

SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

RICHARD PARKER,

Plaintiff,

- against -

CHUBB NATIONAL INSURANCE COMPANY,

Defendant.

TRIAL/IAS PART 22
NASSAU COUNTY

INDEX NO. 8195/06

X X XMOTION SUBMISSION
DATE: 9/5/07MOTION SEQUENCE
NO. 004

The following papers read on this motion:

| | |
|--------------------------------------|----------|
| Notice of Motion and Affidavits..... | <u>X</u> |
| Memorandum of Law..... | <u>X</u> |
| Affirmation in Opposition..... | <u>X</u> |
| Reply Affirmation..... | <u>X</u> |

RELIEF REQUESTED

The defendant moves for an order for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint on the ground that the action is time-barred by reason of the plaintiff's failure to commence suit within two years of the dates of loss as required by the policy of insurance on which plaintiff brings this action, and for leave pursuant to CPLR §1012(a)(2) and CPLR §1013 for the Great Northern Insurance Company to intervene so that the disposition in this action will bar a subsequent action. The defendant submits a Memorandum of Law in Support of the Motion. The plaintiff submits opposition. The defendant submits a reply affirmation.

At the outset, this Court grants defendant's motion to the extent that the defendant is granted leave to intervene Great Northern Insurance Company as they are the signatory to the policy of insurance sued upon.

BACKGROUND

The plaintiff initiated this breach of contract action against the defendant, as per plaintiff's complaint, for defendant's failure to cover a loss that occurred to plaintiff's home as a result of "two separate floods" that occurred "during the fall of 2003". Plaintiff initiated this action sometime in 2006. The defendant has demonstrated that the plaintiff unequivocally attributed the mold he observed in June of 2004 to water leaks that occurred on November 5, 2003 and early December of 2003. The pertinent portion of the subject insurance policy provides that the plaintiff agreed to bring any legal action against the defendant "within two years after a loss occurred".

APPLICABLE LAW

It is well settled that a defendant insurer who demonstrates that an action was not commenced within the contractual limitation period is entitled to summary judgment dismissing the action. (*Schachter v. Royal Ins. Co.*, 21 AD3d 1024; *C.P. City, Inc. v. Maryland Casualty Co.*, 4 AD3d 382; *Neary v. Nationwide Mutual Fire Insurance Co.*, 17 AD3d 331). In an action where plaintiffs sought to recover under their homeowners policy for losses arising from damage to their personal property caused by mold at their residence, the court found that the lower court properly granted defendant's motion seeking summary judgment dismissing the complaint as time-barred. (*Klawiter v. CGU/One Beacon Ins. Group*, 27 AD3d 1155). The court found that plaintiffs failed to commence their action within two years after the date of loss as required by policy and stated that "[c]ontrary to the contention of the plaintiffs, the date of loss is 'the date of the catastrophe insured against', not the accrual date of their cause of action against the defendant". (*Id.*, citing *Costello v. Allstate Ins. Co.*, 230 AD2d 763).

The Court in *Morgan Guaranty Trust Company of New York v. Aetna Casualty and Surety Company*, 199 AD2d 72, unanimously affirmed the lower court's decision in granting defendants' cross-motion for summary judgment dismissing the complaint as barred by the contractual period of limitations. There, the Court stated that the lower court correctly noted that "New York has not recognized any doctrine under which an insured loss is deemed to occur when discovered. Instead, the phrase "inception of the loss" has been interpreted as 'equivalent to the occurrence of the casualty or event insured against', (*Id.*, citing *Margulies v. Quaker City Fire & Mar. Ins. Co.*, 276 App Div 695). Where an insurance policy at issue provides that any action against the insurer must be commenced within two years from the date of loss, the court found there was no merit to the plaintiff's contention that the words "date of loss" were ambiguous, but rather, that the "phrase has been held to refer to the date of the catastrophe insured against, and not the date of the completion of the proceeds to determine the loss". (*Roberts v. New York Property Insurance Underwriting Association*, 253 AD2d 807).

DISCUSSION

In the case at bar, the terms of the insurance policy are clear and unambiguous and contain a two-year statute of limitations provision. The defendant herein sustained its initial burden of demonstrating its entitlement to summary judgment by presenting evidence that plaintiff's action was commenced after the contractual two-year limitations period expired. Therefore, plaintiff's action is time-barred. The plaintiff has failed to raise a triable issue of fact as to whether the defendant waived its right to assert, or should have been estopped from asserting, the limitations period as a defense.

The authorities upon which the plaintiff relies upon, in opposition to the defendant's motion, are readily distinguishable from the facts at bar. The case herein does not involve repeat flooding or intermittent injuries, (*Meruk v. The City of New York*, 233 NY 271); a continuing wrong which accrued anew each time the defendant collected income and profit, (*Barash v. Estate of Ralph Sperlin*, 271 AD2d 558); or ongoing water leaks, (action dismissed as time-barred). (*Martin v. 159 West 80 Street Corp.*, 3 AD3d 439).

In light of the foregoing, the defendant's motion is granted, and therefore, plaintiff's action is dismissed.

ENTER:



J.S.C.

Dated: October 23, 2007

cc: Law Offices of Neil Moldovan, P.C.
Tell, Cheser & Breitbart

ENTERED

OCT 26 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**