SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 37
NASSAU COUNTY

ELBERT GREENAWAY and AUGUSTINA GREENAWAY, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

- against -

TRI-STATE CONSUMER INSURANCE COMPANY,

Defendant.

Index No.: 600260/14
Motion Seq. No.: 05
Motion Date: 01/13/16

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affidavit in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR §§ 901 and 902, for an order certifying a class in this action; and move for an order appointing plaintiff Elbert Greenaway as class representative; and move for an order appointing Wilkofsky, Friedman, Karel & Cummins and Greenblatt and Agulnick, P.C. as class co-counsel; and move for an order directing that notice of class certification be sent to the class by first class mail; and move, pursuant to CPLR § 3025(b), for an order permitting plaintiffs to amend the Verified Class Action Complaint. Defendant opposes the motion.

On January 17, 2014, plaintiffs Elbert Greenaway and Augustina Greenaway electronically filed a Summons and Verified Class Action Complaint on behalf of themselves and all other persons similarly situated. The Verified Complaint alleges that defendant engaged in deceptive acts and practices and defrauded its policyholders by routinely deducting contractors' overhead and profit from all of its repair or replacement cost estimates, by routinely obtaining several contractors' estimates and cherry-picking the lowest one to utilize in adjusting policyholders' claims and otherwise disregarding estimates it arbitrarily believes to be too expensive, and by cancelling payments made to policyholders, as well as stalling and delaying the investigation of claims as punishment when policyholders retain representation. *See* Plaintiffs' Affirmation in Support Exhibit H.

Defendant issued a homeowners insurance policy on 33 Glover Avenue, Yonkers, New York ("the Premises") to the named plaintiffs, covering the period February 6, 2012 to February 6, 2013. The Verified Complaint alleges that, on or about January 27, 2013, a pipe break at the Premises caused water damage and the named plaintiffs made a claim under their homeowners insurance policy with defendant. At defendant's request, Prism General Services estimated the replacement cost value of the loss at the Premises as $56,642.56, which included overhead and profit of $9,295.68. Defendant obtained a second estimate of $20,165.50 from Metro Claims Mgmt NYC Inc., which excluded overhead and profit, and issued payment to the named plaintiffs in that amount. After the named plaintiffs retained counsel and disputed the amount defendant paid for their loss, defendant cancelled the check for $20,165.50 and allegedly threatened to delay investigation of their claim. *See id.*

The named plaintiffs seek to bring this class action pursuant to CPLR Article 9, on behalf of themselves and all current and former owners of insurance policies issued by defendant, for the period beginning six (6) years before commencement of this action to the present, who suffered an insurance loss and reported it to defendant. The Verified Complaint asserts five (5) causes of action. The first cause of action asserts a claim for breach of contract on behalf of the named plaintiffs. The second cause of action asserts a claim for violation of General Business Law § 349 on behalf of the named plaintiffs. The third cause of action asserts a claim for breach of contract on behalf of the putative class members. The fourth cause of action asserts a claim for violation of General Business Law § 349 on behalf of the putative class members. The fifth cause of action seeks a declaratory judgment on behalf of the named plaintiffs and all others similarly situated. *See id.*

By Decision and Order dated September 15, 2014, this Court granted defendant's motion (Seq. No. 01) to dismiss plaintiffs' Verified Complaint to the extent that plaintiff's fourth cause of action for violation of General Business Law § 349 on behalf of the putative class members and fifth cause of action for declaratory judgment on behalf of the named plaintiffs and all others similarly situated were each dismissed. Defendant's motion to dismiss was otherwise denied. Defendant filed a Notice of Appeal from that Decision and Order.

Issue was joined by the filing of a Verified Answer on November 7, 2014, followed by the filing of a Verified Amended Answer on November 20, 2014. *See* Plaintiffs' Affirmation in Support Exhibit J.

It appears that the pre-class certification discovery sought by plaintiffs has been completed.

With regard to so much of plaintiffs' instant motion as seeks class certification in this matter, the proponent of a class action has the initial burden of establishing the prerequisites of class-action certification by competent evidence in admissible form. *See Osarczuk v. Associated Univs., Inc.*, 82 A.D.3d 853, 918 N.Y.S.2d 538 (2d Dept. 2011); *Emilio v. Robison Oil Corp.*, 63 A.D.3d 667, 880 N.Y.S.2d 177 (2d Dept. 2009); *Feder v. Staten Is. Hosp.*, 304 A.D.2d 470, 758 N.Y.S.2d 314 (1st Dept. 2003).

The prerequisites to a class action are contained in CPLR § 901(a), which provides that:

> One or more members of a class may sue or be sued as representative parties on behalf of all if:
> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> 4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Once the prerequisites under CPLR § 901(a) have been satisfied, the Court must consider the factors set forth in CPLR § 902:

> 1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. The impracticability or inefficiency of prosecuting or defending separate actions;
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. The difficulties likely to be encountered in the management of a class action.

