Wikso v Tri-State Consumer Ins. Co.
2014 NY Slip Op 32210(U)
August 5, 2014
Sup Ct, Suffolk County
Docket Number: 10-13823
Judge: Jeffrey Arlen Spinner

[* 1]

SHORT FORM ORDER

INDEX No. 10-13823

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 11-13-13 (#002)
MOTION DATE 11-19-13 (#003)
MOTION DATE 12-4-13 (#004 & #005)
MOTION DATE 1-29-14 (#006 & #007)
MOTION DATE 4-23-14 (#008)
ADJ. DATE 5-14-14
Mot. Seq. # 002 - MG # 005 - MotD
003 - MD # 006 - MD
004 - MD # 007 - MD
008- MG

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JAMES K. WIKSO and ANDREA WIKSO,

Plaintiffs,

- against -

TRI-STATE CONSUMER INSURANCE COMPANY and GREGORY FORAY AGENCY, INC., and FORAY AGENCY, INC.,

Defendants.

WILLIAM J. GRAHAM, P.C.
Attorney for Plaintiffs
982 Montauk Highway, Box 4
Bayport, New York 11705

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant Gregory Foray Agency
1133 Westchester Avenue
White Plains, New York 10604

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TRI-STATE CONSUMER INSURANCE COMPANY,

Third-Party Plaintiff,

- against -

FORAY AGENCY, INC.,

Third-Party Defendant.

RHONDA H. BARRY, ESQ.
Attorney for Defendant/Third-Party
Plaintiff Tri-State Consumer Insurance
2 Robbins Lane, Suite 200
Jericho, New York 11753

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP
Attorney for Defendant/Third-Party
Defendant Foray Agency, Inc.
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Upon the following papers numbered 1 to 227 read on these motions and cross motions for summary judgment, to compel discovery ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25, 40 - 61, 124 - 141, 158 - 171, 176 - 202 ; Notice of Cross Motion and supporting papers 78 - 88, 97 - 117 ; Answering Affidavits and supporting papers 28 - 37, 64 - 75, 89 - 94, 142 - 147, 150 - 153, 204 - 208, 211 - 222 ; Replying Affidavits and supporting papers 38 - 39, 95 - 96, 122 - 123, 154 - 155, 156 - 157, 174 - 175, 223 - 227 ; Other memoranda of law 26 - 27, 62 - 63, 76 -77, 118 - 121, 148 - 149, 172 - 173, 203, 209 - 210 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (#002) by defendant Gregory Foray Agency, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' third cause of action, the sole cause of action asserted against it, and all cross claims against it, is hereby granted, and it is further

ORDERED that the motion (#003) by the plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment as to the liability of the defendant Tri-State Consumer Insurance Company is denied; and it is further

ORDERED that the motion (#004) by the defendant Tri-State Consumer Insurance Company for an order striking the answer of the defendant Gregory Foray Agency, Inc. or, in the alternative, compelling said defendant to provide it with the documents and information requested in its Post EBT Demand dated May 7, 2013, is denied, and it is further

ORDERED that the motion (#005) by the defendant Tri-State Consumer Insurance Company for an order pursuant to CPLR 3212 granting summary judgment dismissing the claims for property damage and contents coverage made by the plaintiff Andrea Wikso and for a judicial declaration that it has no obligation to provide the plaintiffs with insurance coverage for their contents claims, and pursuant to CPLR 3126 dismissing the complaint in its entirety for the plaintiffs failure to comply with outstanding discovery or, in the alternative, compelling the plaintiffs to produce said discovery, is granted to the extent that the claims made by the plaintiff Andrea Wikso are dismissed and the defendant Tri-State Consumer Insurance Company is entitled to a declaration that it has no obligation to provide the plaintiffs with insurance coverage for their contents claims, and is otherwise denied; and it is further

ORDERED that the motion (#006) by the defendant Tri-State Consumer Insurance Company for an order pursuant to CPLR 3126 compelling the defendant Foray Agency Inc. to provide responses to its discovery demands, and for an order compelling the accountants for the plaintiff James K. Wikso to comply with a subpoena duces tecum served upon them and to appear for a nonparty witness examination before trial is denied; and it is further

ORDERED that the motion (#007) by the defendant Tri-State Consumer Insurance Company for an order finding nonparty Lori Gardini, also known as Lori Gardini Wikso and Lori Wikso, in contempt for failing to obey a subpoena to appear for an examination before trial, fining her accordingly, and precluding the plaintiff for offering the testimony of the aforesaid nonparty witness at trial or otherwise, is denied; and it is further

ORDERED that the motion (#008) by the defendant Foray Agency, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' third cause of action and all cross claims against it, and dismissing the third-party complaint against it, is hereby granted.

This is an action to recover damages allegedly sustained by the plaintiffs arising from a fire in a single-family residence located at 1134 Joselson Avenue, Bay Shore, New York (the premises). The fire, which occurred on September 9, 2009, appears to have started in the basement of the dwelling causing damage to the building and destroying much of the personal property of the plaintiff Andrea Wikso (Andrea Wikso). It is undisputed that the plaintiff James K. Wikso (Wikso) obtained title to the premises in May 2006, and that he transferred title to the James K. Wikso Revocable Trust on September 25, 2008. At the time of the fire the home was insured by the defendant Tri-State Consumer Insurance Company (TSC) pursuant to its policy of insurance bearing number HOP-134467-01, effective August 21, 2009 to August 21, 2010 (the policy). After Wikso filed a claim under the policy, TSC purportedly discovered improprieties on the part of Wikso, and disclaimed coverage alleging, among other things, that Wikso did not have an insurable interest in the premises, and that Wikso made material misrepresentations in his application for insurance coverage. On April 13, 2010, the plaintiffs commenced this action setting forth three causes of action. The plaintiffs' first cause of action seeks a declaration that TSC is liable to them under the contract of insurance. The second cause of action seeks damages for TSC's alleged breach of contract. In their third cause of action against the defendants Foray Agency, Inc. (FA) and Gregory Foray Agency, Inc. (GFA), the plaintiffs' allege, among other things, that said agencies were negligent in processing Wikso's application for insurance coverage for the premises.

