SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____

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DAIRYLAND INSURANCE COMPANY, Index №. 27804/2017E

-against- **Hon. MARY ANN BRIGANTTI**

DOREEN GLOVER Justice Supreme Court

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The following papers numbered 1 to ____5_____ were read on this motion (Seq. No. ____1_____)
for __Summary Judgment____ noticed on _____February 8, 2019_____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).1,2,
Answering Affidavit and Exhibits	No(s).3,4
Replying Affidavit and Exhibits	No(s).5

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers, the plaintiff Dairyland Insurance Company ("Plaintiff") moves for an order (1) pursuant to CPLR 3212, granting it summary judgment, declaring pursuant to CPLR 3001 that Plaintiff has no duty to defend or indemnify defendant Doreen Glover ("Glover") in connection with an October 11, 2014 motor vehicle accident, together with such other and further relief as the Court deems just and proper. Glover opposes the motion.

I. Background

According to Plaintiff's affirmation of counsel in support of their motion, this matter arises out of a motor vehicle accident that occurred on October 27, 2016 - not October 11, 2014, as stated in the notice of motion. The accident allegedly occurred between a vehicle operated by Glover, and another vehicle owned and operated by necessary additional parties Klara Dilone Moreno ("Moreno") and Kayssibelle Mojica Sanchez ("Sanchez"), in the Bronx, New York.

Prior to the accident, on February 16, 2016, Plaintiff issued a personal automobile insurance policy to Glover in the state of Washington. The type of coverage issued was a "Broad Form Named Driver Policy" which provides coverage for only the named insured while driving either owned or non-owned vehicles. The insurance policy had an expiration date of February 16, 2017. Plaintiff asserts the address of "116 W. Third Avenue, Moses Lake, Washington 98837" was listed as the address used by Glover to procure the insurance policy. The vehicle garaging zip code provided, as listed in the Policy Declarations Page, was the Washington zip code of 98837/37.

To procure the insurance coverage, Glover executed an application that included the clause:

"I understand and agree it is my responsibility to report any change of garaging location to the Company within 14 days of the change and I declare that each vehicle listed in this application is

garaged more than 50% of the time at the garaging zip listed."

The policy also contained terms and conditions stating that it was issued in reliance on Glover's statements and that if Glover made any false statements in the application the policy may not provide coverage.

The motor vehicle accident at issue occurred on October 27, 2016. Plaintiff submits a copy of the police accident report indicating that the accident occurred in the Bronx, New York. After receiving notice of the claim, Plaintiff opened up a claim file. On January 24, 2017, Plaintiff sent Glover a letter reserving its rights under the terms and conditions of the policy. Per the letter, Plaintiff stated that it was investigating whether the vehicle was principally garaged in Washington. On November 18, 2016 and June 19, 2017, claims for property damage and bodily injuries were submitted to Plaintiff on behalf of Moreno and Sanchez. Eventually, Glover appeared for an Examination Under Oath ("EUO") on April 14, 2017. The notice was addressed to the New York address listed on Glover's driver's license, and also addressed to her Washington state address. The letter sent to Washington was returned as "not delivered as addressed" "unable to forward" and "return to sender." At the EUO, Plaintiff testified that she was living in the Bronx for 20 -some years and she never lived outside of New York State, and never lived in Washington. She knew a friend who lived in Washington but did not disclose the name. She testified that "116 West Third Street or Avenue in Moses Lake, Washington" was her business address - a car dealership. She was allegedly operating the car dealership for maybe more than six months, maybe a year to a year and a half. Glover testified that the vehicle was purchased by her brother, however, she does not know where the vehicle was purchased, how it was purchased, where it was registered, or whether there was insurance on it. She testified that she did not put the vehicle on her insurance. Her brother was the primary driver.

In support of its motion, Plaintiff provides an affidavit from its Associate Director of Compliance and Product Development, Daniel L. Rosenow ("Rosenow"), a person with personal knowledge of the transaction at issue as well as Plaintiff's daily operations as to their handling of claims. Rosenow asserts that Glover was issued policy number 474740973 with an inception date of February 16, 2016. At the time she provided an address of 116 W. Third Avenue, Moses Lake, Washington 98837 in order to procure the policy. Rosenow asserts that if Plaintiff was not fraudulent in her representations concerning her place of domicile and insurance policy would not have been issued. The garaging zip code provide was "98837/37", a Washington State zip code. He asserts that if Glover had not been fraudulent in her representation that the vehicle she drove would be principally garaged in New York, Plaintiff would not have issued Glover a personal automobile policy. Rosenow also asserts that if Glover was truthful in her intent to use her personal automobile insurance policy for business purposes, Plaintiff would not have issued her a personal automobile insurance policy. He further asserts that the other named defendants did not have active policies with Plaintiff.

Relying on the above submissions, Plaintiff argues that they are entitled to summary judgment and a declaration that it is not obligated to defend or indemnify Glover in the underlying motor vehicle accident, because Glover made material misrepresentations in procuring her insurance policy. Plaintiff argues that due to these material misrepresentations, it has the right to rescind the policy and make it void ab initio. Plaintiff asserts that, under the circumstances of this case, Washington State law should apply since Washington had the most significant contacts with the parties to the contract. Plaintiff argues that under Washington Law, rescission of the insurance policy is warranted due to Glover's material misrepresentation as to the garaging of her vehicle.

In opposition to the motion, Glover argues that the motion should be denied, and the Court should sua sponte grant summary judgment in her favor. Glover argues that the application itself never asked where she resided, and therefore there was no false answer given. Glover asserts that she gave a mailing address, but never claimed that this was a residence. Glover also notes that she gave a phone number with a "917" area code on her application, which is not associated with Washington state. Glover also asserts that at the time of the application, and as confirmed at her EUO, she presented a New York State driver's license which showed her Bronx address at the time of her application. Glover further points out that a credit check was conducted, which would have showed that Glover only lived and transacted business in New York. Moreover, the premium charge on Plaintiff's exhibit "6" shows that the figure was based on Glover's "out of state license" - further indicating that Plaintiff was aware of Glover's residence.

Glover further argues that this "Broad Form Named Driver Policy" provides coverage only for the named insured while driving either owned or non-owned cars, and it states that "owned cars will not be listed." She argues that, accordingly, the terms of the policy establish that it had nothing to do with where the vehicles are garaged. Glover asserts that the zip code is listed under vehicle information, but the policy itself states that "vehicle information does not apply" - so the policy itself does not concern where a vehicle is garaged. Rather, the policy concerns the person, and not the vehicle.

Glover further contends that none of these allegedly false statements were "material" since the subject policy was renewed in March 2017. Plaintiff alleges that had the "correct" answers to the vehicle garaging been given, the policy would not have been issued. However, after Plaintiff issued a "reservation of rights" letter to Glover at her New York address, Plaintiff renewed its policy with the same policy number, with a coverage date from March 6, 2017 to March 6, 2018. Glover contends that Plaintiff's affidavit cannot be reconciled with what Plaintiff actually did or cared about.

Glover alleges that there was no due diligence on the part of Plaintiff is issuing its policy, and the policy was not actually concerned with insuring vehicles - but merely the driver. Glover notes that the policy contained the words "Broad Form Named Driver-Vehicle Information Does not Apply." She testified that she did not own any vehicles in her examination under oath, but she owned "Royal Rich Auto

LLC." It would not be unusual for her to have insurance issued in the event that she was required to drive. Glover further alleges that any ambiguities in the insurance contract and applications must be decided in favor of the insured.