CPLR Article 9 is to be liberally construed and the determination as to whether to grant class certification rests in the discretion of the trial court. *See Beller v. William Penn Life Ins. Co. of N.Y.*, 37 A.D.3d 747, 830 N.Y.S.2d 759 (2d Dept. 2007).

Regarding the requirement that the class be so numerous that joinder of all members is impracticable (*see* CPLR § 901(a)(1)), plaintiffs offer the transcript of the deposition of non-party Joseph DeRosa ("DeRosa"), a former employee of defendant who handled homeowners' claims. When asked to estimate the number of insurance claims made to defendant which should have been paid with profit and overhead but were not, DeRosa testified, "I'm sure there's thousands of claims." *See* Plaintiffs' Affirmation in Support Exhibit L p. 61 lines 13-24. His testimony is further substantiated by the affidavit of Arthur Palma, a general contractor whose company prepared estimates for defendant from 2008 through 2013. He averred that the omission of profit and overhead from estimates affected "hundreds if not thousands of claims." *See* Plaintiffs' Affirmation in Support Exhibit N ¶ 12.

Defendant has failed to directly refute the accuracy of these numbers, instead criticizing plaintiffs for failing to "quantify" the identities of other policyholders similarly situated to plaintiffs. This argument is disingenuous at best since during pre-certification discovery, defendant moved (Seq. No. 03) for a protective order allowing it to redact all personal and confidential information contained in the documents it produced to plaintiffs, which relief was granted by this Court in its Decision and Order dated August 3, 2015.

There is no set rule for the number of prospective class members which must exist to satisfy the numerosity requirement of CPLR § 901(a)(1), however, a class of forty (40) or more has been found to raise a presumption of numerosity. *See Weinstein v. Jenny Craig Operations, Inc.*, 41 Misc.3d 1220(A), 981 N.Y.S.2d 639 (Sup Ct New York County 2013). Plaintiffs'

submissions adequately establish the requirement of numerosity necessary for certification of a class action.

Plaintiffs have also established that the claims of the named plaintiffs are typical of the claims of the proposed class and that the named plaintiffs can adequately protect the interests of the proposed class. *See* CPLR § 901(a)(3) and (4). The named plaintiffs' claims derive from the same practices and course of conduct that give rise to the claims of the other members of the putative class and are based on the same legal theory. The named plaintiffs' claims need not be identical to those of the class. *See Krebs v. Canyon Club, Inc.*, 22 Misc.3d 1125(A), 880 N.Y.S.2d 873 (Sup Ct Westchester County 2009).

Defendant's argument that plaintiffs' claims are atypical because they are subject to the unique defenses of failure to mitigate damages and fraud are without merit. It should be noted that defendant has not even raised failure to mitigate damages or fraud as affirmative defenses in its Verified Amended Answer. Moreover, defendant fails to offer any factual basis whatsoever for the fraud defense. Although defendant's First Party Homeowner Claim Adjustment Guidelines require that a written notice of claim denial "state the factual reason(s) for the denial of claim" (*see* Plaintiffs' Affirmation in Support Exhibit P p. 3), the partial disclaimer letter issued to plaintiffs by defendant fails to explain the basis for defendant's allegation of fraud. *See* Defendant's Affidavit in Opposition Exhibit C. However, even if the fraud defense were viable, it would not cause plaintiffs' claims to be atypical since it appears that defendant frequently raises this defense to its policyholders' claims. *See* Plaintiffs' Reply Affirmation Exhibit A.

While plaintiffs have met the other prerequisites of CPLR § 901(a), they fail to meet the commonality and superiority requirements necessary for certification of a class action. As a precondition to the certification of a class action, there must be questions of law or fact common

to the class which predominate over any questions affecting only individual members of the putative class (*see* CPLR § 901(a)(2)) and a class action must be superior to other available methods for the fair and efficient adjudication of the controversy. *See* CPLR § 901(a)(5).

There are some common questions regarding defendant's handling of its policyholders' claims, however, the constituency of the proposed class may only be determined after each alleged member of the class proves that they made a timely claim to defendant for which they were entitled to overhead and profit and that they did not receive it; and/or that defendant requested more than one estimate of damage and then chose the lower estimate to adjust the claim; and/or that defendant canceled payment of a claim when a policy holder retained representation or disputed a payment amount. Then there will be separate issues as to whether there are any defenses or set-offs to each policyholder's claim and what, if any, damages each policyholder would be entitled to.

As the Appellate Division, Third Department held in *Mazzocki v. State Farm Fire & Cas. Corp.*, 1 A.D.3d 9, 766 N.Y.S.2d 719 (3d Dept. 2003), if the loss estimates fail to establish a reasonable likelihood that the services of a general contractor would be needed for a claim, then a class action would not be appropriate because the insurer's liability would require proof by each insured that a general contractor would be needed to replace their damaged property. The Court further held that, "[t]his issue's resolution would be unique for each member, and it would sufficiently predominate over the common questions of fact and law so as to require denial of class certification." *Mazzocki v. State Farm Fire & Cas. Corp.*, *supra* at 15.

