SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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LINQ1 LLC,

Plaintiff,

- v -

170 EAST END AVENUE CONDOMINIUM, LTB MECHANCIAL CORP., STATE FARM FIRE AND CASUALTY

Defendants.

INDEX NO. 154594/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action by plaintiff LINQ1 LLC to recover for mold and water damage to Unit 2D of the building located at 170 East End Avenue, New York, NY, defendant State Farm Fire and Casualty Company (hereinafter "defendant") moves for summary judgment dismissing the complaint against it on the ground that it is barred by the two-year limitations period in the insurance policy, and plaintiff cross-moves for leave to replead against State Farm. After oral argument, and upon a review of the papers submitted as well as the relevant statutes and case law, **the motion is granted**.

Plaintiff alleges that it purchased the subject apartment as an income property in February 2010 and that it sustained mold and water damage significant enough to require the tenants in the property to leave in July 2013. Plaintiff asserts that the exact cause of the mold is still not determinable. In August 2013, plaintiff submitted a claim to defendant, its insurer for the property. (Doc. No. 21). By letter dated October 25, 2013, defendant denied the claim and

recited, verbatim, among other things, the provision in the insurance contract that "[n]o action shall be brought unless there has been full compliance with the policy provisions **and the action is started within two years after the occurrence causing loss or damage.**" (Doc. No. 16) (emphasis added). The letter also specified that defendant considered the date of loss to be July 19, 2013. By email dated November 12, 2013, counsel for plaintiff submitted an email asking for the reports from defendant's experts that the letter stated was enclosed, but apparently had not actually been. (Doc. No. 27). The email made no reference to the limitations period recited in defendant's letter, and nothing in the papers before this Court suggests that any further discussion regarding the limitations period was held until the commencement of this action in October 2016, well over two years after the July 19, 2013 date of loss and, indeed, also more than two years after the denial letter.

While a cause of action sounding in breach of contract must ordinarily be brought within 6 years after the alleged breach (*see* CPLR 213 [2]), "'an agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable'" (*Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 [2014] [brackets omitted], quoting *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550-551 [1979]; *accord Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014]). The two-year limitations period for first-party coverage in the contract at issue here is unambiguous and enforceable (Doc. No. 15) (*see Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d 820, 823 [1985]; *Blanar v State Farm Ins. Cos.*, 34 AD3d 1333, 1333-1334 [4th Dept 2006]; *BNS Building LLC v Greenwich Ins. Co.*, 2010 NY Slip Op 30654[U], 2010 WL 1259934 [Sup Ct, NY County 2010, Gische, J.]). Particularly in light of the recitation of the shortened limitations period in the denial letter, plaintiff cannot seriously contend that defendant

waived same or that it constituted some sort of secret provision of which plaintiff was not made aware. Neither has plaintiff pointed to any concrete conditions precedent that made it impossible to bring suit within the time provided by the contract (*see BNS Building LLC v Greenwich Ins. Co.*, 2010 NY Slip Op 30654[U], 2010 WL 1259934; *compare Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d at 519). This Court has considered the remainder of plaintiff's arguments and finds them to be without merit.

Finally, plaintiff's cross motion for leave to replead must be denied, since this Court can discern no cause of action that survives the application of the contractual limitations period (*see Genger v Genger*, 135 AD3d 454, 455 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

Accordingly, it is hereby:

ORDERED that defendant State Farm Fire and Casualty's motion to dismiss the complaint against it is granted, and the complaint against it is severed and dismissed; and it is further

ORDERED that plaintiff's cross motion for leave to replead is denied; and it is further

ORDERED that counsel for State Farm is directed to serve a notice of entry on all sides within 20 days after this order is entered; and it is further

ORDERED that counsel for State Farm is directed to e-file a Notice to County Clerk (Form EF-22), with a copy of this order attached thereto, and the Clerk is directed to remove State Farm Fire and Casualty from the caption as a defendant.

12/8/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE