IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TOWER CROSSING CONDOMINIUM ASSOCIATION, INC., Plaintiff, v. AFFILIATED FM INSURANCE COMPANY, Defendant.	)	Civil No. 1:21-cv-06228 District Judge LaShonda A. Hunt

MEMORANDUM IN SUPPORT OF AFFILIATED FM INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Defendant Affiliated FM Insurance Company ("Affiliated FM") is entitled to judgment as a matter of law under Federal Rule of Civil Procedure 56 because the undisputed material facts demonstrate that (1) Plaintiff Tower Crossing's claims are barred because it failed to satisfy a condition precedent to coverage under the Policy by not providing an actually "signed and sworn" Proof of Loss ("POL") as required by the express terms of the Affiliated FM Policy; (2) Tower Crossing's claims are barred by the contractual suit limitations period contained in the Policy inasmuch as the unsigned and unsworn POL does not toll the Policy's suit limitation period that expired on October 2, 2021, and before this action was commenced; and (3) this Court has the inherent power to dismiss this action because Tower Crossing falsely presented the POL to the Court as being signed and notarized when it had not been. Accordingly, Affiliated FM is entitled to judgment as a matter of law on each of these three separate grounds.

I. SUMMARY OF ARGUMENT

Although Tower Crossing's claims are also barred based upon numerous coverage issues, there are three separate dispositive threshold issues requiring dismissal on summary judgment,

each stemming from the reality that the POL Tower Crossing provided to Affiliated FM on October 1, 2021, (the "$4.3 Million POL," SUF ¶¶ 5, 25), was not "signed and sworn" as required by the Affiliated FM Policy and applicable law. Despite Tower Crossing initially attempting to pass off the $4.3 Million POL as signed, sworn and notarized, discovery has revealed the truth behind that document. Moreover, it is now undisputed that the $4.3 Million POL was, in fact, not as it appeared and it was not actually "signed and sworn" (nor was it notarized). Instead, the signature and notary certification was simply removed from a different POL, one for $2.9 million (the "$2.9 Million POL," SUF ¶¶ 5, 12-18, 32), and was "re-attached" to the $4.3 Million POL in order to make that document appear as if it had been signed and sworn.[1]

No longer able to dispute the fact that the $4.3 Million POL was not actually "signed and sworn" as required by the Policy, Tower Crossing now apparently takes the incredible and untenable position that the act of removing the signature and notary certification page from the $2.9 Million POL, and attaching that same signature and notary certification to a completely different document with materially different amounts, the $4.3 Million POL, is somehow proper under the terms of the Policy and still considered notarized or "sworn" under the law. It is not. As demonstrated below, Tower Crossing's "switching" of the signature and notary certification does not transform the $4.3 Million POL into a signed, sworn and notarized document, as a matter of law. To the contrary, Tower Crossing's switching signature and notary certification pages, at best, renders the $4.3 Million POL a nullity and constitutes fraud on the Court.

Switching signature pages and notary certificates from one legal document to another makes a mockery of the notarial rules, thwarts the Policy's terms and requirements, runs afoul of

[1] It is axiomatic that summary judgment should be granted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Henry v. Hulett*, 969 F.3d 769, 776 (7th Cir. 2020) (quoting Fed. R. Civ. P. 56(a)).

the controlling law, and undercuts the integrity of legal documents and the legal system. However, for purposes of this Motion, the simple and undisputed fact is that the $4.3 Million POL was not signed and not sworn as required by the Policy. Accordingly, (1) Tower Crossing failed to satisfy a condition precedent of the Policy, (2) the contractual limitations period was not tolled under 215 ILCS 5/143; and (3) the Court has the inherent power to dismiss this action as a matter of law.

II. STATEMENT OF UNDISPUTED FACTS

A. The Policy Requires That The Proof Of Loss Be "Signed And Sworn"

The Affiliated FM Policy expressly requires that the Insured must "[g]ive a signed and sworn proof of loss to the Company within 90 days of loss, unless that time is extended in writing…" (SUF ¶ 2). Indeed, the Policy lists this requirement under a heading styled **"REQUIREMENTS IN CASE OF LOSS"** that appears in bold, capital letters. In contrast, the $4.3 Million POL – which is the centerpiece of Tower Crossing's case and was attached as "Exhibit D" to the First Amended Complaint (Pl.'s Ex. D, ECF 11-4) – was actually neither signed nor sworn. (SUF ¶ 5). Discovery in this action revealed that the $4.3 Million POL was not signed and sworn when a copy of a different POL, one for $2.9 million, surfaced from a third party's file containing the exact same signature and notary page. (SUF ¶¶ 5, 12-38). Throughout the litigation, Tower Crossing tried to hide the fact it switched POLs causing Affiliated FM to write numerous deficiency letters and file a motion to compel. (*See, e.g.,* SUF ¶ 44).

B. It Is Now Undisputed That The $4.3 Million POL Was Not "Signed And Sworn"

The evidence ultimately became overwhelming requiring Tower Crossing to concede that its President, Kenneth Freedman, did not sign the $4.3 Million POL nor was that POL notarized. (SUF ¶¶ 5, 17-18, 28-31). On the contrary, the signature and notary page was simply lifted from the earlier $2.9 Million POL and re-attached to the $4.3 Million POL (SUF ¶¶ 5, 17-18, 28-31)

which was then passed off to Affiliated FM (and to the Court) as the signature and notary page to the $4.3 Million POL so it would appear to be signed and notarized when it had not been. (*See* SUF ¶¶ 5, 22, 25, 28-38; *also see* Pl.'s Resp. to Motion to Dismiss, ECF 15 at 3, 5-6).[2] Mr. Freedman's testimony confirmed that the $4.3 Million POL signature page is "literally identical" to the $2.9 Million POL signature page and was reattached to the $4.3 Million POL as opposed to being separately signed and notarized.[3]

Upon the revelation of the identical signature and notarization certificate, Tower Crossing attempted to dance[4] around the issue forcing Affiliated FM to retain, at great expense, a forensic document examiner, an insurance claims expert, and a notary public as experts. At each of their depositions, Tower Crossing's counsel conceded "for the record" that it was "not even in dispute" that the $4.3 Million POL signature notary page was identical to the signature and notary page of the earlier $2.9 Million POL and was only signed once. For example, the forensic document examiner, Mr. Kulbacki, testified that: "Yes, so essentially it is the same exact signature page**.** These were not two separately signed documents. They are one signature page that appears on both of these documents. The identical document that as – essentially, it was signed once. It was

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[2] Tower Crossing admits that it never provided Affiliated FM with the actually signed and sworn $2.9 Million POL. (SUF ¶ 22).

[3] Mr. Freedman acknowledged that the signature pages of those two documents were "literally identical." (SUF ¶ 28). He testified that the $4.3 Million POL signature page contains his signature but he is **"not quite sure how the signature page was reproduced or attached[,]"** (SUF ¶ 32) (emphasis added), and the signature page was originally attached to the $2.9 Million POL and reattached to the $4.3 Million POL. (SUF ¶¶ 5, 15-18, 21, 23-24, 27-28, 32).

[4] While a side-by-side comparison reveals the two signature pages are literally identical (SUF ¶¶ 28-31), Tower Crossing refused to admit that Mr. Freedman only physically signed and swore an oath on the truth of statements in only one POL on September 30, 2021. (SUF ¶ 43). However, Mr. Freedman testified that was not sure that the $4.3 Million POL even existed at the time he signed and swore the oath. (SUF ¶¶ 17-18).

not signed twice." (SUF ¶ 31) (emphasis added). Tower Crossing's counsel stated: "And I just want to state for the record, that's not even in dispute in this case, Mr. Kulbacki, so I'm not even sure – hopefully you didn't waste too much time but that's not even an issue in the case[.]" (SUF ¶ 31; *see also* SUF ¶¶ 37, 42).

III. ARGUMENT

A. Tower Crossing Failed To Satisfy Conditions Precedent Under The Policy

Tower Crossing is barred from recovery under the Policy because it filed the present suit without fulfilling all conditions precedent to coverage as required by the Policy, including providing a "signed and sworn" POL. "[T]he requirement of proof of loss in an insurance policy is a condition precedent to the enforcement of liability" under the Policy. *Vogelsang v. Credit Life Ins. Co.*, 119 Ill. App. 2d 67, 73, 255 N.E.2d 479, 483 (Ill. 1970) (citation omitted).[5] Summary judgment is proper here as Tower Crossing cannot prove that it performed all conditions precedent, because it now admits that it never provided Affiliated FM with the $2.9 Million POL (SUF ¶ 22) and thus it cannot show that it complied with the conditions of the Policy with the unsigned and unsworn $4.3 Million POL.

B. "Switching" The Signature And Notary Certification Pages, As Was Done Here, Renders The Neither Sworn Nor Notarized $4.3 Million POL A Nullity

The $4.3 Million POL was never actually signed and sworn in the presence of a notary public and thus it is a nullity. The Illinois Supreme Court has noted that "[a]n affidavit is simply a declaration, on oath, in writing, sworn to by a party before some person who has authority under

[5] Tower Crossing has the burden to prove that it performed all conditions precedent. *Id.* ("It is the duty of the insured to allege and prove the performance of all conditions precedent."). It is undisputed that the Policy requires an insured to fully comply with all terms and conditions of the Policy prior to filing a lawsuit under the Policy. (SUF ¶ 3). Among the terms and conditions, is to provide a signed and sworn POL with Affiliated FM. (SUF ¶ 2).

the law to administer oaths. It does not depend on the fact whether it is entitled in any cause or in any particular way. Without any caption whatever, it is nevertheless an affidavit." *Estate of Roth v. Ill. Farmers Ins. Co.*, 202 Ill. 2d 490, 493-94, 782 N.E.2d 212, 214 (2002) (citations omitted).[6] Furthermore, "[a]n affidavit that is not sworn is a nullity" *Id*. at 216. Courts in Illinois have long held that "[a]n unsigned and unsworn affidavit is no affidavit at all." *Lowrence v. Hacker*, No. 85 C 5268, 1993 U.S. Dist. LEXIS 3796, at *20 (N.D. Ill. Mar. 26, 1993).

Tower Crossing now attempts to explain away the problem of the $4.3 Million POL not being signed and notarized and claims that Mr. Freedman gave his consent to have the signature and notary page removed and "reattached" to a materially different POL (for over a million dollars higher). In that regard, when asked if he actually signed the $4.3 Million POL, Mr. Freedman testified that: "I'm sure that whoever prepared the revised partial sworn statement [the $4.3 Million POL] would have asked me for my okay to attach my signature." (SUF ¶ 32). And, in deposing the notary expert, Ms. Patricia Bridges, Tower Crossing's counsel, again stated that it was "undisputed" that the signature and notary page was "reattached" to the $4.3 Million POL and stated as follows: "But what do you mean by – its undisputed by the way, that Mr. Freedman consented to that happening, he knew the sworn proof of loss was different, they had discussions about it, he said, yep, looks good to me. It's fine if you attached that – reattach that page?" (SUF ¶ 37).

However, this explanation of events does not save Tower Crossing as it does not comply with the Policy terms, does not comply with applicable law or make its conduct any less egregious.

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[6] The notary certificate for the $2.9 Million POL states that the document was "subscribed and sworn before me this 30th day of September, 2021," above the signature line and signature of Notary Public Charles Alexander, and is stamped with Mr. Alexander's notary seal. (SUF ¶ 14). Despite this, Tower Crossing admits that it did not provide, and indeed never provided Affiliated FM with the $2.9 Million POL. (SUF ¶ 22).

Nor does it create a material issue of fact for purposes on the instant Motion, insofar as, as a matter of law, the $4.3 Million POL that was submitted was not and could not have been actually signed as required by the Policy nor was it sworn or notarized. (SUF ¶¶ 5, 15, 17-37).

The Illinois Notary Public Act (5 ILCS 312/1 *et seq.*) (the "Notary Act"), which sets forth the proper notarial acts, does not provide that a signatory (or notary for that matter) can simply switch the signature and notary pages *even if* the signatory later thinks that he might, could, would, or actually did give his "okay." (SUF ¶¶ 19-20, 33-36). Any such "okay" or consent (even if actually given) does not render the $4.3 Million POL sworn or signed, much less notarized. (SUF ¶¶ 33-36).[7]

C. Switching Out Notary Certificates From One Document To Another Is Not A Notarial Act And Does Not Make The Resulting Document "Signed And Sworn"

The act of taking the notary certificate from the $2.9 Million POL and re-attaching it to a second materially different document does not make the second document signed or sworn (notarized) nor does it satisfy the requirement of appearing before a notary public to sign and swear an oath to the truthfulness of the document as mandated by Illinois notary law. (SUF ¶¶ 19-20, 33-36). The Notary Act prescribes the requirements for notaries and notarial acts and sets forth the proper and valid methods of notarizing a document. The Notary Act demonstrates that if an action or process is not prescribed or enumerated in the statute as a notarial act, then that process is not a notarial act and accordingly using that action or process will not notarize a document.[8]

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[7] To illustrate, once a will leaving an heir $2.9 million has been notarized, not even the testator can remove their own notarized signature page and use that page on a new will leaving their heir $4.3 million. Doing so does not make the resulting "revised" $4.3 million will valid or "final" any more than it makes the notarized $2.9 million will a "draft."

[8] For example, the Notary Act grants notary publics authority to perform the specific notarial acts and the authority to administer oaths. (5 ILCS 312/6-l0l(a)). Tower Crossing's position undermines the entire notary system and law. It is recognized that "a notary holds an important role in society in preventing fraud law and forgery in certain transactions, such as ones involving

1. Verification Upon Oath Or Affirmation Requires An Oath

In this case, the specific notarial act evidenced by the language "subscribed and sworn before me" in the notary certificate for the $2.9 Million POL was a verification upon oath or affirmation. (SUF ¶¶ 14, 19). A verification upon oath or affirmation is "a declaration that a statement is true made by a person upon oath or affirmation." (SUF ¶¶ 15, 19). A verification upon oath or affirmation requires the signatory to personally appear before the notary and sign the document in the presence of the notary and the notary public is required to administer an oath. (SUF ¶ 20). However, Mr. Freedman testified that, "my signature which Charles Alexander acknowledged and which was attached to the original proof of loss for two-million-plus, was later attached to the revised, what I would call the revised proof of loss for -- that being for four-million-plus." (SUF ¶¶ 17-18). Mr. Freedman believed and swore that the $2.9 Million POL contents were true in the presence of Notary Public Mr. Alexander. (SUF ¶¶ 12-20).

2. Verification Upon Oath Or Affirmation Requires Personally Appearing In The Physical Presence Of The Notary Public

Along with the oath, performing a verification upon oath or affirmation requires the person signing the document to personally appear and sign the document in the physical presence of the notary public. (SUF ¶ 20). *See* 5 ILCS 312/6-105(c) ("The person requesting this notarial act must personally appear before the notary and sign the document in the presence of the notary"); *also see* 5 ILCS 312/1-104 (defining "In the presence of" or "appear before" as "being in the same physical location as another person and close enough to see, hear, communicate with and exchange credentials with that person . . . .").

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mortgages and loan documents that have financial significance." *Quicken Loans v. Downing*, No. 1:10-CV-1565-TWP-DKL, 2012 WL 4762411, *10 (S.D. Ind. Oct. 5, 2012) (citation omitted).

3. The Notary Act Does Not Provide A Method Of Notarization Involving An Executed Notary Certificate Being Removed From One Document And Then Used On A Second Different Document

Tower Crossing cannot assert that the $4.3 Million POL was signed and sworn, because attaching the notary certificate from the $2.9 Million POL evidencing the notarial act for a verification upon oath or affirmation on the $2.9 Million POL, does not make the $4.3 Million POL signed and sworn under the Notary Act. The Notary Act prescribes the notary acts and requirements that must be followed in order for a document to be notarized. *See generally*, 5 ILCS 312/1 *et. seq*. The Notary Act does not enumerate or prescribe a method of notarization involving an executed notary certificate being removed from one document and then used on a second, different document. *See generally*, *Id*.

As a matter of law, the Notary Act does not recognize removing an executed notary certificate from the $2.9 Million POL and re-attaching it to a materially different document (the $4.3 Million POL) as a valid notarial act, even *if* the re-attachment was performed by a notary public. (SUF ¶¶ 33-36). No such notarial act exists. *See generally*, 5 ILCS 312/1 *et. seq*.

Based on the undisputed facts and the requirements of the Notary Act, the $4.3 Million POL did not become signed and sworn when Tower Crossing removed the notary certificate from the $2.9 Million POL and re-attached that certificate to the $4.3 Million POL. (*See* SUF ¶¶ 33-34). As a result, the $4.3 Million POL is not signed and is not sworn. (*See* SUF ¶¶ 33-36). As a further result, it was not notarized. *Id*. Instead, it is a "nullity." *See Estate of Roth*, 202 Ill. 2d at 497, 782 N.E.2d at 216. Accordingly, Tower Crossing did not fulfill and cannot show that it fulfilled all conditions precedent required for it to sue Affiliated FM under the Policy (*see* SUF ¶¶ 2, 3). Tower Crossing's present lawsuit is barred.

D. Absent An Actually "Signed And Sworn" POL As Required By The Policy, This Action Is Barred By The Policy's Suit Limitations Provision

The Policy contained a contractual suit limitations period requiring the Insured bring suit within two years of the alleged date of loss, (SUF ¶ 3), and Affiliated FM agreed, in writing, to extend the time for filing suit on the claim under the Policy from July 2, 2021, to October 2, 2021 in a letter. (SUF ¶ 10).[9] It is also undisputed that this lawsuit was filed on November 19, 2021, (ECF 1), and thus after the agreed October 2, 2021 extension.

Having missed the October 2, 2021 extended deadline, Tower Crossing claims that the $4.3 Million POL which it submitted to Affiliated FM, tolled the time period pursuant to Section 143.1 of the Illinois Insurance Code. (Pl. Am. Compl. ECF 11 ¶¶ 18-20). However, that Code provision (and the cases interpreting it) provide that for tolling to occur the POL "must" be in the form "required by the policy." 215 ILCS 5/143.1. Accordingly, whether the period for Tower Crossing to file suit was tolled turns on whether the POL that was submitted was in the form required by the Policy, *i.e.,* "signed and sworn." It was not "signed and sworn" and not in the form required by the Policy.

Earlier, Tower Crossing argued against Affiliated FM's motion to dismiss, (ECF 13), asserting that this $4.3 Million POL tolled the contractual suit limitation period. (Pl.'s Resp., ECF 15 at 3, 5-6). On January 27, 2023, the Court (J. Blakey) denied Affiliated FM's motion to dismiss based upon the pleadings at that time and cited to Illinois law (215 ILCS 5/143.1). (Memorandum Opinion and Order, ECF 21 at 8). However, unbeknownst to both Affiliated FM and the Court *at the time* of that ruling, the $4.3 Million POL was not as it appeared (and as Tower Crossing had represented). Indeed, it was not actually signed and sworn as required by the Policy terms and

[9] The Policy provides that: "[n]o suit, action, or proceeding for the recovery of any claim under this policy, will be sustainable in any court of law or equity unless: . . . [i]t is Initiated within two years after the date on which the direct physical loss or damage first commenced or occurred, extended by the number of days between the date the proof of loss was filed until the date the claim is denied in whole or in part." (SUF ¶ 3).

Illinois law and thus, as a nullity, does not toll the time period. *See LaMonica Fam. Ltd. Partnership, LLC v. W. Bend Mut. Ins. Co.*, No. 3:23-CV-50258, 2024 WL 1376071, at *3-4 (N.D. Ill. Apr. 1, 2024) (finding no tolling of the Policy's limitation period by an unsigned, unsworn estimate).

1. Contractual Suit Limitations Are Enforced As A Conditions Precedent

Courts applying Illinois law construe the contractual suit limitation provisions contained in property insurance policies to time-bar suits filed after the expiration of the suit limitation period. *See Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 529-30, 675 N.E.2d 897 (Ill. 1995); *Hoover v. Country Mut. Ins. Co.*, 975 N.E.2d 638, 645-46 (Ill. Ct. App. 2012); *Omega Demolition Corp. v. Travelers Prop. Cas. Of Am.*, No. 14–cv–01288, 2015 WL 3857341, at *6 (N.D. Ill. June 19, 2015). Under Illinois law, a suit limitation provision is essentially a contractual statute of limitations. *See Cramer*, 174 Ill. 2d at 529-30. It is well-ensconced in Illinois law that the parties to a contract may agree to limit the time in which a party to the contract may file a complaint based upon the contract, and Illinois Courts have enforced suit limitation provisions appropriately. *See Hoover*, 975 N.E.2d at 645-46; *Cramer*, 174 Ill. 2d at 529-30. Further, a suit limitation provision is a valid condition precedent under a property insurance policy. *Id.* (citations omitted).

2. Under Illinois Law, The POL "Must" Be In The Form Required By The Policy For It To Toll The Suit Limitation Period---The $4.3 Million POL Here Was Not

Under Illinois law, Section 143.1 of the Illinois Insurance Code provides that an insurance policy's suit limitation period may be tolled by the submission of a POL, *if* the POL is provided in the form required by an insurance policy. More specifically, it provides:

> Sec. 143.1. Periods of limitation tolled. Whenever any policy or contract for insurance, . . . contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, **in whatever form is required by the policy**, until the date the claim is denied in whole or in part.

(215 ILCS 5/143.1) (emphasis added).

The Policy at issue expressly requires that the insured, Tower Crossing, provide a "signed and sworn" POL to Affiliated FM. (SUF ¶ 2). Insofar as Tower Crossing failed to provide a signed and sworn POL, (*see* SUF ¶ 22), as discussed above, Tower Crossing also failed to toll the limitations period under Section 143.1 by October 2, 2021. (*See* SUF ¶¶ 3, 10).

As the Illinois Insurance Code makes clear, in order to take advantage of Section 143.1's tolling, the POL must be provided to the insurer in the form required by the policy. "Section 143.1 requires a proof of loss **must** be filed in the form required by the policy in question before the limitations period provided in the policy will be tolled." *Vala v. Pac. Ins. Co*., 296 Ill. App. 3d 968, 971, 695 N.E.2d 581, 583 (1998) (emphasis added) (citing 215 ILCS 5/143.1). Under the applicable law, including *Vala*, Tower Crossing could not toll the time to file suit under the Policy with the unsigned and unsworn $4.3 Million POL, which would have expired on October 2, 2021. Therefore, Tower Crossing's present case, filed on November 19, 2021 is untimely and barred by the Policy's time limitation on suits.

E. Courts Condemn The Conduct Of Switching Signature Pages To Make An Unsigned Document Falsely Appear To Be Signed

Courts condemn such improper maneuvers to make a document appear signed and sworn. For example, in *Rivera v. Allstate Ins. Co*., 140 F. Supp. 3d 722 (N.D. Ill. 2015), the Court made clear that the effect of re-using a signature facsimile rendered the document a nullity and that such a maneuver does not magically make the new document signed or sworn. In *Rivera*, the court determined that the declarations of the plaintiffs Rivera and Scheuneman were not signed and dated when their signature pages were exact facsimiles of those plaintiffs' earlier interrogatory verifications. *Id.* at 729. As the court in *Rivera* noted, the consequence of the plaintiffs' signature pages in their declarations being "recycled" from their earlier interrogatory responses was that the

declarations themselves were unsigned, not evidence, and therefore should be disregarded. *Id.* at 729-730. Similarly, here, the signature page of the $4.3 Million POL was undisputedly "recycled" and taken from the $2.9 Million POL and, as a necessary result, the $4.3 Million POL is, as a matter of law, deemed unsigned, unsworn, undated, unnotarized, and a nullity, masquerading as a signed and sworn POL under the false flag of a "recycled" signature and notary certification page.

In *Flava Works Inc. v. Momient*, No. 11 C 6306, 2013 WL 1629428, at *2-3 (N.D. Ill. Apr. 16, 2013), Judge Shadur addressed the scenario where a *bona fide* signature had been "transposed" onto a totally different document. Judge Shadur noted that it was "the most egregious fraud on the Court that this Court has encountered in its nearly 33 years on the bench." *Id*. at *2. He noted that the offending party's complaint should be dismissed with prejudice as a sanction for this fraud on the court. *Id*. at *3 (citations omitted).[10]

F. The Court Has The Inherent Power To Grant Summary Judgment

It is undisputed that Tower Crossing submitted this false document to the Court in the Amended Complaint (ECF 11-4) and again highlighted this false document in responding to the motion to dismiss. (ECF 15 at 3, 5-6). When a false document is submitted, a court has inherent powers to address the situation, including dismissing the lawsuit and ordering an independent

[10] Other courts too have condemned the conduct of switching signature pages and notary pages and have sanctioned and reprimanded attorneys who do so and have also rendered such altered documents a nullity. *See*, *e.g.*, *In re Conduct of Hostetter*, 348 Or. 574, 602-4, 238 P.3d 13, 29-30 (2010) (affirming trial panel's conclusion that attorney's attachment of notarized signature page from an earlier deed to a later deed that was substantively different from the first constituted fraudulent preparation of documents in attorney disciplinary case); *Fleigel v. Blonder,* 121 Misc. 2d 502, 503-04, 468 N.Y. S 2d 95, 95-96 (Sup. Ct. 1983) (an affidavit made out of the presence of a notary and altered was legally insufficient); *Grissom v. Stange*, No. 18-cv-960-jdp, 2019 WL 1877300 (W.D. Wis. Apr. 26, 2019) (dismissing case where plaintiff copied a notary certification from a filing in another case, fraudulently altered it, and attached it to a motion.); *Mahoning Cnty. Bar Ass'n v. Mac Ala,* 175 Ohio St. 3d 416, 424-428, 244 N.E.3d 15, 23-26 (Ohio 2024) (A public reprimand and sanction for an attorney's fraudulent signing, alteration and/or notarization of documents that were filed with a court).

investigation to determine whether there has been a fraud-on-the-Court.[11] It is well recognized that any sanction short of dismissal with prejudice or entry of judgment against a party fails as sufficient punishment for reliance upon inauthentic, forged evidence.[12] In *Quela v. Payco-Gen Am. Creditas, Inc.*, finding "that default judgment is the only appropriate remedy under the inherent power of the court," Judge Castillo stated:

> Given the extreme importance of accurate and truthful discovery, our court system must have zero tolerance for parties who seek to intentionally distort the discovery and trial process. * * *
> The defendants' conduct shows such blatant contempt for this Court and a fundamental disregard for the judicial process that their behavior can only be adequately sanctioned with a default judgment. Entering a default judgment will send a strong message to other litigants, who scheme to abuse the discovery process and lie to the Court, that this behavior will not be tolerated and will be severely punished.

No. 99 C 1904, 2000 WL 656681, at *7-10 (N.D. Ill. May 18, 2000).

In addition, Affiliated FM has no duty to pay any loss or damage under the Policy because Tower Crossing tendered the $4.3 Million POL that was not actually signed or sworn along with a notary certificate from a materially different document (SUF ¶¶ 5, 15, 17-19, 32-36), to make the document appear as though it complied with the Policy and Section 143.1, when it did not, and materially affected the claim.[13]

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[11] *See Flava Works Inc.*, 2013 WL 1629428, at *2-3 (noting where a signature was lifted from another document, the likely sanction is dismissal for a fraud on the court).

[12] *See Brady v. U.S.,* 877 F. Supp. 444, 453-54 (C.D. Ill. 1994) (dismissal where plaintiff fabricated evidence); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1117-1122 (1st Cir. 1989) (dismissal affirmed where plaintiff attached forged document to his complaint); *Pope v. Fed. Exp. Corp.*, 974 F.2d 982, 984, 986 (8th Cir. 1992) (same).

[13] The Policy's Illinois Amendatory Endorsement also contains the following provision addressing fraud and misrepresentation: "[t]his Company will not pay for any loss or damage if an Insured has: . . . a) Willfully concealed or misrepresented any material fact or circumstance concerning the loss or damage, or the interest of an Insured; and b) The concealment or misrepresentation is made with the intent to deceive or materially affected the claim." (SUF ¶ 4).

While summary judgment in favor of Affiliated FM is warranted and proper under the law and undisputed facts, it is also justified given that Tower Crossing brought and maintained this lawsuit based on a document that it manufactured and misrepresented as signed and sworn and notarized.[14]

IV. CONCLUSION

Tower Crossing submitted and filed an unsworn and unsigned $4.3 Million POL by improperly switching the signature and notary certification page of a different document. It cited the Policy and Section 143.1 in its Amended Complaint (ECF 11 ¶¶ 18-20), and continued the masquerade that the $4.3 Million POL complied with the Policy and Section 143.1 in an effort to reap the benefits of the tolling provisions (even though it was fully aware that the POL was not actually signed and sworn). As Tower Crossing cannot provide evidence showing that it provided an actually signed and sworn POL so as to qualify for the benefits of Section 143.1 tolling, there can be no tolling and is barred. For the above reasons, Affiliated FM respectfully requests that this Honorable Court grant Affiliated FM's Motion for Summary Judgment.

Respectfully submitted,

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[14] Affiliated FM has many other coverage defenses to Tower Crossing's claims including for example, that there was no hail event on the alleged date of loss of July 2, 2019 (Report of Meteorologist Dr. Jason Webster). However, the Court need not address these and the other coverage defenses as the entire Tower Crossing claim fails, as a matter of law, because it was premised on an unsigned and unsworn document that does not comport with the Policy terms or the law and did not toll the time to file this action.

CERTIFICATE OF SERVICE

I hereby certify that on **January 31, 2025**, I electronically filed the foregoing **Memorandum In Support Of Affiliated FM Insurance Company's Motion For Summary Judgment** with the Clerk of the U.S. District Court, using the CM/ECF system reflecting service of to be served upon all parties of record.

/s/ John DeLascio