SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Trial Term Part 35 x

MIN RU ZHENG,

Index No.: 504848/20

Plaintiff,

-against-

Decision/Order

HYUNDAI MARINE & FIRE INSURANCE CO., LTD.,

Defendant.

x

Recitation as required by CPLR 2219(a) of the papers considered on the pre-answer notice of motion of defendant filed on June 1, 2020, under motion sequence one, for an order pursuant to CPLR 3211 (a)(1) and (a)(7), dismissing the plaintiff's complaint.

Papers	Numbered
Notice of Motion, Affirmations and Supporting Exhibits	1-29
Affirmation in Opposition	30-36
Reply	37

The Decision/Order on this motion is as follows:

In this action to recover damages for breach of a homeowner's insurance policy, defendant seeks an order dismissing plaintiff's complaint pursuant to CPLR 3211 (a)(1) and (a)(7), and declaring the subject policy rescinded and void ab initio.

Defendant insurer alleges that plaintiff owned a home in Brooklyn consisting of a finished basement and three floors above and purchased insurance for a two-family home. After a fire at the premises on July 30, 2019, defendant disclaimed coverage alleging that plaintiff had converted the house into a twelve-family apartment house. Defendant contends that they do not issue policies for twelve-family dwellings, the policy did not cover premises of more than a four-family dwelling, and that plaintiff misrepresented in her application that the premises would be used as a two-family house. Further, Hyundai would not have issued the insurance policy had the actual use of the property been disclosed. Defendant issued a refund check to plaintiff for all premium payments which plaintiff deposited.

In opposition, plaintiff contends that there were no material misrepresentations in the application for the subject insurance policy. Plaintiff further contends that after the policy was issued the premises was converted into a three-family dwelling and she rented

the premises to three individual tenants which did not exceed the four-family limit under the policy.

In support of its motion, Hyundai relies on the F.D.N.Y. Fire Marshal's investigation, New York City Building Department inspections, sworn statements by former occupants of the building, plaintiff's own statements made during her Examination Under Oath, Hyundai's Cause and Origin expert's findings, affidavits from Hyundai's Underwriter and Field Adjuster, and a copy of the Hyundai underwriting guidelines. Plaintiff's submissions include her affidavit, her insurance application, three leases for the subject premises, and the denial of claim letter. As the respective submissions of both parties demonstrate that they were "laying bare their proof and deliberately charting a summary judgment course" (*Jamison v Jamison*, 18 AD3d 710, 711 [2d Dept 2005] quoting *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 321 [1st Dept 1987]), the exception of notice necessary to convert the motion to one for summary judgment applies here. Accordingly, pursuant to 3211(c) the motion is converted to one for summary judgment.

"[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*Friedman v Otsego Mut. Fire Ins. Co*., 179 AD3d 1023, 1024 [2d Dept 2020] quoting (*Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713, 714 [2d Dept 2001]; see Insurance Law § 3105[b]). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993, 994 [2d Dept 2011] quoting (*Schirmer v Penkert*, 41 AD3d at 690–691[2d Dept 2007]).

Here, the evidentiary submissions by defendant demonstrate that at the time of the claimed loss the premises was not configured as a two-family dwelling as covered by the policy and as represented in plaintiff's insurance application. Based on its structural configuration at the time of the claimed loss, the premises well exceeded a four-family dwelling (*see Dauria v CastlePoint Ins. Co.*, 104 AD3d 406 [1st Dept 2013]). The FDNY Fire Marshal's investigation recited that on the third floor there were five separate living units, each with its own door and lock. The affidavit of defendant's field adjuster indicated same and that the units shared a common kitchen and bathroom. The affidavits of several former tenants demonstrate that four separate families lived on the third floor, three to four families resided on the second floor, and additional families resided on the first floor and in the basement. One diagram submitted with an affidavit by a former tenant illustrated the separate living units on the third floor, the names of the individuals residing in the units, and the amount of rent each paid. DOB summonses issued after the fire indicated, "Dwelling converted or maintained with (3) or more additional dwelling

units than legally authorized by D.O.B. records. Noted. D.O.B. records indicate a (2) family dwelling…residence now occupied as a (12) family." Additionally, in the section marked "Information Used to Rate Your Premium" in plaintiff's insurance application, the number of families listed is two. Although plaintiff stated in her affidavit that she rented the premises to three tenants and that twelve families did not reside in the premises, plaintiff testified at her Examination Under Oath that neither she nor her husband ever occupied the house, sheetrock was put up and rooms and doorways were added after she purchased the house, and her husband installed the locks on the bedroom doors.

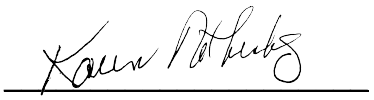
Defendant further established through the affidavit of its underwriter and the pertinent underwriting guidelines that the policy issued to plaintiff would not have been issued if the correct information had been disclosed in plaintiff's application (*see Friedman at* 1025; *James v Tower Ins. Co. of N.Y.*, 112 AD3d 786, 787 [2d Dept 2013]). Defendant's underwriter explained that Hyundai will not issue dwelling policies for any dwelling that exceed four families as is clearly stated in the "Occupancy" section of the guidelines as are "ineligible exposures" which include "boarding rooming, halfway or group homes." In opposition, plaintiff fails to raise a triable issue of fact. Thus, based on the material misrepresentation made by the plaintiff, the subject policy was void ab initio (*see Friedman at* 1025).

Accordingly, defendant's motion is granted and the complaint is dismissed.

This constitutes the Decision/Order of the Court.

Date: October 1, 2020

ENTER,



Hon. Karen B. Rothenberg
J.S.C.