In reply, Plaintiff asserts that Glover has admitted that she made a material misrepresentation as to the garaging of the vehicle and therefore the motion must be granted. Plaintiff notes that New York State does not honor Broad-Form Insurance Policies - thus Glover admittedly tried to procure out-of-state insurance that is not honored in New York. Plaintiff notes that on the application, Glover signed a statement saying that she understood and agreed to report any change in the garaging location, and she declared that her vehicle listed in the application was garaged more than 50% of the time at the listed garaging zip code. Plaintiff argues that it is clear that Glover never intended to reside in Washington, and she testified that the Washington address given was a "business address" yet she could not remember when she claimed ownership of the Washington-based business. Further, pursuant to the insurance contract she executed, Plaintiff agreed not to use the motor vehicle in any "business or commercial occupation." Glover has yet to oppose the fact that she used her alleged business address as her residence in order to procure the policy, which constitutes a material misrepresentation and is a ground for rescission ab initio. Plaintiff asserts that the New York driver's license that she used is only associated to being charged a higher premium, and does not concede any other provisions in the contract - specifically that Glover would reside in Washington and primarily driver the insured vehicle in Washington. As for the policy renewal, Plaintiff alleges in an affirmation of counsel that it renewed the policy "because 1) [Glover] applied for a renewal, and 2) [Plaintiff's] investigation regarding defendants residence was not complete." Plaintiff alleges that it is not in the business of cancelling or not renewing policies where an investigation in still pending.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary

judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

(1) Choice of Law

This Court agrees with Plaintiff's contention that Washington law should apply to the resolution of this matter. There is a conflict of law since New York state does not permit cancellation of an automobile insurance policy. "It is well settled that Vehicle and Traffic Law §313(1)(a) 'supplants an insurance carrier's common-law right to cancel a contract of insurance retroactively on the grounds of fraud or misrepresentation, and mandates that the cancellation of a contract pursuant to its provisions may only be effected prospectively'" (*Metlife Auto & Home v. Agudelo*, 8 A.D.3d 571, 572 [2d Dept. 2004]). Under Washington law, however, an insurer may rescind a policy when: (1) the policyholder represented as truthful certain information during the negotiation of the insurance contract; (2) those representations were untruthful, or misrepresentations; (3) the misrepresentations were material; and (4) the misrepresentations were made with the intent to deceive" (*United Specialty Insurance Company v. Shot Shakers, Inc.*, No. C18-0596 WL 199645 at *15 [W.D. Wash. Jan. 15, 2019], citing *Karpenski v. Am. Gen. Life Cos.*, 916 F.Supp. 2d 1188, 1190 [W.D. Wash. 2012][citations omitted]; RCW 48.18.090[1]). A policy rescinded on these grounds is void ab initio (id., quoting *Karpenski*, at 1190). Case law indicates that such rescission is available when the misrepresentations involves automobile insurance policies as well (see generally *Glandon v. Searle*, 68 Wash. 2d 199 [1966]).

"Under New York's 'center of gravity' or 'grouping of contracts' approach to choice-of-law questions in contract cases, we are required to apply the law of the state with the 'most significant relationship to the transaction and the parties.' (internal citation omitted). This approach generally dictates that a contract of liability insurance be governed by the law of 'the state which the parties understood to be the principal location of the insured risk... unless with respect to the particular issue, some other state has a more significant relationship...to the transaction and the parties'" (*Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 21 [1st Dept. 2006], quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 317, 318 [1994][quoting Restatement [Second] of Conflict of Laws [hereinafter, Restatement] §188[1]).

In this matter, Plaintiff issued its policy to Glover in Washington, Glover allegedly gave a

Washington address and represented that the insured vehicle would be principally garaged in Washington, and the only connection between the insurance policy and New York is that Glover was operating the subject vehicle in New York at the time of the accident. In light of the foregoing, Washington law applies because it had the most significant contacts with the contracting party at the contract itself (*Government Employees Ins. Co. v. Nichols*, 8 A.D.3d 564 [2nd Dept. 2004]). Because New York had no legitimate contact with the subject contract, the validity of it its making and this attempted cancellation must be determined under Washington law (*Eagle Ins. Co. v. Singletary*, 279 A.D.2d 56, 59 [2nd Dept. 2000]).

(2) Rescission of an insurance contract on the grounds of Material Misrepresentation

As noted above, Washington law states that "an insurer may rescind a policy when: (1) the policyholder represented as truthful certain information during the negotiation of the insurance contract; (2) those representations were untruthful, or misrepresentations; (3) the misrepresentations were material; and (4) the misrepresentations were made with the intent to deceive" (*United Specialty Insurance Company.*, No. C18-0596 WL 199645 at *15, citing *Karpenski*, 916 F.Supp. 2d at 1190; see RCW §48.18.090[1]). However, the Washington Supreme Court in *Glandon v. Searle* (68 Wash. 2d 199) has held: "...where the insurer claims the policy was never effected due to the insured's fraud or misrepresentation, then as a condition precedent to this defense, the insurer must tender back the premium" (id. at 204). In other words, under Washington Law, where an insurer brings an action to rescind a contract based upon fraud or misrepresentation, the action cannot be maintained unless the insurer has tendered back premiums paid by the insured (see *Johnson v. Allstate Ins. Co.*, 126 Wash.App. 510 [2005], citing *Gossett v. Farmers Ins. Co. of Washington*, 133 Wash.2d 954 [1997]; see also *Queen City Farms, Inc. v. Central Nat. Ins. Co. of Ohama*, 64 Wash. App.838, 873 [1992], *aff'd and remanded*, 126 Wash.2d 50 [1994]). The Supreme Court has reasoned: "[c]learly, the [insurer] could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitely waived every objection on which its validity could be denied." (*Glandon*, 68 Wash. 2d at 204] [internal quotation marks omitted]).

In this matter, Plaintiff's moving papers do not address the issue of whether it ever returned premiums paid on the subject insurance policy to Glover. In light of the above authority, Plaintiff thus failed to demonstrate its prima facie entitlement to summary judgment on its declaratory judgment action, which seeks, among other things, a declaration that the subject insurance policy is void ab initio. Furthermore, in opposition to the motion, Glover submits evidence that on March 6, 2017, Plaintiff renewed the subject insurance policy. Plaintiff submits no affidavit in reply from an individual with

personal knowledge explaining the renewal. In a reply affirmation from counsel, Plaintiff asserts that it renewed the policy because "1) [Glover] applied for a renewal, and 2) [Plaintiff]'s investigation regarding residence was not complete." However, the renewal occurred approximately 1 ½ months after Plaintiff issued a reservation of rights letter to Glover indicating that they were investigating whether misrepresentations were made about the vehicle's principal garaging location. There is no indication from Plaintiff whether premiums on the renewed policy have been accepted or returned. The foregoing presents fact issues as to whether Plaintiff, despite being aware of possible grounds to avoid the insurance policy, nevertheless affirmed the validity of the policy by renewing it (see generally *Grooms v. Liberty Mut. Fire Ins.* Co., 2009 WL 2512408 [W.D. Wash. 2009]).

Furthermore, as noted in opposition, Plaintiff had presented a New York driver's license at the time she applied for insurance, and was given a rate based on that out-of-state license. In order for a misrepresentation to be "material," it must be shown that "a reasonable insurance company, in determining the course of action, would attach importance to the fact misrepresented" (*Kim v. Allstate Ins. Co., Inc.*, 153 Wash.App. 339, 355-56 [2009]). Given the fact that Plaintiff was aware of Glover's address listed on her driver's license, apparently did not return any premiums before commencing this action, and renewed the insurance policy despite the existence of an investigation into Glover's alleged misrepresentation, there are fact issues as to whether the misrepresentations were in fact "material" and warrant voiding the policy ab initio.

The Court declines Glover's invitation to search the record and grant summary judgment in her favor. Glover failed to eliminate all triable issues of fact as to whether she made material misrepresentations in her insurance policy application, and whether or not Plaintiff waived its entitlement to rescission on the contract by failing to return premiums or renewing the policy in March 2017.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 10/2/19 **Hon.** Mary Ann Brigantti **J.S.C.**

Hon. Mary Ann Brigantti

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED	☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT