

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

e  
2-12-10

PRESENT: Hon. EILEEN BRANSTEN  
Justice

PART 3

EAST 115TH STREET REALTY CORP.,  
Plaintiff,

INDEX NO. 604164/2007  
MOTION DATE 08/03/2009  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

-against-

FOCUS & STRUGA BUILDING DEVELOPERS LLC,  
GREAT AMERICAN INSURANCE COMPANY OF  
NEW YORK, ABAD CONSULTING (a corporation),  
I. ARTHUR YANOFF & CO., LTS, and MAZZOCCHI  
WRECKING INC., SHARON ENGINEERING, P.C.,  
and S IRON WORK INCORPORATED,

Defendants.

FOCUS & STRUGA BUILDING DEVELOPERS, LLC,  
Third-Party Plaintiff,

THIRD-PARTY INDEX NO.: 590610/2008

- against -

SHARON ENGINEERING, P.C. and  
S IRON WORK INCORPORATED,

Third-Party Defendants.

The following papers, numbered 1 to 6 were read on this motion to Dismiss.

- J.S.C. Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
- J.S.C. Answering Affidavits — Exhibits
- J.S.C. Replying Affidavits & Authorized Sur-reply

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

PAPERS NUMBERED	
2	_____
2	_____
2	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ORDERED that Defendant Great American Insurance Company of New York's motion for summary judgement is decided in accordance with the accompanying memorandum decision.

Dated: 3-9-10

HON. EILEEN BRANSTEN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART THREE

-----X  
EAST 115TH STREET REALTY CORP.,

Plaintiff,

Index No.: 604164/2007  
Motion Date: 08/03/09  
Motion Seq. No.: 003

-against-

FOCUS & STRUGA BUILDING DEVELOPERS LLC,  
GREAT AMERICAN INSURANCE COMPANY OF  
NEW YORK, ABAD CONSULTING (a corporation),  
I. ARTHUR YANOFF & CO., LTS, and MAZZOCCHI  
WRECKING INC., SHARON ENGINEERING, P.C.,  
and S IRON WORK INCORPORATED,

Defendants.

-----X  
FOCUS & STRUGA BUILDING DEVELOPERS, LLC,

Third Party Plaintiff,

Third Party  
Index No.: 590610/2008

-against-

SHARON ENGINEERING, P.C. and  
S IRON WORK INCORPORATED,

Third Party Defendants.

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
EILEEN BRANSTEN, J:

Defendant Great American Insurance Company of New York ("GA"), moves for summary judgment pursuant to CPLR 3212, dismissing plaintiff East 115th Street Realty Corp.'s ("Plaintiff") third cause of action. Plaintiff opposes the motion and cross-moves for summary judgment of Plaintiff's third cause of action pursuant to CPLR 3212 against GA and to dismiss GA's affirmative defenses. Plaintiff, alternatively seeks summary judgment against I. Arthur Yanoff & Co., Ltd. ("Yanoff"), one of Plaintiff's insurance brokers,

pursuant to CPLR 3212, should the court deny Plaintiff's motion for summary judgment against GA.

## **Background**

### **I. Formation of the Agreement**

Plaintiff owns a five story masonry building located at 1861 Lexington Avenue, New York, New York ("Building"). Plaintiff engaged defendants Abad Consulting ("Abad") and Yanoff to broker insurance coverage for its planned renovation of the Building (collectively "Plaintiff's Brokers") (Affirmation of Alyssa E. Litman in Opposition to GA's Motion for Summary Judgment ["Litman Aff"] ¶6). Yanoff also acted as GA's insurance agent (*id.*).

On or about February 5, 2007, Yanoff emailed GA Plaintiff's application for builder's risk insurance to cover a renovation project at the Building. The email stated "owner [is] hiring a GC to build a 5 story masonry building-ground-up - 1.9 million cost of completed value-soft costs 300,000, 11 month project, Hired contractor-Focus & Struga Building Development (copy of Cert attached) and copy of breakdown of job" (Affidavit of Marie Mancini, Underwriter for GA, in Support of GA's Motion for Summary Judgment ["Mancini Aff"], Ex 1; Affidavit of Veronica Kirkham, Underwriter for Yanoff, in Opposition to GA's Motion for Summary Judgment ["Kirkham Aff"], Ex 1, YANOFF00041<sup>1</sup>).

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<sup>1</sup> YANOFF00041 refers to the bate stamped page number of the Kirkham Aff, Ex 1.

The insurance application lists specific risk factors concerning the applicant, the property to be renovated, and the renovation plan. The applicant is asked to indicate, through yes or no answers, whether certain factors exist, such as the applicant's prior denial of a insurance coverage or the renovation's exposure to chemicals. The applicant is further directed to "explain all 'yes' answers" (Mancini Aff, Ex 1). Question 12 of the application under the Commercial General Liability Section's General Information asked the applicant whether "any structural alterations [were] contemplated" to the Building. Plaintiff's Brokers, on behalf of Plaintiff, responded "No" (Mancini Aff, Ex 1 at 7; Litman Aff ¶8). Question 13 of the same section asked whether "any demolition exposure [was] contemplated." Again, Plaintiff's Brokers, on behalf of Plaintiff, responded "No" (*id.*).

Plaintiff's application to GA also attached a cost breakdown sheet from the general contractor of the project, defendant Focus & Struga Building Developers LLC ("Focus & Struga"). The cost breakdown sheet listed the expenses for various aspects of the Building's renovation project (Mancini Aff, Ex 1 at 14). The cost breakdown sheet first listed "Demolition & Removal" and stated a "Discounted Cost" of \$143,864 (*id.*; *see also* Litman Aff, Ex B [legible copy of "Discounted Costs"]). The second listed expense, "new floor framing systems 2nd - 5th fl.," stated a "Discounted Cost" of \$49,100 (Mancini Aff, Ex 1 at 14; Litman Aff, Ex B). The third listed expense was for a "new floor framing system 1st fl." and stated a "Discounted Cost" of \$49,100 (Mancini Aff, Ex 1 at 14; Litman Aff, Ex B).

It is disputed whether the application submitted to GA also included the Inter-Reco Contractors' Program Contractor/Developers Supplemental Application ("Inter-Reco App."). The Inter-Reco App. is an agreement between Plaintiff and Focus & Struga that describes the work Focus & Struga was to perform at the Building. It includes a notation that "direct" demolition would occur (Litman Aff at 4; Litman Aff, Ex C). Plaintiff alleges the Inter-Reco App. was part of the initial application, while GA argues that it was never received.

On February 8, 2007, Veronica Kirkham, underwriter for Yanoff, one of Plaintiff's insurance brokers who also acted as GA's insurance agent, sent an email to Marie Mancini, underwriter for GA, stating "[t]he insured [Plaintiff] has a closing at 11 a.m [sic] this morning. They were looking for builders risk—SOME CLARIFICATION—they are renovating an existing structure—Not ground up—AND the broker advises there will be no structural changes" (hereinafter "February 8, 2007, Yanoff email") (Mancini Aff, Ex 2).

GA argues that the February 8, 2007, Yanoff email responded to an inquiry for clarification of apparent inconsistencies in the application as to whether or not the renovation contemplated structural and/or demolition work (GA's Memorandum of Law in Support of its Summary Judgment Motion ["GA Memo"] at 5, citing Mancini Aff ¶9). Plaintiff argues that neither it, nor its brokers, received any correspondence from GA requesting clarification.

On February 20, 2007, GA sent Plaintiff a proposal for builder's risk insurance coverage on the Building. On February 27, 2007, Plaintiff returned the proposal, noting

“Coverage BOUND on the above effective 3/1/07 per quotation. Signed app, cost breakdown, copy of insurance requirements, hold harmless and contract attached” (Kirkham Aff, Ex 1 at YANOFF 00117).

GA issued Plaintiff builder’s risk insurance policy No. IMP 797-28-10-00 providing insurance coverage for the renovation project effective March 1, 2007 through March 1, 2008 (the “Policy”). On March 27, 2007, the Building partially collapsed. What remained of the building was soon after demolished and the remnants removed allegedly under an order from New York City’s Department of Buildings.

## **II. Plaintiff’s Lawsuit**

Plaintiff filed a claim with GA under the Policy for coverage of its loss resulting from the Building’s collapse. GA denied coverage in a letter dated December 13, 2007. GA stated therein that the application for insurance contained material misrepresentations which rendered the policy void from inception (Litman Aff, Ex A). In particular, GA cited representations in Plaintiff’s insurance application that it would do no work to load bearing members of the Building and that no demolition exposure was contemplated (*id.*).

Plaintiff filed the instant complaint on December 19, 2007, against: (1) Focus & Struga and Mazzocchi Wrecking Inc., demolition and construction companies whom Plaintiff alleges caused the Building collapse, for breach of contract and negligence (Affirmation of

Kevin F. Buckley in Support of GA's Motion for Summary Judgment ["Buckley Aff"], Ex 1 ["Complaint"] at 4-5, 8-9); (2) GA for breach of Plaintiff's insurance contract (Complaint at 6); and (3) Plaintiff's Brokers, Abad and Yanoff, for negligence and breach of contract (*id.* at 7-8). Plaintiff seeks damages of \$2,074,219.90 (*id.* at 5-8, 10).

GA asserts four affirmative defenses in its answer, dated January 28, 2008. GA claims it owes Plaintiff nothing under the Policy because: (1) the Policy is void *ab initio* due to Plaintiff's material misrepresentation on its application (Buckley Aff, Ex 2 ["Answer"] ¶¶45-48); (2) Plaintiff's loss falls into the Policy's exceptions (Answer ¶¶49-50); (3) Plaintiff breached its duty under the Policy by demolishing and removing the remains of the Building before GA knew of the partial collapse or had the opportunity to inspect the partially collapsed building (Answer ¶¶51-52); and, (4) if it is shown that the Policy is valid, and the loss does not fall within the Policy's exceptions, then Plaintiff's recovery is subject to all applicable deductibles, limits and sub-limits of the Policy (*id.* at ¶53).

GA also alleges in its answer cross-claims against Focus & Struga and Mazzocchi Wrecking Inc. GA claims that, if coverage under the Policy is deemed to exist, then GA is subrogated to the rights and interests of Plaintiff. GA asserts that upon a finding of coverage, GA is entitled to judgment against Focus & Struga and Mazzocchi Wrecking Inc. in the sum Focus & Struga and Mazzocchi are deemed to be liable to Plaintiff for Plaintiff's loss due to Focus & Struga and Mazzocchi's negligence and/or breaches of contract (*id.* at ¶¶54-55).

### **III. GA's Motion for Summary Judgment Against Plaintiff**

GA moves for summary judgment, pursuant to CPLR 3212, to dismiss Plaintiff's third cause of action against GA. GA first argues that the Policy is void *ab initio* because the insurance application contained material misrepresentations. Specifically, GA alleges that Plaintiff's "No" answers, when asked whether "structural alterations [were] contemplated" and "demolition exposure [was] contemplated" for the renovation Project, were false (GA Memo at 9).

GA cites, in support of its argument, to the Examination Under Oath of Plaintiff's president, Jacob Azoulay, who answered "no" when asked if he considered the "No" answers to "structural alterations contemplated" and "demolition exposure contemplated" on the insurance application "to be accurate statements in light of the plans for the renovation that [Plaintiff] had for the building" (Buckley Aff, Ex 3, Examination Under Oath of Jacob Azoulay, Plaintiff's president ["Azoulay Deposition"] at 111:22 - 112:11).

GA further cites to the February 8, 2007, Yanoff email that informs GA that the renovation will not be ground up and that "the broker advises there will be no structural changes" (Kirkham Aff ¶9; Mancini Aff, Ex 2). Plaintiff does not dispute that Yanoff sent

GA the email three days after sending GA Plaintiff's initial application. Plaintiff's president testified that statements made regarding structural changes in the February 8, 2007, Yanoff email were incorrect (Azoulay Deposition at 122-123).

GA argues that the alleged misrepresentations, that "structural alterations" and "demolition exposure" was not contemplated in the renovation, are material because GA would not have issued Plaintiff the Policy had it known Plaintiff's true plans for the renovation (GA Memo at 10). GA states that its underwriting guidelines preclude issuing a policy when structural alterations and/or demolition is planned for a renovation. GA's underwriting guidelines state:

"[i]f the renovation project involves extensive demolition or the gutting of an existing building of combustible construction, the risk should be declined. [GA] should only provide coverage after these phases of the construction project are over. If structural alterations to the load bearing structure are involved, the risk of collapse can be substantial, and this exposure should be avoided"

(Mancini Aff, Ex 3 ["GA Underwriting Guidelines"] at GA00622). GA also proffered the affidavit of its underwriter, who states that she "is required to follow Great American's underwriting guidelines" and "[i]n accordance with the clear directives in Great American's underwriting guidelines, had [she] been aware of [Plaintiff's] plans to remove structural elements of the Building ... as well as to make other structural alterations, [she] would have declined to issue the Policy" (Mancini Aff ¶¶12, 18).

Plaintiff argues that GA's motion for summary judgment must be denied because there are genuine issues of fact as to whether Plaintiff made material misrepresentations in its application. First, Plaintiff argues that it made no misrepresentations regarding structural alterations and demolition. Plaintiff contends that its application was for gut-renovation and that it included the cost breakdown sheet and the Inter-Reco App., both clearly noting demolition activities. Plaintiff asserts that these activities necessarily include structural alterations (Litman Aff at 6-8). Alternatively, Plaintiff argues that because the application does not define "structural alterations," its "No" answer regarding such alterations was a judgment call by Plaintiff's Brokers. Further, Plaintiff contends that the required structural changes had been completed before Yanoff submitted the application to GA.

Plaintiff further argues that Plaintiff's Brokers bear the responsibility for any material misrepresentations made.

Second, Plaintiff argues that its "No" answers to questions regarding structural alterations and demolition cannot be deemed material. Plaintiff states that its use of the gut-renovation application and its designations on the cost breakdown sheet for "new floor framing systems" and "new roofing/insulation" put GA on notice that structural work would be done to the Building. Plaintiff argues that GA never questioned it, Plaintiff's Brokers or the general contractor to clarify possible discrepancies on the application.

Plaintiff next argues that GA's motion fails to establish that the alleged misrepresentation was material because: (1) GA failed to show that the misrepresentation was willful and intentional; (2) GA failed to proffer evidence that it denied builder's risk coverage to similarly situated applicants; (3) GA issued the Policy despite knowing that the renovation contemplated demolition and structural work; and (4) GA waived the defense of misrepresentation because it received information regarding the demolition and structural work prior to issuing the policy and issued the Policy anyway.

#### **IV. Plaintiff's Cross-Motion for Summary Judgement Against Great American**

Plaintiff cross-moves for summary judgment pursuant to CPLR 3212 against GA. Plaintiff also seeks to dismiss GA's affirmative defenses. Plaintiff's summary judgment argument relies on its same arguments and submissions it cites in opposition to GA's motion for summary judgment. Plaintiff contends that there is no issue of fact regarding GA's duty to rescind its decision to void Plaintiff's insurance policy and provide coverage for Plaintiff's loss as a result of the collapse (Affirmation of Alyssa E. Litman in Support of Plaintiff's Cross-Motion for Summary Judgment ["Litman Cross-Motion Aff"] ¶4). Plaintiff thus contends that summary judgment should be granted in its favor against GA on Plaintiff's third cause of action.

Plaintiff also argues that all of GA's affirmative defenses should be dismissed. GA's first affirmative defense is that the contract is void *ab initio* due to Plaintiff making material misrepresentations on the insurance application. Plaintiff argues that GA's conclusion is moot because Plaintiff has shown that the alleged misrepresentations are not material.

GA's second affirmative defense is that Plaintiff's loss is disclaimed by the Policy's exclusion provision because the loss was caused by faulty workmanship, construction and renovation. Plaintiff avers that GA's second affirmative defense should be dismissed because the exclusion provision would not render the entire loss excluded but would, at most, merely apply to the removal of a few floor joists/beams.

GA's third affirmative defense is that GA is excused from covering Plaintiff's loss because Plaintiff breached its contractual duties to provide GA notice of the loss and allow inspection thereof. Plaintiff contends that the third affirmative defense is unenforceable against Plaintiff because the New York City Department of Buildings forced Plaintiff, for safety reasons, to demolish and remove the remaining structure immediately after the partial collapse (Litman Cross-Motion Aff at ¶¶ 4-6).

Plaintiff does not address GA's fourth affirmative defense, which seeks to enforce the insurance Policy's limits, sub-limits and deductibles in the event GA is ordered to provide coverage for Plaintiff's loss.

If the court does not grant Plaintiff's cross-motion for summary judgment against GA, Plaintiff alternatively seeks summary judgment against its broker Yanoff. Plaintiff does not set forth any grounds for this contention.

### Analysis

#### I. Summary Judgment Standard

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant his day in court it is considered a drastic remedy” (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Brunetti v Musallam*, 11 AD3d 280, 280 [1st Dept 2004]). A motion for summary judgement “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement in favor of any party” (CPLR 3212 [b]). The motion “should not be granted where there is any doubt as to the existence of such issues or where the issue is ‘arguable[.]’ ‘[I]ssue-finding, rather than issue-determination, is the key to the procedure’” (*Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [citation omitted]).

In deciding a summary judgment motion, the court views “the evidence in the light most favorable to ..., the party opposing summary judgement, and [draws] all reasonable

inferences in [that party's] favor" (*Rudner v New York Presbyterian Hosp.*, 42 AD3d 357, 359 [1st Dept 2007]).

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers" (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the movant has made a *prima facie* showing, the party opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [it] rests [its] claim or must demonstrate acceptable excuse for [its] failure to meet the requirement" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*id.*).

## **II. Standard of Law to Find an Insurance Contract Void *Ab Initio***

In order for GA to void the Policy *ab initio*, it must establish that Plaintiff or Plaintiff's Brokers, on behalf of Plaintiff, made a misrepresentation on the application and that the misrepresentation was material (New York Ins. Law § 3105 [a]-[c]; *Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1064 [2d Dept 2009]; *Tyras v Mount Vernon*

*Fire Ins. Co.*, 36 AD3d 609, 610 [2d Dept 2007]; *Albany Ins. Co. v Fashion Ave. Knits, Inc.*, 209 AD2d 194, 194 [1st Dept 1994]).

