013. On April 30, 2014, the Court ordered Fidelity to show cause why Section VIII.C.3 of the National Flood Insurance Program Flood Insurance Manual, General Rules (Oct. 2012) ("FEMA General Rules") does not apply to the Policy and Plaintiff's insurance claim thereunder. (April 30, 2014

Minute Order.) Fidelity submitted its response on May 19, 2014 (Dkt. 34), and Plaintiff sought, and was granted, leave to submit a response thereto on May 23, 2014. (Dkt. 35.) The Court heard oral argument with respect to the parties' positions on the issue of Section VIII.C.3's applicability to this case. The Court ruled at the hearing that Section VIII.C.3 did not apply to Plaintiff's policy. (*See* June 25, 2014 Minute Entry.)

SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where the moving party is entitled to judgment as a matter of law." *Harvis Trien & Beck, P.C. v. Fed. Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.),* 153 F.3d 61, 67 (2d Cir. 1998) (*citing* Fed. R. Civ. Proc. 56(c)); *see also Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

"The burden of showing the absence of any genuine dispute as to a material fact rests on the party seeking summary judgment." *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir.1997); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). "In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, the court is required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *McLee*, 109 F.3d at 134.

The Second Circuit has provided additional guidance applicable in contract disputes:

> In determining a motion for summary judgment involving the construction of contractual language, a court should accord that language its plain meaning giving due consideration to the surrounding circumstances and apparent purpose which the parties sought to accomplish. Where contractual language is ambiguous and subject to varying reasonable interpretations, intent becomes an issue of fact and summary judgment is inappropriate. The mere assertion of an ambiguity does not suffice to make an issue of fact. Ambiguity resides in a writing when—after it is viewed objectively—more than one meaning may reasonably be ascribed to the language used. Only where the language is unambiguous may the district court

construe it as a matter of law and grant summary judgment accordingly. *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006) (Sotomayor, J.) (quoting *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990)). As to each cross-motion, the court construes the facts in the light most favorable to the non-moving party and resolves all ambiguities and draws all reasonable inferences against the respective movant. *See Broadcast Music, Inc. v. JJ Squared Corp.*, 2013 WL 6837186, at *1 n.1 (E.D.N.Y. Dec. 26, 2013) (citing *Capobianco v. City of New York*, 422 F.3d 47, 50 (2d Cir. 2005)); *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004).

DISCUSSION

I. The National Flood Insurance Program

The NFIP is a federal program established by Congress to promote insurance coverage for environmentally vulnerable properties that otherwise would be prohibitively expensive or impossible to insure. *Palmieri*, 445 F.3d at 183; *see also Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 174 (2d Cir. 2012) ("many factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions") (citing 42 U.S.C. § 4001(b)). The NFIP is managed by FEMA, which promulgates rules regarding the NFIP and provides a model contract, titled the Standard Flood Insurance Application, which appears in regulations interpreting the NFIP. *Id.* at 183–84, 188; *Jacobson*, 672 F.3d at 174; 44 C.F.R. § 61 App'x A(1).

Fidelity maintains that the Policy was a Standard Flood Insurance Policy ("SFIP"), governed by the NFIP. (*See* Dkt. 24-7 at 2; Dkt. 26-9 at 1–2); *see also Palmieri*, 445 F.3d at 188 ("All flood insurance made available under the Program is subject . . . [t]o the terms and conditions of the [SFIP], which shall be promulgated by the [Federal Insurance] Administrator

for substance and form, and which is subject to interpretation by the Administrator as to scope of coverage pursuant to the applicable statutes and regulations.") (quoting 44 C.F.R. § 61.4(b)). Indeed, Plaintiff concedes that the Policy was issued pursuant to the NFIP. (*See* Dkt. 23 at 6) ("Plaintiff does not dispute that the Policy was issued under the NFIP[.]").

a. The "Write Your Own" Program

As part of the NFIP, Congress set up a system through which private insurers are authorized to write NFIP insurance contracts in their own names, but pursuant to the requirements established by the NFIP. This program is known as the Write Your Own ("WYO") program and the insurers who participate in the program are known as WYO Companies. 44 C.F.R. § 62.23(g). Fidelity participates in the NFIP as a WYO Company. (*See* Def. St. ¶ 15; Dkt. 26-3 at 1.)

Under the WYO program, although private insurers manage the policies, they act on behalf of the federal government as its fiscal agents, and federal funds are used to underwrite the insurance policies. (*See* Dkt. 26-3 at 1; 42 U.S.C. § 4001 *et seq*.; 44 C.F.R. § 62.63(f)). In other words, the federal government generally bears the losses for any claims paid out under NFIP policies. *See Jacobson*, 672 F.3d at 174 (quoting *Palmieri*, 445 F.3d at 183); *see also* 44 C.F.R. § 62.23(g). In connection with their responsibilities as agents, WYO Companies "must strictly enforce the provisions set out in the regulations, varying the terms of a policy only with FEMA's express written consent." *Jacobson*, 672 F.3d at 175 (citing 44 C.F.R. §§ 61.4(b), 61.13(d)(e), 62.23(c)–(d)). WYO Companies act as fiscal agents of the federal government, but not as its general agent. 44 C.F.R. § 62.23(g). As a result, "WYO Companies are *solely* responsible for their obligations to their insured under any flood insurance policies issued under agreements entered into with the Federal Insurance Administrator, such that the Federal Government is not a

proper party defendant in any lawsuit arising out of such policies." 44 C.F.R. § 62.23(g) (emphasis added).

b. 30-Day Waiting Period

The NFIP imposes a mandatory 30-day waiting period, with respect to a policy's effective date, in connection with the taking out of a new NFIP policy. *See* 42 U.S.C. § 4013(c). Fidelity's primary argument is that the NFIP-mandated 30-day waiting period applied to the Policy, and, therefore, the Policy was not in effect at the time Plaintiff's property was damaged by Hurricane Sandy. (Dkt. 26-3 at 1–2, 7–11.) If the 30-day waiting period applied, Plaintiff's loss occurred before the effective date of the Policy, and Fidelity correctly denied Plaintiff's insurance claim. However, if no 30-day waiting period applied, Fidelity wrongly denied Plaintiff's insurance claim, thereby breaching its insurance contract with Plaintiff.

