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ORIGINAL

Short Form Order/Judgment/Declaration

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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CATERPILLAR INSURANCE COMPANY,

Plaintiff,

-against-

METRO CONSTRUCTION EQUITIES,

Defendant.

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FILED
2013 JUN 13 AM 9:47
QUEENS COUNTY CLERK'S OFFICE

Index No. 25413/10
Motion Date: 4/1/13
Mot. Cal. No. 8
Mot. Seq. 1

The following papers numbered 1 to 5 read on this motion by plaintiff **CATERPILLAR INSURANCE COMPANY** for summary judgment on its complaint and for summary judgment dismissing the counterclaims asserted against it by defendant Metro Construction Equities and on this cross-motion by defendant **METRO CONSTRUCTION EQUITIES** for summary judgment dismissing the complaint against it and for summary judgment on its counterclaims

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1
Notice of Cross-Motion - Affidavits - Exhibits	2
Answering Affidavits - Exhibits.....	3
Reply Affidavits.....	4
Memoranda of Law	5

Upon the foregoing papers it is ordered that the motion and cross-motion are disposed as follows:

On or about October 14, 2008, defendant Metro entered into a lease agreement with Hoffman Equipment, Inc. whereby the latter leased a 2004 Daewoo excavator to the former. Defendant Metro used the excavator on a construction site in Jamaica, New York. The excavator sustained damage when the ground at the site collapsed, causing the machine to roll over onto its side. Hoffman transported the excavator back to its shop for repairs.

* MODIFIED - SEE APPELLATE DIVISION ORDER FILED 8-6-15 *
Audrey I Pheffer
Clerk

Defendant Metro had insured the excavator by taking out a contractor's equipment insurance policy with plaintiff Caterpillar Insurance Company. After defendant Metro made a claim under the policy, one of the plaintiff insurer's adjusters inspected the excavator. Hoffman repaired the machine, and the adjuster approved a final invoice for $25,835.29.

Plaintiff Caterpillar asked defendant Metro to sign a notarized proof of loss statement. However, defendant Metro refused to sign the proof of loss form and the authorization to pay Hoffman directly. Defendant Metro sent a letter dated February 27, 2009, stating in relevant part: "The proof of loss form indicated loss and damage at approximately $26,000. We feel these damages are overstated. Further, we will require a letter indicating why the insurance company authorized these repairs when the total cost of these repairs are close or equal to the machine value." The adjuster replied by letter dated March 11, 2009, stating in relevant part: " As to the value of the Daewoo excavator, our appraiser's opinion of the value was $63,000, so the repairs were well under the machine's value." After defendant Metro again failed to return the proof of loss and authorization to pay forms, the plaintiff gave defendant Metro another 60 days to return the forms. Defendant Metro did not respond. (Although not entitled to evidentiary value, the plaintiff's attorney has affirmed: "Due to an unrelated dispute between the property owner and the insured, the insured refused to allow the dispute to be settled so as to leverage its position in the extraneous dispute that did not involve the plaintiff insurer.")

The plaintiff's agent denied coverage by letter dated August 25, 2009 on the ground that the insured had failed to comply with section 7.C.8 of the policy. That section provides in relevant part: "7. LOSS CONDITIONS [:] C. Duties in the Event of a 'Loss' [:] You must see that the following are done in the event of 'loss' to 'Covered Property' : *** Send us a signed sworn statement of proof of 'loss' containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms."

The plaintiff insurer brought this action for a declaratory judgment on or about October 7, 2010. The defendant answered the complaint, asserting counterclaims for unfair claim settlement practices pursuant to Section 2601(a) of the Insurance Law, for deceptive acts and practices pursuant to section 369 of the General Business Law, and for tortious interference with contract.

"When an insurer gives its insured written notice of its desire that proof of loss under a policy of *** insurance be furnished and provides a suitable form for such proof, failure of the insured to file proof of loss within 60 days after receipt of such notice, or within any longer period specified in the notice, is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense. " (*Igbara Realty Corp. v. New York Property Ins. Underwriting Ass'n* 63 NY2d 201, 209; *Turkow v. Security Mut. Ins. Co.*, 92 AD3d 1180.)

It is true, as defendant Metro points out, that Insurance Law §3407 required the insurer to send it "written notice that it or they desire proofs of loss to be furnished by such insured to such insurer or insurers on a suitable *blank* form or forms." (Italics added.) Metro alleges that plaintiff Caterpillar sent it a proof of loss form that the insurer had already filled out and that, moreover, Metro disputed the amount filled in. However, Metro did not submit proof that it had a basis for disputing the loss calculated by the insurer, and, under all of the circumstances of this case, the court finds that the proof of loss form sent by Caterpillar satisfied the requirements of Insurance Law §3407. Substantial compliance with proof of loss requirements is sufficient for the insured (*see, P.S. Auctions, Inc. v. Exchange Mut. Ins. Co.* 105 AD2d 473), and here no more than substantial compliance by the insurer was necessary. Under all of the circumstances of this case, the court finds that the conduct of the insurer does not estop it from asserting a failure to comply with section 7.C.8 as a breach of the policy.

The failure of defendant Metro to send the plaintiff insurer the proof of loss form provides the latter with a valid reason for disclaiming liability under the policy. (*See, Going 2 Extremes, Inc. v. Hartford Financial Services Group, Inc.* 100 AD3d 694; *DeRenzis v. Allstate Ins. Co.*, 256 AD2d 303.) Plaintiff Caterpillar established its prima facie entitlement to judgment as a matter of law on its complaint, and defendant Metro failed to raise a triable issue of fact in opposition. (*See, Going 2 Extremes, Inc. v. Hartford Financial Services Group, Inc., supra.)*

Accordingly, that branch of the plaintiff's motion which is for summary judgment on its complaint is granted. That branch of the defendant's motion which is for summary judgment dismissing the complaint against it is denied.

The plaintiff insurer also demonstrated that it is entitled to judgment as a matter of law dismissing the counterclaims. The policy provides in relevant part: "E. Duties in the Event of

a 'Loss': *** 3. We may adjust losses with the owners of lost or damaged property if other than you. If we pay the owners, such payment will satisfy your claim against us for the owner's property. We will not pay the owners more than their financial interest in the Covered Property." This clause gave the insurer a contractual basis for negotiating a settlement with the owner of the excavator. Defendant Metro failed to submit evidence that raises a genuine issue of fact concerning whether plaintiff Caterpillar engaged in unfair settlement practices Moreover, Insurance Law § 2601 does not give rise to a private cause of action (*Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603; *Zawahir v. Berkshire Life Ins. Co.*, 22 AD3d 841; *see*, *New York University v. Continental Ins. Co.*, 87 NY2d 308), General Business Law §349 does not apply to private contractual disputes (*see*, *New York University v. Continental Ins. Co.*, 87 N.2d 308), and the insurer did not induce the owner of the excavator to breach a contract with defendant Metro (*see*, *Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413.)

Accordingly, that branch of the plaintiff's motion which is for summary judgment dismissing the counterclaims asserted against it is granted and that branch of the defendant's cross-motion which is for summary judgment on its counterclaims is denied. The court declares that the plaintiff insurer validly disclaimed coverage under the policy.

The Clerk is directed to enter judgment accordingly.

This constitutes the order and judgment declaration of the Court.

Dated: June 7, 2013

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TIMOTHY J. DUFFICY, J.S.C.

Audrey I Pheffer

CLERK

MODIFIED - SEE APPELLATE ORDER
FILED 8-6-15

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