SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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E,

Plaintiff,

Index No:

-against-

Q,

Defendant.

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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO Q'S CROSS MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO Q's OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

_____
_____
_____
_____
Attorney for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JP Morgan Chase v. J.H. Elec. of N.Y., Inc., 69 A.D.3d 802 (N.Y. App. Div. 2d Dep't 2010)

Elisa Dreier Reporting Corp. v Global Naps Networks, Inc., 84 A.D.3d 122 (N.Y. App. Div. 2d Dep't 2011)

Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC, 107 A.D.3d 788 (N.Y. App. Div. 2d Dep't 2013)

Kausal v Educational Prods. Info. Exch. Inst., 105 A.D.3d 909, 911 (N.Y. App. Div. 2d Dep't 2013)

Furia v. Furia, 116 A.D.2d 694 (N.Y. App. Div. 2d Dep't 1986)

219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506 (N.Y. 1979)

Hartford Acci. & Indem. Co. v. Michigan Mut. Ins. Co., 61 N.Y.2d 569 (N.Y. 1984)

Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 38 N.Y.S.3d 1 (N.Y. App. Div. 1st Dep't 2016)

Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co., 53 A.D.3d 140, 145 (N.Y. App. Div. 1st Dep't 2008)

Travelers Indem. Co. v. Am. & Foreign Ins. Co., 286 A.D.2d 626 (N.Y. App. Div. 1st Dep't 2001)

New York State Ins. Fund v Everest Natl. Ins. Co., 125 A.D.3d 536, 537 (N.Y. App. Div. 1st Dep't 2015)

Fish & Richardson, P.C. v Schindler, 75 A.D.3d 219 (N.Y. App. Div. 1st Dep't 2010)

Rodriguez v United Bronx Parents, Inc., 70 A.D.3d 492, 492-493 (N.Y. App. Div. 1st Dep't 2010)

McArthur v. New York City Hous. Auth., 48 A.D.3d 431 (N.Y. App. Div. 2d Dep't 2008)

Henderson v Manhattan & Bronx Surface Tr. Operating Auth., 16 N.Y.3d 886 (N.Y. 2011)

Dreisinger v Teglasi, 130 A.D.3d 524 (N.Y. App. Div. 2015)

Broad St., LLC v. Gulf Ins. Co., 37 A.D.3d 126, 130 (N.Y. App. Div. 2006

Star City Sportswear, Inc. v. Yasuda Fire & Marine Ins. Co. of Am., 1 A.D.3d 58 (N.Y. App. Div. 1st Dep't 2003)

Seaport Park Condominium v. Greater N.Y. Mut. Ins. Co., 39 A.D.3d 51, 55 (N.Y. App. Div. 2007)

Marin v Constitution Realty, LLC, 128 A.D.3d 505 (N.Y. App. Div. 2015)

Ansonia Assocs. Ltd Pshp. v. Public Serv. Mut. Ins. Co., 257 A.D.2d 84 (N.Y. App. Div. 1999)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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E,

Plaintiff,

Index No:

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The Plaintiff E, ("**E**") respectfully submits this Memorandum of Law to seek denial of Defendant Q's ("**Q**") Cross Motion for Summary Judgment and in reply to Plaintiff's Motion for Summary Judgment dated _____.

PRELIMINARY STATEMENT

1. On _____, Plaintiff, E ("**E**") filed a Complaint against Q ("**Q**") on the grounds of Breach of Contract, Negligence, and Breach of the Covenant of Good Faith and Fair Dealing claiming relief of compensatory and consequential damages, interest costs, and attorney's fees.
2. On or about _____, Q filed a Motion to Dismiss the Breach of Contract action dated _____ filed by E against Q alleging that E's claim for Breach of Implied Covenant of Good Faith and Fair Dealing and for Negligent Performance in the Second and Third Cause of Action in the Complaint failed to state a Cause of Action.
3. On _____, E filed a Cross-Motion for Summary Judgment and Support of Cross-Motion to transfer the E v. Q action to the Bronx Supreme Court and in Opposition to Q's Motion to Dismiss.
4. Subsequently, on _____, Q filed a Reply Affirmation in Support of its Motion to Dismiss and in Opposition to E's Cross-Motion for Summary Judgment.
5. On _____, E filed a Reply Affirmation in Opposition to Q's Reply Affirmation in Opposition to Cross-Motion.
6. On _____, the Trial Court granted Q's Motion to Dismiss, filed pursuant to CPLR § 3211(a)(7), and dismissed and severed E's claim for Breach of Covenant of Good Faith and Fair Dealing, Negligence claims, and claim for attorney's fees for failure to state a Cause of Action and dismissed E's Cross-Motion for Summary Judgment with respect to its Breach of Contract claim.
7. Pursuant to the Preliminary Conference Order ("**PCO**") dated _____, E comprehensively responded to Q's discovery request with bate stamped documents that referred back to the Demands. However, Q contumaciously responded to E's discovery request with a "document dump". An examination of the documents Q provided does not reveal any document that comports with its contractual obligation to provide a written notice that the general liability policy was exhausted. As such, Q failed to raise material issues of facts.
8. On _____, E filed a Motion for Summary Judgment on the grounds that Q failed to raise any triable issues of fact through the discovery and inspection. Moreover, the interpretation of the insurance contract in question is a matter of law to be determined by the Court and does not involve issues of fact.
9. On _____, Q filed a Cross-Motion for Summary Judgment and its Opposition to E's Motion for Summary Judgment on the grounds that E cannot prove its prima facie case of Breach of

Contract, that the terms in the Transfer Endorsement and the relevant contract were not breached and that E cannot prove the damages element of its Breach of Contract claim.

10. Accordingly, E is seeking to file a Memorandum of Law in Opposition to Q's Memorandum of Law in support of Cross-Motion for Summary Judgment and a Reply to Q's Opposition to E's Motion for Summary Judgment.

STATEMENT OF FACTS

1. MD, a lessee of certain floors at _____ ("**construction site**") entered into a construction management contract with S. S was required to procure liability insurance for itself and MD, as an additional insured.
2. S obtained coverage that included a policy with a $_____deductible in its general commercial liability insurance policy from N, its primary insurer.
3. On or about _____, S entered into a sub-contract agreement with E. Pursuant to E's sub-contract with S, E agreed to provide labor and materials.
4. Pursuant to the sub-contract clause, E bought primary insurance coverage from Q for $_____and excess insurance coverage from IC for $_____and provided insurance certificates to S. The certificates of insurance mentioned S as an additional insured. S accepted the policies in full satisfaction of the sub-contract terms.
5. On or about _____, M was allegedly injured on the S construction site while performing work for E.
6. E has a long established safety program for construction projects on which their employees work. That policy clearly states the procedure that a E employee must follow if an accident occurs. The employee must notify E supervisors of the accident the moment that it occurs. If the worker is incapacitated, then the notice is to be provided by the workers in the area of the accident.
7. The first purpose of this requirement is to allow E the opportunity to facilitate safe and documented medical care for the worker and his or her family. The second purpose is to allow E to conduct an investigation of the accident. The investigation allows E to notify its insurance carriers and its legal counsel of the accident and the results of the investigation.
8. M continued to work until _____ but did not bring the alleged accident to E's or S's attention nor did he ever file a Worker's Compensation claim. He neglected to fill any accident form to inform E of the alleged accident and the resulting consequences until _____. Underscoring this deviation from E's notification procedure is the fact that not one person on the crowded

construction site witnessed M's purported accident. Later, M served notice of this alleged accident in his Complaint.

9. M's attorney advised S's Corporate Claims Manager, V, through a letter dated _____ that M was asserting a claim in connection with injuries he allegedly suffered as a result of the purported accident that took place on _____.
10. V forwarded the letter to A, representative of S's primary insurer, N.
11. A, by a letter dated _____ also informed Q of M's accident and requested that Q provide indemnification to S in connection with M's claim.
12. On _____, M filed a personal injury action in Bronx County against S. S then filed a Third-Party Complaint on _____ against E, in order to implead E as a Third-Party Defendant in M's personal injury action. S informed E, by a letter dated _____, that a Third-Party Action had been filed against it, and sent a Summons and Complaint to E.
13. Pursuant to the insurance contract that existed between the Parties, the Defendant Q was obliged to notify, 'as soon as practicable', E that the claim under the insurance policy might/would exceed primary coverage.
14. F, defense counsel assigned by Q to E in M matter, sent a letter to E as late as _____ advising E of the potential for an excess insurance trigger. Q, in direct violation of its contractual obligations, failed to notify E that there was evidence presented by M to support a claim that would exhaust the limits of the policy. If Q had comported with its contractual obligation to provide timely written notice of the exhaustion of the general policy limits, E would have notified IC that the excess policy would be triggered much sooner than _____.
15. Q's Breach of Contract caused E to lose the benefit of IC's excess insurance coverage.
16. Thereafter, E filed a Complaint seeking Declaratory Judgment against S and IC on _____ asserting failure on the part of IC to defend and indemnify E in M's personal injury action and failure on the part of S to pay the self- insured reduction of $_____ under N policy in order to contribute towards the damages claimed by M.
17. On _____, IC filed a Summary Judgment Motion to Dismiss E's Complaint seeking Declaratory Judgment. The Lower Court, granted IC's Summary Judgment Motion by an Order and Judgment dated _____ and ruled that E knew or should have known that it was reasonably likely that M's claim would exceed the _____ dollar Q primary policy limit by no later than _____, the date of M's deposition, or, in any event, no later than _____, the date of M's supplemental Bill of Particulars.

18. By reason of Q's breach of its duties to E and the resulting aforementioned decision, E is exposed to a _____ dollar verdict in the M Action.
19. On _____, E filed a Complaint against Q on the grounds of Breach of Contract, Negligence, and Covenant of Good Faith and Fair Dealing claiming relief of compensatory and consequential damages, interest costs, and attorney's fees.
20. On or about _____, Q filed a Motion to Dismiss the Breach of Contract action dated _____, filed by E against Q, alleging that E's claim for Breach of implied Good Faith and Fair Dealing and for Negligent Performance in the Second and Third Cause of Action in the Complaint failed to state a Cause of Action.
21. On _____, E filed a Cross-Motion for Summary Judgment and in Opposition to Q's Motion to Dismiss. Subsequently, on _____, Q filed a Reply Affirmation in Support of its Motion to Dismiss and in Opposition to E's Cross-Motion for Summary Judgment. On _____, E filed a Reply Affirmation in Opposition to Q's Reply Affirmation in Opposition to Cross-Motion.
22. On _____, the Trial Court granted Q's Motion filed pursuant to CPLR § 3211(a) (7) and dismissed and severed E's claim for Breach of Covenant of Good Faith and Fair Dealing, Negligence claims, and claim for attorney's fees for failure to state a Cause of Action and dismissed E's Cross-Motion for Summary Judgment with respect to its Breach of Contract claim.
23. Pursuant to the Preliminary Conference Order (PCO) dated _____, E responded meticulously to Q's discovery request with bate stamped documents that referred back to the Demand. However, Q contumaciously responded to E's discovery request with a "document dump". An examination of the documents provided by Q does not reveal any document that comports with its contractual obligation to provide a written notice that the general liability policy was exhausted. As such Q failed to raise material issues of facts.
24. On _____, E filed a Motion for Summary Judgment on the grounds that Q failed to raise any triable issues of fact through the discovery and inspection. Moreover, the interpretation of the insurance contract in question is a matter of law to be determined by the Court and does not involve issues of fact.
25. On _____, Q filed a Cross-Motion for Summary Judgment and its Opposition to E's Motion for Summary Judgment on the grounds that the E cannot prove its prima facie case of Breach of Contract, that the Transfer Endorsement is inapplicable, that Q did not breach its terms in any event, and that E cannot prove the damages element of its Breach of Contract claim.

26. Accordingly, E is now seeking to file a Memorandum of Law in Opposition to Q's Memorandum of Law in support of Cross-Motion for Summary Judgment and a Reply to Q's Opposition to E's Motion for Summary Judgment.

ARGUMENTS

A. Q'S CROSS- MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AND E'S MOTION FOR SUMMARY JUDGMENT MUST BE GRANTED.

In *Walden Woods Homeowners' Assn. v. Friedman*, 36 A.D.3d 691 (N.Y. App. Div. 2d Dep't 2007), the Appellate Court held that, "The proponent of a motion for summary judgment is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case." See also *Grant v. Hudson Val. Hosp. Ctr.*, 55 A.D.3d 874 (N.Y. App. Div. 2d Dep't 2008); *Kuri v. Bhattacharya*, 44 A.D.3d 718 (N.Y. App. Div. 2d Dep't 2007); *Terranova v. Finklea*, 45 A.D.3d 572 (N.Y. App. Div. 2d Dep't 2007). The Court also held that, "His failure to do so requires denial of the motion, regardless of the sufficiency of opposing papers." *Id.* See also *Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755 (N.Y. App. Div. 2d Dep't 2007). The Court granted plaintiff's Summary Judgment and denied those branches of defendant's Summary Judgment that were for dismissing the Complaint against it because defendant failed to make a prima facie showing of the entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. *Id.*

In *Yaziciyan v. Blancato*, 267 A.D.2d 152 (N.Y. App. Div. 1st Dep't 1999), the Appellate Court upheld the denial of defendant's Summary Judgment, which sought dismissal of the Complaint against them, on the basis of defendant's failure to carry their initial burden of demonstrating the absence of any triable issue of fact.

The Court of Appeals in *Klein v. City of New York*, 89 N.Y.2d 833 (N.Y. 1996) properly granted Summary Judgment to the plaintiff because defendant and the third party defendant failed to present any evidence of a triable issue of fact relating to the prima facie case or plaintiff's credibility.

In *McFadyen Consulting Group, Inc. v Puritan's Pride, Inc.*, 87 A.D.3d 620 (N.Y. App. Div. 2011), the Appellate Court affirmed the order of the Supreme Court which granted plaintiff's Motion for Summary Judgment on the causes of action to recover damages for breach of contract.

In *Tiffany at Westbury Condominium by Its Bd. of Mgrs. v. Marelli Dev. Corp.*, 40 A.D.3d 1073 (N.Y. App. Div. 2007), the Appellate Court denied the Cross Motion for Summary Judgment to dismiss common-law breach of contract claims.

The Appellate Court in *Pesa v Yoma Dev. Group, Inc.*, 74 A.D.3d 769 (N.Y. App. Div. 2010) affirmed the grant of plaintiff's the branch of Cross Motion which was for Summary Judgment on the issue of liability on the causes of action alleging breach of contract against the defendant and denied defendant's the branch of Cross Motion which was for Summary Judgment dismissing the causes of action alleging breach of contract.

In re *Pesa v Yoma Dev. Group, Inc.*,

> Defendant, Yoma Development Group, Inc. (hereinafter Yoma), agreed, in three contracts, to sell three parcels of land to one or more of the plaintiffs. Each contract provided, in relevant part, that if the purchaser did not receive a written mortgage commitment from a lender within sixty days from the date of the contract, the purchaser would be permitted to cancel the contract by giving written notice to Yoma. Yoma, without any of the transactions having closed, and without any party having elected to cancel the contracts, transferred the properties to the defendant Southpoint, Inc. (hereinafter Southpoint), which itself later sold them. Eleven months after Yoma transferred the properties to Southpoint, an attorney for Yoma sent letters to the plaintiffs, purporting to cancel each of the contracts due to the plaintiffs' failure to obtain written mortgage commitments. The plaintiffs commenced this action, inter alia, to recover damages for breach of contract against Yoma and Southpoint. Eventually, the

plaintiffs, and Yoma and Southpoint, sought summary judgment with respect to various issues. The Supreme Court awarded Summary Judgment to Southpoint dismissing the Complaint against it, granted that branch of the plaintiffs' Cross Motion which was for Summary Judgment against Yoma on the issue of liability on the causes of action alleging breach of contract, and denied that branch of the Cross Motion of Yoma and Southpoint which was for Summary Judgment dismissing the Complaint against Yoma. The defendants appealed. On appeal, the Appellate Court affirmed the Order of the Supreme Court. While affirming the grant of plaintiff's that branch of Cross Motion which was for Summary Judgment on the issue of liability on the Causes of Action alleging breach of contract against Yoma, held that plaintiffs demonstrated its prima facie entitlement to judgment as a matter of law by establishing that Yoma committed an anticipatory breach of the contracts by transferring the properties to a third party while the contracts were still in effect, and almost one year before Yoma sought to cancel them. The Appellate Court also held that Yoma failed to raise a triable issue of fact in opposing plaintiff's Cross Motion for Summary Judgment. The Appellate Court affirmed the denial of defendant's Cross Motion for Summary Judgment because Yoma and Southpoint failed to establish, prima facie, that it was entitled to judgment as a matter of law dismissing the breach of contract causes of action against Yoma.

In *Universal Underwriters Acceptance Corp. v. Peerless Ins. Co.*, 31 A.D.3d 749 (N.Y. App. Div. 2006), plaintiff insured filed a complaint to recover damages for breach of contract against defendant insurance company. The Supreme Court denied the insurance company's motion for summary judgement dismissing the complaint and also denied plaintiff insured's cross motion for summary judgment. After the insurance company appealed, the Appellate Court modified the Supreme Courts' decision and held that plaintiff

insured was entitled to summary judgement. The Appellate Court affirmed the denial of insurance company's motion for summary judgement because the insurance company did not meet its burden on its motion for summary judgement.

In *438 Manhattan Ave., Inc. v. Insurance Co. of Pa.*, 251 A.D.2d 71 (N.Y. App. Div. 1998), the Appellate Court affirmed the trial courts' decision which awarded plaintiff insured damages, granted plaintiff insureds partial summary judgment on liability, denied defendants insurers summary judgment dismissing the complaint, granted plaintiff insured judgment as a matter of law, directed judgment for damages, and also affirmed trial court's adherence to the original decision upon defendants' motion for renewal of plaintiff insured's motion for summary judgment.

In *JPMorgan Chase & Co. v. Travelers Indem. Co.*, 73 A.D.3d 9, 18 (N.Y. App. Div. 1st Dep't 2010), the Appellate Court affirmed the Supreme Court's judgment which awarded damages to plaintiff insured pursuant to an prior order granting its motion for summary judgement. The Appellate Court also affirmed the order of the Supreme Court which granted plaintiff insured's motion for partial judgment and denied defendant insurers' cross-motion for summary judgment dismissing the complaint of breach of contract.

Based upon the foregoing case laws, it is evident that E has sufficiently stated the Causes of Action for Breach of Contract and also has successfully established that triable issues of fact exists. As such, E aptly justified its entitlement for the Summary Judgment in its motion (**Exhibit** "**A**"). However, E asserts that Q failed to appropriately substantiate its entitlement for the Summary Judgment.

Q made futile attempts to demonstrate that E cannot prove its prima face case of Breach of Contract. Further, Q wrongly asserts that the Transfer Endorsement on which the claim rests was not breached. E reiterates that Q breached the terms of the Transfer Endorsement and, as a result of Q's breach, E is exposed to unwarranted damages claimed by M in the personal injury action. Moreover, Q failed to adduce sufficient evidentiary proof or factual backing to the unwarranted assertions made in their Cross Motion. Q cannot base its entire Motion on unsubstantiated assumptions as articulated in its brief. As such, Q

failed to meet the standards warranted for Summary Judgment Motion. On the contrary, E has adequately established that the Causes of Action stated in its Complaint and has substantiated its assertions by legal authorities to prove Q guilty of Breach of Contract.

The Case laws cited by Q can be distinguished as follows:

1. Q has inappositely cited *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595, 597 (1980) which is factually different from the case at bar.

In re *Zuckerman v. City of New York*,

> Plaintiff was injured when she fell at a curb near a bus stop in the City of New York while she was attempting to board a bus. She thereafter instituted an action against the city as owner of the sidewalk, the New York City Transit Authority as operator of the bus, the owner of the abutting property and the tenant in the abutting property. Each of the four defendants cross-claimed against the others for indemnification or apportionment. The transit authority moved for summary judgment dismissing plaintiff's pleading asserting that it was under no legal obligation to maintain the sidewalk or curb. Supreme Court granted the relief requested. No appeal from that disposition was taken by plaintiff or by any of the other defendants. The transit authority then moved for summary judgment dismissing all cross claims against it, renewing its disclaimer of obligation with regard to sidewalk or curb maintenance and pointing out that if, as had been determined on the previous motion for summary judgment, it owed no duty to plaintiff for the condition of the sidewalk, it could owe no obligation of contribution to the co-defendants. The city opposed the motion to dismiss by an affirmation of its attorney through which the attorney concluded that the accident was therefore caused by the transit authority because its bus did not pull up to the curb. Nothing accompanied the

> attorney's affirmation. The Supreme Court denied the transit authority's motion for summary judgment and the Appellate Division affirmed, holding that the transit authority might be held liable to one or more of its co-defendants by reason of negligence in the operation of its bus. The court also concluded that the hearsay affirmation of the owner's attorney was sufficient to preclude the grant of summary judgment. The transit authority appealed to the Court of Appeals after appellate court granted leave to appeal. The Court of Appeals reversed the previous orders by stating that it is necessary that a movant establish his cause of action or defence sufficiently to warrant the court as a matter of law by tendering evidentiary proof in admissible form.

Q cited the above case law to project that it has met the standard of summary judgment by making a prima facie showing that no triable issue of fact exist and therefore, it is entitled to Cross motion for Summary Judgment. Q also asserts that the burden now shifts upon E to produce evidentiary proof in admissible form to establish that material facts of issue exist in order to prevail in summary judgment. It is noteworthy to mention here that E has no burden to produce evidence for establishing the existence of material issues of fact because E has always asserted that no material issue of fact exists. In fact, E in its motion for summary judgment retained its allegations and has sufficiently proved the non-existence of triable issues of fact.

2. Q has cited case laws of *Heifets v. Lefkowitz*, 271 A.D.2d 490, 491, 706 N.Y.S.2d 438, 439 (2d Dep't 2000) and *Perez v. Brux Cab Corp.*, 251 A.D.2d 157, 159, 674 N.Y.S.2d 343, 345 (1st Dep't 1998) in support of its contention that an affirmation from an attorney without personal knowledge is inadmissible, has no probative value, and is wholly insufficient to support a Motion for Summary Judgment. E relies upon *Grossberg Tudanger Advertising, Inc. v. Weinreb,* 177 A.D.2d 377 (N.Y. App. Div. 1991) and *Sela v. Hammerson Fifth Ave., Inc.,* 277 A.D.2d 7 (N.Y. App. Div. 1st Dep't 2000) to distinguish Q's case laws on the ground that attorneys' affirmation may be considered as evidentiary proof in admissible form in support of a motion. In *Grossberg*, the Appellate Court

held that, "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may serve as the vehicle for the submission of acceptable attachments that do provide evidentiary proof in admissible form." The Appellate Court held that the attorney, who used his affirmation as a vehicle to submit documents, had personal knowledge of the facts. *Id.* The appellate court concluded that the affidavit in support of the motion should have been considered as evidentiary proof in an admissible form as it set forth facts acquired by the attorney. *Id.* Therefore, applying *Grossberg* to the case at bar, the attorney's affirmation, submitted by E, is sufficient to be considered as evidentiary proof in an admissible form for sustenance of its Motion for Summary Judgment.

3. Q has cited myriad of case laws of *Hartford Acci. & Indem. Co. v. Wesolowski*., 33 N.Y.2d 169, 305 N.E.2d 907, 350 N.Y.S.2d 895 (1973); *Borchardt v. New York Life Ins. Co*., 102 A.D.2d 465, 477, N.Y.S.2d 167 (1st Dep't), *aff'd*, 63 N.Y.2d 1000, 473 N.E.2d 262, 483 N.Y.S.2d 1012 (1984); *Suffolk County Dept. of Social Servs. v. James M*., 83 N.Y.2d 178, 182, 630 N.E.2d 636, 637, 608 N.Y.S.2d 940, 941 (1994); *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141, 145 (1978) for sustenance of its Summary Judgment claim in its Cross Motion. After perusal of the above cited case laws, it is revealed that all of the case laws are distinct from the case at bar on two major points. Firstly, the above cited case law deals with insurer's Summary Judgment Motion which is factually different from the case at bar. In the case at bar, the primary insurer Q has filed a Cross Motion for Summary Judgment in Opposition to insured E's Summary Judgment. E, in its Opposition to Q's Cross Motion for Summary Judgment has cited numerous cases which specifically deny the insurer's Cross Motion for Summary Judgment. As such, it is apparent that Q has inadvertently cited case laws discussing on the grant of insurer's Summary Judgment and not Cross Motion for Summary Judgment. Second, in the cited case laws, the court has discussed and decided upon factually different matters than in the case at bar. The detailed factual distinction of the above cited case law is as follows:

(i) The Court of Appeals case law *Hartford Acci. & Indem. Co. v. Wesolowski*., 33 N.Y.2d 169, 305 N.E.2d 907, 350 N.Y.S.2d 895 (1973) deals with the grant of insurer's Motion for Summary Judgment for determination of whether injuries arose out of one occurrence was a jury question.

In re *Hartford Acci. & Indem. Co. v. Wesolowski*,

The insured's automobile struck one oncoming vehicle, ricocheted off of it and struck a second vehicle more than 100 feet away. As a result, the victims commenced a number of negligence suits against the insured. The insurer instituted a declaratory judgment action naming as defendants all of the plaintiffs in the pending negligence actions and its own insured. Insurer moved for summary judgment alleging that all of the claims arose out of a single occurrence. The special term denied the motion based on its finding that it was a jury question as to whether or not the incident consisted of one occurrence. The insurer appealed. On appeal, the court affirmed Supreme Court's denial of insurer's summary judgment. The insurer, by permission of the appellate court, appealed to the court of appeals. The court of appeals reversed the appellate court's order and granted insurer's motion for summary judgment by ruling that the insured's collision with two different vehicles 100 yards apart constituted one occurrence.

(ii) *Borchardt v. New York Life Ins. Co.*, 102 A.D.2d 465, 477, N.Y.S.2d 167 (1st Dep't), *aff'd*, 63 N.Y.2d 1000, 473 N.E.2d 262, 483 N.Y.S.2d 1012 (1984), involves grant of insurer's motion for Summary Judgment for dismissal of the Complaint against it.

In re *Borchardt v. New York Life Ins. Co.,*

The insurer issued an insurance policy insuring the life of the decedent under which the beneficiary, his business partner, was to collect. The decedent died as a result of a massive heart attack, complicated by a history of hypertension and diabetes. The claim for payment of the benefits under the policy was rejected by the insurer, and the policy was rescinded because of alleged material misrepresentations by the decedent in his application for insurance. The beneficiary filed an amended complaint (it appears that defendant's motion to dismiss the second and third causes of action of the initial complaint was granted with leave to the plaintiff to serve an amended complaint. The prior complaint and motion papers are

> not included in the record of appeal) stating a single cause of action alleging the insurer's failure to pay the benefits due under the policy. Insurer moved to dismiss the complaint for failure to state a cause of action and for summary judgment. The trial court denied the insurer's motion for summary judgment. The insurer appealed. On appeal, the appellate court while reversing the decision of the trial court, granted the motion for summary judgment and dismissed the complaint.

It is apparent that the above cited case law is factually distinguishable from the case at bar. Unlike the cited case law, there exists no action filed by a beneficiary of a policy against the insurance company who rejected to pay for the claim under the policy after the insured died. Rather, the case at bar deals with breach of contract claim alleged by E against Q on the basis of Q's failure to timely notify E of the exhaustion of the primary policy. E seeks damages for breach of contractual obligations by Q.

(iii) *Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d 178, 182, 630 N.E.2d 636, 637, 608 N.Y.S.2d 940, 941 (1994) is an inappropriate case law cited by Q. The cited case law is entirely factually different as it deals with sodomy charge, criminal conviction for the charge and also declaration of a child as an abused or neglected child.

In re *Suffolk County Dept. of Social Servs. v. James M,*

> The Suffolk County Department of Social Services (hereinafter DSS) alleged that the father abused his stepchildren Nicholas and Michael. Following a jury trial, the father was convicted of multiple counts of sodomy based upon charges that he had repeatedly forced one of his children to perform oral sex upon him. Upon conviction, the DSS moved for Summary Judgment 1) arguing that his conviction for acts of sodomy was conclusive proof of the allegations of abuse pending before the Family Court and 2) to have one child declared an abused child and the other child declared a neglected child. The Trial Court granted the department's Motion for Summary Judgment and, in a

> dispositional order, directed the father to have no contact with the children. The father appealed. The Appellate Court affirmed the judgment of conviction. The Court found that the father's criminal conviction was conclusive proof as to the finding that the one child was an abused child. The Court stated that the father had raised no genuine factual issues in Opposition to the Summary Judgment Motion. The Court concluded that the finding that the father had sexually abused one child supported a summary determination that the other child had been neglected. The father, appealed by permission of the Court of Appeals, from an order of the Appellate Division. The Court of Appeals affirmed the order of the Appellate Court and found that summary judgment was proper. The Court further held that the Family Court erred in not holding a dispositional hearing because that kind of hearing might have revealed the children's need for further intervention by the Court awarding custody.

(iv) *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 (1986) deals with medical malpractice action.

In re *Alvarez v. Prospect Hosp,*

> Plaintiff commenced a medical malpractice action against the hospital and nine physicians for failure to make a proper and timely diagnosis of carcinoma of plaintiff's cecum, which is the first segment of her large intestine, and failure to render proper aftercare. One of the doctor defendants moved for Summary Judgment on the ground that his only responsibility to the plaintiff was to interpret the X rays correctly, which he did, since the plaintiff admits that fact. Special Term denied the Motion Summary Judgment. The doctor appealed. The Appellate Court affirmed the Trial Court's denial of the doctor's motion for Summary Judgment and granted his leave to appeal. On

> appeal to the Court of Appeals, the Court reversed the Appellate Court's Order and granted the doctor's Motion for Summary Judgment.

(v) *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141, 145 (1978) involves Summary Judgment on promissory notes.

In re *Rotuba Extruders, Inc. v. Ceppos,*

> Plaintiff initiated a Complaint and Motion for Partial Summary Judgment in lieu of Complaint against defendant on seven promissory notes delivered to plaintiff in payment for goods sold to a close corporation, of which defendant was the chief executive officer. Defendant signed each note and there were no words on the actual notes to signify that defendant was acting in a representative capacity when he signed the note. Defendant insisted that he was not personally liable on the notes and that there was a triable issue of fact regarding his intention to sign them in a representative capacity. The Trial Court granted plaintiff's Summary Judgment. Defendant appealed. On appeal, the Appellate Court reversed the Supreme Court's order and denied plaintiff's Summary Judgment. Plaintiff appealed to the Court of Appeals by permission of the Appellate Division. The Court of Appeals reversed the denial of plaintiff's Motion for Summary Judgment, granting that Motion and holding defendant personally liable for default on plaintiff's seven promissory notes.

For the foregoing reasons, E's Motion for Summary Judgment should be granted and Q's Cross Motion for Summary Judgment should be denied.

B. E HAS RIGHTFULLY STATED A COGNIZABLE CAUSE OF ACTION SOUNDING IN BREACH OF CONTRACT AND THE DAMAGES ELEMENT OF THE BREACH OF CONTRACT CLAIM.

In *Financial Servs. Veh. Trust v Saad,* 137 A.D.3d 849, 851-852 (N.Y. App. Div. 2d Dep't 2016), the Appellate Court held that the insurer was liable to the insured for breach of contract based on insurer's refusal to defend insured in the main action against him for contractual indemnification arising out the underlying wrongful death action.

In re *Financial Servs. Veh. Trust,*

> In July 2003, Andre H. Saad was driving a vehicle leased from the plaintiff, Financial Services Vehicle Trust (Financial), when he was involved in an accident that resulted in the deaths of two pedestrians. On the date of the accident, Saad was insured by the Government Employees Insurance Company (hereinafter GEICO). The estates of the two pedestrians killed in the accident subsequently commenced wrongful death actions against both Saad and Financial. GEICO retained attorneys O'Connor, McGuiness, Conte, Doyle & Oleson and William Watson (O'Connor defendants) to defend Saad and Financial in the wrongful death actions, and Saad retained attorneys Bellavia, Gentile & Associates, LLP, and John Gentile (Bellavia defendants) to monitor the case on his behalf. In February 2007, the wrongful death claims were settled for an aggregate total of $1,150,000. GEICO paid its policy limits toward the settlement, and Financial contributed the remaining balance of $750,000. Financial thereafter commenced an action against Saad (the main action) primarily seeking to recover the $750,000 it had contributed toward the settlement of the wrongful death claims pursuant to a contractual indemnification provision contained in its lease agreement with Saad. Saad then commenced a third-party action against GEICO to recover damages for breach of contract

> based upon GEICO's refusal to defend him in the main action, and against the O'Connor defendants and the Bellavia defendants to recover damages for their alleged malpractice in representing him in connection with the underlying wrongful death claims. The third-party defendants GEICO and the Bellavia defendants separately moved for summary judgment dismissing the third-party complaint insofar as asserted against each of them, and Saad cross-moved for summary judgment against GEICO, the O'Connor defendants, and the Bellavia defendants. The Appellate court held that the Supreme Court properly denied that branch of GEICO's motion which was for summary judgment dismissing the cause of action in the third-party complaint to recover damages for breach of contract insofar as asserted against it based on its failure to defend Saad in the main action.

In *Gilbride v. American Transit Ins. Co.*, 211 A.D.2d 491 (N.Y. App. Div. 1st Dep't 1995), the Appellate Division affirmed the lower court's order, which awarded damages and interest to the insured based on the insurer's breach of contract.

In re *Gilbride,*

> A dispute arose between the insured and the insurer as to the parties' obligations under an insurance contract. The insured filed a breach of contract action against the insurer, seeking damages. The lower court found in favor of the insured, awarding damages and interest to the insured from the date of the jury's general verdict. The insurer appealed, contending that the verdict was excessive and against the weight of the evidence, that the jury was improperly charged, and that interest was incorrectly computed. The court affirmed the lower court's judgment, concluding that the verdict was not against the manifest weight of the evidence. The circumstances warranted a charge to the jury as to the recoverability of attorney's

> fees by the insured. Similarly, the lower court's failure to charge the jury as the time restrictions on responsive pleadings was irrelevant because the insurer did not raise that specific objection below. Nor was the claim that the lower court failed to exclude certain damage claims in its instructions preserved. Finally, the lower court properly specified the date from which interest was to be computed and refused to permit proof of punitive damages.

In *Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.,* 43 A.D.3d 23 (N.Y. App. Div. 1st Dep't 2007), plaintiff insured sued defendant insurer, alleging breach of contract regarding a collapsed parking garage. The Appellate Court affirmed Supreme Court's finding of the insurer's liability for the insured's damages incurred in rebuilding the garage.

While granting the action to recover damages for breach of contract, the Appellate Court in *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.,* 69 A.D.3d 802 (N.Y. App. Div. 2d Dep't 2010) stated that the Complaint adequately alleges all of the essential elements of a Cause of Action to recover damages for breach of contract, to wit: the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages. See also *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.,* 84 A.D.3d 122 (N.Y. App. Div. 2d Dep't 2011). The Court held that the Complaint sufficiently stated a Cause of Action to recover damages for breach of contract. *JP Morgan Chase v. J.H. Elec. of N.Y., Inc* supra

Similarly, in *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC,* 107 A.D.3d 788 (N.Y. App. Div. 2d Dep't 2013), the Appellate Court modified by deleting and thus granting that portion of the order of the Supreme Court which was to dismiss the Cause of Action to recover damages for breach of contract. The Appellate Court held that the Complaint adequately alleges all of the essential elements of a Cause of Action to recover damages for breach of contract.

In *Kausal v Educational Prods. Info. Exch. Inst.,* 105 A.D.3d 909, 911 (N.Y. App. Div. 2d Dep't 2013), the Appellate Court held that, "The elements of a cause of action to recover

damages for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of the contract, and resulting damages." The Appellate Court reversed the order of the Supreme Court and reinstated the Complaint. The Court remitted the matter to the Trial Court on the issue of damages. *Id.*

In *Furia v. Furia,* 116 A.D.2d 694 (N.Y. App. Div. 2d Dep't 1986), the Appellate Court stated that the pleading clearly specifies the terms of the agreement, the consideration, the performance by plaintiffs and the basis of the alleged breach of the agreement by defendant. The Court also held that each and every allegation of the plaintiffs' Complaint are accepted and find that it is legally sufficient. *Id.*

The Court of Appeals in *219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d 506 (N.Y. 1979) held that, "The sole question presented for review is whether the plaintiff's complaint states a cause of action." The Court further stated that if it is found that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, the judicial inquiry is complete and the plaintiff's Complaint must be declared to be legally sufficient. *Id.*

(i) Q is liable for Breach of Contract:

E submits that there existed a valid and enforceable Insuring Agreement between E and Q. E duly performed all conditions, covenants, and promises required to be performed on its part in accordance with the terms and conditions of the Insuring Agreement. However, Q failed to fulfil its obligation.

It is pertinent to mention here that Q controlled the entire M Claim process, appointed the attorneys to represent E, and controlled all communications therein. As such, Q, and not E, possessed the necessary factual information regarding M's damages which, if communicated to E, would have allowed E to timely notify the Excess Carrier that the Excess Policy was triggered. Q, through counsel assigned to E in M Action, gained knowledge about the triggering of the excess policy limit not later than _____, the date of M's deposition or, at the latest, _____, the date of M 's Supplemental Bill of

Particulars. However, Q failed to inform E promptly, instead Q sent a deferred letter on _____ advising E of the potential for an excess insurance trigger.

E submits that Q, in its Cross Motion, has wrongfully contended that E is incorrectly holding an insurance carrier liable for breaching its contract with a construction company upon the failure on part of the insurance carrier to comply with the clear language of the relevant contract between the parties. There is no dispute that Q had a legal duty to timely notify E if M's damages might/would exceed the primary policy threshold and Q failed to do so. In addition to this, Q is ingeniously avoiding addressal of its own duties under the Transfer Endorsement. This conduct is evident by numerous instances that Q chose to ignore. Q knew that M needed his two knees replaced, Q knew that M would never work as a carpenter again, and Q knew that M's damages would exceed the $_____ threshold, triggering the Excess Policy. However, in spite of having prior knowledge, Q did not timely notify E of these facts. Moreover, Q attempted to misrepresent the facts and distort the endorsement terms to shield its inability to defend its malfeasance.

Q incorrectly asserted in its Cross Motion that E's allegations regarding Q's duty to inform the excess carrier, IC, of the primary policy being triggered are mere attempts to obfuscate the issues before the Court. E does not deny its duty to notify the Excess Carrier and asserts that E appropriately fulfilled its obligation to notify the excess carrier. However, due to Q's breach of its duty towards E, E's notice to the excess carrier was delayed.

Therefore, E asserts that Q committed a breach of the terms provided in the Transfer Endorsement by failing to notify E about the exhaustion of the primary policy that was critical information for E in determining the liability in the M Action. As such, E has a rightful cause of action of Breach of Contract against Q.

(ii) <u>E is entitled to damages based on the Breach of Contract:</u>

Q incorrectly stated in its Cross Motion that the duty to timely notify excess insurer has nothing to do with the Transfer Endorsement in the Q policy, or any compliance with

its terms by Q. E reiterates that Q had an obligation to fulfill the terms mentioned in the Transfer Endorsement by complying with its duty to provide E with timely notice. The failure to fulfill the terms of the contract to timely notify E resulted in the loss of excess coverage and, as such, E may be exposed to catastrophic damages. Q's deferred notice destroyed the rights of E to gain the excess coverage. Consequently, E is exposed to potential damages in M Action. Q failed to evaluate the ramifications of its inactions.

E has adequately proven the elements of cause of action for Breach of Contract and the resultant damages. As such, E has a valid Cause of Action for damages based on the alleged Breach of Contract. Therefore, the Court should grant E's Motion for Summary Judgment.

The Case laws cited by Q can be distinguished as follows:

1. Q referred in *Harris v. Seward Park Hous. corp.,* 79 A.D.3d 425, 913 N.Y.S.2d 161 (1st Dep't 2010) its Cross Motion for Summary Judgment which is entirely factually distinguishable than the case at bar.

In re *Harris v. Seward Park Hous.corp.,*

> Plaintiff commenced an action against defendants alleging breach of contract, negligent misrepresentation, and discrimination based upon his race and his disability. Defendants then filed a motion for summary judgment to dismiss the Complaint. The Supreme Court granted defendants' motion for summary judgment dismissing the Complaint. Plaintiff then moved for leave to renew and reargue the supreme court's decision, and upon renewal, modify same to the extent of reinstating its first and second causes of action i.e. breach of contract and negligent misrepresentation respectively. The Supreme Court denied plaintiff's motion to renew, granted reargument as to first cause of action for breach of contract and denied reargument as to second cause of action for negligent misrepresentation. Plaintiff appealed against the denial of its

motion to renew. On appeal, the appellate court affirmed the Supreme Court's denial of the motion to renew.

It is apparent that Q's cited case law is factually different from the case at bar. Unlike the cited case law, there is no motion to renew or reargue initiated by E. The cited case law states that plaintiff had no viable Cause of Action to challenge the dismissal of its Breach of Contract claim. On the contrary, E has very much viable Cause of Action and has also satisfied each element of the Breach of Contract Cause of Action. There exists a contract upon which both the parties are relying. In furtherance of the contract, E performed its obligations but Q failed to accomplish its duty to timely notify E about the exhaustion of the primary policy limit. This caused IC to deny the excess coverage on the basis of E's failure to timely notify IC. As a result, E has suffered losses and damages.

For the foregoing reason, E's Motion for Summary Judgment should be granted and Q's Cross Motion for Summary Judgment should be denied.

C. THE TRANSFER ENDORSEMENT IS APPLICABLE AND Q COMMITTED A BREACH OF ITS TERMS.

The Court of Appeals in *Hartford Acci. & Indem. Co. v. Michigan Mut. Ins. Co.*, 61 N.Y.2d 569 (N.Y. 1984) held that, "A primary liability insurer owes to an excess carrier the same duty to act in good faith which it owes to its own insureds."

In *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 38 N.Y.S.3d 1 (N.Y. App. Div. 1st Dep't 2016), the Appellate Court held that, "The extent of coverage is controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage." See also *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140, 145 (N.Y. App. Div. 1st Dep't 2008)

The Appellate Court in *Travelers Indem. Co. v. Am. & Foreign Ins. Co.*, 286 A.D.2d 626 (N.Y. App. Div. 1st Dep't 2001) upheld the Motion Court's denial, giving evidentiary weight to the insurance procurement provisions of the subcontract general contractor and the injured party's employer, since it was the policy provisions that control.

While discussing the governance of the policy terms, the Appellate Court in *New York State Ins. Fund v Everest Natl. Ins. Co.*, 125 A.D.3d 536, 537 (N.Y. App. Div. 1st Dep't 2015) stated that the extent of insurance is governed not by the terms of the underlying trade contracts among the insureds but by the policy terms.

Relying upon the case law cited above, it could be concluded that the insurance contracts ultimately govern the relationship between the insured and the insurer. The same rationale applies to the case at bar. E has advanced cause of action sounding in breach of insurance contract terms as provided in the Transfer Endorsement. It is pertinent to mention here that the Transfer Endorsement contained terms mutually agreed between E and Q and this governed their relationship as insurer and insured. The Transfer Endorsement was sufficient to establish that Q had a duty to notify E "*as soon as practicable*". Q blatantly disregarded the provisions of the Transfer Endorsement and deliberately attempted to derive an interpretation favorable to its position.

Q has acknowledged in its Cross Motion that the Policy is clear and unambiguous. E maintains that the Transfer Endorsement language is very specific. Paragraph "a" and "b" of the Transfer Endorsement explicitly provides for the duties of Q towards E. The plain construction of the terms itself manifestly provides for Q's obligation to inform E of the possibility of exhaustion of the primary limits.

The contract language clearly states Q's obligation to provide notice to E regarding the exhaustion of policy liability, as dictated by "*occurrences*". It is pertinent to mention here that there exists no uncertainty as to when the said "*occurrence*" happened. The Honorable Judge _____, in his decision dated _____, ruled that around _____, the Bill of Particulars and M's deposition are the *occurrences* that dictated the notice to IC. The decision and order stated that:

> *Here, the severity of the M's injury was made clear from the evidence of M's multiple surgeries, including two total knee replacements, and extended physical rehabilitations described in the M's _____ bill of particulars and _____ deposition testimony. Additionally, the*

likelihood that future surgeries would be necessary was set forth in M's _____ supplemental bill of particulars. . . Even if the medical treatment expenses that M was claiming as damages would have fallen well within Q's primary policy limits, M's claim for past and future lost earnings and probable damages for pain or suffering, made it likely that damages would exceed Q's $___ primary policy limit.

Judge ____ identified the aforestated *occurrences* that triggered E's obligation to notify IC in a timely manner. Judge ____'s decision demonstrates the axiomatic duty E had to notify IC and also recognizes that E's notification was contingent upon Q's adherence to its contractual obligations in the Transfer Endorsement paragraph (a).

Q proffers a patently inaccurate position. Q wrongly relies on the terms "*If we conclude that*" as used in paragraph "a" [1] of the Transfer Endorsement to state that it is the indisputable part of the contract, that the rights and obligations as agreed between the parties and identified in the Transfer Endorsement allows them to provide a written notice at any time they conclude there may be an exhaustion issue. The obvious anomaly in this position is that the contract in question does not state that Q's obligation to provide written notice as to exhaustion is within its sole discretion and conclusion.

Further, E asserts that E never received the supplemental Bill of Particulars or a copy of the deposition testimony reflecting the *occurrences* with respect to notice obligations. Q has not provided an iota of evidence to substantiate the claim that it complied with the obligation and duly sent a written notice with a copy of the said occurrences, the Bill of Particulars and or the deposition testimony, stating that the policy may be exhausted. It is imperative to underscore that Q controlled the claim, appointed the attorneys to represent E, and controlled all communications therein. However, Q

[1] If we conclude that, based on "occurrences", offences, claims or "suits" which have been reported to us and to which this insurance may apply, the :

***

(4) Each Occurrence Limit;

***

Is likely to be used up in the payments of judgments or settlements, we will notify the first Named Insured, in writing, to that effect.

erroneously relied on the Affirmation of K to assert in its Cross Motion that Q complied with the obligations in paragraph "a" of the Transfer Endorsement by sending a letter on _____ and on subsequent occasions. The communications that were presented before the Court can be summed up in simple terms. The letter dated _____ from R, third party administrator for Q, contains boilerplate language from Q's opposition papers. The letter does not even remotely cite occurrences or facts that would indicate the policy was exhausted. IC would rightfully reject such a notice as not being ripe. Judge _____'s decision further explains this by stating that.

> *Any delay by IC in disclaiming coverage to E must be measured, at its earliest, from _____, the date IC received the letter from R.*

As such, it is evident that the _____ notice was insignificant and worthless. The _____ letter, as referred to in Affirmation of K, was a day late and a dollar short. The occurrences that dictated that Q must provide written notice to E are rooted in _____. In _____, IC was in a position to reject E's notice based on Q's late notice to E. Further, the _____ letter by F, the attorneys assigned by Q to represent E in M Action, is an admission of Q's guilt and also deferred.

Further, Q's errors are compounded by violation of paragraph (b)[2] of the Transfer Endorsement, Q incorrectly alleges that its $_____ policy limit has not been exceeded and the Transfer Endorsement is not applicable. Q stated in its Cross Motion that:

> *Notice "as soon as practicable" under paragraph "b." of the Transfer Endorsement has not even been triggered, as it is undisputed that the Q Policy limits have not been actually "used up" in payments of settlements or*

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[2] b. When a limit of insurance described in paragraph a. above has actually been used up in the payment of judgments or settlements;
(1) We will notify the first Named Insured, in writing, as soon as practicable, that:
(a) Such limit has actually been used up; and
(b) Our duty to defend "suits" seeking damages subject to that limit has also ended.
(2) We will initiate, and cooperate in, the transfer of control, to any appropriate insured, of all claims and "suits" seeking damages which are subject to that limit and which are reported to us before that limit is used up. That insured must cooperate in the transfer of control of said claims and "suits."

judgments, and the full limits remain in play.

Q takes this position despite proffering the $_____ primary policy amount to settle the M litigation. Q arrived at this position because M turned down the offer to settle for $_____. Q's arguments are belied by the facts. Q has not withdrawn the offer to settle for the $_____ policy. Further, Q has produced no documentation in support of its contentions that suggest that the policy has not been exhausted.

Q, in its Cross Motion, has wrongly stated that E's Motion papers are misleading and do not make a reference to any paragraph in Transfer Endorsement containing "*as soon as practicable*" language. Q has absolutely neglected the Complaint that rightfully stated:

> *As per p.52, clause b(1) of the Insuring Agreement between E (Insured) and Q (Insurer), "When a limit of insurance . . . has actually been used up . . . We [Q] will notify the first Named Insured [E], in writing, as soon as practicable". Q failed to perform its obligation to timely notify E that the excess insurance may trigger in M's case causing breach of the Insuring Agreement. Q failed to meet their contractual obligations and provide timely notice to E despite knowledge and reasonable apprehension.*

See E's Complaint dated November 17, 2016 at ¶ 32.

It is submitted that E has copiously proved that the Transfer Endorsement is applicable to the case at bar. As such, Q is liable for the Breach of Contract due to its failure to fulfill the terms of the Transfer Endorsement. Therefore, the Court should grant E's Motion for Summary Judgment.

The Case laws cited by Q can be distinguished as follows:

1. Q has blindly relied upon *Monarch Cortland, Inc. v. Columbia Casualty Company*, 224 A.D.2d 135, 646 N.Y.S.2d 904 (3rd Dep't 1996) *app. denied*, 89 N.Y.2d 807, 678 N.E.2d 500, 655 N.Y.S.2d 887 (1997) which is a third department case, rendering it inapplicable to the

case at bar. The case law cited by Q is also entirely factually distinguishable than the case at bar.

In re *Monarch Cortland, Inc. v. Columbia Casualty Company,*

> Defendant agreed to defend plaintiff in a personal injury action brought by William Simmons against plaintiff and others in Massachusetts. In the course of its defense of plaintiff, it appears that defendant rejected a demand for settlement in the amount of $ 950,000 prior to deposition of plaintiff's expert and upon counsel's belief that genuine issues of fact concerning plaintiff's liability remained. Trial of the personal injury action resulted in a verdict in favor of Simmons in the amount of $ 1,125,000, plus pre verdict interest of $ 766,125, less $ 416,000 paid by other parties who settled prior to trial, for a total of $ 1,475,125. While defendant paid its full policy limit plus all post judgment interest according to the terms of its policy, plaintiff was left to pay the remaining $ 475,125 in pre-verdict interest. Plaintiff, which was also insured by Allianz Underwriters Inc. under an excess umbrella policy, attempted to collect from Allianz the amount of prejudgment interest it had paid and brought an action for that relief in United States District Court. That court granted summary judgment to Allianz on the basis of untimely notice under the policy since Allianz was not notified by plaintiff until March 14, 1990. Plaintiff thereafter commenced the instant action alleging in its first three causes of action that defendant was obligated to pay pre-verdict interest. The fourth cause of action alleged that defendant breached its implied contractual obligations of good faith and fair dealing by failing to notify Allianz of the potential for an excess judgment, evidenced by the settlement demand of $ 950,000, and by also failing to advise plaintiff to notify Allianz of the possible need for excess coverage. Defendant

initially moved for partial summary judgment dismissing the first, second and third causes of action. Plaintiff opposed the motion and cross-moved for summary judgment on the fourth cause of action. Defendant then cross-moved for summary judgment on the fourth cause of action. Supreme Court granted plaintiffs motion for summary judgment on the fourth cause of action and denied defendants cross motion for summary judgment on the fourth cause of action. Both plaintiff and defendant appealed. On appeal, the appellate court modified the Supreme Court's order as such cross motion denied and motion granted as to the fourth cause of action, and summary judgment awarded to defendant dismissing the fourth cause of action.

In *Monarch,* the Appellate Court has granted the motion for summary judgment in favor of the defendant insurer because the court found no evidence in the record which would establish that defendant insurer acted deliberately or even recklessly by failing to inform plaintiff insured or plaintiff insured's excess insurance carrier of the possible exposure to liability in excess of the limits of the primary policy. Also, there was no evidence suggesting that defendant insurer had put its own interests ahead of plaintiff insured. The court further concluded that the record demonstrated that defendant insurer kept plaintiff insured informed of all the relevant facts. But, on the contrary, in the case at bar, E alleges that Q had the prior knowledge of the possibility of exhaustion of the primary policy. Q had a duty, by virtue of the transfer endorsement, to immediately inform or notify E about the possibility of the exhaustion which could have enabled E to inform IC about the triggering of the excess policy coverage. Q failed to fulfill its duty to timely notify or inform E as soon as practicable. As such, it is evident that E essentially did not have same information that Q had about the facts or possibilities. Therefore, E is rightfully asserting that Q had the duty to notify E as it had the prior knowledge of the facts. Moreover, Q is relying upon the letter of R, third party administrator of Q, dated _____, to prove that it

had informed E about the possibility of the triggering of the excess policy coverage. It is noteworthy to mention here that the letter on which Q relies, does not contain any language or does not cite occurrences or facts which would stipulate the exhaustion of the primary policy. Also, the documents produced by Q does not establish that it had fulfilled its obligation to notify E about the exhaustion of the primary policy. As such, Q's cited case law is distinguishable from the case at bar.

2. Similarly, *AAA Sprinkler Corp. v. Rashi & Co., Inc.*, 271 A.D.2d 331, 705 N.Y.S.2d 582, 583 (1st Dep't 2000) is also factually distinguishable to the case at bar. In *AAA Sprinkler,* the defendant moved for Cross Motion for Summary Judgment to dismiss the plaintiff's Complaint. On the contrary, in the case at bar, Defendant moved for Cross Motion for Summary Judgment in Opposition to E's Motion for Summary Judgement. Moreover, in *AAA Sprinkler*, the court has determined that the defendant insurer had not acted in bad faith by failing to notify the insured or insured's excess carrier of the possibility of a judgment in excess of the primary insurance limits. It is noteworthy to mention here that the court relied upon the possibility of a judgment in excess of the primary policy. It is also not clear from a bare perusal of Q's cited case law whether there existed a contractual obligation on the insurer to notify the insured about the possibility of the judgement in excess of the primary policy. On the contrary, in the case at bar, E asserts that Q acted in bad faith by not notifying E about the possibility of the exhaustion of the primary policy which was Q's contractual obligation. E, also nowhere, alleges that Q had a duty to foresee the possibility of the judgment which would render the primary policy exhaustive. In this manner, *AAA Sprinkler* is distinguishable.

For the reason stated above, E's Motion for Summary Judgment should be granted and Q's Cross Motion for Summary Judgment should be denied.

D. Q INDULGED IN A PATTERN OF INTENTIONAL DILATORY CONDUCT, INCLUDING WASTEFUL DISCOVERY PRACTICE AND CONCEDED FACTS FROM E.

In *Fish & Richardson, P.C. v Schindler*, 75 A.D.3d 219 (N.Y. App. Div. 1st Dep't 2010), the Appellate Division Court held that, "If a party refuses to obey an order for disclosure or

wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders as are just." The court also held that, "A court may strike an answer as a sanction where the moving party establishes that the failure to comply was willful, contumacious, or in bad faith. Upon such showing, the burden shifts to the nonmoving party to demonstrate a reasonable excuse." *Id.*

In re *Fish & Richardson, P.C.,*

> The trial court struck defendant's answer for failing to comply with court orders and discovery deadlines. The appellate court found that this was proper. Defendant's flouting of his disclosure obligations began before court involvement. At the preliminary conference, the trial court ordered defendant to answer a document request, and to produce certain insurance information. Defendant's response came two weeks after the deadline, and he never produced the insurance information. Defendant also failed to comply with an order that he respond to an interrogatory request and a second demand for documents. Defendant also failed to appear in court for another conference and ignored an order that he provide plaintiff with his residential address. Defendant's pattern of noncompliance with orders was willful, contumacious, and in bad faith. The judgment of the trail court was affirmed.

In *Rodriguez v United Bronx Parents, Inc.*, 70 A.D.3d 492, 492-493 (N.Y. App. Div. 1st Dep't 2010), while discussing about the sanctions for failure to fulfil discovery obligations the Appellate Division Court noted that, "A court may strike a pleading as a sanction against a party who refuses to obey an order for disclosure."

In re *Rodriguez,*

> Plaintiff established that defendant's failure to comply was willful and contumacious, given its repeated and persistent failure to comply with five successive disclosure orders. Defendant's failure to

> adequately explain what efforts were made to locate the documents it failed to disclose, or to explain its inability to provide the last known addresses of its former residents or employees, also supports a finding that its failure to comply was willful. Furthermore, defense counsel's "Affirmation of Search" did not indicate whether he was the custodian of defendant's records, what records were searched, who conducted the search, what the search consisted of, and the statement was made upon "information and belief." Accordingly, this statement is devoid of detail and insufficient.

In *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (N.Y. App. Div. 2d Dep't 2008), the Appellate Court held that, "The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is willful and contumacious." The court also held that, "The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands and/or to comply with discovery orders." *Id.*

In re *McArthur,*

> The appellate court found that the willful and contumacious character of the plaintiff's conduct could be properly inferred by the trial court from her repeated failures to comply with its discovery orders to appear for a deposition and an independent medical examination and to provide certain disclosure, including authorizations to obtain information and medical and employment records, without an adequate excuse. Consequently, the trial court properly dismissed the plaintiff's complaint. The order of the trial court was affirmed.

In *Henderson v Manhattan & Bronx Surface Tr. Operating Auth.*, 16 N.Y.3d 886 (N.Y. 2011), the Court of Appeals held that, "When a party refuses to obey an order for disclosure

or willfully fails to disclose information, the court may render a judgment by default against the disobedient party." The court also held that, "If the moving party clearly shows willfulness or bad faith, the opposing party then assumes the burden of offering a reasonable excuse for its failure to produce the disclosure demanded." *Id.*

In re *Henderson,*

> In a civil action, the Appellate Division concluded that defendants-appellants did not fully comply with a discovery order as their submission of discovery responses mere days before the court-ordered deadline frustrated the purpose of the order, i.e., to have discovery completed within a certain time frame; that they failed to produce a witness by the court-ordered deposition deadline; and that they had not paid a monetary penalty. Further, they failed to proffer reasonable excuses for their delays and noncompliance. The Appellate Division held that defendants-appellants' conduct, in conjunction with their failure to comply with prior discovery orders despite plaintiff's repeated demands, constituted willful, contumacious, and bad faith behavior warranting the striking of their answer.

In *Dreisinger v Teglasi,* 130 A.D.3d 524 (N.Y. App. Div. 2015), the Appellate Court adhered to the legal principle of contract interpretation and held that, "Where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract."

While interpreting the insurance policy, the Appellate Court in *Broad St., LLC v. Gulf Ins. Co.,* 37 A.D.3d 126, 130 (N.Y. App. Div. 2006) held that, "the interpretation of an insurance policy is a question of law . . ." see also *Star City Sportswear, Inc. v. Yasuda Fire & Marine Ins. Co. of Am.,* 1 A.D.3d 58 (N.Y. App. Div. 1st Dep't 2003).

The Appellate Court in *Seaport Park Condominium v. Greater N.Y. Mut. Ins. Co.*, 39 A.D.3d 51, 55 (N.Y. App. Div. 2007) noted that the interpretation of an insurance contract presents a question of law.

In *Marin v Constitution Realty, LLC*, 128 A.D.3d 505 (N.Y. App. Div. 2015), the Appellate Court observed that the issue before the Court comprised of simple contract interpretation.

In *Ansonia Assocs. Ltd Pshp. v. Public Serv. Mut. Ins. Co.*, 257 A.D.2d 84 (N.Y. App. Div. 1999), the Appellate Court affirmed the denial of defendants' Motion for Summary Judgment to dismiss plaintiffs' Complaint on the basis of plaintiffs' failure to state a Cause of Action of bad faith. The Court held that, "A bad-faith plaintiff must establish that the defendant insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that an insured would be held personally accountable for a large judgment if a settlement offer within the policy limits were not accepted." *Id.*

E asserts that Q's remarkable admission is buried in the third footnote of its Memorandum of Law in support of Cross Motion for Summary Judgment. The admission is as follows:

> *"E admits and Q agrees, that the transfer endorsement in the Q policy is clear and unambiguous, and that the court may resolve these motion based upon the courts construction of the endorsement's plain terms without resort to extrinsic or parol evidence."*

E, in its first Cross Motion for Summary Judgment, stated that Q by virtue of the relationship of insurer and insured owed a duty of good faith towards E. E contends that the above-mentioned footnote underscores the "bad faith" that Q has perpetrated in the present case. E further submits that Q attempted to create a false fact pattern by expending the phrase "E admits" and erroneously struggled to indicate that it was the outcome of scrutiny of the litigation. E has previously asserted and admitted in its Affirmation in support of Cross Motion for Summary Judgment dated _____, that the insurance policy in question is clear and unambiguous. It is noteworthy to mention here that E retained its

admissions in its Motion for Summary Judgment dated _____. E's, assertions are as follows:

> *"Further, the Four Corners Rule, as established in aforestated cases provides that extrinsic evidence is always barred from being used to interpret a contract. The rule also provides that the Court gathers the intention of the parties from the four corners of the contract. Applying this rule, E submits that the Court should not allow parole evidence because the contracting parties intended a full and completely integrated agreement and that the Court will only turn to parole evidence if the terms available are wholly ambiguous. In the present case, neither parties have asserted ambiguity in the provisions of the insurance contract. It is submitted that Q has not adduced parole evidence of any nature that would warrant the Court from deviating from its legal standard to rule on breach of contract relying on the insurance contract."*

However, Q, in its previous Reply Affirmation, dated _____, relied upon paragraph "d." of the Transfer Endorsement to deny its obligations pursuant to any of the provisions of the condition. Q stated as follows:

> *[Even if a duty and breach existed, which is denied, by the plain terms of the Transfer Endorsement, Plaintiff will never be entitled to the damages it seeks in excess of the Q Policy limits.*

It is noteworthy to mention that Q denied E's assertion with regard to contract interpretation throughout its Opposition papers. Q indulged in generating a false fact pattern to support its contention. Subsequently, Q, in its Cross Motion dated _____, admitted that the terms of the insurance contract to be interpreted by the Court are clear and unambiguous. Further, Q conceded to E's allegations regarding parole evidence and admits that submission of parole evidence is not required as interpretation of the contract

is a matter of law to be determined by the Court. As such, Q engaged in bad faith conduct by initially rejecting E's assertions and eventually acknowledging the same.

E reiterates the Q owes a good faith duty towards E. However, Q failed to fulfil its duty and acted in bad faith when it asserted the need for Discovery.

The bad faith of 'Q's request for discovery' is underscored in Q's response to the Preliminary Conference Order dated _____ and the contumacious "document dump" which violated the provisions of CPLR § 3122 (c) as asserted in E's Motion for Summary Judgment dated October 18, 2016. E stated in its Motion that:

> *Q contumaciously responded to E's discovery request with a document dump which utterly failed to establish material issues of facts to support Q's assertions.*

E reiterates that contract interpretation is a matter of law to be determined by the Court and does not generate the need for discovery. As such, it can be concluded that the discovery requests by Q were directed towards deliberately delaying the litigation process. Remarkably, Q went even further and obstinately responded E's discovery requests with a "document dump," committing a willful disregard of its discovery obligations under CPLR § 3122 (c).

E submits that Q indulged in a pattern of intentional dilatory conduct, including wasteful discovery practice, and conceded the facts and law E already mentioned in its first Cross Motion. Q remained indifferent to the possibility that E would be held personally accountable for potentially enormous damages in the M Action. As such, Q's conduct constituted bad faith and E is entitled to appropriate relief in this regard.

CONCLUSION

For the foregoing reasons and the matters set forth in this Memorandum of Law E respectfully prays that:

(a) E's Memorandum of Law in opposition to Q's Cross Motion for Summary Judgment and a Reply to Q's opposition to E's Motion for Summary Judgment should be granted.

(b) Q's Insurance Corporation's Cross Motion for Summary Judgment and Memorandum of Law in opposition to E's Motion for Summary Judgment should be denied in the entirety because Q's Cross Motion is based on fallacious legal arguments which are untenable in law.

(c) E respectfully requests for appropriate relief against Q's bad faith conduct.

(d) E respectfully requests such other and further relief as the Court deems just and proper including an award of reasonable attorney fees and expenses.

Dated: New York, New York

_____ _____

Attorney for Plaintiff