Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

ZUOHAO LING

- against -

HENRY N. WU, et al.

Index Number 18116 2007

Motion Date September 24, 2009

Motion Cal. Numbers 23 & 24

Motion Seq. Nos. 3 & 4

The following papers numbered 1 to 8 read on this motion by third-party defendant Paramount Insurance Company (Paramount) for summary judgment dismissing the third-party complaint against it and for summary judgment on its counterclaim, on this motion by third-party defendant C&M First Services, Inc. (C&M) for summary judgment dismissing the third-party complaint against it, and on this cross motion by defendants/third-party plaintiffs Henry N. Wu (Wu) and Flora P. Han Wu for summary judgment against the third-party defendants.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-2
Notice of Cross Motion - Affidavits - Exhibits.....	3
Answering Affidavits - Exhibits.....	4
Memoranda of Law	5-8

Upon the foregoing papers it is ordered that: That branch of the motion by third-party defendant Paramount for summary judgment dismissing the third party complaint against it is granted. That branch of the motion by third-party defendant Paramount for summary judgment on its counterclaim is granted. The motion by C&M

for summary judgment dismissing the third-party complaint against it is granted. The cross motion by the defendants/third-party plaintiffs for summary judgment on their third-party complaint is denied. The court declares that Paramount has no duty to defend and indemnify in *Zuo Hao Ling v Wu*, Index No. 18116/07. The court also declares that C&M has no duty of contribution or indemnification in regard to *Zuo Hao Ling v Wu*, Index No. 18116/07.

(See the accompanying memorandum.)

Dated: December 4, 2009

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 33

ZUOHAO LING	X	INDEX NO. 18116/07
- against -		MOTION SEQ. NOS. 3 & 4
		BY: GOLIA, J.
HENRY N. WU, et al.	X	DATED: December 4, 2009

Third-party defendant Paramount Insurance Company (Paramount) has moved for summary judgment dismissing the third-party complaint against it and for summary judgment on its counterclaim. Third-party defendant C&M First Services, Inc. (C&M) has moved for summary judgment dismissing the third-party complaint against it. Defendants/third-party plaintiffs Henry N. Wu (Wu) and Flora P. Han Wu (collectively the owners) have cross-moved for summary judgment against the third-party defendants.

In November, 2002, Paramount entered into a brokerage agreement with C&M whereby the former appointed the latter to represent it in the State of New York. However, Section VI of the agreement expressly stated in relevant part: "The Broker shall be an independent contractor and nothing herein shall be construed to create the relation of employer and employee ***." Section II of the agreement also provided in relevant part: "1. The Broker shall have no authority to bind the Company on any risk without the approval of the Company."

In August, 2005, Wu called Eric Cheng, the President of C&M, an insurance brokerage, about procuring an insurance policy covering premises known as 42-25 Haight Street, Flushing, New York that he and his wife were buying. Cheng asked Wu a number of questions about the property and the coverage needed, including whether Wu would reside at the property. Wu confirmed that the property would be owner-occupied. Wu admitted at his deposition: " I told him I bought a house, I was going to renew and remodel it and move in myself ***." (Tr. 198.) After the telephone conversation, Cheng sent to Wu an insurance application and two related documents. On or about August 19, 2005, Wu signed a homeowner's insurance application for 42-25 Haight Street. He also signed a one page "fraud statement" in which he represented that "this dwelling is NOT under ANY renovations and the insured will be occupying the above property location as of the requested binding date. This property location is Owner-Occupied." (Emphasis in original.) Wu also signed a one page document captioned "General Fraud Statement" which read in relevant part: "I shall bear all responsibility for the information given on the application that states that the said property location is Owner-Occupied ***. Any claims made will be denied if the information on the application was made falsely." After executing the documents, Wu returned them to the broker without any objections.

C&M forwarded the documents executed by Wu to Paramount, and the insurer, in reliance upon the documents, issued a policy covering 42-25 Haight Street, Flushing, New York with an effective period of August 24, 2005 to August 24, 2006. C&M

sent Wu a copy of the policy after the broker received a copy of it from the insurer, and he accepted it without notifying the broker of any objections to it. Paramount subsequently renewed the policy for an effective period from August 24, 2006 to August 24, 2007. Wu did not notify the broker prior to or after the renewal of the policy that he did not reside at the property. Louis Masucci, the Vice-President of Underwriting for Paramount, swears that the representations made by Wu that (1) the premises were not under renovation, and (2) were owner-occupied were material to the issuance of the policy. Contrary to the representations made by Wu, 42-25 Haight Street, a two-family home, was occupied by a tenant in one apartment and Wu's sister-in-law in another. The premises were also undergoing renovations. Wu had no intention of moving into 42-25 Haight Street until the renovations were complete, and to this day he and his wife do not live there, but rather at another property they own located at 142-16 Cherry Street, Flushing, New York.

On November 22, 2006, Zuo Hao Ling, a tenant at the premises, allegedly sustained injury when a fire broke out. On November 27, 2006, Paramount received notice about the fire, but, after investigation, the insurer sent the owners a letter dated June 13, 2007, rescinding the policy on the ground that the insurance application contained material misrepresentations about the premises being owner-occupied and not undergoing renovations. The letter went on to note that even if the insurer did not rescind the policy, it would not by its terms cover the occurrence because the owners never lived at 42-25 Haight Street, and, thus, the dwelling did not qualify as a "residence premises" within the scope of

the policy.

On or about July 20, 2007, Ling brought an action for personal injury against the owners in the New York State Supreme Court, County of Queens (*Zuo Hao Ling* v *Wu*, Index No. 18116/07.) On or about August 17, 2007, the owners brought a third-party action against C&M and Paramount for a judgment, inter alia, declaring that the third-party defendants are obligated to indemnify them for any damages recovered by Ling. C&M and Paramount answered the third-party complaint, and the latter asserted a counterclaim for declaratory relief. By letter dated September 21, 2007, the insurer again disclaimed coverage on the additional ground that Ling's injury did not arise at an "insured location" within the meaning of the policy (essentially because the owners did not reside at 42-25 Haight Street).

The court turns first to Paramount's motion. "[T]he 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 demonstrate the absence of any material issues of fact ***." (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324.) Paramount successfully carried this burden. First, an insurer may rescind an insurance policy if the insured made a false statement of fact as an inducement to the issuance of the policy and the misrepresentation was material. (*See*, Insurance Law § 3105[a], [b]; *McLaughlin v Nationwide Mut. Fire Ins. Co.*, 8 AD3d 739; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435.) An insurer may rescind on the ground of material misrepresentation even if not made willfully, but rather innocently or unintentionally. (*See*, *Precision Auto Accessories, Inc. v Utica First*

Ins. Co., 52 AD3d 1198; *McLaughlin v Nationwide Mut. Fire Ins. Co., supra; Curanovic v New York Cent. Mut. Fire Ins. Co.*, *supra*.) In the case at bar, Louis Masucci, the Vice-President of Underwriting for Paramount and someone knowledgeable about the insurer's standards and requirements governing the issuance of homeowner's policies, swears that the misrepresentations made by Wu were material to the issuance of the policy. Masucci's affidavit was sufficient to establish a prima facie right to rescind on the ground of misrepresentation, especially in light of *McLaughlin v Nationwide Mut. Fire Ins. Co.* (*supra*), where the Appellate Division, Third Department, held that an insurer was entitled to rescind a homeowner's policy on the ground of misrepresentation where the insured falsely stated that the premises were owner occupied. Second, even if Paramount did not have grounds to rescind for material misrepresentation (which it did), the policy by its terms did not provide coverage for Ling's injury. The policy essentially provided coverage for property damage or bodily injury occurring at a premises that was an "insured location," i.e., in relevant part, (1) premises "where you [the insured] reside and which is shown as the 'residence premises' in the Declarations or (2) "a two family dwelling where you reside in at least one of the family units and which is shown as the 'residence premises' in the Declarations." Paramount's policy clearly excluded coverage for a premises where Wu and his wife did not reside. (*See, e.g.*, *Marshall v Tower Ins. Co. of New York,* 44 AD3d 1014 [no coverage where the owner did not use the insured premises as his residence]; *Metropolitan Property & Cas. Ins. Co. v Pulido*, 271 AD2d 57 [no coverage where the

owners did not use insured premises as their residence].)

The burden on Paramount's motion shifted to the plaintiffs to produce evidence showing that there is a genuine issue of fact which must be tried. (*See*, *Alvarez v Prospect Hospital*, *supra*.) They failed to carry this burden. First, while the plaintiffs' attorney asserts that Wu's signature on the application was "written in" by an employee of C&M, Wu was shown the application at his deposition, and he identified the signature thereon as his. (Tr. 198-199.) Moreover, Wu does not deny that he received the application, does not deny failing to object to anything stated therein, and does not deny executing the "fraud" statements which also contain representations about owner occupancy. The "General Fraud Statement" read in relevant part: "I shall bear all responsibility for the information given on the application that states that the said property location is Owner-Occupied ***." By signing the "General Fraud Statement," he adopted the representations made in the application concerning owner occupancy. Second, the plaintiffs cannot excuse the misrepresentation about owner occupancy by alleging that they were never "advised" of the requirement of owner occupancy. Wu had the responsibility of reading the application and the related documents, and, by signing them, he became bound by their terms. (*See*, *Precision Auto Accessories, Inc. v Utica First Ins. Co.*, *supra*; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, *supra*.) Third, while proof of the materiality of the misrepresentation may require the submission of, e.g., company guidelines (*see*, *Carpinone v Mutual of Omaha Ins. Co.*, 265 AD2d 752), Paramount cured any deficiency in its proof by submitting a copy of

its Homeowners Underwriting Guidelines attached to a reply affirmation. Moreover, in light of *McLaughlin v Nationwide Mut. Fire Ins. Co.* (*supra*), in light of the "fraud" statements required by the insurer concerning owner occupancy, and in light of the failure of the plaintiffs to submit any evidence to rebut the affidavit of Louis Masucci, extensive documentation by the insurer was unnecessary in this case. Paramount established as a matter of law that the misrepresentation concerning owner occupancy was material, that is, that the insurer would not have issued the policy if it had known the truth. (*See*, *Precision Auto Accessories, Inc. v Utica First Ins. Co.*, *supra*.) Fourth, the plaintiffs contend that C&M actually knew that the plaintiffs did not reside at 42-25 Haight Street at the time that they applied for insurance and that such knowledge should be imputed to Paramount. However, the plaintiffs failed to submit sufficient evidence showing that there is a genuine issue of fact concerning whether C&M was the agent of Paramount. The court notes that (1) the brokerage agreement between C&M and Paramount expressly created an independent contractor relationship, not an agency relationship, and (2) a broker is generally the agent of the insured, not the insurance company. (*See*, *Precision Auto Accessories, Inc. v Utica First Ins. Co.*, *supra*.) Fifth, the plaintiffs failed to rebut Paramount's showing that even if it did not have grounds to rescind on the ground of material misrepresentation, the policy by its terms did not cover 42-25 Haight Street.

The court turns next to C&M's motion. An insurance broker can be held liable in negligence if he does not exercise due care in an insurance brokerage transaction. (*See,*

Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc., 65 AD3d 865; *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792.) C& M showed prima facie that it did not breach any duty of care owed to Wu because he informed the broker that he would live at 42-25 Haight Street. Wu and his wife failed to move into the premises during the fifteen month period from the day he applied for insurance to the day of the fire. The burden on this motion shifted to the plaintiffs to show that there is a genuine issue of fact which must be tried. (*See*, *Alvarez v Prospect Hospital, supra*.) They failed to carry this burden.

Accordingly, that branch of the motion by third-party defendant Paramount for summary judgment dismissing the third-party complaint against it is granted. That branch of the motion by third-party defendant Paramount for summary judgment on its counterclaim is granted. The motion by C&M for summary judgment dismissing the third-party complaint against it is granted. The cross motion by the defendants/third-party plaintiffs for summary judgment on their third-party complaint is denied. The court declares that Paramount has no duty to defend and indemnify in *Zuo Hao Ling* v *Wu*, Index No. 18116/07. The court also declares that C& M has no duty of contribution or indemnification in regard to *Zuo Hao Ling* v *Wu*, Index No. 18116/07.

Short form order signed herewith.

J.S.C.