[* 1]

SHORT FORM ORDER

INDEX No. 11-36778
CAL. No. 13-00624CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-23-13
ADJ. DATE 9-17-13
Mot. Seq. # 002 - MD

PARAMOUNT INSURANCE COMPANY, Plaintiff, -against- XUXIN CHEN and SHUJA BAIG Defendants.	NELSON LEVINE deLUCA & HAMILTON Attorney for Plaintiff One Battery Park Plaza, 32nd Floor New York, New York 10004 BASCH & KEEGAN, LLP Attorney for Defendant Shuja Baig 307 Clinton Avenue, P.O. Box 4235 Kingston, New York 12402 XUXIN CHEN, Pro Se 1423 Stony Brook Road Stony Brook, New York 11790-2214

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated June 28, 2013, and supporting papers 1- 20 (including Memorandum of Law dated June 28, 2010); (2) Affirmation in Opposition by the defendant Xuxin Chen, dated September 1, 2013, and supporting papers 21 - 22; (3) Affirmation in Opposition by the defendant Shuja Baig, dated August 5, 2013, and supporting papers 24 - 29; (4) Reply Affirmation by the plaintiff, dated September 4, 2013, and supporting papers 30 - 34; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment is denied.

This declaratory judgment action seeks to rescind, and have the Court declare as void *ab initio*, a certain homeowner's policy issued to the defendant Xuxin Chen (Chen). It is undisputed that the plaintiff issued a homeowner's insurance policy number HO 17396, effective May 27, 2010 to May 27, 2011 (the Policy), to Chen regarding his residence located at 1423 Stony Brook Avenue, Stony Brook, New York (the Premises). On or about January 27, 2011, the defendant Shuja Baig was allegedly on the Premises, and he claims that he was injured when he fell on ice in the driveway. Thereafter, Baig commenced an action against Chen in Supreme Court, Ulster County. The plaintiff has defended Chen in that action pursuant to a reservation of rights.

In its complaint herein, the plaintiff alleges that, in the application that Chen filed with the plaintiff to obtain insurance for his residence, Chen represented that the Premises was not tenant-occupied, that the Premises was not rented, and that the number of household residents were "two." The plaintiff further alleges that it did not discover that these representations were false until after it issued the Policy, that the misrepresentations were material, and that, had it known the facts, it would have led to a refusal by the plaintiff to issue the Policy.

The plaintiff now moves for summary judgment and a declaration that it is not obligated to defend or indemnify Chen in the underlying action entitled *Baig v Chen*, Supreme Court, Ulster County, Index No. 01-01847, and that the Policy is rescinded and void *ab initio*. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the plaintiff submits, among other things, the pleadings, answers to interrogatories served by Chen, the affidavits of two of its employees, the application for insurance submitted by Chen, certain of its underwriting guidelines, and the depositions of two nonparty witnesses. Initially, it is noted that the deposition transcripts of the nonparty witnesses are certified but unsigned, and that the plaintiff has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcripts submitted in support of the motion as the defendants have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]). In addition, the plaintiff has submitted the requisite CPLR 3116 (a) notice regarding one nonparty witness, and the signature page of the other nonparty witness, in its reply papers. This evidence further demonstrates that the transcripts may be considered in support of the motion (*see eg.* ***David v Chong Sun Lee***, 106 AD3d 1044, 967 NYS2d 80 [2d Dept 2013]).[1]

In the answers to interrogatories served by Chen on June 8, 2012, he admits that he purchased the Premises on May 24, 2010, that on May 27, 2010 the Premises included four apartment units, and that he and three tenants resided at the Premises on that date. Chen further states that his father communicated

---

[1] It is noted that some of the exhibits attached to the plaintiff's motion are out of sequence, some are placed "upside down," and that the memorandum of law and two employee affidavits are not tabbed. While it is obvious that none of this affects the outcome of the application, counsel can assist the Court by ensuring that a client's submission is prepared in a more organized manner.

by telephone with Michael An (An) of An Liancheng Yiyuan, Inc. (ALY) with regard to his "May 2010 application for insurance for the premises (Application)," and that the insurance policy arrived later by mail from David J. Louie, Inc.

At his deposition, Xingbin Chen (Father), testified that Chen is his son, that his son purchased the Premises in May 2010, and that his son asked him to get the homeowner's insurance necessary for the purchase. He indicated that he has no ownership interest in the Premises, that he manages the Premises for his son, including the collection of rent, and that he contacted An by telephone to obtain insurance for the Premises. He stated that he told An that the Premises was a rental property, and that An did not ask him any questions regarding any of the alleged misinformation that appears on the application. Father further testified that he did not sign the application, and that he believes that the signature thereon was forged.

At his deposition, An testified that he is a licensed insurance broker, that he has a brokerage agreement with the plaintiff's agent, David J. Louie, Inc. (DJL), and that everything on the Application was obtained by telephone or via the internet. He was unaware that there are "two Chens," and he could not determine whether he spoke with the father or the son in May 2010. He indicated that he "never" signs a client's name on an application for insurance, and that "Chen" did not say that there were tenants at the property. He stated that he always asks an applicant if they live at the property or if they rent, and he admitted that the question only calls for one response. An further testified that a homeowner's policy is issued to an owner of property, and that a dwelling policy is issued for rental properties. He suggested that any discrepancies between the signed and unsigned copies of the Application were due to changes made by DJL during the process of binding the insurance in this matter.

In her affidavit dated June 19, 2013, Joanna Strzalka (Strzalka) swears that she is a senior claims representative employed by Magna Carta Companies, the trade name for the plaintiff Paramount Insurance Company, and that her duties include claims brought by and against the plaintiff. She states that she is "currently handling a claim involving [the plaintiff's] effort to rescind a policy it issued" to Chen. Strzalka further swears that the plaintiff was first notified of Baig's injury on March 9, 2011, that it undertook an investigation and interviewed Chen and Father, and that the plaintiff learned that Chen was aware that the Premises were rented when he made the subject application for insurance. She states that the plaintiff reserved its right to disclaim coverage, agreed to provide a defense in the Baig action, and advised Chen of the potential material misrepresentation made in the Application, in a letter dated July 26, 2011.

In her affidavit dated June 12, 2013, Deborah Gillen (Gillen) swears that she is the personal lines manager for Magna Carta Companies, the trade name for the plaintiff, and that her duties include a "familiarity with and adherence to company underwriting guidelines." She states that her review of the plaintiff's underwriting file for Chen reveals that it received Chen's application for "homeowner" coverage on or about May 27, 2010. The application form, under the category labeled "# Families" includes the response, "1," and under the category labeled "# household res[idents]" the response is "2." Under the category labeled "occupancy," the box next to "owner" is marked, but the box next to "tenant" is not marked. She states that the category labeled "# w[ee]ks rented" is left blank, and that "Xuxin Chen's name appears in the 'Applicant's Signature' section of the application." Gillen further swears

that under the plaintiff's New York Homeowner's Underwriting Guidelines (Guidelines) it only issues homeowner's policies to cover one-family or two-family owner occupied primary residences, and that such policies are not issued for premises rented to tenants. She indicates that the plaintiff "has a [d]welling policy that is issued only for tenant-occupied premises located in New York City's five boroughs." She states that had the plaintiff's underwriters known at the time of the Application that the Premises were being rented to others, the Policy would not have been issued to Chen.

"To 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" (***Varshavskaya v Metropolitan Life Ins. Co.***, 68 AD3d 855, 856, 890 NYS2d 643 [2d Dept 2009], quoting ***Zilkha v Mutual Life Ins. Co.***, 287 AD2d 713, 732 NYS2d 51 [2d Dept 2001]; *see also* ***Interboro Ins. Co. v Fatmir***, 89 AD3d 993, 933 NYS2d 343 [2d Dept 2011]; ***Barkan v New York Schools Ins. Reciprocal***, 65 AD3d 1061, 886 NYS2d 414 [2d Dept 2009]). Thus, the insurer bears the burden of proof on the issue of whether a misrepresentation in an insurance application is material (***Sirius America Ins. Co. v Joline Estates, LLC***, 55 AD3d 899, 866 NYS2d 739 [2d Dept 2008]; ***Schirmer v Penkert***, 41 AD3d 688, 840 NYS2d 796 [2d Dept 2007]; ***Lenhard v Genesee Patrons Co-op. Ins. Co.***, 31 AD3d 831, 818 NYS2d 644 [3d Dept 2006]). 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, which show that it would not have issued the same policy if the correct information had been disclosed in the application (*see* ***Barkan v New York Schools Ins. Reciprocal***, *supra*; ***Schirmer v Penkert***, *supra*; ***Parmar v Hermitage Ins. Co.***, 21 AD3d 538, 800 NYS2d 726 [2d Dept 2005]).

Here, the plaintiff submits its Guidelines and a single page entitled "Dwelling Fire Guidelines - New York." The Guidelines set forth various underwriting provisions, including the following:

Occupancy	Owner-occupied primary. Secondary residences follow logical carrier approach. If Additional Residence Rented To Others (Form HO-70) option is selected, we will not write more than two (2) additional locations of two (2) families each, with a maximum of four (4) families at all locations. If Section II Liability Limit of $500,000 applies, we will not write more than one (1) additional location of one (1) family.

A plain reading of the language in the Guidelines does not establish that the plaintiff "only issues homeowner's policies to cover one-family or two-family owner occupied primary residences, and that such policies are not issued for premises rented to tenants," as Gillen claims in her affidavit. The language of the Guidelines does not appear to cover the instances where, as here, the premises are owner occupied and rented to others. It is undisputed that the Premises was not Chen's secondary or additional residence, and that the Premises was not solely tenant occupied. In addition, the plaintiff's Dwelling Fire Guidelines - New York do not establish as a matter of law that the plaintiff does not issue homeowner policies for premises rented to tenants. Said guidelines consist of a series of "bullet points," which provide in pertinent part: "• 5 Boroughs-Only," and "• 1-4 families Owner or Tenant Occupied."

These two provision do not address the plaintiff's underwriting policy regarding properties outside of New York City, or those dwellings that are owner occupied and rented to others.

Whether a misrepresentation is material is generally a question of fact for the jury (*see* ***Barkan v New York Schools Ins. Reciprocal***, *supra*; ***Schirmer v Penkert***, *supra*; ***Tyras v Mount Vernon Fire Ins. Co.***, 36 AD3d 609, 828 NYS2d 448 [2d Dept 2007]; ***Parmar v Hermitage Ins. Co.***, *supra*). Conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law (***Schirmer v Penkert***, *supra*; ***Lenhard v Genesee Patrons Co-op. Ins. Co.***, *supra*; ***Curanovic v New York Cent. Mut. Fire Ins. Co.***, 307 AD2d 435, 762 NYS2d 148 [3d Dept 2003]).

Here, the documentary evidence does not establish as a matter of law that the plaintiff would not have issued the Policy. Therefore, questions of fact exist as to whether the misrepresentations by Chen were material (*see* ***Jeune v Peerless Ins. Co.***, 72 AD3d 1444, 899 NYS2d 462 [3d Dept 2010]). Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion for summary judgment is denied.

Dated: 12/3/13

PETER H. MAYER, J.S.C.