SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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PHILIP and LOIS SCHATZ,

Plaintiffs,

DCM PART 6

Present:
Hon. Philip G. Minardo

-against-

Decision and Order

ALLSTATE INSURANCE COMPANY and MANNINO AGENCY, INC.

Index No. 102233/05
Motion No. 608-004

Defendants.

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The following papers numbered 1 to 2 were used on this motion the 3rd day of May, 2007:

	Pages Numbered
Notice of Motion For Summary Judgment by Defendants, with Supporting Papers and Exhibits (dated February 26, 2007)	1
Affirmation in Opposition by Plaintiffs, with Exhibits (dated March 29, 2007)	2

Upon the foregoing papers, defendants' motion for summary judgment is granted.

Defendants Allstate Insurance Company ("Allstate") and the Mannino Agency, Inc. move by notice of motion for an order granting them summary judgment and dismissing the complaint. Plaintiffs Philip and Louis Schatz oppose the motion.

This action arises from Allstate's denial of coverage for damages sustained by plaintiffs as a result of vandalism which occurred on May 6, 2005 at premises known as 545 Annadale Road, Staten Island, New York (hereafter, the "premises"). Plaintiffs commenced this action or

about July 27, 2005. Issue was joined by the service of an answer by defendants on or about January 16, 2006.

As is relevant, plaintiff-landlords had insured the premises with defendant Allstate through the Mannino Agency for at least 10 years prior to the date of the underlying incident. The policy was renewed each year for a one year term starting and ending in November, with plaintiffs being sent a landlord renewal package each September. Included in this package was a notice of any changes to the existing policy. In pertinent part, the renewal package sent in September 2001 contained an important notice to the effect that the policy would no longer cover "any loss consisting of or caused by vandalism" (Defendants' Exhibit "J"). It is undisputed that this same policy was renewed annually by plaintiffs through November 2005, and was in effect on the date of the alleged loss, May 6, 2005. In a section of that policy entitled "Losses we do not cover" is the specific term "Vandalism" (Defendants' Exhibits "K", "L").

At his deposition, plaintiff Philip Schatz testified that each year he received and reviewed the renewal packages sent by the Mannino Agency (Schatz E/B/T pp 87-88, 108-109). In addition, Phillip Nappi, a territorial product manager for Allstate, testified that coverage for vandalism had become an optional endorsement for landlord policies around 2000 and 2001, and that plaintiffs were among those notified of the elimination of such coverage (Nappi E/B/T pp 10-12). Defendants allege that plaintiffs are professional landlords who currently own at least four rental properties (and have owned as many as ten), all of which were insured by Allstate. Based on the foregoing, defendants allege that plaintiffs cannot claim that they were unaware of the policy change made in 2001, and since damages from vandalism are specifically excluded, their disclaimer of coverage was proper. Accordingly, defendants allege they are entitled to dismissal of the complaint.

In opposition, plaintiffs have submitted (1) an attorney's affirmation, (2) copies of the aforementioned deposition testimony, (3) a purported transcript of recorded conversations, and (4) an affidavit by plaintiff Phillip Schatz. Notwithstanding the purported disclaimer, plaintiffs contend that a triable issue of fact exists as to whether Mannino negligently failed to obtain and/or maintain vandalism coverage. In addition, plaintiffs allege that Mannino was under a special duty to advise plaintiffs of the coverage changes. They also claim that Mannino has orally admitted that Allstate should have paid the claim because the insurer failed to give adequate notice of the change, notice which they allege Mannino was also required to give and failed to do so.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (see Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (see Glennon v. Mayo, 148 AD2d 580). To prevail on the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324). Upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue (*id*. at 562). Thus, summary judgment, which operates to deprive a party of his or her day

in court, is only appropriate where the movant's initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (Persaud v. Darbeau, 13 AD3d 347).

With this criteria in mind, the Court concludes that defendants have established their *prima facie* entitlement to summary judgment by demonstrating that vandalism was not a covered event. Thus, it falls upon plaintiffs to raise a triable issue of fact or suffer dismissal of their complaint. For the following reasons, plaintiffs have failed to satisfy that burden.

In his opposing papers, plaintiff Phillip Schatz does not deny receiving the landlord renewal package or reviewing its contents. Therefore, he is deemed to be on notice of the exclusion, for which he declined to purchase optional coverage starting in 2001. In this context, it matters not that plaintiff may have originally requested such coverage, as it was included in the standard policy. Viewing the evidence in the light most favorable to plaintiffs, it nevertheless appears that, as professional landlords, they made a business decision to forego the purchase of " vandalism" coverage when advised by Allstate of the policy change. Equally unavailing is any purported assertion that Mannino owed them a special duty to advise plaintiffs of the policy change, and any conceivable claim that plaintiffs would have purchased the optional coverage if advised of the change by Mannino is without evidentiary support and is wholly speculative. Finally, plaintiffs' purported reliance on the self-serving hearsay statements contained in an alleged transcript of conversations with unidentified insurance agents is without probative value, as are the personal opinions of parties without the authority to bind Allstate (see Loschiavo v. Port Auth of N.Y. & N.J., 58 NY2d 1040).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint

dismissed and it is further

ORDERED that the clerk enter judgment in accordance herewith.

ENTER,

s/ Philip G. Minardo
J.S.C.

DATED: July 3, 2007
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