The basis of Fidelity's argument that a 30-day waiting period applied to Plaintiff's claim is that Fidelity issued the policy pursuant to the NFIP, and therefore Plaintiff was bound to abide by all of its terms, including the 30-day waiting period. (Dkts. 26-3, 31-17, 32.) Indeed, Fidelity's briefing is based almost entirely upon the premise that the Policy is governed by NFIP rules and regulations, and that Plaintiff is charged with knowledge of and compliance with them. (*See generally* Dkt. 26-3.) On the other hand, Plaintiff argues that the 30-day waiting period does not apply to the Policy because Fidelity did not disclose to him, nor was he otherwise aware, that the effective date of the Policy was subject to the 30-day waiting period (which was expressly waived in the policy), or that the exception to the 30-day waiting period was contingent upon loan closing. (Dkt. 23 at 6–8 (Fidelity's acknowledgement of its waiver of the 30-day waiting period).) Therefore, Plaintiff argues, he cannot be bound by the terms and conditions of the NFIP, which were never disclosed to him before he purchased the Policy.

The FEMA rules in effect at the time Plaintiff obtained his flood insurance policy provided for a "standard 30-day waiting period for new applications and for endorsements to increase coverage," with some exceptions. *See* FEMA General Rules at GR 8 (Oct. 2012).[5] Generally, the 30-day waiting period is intended to prevent existing homeowners in flood-prone areas from waiting until an impending storm approaches to obtain flood insurance. Otherwise, the number of claims, coupled with the lack of regular premium payments, quickly would bankrupt the flood insurance program. *See Jacobson*, 672 F.3d at 174 ("[M]any factors have made it uneconomic for the private insurance industry alone to make flood insurance available to those in need of such protection on reasonable terms and conditions.") (citing 42 U.S.C. § 4001(b)).

An exception to the 30-day waiting period, relevant here, relates to with the purchase of new property. 42 U.S.C. § 4013(c)(2) provides that the waiting period shall not apply to "the initial purchase of flood insurance coverage under this chapter when the purchase of insurance is in connection with the making, increasing, extension, or renewal of a loan." While it would seem that Plaintiff qualifies for the new property purchase exception, because NFIP regulations construe the term "in connection with the making, increasing, extension, or renewal of a loan" as pertaining to the *closing* of a mortgage loan, a closing must occur for this exception to apply. 44 C.F.R. § 61.11(b); 42 U.S.C. § 4013(c)(2)(A); (Dkt. 26-3 at 7). In other words, a real estate closing is a necessary condition precedent for a purchase of flood insurance to be "in connection with" the making of a real estate loan for purposes of obtaining NFIP insurance. Plaintiff was

[5] The FEMA General Rules in effect at the time Plaintiff obtained the Policy came into effect on October 1, 2012, and are available at http://www.fema.gov/media-library/assets/documents/28812?id=6393. Fidelity provides a similar version of the NFIP Guidelines, which appear to contain the October 1, 2012 revisions. (*See* Dkt. 26-10.) The Court has identified no material differences in the relevant provisions between the two versions and refers to them in tandem.

unable to satisfy this condition prior to Hurricane Sandy and the resulting damage to his home. Irrespective of the cause of Plaintiff's inability to close on the home purchase, there is no dispute that Plaintiff did not close on the purchase of the property prior to the damage to his property, and, therefore, the Policy does not qualify for the 30-day waiting period exception in Section 4013(c)(2). (Pl. St. ¶¶ 16–18.)

II. Inapplicability of the NFIP's 30-day Waiting Period and Loan Closing Requirement to the Policy

The parties do not dispute that the Policy was issued pursuant to the NFIP.[6] Rather, their dispute centers on whether the NFIP's regulations regarding the 30-day waiting period and the loan closure requirement apply to the Policy. Because Defendant failed to sufficiently apprise Plaintiff of these regulations, and expressly waived one of them, *i.e.*, the 30-day waiting period, the Court finds that they do not.

Nothing in the materials issued or provided to Plaintiff relating to the Policy—at least those in the record before the Court—expressly stated that the Policy was governed by NFIP regulations. The "Standard Flood Insurance Application" that Plaintiff completed nowhere states that the application was for a policy pursuant to the NFIP. (Dkt. 26-6.) The "Standard Flood Non-Binding Quote" likewise contains no indication that the quote is for an NFIP policy. (Dkt.

[6] *See, e.g.*, (Dkt. 1-1 at 2) (Plaintiff's complaint asserting causes of action under the NFIP regulations, 44 C.F.R. § 62, App. A, Art. 1, and 44 C.F.R. § 62.22(a)); Dkt. 31-17 at 2 (Defendant's opposition briefing stating that "[t]his is a claim brought pursuant to the NFIP for a claim under Plaintiff's SFIP, which is a codified federal regulation found at 44 C.F.R. Part 61, App. A(1)"); Dkt. 23 at 6 ("Plaintiff does not dispute that the Policy was issued under the NFIP, which is administered by FEMA and supported by taxpayer funds, and which pays for claims that exceed the premiums collected from the insured parties."). Given that the record suggests that Plaintiff was unaware that the Policy was an NFIP policy at the time of its issuance, it appears that Plaintiff has conceded the NFIP status of the Policy for the purpose of asserting federal question jurisdiction in this Court. However, even in the absence of an applicable federal statute, the Court would have had diversity jurisdiction over this matter, which has been pled as a breach of contract claim.

26-5.) In connection with its motion, Defendant submits no evidence that it ever informed Plaintiff that the NFIP applied until they denied his insurance claim under the Policy.[7]

The Court has identified only two relevant documents containing any reference, however oblique, to the NFIP. First, the following passages appear in the "Flood Declarations Page": "DEAR MORTGAGEE: The Reform Act of 1994 requires you to notify the *WYO company* for this policy within 60 days of any changes in the servicer of this loan" and:

> This policy covers only one building. If you have more than one building on your property, please make sure they are all covered. See III. Property Covered within your Flood policy for the *NFIP* definition of "building" or contact your agent, broker, or insurance company. Coverage Limitations may apply. Please refer to your Flood Insurance Policy for details.

(Dkt. 26-9) (emphases added).

Second, a document entitled "Temporary Declaration Page Pending Policy Issuance" ("Temporary Declaration Page") contains the statement that "This policy is not subject to cancellation for reasons other than those set forth by the *National Flood Insurance Program* rules and regulations. In matters involving billing disputes, cancellation is not available other than for billing processing [sic], error or fraud." (Dkt. 24-5 at 1) (emphasis added). The Temporary Declaration Page also states that "[f]axed photographs are not acceptable per *NFIP* guidelines regarding photograph clarity." (Dkt. 24-5 at 1) (emphasis added).

[7] Much of the evidence Fidelity submitted in connection with its proof that the Policy is subject to NFIP regulations relates to its own belief regarding the applicability thereof. *See, e.g.*, (Dkt. 26-7 at ¶¶ 3, 4, 17, 1.) Defendant's internal opinion, if never expressed to Plaintiff before Hurricane Sandy, is irrelevant. Additionally, Plaintiff states that Fidelity only told him that the Policy was an NFIP policy *after* Hurricane Sandy, (Dkt. 30 at 1) ("Plaintiff did not know that the federal government was in any way involved until *after* Sandy, when he finally received a copy of the SFIP.").

Although these provisions allude to the applicability of definitions or certain provisions of the NFIP, they do not indicate that the Policy was governed by all of the NFIP's regulations.[8] Indeed, the Policy's selective references to the NFIP could reasonably be construed as indicating that only the specifically cited provisions of the NFIP, and no others, applied to the Policy.[9]

Importantly, Fidelity does not expressly argue that the application materials it provided to Plaintiff adequately disclosed that the Policy was issued pursuant to the NFIP, and therefore Plaintiff was bound by them. (Dkt. 26-3 at 8.) Rather, Fidelity argues that "Plaintiff cannot claim ignorance of the published federal laws because these statutes are codified federal law, and all persons are charged with knowledge of the published federal laws – especially those participating in a U.S. Treasury funded insurance program!" (Dkt. 26-3 at 9.)

The Ninth Circuit rejected a similar argument in *Pecarovich v. Allstate Insurance Co.*, 135 Fed. App'x 23 (9th Cir. June 6, 2005). In that case, Allstate Insurance Company, the defendant WYO, had waived a proof-of-loss requirement in contravention of the FEMA-

[8] It bears mention that Fidelity could have easily notified Plaintiff that the Policy was governed by NFIP regulations. The SFIP model contract codified in the C.F.R. includes a section entitled "What Law Governs." *See* 44 C.F.R. Part 61, App. A(1) at Section IX. That section notifies the insured, *inter alia*, that "[t]his policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, *et seq.*), and Federal common law." *Id.* Also, the language appearing at the end of the appendix appears to be an acknowledgment form in which the insured, to whom the form is presented, agrees to the terms contained therein: "In witness whereof, we have signed this policy below and hereby enter into this Insurance Agreement." *Id.* There is no evidence that the provisions contained in 44 C.F.R. Part 61, App. A(1) were ever disclosed to Plaintiff or that, if they were, Plaintiff manifested his agreement to be bound by them.

[9] In fact, Plaintiff had reason to believe that the NFIP's loan closing requirement did *not* apply to the Policy. (Dkt. 26-4 at 28:20–24) (Plaintiff's deposition, at which he testified: "That individual [at Fidelity] then told me that it was a FEMA regulation. I said, well, that all sounds interesting but that is not my problem because there is no condition specified anywhere in the contract that I have with Fidelity . . . .").)

promulgated Adjuster's Manual. *Id.* at 25. In support of its denial of the plaintiff's insurance claim, Allstate argued that, because a clause in the SFIP provided to the plaintiff stated that the policy was issued pursuant to "Applicable Federal Regulations in Title 44 of the Code of Federal Regulations," and because those regulations state that the WYO must be guided by the Adjuster's Manual, the plaintiff also was bound by the manual. *Id.* Accordingly, Allstate argued, the NFIP regulations applied to the plaintiff's flood insurance policy, and required plaintiff to timely submit a proof of loss in support of his insurance claim, notwithstanding Allstate's waiver of the proof-of-loss requirement. *Id.* at 25. Allstate argued on appeal that it was precluded from waiving the proof-of-loss requirement, as it had done, by "a guideline in the FEMA Flood Insurance Manual allowing waivers only for claims under $7,500." *Id.*

The Ninth Circuit rejected Allstate's arguments, holding that Allstate breached its contract with the plaintiff because "[t]here is no contractual provision binding upon [the plaintiff] governing . . . the WYO companies' discretion to waive proof of loss. *Nor did [the plaintiff] have notice of that limitation by the bare reference to Title 44 of the C.F.R.*" *Id.* at *2 (emphasis added). The court further held that, while Allstate may have breached its obligation under the NFIP, it was Allstate, and not the insured, who should take responsibility. *Id.* ("Allstate may have breached its obligation to the NFIP when it waived the proof of loss filing in [the plaintiff's] case, but it cannot pass this responsibility on to its insured. Because Allstate waived the proof of loss requirement, [the plaintiff] did not breach the contract by failing to file the Proof of Loss with Allstate.").

The Ninth Circuit's discussion of the NFIP's proof-of-loss requirement, and Allstate's waiver thereof, is directly applicable both to Fidelity's waiver of the 30-day waiting period *and* Fidelity's failure to inform Plaintiff that the Policy, at the time it was issued to him, was

governed by all the terms of the NFIP.[10] The Court finds the reasoning in *Pecarovich* persuasive, especially where, as here, one of the NFIP regulations, *i.e.*, the 30-day waiting period, invoked by Fidelity, was not only *not* referenced in the Policy, but was expressly *waived* in it.

Also, as in *Pecarovich*, whether Fidelity erroneously waived the mandatory 30-day waiting period in violation of FEMA guidelines is a matter between Fidelity and FEMA, not Plaintiff. *See id.* ("Allstate may have breached its obligation to the NFIP when it waived the proof of loss filing in [the plaintiff's] case, but it cannot pass this responsibility on to its insured."). In this case, as with the insurer in *Pecarovich*, the 30-day waiting period is binding upon *Fidelity*, not Plaintiff, and because Fidelity waived that provision—as it acknowledges—the consequences of that waiver are Fidelity's burden to bear, not Plaintiff's.

Furthermore, Fidelity's "notice" to Plaintiff regarding the applicability of the NFIP's terms was even more infirm than the purported "notice" in *Pecarovich*. There, the insurer at least gave notice that the policy was "issued pursuant to 'Applicable Federal Regulations in Title

[10] According to FEMA, the "Policy" is defined as: "The entire written contract between the insured and the insurer. It includes: The printed policy form; The application and declarations page; Any endorsement(s) that may be issued; and Any renewal certificate indicating that coverage has been instituted for a new policy and new policy term." *Definitions*, Federal Emergency Management Agency, *available at https://www.fema.gov/national-flood-insurance-program/definitions*, (last visited Sept. 25, 2014). The record is totally bereft of any indication that Fidelity ever delivered to Plaintiff the "printed policy form," which presumably contains all of the NFIP policies, including the 30-day waiting period and closing requirement. Moreover, if Fidelity did fail to present to Plaintiff the "printed policy form," this likely was in violation of FEMA guidelines. *See FEMA General Rules* at GR 14 ("C. Delivery of the Policy[:] The policy contract must be sent to the insured on new business or when changes are made to the policy form. The policy declarations page must be sent to the insured, agent/producer, and, if applicable, lender."). Because "[a] copy of the Flood Insurance Application and premium payment, *or* a copy of the declarations page, is sufficient evidence of proof of purchase for new policies," *FEMA General Rules* at GR 14, the Court finds that the Flood Declarations Page issued to Plaintiff upon his completion of the Standard Flood Insurance Application and payment of premium constitutes the Policy for purposes of the present motion.

44 of the Code of Federal Regulations[,]'" which the Ninth Circuit found inadequate. *Id.* at 25–26 (holding that the policy's "bare reference to Title 44 of the C.F.R." did not give the plaintiff notice of the relevant provision). Here, Fidelity failed to even notify Plaintiff that Title 44 of the C.F.R., or any other provision outside of the Policy itself, applied to the two aspects of the Policy at issue, the effective date and the loan closing requirement.

Notably, the cases relied on by Fidelity provide further support for this conclusion. In *Palmieri v. Allstate*, the plaintiff argued that the terms of the SFIP should apply to his insurance policy, even though the policy's actual language differed from the provisions of the SFIP. *See Palmieri*, 445 F.3d at 188. The Second Circuit rejected this argument, and instead considered the unambiguous terms in the policy to which the parties agreed, and did not apply the terms of the SFIP. The court reasoned that:

> [E]ven if Allstate violated the regulations by drafting its own contract rather than adopting the SFIP, nothing in the regulations suggests that courts should respond to such a violation by holding the parties to be bound by the terms of the SFIP when neither party agreed to that contract. The terms of Palmieri's policy could not be more clear in limiting his recovery for personal property losses to actual cash value. We therefore decline to apply the terms of the SFIP rather than the unambiguous terms of the policy actually signed by the parties.

Id. at 188. The court later reiterated that the plain meaning of the contract governed, not NFIP regulations that were not incorporated into the contract. *Id.* ("As to the meaning of the contract, the text is plain on its face."); *see also id.* at 187 ("The provisions of the contract authorizing recovery of replacement costs *state bluntly* that . . . .") (emphasis added). The circumstances are nearly identical here, although with respect to a different provision of the Policy (*i.e.* the amount of losses recoverable there versus the effective date here). Like the insurer in *Palmieri*, Fidelity seeks to impose upon the Policy a term not contained in it. Fidelity cannot reform the contract

post hoc by injecting a term into the Policy that was not contained in it or otherwise disclosed at the time the Policy was issued.

Another case cited by Defendant, *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, similarly involved a NFIP policy issued by a WYO insurance company. The damage claim submitted by the plaintiff in *Jacobson* was denied because he failed to timely submit a "proof of loss" statement, as required by the NFIP. 672 F.3d at 174–75. In finding that the NFIP's proof-of-loss requirement applied to the plaintiff's policy,[11] the Second Circuit held that the policy's terms were to be strictly construed because public funds were at risk, and that "an insured must comply strictly with the terms and conditions of such policies" where federal insurance policies are at issue. *See id.* at 176 (citing *Merrill*, 332 U.S. at 384–85.)[12] Thus, *Jacobson* affirmed the principle from *Palmieri*, applicable here, that the terms of an insurance policy should be strictly

[11] Although Defendants seek to rely on the finding in *Jacobson* that the NFIP's proof-of-loss requirement applied to the policy at issue, *Jacobson* is distinguishable in this regard. In *Jacobson*, the parties agreed that the NFIP applied, and there was no evidence indicating, as here, that there was express language in the policy waiving, or overriding, the NFIP requirement.

[12] Fidelity cites the Supreme Court's decision in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), for the proposition that those who regularly deal with the government are presumed to have knowledge of the regulations that apply to such dealings:

> Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents. Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or the hardship resulting from innocent ignorance.

See Merrill, 332 U.S. at 384–85. Fidelity's reliance on *Merrill* is misplaced; if anything, *Merrill* implicitly supports Plaintiff's position. Plaintiff, by engaging in the commonplace act of entering into an insurance contract with a private insurer, was not someone seeking to "come within" a federal regulatory scheme, like the NFIP, such that knowledge of NFIP's regulations should be imputed to him. Indeed, if any party in this case should be charged with "knowledge of what is in" the NFIP, it would be Fidelity, an insurance company seeking to "come within" NFIP's provisions to obtain the benefits of FEMA's underwriting of WYO flood insurance policies, such as this Policy, and not Plaintiff. *Merrill* simply does not apply to this case.

construed, without reference to NFIP terms that were not a part of the insured's policy. *See Palmieri*, 445 F.3d at 188 ("The terms of Palmieri's policy could not be more clear in limiting his recovery for personal property losses to actual cash value. We therefore decline to apply the terms of the SFIP rather than the unambiguous terms of the policy actually signed by the parties.").

Fidelity seeks to avoid a strict construction of the Flood Declarations Page, which made the Policy immediately effective, by arguing that that document is not binding upon Fidelity because it contains a summary of information submitted by Plaintiff, not Fidelity, and that where there is a discrepancy between the declarations page and the SFIP, the SFIP controls. (Dkt. 32 at 2.) This contention is unavailing. First, the Flood Declarations Page states that "This policy is issued by Fidelity National Property and Casualty," and is signed by Fidelity's Chief Operating Officer. (Dkt. 24-13.) Whatever the source of the information contained in the Flood Declarations Page, Fidelity adopted that information when it issued the Policy to Plaintiff. There is no question that the Policy, as reflected in the Flood Declarations Page, is a governing document of the flood insurance policy. (*See* Def. St. ¶ 10) (stating that Fidelity issued the Policy to Plaintiff, and citing to the Flood Declarations Page for the coverage amount, deductible, and effective date); (Dkt. 26-10 at GR 15) ("A copy of the Flood Insurance Application and premium payment, or a copy of the declarations page, is sufficient evidence of proof of purchase for new policies."). Fidelity does not dispute this, and points to no other controlling document executed by the parties that constitutes the Policy or governs its terms.[13] In addition, Fidelity cites no support for the proposition that conflicts between the express

[13] As discussed, *supra*, Fidelity has not submitted in the record the "policy contract" or evidence that it ever was provided to Plaintiff.

language of an insurance policy and the SFIP should be resolved in favor of the SFIP. Indeed, this was the proposition specifically rejected in *Pecarovich*.

Fidelity also contends that, because the Flood Declarations Page contains an effective date that renders the policy ineligible for federal reimbursement, that term constitutes an "error" in the contract. Such an "error," Fidelity argues, renders the term invalid and the SFIP must control. (Dkt. 32 at 1.) This is unpersuasive. That the effective date of the Policy may have precluded reimbursement under the NFIP did not invalidate the policy; rather, it meant that Fidelity would be responsible for paying Plaintiff—not necessarily FEMA—for any damage to the property that occurred between the effective date of the Policy and the date upon which the NFIP requirements were all satisfied, *i.e.*, after the loan closing and the expiration of the 30-day waiting period.

Furthermore, the effective date of October 22, 2013 was certainly not "erroneous" in that it was neither accidental nor unintended. Plaintiff's insurance agent, Clausen, intentionally included that term in the insurance application, per Plaintiff's request. (Pl. St. ¶¶ 7–8.) Indeed, Defendant acknowledges that it waived the 30-day waiting period for coverage based on those representations. (Dkt. 24-7 at 2) ("The [SFIP] is issued with a standard thirty (30) day waiting period for new business. This policy was issued with a waiver of the standard thirty (30) day waiting period."). The October 22, 2012 effective date, though contrary to NFIP regulations, was not an "error," but was a term agreed to by Fidelity via the insurance application system it set up, that may or may not have rendered the policy ineligible for FEMA reimbursement. Again, if Fidelity issued the Policy in violation of NFIP regulations, it has no bearing on whether the Policy, which Fidelity issued to Plaintiff, is a valid contract.

Accordingly, the Court finds that neither the NFIP's 30-day waiting period or loan closing requirement apply to the Policy.

III. Common Law and General Principles of Contract Law

Having determined that the Policy is not governed by these two NFIP requirements, the Court must interpret the Policy pursuant to common law principles of contract interpretation to determine whether Fidelity breached its agreement with Plaintiff by rejecting his damage claim for the property. Because federal common law relies upon state law, and because New York and federal common law relating to contract interpretation are materially the same with respect to the relevant issues here, the Court cites to them in conjunction. *See Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 747 F.3d 44, 49 (2d Cir. 2014) (quoting *Dobson v. Hartford Fin. Servs. Grp., Inc.*, 389 F.3d 386, 399 (2d Cir. 2004)) (in applying the "'federal common law of contract,'" the Court consults "'general principles of contract law,'" which often refer to and are articulated by state law).[14]

Under both federal common law and New York law, unambiguous contracts are interpreted as a matter of law. *See Metro. Life Ins. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) ("Under New York law . . . if a contract is unambiguous on its face, its proper construction is a question of law."); *Am. Express Bank v. Uniroyal, Inc.*, 164 A.D.2d 275, 277

[14] "In developing federal common law in an area, a court may look at state law." *Am. Home Assurance Co. v. Hapag Lloyd Container Linie, GmbH*, 446 F.3d 313, 316 (2d Cir. 2006) (alterations omitted); *see also Hovensa LLC v. Kristensons-Petroleum, Inc.*, 2013 WL 1803694, at *4 (S.D.N.Y. Apr. 26, 2013) (interpreting general contract principles "[u]nder both federal common law and New York law"); *See* 19 *C. Wright, A. Miller, & E. Cooper*, Federal Practice and Procedure § 4518, at 572–573 ("In recent years, the Supreme Court has put increasing emphasis on the notion that when determining what should be the content of federal common law, the law of the forum state should be adopted absent some good reason to displace it."). Moreover, the principles of contract interpretation at issue here—ambiguity, plain meaning, and unilateral reformation—are basic principles of contract law.

(1st Dep't 1990) ("Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment."). "[T]he initial question for the court on a motion for summary judgment with respect to a contract claim is 'whether the contract is unambiguous with respect to the question disputed by the parties.'" *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010) (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002)). The matter of ambiguity is a question for the Court to determine as a matter of law. *Id.* at 465 (citing *Int'l Multifoods Corp.*, 309 F.3d at 83). A contract is ambiguous where the contract's terms "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business." *Id.* at 466 (citing *Int'l Multifoods*, 309 F.3d at 83).[15]

If the Court determines that the contract is unambiguous, the Court's next task is to interpret the contract's unambiguous words. "As a general matter, the objective of contract interpretation is to give effect to the *expressed* intentions of the parties," and "the best evidence of what parties to a written agreement intend[ed] is what they say in their writing." *Law Debenture Trust Co. of New York*, 595 F.3d at 467 (internal citations and alterations omitted) (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002)). Under "general

[15] When a contract is ambiguous, meaning that there may be more than one reasonable interpretation, its construction will be left to the finder of fact to determine. *Amusement Bus. Underwriters v. Am. Int'l Grp.*, 66 N.Y.2d 878, 880 (1985). Nevertheless, even ambiguous contracts may be interpreted by a court as a matter of law in cases where the parties do not submit extrinsic evidence to support their urged interpretations. *See 82-11 Queens Blvd. Realty, Corp. v. Sunoco, Inc. (R & M)*, 951 F. Supp. 2d 376, 382 (E.D.N.Y. 2013) (citing *Weiner v. Anesthesia Assocs. of W. Suffolk*, 203 A.D.2d 454, 455 (2d Dep't 1994)).

principles of contract law," "words and phrases should be given their plain meaning." *LaSalle Bank Nat'l Ass'n v. Nomura Asset Cap. Corp.*, 424 F.3d 195, 206 (2d Cir. 2005). "The Court must construe the agreement in accordance with the intent of the parties, giving unambiguous words their plain meaning." *S.E.C. v. Credit Bancorp, Ltd.*, 242 F. Supp. 2d 260, 264 (S.D.N.Y. 2002) (citing *Bank of New York v. Amoco Oil Co.*, 356 F.3d 643, 661 (2d Cir. 1994)).

IV. Analysis of the Policy

There are no ambiguous terms in the Policy with respect to its effective date, which is the only term the parties dispute. The effective date is expressly stated as October 22, 2012, without qualification. (Dkt. 26-9.) This contract term is not subject to any other meaning when "viewed objectively by a reasonably intelligent person." *Law Debenture Trust Co.*, 595 F.3d at 465. Accordingly, the Court finds the effective date of the Policy to be unambiguous as a matter of law, and interprets it according to its facial meaning as expressed in the Flood Declarations Page, which Fidelity acknowledges reflects the terms of the Policy. (*See* Pl. St. ¶ 10) (citing to policy number 314400537112, which refers to the Flood Declarations Page).

Next, "[i]t is axiomatic that where the language of a contract is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." *Feifer v. Prudential Ins. Co.*, 306 F.3d 1202, 1210 (2d Cir. 2002); *see also Rosenblatt v. Christie, Manson & Woods, Ltd.*, 195 Fed. App'x 11, 12 (2d Cir. 2006) ("Where, as here, a contract is unambiguous, it is enforced according to its terms, and the court will generally not look 'outside the four corners of the document' to add to or vary it.").

As previously discussed, in *Palmieri*, the Second Circuit interpreted the plaintiff-insured's insurance policy according to the terms set forth in the actual policy agreed to by the

parties.[16] The court held: "The terms of Palmieri's policy could not be more clear in limiting his recovery for personal property losses to actual cash value. We therefore decline to apply the terms of the SFIP rather than the unambiguous terms of the policy actually signed by the parties." *Palmieri*, 445 F.3d at 188.

Here, there is no dispute that Plaintiff, through Clausen[17], submitted to Fidelity an application for flood insurance, which Plaintiff signed on October 19, 2012, and which was delivered to Fidelity on October 22, 2012. (Dkt. 24-3 at ECF 4.) There also is no dispute that Fidelity, in turn, issued to Plaintiff the Policy, which contained an "Effective Date" of October 22, 2012. (Dkt. 24-3 at ECF 1.) The Temporary Declaration Page, provided to Plaintiff on October 22, 2012, expressly stated that there was *no* waiting period: "Lender Requirement – No Waiting (SFHA only)."[18] (Dkt. 24-3 at ECF 1.) Also, on October 22, 2012, Fidelity executed the Flood Declarations Page, which stated that the "Date of Issue" was October 22, 2012, with the policy period being "From: 10/22/12 To: 10/22/13". (Dkt. 26-9 at ECF 2.) The Flood Declarations Page also stated that the insurance premium had been paid by the insured, Ed

[16] In *Palmieri*, the parties, "did not use the SFIP, and Palmieri [] made no attempt to argue that Allstate violated his rights by drafting its own contract, rather than adopting the SFIP." *Palmieri*, 445 F.3d at 188. The court further held that "even if Allstate violated the [NFIP] regulations by drafting its own contract rather than adopting the SFIP, nothing in the regulations suggests that courts should respond to such a violation by holding the parties to be bound by the terms of the SFIP when neither party agreed to that contract." *Id.*

[17] The parties dispute whether Clausen was acting as Plaintiff's or Defendant's agent when it submitted the information pertaining to the Policy. This is of no moment. Regardless of whom Clausen was acting on behalf of, it was a *Fidelity* policy that was issued to Plaintiff with an explicit waiver of the 30-day waiting period. (Dkt. 26-3 at 4–5.) If Defendant did not want to waive the 30-day waiting period based upon Clausen's representations, it could have established a different system than the one that it did, which permitted Clausen to directly issue Fidelity insurance policies. (*See* Dkt. 23 at 2–3 & supporting exhibits.)

[18] "SFHA" refers to a FEMA-designated area known as a "Special Flood Hazard Area." *See* 44 C.F.R. § 59.1 ("Area of special flood hazard is the land in the flood plain within a community subject to a 1 percent or greater chance of flooding in any given year.").

Flanders, and that "[t]his policy is issued by Fidelity National Property and Casualty." The Policy was signed by Fidelity's Chief Operating Officer, Patricia Templeton-Jones. (Dkt. 26-9 at ECF 2.)[19] In any event, Fidelity has acknowledged that it issued the Policy to Plaintiff with a waiver of the standard 30-day waiting period. (Dkt. 24-7 at 2.)[20]

Based upon the unambiguous terms of the contract, the Policy was effective as of October 22, 2012. The plain and unambiguous terms of the Policy stated that there was no waiting period and that the Policy was effective immediately upon the premium being received, which it was that day. (Dkt. 26-9) ("Premium Paid By: Insured"). After sustaining damage to the insured property, Plaintiff submitted a claim for insurance reimbursement under the Policy on or about October 31, 2012. (Pl. St. ¶ 13.) Fidelity denied that claim in a letter dated December 3, 2012. (Pl. St. ¶ 15; Dkt. 24-6.) This denial was in breach of the Policy. Accordingly, the

[19] *See also* Fidelity National Property & Casualty Insurance Company, FEMA.gov, http://www.fema.gov/wyo-insurance-company/fidelity-national-property-casualty-insurance-company (listing Patricia Templeton-Jones as "COO" of Fidelity National Property & Casualty Insurance Company) (last visited Sept. 12, 2014).

[20] Thus, Fidelity's arguments that it cannot be bound by the statements made in the declarations page because those are statements of Plaintiff's agent (Clausen), and not Fidelity, are entirely unavailing. (Dkt. 32 at 2–6.) Moreover, the cases discussed in this regard pertain to inadvertent *errors* in submitted declarations, and who should be held accountable for such errors. (*See* Dkt. 27 at 5; Dkt. 26-3 at 10) (citing *Dennis v. Fidelity Nat'l Prop. and Cas. Ins. Co.*, 2010 WL 3306879, at *4 (W.D. La. Aug. 17, 2010)). Inclusion of the 30-day waiting period waiver was not an "error"—it was intentionally included, and, based on the system Fidelity set up to receive insurance applications, was accepted and approved by Fidelity. (Dkt. 24-2 at 45–46; Pl. St. ¶ 5.) As referenced above, Fidelity issued to Plaintiff a policy that was signed by its Chief Operating Officer, which cannot reasonably be considered a statement made by the Plaintiff. (*See* Dkt. 24-13 at ECF 2.) Even if this was done automatically, that is the system Fidelity created, and which it was free to alter. In any event, Fidelity several times admitted that *it* issued the Policy with the 30-day waiver, so its contentions regarding the provenance of the Policy's terms are unavailing. (Dkts. 24-5, 24-9, 24-13.)

Court finds that Fidelity has breached its contract with Plaintiff, and that Plaintiff is entitled to judgment as a matter of law.

V. State Law and Extra-Contractual Tort Claims

Plaintiff's complaint also asserts a claim for bad faith denial of an insurance claim, for which Plaintiff seeks attorney fees and punitive damages. (Dkt. 1 at 9–10.) New York law does not recognize an independent tort for bad faith denial of an insurance contract. *See Wiener v. Unumprovident Corp.*, 202 F. Supp. 2d 116, 123 (S.D.N.Y. 2002) (citing *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d at 315–20 (1995)). Rather, in order to obtain punitive damages in connection with a contract claim, a plaintiff must state an independent tort claim that itself could form the basis for punitive damages separate and apart from the contract. *See New York Univ.*, 87 N.Y.2d at 316. In other words, for a plaintiff to recover punitive damages in connection with a contract, a defendant must have a separate duty of reasonable care independent of the contract, and the defendant must have breached that duty either negligently or intentionally. *See Continental Ins. Co.*, 87 N.Y.2d at 317–18 ("[T]he provisions of the [New York] Insurance Law are properly viewed as measures regulating the insurer's performance of contractual obligations, as an adjunct to the contract, not as a legislative imposition of a separate duty of reasonable care. . . . If the statute does not permit a private right of action in favor of an insured, a fortiori, it cannot be construed to impose a tort duty of care flowing to the insured separate and apart from the insurance contract.")

Accordingly, Plaintiff's extra-contractual tort claim is dismissed for failure to state a claim upon which relief can be granted under New York law. *See, e.g.*, *Funk v. Allstate Ins. Co.*, 13-CV-5933(JS)(GRB) 2013 WL 6537031 (E.D.N.Y. Dec. 13, 2013); *Dufficy v. Nationwide*

Mut. Fire Ins. Co., 13-CV-6010(SJF)(AKT) 2013 WL 6248529 (E.D.N.Y. Dec. 2, 2013) (denying extra-contractual tort claims for failure to state a claim to relief).[21]

VI. Relief

A prevailing party in a breach of contract lawsuit is entitled to compensatory damages. "Elementary principles of contract law dictate that damages for a breach of contract should put the non-breaching party in the position it would have occupied but for the breach; the injured party should not recover more from the breach than the party would have gained had the contract been fully performed." *Topps Co., Inc. v. Cadbury Stani S.A.I.C.*, 380 F. Supp. 2d 250, 269 (S.D.N.Y. 2005); *see also Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 195 (2008) ("Contract damages are ordinarily intended to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed.") (citing *Goodsten Constr. Corp. v. City of New York*, 80 N.Y.2d 366, 373 (1992)) (itself citing Restatement [Second] of Contracts § 347, cmnt a; § 344); *Clearview Concrete Prods. Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461, 469 (2d Dep't 1982) ("The 'benefit of the bargain' standard is intended to place the injured party in as good a position as would have been achieved had there been full performance of the contract, but the damages claimed must be measurable with a reasonable degree of certainty and must be adequately proven.") (citing cases).

With respect to a contract for insurance, compensatory damages generally are in the amount of the covered losses under the insurance policy. *See Bi-Economy Market, Inc.*, 10

[21] It is possible that Plaintiff's state law claim is preempted by NFIP. Although the Second Circuit does not appear to have ruled on the issue, at least one other circuit court has held that the NFIP preempts non-fraud based state law claims. *See Gallup v. Omaha Prop. and Cas. Ins. Co.*, 434 F.3d 341 (5th Cir. 2005). However, since Plaintiff's state law claim does not exist under New York law, the Court need not address the preemption issue, which has not been raised by the parties.

N.Y.3d at 198 ("[I]n insurance contracts or other contracts for the payment of money, the parties have already told us what damages they contemplated; in the case of insurance, it is payment equal to the losses covered by the policy, up to the policy limits.").

Plaintiff stated in the complaint that he seeks an award of "not less than $100,000" in connection with Defendant's breach of contract. (Dkt. 1 at 10.) However, the Court cannot award damages in an indefinite amount. Accordingly, the Court will conduct a damages inquest, which may be conducted via affidavits, to determine the amount of damages to which Plaintiff is entitled. *See Entm't By J&J, Inc. v. PJ's Lounge*, 2005 WL 159631, at *1 (S.D.N.Y. Jan. 26, 2005) (quoting *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) ("The Second Circuit has approved the holding of an inquest by affidavit, without an in-person court hearing, 'as long as [the Court has] ensured that there was a basis for the damages specified[.]'"). The parties also may stipulate to the damages amount, in which case a damages inquest will be unnecessary.

CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment is granted on his breach of contract claim, and denied on his extra-contractual claims. Fidelity's motion for summary judgment is denied as to Plaintiff's breach of contract claim, and granted as to Plaintiff's extra-contractual claims, which are dismissed for failure to state a claim.

Assuming Plaintiff can demonstrate a covered claim, he is entitled to compensatory damages in an amount to be determined following a damages inquest or by stipulation of the parties. The parties shall appear for a status conference to discuss the damages inquest in this matter, which will be canceled in the event the parties stipulate to Plaintiff's damages.

SO ORDERED:

/s/ Pamela K. Chen
PAMELA K. CHEN
United States District Judge

Dated: September 30, 2014
Brooklyn, New York