SHORT FORM ORDER

INDEX No. 04-20998
CAL. No. 06-02479-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2/8/07
ADJ. DATE 3/23/07
Mot. Seq. # 006 - MG; CASEDISP
007 - XMD

ROBERT MIRABELLI and JOSEPH BRANDT,

Plaintiffs,

- against -

MERCHANTS INSURANCE COMPANY OF NEW HAMPSHIRE a/k/a MERCHANTS MUTUAL INSURANCE COMPANY a/k/a MERCHANTS INSURANCE GROUP,

Defendant.

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Upon the following papers numbered 1 to 52 read on this motion for summary judgment and cross motion for declaratory judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 27; Notice of Cross Motion and supporting papers 28 - 37; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 38 - 52; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiffs' complaint in its entirety is granted; and it is further

ORDERED that this cross motion by plaintiffs for declaratory judgment relief and for counsel fees and damages is denied.

On September 30, 1996, plaintiffs purchased from defendant a Businessowners Insurance Policy insuring commercial property located at 3732 Route 112, in Coram, New York. On December 21, 2003 a fire severely damaged the office building on the property. Plaintiffs notified defendant of the fire and sought to recover under the policy so as to rebuild the building. Prior to any determination of coverage under the policy by defendant, plaintiffs commenced the subject action.

By order of this Court dated May 9, 2005 (Burke, J.), defendant's motion for dismissal of the second, third, fourth and sixth causes of action of plaintiffs' complaint and all claims seeking punitive damages, treble damages, exemplary damages, extra-contractual damages and attorney's fees were

dismissed. Only two of plaintiffs' original causes of action remained, the first cause of action for breach of contract and the fifth cause of action for a declaratory judgment declaring that plaintiffs have coverage under the subject policy for said fire loss and that defendant must pay plaintiffs under the policy to enable plaintiffs to rebuild the building before the end of 2004 to preserve the building's zoning status. A subsequent order of this Court dated April 4, 2006 (Burke, J.) granted defendant's motion to compel plaintiffs to provide defendant with full and complete responses to questions 3 (c), 4 (c) and 5 through 11 in defendant's interrogatories and denied plaintiffs' cross motion for declaratory relief as being duplicative of prior motion practice and inconsistent with the Court's determination of plaintiffs' prior applications. The Court's computer records indicate that the note of issue in this action was filed on October 24, 2006.

Defendant now moves for summary judgment in its favor dismissing plaintiffs' complaint in its entirety on the grounds that plaintiffs materially breached a condition precedent for recovery under the policy, the fire alarm warranty of the policy, as asserted in defendant's third and fourth affirmative defenses, since disclosure revealed that plaintiffs did not ever have a central station fire alarm system installed in the subject building and that plaintiffs materially breached the cooperation provisions of the insurance policy listed under "Duties in the Event of Loss or Damage," as asserted in defendant's first and second affirmative defenses, by failing to execute and sign examination under oath transcripts and failing to produce for examination relevant documents and records that were in plaintiffs' possession. In support of the motion defendant submits, among other things, the subject policy with endorsements; the affidavit dated January 12, 2007 of Salvatore Salvato; the affidavit dated July 7, 2006 of Ray Lang; the summons and verified complaint; defendant's answer; the prior order dated May 9, 2005 (Burke, J.); the Protective Safeguards endorsement; the Businessowners Insurance Application dated September 11, 1996; an invoice dated January 31, 2003 from RayDette Sounds & Electronics, Inc. to Rustic Realty; and the examination before trial transcripts of plaintiffs and non-party Audrey Brandt.

Insurance Law § 3106 (a) defines warranty as "any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage, or injury within the coverage of the contract." Insurance Law § 3106 (b) provides that "a breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract."

Plaintiff Robert Mirabelli executed an application for the subject insurance dated September 11, 1996 which indicated that there was a central station fire alarm direct to fire or police and hardwire smoke detectors for the subject building as well as a central station burglar alarm with "police connect."

Defendant added an endorsement for "Protective Safeguards" that changed the policy for the period September 11, 2001 to September 11, 2002 by adding to the Property General Conditions in the Businessowners Property Coverage Form the requirement, as a condition of the insurance, of an "Automatic Fire Alarm, protecting the entire building, that is: (1) Connected to a central station; or (2) Reporting to a public or private fire alarm station" as well as a central station burglar alarm.

The abovementioned endorsement also added to the Exclusions section the following:

> We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you:
> 1. Knew of any suspension or impairment in any protective safeguard listed in the Schedule above and failed to notify us of that fact; or
> 2. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

In his affidavit dated January 12, 2007, Salvatore Salvato stated that he is a fire origin and cause investigator with Thomas J. Russo Consultants, Ltd. which was retained by defendant in December 2003 to conduct a scene examination at the subject location. In addition, Mr. Salvato indicated that he had been a Fire Marshal in New York City and had extensive fire fighting experience. He stated that he conducted his fire scene examination on December 27, 2003 and conducted a further investigation on May 11 and 12, 2004, reviewed fire report records, and conducted interviews. Based on the said investigation, Mr. Salvato concluded that the subject building sustained a large volume fire over a very short duration, that the insureds and the Fire Department were not notified of the fire through a central station communication, and that the fire was discovered by a passerby when the force of the fire blew out windows. Mr. Salvato opined that based on his experience as well as practicality and common sense, buildings with a central station fire alarm system can significantly reduce property loss to a building since time is of the essence and upon the triggering of a fire event, a central station is notified immediately which, in turn, notifies the local fire authorities.

Defendant demonstrated that the subject premises had one tenant, Rustic Realty, and that said tenant had a central station burglar alarm at the time of the subject fire that was maintained by Raydette Sounds & Electronics, Inc. By affidavit dated July 7, 2006, the retired owner of said company, Ray Lang, stated that he installed and maintained said burglar alarm, which was the only automatic central station monitored alarm system requested to be installed at said location and which was central station monitored by Alarm Tech Central by arrangement with his company. In addition, Mr. Lang stated that to his knowledge, the subject building did not have an automatic fire alarm system connected to a central station monitoring company. He added that all of his dealings with Rustic Realty were through plaintiff Joseph Brandt.

At his examination before trial on July 13, 2006, plaintiff Joseph Brandt testified that his wife, Audrey Brandt, was a partner with plaintiffs as owners of the subject building. Plaintiff Brandt also testified that he may have discussed with the installer about the central station monitoring system that was being installed in the building but could not specifically recall the discussion and that his wife merely told him that she was having a central station monitoring system installed for the building without specifying what type of alarm was being installed. He added that he was never advised by plaintiff Mirabelli that there was a central station fire alarm system for the subject building.

Non-party Audrey Brandt testified at her examination before trial on July 13, 2006 that she is a licensed residential real estate broker with 25 years of experience and that prior to June 2005 she was a broker of record for the franchise Century 21 Rustic Realty with a main office located at 3732 Route 112 in Coram, New York. In addition, Mrs. Brandt testified that she owned the franchise as Brandt

Rustic Realty of Suffolk, Inc., was its president, and worked out of said office and that her husband worked as an independent contractor out of a Miller Place office. She indicated that the franchise was a tenant of the building and that within a year of moving into the building in about 1996 she, on behalf of the franchise, had an alarm system installed and that she hired Ray Dent [sic] Lang to install the system. According to Mrs. Brandt, she and her husband, plaintiff Brandt, dealt with Ray Lang to have the alarm installed and just asked for an alarm, assuming that it would be both a fire and a burglar alarm. She stated that Ray Lang told her merely that he was installing an alarm system that would be hooked up to a central station and that she received a bill for his work. Mrs. Brandt further testified that the office had battery operated smoke detectors and that she believed that there was a central station fire alarm based on her observation of the exterior fire alarm with a bell. Mrs. Brandt's testimony revealed that after its initial installation, the alarm system was repaired a few times but she did not state that the system was ever upgraded or changed. Mrs. Brandt stated that during the time that Rustic Realty occupied the building, she had her own separate insurance policy and she made a claim for the contents in connection with the fire.

The invoice marked as an exhibit during Mrs. Brandt's examination before trial indicates two items, a Central Station Monitoring Fee for March 1, 2003 through February 28, 2004 and a Security System Service Contract for the same period. The testimony of plaintiff Mirabelli from his examination before trial on July 13, 2006 reveals that he had no knowledge of the installation of the alarm system or of the type of alarm system that was installed and that he had no contact with the installer.

Here, defendant adequately demonstrated through its submissions that there was no central station fire alarm or an automatic fire alarm reporting to a public or private fire alarm station at the subject premises on the date of the fire. Through said submissions, defendant established that plaintiffs breached the Automatic Fire Alarm Protective Safeguards warranty in the subject policy (*see*, Insurance Law § 3106 [a], [b]; ***730 J&J, LLC v Twin City Fire Ins. Co.***, 293 AD2d 519, 740 NYS2d 119 [2d Dept 2002]). In non-marine cases, a breach of warranty that materially increases the insurer's risk of loss within the meaning of Insurance Law § 3106 (b) precludes coverage as a matter of law (*see*, ***Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co.***, 1 AD3d 58, 765 NYS2d 854 [1st Dept 2003], *affd* 2 NY3d 789, 781 NYS2d 255 [2004]). The subject warranty was binding on the insureds despite the absence of the insureds' signatures on the endorsement containing the warranty since at the time of loss the endorsement had been part of the policy in its original form and for at least two renewals without objection (*see*, ***J. Katz Creations, Ltd. v St. Paul Fire & Marine Ins. Co.***, 80 AD2d 790, 437 NYS2d 10 [1st Dept 1981]). Defendant's proffered proof also demonstrated that the breach materially increased the risk of loss, damage, or injury within the coverage of the policy, thereby defeating plaintiffs' right to recovery (*see*, ***730 J&J, LLC v Twin City Fire Ins. Co.***, *supra*).

In opposition to the motion, plaintiffs contend that defendant has failed to submit probative proof of any such materially increased risk of loss, damage or injury pursuant to Insurance Law § 3106 (b) inasmuch as defendant's investigator, Salvatore Salvato, who opined that the fire had been a rapidly accelerating fire and that there was no evidence of a central station fire alarm in the building, based his opinion following an examination of the site consisting of just rubble five months after the fire occurred. In addition, plaintiffs contend that defendant is estopped from denying coverage by defendant's numerous yearly inspections of the premises by its agents and their acceptance of premiums and policy renewals for almost ten years. Plaintiffs also contend that the

subject endorsement was not properly served upon them. Moreover, plaintiffs question the relevance of Ray Lang's statements to the effect that he did not install a central station fire alarm at the premises and that one did not exist at the premises contending that Ray Lang would have no knowledge of the presence or absence of a fire alarm since he resided in Florida for a period prior to the fire. Plaintiffs cross-move for statutory and equitable relief and a declaration that defendant has wilfully violated Insurance Law §§ 2601 (a)(1), (a)(4), (a)(5) and (b), acted in bad faith, and is liable for the full amount of the loss contained in plaintiffs' proof of loss. Plaintiffs seek an award of exemplary damages, reasonable counsel fees, and costs and disbursements of this litigation with interest from the date of proof of loss.

In support of their opposition and cross motion, plaintiffs submit the affidavit dated February 21, 2007 of plaintiff Mirabelli; the examination before trial transcript dated August 11, 2005 of plaintiffs' insurance agent John Proios; plaintiffs' fire claim form dated February 14, 2004; plaintiffs' complaint; a portion of the Businessowner's Policy for the period September 11, 2003 to September 11, 2004; and a listing by plaintiffs' counsel of documents provided to defendant, correspondence from plaintiffs' counsel to defendant's counsel, and plaintiffs' second interrogatories response.

In reply to plaintiff's submissions, defendant contends that there is no evidence of any inspections of the insured premises with respect to the alarm system and that instead, the insurance company relies on the information provided by the insured as to the existence of an alarm system, such as through the application for insurance. In addition, defendant points out that plaintiffs' insurance agent's testimony supports defendant's regional underwriting manager's statement that the subject alarm warranty endorsement had been part of the plaintiffs' policy since the effective date of September 11, 2000. Defendant also points out that contrary to plaintiffs assertions, Salvatore Salvato did first examine the premises four days after the fire. Defendant further contends that there is no evidence that defendant concealed from plaintiffs the requirement of an operable fire alarm and no evidence that defendant was aware at the time of the fire that plaintiffs did not have such a system. In support of defendant's reply, defendant submits, among other things, the affidavit dated March 16, 2007 of its Regional Underwriting Manager, Eric Feit.

Although plaintiffs argue that defendant's proof is inconclusive with respect to the existence of a central station fire alarm system, nowhere do plaintiffs affirmatively state that they did have an installed and functioning central station fire alarm system at the subject premises at the time of the fire. Said information would and should be within the personal knowledge of the owners of the subject premises, plaintiffs and Mrs. Brandt. It strains credulity that the person who actually had the alarm system installed, Mrs. Brandt, who at the time had 15 years of experience as a real estate broker would merely request that an alarm system be installed without specifying or discussing with the installer what type of system she wanted and would just assume that both a fire and burglar alarm were installed. In addition, at this stage of the action with discovery completed and the note of issue filed, plaintiffs should have provided the very basic information concerning whether or not such a fire alarm system was installed and working at the premises at the time of the fire and the name of the company or persons involved in installing and/or monitoring the site. Plaintiffs' failure to even admit or deny the existence of a fire alarm system at this late juncture does not entitle plaintiffs to a trial based on purported issues of fact. Plaintiffs' counsel cannot rely on the express

decision of defendant's counsel not to depose Ray Lang as an excuse for plaintiff's counsel's failure to do so himself and as a basis for criticizing the submission of Ray Lang's affidavit based on the inability to cross examine the witness.

In addition, plaintiffs fail to demonstrate that defendant is equitably estopped from denying coverage through its agents' alleged inspections of the building and through its acceptance of premium payments and renewals of the subject policy. The applicability of equitable estoppel requires the essential elements of (1) conduct which amounts to a false representation or concealment of material facts, (2) intention that such conduct will be acted upon by the other party, and (3) knowledge of the true facts (*see*, ***Benincasa v Garrubbo***, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). If said elements are established, defendant would be equitably estopped from claiming any facts but the facts represented on which the other party, plaintiffs, relied (*see*, *id.*). Here, there was no proof that defendant's agents inspected the subject building. Eric Feit, defendant's Regional Underwriting Manager, stated in his affidavit that defendant did not directly verify with central station companies the existence or absence of a central station service and, instead, relied on the representation of the insureds on this matter in their signed application for insurance. He added that the insured receives a reduction in premium by having a central station monitored fire alarm system on the premises. In any event, plaintiffs were in a better position to know whether such a fire alarm system existed. There was also no evidence that defendant concealed the Protective Safeguards endorsement inasmuch as plaintiff's own insurance agent testified at his examination before trial that his notes indicated that a post-it note was placed on said endorsement with the policy that was effective from September 11, 2000 to September 11, 2001, which he received from defendant, and sent from his office to the plaintiffs' address indicating "please review, this would effect coverage, call if any questions." The declarations page and the accompanying endorsements were made part of the insurance policy and were incorporated by reference into the policy regardless of whether the insured received actual delivery thereof (*see*, ***Hirshfeld v Maryland Cas. Co.***, 249 AD2d 274, 671 NYS2d 100 [2d Dept 1998]). Once plaintiffs received the policy, they were presumed to have known its contents, including its Protective Safeguards endorsement, and to have assented to them (*see*, ***Stone v Rullo Agency, Inc.***, ___ NYS2d ___, 2007 WL 1287956, 2007 NY Slip Op 03820 [NYAD 3 Dept May 03, 2007]). Therefore, plaintiffs have failed to rebut defendant's showing that plaintiffs breached the Automatic Fire Alarm Protective Safeguards warranty in the subject policy and raise a triable issue of fact as to whether they fulfilled the automatic fire alarm requirement (*see*, ***Star City Sportswear, Inc. v Yasuda Fire & Marine Ins. Co.***, *supra*). In light of the above, defendant's request for summary judgment dismissing plaintiffs' complaint based on plaintiffs' failure to cooperate under the policy is rendered academic.

Plaintiffs' cross motion is denied as unmeritorious and duplicative of prior requests for relief. Initially, the Court notes that plaintiffs' requests for declaratory judgment relief are far broader than their fifth cause of action. The request for a declaration that defendant wilfully violated Insurance Law § §§ 2601 (a) (1), (a)(4), (a)(5), and (b) by engaging in unfair claim settlement practices is denied as moot inasmuch as said statutory violation claims were alleged in plaintiffs' fourth cause of action which was dismissed by the prior order dated May 9, 2005 (Burke, J.). In addition, the request for a declaration that defendant acted in breach of defendant's fiduciary duties to plaintiffs is denied as moot since said allegations constituted plaintiff's sixth cause of action which was also

dismissed by that order. Plaintiffs have failed to demonstrate that defendant acted in bad faith within the meaning of the Insurance Law and breached the subject policy (*see generally*, ***Catucci v Greenwich Ins. Co.***, 37 AD3d 513, 830 NYS2d 281[2d Dept 2007]; ***Shah v Cambridge Mut. Fire Ins. Co.***, 304 AD2d 815, 757 NYS2d 870 [2d Dept 2003]). Plaintiffs' remaining requests lack merit.

Accordingly, the motion is granted and the cross motion is denied and the complaint is denied in its entirety. The Court declares that defendant is not liable for coverage of all losses attendant to the subject fire at plaintiffs' premises located at 3732 Route 112, in Coram, New York.

Dated JUN 07 2007

J.S.C.

__X__FINAL DISPOSITION _____NON-FINAL DISPOSITION