

**Booker v Tower Insurance Company of New York**

2007 NY Slip Op 34199(U)

December 19, 2007

Supreme Court, New York County

Docket Number: 0116815/2006

Judge: Shirley W. Kornreich

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

PRESENT

Index Number : 116815/2006

PART 54

BOOKER, CRISPIN B.

vs  
TOWER INSURANCE

INDEX NO. 116815/06

Sequence Number : 001

FILED DATE 9/26/07

SUMMARY JUDGMENT

FILED SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED	
1, 2	
3	
4	

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**

DEC 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 12/19/07

[Signature]  
HON. SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

----- X  
CRISPEN B. BOOKER,

Plaintiff,

-against-

TOWER INSURANCE COMPANY OF  
NEW YORK,

Defendant.

----- X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 116815/06

DECISION  
and ORDER

**FILED**  
DEC 26 2007  
NEW YORK  
COUNTY CLERKS OFFICE

This breach of contract action arises out of a fire insurance policy entered into between plaintiff Crispin B. Booker (“Booker”) and defendant Tower Insurance Company of New York (“Tower”). In his complaint, Booker alleges that Tower breached its insurance policy by failing to indemnify him for damage to property he owned at 600 Saint Marks Avenue, Brooklyn, N.Y. 12216 (“the Premises”), that was allegedly caused by arson on or about January 7, 2006. Tower now moves for summary judgment pursuant to CPLR § 3212 on the ground that the insurance policy sued upon is *void ab initio* due to Booker’s material misrepresentations on his insurance application. Plaintiff opposes.

*I. Background*

On December 5, 2005, Booker purchased the Premises for \$850,000. On December 6, 2005, Booker submitted a signed Dwelling Fire Insurance Application (the “Application”) to Tower. The Application contains, *inter alia*, under the “Rating/Underwriting” section, several questions requiring Booker to check certain boxes describing the property he sought to insure. Tower uses this section to assess the risks involved to determine whether to issue an insurance policy. On his Application, Booker filled in the “Rating/Underwriting” section as follows: in the “Structure Type” box, Booker indicated that the Premises were a “Dwelling”; in the box marked

“Usage Type,” Booker checked off “Primary”; and in the “Occupied By” box, Booker marked off “Owner.” He also listed the Premises as his “Mailing Address.” Based upon this information, Tower approved the Application and issued Dwelling Package Policy No. DPP2551627 (the “Policy”) to Booker for the Premises with an effective coverage period from December 5, 2005 through December 5, 2006.

On January 7, 2006, a fire at the Premises caused a great deal of damage to the property. Booker submitted a claim to Tower for the losses in the amount of \$492,954 in structural damages and \$19,200 in lost rents. During its investigation, Tower discovered that the Premises were occupied only by squatters not by Booker and his family. During his examination before trial, Booker admitted that prior to his purchase of the Premises, he knew that it was being occupied by squatters. Booker also testified that after he purchased the Premises and up until the date of the fire on January 7, 2006, he and his family never lived there and squatters continued to be the sole occupants. He further averred that at the time he filled out the Application and executed the Policy, he did not plan to move into the Premises for at least three to six months due to the large amount of renovations that were necessary. Once these renovations were complete, Booker intended to move his entire family into the Premises.

Tower’s Personal Lines Underwriting Manager Jerome Turak (“Turak”), who was directly involved in underwriting the Policy, avers that Tower’s underwriting decisions are governed by its “Selection Rules” which prohibit certain risks from being insured. To be eligible for insurance, Tower’s rules require that the subject property be both owner-occupied and the insured’s primary residence. Turak states, “[i]t is well known that an applicant who does not reside in the building to be insured presents a significantly greater risk to his insurer, and accordingly, the risk is deemed inappropriate for certain policies of insurance.” Based upon these guidelines, Turak avers that Booker’s responses to the usage and occupancy questions

highlighted in the “Rating/Underwriting” section of the Application were material to Tower’s decision on whether or not to issue him an insurance policy. Tower’s “Section Rules” explicitly state in the “Unacceptable Exposures” section that “vacant or unoccupied dwellings” present unacceptable levels of risk such that policies may not be written. Turak, finally, avers that Tower became aware that Booker never occupied the Premises during its investigation into the fire, and that based upon his material misrepresentations during the Application process, “Tower’s clear underwriting rules applicable to this risk, which are in accord with industry practice and common sense, would have prohibited the issuance of [the Policy] if [Booker] truthfully informed Tower in the [A]pplication that he did not intend to reside in the Premises.”

