Levi v Utica First Insurance Company
2006 NY Slip Op 30278(U)
June 29, 2006
Supreme Court, New York County
Docket Number:
Judge: Marcy S. Friedman
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SCANNED ON 7/12/2006

[* 1]

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

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

Levi

INDEX NO. 122948/02

MOTION DATE

- v -

MOTION SEQ. NO. 005

Utica First Ins. Co. et al.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
JUL 12 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/29/06

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DANIELLA LEVI and HAIM LEVI,

Plaintiffs,

- against -

UTICA FIRST INSURANCE COMPANY, et al.,

Defendants.

Index No.: 122948/02

DECISION/ORDER

In this action, plaintiffs sue for damages arising out of the denial by defendant Utica First Insurance Company ("Utica") of a claim made by plaintiffs for insurance proceeds after a fire destroyed a house that they owned in Jamaica Estates, Queens, on December 27, 2001. Plaintiffs move for partial summary judgment against Utica on their first cause of action for breach of contract. Utica moves for summary judgment against defendant Morstan General Agency, Inc. ("Morstan") on its cross-claim against Morstan, and for summary judgment dismissing plaintiffs' causes of action and the cross-claims of Morstan and defendants Eric Derzie & Associates, Inc. and Eric Derzie (collectively "Derzie") against Utica. Morstan moves for partial summary judgment limiting plaintiffs' claims for damages. Derzie moves for summary judgment dismissing the complaint and all cross-claims asserted against it.

FILED
JUL 12 2006
COUNTY CLERK'S OFFICE

It is undisputed that in July 2001, shortly before plaintiffs closed on the house, plaintiffs contacted Derzie, an insurance broker, to obtain coverage for the house. Derzie contacted Morstan, an agent of Utica with authority to issue binders on Utica's behalf, to purchase the insurance for plaintiffs. Morstan delivered an insurance binder to Derzie for coverage of

plaintiffs' house, with an effective date of August 1, 2001. Plaintiffs paid a premium to Derzie which was never remitted to Morstan or Utica and is still in Derzie's possession, although Derzie claims that the check was deposited into an escrow account pending receipt, which never occurred, of an invoice from Morstan. Morstan did not forward plaintiffs' insurance application or the binder to Utica prior to the fire. The binder was never cancelled.

Utica contends that the policy is "void ab initio" based on material misrepresentations allegedly made by plaintiffs on their application for insurance as to their occupancy and renovation of the house. The parties' central dispute in this action concerns the circumstances under which the questions concerning occupancy and renovation were filled in, and the legal impact of the omissions or representations that were made in response to these questions.

The Rating/Underwriting section of the application contained a question, "Occupied Daily?," with "Yes" or "No" blanks to be checked. The General Information section contained a question 19, "Is Building Undergoing Renovation or Reconstruction? (Give estimated completion date and dollar value)," with "Yes" or "No" blanks to be checked. The application contained the following statement above the signature line: "Applicant's 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."

It is undisputed that after plaintiffs signed the application, Morstan filled in the blanks for the above questions, answering "Yes" to the occupied daily question and "No" to the undergoing renovation question. More particularly, plaintiff Daniella Levi filled in the application on behalf of herself and her husband, Haim Levi, and she left the occupancy and renovation questions blank. The Levis then signed the application before forwarding it to Mr. Derzie. Mrs. Levi claimed that she left the blanks at Mr. Derzie's instruction. She thus testified at her deposition

that she called Mr. Derzie because she "had some questions" about how to fill out the specific questions regarding occupancy and renovations, and that she "believe[d] I told him I have the option to stay in the house that I was currently in [in] Rego Park for up to six months and that I was anticipating doing some renovation and I was not really sure * * * how long it was going to be before I moved in." (D. Levi Dep. at 57-58.) She further testified that "I asked him how I should I fill it out. He said it is not important, leave it blank. So that is what I did." (Id. at 58.) She also testified that she told Mr. Derzie that she was "not sure what was the definition of renovation or remodeling," and he again told her to "leave it blank, it does not matter." (Id.) Mr. Derzie denies that plaintiffs ever informed him that they were planning to do renovations to the house. (Aff. of Eric Derzie In Support of Derzie Motion ["Derzie Aff."], ¶ 7.)

It is further undisputed that after Mrs. Levi returned the application to Mr. Derzie, Mr. Derzie did not make any changes to the application, and sent it to Vladimir Peraza, Morstan's underwriting agent. Mr. Peraza then sent Mr. Derzie a letter, by facsimile, specifying information needed to complete the underwriting evaluation. Under the heading "Other," the letter sought information for a number of specified items in the Rating/Underwriting section of the insurance application that had been left blank – specifically, Construction, Number of Families, Distance (to hydrant or fire station), Renovation Type, and Roof Type. The letter did not seek an answer to the "Occupied Daily?" question that also appeared in the Rating/Underwriting section and had also been left blank. The letter further requested "General Information." The General Information section of the insurance application contained 12 questions that had been left blank by the Levis, including question 19, the renovation question ("Is building undergoing renovation or reconstruction?"). Mr. Derzie attests that by return facsimile, he wrote answers to the questions on the letter that Mr. Peraza had sent him. (Derzie

Aff., ¶ 9.) The document shows that he answered four of the six questions, providing information as to the construction (brick), distance (50 ft), heat type (oil) and roof type (tar). He did not provide answers to the General Information questions, including question 19.

Mr. Peraza acknowledges that he then completed the insurance application in his own handwriting. (Peraza Dep. at 44-45.) A substantial dispute between Derzie and Morstan exists, however, as to how Mr. Peraza obtained the information to complete the occupancy and renovation questions, given that Mr. Derzie did not supply answers to those questions on the letter request for information that Mr. Peraza had sent to Mr. Derzie. Mr. Peraza had no specific recollection of having spoken with Mr. Derzie about these items (Peraza Dep. at 53-54, 155), but stated that it would have been his "custom and practice" to speak with the insured's broker to obtain the necessary information. (Id. at 50, 157.) Mr. Derzie categorically denies that he had any conversation with Mr. Peraza about the questions on the insurance application. (Derzie Dep. at 93.)

Breach of Contract by Utica

Plaintiffs move for partial summary judgment on their first cause of action for breach of contract against defendant Utica, claiming that Utica is obligated to pay insurance coverage to them under a binder issued by Utica's agent, Morstan. Utica moves for summary judgment dismissing this claim.

As a threshold matter, the court rejects plaintiffs' contention that Utica may not assert the defense of material misrepresentation because it never disclaimed on this basis.[1] This argument

[1]In letters dated between January 11 and March 6, 2002 (Ex. D to P.'s Motion), Utica asserted "non-coverage" on the ground that it did not issue or authorize a policy or binder. Utica does not seek summary judgment on this basis, and has apparently abandoned the argument that it is not bound by the binder issued by Morstan because it did not receive documents from Morstan evidencing the insurance application or issuance of the binder.

was apparently considered and rejected by the Appellate Division in an order entered on November 18, 2004, which upheld an order of this court, entered on September 15, 2003, denying a pre-discovery summary judgment motion brought by plaintiffs on their breach of contract claim against Utica. (See P.'s Brief on Appeal, Ex. C to Utica's Aff. In Opp. To P.'s Motion; Appellate Division order, Ex. D.) Moreover, any prohibition against an insurer's assertion of a ground for disclaimer that was not included in its original notice of disclaimer is not applicable where a material misrepresentation in the application for insurance voids coverage ab initio. (See Taradena v Nationwide Mut. Ins. Co., 239 AD2d 876 [4th Dept 1997].) The court accordingly turns to the critical issue of whether plaintiffs' insurance application made a material misrepresentation.

Utica contends that the application contained misrepresentations as to plaintiffs' occupancy and renovation of the premises during the policy period, and that these misrepresentations were material because Utica's underwriting guidelines prohibit binding of risks where a dwelling is unoccupied or undergoing renovation. Plaintiffs contend that the insurance application that they signed contained, at most, omissions as to their occupancy and renovation of the premises, and that they did not make any misrepresentations because Utica's own agent filled in the incorrect information that the premises was occupied and not undergoing renovation. Plaintiffs also claim that the questions in the insurance application were ambiguous as to time frame.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless

of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman v City of New York, supra, at 562.)

