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SHORT FORM ORDER

COPY

INDEX No. 09-16545
CAL. No. 10-02021CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-18-10
ADJ. DATE 1-20-11
Mot. Seq. # 001 - MG; CASEDISP

URSULA A. HABACKER,	:	STEVEN C. ASKINAS ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	1991 Union Boulevard, Suite B
	:	Bay Shore, New York 11706
	:	
	:	FELDMAN RUDY KIRBY P.C.
ALLSTATE and ROLAND A. JOHNSON,	:	Attorney for Defendants
	:	410 Jericho Turnpike, Suite 315
Defendants.	:	Jericho, New York 11753

Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12 - 14; Replying Affidavits and supporting papers 15 - 16; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Allstate and Roland A. Johnson for an order pursuant to CPLR 3212 dismissing plaintiff's complaint is granted.

The instant action seeks to recover damages which occurred on or about January 12, 2009 at plaintiff's second home, located at 15 South Harbor Drive, Sag Harbor, New York, as a result of water damage from a cracked pipe (loss of heat caused the pipe to freeze and crack). At the time she purchased the Sag Harbor residence, plaintiff was issued a policy of insurance from defendant Allstate through its agent defendant Roland A. Johnson (Johnson). After the January 2009 loss, plaintiff filed a claim with the defendants for the loss she sustained in the amount of $50,000.00. Defendant Allstate denied the claim alleging that it was not covered under the policy of insurance issued to plaintiff. As a result thereof, plaintiff brought this action alleging that defendant Roland A. Johnson failed to secure the proper policy of insurance according to her needs and that defendant Allstate issued an improper policy of insurance as a result of its agent's actions.

Defendants now move for summary judgment dismissing plaintiff's complaint against Allstate on the ground that the policy issued by Allstate was a named peril policy, which covered specific perils named

in the policy but did not cover water damage resulting from a burst or cracked pipe. Defendants request that the complaint be dismissed against defendant Johnson on the grounds that he was an employee of Allstate at the time the policy was issued to plaintiff, that the policy issued to plaintiff for her second home was the only type of policy that Allstate would issue on second homes, that plaintiff never made any request to change the coverage or obtain any other specific coverage for the Sag Harbor premises, and that Johnson had no duty to advise plaintiff regarding her coverage. In support of the motion, defendants submit copies of the pleadings, bill of particulars, policy of insurance, portions of the transcript of plaintiff's deposition, and an affidavit of defendant Johnson.

In March 2010, plaintiff testified at her deposition that the day before she was to close on the Sag Harbor premises she telephoned defendant Johnson and indicated that she needed an insurance policy "right away" for the Sag Harbor property. She went to his office and was given a policy for the closing to be held on January 22, 1997. Defendant Johnson was aware that it was a second home, as he had procured her Allstate homeowner's policy for her primary residence. Plaintiff testified that she did not request any type of specific coverage for the Sag Harbor premises. She indicated that she paid her renewal premium each year after the purchase of the premises and did not speak with Johnson or Allstate regarding the coverage or any change to the coverage after the purchase of the policy in 1997. She did not recall receiving a complete copy of the policy and never requested one from defendants. The pertinent portions of the insurance policy purchased by plaintiff for the Sag Harbor premises state:

> We will cover sudden and accidental physical loss to the property described in **Coverage A–Dwelling Protection, Coverage B– Other Structures Protection** and **Coverage C– Personal Property Protection** except as limited or excluded in this policy, caused by:
>
> 1. Fire or Lightning
>
> 2. Windstorm or Hail
>
> **We** do not cover:
> . . .
>
> 3. Explosion
>
> 4. Riot or civil commotion, including pillage and looting during, and at the site of, the riot or civil commotion.
>
> 5. Aircraft, including self-propelled missiles and spacecraft.
>
> 6. Vehicles.

7. Smoke.

8. Vandalism and Malicious Mischief.
We do not cover...

9. Theft, or damage to personal property caused by attempted theft, including disappearance of property from a known place when it is likely that a theft has occurred. Any theft must be promptly reported to the police.

We do not cover...

10. Breakage of glass which is part of the covered **building structure. We** pay a maximum of $50 for each **occurrence.**

We do not cover...

Losses We Do Not Cover Under Coverages A, B and C:
We do not cover loss to the property described in **Coverage A–Dwelling Protection, Coverage B– Other Structures Protection** and **Coverage C– Personal Property Protection** caused by or consisting of:

1. Flood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.

. . .

Nowhere does the policy indicate that it will cover loss from water damage resulting from broken pipes, and it actually excludes coverage for damage resulting from flooding. Defendant Johnson avers in his affidavit that the policy issued to plaintiff for the Sag Harbor premises "was and is the only policy of insurance that Allstate will write on a second home or a vacation home." He indicated that plaintiff never requested any specific coverage or an alteration in the policy after it was issued and that he was a sales agent for defendant Allstate when the policy was purchased in January 1997.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary

judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

"An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so (*citations omitted*). Thus, the duty is defined by the nature of the client's request (*citations omitted*). Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage" (*citations omitted*) (***Verbert v Garcia***, 63 AD3d 1149, 1149, 882 NYS2d 259, 260 [2d Dept 2009]; ***Loevner v Sullivan & Strauss Agency, Inc.***, 35 AD3d 392, 393, 825 NYS2d 145,146 [2d Dept 2006]; *see* ***Core-Mark International v Swett & Crawford Inc.***, 71 AD3d 1072, 898 NYS2d 206 [2d Dept 2010]). It is incumbent upon the Court to determine the parties' rights and obligations under an insurance policy based upon the specific language of the policy and to enforce the policy according to its terms (*see* ***Tag 380, LLC v Commet 380, Inc.***, 10 NY3d 507, 860 NYS2d 433 [2008]; ***Vermont Teddy Bear Co. v 538 Madison Realty Co.***, 1 NY3d 470, 775 NYS2d 765 [2004]; ***Newin Corp. v Hartford Acci. & Indem. Co.***, 62 NY2d 916, 479 NYS2d 3 [1984]). As opposed to an "all risk" policy which covers all risks of physical loss except those perils which have been specifically excluded, a "named peril" policy covers only those risks which are specifically enumerated (*see* ***Tag 380, LLC v Commet 380, Inc.***, *supra*).

Here, where plaintiff made no specific request for certain coverage and where she was provided with a policy of insurance typically provided for a seasonal or secondary residence, defendants were under no duty to obtain other coverage for her. Defendants have met their burden in establishing that plaintiff's loss was not covered under the named perils in the policy issued by them and that they complied with all duties they owed to plaintiff in that they provided her with a policy of insurance required for her closing as she requested.

In opposition to defendants motion, plaintiff alleges, for the first time, that she requested a policy of homeowner's insurance for her second home in Sag Harbor similar to the one she had for her primary home. She avers in the January 13, 2011 affidavit prepared in opposition to the within motion, that "Prior to the January, 1999 [*sic*] closing I advised the defendant, Johnson, that I needed a policy of insurance for my Sag Harbor house like the one I had for my primary residence. . . I was subsequently advised by defendant, Johnson, that he had meant to advise me years earlier to change policies to obtain one that had water coverage." Plaintiff offers no explanation for the "change" in her testimony (*i.e.*, at her deposition taken ten [10] months earlier she indicated that she did not ask for any specific type of insurance for the property and that she had not spoken to Johnson about a change to her policy). An issue of fact cannot be

created by making self-serving statements in an affidavit which contradict previously sworn testimony without any explanation for the contradictions (*see* ***Zylinski v Garito Contr.***, 268 AD2d 427, 702 NYS2d 86 [2d Dept 2000]; *see also* ***Liberty Mutual Insurance Company v General Accident Insurance Company***, 277 AD2d 981, 716 NYS2d 515 [4th Dept 2002]; ***Miller v Doniger***, 272 AD2d 73, 707 NYS2d 170 [1st Dept 2000]). Plaintiff does not allege fraud, admits that she did not review the policy and relied upon her belief that the loss would be covered. It is clear that plaintiff has failed to raise a triable issue of fact and that summary judgment should be granted to defendants dismissing her complaint (*see,* ***Core-Mark Int. v Swett & Crawford Inc.***, *supra*; ***Brownstein v Travelers Companies***, 235 AD2d 811, 652 NYS2d 812 [3d Dept 1997]).

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: March 17, 2011

W. Gerard Asher
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**