

**MDRN Intelligence Living Wolfhome v Hartford Fin.  
Servs. Group, Inc.**

2022 NY Slip Op 30498(U)

February 15, 2022

Supreme Court, New York County

Docket Number: Index No. 650410/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

-----X

MDRN INTELLIGENCE LIVING WOLFHOME,

Plaintiff,

- v -

THE HARTFORD FINANCIAL SERVICES GROUP, INC.,  
and TWIN CITY FIRE INSURANCE COMPANY,

Defendants.

-----X

**INDEX NO.** 650410/2021

**MOTION DATE** 04/09/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36

were read on this motion for

JUDGMENT - SUMMARY

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendants' motion for summary judgment dismissing the complaint against them is granted based upon the following memorandum decision.

**Background**

In this action for breach of an insurance contract, various commercial torts, and breach of General Business Law § 349, plaintiff MDRN Intelligence Living Wolfhome ("plaintiff") alleges six causes of action: declaratory judgment (first cause of action); breach of contract (second cause of action); breach of the implied covenant of good faith and fair dealing (third cause of action); "tortious" breach of the implied covenant of good faith and fair dealing (fourth cause of action); bad faith (fifth cause of action); and unfair trade practices in violation of General Business Law § 349 (sixth cause of action). Defendants The Hartford Financial Services

Group, Inc. (“Hartford”) and Twin City Fire Insurance Company (“Twin City”) now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

Plaintiff holds a Business Owner’s Policy issued by Twin City, pursuant to which Twin City insured plaintiff’s business property located within plaintiff’s business premises of 238-240 East 59th Street (NYSCEF Doc. No. 12, ¶ 2; NYSCEF Doc. No. 13, ¶ 3; NYSCEF Doc. No. 14). The policy provides that that it would be void in the event of any fraud by plaintiff, or if plaintiff intentionally concealed or misrepresented a material fact concerning the policy, plaintiff’s property, plaintiff’s interest therein, or any claims under the policy (*id.* at Twin City 23). Further, in the event of loss or damage, plaintiff was required to, *inter alia*, give Twin City inventories of damaged and undamaged property, allow Twin City to inspect and take samples of the damaged property, “permit [Twin City] to question [plaintiff] under oath at such times as may be reasonably required about any matter related to this insurance or [plaintiff]’ claim,” and generally “cooperate with [Twin City] in the investigation or settlement of the claim” (*id.* at Twin City 46). Hartford is Twin City’s parent company and did not issue the policy or provide insurance thereunder (NYSCEF Doc. No. 12, ¶ 2).

On January 7, 2020, plaintiff reported a loss due to water damage at its business premises, damaging fabric and materials in excess of \$250,000 (*id.*, ¶ 3). In the course of its investigation, Twin City discovered that one of plaintiff’s principals, Elizabeth Jones, had previously worked at another company, WDH London, Inc. (the “prior claim”), in which capacity she had made a similar claim for water damage dating from June 8, 2018 (*id.*, ¶ 4). Upon reviewing the file for the claim, Twin City believed that plaintiff might have been attempting to resubmit portions of the prior claim, which had already been paid by WDH London’s insurer (*id.*). Twin City then retained counsel to conduct an Examination under Oath

(“EUO”) of plaintiff’s manager, Warren Kay, and reserved the right to take one of Ms. Jones (*id.*, ¶¶ 4-5). Kay’s EUO took place on June 15, 2020 (NYSCEF Doc. No. 11, ¶ 3). When counsel began to inquire of Kay regarding the prior claim made by WDH London, Kay’s counsel asked to adjourn for the day (*id.*). Counsel continued to engage in discussions regarding documents related to the prior claim, and whether the damaged property from that claim had been given up for salvage or not (*id.*, ¶¶ 4-5). On July 14, 2020, Kay’s counsel asserted that plaintiff would not sit for any further examinations or provide any further documents regarding the prior claim, as plaintiff’s position was that it was either irrelevant or had already been completely settled and was not being resubmitted to Twin City (*id.*, ¶ 5). Despite continued discussions thereafter, plaintiff refused to complete Kay’s EUO, schedule Jones’ EUO, provide any of the documents requested related to the prior claim, or provide a signed copy of Kay’s EUO transcript (*id.*, ¶¶ 6-12). Accordingly, Twin City denied coverage to plaintiff on October 15, 2020 (NYSCEF Doc. No. 16). The instant litigation followed.

Plaintiff commenced this action by filing a summons and complaint on January 20, 2021 (NYSCEF Doc. No. 1). Defendants appeared and answered the complaint (NYSCEF Doc. No. 4), and now move for summary judgment dismissing it against them.

### **Standard of Review**

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and

give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

### Discussion

Defendants essentially make two arguments. First, that the action must be dismissed in its entirety because of plaintiff's failure to cooperate with Twin City's investigation of plaintiff's claim. Failing that, they argue that Hartford is entitled to summary judgment as it is not a party to the insurance contract and did not provide insurance thereunder, that plaintiff's commercial tort and statutory claims are legally insufficient, and that plaintiff is not entitled to punitive damages. On these grounds, at least, defendants claim entitlement to summary judgment if the contract claims are to continue. As an initial matter, Hartford established prima facie that it was not the insurer on the policy and did not provide insurance to plaintiff under the policy, and plaintiff failed to raise a triable issue of fact in opposition. Accordingly, Hartford is entitled to summary judgment dismissing the claims against it.

“[A]n insured has a duty to cooperate in an insurance investigation by its insurer. In fact, typically, an insurer may disclaim coverage where an insured deliberately fails to cooperate with its insurer as required by an insurance policy” (*Hochhauser v Electric Ins. Co.*, 46 AD3d 174, 180 [2d Dept 2007]). “In order to establish breach of a cooperation clause, the insurer must show that the insured engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents” (*Matter of New York Cent. Mut. Fire Ins. Co. v Rafailov*, 41 AD3d 603, 604 [2d Dept 2007]). “The burden of proving lack of cooperation is a heavy one and rests on the insurer” (*City of New York v Cont. Cas. Co.*, 27 AD3d 28, 31-32 [1st Dept 2005]). “A distinction may be drawn, however, between a court's natural reluctance to see an accident victim deprived of his source of payment because a liability

carrier claims that its assured has failed to cooperate, and an indemnity carrier denying payment to its insured because the insured has failed to cooperate” in investigating a claim (*Dyno-Bite, Inc. v Travelers Companies*, 80 AD2d 471, 476 [4th Dept 1981]) “To meet its burden, an insurer must prove (1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that its efforts were reasonably calculated to obtain the insured's cooperation, and (3) that the insured's attitude demonstrated willful and avowed obstruction” (*id.* [internal quotation marks and citations omitted]).

Here, Twin City diligently sought documents and testimony from plaintiff that were relevant to its investigation of plaintiff’s claim. As Twin City’s submissions reflect, Twin City’s counsel engaged in substantial and detailed correspondence with plaintiff’s counsel as to what information, documents, and testimony it was seeking, and why it believed them to be relevant to its investigation (NYSCEF Doc. No. 11, ¶¶ 3-12; NYSCEF Doc. No. 12, ¶¶ 4-6). Moreover, plaintiff was repeatedly put on notice that its failure to comply with Twin City’s requests would result in Twin City declining coverage (NYSCEF Doc. No. 11, ¶¶ 9-11). In response, not only did plaintiff continue to refuse to comply, but plaintiff in fact notified Twin City that it would be retaining litigation counsel to commence an action on the policy (*Id.*, ¶ 10). Such action can only be interpreted as willful and avowed obstruction (*Rafailov*, 41 AD3d at 605 [“As the appellants engaged in an unreasonable and willful pattern of refusing to supply material and relevant documents, the order permanently staying arbitration was appropriate”]; *DePicciotto Corp. v Wallis*, 177 AD2d 327, 328 [1st Dept 1991] [“the willful refusal to furnish the tax information, despite Lloyd's three demands therefor constituted a breach of the policy, and made out a prima facie case for summary judgment in favor of the insurer”]).

In opposition, plaintiff does not raise a triable issue of fact. Plaintiff's position is that it fully cooperated with Twin City's reasonable and good faith demands and that the inquiry into the prior claim is a meritless fishing expedition. Specifically, plaintiff provides an invoice and claim inventory regarding the damaged inventory (NYSECF Doc. No. 28), a copy of a salvage agreement purporting to dispose of all of the damaged material from the prior claim (NYSECF Doc. No. 27), and a comparison of the fabrics claimed as damaged on the prior claim and those claimed as part of the instant claim (NYSECF Doc. No. 30).<sup>1</sup> Jones and Kay also submitted affidavits, in which they aver that there is no overlap between the prior claim and the instant claim (NYSECF Doc. No. 22, ¶¶ 14-23; NYSECF Doc. No. 23, ¶¶ 14-23). Tellingly, however, Jones also states that Kay was not employed by WHD London, the prior claimant, and that she possessed the only recollection of the events surrounding it between the two of them (NYSECF Doc. No. 22, ¶¶ 14, 18). Indeed, as Twin City's submissions set forth, notwithstanding plaintiff's independent position that the prior claim was irrelevant and that it need not cooperate with Twin City further in that respect, the documentation Twin Cities had received was inconclusive of the question, and that Kay had stated during his examination that there were several other matters which only Jones would have knowledge of, necessitating her EUO (NYSECF Doc. No. 12, ¶ 6).

“The right to examine under the cooperation clause of [an] insurance policy . . . is much broader than the right of discovery under the CPLR” (*Dyno-Bite, Inc.*, 80 AD2d at 474). Even assuming that plaintiff is correct regarding the relevance and/or applicability of the prior claim to this claim, plaintiff provides no explanation for its refusal to produce Jones for an EUO in light of the other matters about which Kay testified that only Jones would have knowledge of

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<sup>1</sup> Plaintiff further inappropriately submits and relies upon an email between Twin City's adjuster and its counsel (NYSECF Doc. No. 26), which is plainly privileged, was inadvertently disclosed to plaintiff, and timely clawed back. As consideration of such document is not necessary to resolve this motion, the Court will not address further whether such conduct merits further response from the Court.

(*Somerstein Caterers of Lawrence, Inc. v Ins. Co. of State of Pennsylvania*, 262 AD2d 252 [1st Dept 1999] [“Appellant's refusal to present its treasurer or bookkeeper for examination under oath respecting the loss claimed under the subject policy constituted a material breach of the policy's cooperation clause”]). Plaintiff’s independent judgment that the information sought was irrelevant or improper is insufficient excuse; an insured has been held to be in breach of the duty to cooperate even where such failure to cooperate has been on advice of counsel (*Evans v International Ins. Co.*, 168 AD2d 374, 376 [1st Dept 1990]). The cases cited by plaintiff are not to the contrary; none of them address the duty to cooperate pursuant to a cooperation clause.

Accordingly, it is hereby,

ORDERED that the motion of defendants The Hartford Financial Services Group, Inc. and Twin City Fire Insurance Company for summary judgment regarding plaintiff’s first cause of action seeking a declaratory judgment, is granted, and a declaratory judgment shall be rendered in defendants’ favor; and it is further

ADJUDGED and DECLARED that defendants The Hartford Financial Services Group, Inc. and Twin City Fire Insurance Company have no obligation to plaintiff MDRN Intelligence Living Wolfhome in connection with the claimed loss under the policy; and it is further

ORDERED that defendants’ motion for summary judgment regarding the remainder of the complaint is also granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

ENTER:

*Louis L. Nock*

<u>2/15/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/> NON-FINAL DISPOSITION
			<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE