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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

JAMES BERT,
Plaintiff,

- against -

STATE FARM FIRE AND CASUALTY COMPANY,
Defendant.

Index No. 345 2010

Motion Date December 20, 2012

Motion Cal. No. 3

Motion Seq. No. 8

The following papers numbered 1 to 4 read on this motion by defendant State Farm Fire and Casualty Company (State Farm) for renewal of its prior motion for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits(1-8).....	1-3
Opposing Affirmation.....	4
Memorandum of Law.....	
Reply Memorandum.....	

Upon the foregoing papers the motion is determined as follows:

State Farm's motion for leave to renew its prior motion for summary judgment is granted, as it has timely complied with the provisions of this court's order of September 23, 2011.

In March 2002, Shannett Demetrius became the owner of the real property known as 136-12 243rd Street, Rosedale, New York. On March 22, 2002, State Farm issued a

homeowner's policy to Ms. Demetrius which insured the Rosedale property. Said policy provided, among other things, personal liability coverage for said premises.

On October 7, 2004, a fire occurred at the premises and Ms. Demetrius made a claim under the subject insurance policy for property damage. State Farm, in a letter dated March 17, 2005 and addressed to Ms. Demetrius, stated that, based upon information obtained during a recent claims investigation, it had

> "determined that a material misrepresentation had occurred, as you do not reside at the location listed on the above referenced policy, nor were you residing there at the time the application was written. This policy of insurance was issued to you in reliance upon the statements made in the application. If we had known of the facts of the matter at the time, we would have rejected your application and would have declined to issue a policy. Due to this misrepresentation, we are rescinding your policy and exercising our contractual right to void the policy from its inception."

State Farm, in a letter dated March 25, 2005 and addressed to Ms. Demetrius, denied her claim

> "on the fact that the above-captioned policy of insurance has been rescinded. State Farm also bases its denial on the fact that there is no coverage for the loss of October 7, 2004, because the premises at 136-12 243rd Street, Rosedale, NY was not your residence premises. State Farm further bases its denial on your violation of the concealment or fraud condition of the above-captioned insurance policy, and on the misrepresentations made by you in the application for the above captioned insurance policy."

On January 20, 2006, Ms. Demetrius commenced an action in this court entitled *Shannett Demetrius v State Farm Fire and Casualty Company*. The complaint alleged that State Farm's refusal to compensate Ms. Demetrius for property damage arising out of the fire at the Rosedale premises constituted a breach of the insurance agreement. State Farm served an answer and interposed seventeen affirmative defenses. The seventh affirmative defense asserted that the policy is void *ab initio* due to Ms. Demetrius' fraudulent conduct, and the eleventh affirmative defense asserted that there was no coverage under the policy, as Ms. Demetrius did not reside at the premises during the policy period. Neither party sought declaratory judgment with respect to the subject insurance policy. Venue of said action was changed to Nassau County upon consent of the parties, and Index No. 5015/06 was assigned to the matter in that County.

In December 2007, State Farm served a motion in the Nassau County action for summary judgment dismissing the complaint on the grounds that Ms. Demetrius admittedly never resided at the insured location and, therefore, State Farm had notified Ms. Demetrius that it had rescinded the policy, and that there was no coverage under the express terms of the policy. Ms. Demetrius testified at a deposition that when she purchased the Rosedale property, she resided in Florida and, although she intended to move to New York and reside in the Rosedale property, she was unable to do so due to her mother's illness. Ms. Demetrius opposed said motion, and the matter appeared on the motion calendar of March 21, 2008 before the Hon. R. Bruce Cozzens, Jr. Justice Cozzens, in an order dated June 25, 2008, and entered on June 30, 2008, granted State Farm's motion for summary judgment dismissing the complaint based upon the terms of the policy. Justice Cozzens stated, in pertinent part, that "the provisions of the policy are not ambiguous. The 'residence premises' is where you reside (see Policy Definitions, para 10). It is not disputed that the plaintiff did not reside at the insured location."

On October 5, 2007, while the Nassau County action was still pending, James Bert commenced an action in this court entitled *James Bert v Shannett Demetrius* (Index No. 24970/07) to recover damages for personal injuries he sustained while responding to the fire at the Rosedale premises on October 7, 2004. Mr. Bert, a fire lieutenant employed by the New York City Fire Department, sustained severe injuries when a ceiling collapsed on him while he was supervising other firefighters operating a hose line at the Rosedale premises. A default judgment was granted in favor of Mr. Bert on the issue of liability on May 20, 2008.

State Farm's counsel received notice of the action entitled *Bert v Demetrius* (Index No. 24970/07) on June 30, 2008. State Farm, in a letter dated July 11, 2008, informed Ms. Demetrius that the insurance policy:

> "had been rescinded based upon Supreme Court decision Shannett Demetrius, Plaintiff vs. State Farm Fire and Casualty Company, Defendant, bearing index number 5015/2006. Based upon the rescission of the policy, there was no policy in force on the date of the loss noted in the James Bert action. Based on this information, State Farm denies coverage under the subject policy of insurance and will not be providing defense or indemnification of in this matter."

An inquest as to damages was held on December 17, 2008 in the action commenced under Index No. 24970/07; and a judgment was entered on March 26, 2009 in Mr. Bert's favor in the sum of $1,971,558.27. No part of this judgment has been paid.

On January 7, 2010 James Bert commenced the within action against State Farm by filing summons with notice, and a motion for summary judgment in lieu of a complaint to recover the unsatisfied judgment, pursuant to Insurance Law § 3420 (a) (2), and CPLR 3213. The Hon. Lee Mayersohn, in an order dated March 11, 2010, denied plaintiff's motion for summary judgment in lieu of a complaint, and deemed the papers submitted by plaintiff to be the complaint and State Farm's opposing papers to be the answer. Plaintiff's summons contains a notice which states as follows: "On or about October 7, 2004 plaintiff JAMES BERT was seriously injured due to a ceiling collapse at the premises of Shannett Demetrius, an insured of the defendants [sic], sustaining multiple bodily injuries. Plaintiff seeks a declaratory judgment that the defendants [sic] must provide insurance coverage to the plaintiff for the incident." The summons further states that plaintiff seeks the enforcement of a judgment in the amount of $1,971,558.27.

Plaintiff's moving affirmation was converted to a complaint and alleges, in pertinent part, that Mr. Bert, a fire lieutenant with the New York City Fire Department, sustained severe injuries on October 7, 2004, during the course of his employment while supervising firefighters at the Rosedale premises owned by Ms. Demetrius; that at the time of the occurrence the premises were insured by a policy issued by State Farm (Policy Number 56-EC-6416-9); that a default judgment in Mr. Bert's favor was entered against Ms. Demetrius in the sum of $1,971,558.27 on March 16, 2009; that a copy of said judgment and notice of entry was mailed to Ms. Demetrius and State Farm on April 23, 2009; and that the judgment remains unsatisfied. It is further asserted that State Farm was given an opportunity to defend the action against Ms. Demetrius and that it refused to do so; that State Farm retroactively cancelled the subject insurance policy after the fire occurred; and that the insurer should be not be allowed to retroactively investigate its applications for insurance where, as here, it failed to conduct an investigation when it initially issued the policy or shortly thereafter.

State Farm's opposing affirmation was converted to an answer and alleges in pertinent part that the subject policy of insurance was rescinded, *ab initio*, and thus no valid and enforceable policy was in effect on the date of loss. State Farm alleged that it had properly rescinded the policy after learning that Ms. Demetrius had made a material misrepresentation in the policy application regarding her residence at the premises, which – had State Farm been made aware – it would not have issued the subject policy. State Farm stated that it had advised the insured of its reason for rescinding the policy and timely denied any obligation to defend or indemnify Demetrius in connection with the underlying action. State Farm therefore asserted that plaintiff could not conclusively establish that there was a policy in effect on the date of the loss. State Farm also asserted that its rescission the insurance policy and subsequent disclaimer is effective against plaintiff, a judgment creditor, pursuant to Insurance Law § 3420; that State Farm is not estopped from rescinding the policy *ab initio*, or from disclaiming coverage upon its discovery of Ms. Demetrius' misrepresentation; and

that in the event that plaintiff is entitled to recover on the judgment, his recovery against State Farm is limited to the applicable policy limits of $300,000.00 per occurrence.

State Farm's prior motion for summary judgment dismissing the complaint was denied by this court in its order of September 23, 2011, with leave to renew within 30 days, upon submission of: (1) the complaint in the Nassau County action by Ms. Demetrius against State Farm; and (2) an explanation articulating what effect the dismissal of the complaint in that action has on the within action.

State Farm has timely moved for renewal of its motion for summary judgment and has submitted a copy of the pleadings in the Nassau County action. State Farm states that, with respect to the Nassau County action, it only moved on its eleventh affirmative defense and that "although Justice Cozzens found that Demetrius did not reside at the insured premises, he did so only in connection with determining whether there was first-party coverage under the terms of the policy, as written." State Farm further states that the issue of the validity of its rescission of the insurance policy was not the subject of its motion in the Nassau County action. It is therefore asserted that the issue before this court is whether State Farm is obligated to satisfy plaintiff's judgment and provide coverage in connection with the third-party claim, where the policy was rescinded *ab initio* due to Ms. Demetrius' material misrepresentation in her policy application.

State Farm asserts that it is entitled to summary judgment as a matter of law, as it has established it rescinded the insurance policy *ab initio* based on Ms. Demetrius' material misrepresentation in the policy application that the premises were owner-occupied, and therefore plaintiff cannot recover on his judgment against Ms. Demetrius. It is further asserted that plaintiff has failed to submit any proof to rebut this showing or demonstrate that the rescission was improper. In the alternative, State Farm argues that, even if it is determined that plaintiff were entitled to recover, recovery is limited to the policy limit of $300,000.00 per occurrence.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue

of fact or demonstrate an acceptable excuse for his failure to do so (*Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [1989]). The opponent must assemble, lay bare and reveal his or her proof in order to establish that the matters set forth in the pleading are real and capable of being established at a trial (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant a court as a matter of law to direct judgment in favor of any party (CPLR §3212 [b]).

"To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy" (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2011]; *see Novick v Middlesex Mut. Assur. Co.*, 84 AD3d 1330 [2011]; *Varshavskaya v Metropolitan Life Ins. Co.*, 68 AD3d 855 [2009]; *Schirmer v Penkert*, 41 AD3d 688 [2007]; *Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713 [2001]). A misrepresentation is considered material if it can be shown that the insurer would not have issued the policy had it known the facts misrepresented (Insurance Law § 3105 [b]; *Interboro Ins. Co.*, 89 AD3d at 994; *Novick*, 84 AD3d at 1330). Further, "[t]o establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*Schirmer*, 41 AD3d at 690-691).

In the case at bar, State Farm established, prima facie, that Ms. Demetrius had made a misrepresentation of fact when she indicated that the premises to be insured was to be owner-occupied. Ms. Demetrius admitted that she never resided in the Rosedale property, despite the insurance application which represented to the insurer that she was to reside there. State Farm further demonstrated that such misrepresentation was material by submitting the affidavit of its Underwriter and the attached Underwriting Guidelines. These submissions establish that: (1) State Farm issued the policy based on Ms. Demetrius' misrepresentation regarding her occupancy status; (2) the Underwriting Guidelines required that the insured reside at the property in order to qualify for homeowner's insurance; and (3) State Farm would have denied her application had it been informed that Ms. Demetrius would not be residing at the Rosedale property. Accordingly, as noted above, State Farm had the right to rescind the policy, rendering it void *ab initio*.

Moreover, the effect of Ms. Demetrius' material misrepresentations certainly affect plaintiff as a third-party claimant. As seen by Justice Cozzens' decision (whether same is interpreted as there being no coverage under the policy or there being no policy in place), Ms. Demetrius – the insured – was not entitled to recover against State Farm due to her occupancy status. To that end, neither is plaintiff permitted to recover as a third-party claimant. Stated plainly:

> "A judgment creditor seeking to enforce a policy insuring the judgment debtor against liability stands in the shoes of the insured and can recover against the insurer only if the insured could recover under the terms of the policy. Stated differently, his or her rights against the insurer can be no greater than those of the insured. Such person stands only upon the terms of the policy and, therefore, cannot recover against the liability insurer unless the insured could have recovered had he or she paid the judgment and sued the company.
>
> "The statute giving the injured person, after judgment, the right to proceed against the insurer upon the policy [Insurance Law 3420 (a) (2), upon which plaintiff bases his action herein] does not increase the rights of the injured person over those of the insured. Thus, although by virtue of the statute a judgment creditor has the right to proceed against an insurer when his or her judgment remains unsatisfied for 30 days, the right of action thus given, nevertheless, is no greater than that given to the insured" (70A NY Jur 2d, Insurance § 2140; *see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990]; *Spadaro v Newark Ins. Co.*, 21 AD2d 226 [1964], *affd* 15 NY2d 1000 [1965]).

In opposition to the motion, plaintiff argues that State Farm "should not be able to retroactively investigate applications to rescind insurance policies because this creates an incentive for all insurance companies to rescind policies for errors in applications when a modest amount of investigation before issuing the policy or at the policy's birth would unearth these easy to find facts." The court finds this contention to be without merit. First, it is unclear what type of further investigation was required by State Farm prior to issuing the policy. Ms. Demetrius' application clearly stated that the Rosedale property was to be owner occupied. More importantly, Ms. Demetrius herself testified that, at the time she sought insurance, she believed that statement to be true, and she intended to reside there. Whether or not, inter alia, Ms. Demetrius filled out the application herself, and whether or not there was other information on the application that was incorrect, does not change the fact that the policy was rescinded because Ms. Demetrius did not reside in the Rosedale property. Moreover, while plaintiff argues that there was no material misrepresentation made at the time the policy was issued since Ms. Demetrius had all intentions of residing there, the Appellate Division, Second Department, has made clear that "[t]he plaintiff's mere intention to reside at the premises [is] insufficient to satisfy the policy's 'residence premises' requirement" (*see Vela v Tower Ins. Co. of N.Y.*, 83 AD3d 1050 [2011]). Further, the fact that State Farm may have indeed issued a different policy for her purposes is also irrelevant (*see Carpinone v Mutual of Omaha Ins. Co.*, 265 AD3d 752 [1999]; *see also* Insurance Law § 3105 [referring to the right of the insurance company to avoid a contract when a

misrepresentation would have resulted in the refusal to make "such contract" as opposed to "any contract"]).

Accordingly, State Farm's motion for leave to renew its prior motion for summary judgment is granted, and upon renewal, State Farm's motion for summary judgment dismissing the complaint is granted.

Dated: March 29, 2012

J.S.C.