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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 14

_____X

STOUT STREET FUND 1, LP,

Plaintiff,

-against-

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

_____X

Index No. 006283/11
Motion Sequence...01, 02
Motion Date...02/21/12
XXX

Papers Submitted:
Notice of Motion (Mot. Seq. 01).....x
Memorandum of Law.....x
Notice of Cross-Motion (Mot. Seq. 02).....x
Memorandum of Law.....x
Reply Affirmation.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion, pursuant to CPLR § 3212, by the Plaintiff seeking summary judgment against the Defendant, State Farm Fire and Casualty Company (hereafter "State Farm") and the Cross-motion by the Defendant, State Farm, pursuant to CPLR § 3212, seeking summary judgment dismissing the complaint are determined as herein provided.

In this action, the Plaintiff, the named mortgagee/additional insured under a

policy of insurance (92-BK-G100-5) issued by the Defendant, State Farm, on property located at 17 Carr Lane, Medford, New York, seeks damages flowing from the Defendant, State Farm's alleged breach of contract and a declaration that the Defendant, State Farm, is obligated to provide fire insurance coverage with respect to the subject property which was damaged in a fire on November 28, 2010.

The Plaintiff alleges that, in reliance on a declaration issued by the Defendant, State Farm, that property known as 17 Carr Lane, Medford, New York was insured for the period December 12, 2009 to December 14, 2010, Stout Street Funding, LLC, the Plaintiff's assignor, lent Sedberg Holding Corp. (Sedberg), the owner of the property, $55,000. In accordance with such loan, Sedberg executed a note and mortgage in favor of the Plaintiff's assignor, dated December 15, 2009, secured by the property. Thereafter, Stout Street Funding, LLC assigned all of its rights under the note and mortgage to the Plaintiff. After the property suffered damage in a fire, Sedberg submitted a claim to the Defendant, State Farm. By letter dated January 13, 2011, the Defendant, State Farm, advised the Plaintiff that:

> "no coverage is available for the fire damage . . . as the Rental Dwelling Policy on this location was effectively cancelled as of July 4, 2010 due to non-payment of premium."

The letter further states as follows:

> "Additionally, we have verified that notification of the policy cancellation was provided via written correspondence by our Underwriting Department to both Stout Street Funding and Sedberg Holding Corp. This cancellation notification was issued to you on June 14, 2010. therefore, no payment can be made to you for this claim."

The Plaintiff's motion for summary judgment against the Defendant, State

Farm, is predicated on the grounds that the Defendant, State Farm, breached its contract with the Plaintiff by failing to provide insurance coverage on the subject property for the applicable one year period as set forth on the Declaration. In this regard, the Plaintiff alleges that it has "no record of ever receiving a Notice of Cancellation of the Policy." The Plaintiff further claims that it reasonably relied on the representation, set forth on the Declaration, that insurance coverage had been purchased. Moreover, the Plaintiff argues that it would not have lent money to Sedberg if it believed that the premium had not been paid.

In support of its cross-motion for summary judgment dismissing the complaint, the Defendant, State Farm, explains that Sedberg maintained six policies of insurance with State Farm for various properties including the property at issue in this action. In May 2010, the Defendant, State Farm, mailed a bill to Sedberg requesting payment on its six State Farm policies for the outstanding premium of $4,554.90. The Plaintiff was the listed mortgagee on each of the six accounts *vis-a-vis* Sedberg's policies. When the Defendant, State Farm, received no response to the outstanding bill, or any payment thereunder, the Defendant alleges it mailed a Notice of Policy Cancellation dated June 14, 2010 to both Sedberg and the Plaintiff.

It is undisputed that no payment was received from either the insured or the Plaintiff as mortgagee. As a result, the Defendant, State Farm, maintains that the policy was properly cancelled on July 4, 2010.

A party seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and that the loss was a covered event within the terms of the

policy. *Gongolewski v. Travelers Ins. Co.*, 252 A.D.2d 569 (2nd Dept. 1998) *appeal denied* 92 N.Y.2d 815 (1998). Although the Plaintiff claims it detrimentally relied on the Defendant insurer's alleged "misrepresentation" as to the "scope of coverage," the allegation is made by the Plaintiff's counsel who has no personal knowledge of such reliance, only a familiarity with the facts and circumstances gleaned from a review of the pleadings and proceedings. Counsel's Affirmation, therefor, lacks probative value and is an insufficient basis on which to award summary judgment in the Plaintiff's favor. *Shickler v. Cary*, 59 A.D.3d 700 (2nd Dept. 2009). The affiant has no personal knowledge *vis-a-vis* the Plaintiff's reliance on a representation of insurance coverage made by the Defendant, State Farm.

Despite the Plaintiff's contention that the Premium Notice submitted, which lists the premium as $1,379, and the amount paid as $1,379, constitutes proof of fire insurance coverage, the notice states that: "This is the only notice you will receive. Please make check payable to State Farm and return it with this notice to the address shown below. Your cancelled check is your receipt".

The Plaintiff has failed to present a copy of the cancelled check and offers only an attorney's Affirmation in support of its motion for summary judgment. The Affirmation, however, has no probative value on the issue of whether the Plaintiff relied on the Notice of Premium in issuing a mortgage to the owner of the property or whether insurance coverage was actually purchased.

Detrimental reliance is synonymous with equitable estoppel and is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud

or injustice upon the party against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought". *Nassau Trust Company v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 184 (1982).

There is no independent cause of action for detrimental reliance which is an element of equitable or promissory estoppel. Equitable estoppel prevents a party from denying its own express or implied admission which has, in good faith, been accepted and acted upon by another. The elements of estoppel are, with respect to the party estopped:

> 1) conduct which amounts to a false representation or concealment of material facts;
>
> 2) intention that such conduct will be acted upon by the other party; and
>
> 3) knowledge of the real facts.

The party asserting estoppel must show that:

> 1) it lacked knowledge of the true facts
>
> 2) it relied upon conduct of the party estopped; and
>
> 3) it experienced a prejudicial change in position.

Airco Alloys Div. v Niagara Mohawk Power Corp., 76 A.D.2d 68, 81 (4th Dept 1980).

Here, the Defendant insurer maintains that the policy of insurance under which the Plaintiff claims coverage was cancelled on July 4, 2010, four months prior to the fire. As such, the Defendant, State Farm, bears the burden of proving timely cancellation of the policy. *Tobia v. Liberty Mut. Fire Ins. Co.*, 70 A.D.3d 928 (2nd Dept. 2010).

An insurer is entitled to a presumption that a cancellation or disclaimer notice was received when "the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the Notices of Cancellation have been duly addressed and mailed." *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829 (1978). In order for the presumption to arise "office practice must be geared so as to ensure the likelihood that a Notice of Cancellation is always property addressed and mailed." *Badio v. Liberty Mut. Fire Ins. Co.*, 12 A.D.3d 229, 229-30 (1st Dept. 2004).

An insured's denial of receipt, standing alone, is insufficient to rebut the presumption. "In addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the Notice was mailed. *Nassau Ins. Co. v. Murray*, *supra*, at p. 830. No such showing has been made here.

Here, the Defendant, State Farm, has met its burden by submitting the affidavit of a supervisor at the Insurance Support Center (ISC) whose duties include the supervision of the manual handling function in the Printing, Inserting, Mailing Center within the ISC, who attests to the standard operating procedure *vis-a-vis* the issuance of cancellation notices sent to State Farm policyholders. The Defendant also submits the affidavit of the general manager of Pitney Bowes Presort Services, Inc. (PBPS) who confirmed the process PBPS uses to effectuate delivery of mail that comes into its possession from State Farm.

Under the circumstances extant, the Plaintiff's allegation that it never received the Notice of Cancellation the Defendant alleges was sent to the Plaintiff and Sedberg,

without more, is insufficient to rebut the presumption of mailing. *Kaufman v. Leatherstocking Coop Ins. Co.*, 52 A.D.2d 1010, 1012 (3rd Dept. 2008).

By establishing its routine and reasonable office practice regarding the mailing of cancellation notices, the Defendant met its burden of proof establishing that notice was actually mailed to the Plaintiff and presumed received. The burden then shifted to the Plaintiff to rebut the presumption of receipt. The Plaintiff has failed to satisfy this burden.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion (Mot. Seq. 01) seeking summary judgment is **DENIED**; and it is further

ORDERED, that the Defendant's Cross-motion (Mot. Seq. 02) seeking summary judgment and declaring that the Defendant, State Farm is not obligated to provide insurance coverage with respect to property located at 17 Carr Lane, Medford, New York which was damaged in a fire on November 28, 2010 is **GRANTED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

DATED: Mineola, New York
April 24, 2012

Hon. Randy Sue Marber, J.S.C.
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