SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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E, Index No.:

Plaintiff,

-against- **NOTICE OF MOTION**

Q,

Defendant.
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PLEASE TAKE NOTICE, that upon the annexed affirmation of Plaintiff's Attorney dated _____, the accompanying Memorandum of Law, and all pleadings and proceedings heretofore had herein, Plaintiff E, by its counsel _____, will move this Court before the Supreme Court, New York County, at the Courthouse located at _____ on _____, 20_, at _____ in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order granting Plaintiff's Summary Judgment pursuant to C.P.L.R. § 3212, together with such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to C.P.L.R. § 2241(b) and the Uniform Rules of the Trial Courts of the State of New York § 202.8(c), answering affidavits, if any, are to be served upon the undersigned at least seven (7) days prior to the return date of this Motion.

Dated: New York, New York
_____,

Respectfully submitted,

Attorneys for Plaintiff
_____
_____
_____

TO: _____

Attorneys for Defendant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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E,

Plaintiff, Index No.:
.

-against-

Q,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION

FOR SUMMARY JUDGMENT

_____
_____
_____
Attorney for Plaintiff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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E,

Plaintiff, Index No.:

-against-

Q,

Defendant.

---------- ×

The Plaintiff, E respectfully submits this Memorandum of Law, in support of its Motion for Summary Judgment pursuant to NY CPLR § 3212.

II. PRELIMINARY STATEMENT

1. On _____, Plaintiff, E ("**E**") filed a complaint against Q ("**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.

2. On or about _____, Q filed a Motion to Dismiss the Breach of Contract action dated _____ filed by E against Q alleging that Plaintiff'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 fail 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 dismissal of E's Cross-Motion for Summary Judgment with respect to its Breach of Contract claim.

7. Pursuant to the Preliminary Conference Order ("**PCO**") _____, 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 their 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. Accordingly, E is now seeking to file a Motion for Summary Judgment on the grounds that Q has 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 involves issues of fact.

III. 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's as an additional insured.

2. S obtained coverage that included a policy with a $_____deductible in its general commercial liability insurance policy from N, their primary insurer.

3. On or about _____, S entered into a sub-contract 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 a E employee must follow when an accident occurs. The employee must notify E supervisors of the accident the moment it occurs. If the worker is incapacitated, the notice is to be provided by the workers in the area of the accident.

7. The purpose of this requirement is to allow E the opportunity to facilitate safe and documented medical care for the worker and their families. 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 counsels 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 attention nor did he ever file a Worker's Compensation claim or filled any accident form for E until _____. Underscoring this deviation from E's notification procedure is the fact that no one on the crowded construction site witnessed M's purported accident. Later, M served notice of this alleged accident in its 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 suffered as a result of the 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 October 2, 2008 also informed Q of M's accident and requested Q to 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 was filed against it, and sent a summons and complaint to E.

13. Pursuant to the Insurance contract that existed between the Parties, the Defendant was obliged to notify, 'as soon as practicable', E the fact that the claim under the Insurance policy might/ would exceed primary coverage.

14. However, Q sent a letter to E as late as on _____advising E of the potential for an excess insurance trigger. Q, in direct violation of their contractual obligations, failed to notify E that there was evidence that was 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 much before _____.

15. Q's Breach of Contract caused E to lose the benefit of the IC's excess insurance coverage.

16. Thereafter, E filed a complaint seeking declaratory judgment against S and IC on _____asserting failure on part of IC to defend and indemnify E in M's personal injury action and failure on the part of S in paying 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 of 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 the 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 Plaintiff'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 fail 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 they provided does not reveal any document that comports with their 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. ***Accordingly, E now files this Motion for Summary Judgment on the grounds that Q failed to raise any triable issues of fact through the discovery and inspection exchange between the parties. Moreover, the interpretation of the insurance contract in question is a matter of law to be determined by the court and does not involves issues of fact***.

IV. ARGUMENTS

A. E is entitled for Motion for Summary judgment based on the underlying grounds

In *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (N.Y. App. Div. 1st Dep't 2012), the New York Appellate Court held that, " [t]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." The court also held that, "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Id*. See also *Kershaw v Hospital for Special Surgery*, 114 A.D.3d 75 (N.Y. App. Div. 1st Dep't 2013).

The New York Appellate Court in *Pokoik v Pokoik*, 115 A.D.3d 428 (N.Y. App. Div. 1st Dep't 2014) held that, "Summary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing."

Applying the afore-stated principles to the case at bar, it is evident that E has adequately established the absence of material issues of fact. The interpretation of the insurance contract in question is a matter of law to be determined by the Court and does not encompass any triable issues of fact. Moreover, contract interpretation does not generate the need for discovery, still E complied with its obligation by responding appropriately to the document requests of Q and Q has failed to raise any material issue of facts. It is submitted that, Q has failed to comply with E's discovery request in that Q produced a document dump in response to discovery and inspection. In addition to this, the documents that Q submitted were public documents and did not even remotely make a reference about triable issues of fact. Q is under an obligation to comport and respond to E's demands that produce documents corroborating evidentiary proof to establish the existence of a material issue of fact. Q failed to adduce proof with respect to material issues of fact. Therefore, E is entitled to summary judgment.

B. Contract interpretation is a matter of law to be determined by the court and does not generate the need for discovery.

The New York Appellate Court in *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 2016 N.Y. App. Div. LEXIS 5930 (N.Y. App. Div. 1st Dep't Sept. 15, 2016) held that, "Generally, courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies." The court also held that, "Well-established principles governing the interpretation of insurance contracts provide that the

unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court." *Id*.

In *300 Park Ave., Inc. v Café 49, Inc.*, 89 A.D.3d 634, 635 (N.Y. App. Div. 1st Dep't 2011), the New York Appellate Court held that, "The interpretation of the terms presented a question of law for the court, which accorded those terms their plain and ordinary meaning."

The New York Appellate Court in *Dreisinger v Teglasi*, 130 A.D.3d 524 (N.Y. App. Div. 1st Dep't 2015) 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."

In *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 A.D.3d 1, 2 (N.Y. App. Div. 1st Dep't 2012), the New York Appellate Court stated that because the parties' agreement was clear and complete on its face, any such discovery would simply be an opportunity for plaintiff to uncover parole evidence in an attempt to create an ambiguity in an otherwise clear and unambiguous agreement. The court concluded that absent a finding of ambiguity in the agreement, discovery was unnecessary, as any parole evidence would be inadmissible. *Id*.

In the case at bar, E has rightfully relied upon the insuring agreement, which is the only written document of evidence, for backing its assertions. On the basis of the foregoing case laws and legal principles, it is apparent that the interpretation of the insurance contracts is a question of law for the Court to decide. The Court has to accord plain and ordinary meaning to the insurance contract in issue while affording interpretation.

It is noteworthy to mention here that the interpretation of the contract being a question of law, discovery is not needed as there are no triable issues of fact involved therein. Q has failed to establish a triable issue of fact which would necessitate discovery leading to trial. Further, the

factual circumstances underscore the point that a contract dispute does not require discovery. It is pertinent to mention here that, the issue in question dealt with contract interpretation and there was absolutely no requirement for discovery and inspection although Q unnecessarily took the course of discovery. E duly complied with its discovery obligations pursuant to the Preliminary Conference Order (PCO) dated May 17, 2016. E responded meticulously to Q's discovery with bate stamped documents that referred back to the Demand. However, 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.

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.

Therefore, E submits that contract interpretation is a matter of law to be determined by the court and does not generate the need for discovery. As no triable issues of fact exists in the case at bar, E is entitled to summary judgment.

C. The document dump, without responding to each demand, was a dereliction of their duties in responding to the discovery and Inspection

In *TYT E. Corp. v Lam*, 139 A.D.3d 498, 501 (N.Y. App. Div. 1st Dep't 2016), the court noted that the defendants were in default going into the motion, since they wilfully disregarded their discovery obligations, including express directives to produce all relevant documents.

In *TYT E. Corp. v Lam,*

> The motion court granted the motions of third party plaintiffs and denied the motion by the Park Regent parties and the cross motion by Lin. The court noted that Lin and the Park Regent parties were in default going into the motion, since they willfully and contumaciously disregarded their discovery obligations, including express directives to produce all documents reflecting loans made by TYT and Zhuang. The court reasoned that denial of their motions was warranted on that ground alone. The Appellate Court held that the motion court erred in granting summary judgment to third party plaintiffs on their third-party claims against the third party defendants. While the court properly declined to consider as evidence a copy of the promissory note which the third party defendants produced in an untimely manner, issues of fact concerning the $200,000 in payments from plaintiff TYT to third party defendant Park Regent are presented by other record evidence, including affidavits and deposition testimony claiming that there was such a loan.

The New York Appellate Court held that, "Dismissal of the answer is supported by conduct that can fairly be described as dilatory, evasive, obstructive and ultimately contumacious." *CDR Créances S.A.S. v. Cohen*, 104 A.D.3d 17, 26 (N.Y. App. Div. 1st Dep't 2012); See also *Cantos v. Castle Abatement Corp.*, 251 A.D.2d 40 (N.Y. App. Div. 1st Dep't 1998). The court also held that, "The striking of pleadings is warranted where, the conduct of the offending party frustrates the disclosure scheme provided by the CPLR." *Id*. *Pimental v. City of New York*, 246 A.D.2d 467 (N.Y. App. Div. 1st Dep't 1998).

In *Seattle Pac. Indus., Inc. v. Golden Val. Realty Assoc.*, 54 A.D.3d 930 (N.Y. App. Div. 2d Dep't 2008), the New Yok Appellate Court held that, **"**Pursuant to CPLR 3120(2), a party seeking

discovery from another party, inter alia, shall set forth the items to be inspected, copied, tested, or photographed by individual item or by category, and shall describe each item and category with reasonable particularity."

In *Mendelowitz v. Xerox Corp.*, 169 A.D.2d 300 (N.Y. App. Div. 1st Dep't 1991), the New Yok Appellate Court stated that CPLR 3120 requires that the notice of discovery specify the things sought with reasonable particularity and the burden of specification is on the requesting party.

In *H.P.S. Mgt. Co., Inc. v. St. Paul Surplus Lines Ins. Co.,* 127 A.D.3d 1018 (N.Y. App. Div. 2d Dep't 2015) the New York Appellate Court denied that branch of plaintiff's motion vacating the Court Attorney Referee directives to provide discovery responses in a manner that allows the defendants "to know and understand" which documents apply to their separate discovery demands.

In *H.P.S. Mgt. Co., Inc. v. St. Paul Surplus Lines Ins. Co.,*

> In response to the defendants' three separate discovery demands, the plaintiffs provided a single computer flash drive which contained more than 9,000 pages of documents. The plaintiffs did not indicate which documents corresponded to which discovery demands. At a discovery conference, the defendants contended that the plaintiffs failed to comply with CPLR 3122 (c) because the documents provided by the plaintiffs in response to their discovery demands were not produced in the manner that the documents were kept in the regular course of business and were not labelled to correspond to the categories in the defendants' demands. The Court Attorney Referee agreed, and directed the plaintiffs to, in effect, provide their discovery responses in a manner that allows the defendants "to know and understand" which documents apply to their separate discovery demands. Under these circumstances, the Supreme Court did not improvidently exercise its discretion in denying that branch of the plaintiffs' motion pursuant to CPLR 3104 (d) which was to vacate the directive of the Court Attorney Referee.

Applying the afore-stated principles to the case at bar, it can be concluded that E complied with the provisions of CPLR 3120 and stated with specificity the documents to be produced by Q.

CPLR 3120 provides that:

- *After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served*
- *The notice or subpoena duces tecum shall specify the time, which shall be not less than twenty days after service of the notice or subpoena, and the place and manner of making the inspection.*

It is submitted that E duly complied with the aforestated provisions and appropriately specifically requested production of document from Q.

Further, CPLR 3122 (c) provides that:

Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.

Pursuant to this rule, Q, had an obligation to reasonably organize, label or index the produced documents to correspond with the categories in the request. Instead, Q produced voluminous documents in response to the request. Q had an obligation to ensure that documents responsive to a particular request are identified in response to that request and that the documents can be reasonably accessed in the document production. Q failed to comply with the discovery obligation under CPLR 3122 (c) and responded to E's document requests by producing voluminous documents in no apparent order. Q was under a duty to produce its records in the manner they are kept in the usual course of its business, and identify the documents with an appropriate index or references to the document numbers corresponding to the specific requests. However, Q deviated

from the obligations of a responding party under the said rule and did not honour the requirement set forth in the rule.

Q had an obligation to identify the produced documents appropriately with references corresponding to the specific document requests. Q, who failed to maintain and produce its business records in an organized state, cannot rely on its own lack of organization to dump records on the discovering party E and simply direct E to go search for what it is seeking.

Therefore, Q's conduct of responding to E's discovery and inspection with a document dump was a contumacious dereliction of their duties and discovery obligations.

D. An examination of the "document dump" does not produce any document which comports with their contractual duty to provide written notice that the general liability policy was tendered, thus exhausted.

In *DaSilva v Haks Engrs.*, 125 A.D.3d 480 (N.Y. App. Div. 1st Dep't 2015), the New York Appellate Court affirmed the summary judgment for Cross-motion. The court held that, "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence."

In *BDCM Fund Adviser, L.L.C. v. Zenni*, 103 A.D.3d 475 (N.Y. App. Div. 1st Dep't 2013), the New York Appellate Court concluded that the defendants established a prima facie case for summary judgment based on affidavits and plaintiffs failed to raise a triable issue of fact.

In *FCI Group, Inc. v. City of New York*, 54 A.D.3d 171 (N.Y. App. Div. 1st Dep't 2008), the New York Appellate Court granted Summary judgment which involved interpretation of contract dispute.

In re *FCI Group, Inc. v. City of New York,*

> The city and the department argued that the contractor forfeited its right to further payment by its attempted bribery of two city employees. The contractor's president pled guilty to attempted

> bribery, and the issue of bribery was not in dispute. The appellate court initially found that the contract's arbitration clause was inapplicable. The dispute did not involve an item of the work performed but the interpretation of a contract provision not within the purview of the arbitration provision. However, the contractor had agreed to conduct itself ethically in its performance of the contract and consented to penalties for violating the contractual prohibition against dispensing monetary inducements to city workers. This disincentive promoted public policy. The bribery had a direct connection to the obligation sued upon since it concerned a significant portion of the outstanding balance due on the contract. Payment for the outstanding balance still had to be approved by the department, and the employees the president tried to bribe were responsible for approving change order requests. Thus, the corruption was not merely incidental or collateral to the contract performance.

In *Rosenthal v Quadriga Art, Inc.*, 69 A.D.3d 504, 506 (N.Y. App. Div. 1st Dep't 2010), the New York Appellate Court, while affirming the grant of summary judgment consisting of interpretation of contract, held that, "Our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract." The Court also held that, "If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further." *Id*.

In the case at bar, E asserts that Q had nothing to demand in the discovery and inspection, still they burdened E with request for public court documents and evidence in the M case which they could have easily obtained from Q's assigned counsel. Even in this situation, E honored its obligation to respond to each request with identifiable documents which were bate stamped. However, the documents that Q produced as per the document request by E did not support Q to establish disputed facts. A careful scrutiny of the documents submitted by Q pursuant to E's discovery request, did not reveal a single document that comports with their contractual obligation to provide a written notice that the general liability policy was exhausted. As such, E submits that Q has failed to adduce sufficient evidence to proves issues of facts exists as to the case at bar. E also submits that the conduct of Q of recklessly responding to E's discovery request with document dump is frivolous in nature. Q deliberately assumed this standing as a defense position for delaying

of the Court's obvious obligation to interpret the relevant contract by the four corners of the insurance contract as established by the above-mentioned case laws.

E submits that Q failed to produce any document which comports with their contractual duty to provide written Notice that the general liability policy was tendered and exhausted. As a result, Q failed to establish that the case at bar involves any material issues of fact and therefore, E is entitled to summary judgment.

V. CONCLUSION

For all of the foregoing reasons, E respectfully prays for relief against Q and requests the Hon. Court to grant judgement as follows:

1. E is entitled to summary judgement against Q.
2. Contract interpretation does not involve matter of facts, instead it is a matter of law to be determined by the court and does not generate the need for discovery.
3. The document dump without responding to each demand was a contumacious dereliction of Q's duties in responding to the discovery and Inspection.
4. Q failed to produce any document which comports with their contractual duty to provide written Notice that the general liability policy was tendered and exhausted.
5. For such other and further relief in E's favor as may be deemed just and proper by the Court.

Dated: New York, New York

_____

_____
_____
_____
Attorney for Plaintiff