## II. *Conclusions of Law*

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

Statements made by an applicant on an insurance application are considered to be representations. *See* Insurance Law § 3204. A representation is defined as “a statement as to past or present fact, made to the insurer by...the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof.” Insurance Law § 3105. A misrepresentation is defined as a “false representation.” *Id.*

An insurer may rescind an insurance policy if it can demonstrate that the insured made a material misrepresentation in the inducement of the insurance contract. *Zilkha v. Mutual Life Ins. Co. of New York*, 287 A.D.2d 713, 714 (2<sup>nd</sup> Dept 2001); *Curanovic v. New York Cent.*

*Mutual Fire Ins. Co.*, 307 A.D.2d 435, 436 (3<sup>rd</sup> Dept 2003); Insurance law § 3105(b). A misrepresentation is material if true knowledge of the misrepresented facts would have obviated the issuance of the policy. *Zilkha*, 287 A.D.2d at 714; Insurance Law § 3105(b). Materiality of an applicant's misrepresentations is generally an issue of fact, but the court may decide this issue as a matter of law where the evidence is clear and largely uncontradicted. *Kroski v. Long Island Savings Bank FSB*, 261 A.D.2d 136 (1<sup>st</sup> Dept 1999). This is especially true where the misrepresentation "substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might not otherwise have taken." *Kroski*, 261 A.D.2d at 136 quoting *Aguilar v. United States Life Ins. Co.*, 162 A.D.2d 209, 210-211 (1<sup>st</sup> Dept 1990).

To establish materiality of a misrepresentation as a matter of law, the insurer must proffer an affidavit from its underwriter and documentary evidence regarding its underwriting practices such as an underwriting manual, bulletin or rules pertaining to similar risks, in order to show that it would not have issued the policy if the correct facts were made available on the application. *Kroski*, 261 A.D.2d at 136; *Curanovic*, 307 A.D.2d at 437.

Here, Tower has met its burden. Booker testified that he was not living at the Premises when he filled out the Application and subsequently executed the Policy. He also testified that at no point in time did he and his family live in the Premises. In addition, Booker testified that at the time he filled out the Application and signed the Policy, he did not plan to move into the Premises until renovations were completed in three to six months. In contrast, on his Application, Booker represented that the Premises were his primary residence and that he was in occupancy.<sup>1</sup> As a result, based upon his own testimony, Booker misrepresented these facts to

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<sup>1</sup>Tower also had no duty to inquire or reason to believe that squatters were in occupancy of the Premises since Booker did not represent this fact on his Application. *Kroski*, 261 A.D.2d at 137 (insured cannot shift its own burden of truthfulness into burden of distrust and additional

Tower on the Application. Tower's "Section Rules" clearly state that insurance policies will not be issued to "vacant or unoccupied dwellings." Consequently, Booker's misrepresentations on his Application and during the inducement and execution of the Policy were unequivocally material. This evidence, combined with Turak's uncontradicted affidavit, demonstrates that if Tower had actual knowledge of Booker's intentions to move into the Premises some three to six months after he purchased it on December 5, 2005, it would not have issued the Policy. *See McLaughlin v. Nationwide Mutual Fire Ins. Co.*, 8 A.D.3d 739 (3<sup>rd</sup> Dept 2004) (rescission of insurance policy granted where plaintiff's representation on insurance application that dwelling was owner-occupied deemed material where in fact plaintiff did not occupy premises at any point in time up until fire destroyed it despite his testimony that he and his family intended to move into home when application was filled out).

In opposition to this motion, plaintiff has failed to produce admissible evidentiary proof sufficient to establish material issues of fact warranting a trial. *Zuckerman*, 404 N.E.2d at 720. Accordingly, it is

ORDERED that the summary judgment motion of the defendant is granted and the complaint against the defendant Tower Insurance Company of New York is dismissed.

ENTER

DATE: December 19, 2007  
New York, NY

  
\_\_\_\_\_  
J.S.C.

**FILED**  
DEC 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

inquiry on part of insured, therefore failure of insured to make any additional inquiry does not counteract fraud by insured).