“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 ... at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation” (New York Ins. Law § 3105 [a]). An uncontradicted false answer on an application for insurance has long been deemed a misrepresentation (*Travelers' Ins. Co. v Pomerantz*, 246 NY 63, 66-67 [1927])

“No misrepresentation shall avoid any contract of insurance ... unless such misrepresentation was material” (New York Ins. Law § 3501 [b]). A misrepresentation is material when “knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such a contract” (New York Ins. Law § 3501 [b]). Generally, “the question of whether the misrepresentation is material pursuant to Insurance Law § 3105 presents a question of fact for the jury” (*Albany Ins. Co.*, 209 AD2d at 194). However, “where the evidence of the materiality is clear and substantially uncontradicted ... the issue becomes one of law for the court to decide” (*Feldman v Friedman*, 241 AD2d 433, 434 [1st Dept 1997]). “The test is whether failure to furnish a true answer defeats or seriously interferes with the exercise of the insurance company’s right to accept or reject the application. The major question is whether the company has been induced to accept an

application which it might otherwise have refused” (*Process Plants Corp. v Beneficial Natl. Life Ins., Co.*, 53 AD2d 214, 216-217 [1st Dept 1976]; see also *Equitable Life Assur. Soc. of U.S. v Schusterman*, 255 AD 54, 56 [1st Dept 1938]).

“To establish materiality as a matter of law, the insurer must present documentation concerning underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application” (*Roudneva v Bankers Life Ins. Co. of New York*, 35 AD3d 580, 581 [2d Dept 2006] [finding materiality through affidavit of chief underwriter and relevant portion of underwriting manual]; see also *Chester v Mutual Life Ins. Co. of New York*, 290 AD2d 317, 317 [1st Dept 2002] [finding misrepresentations on application to be material through affidavit of underwriter and excerpts from underwriting guidelines]; *Alaz Sportswear v Pub. Serv. Mut. Ins. Co.*, 195 AD2d 357 [1st Dept 1993] [finding conclusory affidavit insufficient for summary judgment and stating that movant must also proffer proof of underwriting practices]). An innocent misrepresentation can be material if “it defeats or seriously interferes with the exercise of such a right [i.e., to accept or reject the application]” (*In Re Liquidation of Union Indem. Inc. Co. of New York*, 89 NY2d 94, 107 [1996]; *Greer v Union Mut. Life Ins., Co.*, 273 NY 261, 271 [1937]; *Tennenbaum v Ins. Corp. of Ireland, Ltd.*, 179 AD2d 589, 592 [1st Dept 1992]).

### **III. GA Has Made a *Prima Facie* Showing of Entitlement to Summary Judgment**

Because one material misrepresentation on an application can void an insurance contract *ab initio*, this analysis focuses only on the structural alterations issue (*In Re Liquidation of Union Indem. Inc. Co. of New York*, 89 NY2d at 107). GA has made a *prima facie* showing of entitlement to summary judgment as a matter of law. GA has shown that Plaintiff materially misrepresented in its insurance application that structural alterations was not contemplated for the renovation project on the Building.

#### **A. GA Established Plaintiff Made Misrepresentations on Insurance Application**

GA has first established that Plaintiff's application states that structural alterations were not contemplated in the renovation. Plaintiff has admitted that "demolition and structural work were not indicated on the Commercial General Liability Section of the application" (Litman Aff ¶5). Plaintiff's president was directly asked at his deposition whether he considered the "No" answers to the application questions regarding structural alterations and demolition to be "accurate statements in light of the plans for renovations that you had for the building" (Azoulay Deposition at 111-112). He testified "[n]o" (*id.*).

Moreover, GA proffered the uncontested February 8, 2007, Yanoff email, sent to GA three days after Yanoff emailed the initial application that allegedly would put GA on notice that structural alterations were contemplated. In the email, Plaintiff's Broker Abad, through Yanoff, Plaintiff's other Broker and agent for GA, clarified that "[Plaintiff is] renovating an

existing structure—Not ground up—AND the broker advises there will be no structural changes” (Kirkham Aff ¶9; Mancini Aff, Ex 2). Plaintiff’s president testified that the statements made regarding structural changes in that email were incorrect (Azoulay Deposition at 122-123).

GA has established that Plaintiff’s application for builder’s risk insurance contained misrepresentations.

**B. GA Established That Plaintiff’s Misrepresentations Are Material**

GA has also established that Plaintiff’s misrepresentations regarding structural alterations on its application are material. GA’s underwriter proffered GA’s underwriting guidelines (Mancini Aff ¶18). The underwriting guidelines advise GA’s underwriters against issuing policies that contemplate structural alterations or extensive renovation (Mancini Aff ¶18; Mancini Aff, Ex 3, GA’s Guidelines at GA 00622). GA’s underwriter, who issued the Policy to Plaintiff, stated that it is her practice to base her decisions on her company’s underwriting guidelines and that had she known that the Project contemplated structural alterations, she would not have issued Plaintiff the Policy (Mancini Aff ¶¶12, 18). GA’s underwriter states that, according to GA’s underwriting guidelines, structural alterations involve a substantial risk of collapse (Mancini Aff ¶¶12-18; Mancini Aff, Ex 3, GA Guidelines at GA00622).

GA's underwriting guidelines are sufficient proof of its underwriting practices (*Roudneva*, 35 AD3d at 581; *Chester*, 290 AD2d at 317). Despite Plaintiff's argument to the contrary, (*see* Litman Aff at 9), GA need not present evidence of its denial of coverage of actual applicants or insureds with similar histories. Plaintiff's cited cases in support of its argument merely hold that materiality requires not only statements from underwriters claiming that they would not have issued the policies had they known the truth, but also evidence of the underwriting practices which support the underwriters' assertions (*see Alaz Sportswear*, 195 AD2d at 358 [holding that conclusory statement of underwriter alone is not sufficient for summary judgment; the insurer must also present "[p]roof of underwriting practices" for summary judgment to be granted]; *Sonkin Assocs. Inc.*, 150 AD2d at 765; *Curanovic*, 307 AD2d at 437). As stated above, GA has submitted such evidence.

Moreover, GA was not required to show that Plaintiff's misrepresentations were willful or intentional. A showing of willful and intentional misrepresentation would be necessary only if GA denied coverage based on an allegation of fraudulent proof of loss upon an existing insurance contract (*Chang v Gen. Acc. Ins. Co. of Am.*, 193 AD2d 521, 521 [1st Dept 1993] [requiring a showing of willful and intentional misrepresentation in a proof of loss]; *Deutsch Textiles Inc. v New York Prop. Ins. Underwriting Assoc.*, 62 NY2d 999, 1001 [1984] [finding fraudulent proof of loss required willfulness of misrepresentation]). In cases where the misrepresentation is in the inducement, even an innocent

misrepresentation can void an insurance contract (*Greer*, 273 NY at 271; *In Re Liquidation of Union Indem. Inc. Co. of New York*, 89 NY2d at 107).

GA has established that Plaintiff made material misrepresentations on its application for builder's risk insurance (New York Ins. Law § 3105 [a]; (*Roudneva*, 35 AD3d at 581; *Chester*, 290 AD2d at 317). GA has therefore shown a *prima facie* entitlement to summary judgment to void Plaintiff's Policy *ab initio*.

#### **IV. Plaintiff Has Not Met Its Burden to Show That an Issue of Fact Exists**

Because GA has made a *prima facie* showing of its entitlement to summary judgment, Plaintiff bears the burden to show that an issue of fact exists to defeat the summary judgment motion (*Zuckerman*, 49 NY2d at 557). Plaintiff argues that it has proffered sufficient evidence to do so. Plaintiff avers that its alleged misrepresentation regarding structural alterations was not a misrepresentation, and, if the court deems it to be a misrepresentation, it is not chargeable against Plaintiff.

Alternatively, Plaintiff argues that, if the court deems the representation regarding structural alterations on its application to be a misrepresentation chargeable against Plaintiff, the alleged misrepresentation is not material because GA had notice of the truth of the contemplated work when it issued the Policy.

**A. Plaintiff's Misrepresentation of "No" "Structural Alterations Contemplated"**

Plaintiff has failed to proffer sufficient evidence to create an issue of fact as to whether its answer that "No" "structural alterations [were] contemplated" on its Policy application was a misrepresentation. Plaintiff argues that its answer cannot be deemed a misrepresentation because: (1) the required structural repairs were completed prior to the application in this matter (Litman Aff ¶8, citing Azoulay Deposition at 36-39); (2) the parties had a different understanding of the definition of 'structural alterations' (Litman Aff at 11-12 [noting that GA underwriter guidelines do not define structural alterations]); and (3) Plaintiff indicated to its Brokers that the project was to be a "complete gut, with the exception of exterior walls" and its Brokers filled out the application incorrectly (Litman Aff ¶8).

Plaintiff's evidence does not refute GA's showing that Plaintiff contemplated structural alterations in the renovation for which it sought builder's risk insurance from GA. Regardless of whether the required structural changes were completed before the issuance of the Policy or not, the Plaintiff's president admitted in his deposition that the renovation plan for which it sought insurance from GA included structural work (Azoulay Deposition at 122-123 [agreeing that the notation in the February 8, 2007 Yanoff email from Plaintiff's Broker Yanoff to GA indicating that there would not be structural work was incorrect]). Plaintiff's president's description of the renovation shows that Plaintiff contemplated structural changes (Azoulay Deposition at 17, 97 [stating that the renovation would be a

“Complete gut job. Everything is going to be removed,” and that all of the “floors and columns that supported the floors” and the roof would be removed so that only the exterior walls remained]).

Plaintiff’s argument that the parties had a different understanding of what was meant by “structural alterations” is misleading. Plaintiff understood its renovation to include structural changes and told its brokers such (Azoulay Deposition at 97). Plaintiff’s evidence does not suggest that its Brokers had a different definition of structural alterations but merely shows that the Brokers did not consider the work contemplated to be a “structural risk” (Litman Aff at 11). Moreover, even if Plaintiff’s Brokers’ definition of structural alterations differed from both Plaintiff’s and GA’s, the misunderstanding would be irrelevant – even an innocent misrepresentation can be deemed material (*Greer*, 273 NY at 271). Thus, Plaintiff has failed to raise an issue of fact as to whether the answer of “no” “structural alterations [were] contemplated” on the application is a misrepresentation.

Plaintiff next argues that it made its brokers aware that structural changes were to be part of the scope of the work and the Brokers’ erroneously filled out the application. Plaintiff claims it is not responsible for its Brokers’ actions. Plaintiff allegedly indicated to its brokers “that the renovation was going to be a complete gut, with the exception of exterior walls” (Litman Aff ¶8). However, Plaintiff cannot escape responsibility for the representations its Brokers made on the application. False representations by an insurance broker are binding

on his or her principal (*Falcon Crest Diamonds, Inc. v Dixon*, 173 Misc2d 450, 456 [Sup Ct, New York County 1996, Schackman, J.] citing *Amalgamated Mut. Cas. Co. v Schultz*, 27 Misc2d 208, 210 [Sup Ct, Queens County 1960, Rabin, J.]). Thus, Plaintiff is bound by the representations of its Brokers (*Falcon Crest Diamonds, Inc.*, 173 Misc2d at 456).

Plaintiff has shown no triable issue of material fact as to whether its answer on the insurance application regarding structural alterations was a misrepresentation.

**B. The Materiality of “No” “Structural Alterations Contemplated”**

Plaintiff has also failed to proffered sufficient evidence to create an issue of fact as to the materiality of its misrepresentation that no “structural alterations [were] contemplated.” Plaintiff argues that its “No” answer cannot be material because GA knew structural work was part of the renovation before it issued the Policy. According to Plaintiff, the cost breakdown sheet, which was attached as the last page of Plaintiff’s insurance application, listed and allocated significant amounts of money to renovation tasks which necessarily require structural work, including “Demolition & Removal,” “new flooring systems” for the first through fifth floor, “new roofing/insulation,” and “masonry work.” (Litman Aff at 11, 13; Azoulay Deposition at 120 [stating that he, Plaintiff’s president, considered demolition work to include structural changes]). Plaintiff argues that the inconsistency between its “No” answer on the application and the allocations on the cost breakdown sheet put GA on notice that structural alterations were contemplated.

However, even assuming Plaintiff's argument to be true, Plaintiff has not raised an issue of fact to refute the February 8, 2008 Yanoff email, where Abad, through Yanoff, expressly tells GA that Plaintiff's renovation is not ground up and does not include structural changes (Kirkham Aff ¶9; Mancini Aff, Ex 2). Any issue of fact as to whether the email was sent in reply to an inquiry of clarification from GA's underwriter, (compare Kirkham Aff ¶9 and Mancini Aff ¶8), does not contradict the fact that the email was sent nor the content of the email (Kirkham Aff ¶9; Mancini Aff, Ex 2). The February 8, 2007 Yanoff email, solicited or not, is a misrepresentation (Azoulay Deposition at 122-123 [Plaintiff's president agreeing that the representations in the February 8, 2007, Yanoff email were incorrect ]; New York Ins. Law §3105 [a]).

The February 8, 2007, Yanoff email is also material (*Process Plants Corp.*, 53 AD2d at 216-217). Plaintiff does not deny that Yanoff sent the email to GA and admits the email was incorrect (Azoulay Deposition at 122-123). GA's underwriter concluded from the email that the renovation would not include structural changes. GA's underwriter based her decision to issue the Policy on that conclusion and on GA's underwriting guidelines. (Mancini's Aff ¶¶9, 14, 18).

Plaintiff next argues that its broker, Abad, admitted to Plaintiff in a letter in October 2007, that it had told a GA representative about the specific discrepancy regarding structural alterations in the application, albeit after the partial collapse (Litman Aff at 7, citing Ex F).

The letter states that Abad pointed out the insurance application's discrepancy to a GA representative in May 2007 (*id.*). Because the conversation between GA and Abad, alluded to in Abad's October 2007 letter took place two months after the partial collapse, the letter is not probative to GA's knowledge of the fact that structural alterations were contemplated at the time it issued the Policy.

The February 8, 2007, Yanoff email clarifying the renovation plan for GA is "clear and substantially uncontradicted," and Plaintiff has failed to raise an issue of fact as to the materiality of the misrepresentation regarding its statement that "there will be no structural changes" to the Building. GA has thus established, as a matter of law, that Plaintiff materially misrepresented in its application for builder's risk insurance that structural changes to the Building were not a part of the plan of renovation (*Feldman*, 241 AD2d at 434).

One misrepresentation can void a contract *ab initio* if it is material (*In Re Liquidation of Union Indem. Inc. Co. of New York*, 89 NY2d at 107). In light of this court finding that Plaintiff materially misrepresented that "No" "structural alterations [were] contemplated" on its application for builder's risk insurance, the Policy is void *ab initio*.

Due to the Policy being void *ab initio* based on the above, the court need not further inquire as to whether Plaintiff's representation that "No" "demolition exposure [was] contemplated" was a material misrepresentation.

GA's motion for summary judgment is granted, and the court finds that, for the above reasons, the Policy is void *ab initio*.

## **V. Plaintiff's Cross-Motion for Summary Judgment**

### **A. Plaintiff's Motion Against GA**

Plaintiff's cross-motion for summary judgment is denied. Plaintiff bases its cross-motion on the documents and arguments it submitted in opposition to GA's motion for summary judgment (Affirmation of Alyssa E. Litman in Support of its Cross-Motion for Summary Judgment ["Litman Cross-Motion Aff"] ¶4). Plaintiff argues that there are no issues of fact with respect to GA's duty to rescind its decision to void Plaintiff's insurance Policy and provide coverage for the collapse of the Building (Litman Cross-Motion Aff ¶4). However, Plaintiff's cross-motion for summary judgment is denied as moot in light of this court's decision to grant GA's motion for summary judgment. Plaintiff's cross-motion, as it pertains to dismiss GA's affirmative defenses, is also denied as moot in light of the disposition of GA's summary judgment motion.

Further, Plaintiff has not proffered sufficient evidence to show that GA waived its right to rescission of the Policy based on misrepresentation. Plaintiff claims that GA waived its right because it was on notice that demolition and structural alterations were part of the renovation before it issued the Policy (Litman Aff at 12-13). However, because GA has

established, as a matter of law, that it did not have notice that the renovation contemplated structural alterations at the time it issued the Policy, Plaintiff's argument fails (*Cont'l Ins. Co. v Helmsley Enters., Inc.*, 211 AD2d 589, 589 [1st Dept 1995], citing *Zeldman v Mut. Life Ins. Co.*, 269 AD 53, 58 [1st Dept 1945] ["Where an insured accepts premiums after learning of an event allowing for the cancellation of the policy, the insurer has waived the right to cancel or rescind"])

**B. Plaintiff's Motion Against Yanoff**

Plaintiff does not supports its cross-motion for summary judgment against Yanoff with either facts or law that would allow the court to grant the cross-motion. Plaintiff has, therefore, failed to "tender[] sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad*, 64 NY2d at 853). Plaintiff's cross-motion for summary judgment against Yanoff is therefore denied without prejudice and with leave to renew upon the completion of discovery (*Rudner*, 42 AD3d at 359).

Accordingly, it is

ORDERED that defendant Great American Insurance Company of New York's motion for summary judgment dismissing plaintiff East 115th Street Realty Corp.'s third cause of action against defendant Great American Insurance Company of New York, pursuant to CPLR 3212, is granted; and it is further

ORDERED that Great American Insurance Company of New York's builder's risk insurance policy No. IMP 797-28-10-00 issued to plaintiff East 115th Street Realty Corp. is void *ab initio* due to material misrepresentations on the insurance application; and it is further

ORDERED that plaintiff East 115th Street Realty Corp.'s cross-motion for summary judgment of its third cause of action against defendant Great American Insurance Company of New York, pursuant to CPLR 3212, is denied; and it is further

ORDERED that plaintiff East 115th Street Realty Corp.'s cross-motion for summary judgment dismissing defendant Great American Insurance Company of New York's four affirmative defenses, pursuant to CPLR 3212, is denied; and it is further

ORDERED that plaintiff East 115th Street Realty Corp.'s cross-motion for summary judgment pursuant to CPLR 3212 against defendant I. Arthur Yanoff & Co., Ltd is denied without prejudice and with leave to renew upon the completion of discovery.

This constitutes the Decision and Order of the Court. The remaining parties are to continue discovery pursuant to the Preliminary Conference Order

Dated: New York, New York  
March 9, 2010

ENTER



Hon. Eileen Bransten

**FILED**  
MAR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE