NEW YORK STATE SUPREME COURT, PART 24– QUEENS COUNTY

Present: HON. SALLY E. UNGER

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XIAO DONG LIN, **Index No. 719647/2021**

Plaintiff, **Motion Date: 2/3/2022**

-against- **Motion Seq. 1** 9/20/2023 GRANTED DISPOSE

HYUNDAI MARINE & FIRE INSURANCE,

Defendants.

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The following papers were electronically filed on a motion by the defendant for an order pursuant to CPLR §3211 dismissing the complaint; and duly submitted as motion sequence 1.

	NYSCEF Doc. Nos
Notice of Motion – Exhibits, Affirmation and Affidavit Annexed.....	EF04 – EF31
Affirmation in Opposition	EF35 – EF39
Reply.....	EF40 - EF45

Upon the foregoing papers it is ordered that the motion is decided as follows:

This action arises from property damage at the premises known as and located at 37-51 108th Street, Corona, New York (hereinafter "subject premises") on January 11, 2021, caused by a fire at this multi-family dwelling. The plaintiff filed a claim with his insurer, the defendant Hyundai Marine & Fire Insurance (hereinafter "Hyundai"). After investigating the matter, Hyundai denied the claim and rescinded the policy. Plaintiff then commenced this lawsuit asserting, *inter alia* intentional and reckless breach of fiduciary duty, breach of contract and unjust enrichment.

The policy of insurance that is the subject of this action bears policy number DPNY2016010148-20. It was effective from January 13, 2020, to January 13, 2021 (hereinafter "the policy"). After the plaintiff filed a claim for property damage, Hyundai disclaimed coverage, alleging, among other things, that the subject premises was over-occupied, which was a material violation of the policy. According to Hyundai, the subject premises was insured as a three-family dwelling. However, upon investigation, the subject premises contained in excess of 5 separate dwelling units. Hyundai now moves to dismiss the complaint, based on documentary evidence.

On a motion to dismiss a complaint based on documentary evidence, the defendant bears the burden of demonstrating that the proffered evidence conclusively refutes plaintiff's factual allegations. CPLR §3211(a)(1); *Ocean Gate Homeowners Association, Inc. v. T.W. Finnerty Property Management, Inc.*, 163 AD3d 971, 83 NYS3d 494 (2nd Dept.,

2018). For evidence to qualify as "documentary," to provide a basis for dismissal of the complaint, it must be unambiguous, authentic, and undeniable. CPLR 3211(a)(1). *Sunset Café, Inc. v. Mett's Surf & Sports Corp.,* 103 AD3d 707, 959 NYS2d 700 (2nd Dept., 2013).

In support of the motion, Hyundai submits, among other things: the pleadings, the policy, the insurance application (hereinafter "Dwelling Policy Application"), an affidavit of Eddy Kim, an Underwriter with Hyundai, a copy of the underwriting guidelines, a copy of the New York City Fire Department's (hereinafter "FDNY") Fire Incident Report (hereinafter "FIR"), photographs, a copy of the certificate of occupancy (hereinafter "C/O"), copies of the violations issued by the FDNY, statements from tenants taken immediately following the fire and the transcript of the plaintiff's examination under oath (hereinafter "EUO").

The C/O provided by Hyundai identifies the subject premises as a three family multiple dwelling with accessory parking garage for two cars. Additionally, on page "2" of the DPA, the number of families slated to occupy the premises was three. The DPA was signed by the plaintiff on January 12, 2016. The Underwriting Guideline, accompanying the affidavit of the underwriting agent, Eddie Kim, states the carrier is limited to insuring 1-4 family, owner occupied dwellings. By signing the DPA, plaintiff represented the property to be a three-family dwelling house, and based on that representation, Hyundai issued a policy of insurance, which was renewed annually under the same terms and conditions set forth in the initial policy.

Following the fire of January 11, 2021, an investigation was commenced by the FDNY. The FDNY's FIR states the subject premises had three floors above grade, and one below. The report also states that the matter was being referred to the Department of Buildings due to the discovery of single room occupancy/illegal conversions (hereinafter "SRO") at the time of the fire. Summonses were issued due to the subject premises being converted, maintained, or occupied with three or more additional dwelling units than legally authorized by the C/O. A class "A" apartment was created in the cellar with full kitchen and bath and four partitioned rooms with locking devices. A partition was erected on the third floor, with locking devices to create illegal rooms, contrary to the C/O.

Another investigation was conducted by Hayden Karn Consulting, Inc. (hereinafter "Hayden"). According to Hayden's investigation report, many tenants confirmed the existence of additional units in the subject premises. Violations were issued to the plaintiff by FDNY for a variety of offences, including the creation of single room occupancy units on each floor, as well as the basement.

Hyundai's investigation determined that the subject premises contained at least five dwelling units at the time of the fire, a situation flagged as an "ineligible exposure" in its underwriting guidelines. Based on the foregoing, Hyundai issued a denial letter of August 2, 2021, rescinded the policy on August 4, 2021, and returned all premiums paid by the plaintiff. The Court finds the defendant's evidence to be unambiguous, authentic, and undeniable, and has therefore met its burden.

In opposition, plaintiff argues that defendant's motion to dismiss should be denied on three grounds: (1) its untimeliness; (2) based on plaintiff's continued policy renewal, and that there is no signed provision within the policy which allows the defendant to disclaim if there are "alleged" illegal conversions; and (3) the motion is premature, because discovery has not taken place.

First, with regard to timeliness, the instant motion was filed on October 12, 2021. According to the affidavit of service, Hyundai was served with the summons and verified complaint at their corporate headquarters in New Jersey on September 9, 2021. CPLR §320 prescribes the time period for a defendant to appear, answer or serve a motion as 30 days from the date of service, which in this matter was October 9, 2021, a Saturday. According to the General Construction Law §25–a (1), when a date certain set by law by which an act must be performed falls on a Saturday, Sunday or a public holiday, the deadline for performing that act is extended to the next succeeding business day. See *Matter of Elbin Realty No. 2 v. Boyland*, 22 AD2d 913, 255 NYS2d 543, affd. 16 NY2d 599, 261 NYS2d 56 (1965). Here, the next succeeding business day was October 12, 2021, the date the motion was filed with the Court. As such, Hyundai's motion was timely filed.

With respect to plaintiff's claim that the policy was renewed, and as such, should be honored, it should be noted that "to renew" or "renewal" is defined as "the issuance and delivery by an insurer, at the end of the policy period, of a policy superseding a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of the policy beyond its policy period or term." Insurance Law §67–a(1)(b). It is well settled that implicit in a policy renewal is that the terms of the existing policy are to be contained in the absence of a contrary intention. See *Walton v. Sterling Fire Ins. Co*., 10 AD2d 54, 197 NYS2d 277 (4th Dept., 1960). In the initial DPA and the C/O, the subject premises was described as a three-family dwelling. The Fire Department Incident Report reported illegal conversion SRO's at the subject premises. Moreover, the witness statements and plaintiff's own statement at his EUO confirmed this fact.

An insurer may void an insurance contract if the insured made a false statement of fact as an inducement to making the contract and the misrepresentation was material. See Insurance Law §3105(a)(b). Rescission is available even if the material misrepresentation was innocently or unintentionally made. The signer of a contract is conclusively bound by it regardless of whether they actually read it. An insured cannot remain silent while cognizant that their insurance application contains misleading or incorrect information. See *Curanovic v New York Cent. Mut. Fire Ins. Co*., 307 AD2d 435,762 NYS2d 148 (4th Dept., 1993).

Additionally, to void an insurance contract, the misrepresentation must be material. 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 to demonstrate it would not have issued the same policy if the correct information had been disclosed in the application. See *Cutrone v American General Life Ins. Co. of New York*, *supra*. Hyundai provided the affidavit of underwriting agent Eddy Kim, underwriting guidelines and a copy of the policy, all of which demonstrated that the carrier is limited to insuring 1-4 family, owner occupied dwellings. Here, there is no dispute that the plaintiff's DPA contained misrepresentations. Specifically, on page "2" of the DPA, where plaintiff answered the question about the number of families occupying the premises, his response was "3."

Plaintiff further asserts that the instant motion is premature because discovery is incomplete. The Court disagrees. The plaintiff failed to demonstrate how further

discovery may lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of the defendant. *See* CPLR §3212(f), *Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 (2nd Dept. 2011). Plaintiff certainly had the opportunity to submit an affidavit of facts refuting the claims made by the plaintiff, but failed to do so.

Accordingly, it is hereby

ORDERED, that defendant's motion is granted, and plaintiff's complaint is dismissed in its entirety.

This constitutes the decision and order of the Court.

Dated: September 20, 2023

SALLY E. UNGER, A.J.S.C.