Even if there are common issues in this case, the predominance of individualized factual questions renders this case unsuitable for class treatment and a class action would be unlikely to achieve judicial economy or efficiency. *See Westfall v. Olean Gen. Hosp.*, 132 A.D.3d 1393, 17

N.Y.S.3d 572 (4th Dept. 2015); *Scott v. Prudential Ins. Co. of Am.*, 80 A.D.2d 746, 437 N.Y.S.2d 180 (4th Dept. 1981); *Conrad v. Hackett*, 184 A.D.2d 995, 584 N.Y.S.2d 241 (4th Dept 1992).

Since plaintiffs have failed to satisfy each of the basic prerequisites of CPLR § 901(a) for certification of a class action, it is not necessary for the Court to consider the additional factors set forth in CPLR § 902 and so much of plaintiffs' motion as seeks certification of a class, and the relief related thereto, is denied.

With regard to so much of plaintiffs' motion as seeks leave to amend their Verified Complaint, while leave to amend a pleading is to be freely given (*see* CPLR § 3025(b)), such leave should be denied if the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit. *See Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008).

As previously noted, in its Decision and Order dated September 15, 2014, this Court dismissed plaintiffs' fifth cause of action asserted in plaintiffs' Verified Complaint for declaratory judgment on behalf of the named plaintiffs and all others similarly situated. That cause of action alleged that defendant's actions interfered with the contractual and fiduciary rights that policyholders enjoy contained in the contracts issued by defendant. In dismissing that cause of action, this Court held that defendant cannot be liable for tortious interference with its own contracts and that plaintiffs' claim of tortious interference was duplicative of their breach of contract claims.

Plaintiffs' new proposed cause of action suffers from the same infirmities which plagued the fifth cause of action already dismissed by this Court. The fourth cause of action asserted in plaintiffs' proposed Amended Verified Complaint seeks declaratory judgment on behalf of the named plaintiffs and all others similarly situated and alleges that the actions of defendant

interfere with the contractual and fiduciary rights that policyholders enjoy contained in the contracts issued by defendant. As previously held by this Court, defendant cannot be liable for tortious interference with its own contracts and plaintiffs' claim of tortious interference is duplicative of their breach of contract claims. Therefore, plaintiffs' proposed new cause of action is patently devoid of merit and leave to amend to add it to the Verified Complaint must be denied.

In his Reply Affirmation, plaintiffs' counsel appears to withdraw plaintiffs' request for leave to amend the Verified Complaint to assert that cause of action. *See* Plaintiffs' Reply Affirmation ¶ 57. However, plaintiffs still seek leave to amend their Verified Complaint to assert other instances of alleged wrongful conduct perpetrated by defendant upon the named plaintiffs and members of the proposed class. *See* Plaintiffs' Affirmation in Support Exhibit U p. 5.

To the extent that the allegations which plaintiffs propose to add merely reflect new facts purportedly uncovered during pre-certification discovery and are consistent with plaintiffs' existing theories, they are not patently devoid of merit and would not result in significant prejudice or surprise to defendant, especially at this early stage of the litigation where regular discovery has not yet begun. *See Saldivar v. I.J. White Corp.*, 9 A.D.3d 357, 780 N.Y.S.2d 28 (2d Dept. 2004); *MVB Collision, Inc. v. Allstate Ins. Co.*, 129 A.D.3d 1041, 13 N.Y.S.3d 137 (2d Dept. 2015). However, the allegations plaintiffs seek to add regarding Ms. Hart do not support their breach of contract claim or their claim for a violation of General Business Law § 349 and leave to amend to add such allegations is denied. The remaining proposed allegations regarding defendant's position regarding the actual cash value of claims; depreciation of the value of insureds' contents; and determinations concerning insured's contents claims may be added and leave to amend is granted only to that limited extent.

Based upon the foregoing, the branches of plaintiffs' motion, pursuant to CPLR §§ 901 and 902, for an order certifying a class in this action; and for an order appointing plaintiff Elbert Greenaway as class representative; and for an order appointing Wilkofsky, Friedman, Karel & Cummins and Greenblatt and Agulnick, P.C. as class co-counsel; and for an order directing that notice of class certification be sent to the class by first class mail are hereby **DENIED**.

The branch of plaintiffs' motion, pursuant to CPLR § 3025(b), for an order permitting plaintiffs to amend the Verified Class Action Complaint is hereby **GRANTED only to the extent** that plaintiffs are granted leave to amend the Verified Complaint to the extent set forth herein. Such Amended Verified Complaint shall be served and filed within ten (10) days of the date of this Order and defendant shall serve and file an Amended Verified Answer to such Amended Verified Complaint within twenty (20) days of service thereof.

All parties shall appear for a Certification Conference in IAS Part 37, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on March 29, 2016, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

ENTERED

FEB 24 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
February 23, 2016