

<b>Starr Indem. &amp; Liab. Co. v Monte Carlo, LLC</b>
2019 NY Slip Op 30868(U)
April 1, 2019
Supreme Court, New York County
Docket Number: 651045/2013
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**STARR INDEMNITY & LIABILITY COMPANY,**

**Plaintiff,**

**DECISION AND ORDER  
Index No.: 651045/2013**

**-against-**

**Motion Sequence No.: 010**

**MONTE CARLO, LLC, DORCHESTER, LLC  
AND GREAT AMERICAN INSURANCE COMPANY,**

**Defendants.**

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**O. PETER SHERWOOD, J.:**

Plaintiff moves, pursuant to CPLR 3212, for summary judgment and defendants Monte Carlo, LLC (Monte Carlo) and Dorchester, LLC (Dorchester, together Defendants) cross-move, pursuant to CPLR 3212, for summary judgment. The action was discontinued as against Great American Insurance Company by stipulation dated May 23, 2017.

**Underlying Allegations**

Plaintiff is an insurance company that issued a commercial general liability policy, policy number SIKCMF00810-00, (the Policy) to Dorchester. The Defendants are affiliate entities that own a number of properties, including real property located at 9-17 St. Paul’s Road North, Hempstead, New York (the St. Paul Buildings), consisting of a complex of residential apartment buildings, real property located at 599 Front Street, Hempstead, New York (the 599 Building), a residential apartment building, and real property located at 621 Front Street, Hempstead, New York (the 621 Building), a residential apartment building. On October 18, 2012, Defendants filed their application for insurance (the Application). Question 9 of the Application asked “[A]ny uncorrected fire code violations” and defendants answered “No.” On October 20, 2012, the Policy was issued, effective from October 20, 2012 through October 20, 2013. The Policy covered, among other properties, the St. Paul, the 599 and 621 Buildings.

On February 9, 2013, there was a fire at one of the buildings in the complex of the St. Paul Buildings, resulting in two deaths and multiple injuries. On February 11, 2013, Defendants notified

plaintiff of the potential claims, arising from the fire at the St. Paul Buildings. On March 21, 2013, plaintiff sent a letter (the Rescission Letter), rescinding the Policy based upon Defendants' alleged misrepresentation in the answer to Question 9. Defendants have subsequently been sued for claims arising out of the fire.

Plaintiff contends that there were uncorrected fire code violations dating back to June 1, 2007 and up to March 30, 2012 and October 11, 2012. It asserts that these violations included problems with emergency lighting and fire alarm systems that were not fully functional and not up to code. Plaintiff states that had it been accurately advised of the state of the fire alarm systems, it would not have issued the Policy (Kern affidavit, §§ 9-17).

Defendants assert that the Kern affidavit should not be considered, since Kern was not identified on plaintiff's witness list. They also contend that Question 9 is ambiguous, since they claim it is capable of more than one reasonable interpretation. Defendants state that plaintiff cannot properly rescind the Policy based upon this purportedly ambiguous question. They also state that the allegedly improper condition of the fire alarm systems were remedied and that, consequently, there were no uncorrected fire code violations and their answer to Question 9 was accurate (Mott affidavit, §§ 22-30).

### **Summary Judgment Standard**

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn

from the evidence, the motion should be denied” (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). “[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment” (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

### **Fraud**

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]). A cause of action for “fraud must state in detail ‘the circumstances constituting the wrong’ (CPLR 3016 [b]) [and] [c]onclusory allegations or mere suspicion of fraud are wholly insufficient” (*Bank Leumi Trust Co. of N.Y. v D’Evori Intl.*, 163 AD2d 26, 32 [1st Dept 1990]; *see also Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Moreover, “[a] fraud claim is not actionable without evidence that the misrepresentations were made with the intent to deceive” (*Friedman*, 23 AD3d at 167).

### **Contract Interpretation**

Generally, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . [and extrinsic evidence] is generally inadmissible to add to or vary the writing” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). It is improper for the court to rewrite the parties’ agreement and the best evidence of the parties’ agreement is their written contract (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Put another way, “[c]ourts will give effect to the contract’s language and the parties must live with the consequences of their agreement [and] [i]f they are dissatisfied . . . , the time to say so [is] at the bargaining table” (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 424 [2013] [internal quotation marks and citation omitted]; *see also McFarland v Opera Owners, Inc.*, 92 AD3d 428, 428-429 [1st Dept 2012]; *Crane, A.G. v 206 W. 41st St. Hotel Assoc., L.P.*, 87 AD3d 174, 180 [1st Dept 2011]).

“To be found ambiguous, a contract must be susceptible of more than one commercially reasonable interpretation . . . by examining the entire contract . . . as a whole [and] in deciding the motion, [t]he evidence will be construed in the light most favorable to the one moved against” (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 446 [1st Dept 2017] [internal quotation marks and citations omitted]). “Whether a contract is ambiguous is a question for the court” (*RMS Realty Holdings Corp. v Moore*, 64 AD3d 434, 441 [1st Dept 2009]).

### **Rescission**

“As a general rule, rescission of a contract is permitted where there is a breach of contract that is ‘material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract’” (*Lenel Sys. Intl., Inc. v Smith*, 106 AD3d 1536, 1538 [4th Dept 2013] [citation omitted]; *see also Matter of Kassab v Kasab*, 137 AD3d 1138, 1140 [2d Dept 2016]; *RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005]). “A contract may be voided on the ground of a unilateral mistake of fact only where the enforcement of the contract would be unconscionable, the mistake is material and made despite the exercise of ordinary care by the party in error” (*William E. McClain Realty v Rivers*, 144 AD2d 216, 218 [3d Dept 1988], *app dismissed* 73 NY2d 995 [1989]). A party may also establish a claim to rescission “based on . . . the parties’ mutual mistake” (*Silver v Gilbert*, 7 AD3d 780, 781 [2d Dept 2004]; *see also Almap Holdings v Bank Leumi Trust Co. of N.Y.*, 196 AD2d 518, 519 [2d Dept 1993], *lv denied* 83 NY2d 754 [1994]). “Moreover, the party seeking rescission has the burden of establishing these elements by clear and convincing evidence” (*Executive Risk Indem. Inc. v Pepper Hamilton LLC*, 56 AD3d 196, 206 [1st Dept 2008], *affd as mod* 13 NY3d 313 [2009]; *see also Silver*, 7 AD3d at 781).

### **Rescission of an Insurance Policy**

“To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when securing the policy” (*Indian Harbor Ins. Co. v SP&K Constr.*, 151 AD3d 704, 704 [2d Dept 2017]; *see also Smith v Guardian Life Ins. Co. of Am.*, 116 AD3d 1031, 1031 [2d Dept], *lv denied* 24 NY3d 909 [2014]). “An answer to an ambiguous question on an application for insurance cannot be the basis of a claim of misrepresentation by the insurer”

(*Fanger v Manhattan Life Ins. Co. of N.Y., N.Y.*, 273 AD2d 438, 439 [2d Dept 2000], *lv dismissed* 96 NY2d 754 [2001]; *see also Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 232 [1st Dept 2007]). Moreover, “[m]ateriality of the misrepresentation is ordinarily one of fact except where the evidence of the materiality is clear and substantially uncontradicted” (*Feldman v Friedman*, 241 AD2d 433, 434 [1st Dept 1997]; *see also Smith*, 116 AD3d at 1031; *Kroski v Long Is. Sav. Bank*, 261 AD2d 136, 136 [1st Dept 1999]). An insurer may demonstrate that a “misrepresentation was material by submitting an appropriate affidavit . . . [together] with a description of its [applications process] and excerpts from its underwriting guidelines” (*Bleecker St.*, 38 AD3d at 232). Put another way, “[t]o establish materiality as a matter of law, the insurer must present documentation of its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application” (*Smith*, 116 AD3d at 1031-1032 [internal quotation marks and citation omitted]; *see also Indian Harbor*, 151 AD3d at 704-705).

### Discussion

Defendants state that the court should not consider the Kern affidavit. However, Defendants’ cross motion for summary judgment claimed that plaintiff had not shown the materiality of the alleged misrepresentation in the answer to Question 9 of the application. Plaintiff submitted the Kern affidavit in response to this point, which supports its claim that pursuant to its underwriting policies, it would not have issued the Policy due to the failure to accurately set forth fire code violations. Defendants have had the opportunity to address this argument in their reply papers and the Kern affidavit “was directly responsive to [Defendants’] opposition to the summary judgment motion” (*Home Ins. Co. v Leprino Foods Co.*, 7 AD3d 471, 471 [1st Dept 2004]; *see also Davison v Order Ecumenical*, 283 AD2d 383 [2d Dept 2001]).

Defendants have asserted that Question 9 was ambiguous and have presented deposition testimony of various witnesses, including Defendants’ principal, that whether there were uncorrected fire code violations, was capable of different meanings and have noted that plaintiff has subsequently changed the question. However, whether a phrase is ambiguous is a matter of law for the court to resolve and, in doing so, the court should adopt the ordinary common sense meaning of the words

used, rather than a strained or forced interpretation (*see RMS Holdings*, 64 AD3d at 441; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]). Viewed from this perspective, Question 9 is clear and unambiguous and the court denies the portion of Defendants' cross motion that seeks summary judgment on the claim that Question 9 was ambiguous.

Plaintiff has also set forth evidentiary proof, through the Kern affidavit and the exhibits annexed to it, that the answer to Question 9, that there were no uncorrected fire code violations, was material to its decision to issue the Policy. Plaintiff has therefore established its prima facie entitlement to summary judgment of rescission of the Policy (*see Indian Harbor*, 151 AD2d at 704-705, *Smith*, 116 AD3d at 1031-1032; *Bleecker*, 38 AD3d at 232). However, Defendants have raised an issue of fact as to whether there were, in fact, uncorrected fire code violations. Since plaintiff is seeking rescission, it must establish its claim by clear and convincing evidence (*see Executive Risk*, 56 AD3d at 206). Defendants have asserted and presented evidentiary proof that the prior code violations were remedied and that, therefore, when they filed the Application, there were no uncorrected fire code violations. If the prior violations were corrected, Defendants' answer was true. Since the court must accept their version of contested facts for the purpose of deciding plaintiff's motion for summary judgment, plaintiff's motion must be denied.

When resolving Defendants' cross motion for summary judgment, the court must accept plaintiff's version of contested facts, that there were uncorrected fire code violations, that Defendants' answer to Question 9 of the Application was false, that this answer was material to plaintiff's issuance of the Policy. This raises a material issue of fact and accordingly, Defendants' cross motion for summary judgment must be denied.

It is, therefore,

**ORDERED** that plaintiff's motion for summary judgment is denied; and it is further

**ORDERED** that defendants' cross motion for summary judgment is denied.

This constitutes the decision and order of the court.

**DATED:** April 1, 2019

**ENTER,**

  
**O. PETER SHERWOOD J.S.C.**