SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

x	**TRIAL/IAS, PART 18 NASSAU COUNTY**
DINESH SABHARWAL,	
Plaintiff(s),	**Index No. 616248/19**
-against-	
HYUNDAI MARINE & FIRE INSURANCE CO., LTD,	**Motion Seq. No.: 001 & 002** **Motion Submitted: 7/10/2020**
Defendant(s).	**XXX**
x	

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Notice of Cross Motion/Opposition/Supporting Exhibits.....X
Affirmation in Opposition to Cross Motion.....X
Reply Affirmations.....XX

Defendant, Hyundai Marine & Fire Co., LTD (Hyundai), moves this court (Motion Seq. 001), pursuant to CPLR §3211(a)(1) and (a)(7), for an order dismissing the complaint against it. Plaintiff, Dinesh Sabharwal (Sabharwal), opposes the motion and cross movies (Motion Seq. 002) for summary judgment. Hyundai opposes the cross

motion.

Sabharwal commenced this action by service of a summons and complaint dated November 20, 2019. The complaint contains one cause of action for breach of contract. The within motion to dismiss was brought in lieu of an answer.

The following facts were taken from the affidavits and exhibits annexed to the motion papers. On November 16, 2016, Sabharwal completed a "Dwelling Fire Application" with Hyundai for insurance for a property located at 53 Kingston Avenue, Hicksville, New York 11801. Sabharwal also filled out a "Personal Insurance Application". The named insured is "Dinesh Sabharwal". In the sections asking whether Sabharwal had any bankruptcies or judgments against him in the previous five years, none are listed. In November, 2017, Sabharwal transferred ownership of the property to Sabharwal Properties LLC, of which Sabharwal was the sole member. He neither informed Hyundai of this transfer, nor did her seek their permission to assign the policy, and is required by the terms of the policy.

On January 21, 2019 a discharge of water occurred at the Property resulting in a loss. Sabharwal subsequently filed a claim with Hyundai. Hyundai denied the claim by way of disclaimer letter dated July 19, 2019. The denial was based on several alleged misrepresentations in the policy application regarding adverse judgments and bankruptcies. Hyundai's investigation indicated an adverse money judgment against Sabharwal by Auto Chlor from December 15, 2015 that was not satisfied until November

1, 2017, as well as a bankruptcy discharge on August 15, 2013. Additionally, Hyundai denied the claim because the property was owned by a corporation, not an individual. Hyundai's investigation revealed that on November 17, 2017, Sabharwal transferred his right, title, and interest in the Property to Sabharwal Properties LLC. Sabharwal then commenced this action alleging breach of contract. Hyundai now moves to dismiss the complaint.

HYUNDAI'S MOTION TO DISMISS (MOTION SEQ. 001)

A motion to dismiss a complaint based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law (*Gosch v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Bibbo v 31-30, LLC*, 105 AD3d 791, 792 [2d Dept 2013]). To be considered documentary, for the purposes of a motion to dismiss based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," qualify as "documentary evidence" in the proper case. If the document does not reflect an out-of-court transaction, and is not essentially undeniable, it is not documentary evidence within the intendment of CPLR 3211(a)(1) (see *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Neither affidavits, deposition testimonies, nor letters are considered

documentary evidence within the intendment of CPLR 3211(a)(1) (*Integrated Constr. Servs., Inc. v Scottsdale Ins.* Co., 82 AD3d 1160, 1163 [2d Dept 2011]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" *(Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010], *supra; see Leon v Martinez*, 84 NY2d 83, 87 [1994], *supra; Sokol v Leader*, 74 AD3d 1180,1181 [2d Dept 2010], *supra; Breytman v Olinville Realty*, LLC, 54 AD3d 703, 703-704 [2d Dept 2008]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2d Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally

construed (*see Leon v. Martinez*, 84 NY2d at 83). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (see *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2d Dept 2008]; *see also EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005]).

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (see CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

A cause of action for breach of contract must establish: the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *Arnell Constr. Corp. v. New York City School Constr. Auth.*, 144 A.D.3d 714, 715, 41 N.Y.S.3d 101.

In support of its motions, Hyundai submits an affidavit of Eddy Kim, an underwriter for Hyundai, some judgments entered against Sabharwal, and a deed showing Sabharwal's transfer of interest to the LLC. Hyundai goes to great lengths to show that Sabharwal's claim is based on a fraudulent history and material misrepresentations. The Hyundai underwriting guidelines forbid issuance of a dwelling policy to corporations. Additionally, the guidelines forbid issuance to persons with adverse judgments or bankruptcies in the last five years. It is evident that Sabharwal disregarded these guidelines.

However, after denying the claim, Hyundai took no action to rescind the policy despite now knowing of the misrepresentations and the transfer of ownership. Further, Sabharwal then sent in a payment in November, 2019 to renew the policy, which payment was accepted and a renewal was issued. Mr. Kim, in his affidavit, states that accepting the payment and renewing the policy was in error and that Hyundai never intended to renew the policy. The problem with this argument is that it was at Sabharwal's request that the payment be returned and the policy not renewed. Why he would send in a payment and them immediately ask for it back is never explained and, tellingly, despite the numerous allegations lodged by his counsel, Sabharwal offers no affidavit of his own to address these issues. Regardless, Mr. Kim also fails to explain why the policy was not rescinded upon learning of the misrepresentations and transfer of ownership. Even accepting the argument that Hyundai has the right to investigate a claim before making a

decision whether or not to rescind, they were clearly aware in July, 2019 of the misrepresentations and transfer of ownership, yet seemed content to keep the policy intact until its expiration date.

Hyundai's strongest argument is that Sabharwal did not have an insurable interest. He did not own the property at the time at the time of the loss, yet he is the one who made the claim and who would have received the payment had it been approved. Further, the terms of the policy require that the property be "solely owned by individuals". Even assuming some of Sabharwal's other breaches of the policy could have been waived by Hyundai failing to rescind. and by renewing the policy, Hyundai claims the lack of an insurable interest cannot be waived.

The law is clear that a party must have an insurable interest in property to recover from an insurance policy on that property. (*Azzato v. Allstate Ins. Co.*, 99 AD3d 643 [2d Dept 2012]). One has an insurable interest when the person stands to gain from the property's continued existence, or stand to face a loss should the property be destroyed. *Id.* While one does not have to own property to have an insurable interest in it, the interest must be direct, as opposed to remote or consequential. *Id.* Based on the foregoing, it is clear that Sabharwal did not have an insurable interest in the property. It is true he was the sole owner of the LLC, but it was the LLC that owned the property. Sabharwal's loss was a consequence of the LLC facing a loss. It was not a direct loss to Sabwarhal.

As a result, the court must determine whether Hyundai waived the right to claim there was no insurable interest by continuing to insure Sabharwal and then renewing his policy, even if in error. Insurance Law §3401 holds, in pertinent part: "No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured." As the court finds that Sabharwal has no insurable interest, the insurance contract is not enforceable under the Insurance Law. A statutory provision such as Insurance Law §3401 cannot be waived. (*F.A.S.A. Constr. Corp. v. Village of Monroe*, 14 AD3d 532 [2d Dept 2005]).

Regarding Sabharwal's opposition, the court must first take issue with the self-righteous tone Sabharwal's counsel takes in attacking Hyundai and accusing them of illegal behavior. In what is, at best, an ironic and tone deaf series of allegations, Sabwarhal seems to forget that he intentionally lied on an insurance contract, and therefore procured the insurance under fraudulent circumstances. He claimed he had no bankruptcies in the prior five years, yet he did. He claimed he had no judgments against him in the prior five years, yet he had numerous judgments entered against him in the time period. He transferred ownership of the property to an LLC despite knowing that the insurance policy he procured was for individuals only. He transferred ownership of the insured property but did not inform the insurer. If Sabharwal's counsel was genuine in his demand that this court refer Hyundai to the authorities for their misdeeds, then the

court would certainly be obliged to report Sabharwal as well for his misdeeds which were more blatant and intentional.

Though Sabharwal argues that it is obvious he had an insurable interest in the property, he cites to no case law to support the assertion. He cites to no case where an individual obtained an individual policy, transferred the property to an LLC in violation of the policy, and then the individual was able to collect on the policy. One of the main advantages of incorporating is to insulate one from liability. It appears Sabharwal wanted the benefits of the corporate structure, but did not want that structure to be recognized when the property suffered a loss. The court rejects Sabharwal's arguments in this regard and finds he makes no cognizable argument in support of his assertion he, individually, had an insurable interest in the property.

Finally, the court notes that the LLC is not a plaintiff in this action even though it is the entity that actually suffered the loss. Sabharwal cannot deny that his only interest is that he owns the entity that owns the property. If the reason why the LLC did not join in the action is because it did not have a contract, or privity, with Hyundai, then the entire theory by which Sabharwal seeks the proceeds of the policy is undermined. If his interest and that of the LLC are interchangeable, as he seems to argue, then the LLC could have been a party to this action. In other words, the failure to add the LLC seems to undermine the argument they are interchangeable. For all the foregoing, Hyundai's motion will be granted.

SABHARWAL'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 002)

In light of the court's determine on Motion Seq. 001, *supra*, the court finds the summary judgment motion must be denied as moot. However, had it been decided on the merits, the court would have found multiple issues of fact related to all of the misrepresentations and the transfer of ownership.

Accordingly, it is hereby

ORDERED, that Hyundai's motion to dismiss (Motion Seq. 001) is GRANTED. The complaint is dismissed; and it is further

ORDERED, that Sabharwal's motion for summary judgment (Motion Seq 002) is DENIED as moot.

This constitutes the Decision and Order of the Court.

Dated: August 3, 2020
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.