The following additional facts are undisputed by the parties to this action: the premises was insured by Allstate Insurance Company (Allstate) until August 21, 2009. Prior to that date, Wikso received a notice from Allstate that it would not re-new the existing policy, and Wikso submitted an application for insurance with TSC in early August 2009. He went to the offices where FA and GFA were located, and spoke with Katherine Houlihan (Houlihan) who asked him questions regarding the TSC application and entered those answers into the computer system used to process TSC applications. Based on those answers, TSC issued an insurance policy for the premises in Wikso's name.

The parties heatedly dispute almost every remaining issue herein. In that regard, it is deemed appropriate to set forth a non-exhaustive summary of the contentions of the parties. The plaintiffs contend that Houlihan, an employee of either FA or GFA, failed to elicit proper information from Wikso, or ignored the significance of his statements to her, regarding the application for insurance. The plaintiffs contend that TSC improperly denied their claim for damage to the premises and for the loss of Andrea Wikso's personal property, and failed to follow its own policies and procedures. TSC contends that Wikso does not own the insured premises, did not occupy the premises as his primary residence at the time of the loss, failed to disclose that he owned another residence, and operated a business out of the premises. TSC further contends that Andrea Wikso, the sister of Wikso, is not an insured under the policy. GFA contends that Houlihan is not its employee, and that it was not the agency with which Wikso dealt in making the application for insurance.

GFA's motion for summary judgment (#002)

GFA now moves for summary judgment dismissing the plaintiffs' third cause action and all other claims and cross claims against it. The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

In support of its motion, GFA submits the pleadings, the affidavit of its sole shareholder, the deposition transcripts of the parties and a nonparty witness, and various documents relevant to the issues herein. Gregory Foray was deposed on April 3, 2013, and he submits an affidavit dated October 17, 2013 in support of GFA's motion. His testimony and the statements in his affidavit are essentially the same, and can be summarized as follows: he is the president and sole shareholder of GFA. His corporation does not have any employees, and shares office space with FA. However, the two corporations have separate "books of business," separate bank accounts, and do not share insurance brokerage commissions. GFA uses the phone and internet service at the office space shared with FA, and those are billed to and paid by FA. In his affidavit, Gregory Foray states that he was never an owner or shareholder of FA, that Wikso was never a client of GFA, and that he did not agree to procure insurance for Wikso. He indicates that GFA did not receive an earned commission or any compensation regarding Wikso, that it was not the broker of record for the TSC policy, and that GFA did not share in any commission paid by TSC to FA or any other entity. At his deposition, Gregory Foray testified that he did not have a conversation with Houlihan regarding Wikso's application for insurance, that Houlihan did work for both GFA and FA, and that his agency did not pay anything to Houlihan. He stated that the declaration page for the TSC policy indicates that his brother Stephen Foray, owner of FA, was the broker of record for Wikso, that FA was the broker on Wikso's Allstate policy, and that when an existing client needs other insurance they stay with the broker in the office which dealt with the original policy.

At his deposition[1], Stephen Foray testified that he is the president and sole shareholder of FA, that Houlihan was employed by FA, and that he did not believe that GFA had any employees. He stated that, based on the e-mail address noted there, the TSC insurance application was done at FA, and that the

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[1] Only those portions of Stephen Foray's testimony relevant to the issues raised in this motion are summarized here.

amended declaration page for the TSC policy indicates that he was the broker of record, meaning that FA, his agency, is the broker on this policy.

Among the documents submitted by GFA are a series of letters from FA to Wikso, signed by Stephen Foray, advising him that his Allstate policy for the premises has been changed or renewed. Said letters refer to the Allstate policy and its renewals effective from August 21, 2005 to August 21, 2009. In addition, GFA submits a copy of the application for insurance submitted to TSC on Wikso's behalf which indicates that the agency name is Stephen Foray, and a copy of the declaration page attached to the TSC policy which indicates that the broker of record is Stephen Foray.

Here, GFA has established its entitlement to summary judgment dismissing the complaint and all cross claims against it. The plaintiffs' third cause of action against GFA alleges that it acted negligently in processing Wikso's insurance application. The plaintiffs have not opposed the motion, and counsel for GFA indicates in his affirmation that counsel for the plaintiffs has indicated his intention to discontinue against his client. TSC's cross claim against GFA essentially consists of its allegation that GFA "negligently or in breach of warranty or contract caused, in whole or in part, the events for which [the plaintiffs] in this action [seek] damages." Thus, it is incumbent upon TSC, the nonmoving party, to produce evidence in admissible form sufficient to require a trial of the material issues of fact regarding it cross claim (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*).

In opposition to GFA's motion, TSC submits, among other things, the deposition testimony of Wikso, Gregory Foray and Houlihan, a copy of a business card with Houlihan's name thereon, and a copy of its motion (#004) which seeks to strike the answer of GFA on the ground that GFA has failed to produce certain discovery[2]. At her deposition, Houlihan testified that she was employed by the Foray Agency for ten years ending in January 2010, and that she reported to Gregory and Stephen Foray. She stated that Stephen Foray "let her go" in 2010 for economic reasons. During 2009, her duties at the Foray Agency included selling Allstate and TSC insurance policies, and assisting customers with the on-line application for TSC insurance. She indicated that she would ask customers the questions listed on the application. However, she did not recall meeting with, or speaking with, Wikso. She did not recall if she asked Wikso whether he lived in the premises, whether he owned another residence, or who owned the premises. Houlihan further testified that her name appears on the completed insurance application indicating that she "did the application," and that the application indicates that the agency writing the TSC policy was Stephen Foray. When shown a business card, she acknowledged that it was her business card for GFA. She did not recall if she had business cards for both FA and GFA.

At his deposition[3], Wikso testified that he received a letter from Allstate indicating that it was not renewing his insurance policy for the premises, that he contacted the "Foray Agency," and that he went to their offices in early August 2009 and spoke with Houlihan. He indicated that Houlihan asked him

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[2] Having reviewed TSC's motion (#004), the Court has determined that it does not affect the outcome of the instant motion.

[3] Only those portions of Wikso's testimony relevant to the issues raised in this motion are summarized here.

questions, recorded his answer on her computer, and did not give him anything to sign. He stated that he did not recall ever speaking with Gregory Foray, or ever dealing with GFA specifically. Wikso further testified that he only met with Houlihan that one time, that he did not recall whether he saw her business card before the day of his deposition, and that Houlihan "could ... have given me [a business card], yeah. I don't recall seeing it." He indicated that "[i]n all likelihood, she did give me a business card ..."

In his affirmation in opposition to the motion, counsel for TSC contends that "if [GFA] procured or assisted in procuring any insurance from [TSC] on behalf of [Wikso] it did have a duty to plaintiffs" to do so properly, and that there are issues of fact concerning GFA's liability on an "alter ego" theory and an apparent authority theory. TSC has failed to raise an issue of fact regarding GFA's duty to Wikso and its involvement in the subject insurance application process. The sole basis of TSC's argument in this regard is Houlihan's GFA business card produced by Wikso. However, Wikso's testimony does not establish that Houlihan gave him said business card, nor does it negate the possibility that Wikso picked up the card on his own without Houlihan's knowledge. Under the circumstances, the fact that Wikso was in possession of the business card does not create an issue of fact regarding Houlihan's employment status while working to complete the insurance application.

In addition, Wikso's testimony establishes that GFA cannot be found liable to the plaintiffs on the theory that Houlihan had apparent authority to act on its behalf. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third-party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (***Standard Funding Corp. v Lewitt***, 89 NY2d 546, 551, 656 NYS2d 188 [1997], quoting ***Hallock v State of New York***, 64 NY2d 224, 231, 485 NYS2d 510 [1984]). "The agent cannot by his own acts imbue himself with apparent authority" (***Hallock v State of New York***, *id.*). In addition, the existence of apparent authority depends upon a factual showing that the third-party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal, not the agent (*see* ***Standard Funding Corp. v Lewitt***, 89 NY2d 546, 678 NE2d 874 [1997]). Wikso testified that he did not recall seeing said business card at the time that he visited the offices shared by FA and GFA to complete the subject insurance application. Thus, even if Houlihan erroneously handed him the subject business card, Wikso did not rely upon that fact in completing the insurance application, and her error should not be imputed to GFA.

Finally, TSC's contention that GFA can be held liable herein on an "alter ego" theory is without merit. While it has been established that GFA shares office space, equipment and at least one employee with FA, that does not establish that the corporate existence of the two entities should be ignored under the facts and circumstances herein. The doctrine of "piercing the corporate veil" requires that the corporate entity has an underlying obligation to the plaintiff (***Matter of Morris v New York State Dept. of Taxation and Fin.***, *supra*; ***ARB Upstate Communications LLC v R.J. Reuter, LLC***, 93 AD3d 929, 940 NYS2d 679 [3d Dept 2012]; ***Matter of Moak***, 92 AD3d 1040, 938 NYS2d 648 [3d Dept 2012]). Moreover, a plaintiff must establish that the defendant corporation, even if liable in damages to the plaintiff, was the instrument of fraud or wrongful or inequitable consequences (***TNS Holdings, v MKI Sec. Corp.***, 92 NY2d 335, 680 NYS2d 891 [1998]; ***Cobalt Partners, L.P. v GSC Capital Corp.***, 97 AD3d 35, 944 NYS2d 30 [1st Dept 2012]; ***Colonial Sur. Co. v Lakeview Advisors, LLC***, 93 AD3d

1253, 941 NYS2d 371 [4th Dept 2012]; *see also* ***Damianos Realty Group, LLC v Fracchia***, *supra*; ***Millennium Constr., LLC v Loupolover***, *supra*).

Here, TSC has failed to raise an issue of fact whether GFA owed any obligation to the plaintiffs, whether GFA was involved in any manner in Wikso's attempt to procure insurance from TSC, or that GFA is or will be an instrument of fraud, or wrongful or inequitable consequences as to the plaintiffs. Accordingly, GFA's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The plaintiffs' motion for summary judgment against TSC (#003)

The plaintiffs now move for partial summary judgment on their first and second causes of action against TSC. In support of their motion, the plaintiffs submit, among other things, the pleadings, the deposition transcripts of Wikso and TSC's representative, the policy, TSC's insurance underwriting guidelines, and TSC's letters denying coverage dated January 12, 2010 and April 26, 2010. At his deposition, Wikso testified that he conducted business as a sole proprietor doing construction work from 1989 until he incorporated the business in 2011. He indicated that he had a home office for his business on the first floor of the premises starting from the time that he moved into the premises in 2003, and that his business telephone line was the only phone that he maintained at the premises. Approximately one to two weeks before the basement fire on September 9, 2009, he had moved the home office into the basement. He stated that he did not have clients or vendors visit him at his home office, that his business did not have any employees, and that he stored his construction tools in sheds located in the backyard of the premises. Wikso further testified that his mother had purchased the home in 2003, that she had transferred it to him sometime in 2006, and that he had transferred it to the James K. Wikso Revocable Trust (Trust) on September 25, 2008. He indicated that he purchased a second property located at 11 Aldrich Court, Bay Shore, New York (Aldrich) in June 2008, that he did not live in Aldrich before the date of the fire, and that his fianceé and her daughter moved into Aldrich in November 2008. He stated that he stayed at Aldrich to keep his fianceé company less than ten times between the time he purchased Aldrich and the date of the fire, and that they were married on July 11, 2010. Wikso acknowledged that he transferred title in Aldrich to his fianceé and himself in September 2008, and that the deed which he signed indicated that his address was at Aldrich. He explained that he "didn't prepare this document." Wikso further testified that his sister, Andrea Wikso, moved into the premises with him after their mother died in 2006, and that she moved into the basement while he lived on the first floor. He described the basement as consisting of, among other things, one bedroom, and he declared that he brought his personal property down into the basement for storage "when I did renovations upstairs." He recounted his experience in applying for insurance with TSC after Allstate decided not to renew his policy, including his meeting with Houlihan. He stated that Houlihan asked him who owned the property, and that he initially answered that he did, but that later on he mentioned that the Trust owned the premises. He indicated that Houlihan's response was that it did not matter. Houlihan also asked him if anyone else lived with him at the premises and he told her that his sister was living there. He did not recall if she asked him if he owned another property. After the meeting with Houlihan, he received the TSC policy in the mail. Wikso further testified that he filed a claim after the fire, that he did not recall if it was called a proof of claim, and that he received a letter dated January 12, 2011 from TSC denying his claim.

Susan Most (Most) was deposed on October 9, 2012, and her deposition continued on February 13, 2013. She testified that she was employed by TSC in operations, that she had previously worked in the homeowners underwriting department, and that she did not recall if she performed the underwriting work on Wikso's insurance application. She indicated that pages 13 to 19 of TSC's underwriting guidelines would be reviewed to determine whether TSC was willing to accept the risk of insuring Wikso's premises, and she explained the workings of the TSC e-filing system used by agents to complete applications for insurance. She stated that agents are instructed not to complete an application without direct input from the customer, and that there are two ways in which TSC learns that there are errors in an application. One, is when the customer is sent a printed application to sign and return to the company with corrections, the other is when a fire or other loss occurs. Most further testified that because the subject fire occurred, and a cancellation notice went out shortly thereafter, she did not know if a printed application was sent to Wikso for his review. She stated that the underwriting guidelines require an insured premises to be owner occupied, and that, where business is conducted in the premises, TSC would decline to issue a policy. She indicated that Andrea Wikso would not be an insured under the policy because Wikso was not living at the premises, and that TSC would not have issued the policy if it had known that the Trust owned the premises or that Wikso owned another parcel of residential property. She acknowledged that the underwriting guidelines do not include any instructions regarding trusts, that she did not know if TSC learned that business visitors had been to the premises prior to the fire, and that she did not know how TSC's claims department received information that tenants had been living at the premises. She further acknowledged that the underwriting guidelines do not limit the number of properties owned by an insured as long as the insured premises is owner occupied, that a home office would be acceptable as long as no clients visited the premises, and that the storage of tools would be acceptable as long as no workers came to the premises to pick up those items.

The letter dated January 12, 2010 denying Wikso's claim essentially indicates, among other things, that the reason for the denial of coverage is that Wikso was not living in the premises. It is undisputed that TSC's underwriting guidelines provide that "The homeowner/ insured must live in the house, and the insured premises must be the homeowner/insured's primary residence. It is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement (***York Restoration Corp. v Solty's Const., Inc.***, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; ***Stillwater Cent. School Dist. v Great Am. E & S Ins. Co.***, 66 AD3d 1260, 887 NYS2d 719 [3d Dept 2009]; ***National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.***, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006]; ***Kidalso Gas Corp. v Lancer Ins. Co.,*** 21 AD3d 779, 802 NYS2d 9 [2005]; ***Moleon v Kreisler Borg Florman Gen. Const. Co.***, 304 AD2d 337, 758 NYS2d 621 [1st Dept 2003]).

Here, the plaintiffs have failed to establish their entitlement to partial summary judgment herein. There are issues of fact regarding where Wikso was living at the time he filed his application for insurance with TSC, during the renovations to the premises, and at the time of the fire. The failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In any event, TSC's opposition papers raise additional issues of fact whether Wikso occupied the premises. The deposition testimony of nonparty witness Jamie Winkler, Wikso's real estate broker,

establishes that Wikso placed the premises on the rental market one week before the fire. Accordingly, the plaintiffs motion for summary judgment is denied.

TSC's motion to strike GFA's answer or compel discovery (#004)

In light of the determination granting summary judgment dismissing the complaint and all cross claims against GFA, and for the reasons stated above, this motion is deemed academic. In addition, counsel for TSC submits an affirmation of good faith which is essentially identical to the affirmation submitted in support of its motion (#005) seeking discovery from the plaintiffs. For the reasons stated below, the affirmation submitted herein is deemed deficient.

TSC's motion for summary judgment dismissing the plaintiffs' claims for property damage and dismissing the plaintiffs' complaint for failure to provide discovery (#005)

That branch of TSC's motion which seeks to dismiss the plaintiffs' complaint for failure to provide discovery is denied. Summary denial of motion #004 is mandated as TSC failed to provide a sufficient affirmation of a good faith effort to resolve the issues raised by the motion (*see* Uniform Rules for Trial Cts. [22 NYCRR 202.7 [a]). Such an affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Cts [22 NYCRR 202.7 [c]). Here, the subject affirmation merely provided that counsel for TSC "had an oral conversation with counsel for defendant, [GFA] ... to obtain such discovery" during two court conferences and that "such efforts were unsuccessful." Said affirmation does not indicate the nature of those "conversations," or indicate that there was any effort made on those occasions to resolve the parties' discovery dispute, but only to advise his adversary that the disclosure was outstanding. "The burden is on the party seeking sanctions based on disclosure issues to comply with Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a][2] and [c]. If the moving defendants did not confer with the opposing parties counsel, they should have set forth their reasons for not doing so in the affirmation. The court should not be left to wonder whether any consultation with opposing parties counsel occurred, or be compelled to assume the reasons why no consultation occurred" (***Hutchinson v Langer***, 25 Misc 3d 1235[A], 2009 NY Slip Op 52427U [Sup Ct, Kings County 2009]). The submitted affirmation is deficient (*see* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]).

In addition, TSC now moves for summary judgment dismissing Andrea Wikso's claim for property damage and contents coverage and for a judicial declaration that it has no obligation to provide the plaintiffs with insurance coverage for their contents claims. The gravamen of TSC's contentions is that the plaintiffs failed to provide an inventory of their personal property damaged in the fire within a reasonable time, and that they failed to timely file a sworn proof of loss. In support of its motion, TSC submits, among other things, the pleadings, an affidavit from Most, the policy, and a copy of a fact sheet submitted by Wikso.

In her affidavit supplementing her deposition testimony, Most swears that "[i]n September 2009, it was [TSC's] practice and procedure that upon being notified of a ... claim by its insured, a document

entitled 'Fact Sheet' and an attached inventory sheet were forwarded to the named insured." She states that the fact sheet includes the written advisory to the insured that "the inventory sheet must be returned with the fact sheet," and that her review of the TSC claims file "recites that ... our office mailed to [Wikso] ... a fact sheet and inventory sheet." She indicates that her office received a completed fact sheet from Wikso on September 16, 2010, and that her review of the claims file "recites that our office did not receive a completed inventory sheet with the [completed] fact sheet." Most further swears that, at no time prior to the commencement of this action was TSC notified that Andrea Wikso was making any claim under the policy, or that either plaintiff was making a claim for damage to their personal property. She states that because the fact sheet only set forth a building damage claim, TSC retained a company to appraise that damage, and did not investigate any contents or personal property damage. She indicates that TSC received a list of contents that were allegedly damaged in the fire "over three years after the loss," after it was impossible to confirm the replacement cost and/or actual cash value, and that TSC has been prejudiced by the plaintiffs' failure to provide an inventory of damaged personal property "within sixty (60) days of [TSC's] request."

The fact sheet signed by Wikso and dated September 14, 2009 contains the following statement beneath the signature line: "Kindly Complete The Attached Inventory Sheet Which Has To Be Returned With This Form." The fact sheet also contains the following handwritten response to the request for a brief description of the circumstances surrounding the loss: "A fire started in the basement and destroyed the basement[,] the back wall, and part of the 1st Fl[oor]. cause of fire undetermined." The policy, Form HO-4 Ed. 1-10, Section I - Conditions[4] provides, in pertinent part:

> B. Duties after loss.
>
> In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an insured seeking coverage, or a representative of either:
>
> 1. Give prompt notice to us or our agent;
>
> * * *
>
> 6. Prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;

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[4] The record reveals that the policy form set forth in TSC's motion and quoted herein appears to be an amended version of the policy. However, the correct policy form attached to the plaintiffs motion for summary judgment (#003) and FA's motion for summary judgment (#006), Bates stamped and exchanged by the parties, contains the identical language. The parties have not raised the issue, and the error is not fatal nor does it result in prejudice to any party. In addition, the error does not alter the substantive issues herein.

* * *

> 8. Send to us within 60 days after our request, your signed sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> * * *
>
> f. The inventory of damaged personal property described in 6. above;

Where the provisions of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning (***White v Continental Cas. Co.***, 9 NY3d 264, 848 NYS2d 603 [2007]; ***Marshall v Tower Ins. Co. of N.Y.***, 44 AD3d 1014, 845 NYS2d 90 [2d Dept 2007]; ***Hiraldo v Allstate Ins. Co.***, 8 AD3d 230, 778 NYS2d 50 [2d Dept 2004], *affd* 5 NY3d 508, 806 NYS2d 451 [2005]). Courts may not vary the terms of an insurance contract to accomplish their notions "of abstract justice or moral obligation, since 'equitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against'" (***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *quoting* ***Weinberg & Holman, Inc. v Providence Washington Ins. Co.***, 254 NY 387, 391, 173 NE 556 [1930]; *see* ***Government Empls. Ins. Co. v Kligler***, 42 NY2d 863, 392 NYS2d 777 [1977]).

Here, it is determined that the plain meaning of the policy requires the insured to provide an inventory upon the request of the insurer pursuant to Section B (6), and/or a sworn proof of loss with an inventory pursuant to Section B (8). The failure of the plaintiffs to provide said inventory, or any other notice that they intended to make a claim for damage to their personal property, within a reasonable time constitutes a breach of the contract of insurance which prejudiced the ability of TSC to investigate and defend the claim (***Briggs Ave. LLC v. Ins. Corp. of Hannover***, 11 NY3d 377, 870 NYS2d 841 [2008]; ***Sevenson Envtl. Servs. Inc. v Sirius Am. Ins. Co.***, 64 AD3d 1234, 883 NYS2d 423 [4th Dept 2009]). Thus, TSC has established its prima facie entitlement to summary judgment herein regarding the plaintiffs' failure to provide an inventory of the alleged damage to their personal property until approximately three years after the loss, and well after the time in which the insurer would have been able to determine the replacement cost and/or actual cash value of that property. TSC has failed to establish its entitlement to summary judgment on the ground that the plaintiffs failed to provide a sworn proof of loss herein, as there is no evidence that it gave the plaintiffs written notice and a suitable blank form pursuant to Insurance Law 3407. In addition, it is undisputed that Andrea Wikso does not have an ownership interest in the premises and that she cannot maintain a cause of action for property damage hereto.

Having established its entitlement to summary judgment dismissing Andrea Wikso's claim for property damage coverage and the plaintiffs' claims for contents coverage, it is incumbent upon the plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition, counsel

for the plaintiffs merely contends that TSC did not demand a proof of loss from the plaintiffs and that the Most affidavit does not say that forms were mailed to Wikso, only that it was TSC's practice to do so. It is undisputed that the fact sheet received and returned signed by Wikso expressly requests the return of an inventory sheet. The plaintiffs have failed to submit any evidence to raise an issue of fact regarding their failure to submit a claim for contents coverage or an inventory sheet within a reasonable time under the circumstances. Accordingly, TSC's motion to dismiss Andrea Wikso's claim for property damage and contents coverage and for a judicial declaration that it has no obligation to provide the plaintiffs with insurance coverage for their contents claims is granted.

TSC's motion for an order compelling FA to provide discovery and compelling nonparty Silva & DiMarco, LLP to comply with its subpoena duces tecum and to appear for a deposition (#006)

That branch of TSC's motion which seeks an order compelling FA to provide responses to its demands dated July 8, 2013 and August 29, 2013 is denied. Counsel for TSC submits an affirmation of good faith which is essentially identical to the affirmations submitted in support of its motions #004 and #005 seeking discovery from GFA and the plaintiffs respectively. For the reasons stated above, the affirmation submitted herein is deemed deficient.

TSC now moves for an order compelling Silva & DiMarco, LLP (S&D), the accountants for Wikso, to appear for a deposition and to produce unredacted copies of Wikso tax returns. TSC contends that "the location of Wikso's primary residence is crucial," and that Wikso's tax returns will indicate whether he took a "home office deduction" on his tax return prior to the fire. Counsel for TSC contends that Wikso's failure to take such a deduction "constitutes evidence that the plaintiff did not reside" at the premises. TSC acknowledges that Wikso has exchanged redacted copies of his tax returns which indicate that he took "some item of depreciation as a deduction on his tax returns." TSC contends that if the depreciation was taken on the premises it would constitute evidence that the premises was an investment property, and not Wikso's primary residence.

In opposition to this branch of TSC's motion, S&D submits the affirmation of its attorney, a letter objecting to TSC's subpoena, and a copy of an IRS webpage. In his affirmation, counsel for S&D states that his client has been cooperative and remains ready, willing and able to comply with TSC's subpoena provided that TSC complies with IRS Code §7216 and obtains a written authorization from Wikso permitting S&D to release his records or a court order directing such release. He indicates that, on August 29, 2013, S&D was served with a subpoena to appear for a nonparty deposition on October 9, 2013. By letter dated September 6, 2013, he advised TSC that his client S&D was prohibited from producing or disclosing any information, and subject to criminal sanctions, unless it complied with the above-referenced code section.

IRS Code § 7216 provides, in pertinent part that "[a]ny person who is engaged in the business of preparing, or providing services in connection with the preparation of, [tax returns] ... who knowingly or recklessly ... discloses any information furnished to him ... shall be guilty of a misdemeanor ..." unless such disclosure is permitted within certain exceptions.

In its reply, TSC does not address the issues raised by S&D. It is undisputed that TSC has not provided S&D with an authorization from Wikso permitting the disclosure or a court order directing S&D to disclose such information. Accordingly, TSC's motion to compel S&D to comply with its subpoena duces tecum and to appear for a deposition is denied.

In any event, TSC's contention that Wikso's unredacted tax returns would provide some evidence whether the premises was his primary residence is not established on this record. A review of Wikso's redacted tax returns indicates, at this point, that Wikso did not take a home office deduction, and that the only item depreciated was a truck used in his business. The plaintiffs contend that the only things redacted in the returns provided to TSC are social security numbers and the dollar figure for each line of the return. A review of said returns confirms those contentions. Thus, TSC has failed to establish that S&D's deposition testimony is necessary to clarify Wikso's redacted tax returns.

TSC's motion for an order finding nonparty Lori Gardini Wikso in contempt for her failure to comply with its subpoena ad testificandum and precluding the plaintiffs from offering any testimony of said nonparty at trial (#007)

It is undisputed that Lori Gardini (Gardini) was Wikso's fianceé in September 2009, and that the two were married on July 11, 2010. TSC contends that Gardini has knowledge whether Wikso resided at the premises prior to the subject fire. It appears that TSC served this nonparty witness with a subpoena to appear for a deposition, and TSC claims that Gardini failed to so appear. TSC now moves for an order punishing Gardini, a nonparty, for contempt of court based on her failure to comply with a judicial subpoena requiring her appearance at a deposition.

The subpoena served upon Gardini, a copy of which is annexed to the moving papers, is facially defective and unenforceable because it neither contained nor was accompanied by a notice setting forth the "circumstances or reasons" why disclosure was sought (*see* CPLR 3101 [a] [4]; ***Kooper v Kooper***, 74 AD3d 6, 901 NYS2d 312 [2d Dept 2010]; ***Matter of American Express Prop. Cas. Co. v Vinci***, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]; ***Matter of Ehmer***, 272 AD2d 540, 708 NYS2d 903 [2d Dept 2000]). A party seeking disclosure from a nonparty must demonstrate that the information and records sought is material and necessary to its defense (*see* ***Humphrey v Kulbaski***, 78 AD3d 786, 911 NYS2d 138 [2d Dept 2010]; ***Mendelovitz v Cohen***, 49 AD3d 612, 852 NYS2d 795 [2d Dept 2008]), and cannot be obtained from other sources (*see* ***Conte v County of Nassau***, 87 AD3d 558, 2011 NY Slip Op. 06212 [2d Dept, Aug. 9, 2011]; ***Troy Sand & Gravel Co., Inc. v Town of Nassau***, 80 AD3d 199, 912 NYS2d 798 [3d Dept 2010]; ***Kooper v Kooper***, *supra*).

More importantly, it appears from the record that, initially, TSC did not personally serve the subject subpoena on Gardini in a timely manner, and that there was no properly scheduled date for Gardini's appearance. The subpoena, dated June 26, 2013, commands Gardini to appear for a deposition on June 26, 2013. However, the affidavit of service submitted by TSC indicates that Gardini was not properly served with said subpoena until December 5, 2013. TSC's submission fails to indicate that any effort was made to schedule Gardini's deposition after she was served with the subject subpoena. Accordingly, that branch of TSC's motion seeking to punish Gardini for contempt is denied.

In light of the Court's determination herein, and the fact that a note of issue has not been filed in this action, it is determined that the branch of TSC's motion seeking to preclude Gardini from testifying at trial is premature.

FA's motion for summary judgment (#008)

FA now moves for summary judgment dismissing the plaintiffs' third cause of action and all cross claims against it on the grounds that its alleged negligence was not the proximate cause of the plaintiffs' injuries, that the subject insurance application did not contain any material misrepresentations, that Wikso had an insurable interest in the premises, and that it owed no duty to Andrea Wikso. FA further moves for summary judgment dismissing the third-party complaint against it on the grounds that TSC is not entitled to contractual indemnification, common law indemnification, or contribution in this action.

In support of its motion, FA submits the pleadings, the affirmation of its attorney, the affidavit of Stephen Foray, duplicates of exhibits previously provided in the motions and cross motions addressed herein, and the order consolidating the plaintiffs' separate action against FA. The inclusion of this last exhibit raises issues which warrant some explanation. The record reveals that, on or about April 5, 2010, the plaintiffs initially commenced an action against TSC and GFA only, and that the defendants served their answers in May and June 2010. By stipulation dated September 22, 2010, counsel for GFA and TSC accepted service of an amended complaint which purported to name FA as an additional defendant in the plaintiffs' action. There is no evidence that FA was served with the amended complaint, and it appears that FA did not serve an answer to the amended complaint. On April 7, 2011, the plaintiffs commenced a second action against FA only, and FA appeared by service of an answer dated August 1, 2011. On or about October 14, 2011, all parties entered into a stipulation consolidating the two actions, amending the caption, permitting FA to assert cross claims against TSC, and providing for the orderly prosecution of the consolidated action. Said stipulation was so-ordered by the undersigned on October 26, 2011, and filed with the Clerk of the Court. Considering the stipulation, and the fact that the parties have not raised the issue that FA has not served an answer to the amended complaint, the Court will deem FA's answer in the plaintiffs' "second action" to be its amended answer for the purposes of this motion.[5] It is noted that, because the subject stipulation did not provide permission for TSC to assert cross claims against FA, TSC felt compelled to commence a third-party action against FA on or about September 3, 2013.

It has been held that the CPLR does not authorize third-party practice to seek indemnity for a claim asserted in a cross complaint (***Buttermark v Korber***, 65 AD2d 587, 409 NYS2d 251 [2d Dept 1978]; *see also* ***Japcap Establishment v Trust for Cultural Resources of City of N.Y.***, 115 AD2d 382, 495 NYS2d 669 [1st Dept 1985]; *see e.g.* ***McNamara v Banney***, 227 AD2d 892, 643 NYS2d 800 [4th Dept 1996]). In addition, in signing the stipulation accepting service of the plaintiffs' amended answer, TSC acknowledged that FA is a codefendant in this action. It is noted that third-party actions are for the purpose of joining a new party in an action (Vincent C. Alexander, Practice Commentaries, McKinney's

[5] The reason for this determination is made clearer below.

Cons Laws of New York, Book 7B, CPLR C1007:2), and that the current caption would be unavoidably confusing to a jury upon a trial of this action. Accordingly, the allegations in the third-party complaint are deemed cross claims against FA.[6]

In their complaint in the action commenced against FA only, the plaintiffs set forth a single cause of action alleging that FA "owed [Wikso a] duty of care in the processing of the insurance application," and "breached that duty by negligently and inaccurately processing the insurance application." In their amended complaint, to which FA has not served an answer, the plaintiffs set forth their third cause of action alleging that GFA and FA "owed [Wikso a] duty of care in the processing of the insurance application," and "breached that duty by negligently and inaccurately processing the insurance application." In its answer to the complaint served upon it, FA denies the relevant allegations.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]; ***Elliot v Long Is. Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, *supra*; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]; ***Schindler v Ahearn***, *supra*). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]; ***De Angelis v Lutheran Med. Center***, 58 NY2d 1053, 462 NYS2d 626 [1983]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, *supra*). Although determinations of causation are generally left for trier of fact, it is the function of the court to determine if a prima facie case of causation has been established in the first instance (***Outlaw v Citibank, N.A.***, 35 AD3d 564, 826 NYS2d 642 [2d Dept 2006]; ***Grover v Town of Montour***, 252 AD2d 859, 675 NYS2d 686 [3d Dept 1998]; ***Pahler v Daggett***, 170 AD2d 750, 565 NYS2d 587 [3d Dept 1991]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based, not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

Here, it is determined that FA has established its prima facie entitlement to summary judgment dismissing the plaintiffs' third cause of action on the grounds that it did not owe a duty to the plaintiffs beyond properly processing the subject insurance application, and that its conduct was not the proximate cause of the plaintiffs' injuries. It is undisputed that TSC has denied coverage under its policy on the grounds, essentially, that Wikso did not reside at the premises, that he conducted a business at the premises, that he did not own the premises and did not have an insurable interest therein, that he did not

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[6] To resolve this procedural issue, the caption should be amended to omit the third-party action regardless of the outcome of the instant motion.

make a claim for property damage, and that Andrea Wikso failed to timely serve an inventory of the damage to her personal property and cannot be considered an insured because Wikso did not reside at the premises. It is determined that FA did not have any duty to the plaintiffs regarding their obligations under the policy including, but not limited to, the filing of claims or the documentation required to prosecute those claims. Thus, FA can have no liability to the plaintiffs for TSC's denial of the plaintiffs' claims for contents coverage based on their alleged failure to meet their obligations under the policy.

In addition, the record reveals that FA asked the proper questions, and correctly noted and reported Wikso's answers, in completing the subject insurance application regarding Wikso's occupancy of the premises, Wikso's operation of a business at the premises, and Andrea Wikso's occupancy of the premises and her relationship to Wikso. As noted above, at his deposition, Wikso testified that Houlihan asked him if anyone else lived with him at the premises, and that he told her that his sister was living there. The computer print out of Wikso's answers to Houlihan's questions, as well as the final application, contain identical notations, under the heading "List of all persons in household ...," that "insured, and insured sister Andrea ... dispatcher related to insured," and, under the heading "Comments," that "insured has small office but office used only for paperwork and no clients come into house. Insured is general contractor and uses computers only for typing estimates for clients. No clients in home." Without implying any wrongdoing on Wikso's part, it is beyond cavil, that FA did not have a duty to investigate the accuracy of Wikso's answers to the questions asked of him in the application process. In addition, the deposition testimony of Most, summarized above, supports the determination that TSC considered these issues in its review of Wikso's application for insurance. Thus, it is determined that FA's conduct was not the proximate cause of the plaintiffs' injuries in relation to TSC's denial of coverage on these grounds.

The remaining issue is whether Wikso's testimony that he told Houlihan that the premises was owned by his trust, and her dismissing the fact as unimportant, results in potential liability on FA's part. In its letter denying coverage under its policy, TSC alleges, among other things, that Wikso's failure to reveal that the premises was owned by his trust is a material misrepresentation permitting it to rescind the policy, and that his "lack [of] an insurable interest [in the premises] voids" certain coverages under the policy. Pursuant to Insurance Law 3105 (b) (1), "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." Thus, the insurer bears the burden of proof on the issue of whether a misrepresentation in an insurance application is material (***Sirius America Ins. Co. v Joline Estates, LLC***, 55 AD3d 899, 866 NYS2d 739 [2d Dept 2008]; ***Schirmer v Penkert***, 41 AD3d 688, 840 NYS2d 796 [2d Dept 2007]; ***Lenhard v Genesee Patrons Co-op. Ins. Co.***, 31 AD3d 831, 818 NYS2d 644 [3d Dept 2006]). It is well settled that, in order to rescind an insurance policy on the grounds of material misrepresentation, 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 (***James v Tower Ins. Co. of N.Y.***, 112 AD3d 786, 977 NYS2d 345 [2d Dept 2013]; ***Interboro Ins. Co. v Fatmir***, 89 AD3d 993, 933 NYS2d 343 [2d Dept 2011]; ***Novick v Middlesex Mut. Assur. Co.***, 84 AD3d 1330, 924 NYS2d 296 [2d Dept 2011]). Here, the deposition testimony of Most, summarized above, and TSC's underwriting guidelines, establish that TSC did not have documentation

or policies regarding the issuance of policies to revocable trusts which support a determination that it would not have issued the policy if the correct information had been disclosed.

In addition, TSC's contention that Wikso lacked an insurable interest in the premises is without merit. Insurance Law 3401 provides that:

> No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. In this article, "insurable interest" shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

Pursuant to EPTL 10-10.6, "[w]here a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned." At his deposition, Wikso testified that he is the trustee of the Trust, and that he conveyed title to the premises to the Trust by deed on September 25, 2008. A settlor or creator of a trust, reserving the power to revoke the trust, possesses all the powers of ownership of the property held in trust (*see* ***City Bank Farmers Trust Co. v Cannon***, 291 NY 125 [1943]). Thus, Wikso retained the power to convey the property, or otherwise deal with it as an owner. It is determined that Wikso had an insurable interest in the premises.

In its third-party complaint, deemed a cross claim herein, TSC alleges that FA "carelessly and negligently or in breach of warranty or contract caused, in whole or in part the events for which the plaintiff ... seeks money damages," and that, if it is held liable herein, FA "will be required to indemnify and hold TSC harmless, in whole or in part ... for any judgment in favor of the plaintiff against TSC." In light of the determination herein that the plaintiffs have no cause of action against FA, FA cannot have any liability giving rise to a claim against it for contribution, common law indemnification, or apportionment. The "critical requirement" of a valid claim for contribution is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997] *quoting* ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 528 NYS2d 516 [1988]; *see also* ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Similarly, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; quoting ***Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola***, 134 NY 461 [1892]; *see also* ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). In addition, to the extent that TSC's third-party complaint/cross claim can be read to assert a claim for contractual indemnification, FA has alleged that there is no contract between it and TSC relative to this issue. In any event, the grant of summary

judgment dismissing the complaint against FA necessarily rendered inoperative any contractual obligation of FA to indemnify TSC (***Hajdari v 437 Madison Avenue, Fee Associates***, 293 AD2d 360, 740 NYS2d 328 [1st Dept 2002]; *see also* ***Zebbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]).

Having established its entitlement to summary judgment dismissing the complaint and all cross claims against it, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to FA's motion, the plaintiffs submits the affirmation of their attorney and a memorandum of law. In neither document do the plaintiffs address the issues raised in FA's motion and determined herein. Accordingly, the plaintiffs have failed to raise an issue of fact requiring a trial of their third cause of action against FA.

In opposition to FA's motion, TSC submits the affirmation of its attorney, a copy of its motion against FA to compel discovery (# 006), and copies of certain depositions and documents submitted with the prior motions and cross motions made herein. In his affirmation, counsel for TSC contends that there is "sufficient evidence that plaintiff made a material misrepresentation to [TSC] requiring the denial of [FA's] motion for summary judgment," and that "the acts/omissions of [Houlihan] require a denial of the summary judgment motion." In addition, counsel for TSC contends that FA's motion for summary judgment is premature as there are "multiple items of outstanding discovery that [TSC] may [utilize] to oppose the motion." Initially, as discussed above, it is determined that TSC's arguments regarding Wikso's alleged material misrepresentations have no bearing on the issue of FA's alleged negligence or breach of warranty or contract. Regarding Houlihan's actions, the sole substantive argument made by counsel for TSC is that she "failed to specifically inquire as to whether [Wikso] maintained the insured residence as its (*sic*) primary residence." A review of the application form indicates that there is no such question asked of the applicant. In addition, TSC has failed to produce any evidence or authority that Houlihan had a duty to ask for information which TSC itself did not require to complete the application form.

In reviewing FA's motion in the most favorable light on TSC's behalf, to the extent that TSC can be deemed to have raised the issue that Houlihan negligently failed to ask Wikso if he owned any other property, said contention would be without merit. Wikso testified that he did not recall if Houlihan asked him that specific question. Again, the application form does not ask that question of the applicant, and TSC has failed to produce any evidence or authority that Houlihan had a duty to ask for information which TSC itself did not require to complete the application form. The relevant question on the application reads: "[i]s any other residence owned, occupied or rented?" Accordingly, TSC has failed to raise an issue of fact requiring a trial of its third-party complaint/cross claims against FA.

The Court now turns to TSC's contention that the motion should be denied as premature. In his affirmation, counsel for TSC "adopts and incorporates by reference the arguments raised in" its motion to compel discovery from FA (# 006), and he argues that without such discovery, as well as the testimony of Wikso's fianceé, now wife, sought in a separate motion to compel, "it would be unfair for the defendant, [FA], to be granted summary judgment." Here it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant

evidence regarding FA's alleged negligence. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of depositions on issues peripheral to those at issue between FA and TSC is an insufficient basis for denying the motion as to what that discovery would uncover (*see generally* ***Lauriello v Gallotta,*** 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; ***Kimyagarov v Nixon Taxi Corp.*** 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]).

TSC's clearly contends that its motion to compel the testimony of Wikso's fianceé, now wife, is for the purpose of determining whether the premises was Wikso's primary residence at the time of this loss. As discussed above, TSC's motion to compel discovery (# 006) includes a request for an order compelling Wikso's accountant to provide documents and appear for a non-party witness deposition. Again, TSC contends that said discovery will be helpful in determining whether the premises was Wikso's primary residence at the time of this loss. In both cases, the outstanding discovery does not impact on the issue of FA's liability herein. Moreover, in reviewing TSC's opposition to FA's motion for summary judgment, it is determined that it fails to show any evidentiary basis that the discovery requested in its motion to compel discovery from FA (# 006) may lead to relevant evidence regarding FA's negligence, and that facts essential to justify opposition is exclusively within the knowledge and control of FA (*see* ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]).

Accordingly, FA's motion for summary judgment dismissing the plaintiffs' third cause of action and all cross claims against it, and dismissing the third-party complaint against it, is granted.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Submit Judgment.

Dated: AUG 05 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION