

To commence the statutory period for appeals as of right under CPLR § 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
ROCKLAND COUNTY

-----X  
DANIEL NAJMAN,

Index: 031914/2020

Plaintiff,

-against-

DECISION & ORDER

HYUNDAI MARINE & FIRE INSURANCE CO, LTD.,  
(U.S. BRANCH), and UNION MUTUAL FIRE  
INSURANCE COMPANY,

Defendants.

-----X  
Zugibe, J.

Upon all prior papers related to motion sequence three (NYSCEF 28-39), the Defendants’ motion for summary judgment is granted.

The parties will recall a motion to dismiss was denied in this matter on January 21, 2021 on the basis there may be further information “regarding the state of the property at issuance to be located within either the claims or underwriting file”. No further information was identified on the issue although discovery was conducted to include insurance underwriting materials.

“[E]ven innocent misrepresentations, if material, are sufficient to allow insurer to defeat recovery under the insurance contract.” *Meagher v. Exec. Life Ins. Co. of New York*, 200 A.D.2d 720, 607 N.Y.S.2d 361 (2d Dep’t 1994); *Thandi v. Otsego Mut. Fire Ins. Co.*, 199 A.D.3d 849, 157 N.Y.S.3d 516, 519 (2d Dep’t 2021). The Plaintiff takes the position there was no misrepresentation of any kind. “Plaintiff’s position is that it never represented to Defendant that

the subject premises was occupied” (Memorandum of Law in Opposition NYSCEF 126). This is confusing as there are clearly sections within the signed document requesting confirmation on the subject. It is not clear how it could be concluded otherwise.

**Other Information**

The applicant acknowledge and confirm that his/her dwelling does not belong to any of the following conditions :

1) Dwelling that is a seasonal/secondary residence or vacant/unoccupied

Once such a misrepresentation is made, the question then is the materiality. “No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.” N.Y. Insurance Law § 3105(b)(1). The standard for establishing materiality in the Second Department is as follows. “[T]he 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” *Schirmer v. Penkert*, 41 A.D.3d 688, 690–91, 840 N.Y.S.2d 796 (2d Dep’t 2007). In reviewing the submission of the Hyundai NY Dwelling Property Underwriting Guideline (as at 11.1.2016), there is a section on Occupancy. The Occupancy section states a requirement of “1 - 4 family, owner occupied & tenant occupied” (NYSCEF 96). The bottom part of the section states “Vacant / Unoccupied for more than 30 days is not eligible”. The parties have disparate interpretations on this section. Plaintiff argues that this provision provides a thirty day grace period at the commencement of the policy. The Second Department has allowed for affidavits by corporate representatives. *Thandi supra* at 157 N.Y.S.3d 516, 519. Here, there is both an affidavit and deposition by Eddy Kim. According to Mr. Kim, a policy would not have been granted if Hyundai was aware the house was not occupied. (NYSCEF Document 92; NYSCEF Document 120). To the extent there is a disagreement regarding what has been referred to as a thirty day

grace period, the deposition indicated, following numerous clarifications, that Hyundai would only allow for such “wobble room” where there was a previously declared tenant. (Id. at 120).

Therefore, the motion for summary judgment is granted to Defendants and the Complaint is hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 29, 2022

New City, New York

ENTER

  
THOMAS P. ZUGIBE  
J.S.C.