It is further settled that "[a]n insurer may avoid an insurance contract if the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material." (Federal Ins. Co. v Kozlowski, 18 AD3d 33, 39 [1st Dept 2005] [quoting Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 436 [3d Dept 2003]. See Insurance Law § 3105[a], [b].) Rescission of the insurance contract may be based on a material misrepresentation even if the misrepresentation was made in good faith or unintentionally. (Anderson v Aetna Life Ins. Co., 265 NY 376 [1934]; Curanovic, 307 AD2d at 436.) Contrary to plaintiffs' contention, an omission in an insurance application, or failure to disclose in response to a particular question, "is as much a misrepresentation as a false affirmative statement." (Vander Veer v Continental Cas. Co., 34 NY2d 50, 52 [1974]; Fernandez v Windsor Life Ins. Co., 83 Misc 2d 301 [Sup Ct, Queens County 1975], affd 52 AD2d 589 [2d Dept 1976].)

Significantly, an insured is responsible for omissions or misstatements in an insurance application even if the insured leaves blanks at the directive of the insurance agent or the insurance agent inserts false answers in the application, particularly where the application that the insured signs contains a representation that the answers in the application are true and complete. This result obtains even where the non-disclosure or false answer is made at the instance of the insurer's own agent. (See, e.g., Courtney v Nationwide Mut. Fire Ins. Co., 179 F Supp2d 8 [ND NY 2001] [applying New York law], affd 23 Fed Appx 91 [2d Cir 2002]; Nationwide Ins. Co. v Dorch, 1996 US Dist Lexis 22730 [SD NY 1996] [applying New York law] [insurer's agent];

Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, supra [insured's agent]. See also Wageman v Metropolitan Life Ins. Co., 18 NY2d 777 [1966] [insurer's agent]; Minsker v John Hancock Mut. Life Ins. Co., 254 NY 333 [1930] [insurer's agent].) The rationale for this authority is that "[t]he insured has the duty to read the application, correct any incorrect or incomplete answers and is presumed to have done so, even if told by the agent it was unnecessary to read the application, especially where * * * the insured specifically represented that the answers on the application were true and the insurer could rely on them." (Courtney, 179 F Supp2d at 12-13 [citing Dorch, 1996 US Dist Lexis 22730 at 6-7.)

Applying these principles, the court rejects plaintiffs' contention that a triable issue of fact exists as to whether they made misrepresentations about their occupancy and renovation of the dwelling. Plaintiffs cannot avoid responsibility for the misrepresentations contained in the application based on the fact that they merely left the questions about occupancy and renovation blank; that they were allegedly told by their insurance agent, Mr. Derzie, to do so; or that Morstan's agent, Mr. Peraza, filled in the answers to these questions. While there is a dispute between Derzie and Morstan as to whether Morstan's agent, Mr. Peraza, filled in the blanks without first obtaining the information from Mr. Derzie, that dispute is irrelevant to Utica's liability to plaintiffs, as plaintiffs had a duty to review the application after it was completed to ensure that it was accurate and to correct any mistakes. Instead, plaintiffs knowingly signed the application stating that their answers were true and complete, notwithstanding that it contained blanks on critical questions regarding occupancy and renovation about which Mrs. Levi had herself inquired. They then failed to review the completed application, notwithstanding that it was available to them. The uncontroverted evidence shows that the application, stamped "Binder" and with the answers completed by Mr. Peraza, was returned to Mr. Derzie as of

August 1, 2001. (See Ex. E to Utica Motion.) As Mr. Derzie was plaintiffs' agent, notice to him as to how the questions were completed was notice to plaintiffs. "An insured cannot remain silent while cognizant that his insurance application contains misleading or incorrect information, but has a duty to review the entire application and to correct any incorrect or incomplete answers." (Curanovic, 307 AD2d at 437 [internal citations and quotation marks omitted].) Neither Mr. Derzie nor plaintiffs personally ever took any steps to review the completed application to ensure its accuracy. Their failure to do so is particularly glaring, given that Mrs. Levi is an attorney and that she was aware of the potential significance of the questions about occupancy and renovation, as evidenced by her testimony that she contacted Mr. Derzie to ask how to answer these questions.

The court further holds that plaintiffs' failure to answer the occupancy and renovation questions or to correct Morstan's answers constituted a material misrepresentation. Under Insurance Law § 3105(b), "[n]o misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Materiality is generally a question of fact. (Kozlowski, 18 AD3d at 39.) "To establish materiality of misrepresentations as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application." (Curanovic, 307 AD2d at 437. Accord Parmar v Hermitage Ins. Co., 21 AD3d 538 [2d Dept 2005].)

Here, Utica demonstrates as a matter of law that the misrepresentations in the application were material. Utica's underwriting guidelines expressly include among uninsurable risks "[d]wellings undergoing entire renovation" and "[d]wellings that are vacant, unoccupied, or up

for sale." (Utica First Ins. Co. Homeowner Guidelines, "Prohibited Classes, Do Not Bind," §§ 5, 7 [Ex. L to Utica's Motion].) In opposition to plaintiffs' motion for summary judgment, Utica submits the affidavit of David Satterlee, its senior underwriter for personal lines, who attests that if plaintiffs' application for insurance had been transmitted to Utica, as required, Utica would have issued a policy, ordered an inspection, and then cancelled the policy when the inspection uncovered a violation of the underwriting guidelines. More particularly, Mr. Satterlee attests that at the time of plaintiffs' application, Morstan was required to transmit the paperwork to Utica within three working days of issuance of the binder, and Utica would then issue a policy within five working days. Once the policy was issued, the paperwork would be sent to him and he would order an inspection of every risk, without exception. An inspection would be performed by an inspection vendor within two to four weeks of receipt of Utica's order. Thus, Mr. Satterlee estimated that as the insurance was bound on August 1, 2001, the inspection would have been performed by September 20, 2001. (Satterlee Aff., ¶¶ 3 - 9.) Mr. Satterlee further attests that the insurance would have been cancelled because the inspection would have revealed that the dwelling was vacant and undergoing renovation, in violation of Utica's underwriting guidelines. (Id., ¶ 10.)

Contrary to plaintiffs' contention, Mr. Satterlee's statements as to what the inspection would have revealed are not based on speculation. Plaintiff herself testified that she and her husband did not move into the dwelling at any time in the five months between the insurance application and the fire. (D. Levi Dep. at 86 .) She also testified that the plans for the renovation started out as a "face-lift" or "a little update on the kitchen and the bathrooms and it kind of took on a life of its own." (Id. at 22.) A Department of Buildings document entitled "Work Permit Data" shows that a permit was issued on August 24, 2001 for a job with a

proposed start date of August 24, 2001, for "[i]nterior renovation of existing one family dwelling." (Ex. G. to Utica Opp. To P.s' Motion.) According to plaintiffs, work began probably towards the end of August or the beginning of September. (D. Levi Dep. at 29.) By the time of the fire, an extensive renovation was nearing completion. As described by plaintiff, the renovation had included new bathroom and lighting fixtures, custom-made staircases and doors, central air conditioning, and a new alarm system. (Id. at 87-89.)

On plaintiffs' own evidence, therefore, an inspection in September would have revealed that the dwelling was vacant and that renovation was ongoing. As Utica's underwriting guidelines prohibit insurance of such risks, plaintiffs' misrepresentations on the issues of occupancy and renovation were unquestionably material.[2] (See McLaughlin v Nationwide Mut. Fire Ins. Co., 8 AD3d 739 [3d Dept 2004] [misrepresentation that cottage was occupied held material notwithstanding plaintiffs intention at time of application for insurance to move in].) The court accordingly holds that the coverage was void from its inception, and that Utica is entitled to summary judgment dismissing plaintiffs' breach of contract claim against it.

In so holding, the court rejects plaintiffs' argument, based on Philadelphia Indem. Ins. Co. v Horowitz, Greener & Stengel, LLP (379 F Supp 442, 453 [SD NY 2005]), that "where upon the face of [an insurance] application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial." (See

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[2]Plaintiffs also appear to argue that the misrepresentations were not material because there was some flexibility on Utica's part about whether to insure dwellings that were vacant for the relatively short period of two to three weeks or were undergoing limited repairs. (See Dep. of Richard Zick [Utica's CEO] at 102-104.) In the instant case, however, it is undisputed that the dwelling was never occupied by plaintiffs in the five month period between the issuance of the binder and the fire, and that the renovations, however minor in their inception, spiralled into a major project. Under these circumstances, the misrepresentations were material.

P.s' Aff. In Support, ¶ 69.) This proposition, as set forth in Philadelphia Indemnity, is not supported by any citation to New York law and ignores the substantial authority, cited above, that makes an insured liable for a failure to disclose or affirmative misrepresentation on an insurance application, where the insured has represented that the application is truthful and complete. Moreover, Philadelphia Indemnity involved an insured's truthful answer to a question but failure to include details on a supplemental form. Here, in contrast, plaintiffs wholly failed to answer critical questions.

The court also rejects plaintiffs' contention that the questions on the insurance application regarding occupancy and renovation were ambiguous as to time frame. It is well settled that "[a]n answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation by the insurer against its insured where * * * a reasonable person in the insured's position could rationally have interpreted the question as he did." (Fanger v Manhattan Life Ins. Co. of New York, 273 AD2d 438, 439 [2d Dept 2000], lv dismissed 96 NY2d 754 [2001].) In the instant case, plaintiffs in effect interpreted the questions as not requiring an answer. However, any reasonable person in plaintiffs' position knew or should have known that the insurer would want to know and would be influenced by knowledge of plaintiffs' disclosures as to occupancy and renovation of the dwelling. (Cf. Wageman v Metropolitan Life Ins. Co., 24 AD2d 67 [1st Dept 1965], affd 18 NY2d 777 [1966].) Moreover, while the principals and employees of defendants disagreed among themselves as to whether the questions were to be answered as of the date of the insurance application, the effective date of the policy, the date of the closing, or a date into the policy period (see Ex. X to P.'s Motion), parol evidence interpreting the questions is inadmissible as the court finds that the questions are unambiguous on their face. The questions are framed in the present tense: "Occupied daily?"; "Is building

undergoing renovation or reconstruction?" Ordinarily, a representation that a certain state of facts does or does not exist "refer[s] to the time when the contract is completed, and it becomes binding at that time." (6 Couch on Insurance § 82:2 [3d ed].) Similarly, under the circumstances of this case in which plaintiffs applied for insurance before they had closed on the house, the only date as of which the questions could have been answered in the present tense was the effective date of the policy or the date as of which plaintiffs closed and thereby acquired an insurable interest in the house. The house was concededly not occupied daily on that date, and it was undergoing renovation to the extent that it was left vacant pending the commencement of contemplated repairs. Thus, as held above, because plaintiffs failed to disclose that the house was not occupied daily and was undergoing renovation, and this non-disclosure was material, the policy was void.

Utica's Additional Claims

Utica also seeks summary judgment dismissing plaintiffs' remaining claim against it for forgery. The uncontradicted evidence is that Morstan inserted the false answers to the occupancy and renovation questions in the insurance application, and that the application was not sent to Utica prior to the fire. The forgery claim therefore may not be maintained against Utica unless the acts of Morstan may be imputed to it. It is well settled that "a principal, even if innocent, is liable for acts of fraud that are within the scope of an agent's actual or apparent authority." (Chubb & Son, Inc. v Consoli, 283 AD2d 297, 298 [1st Dept 2001].) Here, however, the evidence showed that Morstan was not authorized to insert answers – much less, fraudulent answers – in insurance applications. The making of fraudulent representations was not within the scope of the insurer's agent's actual authority, as it "was not reasonably or necessarily incidental to that which [the agent] was authorized to do." (See McGarry v Miller, 158 AD2d

327, 328 [1st Dept 1990].) Nor was Morstan's act in inserting the answers within the scope of its apparent authority, as Utica never had any contact with plaintiff or Derzie that communicated Morstan's authority to insert answers in an already signed application. (See id. See generally Standard Funding Corp. v Lewitt, 89 NY2d 546 [1997].) Plaintiffs' claim against Utica for forgery should accordingly be dismissed, leaving no remaining claims by plaintiffs against it.

Utica's summary judgment motion also seeks summary judgment against Morstan on Utica's cross-claim for a defense and indemnification from Morstan based on Morstan's alleged breach of its agreement with Utica. This agreement (Ex. K to Utica's Motion), provides in pertinent part: "The Agent must notify the Company within three (3) working days of all business which the Agent has bound pursuant to the authority granted herein." (Agency Agreement, ¶ 1.) It further provides: "The Agent agrees to hold the Company harmless from any liability, including cost of defense, which is suffered by the Company because of * * * failure to comply with the terms of this Agreement." (Id., ¶ 8.) Morstan does not dispute that it did not send notification of the binder to Utica until after the fire, and that it issued a binder for more than 30 days, despite the limitation in the "Binding Authority" section of Utica's Homeowner Guidelines (Ex. L to Utica's Motion), providing: "Coverage not to exceed 30 days." As held above as a matter of law, had Morstan forwarded the insurance binder to Utica within the three day period required by the Agency Agreement, an inspection would have revealed that the dwelling was unoccupied and undergoing renovation and the policy could have been cancelled. As a result of Morstan's failure to abide by the terms of the Agency Agreement, Utica has sustained the costs of defending against plaintiffs' claim, for which Morstan is liable.

Derzie's Motion

The Derzie defendants move for summary judgment dismissing plaintiffs' claims against

them. Eric Derzie argues that he is not liable in his individual capacity. Eric Derzie & Associates, Inc. ("Derzie & Assocs.") argues that it is not liable for breach of contract or misrepresentation because Utica's authorized agent issued a binder that was never cancelled, and it therefore truthfully represented that an insurance policy was in effect.

The claims against Eric Derzie individually should be dismissed, as there is no evidence in the record that he exercised such dominion and control over the corporation as to warrant piercing of the corporate veil (see generally Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 [1993]) or that he otherwise acted to assume liability in his individual capacity.

As to Derzie & Associates, this court's determination of the Derzie defendants' CPLR 3211 motion to dismiss the complaint cited settled law that "a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to the insured." (Soho Generation of New York, Inc. v Tri-City Ins. Brokers, Inc., 256 AD2d 229, 231 [1st Dept 1998]; Tucci v Hartford Cas. Ins. Co., 167 AD2d 387 [2d Dept 1990].) As held above, the binder that Derzie & Assocs. procured on plaintiffs' behalf is void based on plaintiffs' misrepresentations. In addition, defendant fails to eliminate triable issues of fact, including issues as to whether plaintiffs acted on its advice in failing to answer the questions on occupancy and renovation in the application; whether Derzie & Assocs. otherwise negligently failed to follow-up on the binder; and whether it made negligent misrepresentations that coverage was in effect, although it never obtained a copy of the policy. The court finds, however, that the evidence in the record is insufficient as a matter of law to support plaintiffs' intentional misrepresentation, fraud, and forgery causes of action against Derzie & Assocs.

Derzie & Assocs. also seeks dismissal of the co-defendants' cross-claims against it. While Utica's cross-claims will be dismissed as moot, Derzie & Assocs. does not expressly

address its bases for dismissal of Morstan's cross-claims, and thus fails to demonstrate as a matter of law that such claims should be dismissed.

Morstan's Motion

Morstan does not move to dismiss plaintiffs' sole remaining claim against it for forgery but, rather, seeks to limit plaintiffs' damages to damages that could have been obtained under the policy that would have been issued had Utica afforded coverage and, in particular, to damages for dwelling coverage as opposed to personal property or contents coverage. On this inadequately briefed record, the court cannot say that the measure of damages for forgery, if proved, should be limited to coverage under the policy.

It is accordingly hereby ORDERED that

Plaintiffs' motion for partial summary judgment against defendant Utica First Insurance Company is denied; and it is further

ORDERED that the motion for summary judgment of defendant Utica First Insurance Company is granted to the following extent:

It is ORDERED that the complaint and all cross-claims against defendant Utica First Insurance Company are dismissed; and it is further

ORDERED that defendant Morstan General Agency, Inc. shall indemnify defendant Utica First Insurance Company for all defense costs in connection with plaintiffs' claim, in an amount to determined at the trial or upon final resolution of this action; and it is further

ORDERED that the motion for summary judgment of defendants Eric Derzie & Associates, Inc. and Eric Derzie is granted to the following extent:

It is ORDERED that the complaint and all cross-claims are dismissed against defendant Eric Derzie; and it is further

ORDERED that the sixth cause of action (intentional misrepresentation), seventh cause of action (fraud), and eighth cause of action (forgery with intent to defraud) of the complaint are dismissed against defendant Eric Derzie & Associates, Inc., and all cross-claims of defendant Utica First Insurance Company are dismissed against said defendant; and it is further

ORDERED that the motion of defendant Morstan General Agency, Inc. for partial summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 29, 2006

MARCY FRIEDMAN, J.S.C.

FILED
JUL 12 2006
COUNTY CLERK'S OFFICE