

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 621652-2018

XIN YU,

Law Office of Mitchell J. Winn, PLLC
Attorneys for Plaintiff
585 Stewart Avenue, Suite 544
Garden City, NY 11530

Plaintiff,

-against-

Ahmuty, Demers & McManus
Attorneys for Defendant
200 I.U. Willets Road
Albertson, NY 11507

HYUNDAI MARINE & FIRE INSURANCE CO., LTD.
(U.S. BRANCH),

Defendant.

MOTION DATE: 01/09/19
SUBMITTED: 01/09/19
MOTION SEQ. NO.: 1 & 2
MOTION: 001 MG
002 MD

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (#001) by Defendant dated December 13, 2018 and supporting papers; and (2) Notice of Cross-Motion (#002) by Plaintiff dated December 26, 2018 and supporting papers; (3) Defendant's Affirmation in Opposition dated January 7, 2019 and supporting papers; and (4) Defendant's Affirmation in Reply dated January 8, 2019 and supporting papers (and after hearing counsel in support and in opposition to the motion) it is,

ORDERED that defendant's application for an Order dismissing the plaintiff's complaint and defendant's cross-motion for summary judgment are consolidated for purposes of this determination; and it is

ORDERED that defendant's motion for an Order dismissing the plaintiff's complaint pursuant to CPLR 3211 is granted; and it is

ORDERED that plaintiff's cross-motion for summary judgment pursuant to CPLR 3212 is denied, as moot.

Plaintiff commenced this action with the filing of a summons and complaint on November 5, 2018 seeking to recover money damages for property damages related to the freezing and bursting of water pipes at her home located at 11 Deanna Court, Dix Hills, NY (the subject premises) on or about January 10, 2018. Plaintiff is the owner of the subject premises having purchased the property on June 14, 2013 with a sale recorded in the Office of the County Clerk on September 30, 2013.

Plaintiff, through a family member, procured a homeowner's insurance policy from defendant which was in effect starting July 1, 2017 for a one-year term. She alleges that on or about January 10, 2018 her uncle was notified that an alarm had sounded at the subject premises and that the fire department had responded to the location. When the uncle arrived and allowed the fire personnel into the home it was discovered that a pipe had burst in the home due to freezing causing the first floor and the basement ceiling to collapse. The temperature in the home is alleged to have been at or near thirty-two degrees. Plaintiff submitted a claim for damages and defendant began an investigation regarding the claim. Defendant sent a communication to the plaintiffs as early as February 12, 2018 indicating the insurer had concerns regarding coverage and that an investigation of the claim was continuing, specifically with respect to whether heat was being maintained in the home.

Within the application for homeowner's insurance, which was completed by the plaintiff's family member with information allegedly provided by the plaintiff, it is noted that the subject premises will be owner occupied. The policy further notes that the homeowner is to provide prompt notification to the defendant should the ownership or occupancy of the subject premises change during the term of the policy and that failure to provide prompt notice (within 14 days) may result in declination of coverage.

Defendant now moves, pre-answer, for dismissal of the complaint and argues that the plaintiff did not reside in the subject premises when the policy was procured. Defendant maintains that plaintiff is a citizen of the People's Republic of China where she was born, resides in Shanghai with her husband and child and works in that city. Defendant further contends that plaintiff's passport reveals that she has not traveled to the United States since, at the latest, December 28, 2015. Defendant also avers that plaintiff's parents have stayed at the subject premises on occasion and that her uncle visited the home approximately once every two weeks. In addition to the foregoing, the defendant argues that the plaintiff indicated on the application that the subject premises was primarily heated by gas and that there was no fuel storage tank, both of which appear to be false representations. Defendant has allegedly refused to tender payment for the damages sustained by plaintiff based on the alleged misrepresentations in the application for homeowners insurance. In support of the motion to dismiss defendant has submitted, *inter alia*, an affidavit from Eddy Kim, an insurance underwriter employed by defendant, a copy of the insurance application form, a copy of the insurance policy, the stenographic minutes of the Examination Under Oath of plaintiff's uncle, a copy of her passport and copies of communications between plaintiff and defense counsel.

Plaintiff has submitted a cross-motion seeking an Order granting her summary judgment on the issue of liability and asks for an inquest on the issue of damages. Plaintiff maintains that adequate steps were taken to ensure that the subject premises was properly heated, particularly by contracting with an oil delivery company with automatic deliveries, that she was residing at the subject premises according to the terms of the policy and that defendant is estopped from asserting the defense of misrepresentations with respect to the fuel oil and plaintiff residing at the subject premises. In support of the cross-motion plaintiff submits, among other things, a copy of the complaint, copies of invoices from the fuel delivery service, climatological records evidencing a snow storm shortly before the incident at issue and photographs of the subject premises.

Although not specifically delineated it appears from a fair reading of defendant's submissions that it seeks dismissal pursuant to CPLR 3211(a)(1) in that the defenses asserted are founded upon documentary evidence. To prevail on a motion to dismiss pursuant to CPLR § 3211 (a)(1), the defendant is required to demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 NYS2d 858 [2002]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic,

and undeniable” (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 913 NYS2d 668 [2d Dept 2010], quoting *Fontanetta v. John Doe I*, 73 A.D.3d 78, 898 NYS2d 569 [2d Dept 2010]).

Here, the defendant has submitted the application for homeowner’s insurance which was completed by, or on behalf of, the plaintiff. That application indicates that the plaintiff signed that portion of the document attesting to the assertion that the subject premises was “owner occupied” and that plaintiff would notify defendant if there was a change in that status within 14 days. The application also provides that failure to make that notification could result in the declination of coverage. In addition, the plaintiff indicated on the application that the primary heating source was from gas and that there was no fuel storage tank located on the premises. The policy application continues later by stating, in pertinent part,

APPLICANTS STATEMENT: I HAVE READ THE ABOVE APPLICATION AND ANY ATTACHMENTS. I DECLARE THAT THE INFORMATION PROVIDED IN THEM IS TRUE, COMPLETE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. THIS INFORMATION IS BEING OFFERED TO THE COMPANY AS AN INDUCEMENT TO ISSUE THE POLICY FOR WHICH I AM APPLYING.

The plaintiff placed her signature below this paragraph in the appropriate space provided. In further support of the application to dismiss, the defendant has submitted a copy of the plaintiff’s passport which reveals that she has not traveled to the United States since well before the commencement of the insurance term.

“To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy. A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof (*Joseph v Interboro Ins. Co.*, 144 AD3d 1105, 42 NYS3d 316 [2d Dept 2016][Internal citations omitted]; Insurance Law 3105[a]). “A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented. To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices to show that it would not have issued the policy if the correct information had been disclosed in the application (*see Id.*, quoting *Interboro Ins. Co. v Fatmir*, 89 AD3d 993, 933 NYS2d 343 [2d Dept 2011]). A material misrepresentation, even if innocent or unintentional, is sufficient to warrant rescission of an insurance policy (*Piller v Otsego Mut. Fire Ins. Co.*, 164 AD3d 534, 82 NYS3d 489 [2d Dept 2018], citing *Joseph v Interboro Ins. Co.*, supra).

In this case it is clear from the record before the Court that the plaintiff was not, at the time the application for the homeowner’s insurance policy was submitted to the defendant, a resident of the subject premises such that the subject premises could be deemed “owner occupied.” The plaintiff is a resident of the People’s Republic of China, lived and worked in the City of Shanghai at the time the application was submitted and has offered no evidence of an intent to move to the United States and occupy the subject premises. Nor, for that matter, did the plaintiff provide timely notice after the commencement of the insurance term that she was not occupying the subject premises. More than six months passed from the time the policy went into effect until the damage was caused by the freezing pipes in the subject premises.

In addition, the defendant has submitted a copy of its underwriting guidelines, together with an affidavit of Eddy Kim, an underwriter employed by the defendant. The underwriting guidelines in effect at the time the plaintiff completed the application for homeowners insurance indicate that the structure insured must be “owner occupied” and that vacant/unoccupied homes “for more than 30 days is not eligible” (*see*

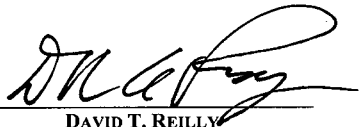
Defendant's "Kim Exhibit 2"). Mr. Kim's affidavit states that the defendant relied on the plaintiff's application and would not have issued the subject policy had the application described the risk accurately.

Based on the sum of the foregoing, the Court finds that defendant has established its entitlement to dismissal of the complaint based upon the material misrepresentations made by plaintiff in the application for homeowners insurance, specifically that the subject premises would be owner-occupied (see Insurance Law §3105). Further, the Court finds no merit to plaintiff's General Business Law §349 claim. "The elements of a cause of action to recover damages for deceptive business practices under General Business Law §349 are that the challenged act or practice was a consumer-oriented act or practice that is misleading in a material way, and caused injury to the plaintiff" (*Ludl Elec. Prods. v Wells Fargo Fin. Leasing, Inc.*, 6 AD3d 397, 775 NYS2d 59 [2d Dept 2004]). Here, the dispute involves a private contract dispute over policy coverage not affecting the consuming public at large (see *Vescon Constr., Inc. v Gerelli Ins. Agency, Inc.*, 97 AD3d 658, 948 NYS2d 636 [2d Dept 2012]).

Accordingly, the defendant's motion to dismiss the plaintiff's complaint is granted and the plaintiff's motion for summary judgment is denied, as moot.

This constitutes the decision and Order of the Court.

Dated: April 1, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION