STATE OF NEW YORK COUNTY OF ORLEANS
SUPREME COUNTY COURT

ESTATE OF ROSE S. PELLEGRINO,

Plaintiff ,

Index# 11-39502

-vs-

ERIE INSURANCE COMPANY,

Defendant.

Jeanne M. Vinal, Esq. Attorney for Plaintiff

Joseph A. Wilson, Esq. Attorney for Defendant

HON. JAMES P. PUNCH, Justice Presiding

DECISION AND ORDER

The Plaintiff in this matter has filed a motion seeking an order granting partial summary judgment, pursuant to CPLR §3212, on the Plaintiff's first cause of action for breach of contract on the real property dwelling damage claim of $217,500.00 plus statutory interest from April 12, 2010, pursuant to CPLR§3212. The Defendant Erie Insurance Company (hereinafter "Erie") appears in opposition and has filed a cross-motion seeking an order granting summary judgment in favor of the Defendant, seeking dismissal of the First,

Third and Fourth causes of action. Plaintiff appears in opposition to the Defendant Erie's cross-motion.

The undisputed facts are as follows: In 2002, Rose Pellegrino applied for and was issued a HomeProtector Ultracover policy by Erie Insurance for her house at 14322 Allen Road, Albion, New York. On January 6, 2010, a fire destroyed the home and the subsequent investigation revealed that the home was unoccupied at the time of the fire as Ms. Pellegrino had been living in a nursing home since November 13, 2009. Additionally, Rose Pellegrino had transferred her ownership in the property to Peter Pellegino and Elizabeth Westlund in 1998. Defendant Erie denied coverage for the reasons set forth in this motion by letter dated April 12, 2010.

Plaintiff argues that the decedent had an insurable interest. Plaintiff states that in the disclaimer, Defendant Erie cites the language of the policy that "insurable interest shall include any lawful and substantial economic interest in the safety or preservation of property for loss, destruction or pecuniary damage" and therefore, Plaintiff argues that titled ownership is not required by the policy as to insurable interest. Plaintiff argues that Rose Pellegrino had an insurable interest as she was not only the sole occupant and

possessor of the home, but also paid for all of the upkeep related to the use of the property. Plaintiff argues that the house was a total loss; that the fire was a covered loss; and that the value of the dwelling was in excess of the policy limits of $217,500.00. Additionally, the Plaintiff argues that there was no material misrepresentation as the transfer of the property was completed years prior to the issuance of the policy and that the application was accurately completed by Rose Pellegrino, and further that none of the terms in the application imply that the applicant must be the titled owner. Therefore, the Plaintiff argues that there was no misrepresentation at all by Rose Pellegrino. Finally, the Plaintiff argues that it is undisputed that Rose Pellegrino lived in the home from when she and her husband built it until she was hospitalized in November 2009 and then in rehab at the local nursing home. The Plaintiff argues that the home continued to be Rose Pellegrino's legal and actual residence; that the policy insures where the person resides. Plaintiff argues that the three reasons for the denial are groundless; that the facts are undisputed and that therefore the Plaintiff is entitled to a finding as a matter of law and an award of partial summary judgment on the breach of

contract claim on the house in the amount of $217,500.00 plus interest from April 2010.

Defendant Erie argues that summary judgment is warranted because Rose Pellegrino did not have an insurable interest in the property at the time of the loss; the property did not qualify as Rose Pellegrino's "residence premises" as required under the insurance policy; and the insurance policy's misrepresentation clause precludes coverage for the property. Defendant Erie states that the property was not owned by Rose Pellegrino at the time of the loss and that she did not retain any legal or equitable interest in the property and that Defendant Erie was never made aware of the transfer to the adult children of Rose Pellegrino. Defendant Erie further argues that the home was not the "residence premises" of Rose Pellegrino as it is undisputed that she was living at a nursing home from November 2009 until her death 17 months later. Defendant Erie further states that Rose Pellegrino specifically applied for a HomeProtector Ultracover policy, which is available only to insureds who own and occupy their home and based on that specific application, Defendant Erie issued that policy to Rose Pellegrino. Defendant Erie states that if they were advised that Rose Pellegrino did not own the

property, it would not have issued that type of owner-occupied insurance policy to her. Therefore, Defendant Erie argues that the misrepresentation precludes coverage. Additionally, Defendant Erie argues that any recovery would be limited to, at most, the actual cash value of the property, not the replacement value sought by the Plaintiff. Defendant Erie states that it did provide coverage for Rose Pellegrino's personal property inside the house at the time of the loss and did fully and properly reimburse Rose Pellegrino for that loss. Defendant Erie further seeks dismissal of the third cause of action as it is undisputed that Albion Agency is neither an exclusive agent not an employee of Defendant Erie; and as such, there is no basis upon which Defendant Erie can be held vicariously liable for the negligence of an insurance broker for procuring inadequate insurance. Finally, Defendant Erie seeks dismissal of the fourth cause of action, which asserts that the Defendant acted in "bad faith" by denying the claim and seeks "consequential damages". Defendant Erie argues that New York does not recognize an independent tort of "insurer bad faith"; that the Plaintiff has not offered any proof that Defendant Erie's conduct was in gross disregard of the insured's interest; and that Plaintiff admitted in depositions that there were no

"consequential damages" but rather the only damage sought is the value of the property. The Defendant Erie further disputes the value of the property as it states that the property was assessed at $106,383.00 by the Town of Albion approximately one month prior to the fire; that the land sold for $10,000.00 and that therefore, the value of the house would be approximately $96,383.00. Therefore, the Defendant Erie seeks an order of summary judgment dismissing the complaint in its entirety.

The Plaintiff argues in reply that Rose Pellegrino did have an insurable interest in the home; that the Defendant has failed to make a prima facie case regarding the issue of consequential damages; and that the assessed value is not an admissible value of the home and that the Defendant Erie is bound by its own valuation of the home.

With respect to the issue of whether Rose Pellegrino had an insurable interest in the house, based on the submissions, the Court finds that there is a question of fact to be determined at the time of trial, which precludes summary judgment and dismissal of the cause of action based on breach of contract. Insurance Law §3401 states that "insurable interest" shall include any lawful and substantial economic interest in the safety or preservation of a

property from loss, destruction or pecuniary damage. The Appellate Division, Fourth Department, states in Etterle et al v. Excelsior Insurance, 74 AD2d 436 (1980), that "[t]he statue codifies the liberal interpretation applied by the courts in construing the interest necessary to constitute an insurable interest and recognizes that '[a]ny right which may be enforced against the property, and which is so connected with it that its injury or destruction will cause loss' is an insurable interest "(cites omitted). The Court further states that " '[t]he test for insurable interest in whether an injury to the property or its destruction by the peril insured against would involve the assured in pecuniary loss' ", quoting from Berry v. American Cent. Ins.Co. of St. Louis, 132 NY 49. The facts in Etterle et al v. Excelsior Insurance are similar to the facts before the Court as it involved parents who transferred title to their son. The Appellate Court found that the parents may have transferred title based on an oral agreement with their child that they would be able to remain on the premises for as long as their health permitted and that whether the parents were to be viewed as life tenants of the property or beneficiaries of a constructive trust, their interest was substantial enough to be described as an "insurable interest". A review of the transcripts supports a finding by this

Court that the children of Rose Pellegrino viewed the house as her home and that she paid taxes on the home prior to the loss. Peter J. Pellegrino states "[s]he had 100% ownership in it. She built the house back in 1964. And that was her home until she died really" (Page 9, lines 2-7). The Court finds that based on this testimony, there may have been an agreement between Rose Pellegrino and her children which may have created an "insurable interest". The Court further finds that Defendant Erie states that as she was not the titled owner in the property, Rose Pellegrino's did not have an insurable interest in the property, but rather only in her personal possessions. Therefore, the Court finds that a question of fact exists regarding whether Rose Pellegrino had an insurable interest in the property, which is interrelated with the issue of whether she resided in the home.

The Court finds that, based on the submissions, that there is a question of fact regarding whether Rose Pellgrino resided in the home. While it is undisputed that Rose Pellegrino was living in a nursing home at the time of the fire and destruction of the home, there is no proof before the Court to establish whether the situation was temporary, whether she intended, or was able, to return to the home, or whether this was a permanent move. Both the

Plaintiff and the Defendant Erie have made statements regarding this issue, but there is no medical proof or other submissions to support either party's statement. Therefore, the Court finds that there is a question of fact which precludes dismissal and summary judgment on this issue.

Based on the submissions, this Court finds that the application completed by the decedent did not ask whether she was the titled owner of the property which was to be insured. And while the underwriting guidelines state that "only owner-occupants can be shown as named insureds. Live-ins should have their own separate Tenant's Policy" (see HomeProtector Underwriting Guidelines, paragraph 20), the Court finds that there is no proof that Rose Pellegrino was ever asked whether she was the titled owner of the property. In fact, in her deposition, Nancy Mowins stated that there was no misrepresentation on the application completed by Rose Pellegrino (Mowins EBT pg 25, lines 12-14), although she claims that there was misrepresentation because Rose Pellegrino did not volunteer the information (lines 9-15). The Court finds that it is undisputed that Rose Pellgrino and her husband built the home in 1964 and had lived in it since then. The Court further finds that the insurance policy itself does not reference the titled

owner of the property. Therefore, the Court finds that there is no question of fact regarding this issue and finds that Rose Pellegrino did not make a misrepresentation to the Defendant Erie regarding titled ownership of the home.

With respect to the value of the house and the proper amount to be paid by the insurance company, this Court finds that there is insufficient evidence presented to make such a determination and therefore, finds that this is a question of fact to be determinated at the time of trial.

The third cause of action states that Albion Agencies, Inc. is the agent for Erie Insurance Company and that Defendant Erie Insurance Company is responsible for the acts and omissions of its agent Albion Agencies, Inc., made in the course of said agency. The cause of action addresses the application and the policy regarding the titled ownership of the property and the denial of the claim. Defendant Erie states that Albion Agencies, Inc. is neither an exclusive agent not an employee of Defendant Erie, basing that position on a statement of Peter Pellegrino in a previous affidavit ; and as such, there is no basis upon which Defendant Erie can be held vicariously liable for the negligence of an insurance broker for procuring inadequate

insurance. However, the Court finds that the claim is not for inadequate insurance and that there is a principal-agent relationship that precludes dismissal of the third cause of action.

With respect to the fourth cause of action, the Court finds that there is no proof of bad acts on the part of the Defendant Erie, that it appears from the submissions that the fourth cause of action is a duplication of the first cause of action for wrongful denial of the claim. Therefore, the Court will grant dismissal of the fourth cause of action.

Accordingly it is hereby

ORDERED that the Plaintiff's motion for summary judgment is granted regarding the issue of misrepresentation, but is denied in all other respects; and it is further

ORDERED that the Defendant Erie's motion seeking dismissal of the first, third and fourth causes of action is granted regarding the fourth cause of action but is denied in all other respects.

ENTER

Dated: March 16, 2016

HON. JAMES P. PUNCH
A. Supreme Court Justice

GRANTED
March 16, 2016
KRISTIN E. NICHOLSON
Chief Clerk