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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART __2_

CARLOS DIAZ, JR., MARTHA P. DIAZ, MARITZA DIAZ and EDGAR E. DIAZ,

Plaintiff,

-against-

ALLSTATE INSURANCE COMPANY,

Defendants.

Index Number: 2534/16

Motion Date: 6/14/17

Motion Seq. No. 1

The following papers numbered 1 through 12 were read on this motion by defendant for summary judgment, pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affirmations - Exhibits	1-7
Answering Affirmation	8-9
Reply Affirmation - Exhibits	10-12

Upon the foregoing papers it is ordered that the motion by defendant is determined as follows:

Plaintiffs filed the instant declaratory judgment action seeking a declaration that defendant is liable to plaintiffs for a loss sustained under Homeowners Insurance Policy, Number 000003060729, arising from a fire at premises, 34-40 92nd Street, Jackson Heights, New York, on February 5, 2014. Such insurance policy was purchased by Carlos A. Diaz, the then-owner of the subject premises and father of plaintiffs, who died on or about April 25, 2012. It is uncontested that defendant was first notified of Carlos' death on February 6, 2014, when a claim was submitted for the fire damage to the premises. Defendant disclaimed and denied coverage on March 18, 2014, on the grounds, among others, that coverage under the Policy had expired; that the Estate lacked an insurable interest in the premises at the time of the fire; that plaintiffs lacked standing to commence this action; and that the Policy period within which to bring an action had expired. Submitted records show that on August 1, 2013,

the Estate of Carlos A. Diaz transferred title to the property to the plaintiffs, in equal shares. Defendant brought this motion for summary judgment seeking dismissal of plaintiffs' action, and seeking a declaratory judgment on its "First Counter Claim," that plaintiffs' claim "is not covered by any Policy of insurance issued by Defendant." Plaintiffs oppose.

By order of this court, dated June 26, 2017, this submitted motion was "held in abeyance pending plaintiffs' service of a sur-reply ... on or before July 13, 2017." No sur-reply has been served or submitted to date.

In the instant action, plaintiffs request that the court determine the parties' rights and obligations, if any, under the Homeowners policy issued to Carlos A. Diaz by defendant. Defendant has filed a counterclaim seeking a declaration that it owes no coverage to plaintiffs for the underlying fire damages action. "An action for a declaratory judgment as to the rights of the insured vis-á-vis his or her insurance carrier is the appropriate means of resolving a coverage dispute" (*McDonald v Shore*, 100 AD3d 602, 603 [2012]; *see Iacobellis v A-1 Tool Rental, Inc.*, 65 AD3d 1015 [2009]).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 *[1993],* citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving parties (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]).

Defendant has demonstrated prima facie entitlement to summary judgment dismissing

plaintiffs' complaint by showing, initially, that pursuant to the terms of the subject insurance policy, the instant action is time-barred, as plaintiffs failed to commence such action "within two years after the inception of loss or damage," or, in another section, "within two years next after inception of the loss." "Resolution of disputes about insurance coverage begin with examination of the language of the policy" (*Garcia v Government Empls. Ins. Co.*, 151 AD3d 1020, 1022 [2017]; *see Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675 [2017]). "Exclusions from coverage in an insurance policy are to be accorded strict and narrow construction" (*Rego Park Holdings, LLC v Aspen Specialty Ins. Co.*, 140 AD3d 1147, 1148 [2016], quoting *Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 [2009]). "Whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Conlon v Allstate Veh. & Prop. Ins. Co.*, 152 AD3d 488, 490 [2017], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]), which "is subject to no other reasonable interpretation, and applies in the particular case" (*County of Dutchess v Argonaut Ins. Co.*, 150 AD3d 672, 674 [2017], quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). Unambiguous provisions of an insurance policy must be given their "plain and ordinary meaning" (*Hansard v Federal Ins. Co.*, 147 AD3d 734, 737 [2017]), and their interpretation is a matter of law for the court (*see White v Continental Cas. Co.*, 9 NY3d 264 [2007]; *Hansard v Federal Ins. Co.*, 147 AD3d 734). Even where policy language is susceptible of more than one interpretation, the court will not find an ambiguity if only one of them is reasonable, as determined by the reasonable expectations of the average insured (*see Federal Ins. Co. v International Bus. Machs. Corp.*, 18 NY3d 642 [2012]; *Great Am. Restoration Servs., Inc. v Scottsdale Ins. Co.*, 78 AD3d 773 [2010]).

While ambiguities in policy language must be resolved in favor of the insured and against the insurer (*see Conlon v Allstate Veh. & Prop. Ins. Co.*, 152 AD3d 488; *Garcia v Government Empls. Ins. Co.*, 151 AD3d 1020), the policy language in the case at bar is unambiguous. The plain, dictionary meaning of the word "inception" is "beginning, commencement, or origin." The sole reasonable "loss" referred to in this case is the fire. Plaintiffs' disingenuous argument that the "loss" might be interpreted as some other event is belied by their references, in their complaint, to the date of the fire, i.e., "February 5, 2014", as "the date of loss" (¶ 11 and [a] and [b] in "Wherefore" clause). Additionally, plaintiffs' contention that an ambiguity exists because a claim for loss of rental income cannot be determined until such claim is ascertained is without merit. The one case cited by plaintiffs had different facts, was a lower court decision, and is not applicable in this matter. Further, plaintiffs have failed to state a claim for, or submit any evidence of, loss of rental income herein.

As plaintiffs have failed to rebut defendant's prima facie entitlement to summary judgment on the ground that the commencement of this action was untimely, defendant's

motion is granted.

However, the untimeliness of the action is not the only reason for dismissal herein. Defendant contends that upon Carlos A. Diaz's death, the policy clearly stated that coverage continued only until July 2, 2012, and only for the Estate, and at the time of the fire, the Estate no longer had an insurable interest in the subject property, as the Estate transferred said property to the plaintiffs prior to the date of loss/fire. Such contention has merit. "Insurance is a mere personal contract to pay a sum of money by way of indemnity to protect the interests of the insured ... and runs to the individual insured, and not with the land" (*Brownell v Board of Educ. of Inside Tax Dist. of City of Saratoga Springs*, 239 NY 369 [1925]), and, at the time of the fire, the Estate no longer had any standing/interest in the subject policy due to the facts that the terms of the policy clearly stated the policy had previously expired, and because the property had been transferred to third parties.

Further, the plaintiffs, to whom the property had been transferred, lacked standing to commence an action pursuant to the policy because they were, clearly, not the policy owners, named insureds, or additional insureds, and, thus, were not in privity of contract with defendant. Even if the court were to disregard the fact that the policy, by its terms, was discontinued, the fact that plaintiffs owned the "insured" property would not, in and of itself, confer standing (*see Brownell v Board of Educ. of Inside Tax Dist. of City of Saratoga Springs*, 239 NY 369). It does not appear, "from the four corners of the policy" that defendant intended to insure plaintiffs' interests (*Bronxville Props., Inc. v Friedlander Grp., Inc.*, 307 AD2d 245, 247 [2003]), While plaintiffs may have had an insurable interest in the property at the time of the fire (Insurance Law § 3401), "[a] nonparty to a contract may maintain a cause of action alleging breach of contract only if it is an intended, and not a mere incidental beneficiary of the contract" (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 480 [2017]). Here, plaintiffs are neither seeking reformation of the contract, nor asserting, or offering evidence of, third-party beneficiary status (*see State of Cal. Pub. Emps. Ret. Sys. v Shearman & Sterling*, 95 NY2d 427 [2000]; *Nanomedicon, LLC v Research Found. of State Univ. of N. Y.*, 112 AD3d 594 [2013]).

Additionally, plaintiffs' contention that defendant's acceptance of premium payments for the subject policy, after the death of the insured, acted as a ratification of the policy, permitting plaintiff's "a reasonable expectation of coverage," is without merit. Plaintiffs' submissions are devoid of proof of such payments and how they were made, and of whether any such payments were made, and accepted, after defendant received notice of Carlos A. Diaz's death. As there is no dispute that defendant was first informed of Carlos' death in February 2014, acceptance of premium payments prior to that time cannot serve as a ratification of the policy, or support plaintiffs' evoking the "reasonable expectation" doctrine herein.

Consequently, defendant has demonstrated plaintiffs' lack of standing to commence this action, providing another reason why the instant motion for summary judgment dismissing the action is granted.

Plaintiffs' remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determinations.

As a result, defendant has established its prima facie entitlement to summary judgment on its counterclaim as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Liberally construing the evidence in a light most favorable to the non-moving parties (*see Nash v Port Washington Union Free School Dist.*, 83 AD3d 136 [2011]; *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2009]), the opposition papers are devoid of evidence demonstrating the presence of any material issue of fact in rebuttal which would deny judgment to defendant (*see Zuckerman v City of New York Transit Auth.*, 49 NY2d 557 [1980]; *Baird v Four Winds Hosp.,* 140 AD3d 810 [2016]), this branch of defendant's motion is granted, and defendant is declared to have issued, and existing, no insurance policy which would apply to any claim arising from the instant action.

Accordingly, defendant's motion is granted in its entirety.

Dated: October 24, 2017

J.S.C.