Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ROBERT I. CALORAS **PART 36**
Justice

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VASILE MICLE and ANGELINA MICLE,

Plaintiff,

-against-

Index No.: 707767/17
Motion Date: 1/3/19
Motion Cal. No.: 9
Seq.# 1

MIC GENERAL INSURANCE CORPORATION, NORTHEAST AGENCIES, INC., and MICHAEL KALKIN,
Defendants.

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The following papers numbered E18 to E59 read on this motion by defendant **MIC GENERAL INSURANCE CORPORATION** ("MIC") for summary judgment, pursuant to CPLR § 3212, in its favor dismissing the plaintiffs' complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	E18-E32, E34-E43
Memorandum of Law.....	E36-E37
Affirmation in Opposition-Exhibits.....	E45-E55
Reply Affirmation-Exhibits.....	E56-E58
Memorandum of Law.....	E59

Upon the foregoing papers it is ordered that this motion for summary judgment by defendant MIC, is granted, for the following reason:

This action arises out of defendant's denial of plaintiffs' claim of fire damage under Policy No. DFP1050441 for the property located at 94-34 133d Avenue, Ozone Park, New York 11417 (the "Premises"). The denial was based upon the dwelling being a three family dwelling and it was described in the Policy Declarations as a two family dwelling, and, therefore, does not fall within the coverage granted by the Policy. MIC also informed plaintiffs that denial was also based upon a material misrepresentation made during the procurement of the Policy. This is due to their representations during the application process that the Premises was to be used as a two-family home, when in fact it was being used as a three-family home. In response to the denial by MIC plaintiffs commenced the instant action alleging that MIC "refused to pay the

aforesaid claim for damages, without proper justification." The claims against the other defendants are based upon constructive notice of the dwelling not being a 2 family dwelling and on negligence.

Defendant MIC now seeks summary judgment dismissing plaintiffs' complaint as against it, based upon there is no coverage under the policy because the premises, which is a three family dwelling, does not fall within the policy's coverage for a two-family dwelling. In support of its motion, defendant has submitted, *inter alia*, the correspondence and records concerning plaintiffs' Policy, defendant's policy writing guidelines, an affidavit of Brett Hammond, the Personal Lines Underwriting Manager for National General Insurance Company ("NGIC"), with underwriting responsibility for NGIC's subsidiaries and their predecessors, which included CastlePoint Insurance Company ("CastlePoint") when it was an operating entity and MIC, and the deposition transcripts of plaintiffs.

This evidence shows that plaintiffs, through their insurance broker, submitted an application for a two-family dwelling. Thereafter, plaintiffs were issued Policy No. DFP1050441 for the Premises, by Castlepoint Insurance Company. The Policy was renewed each year by Plaintiffs and in 2015, the company underwriting the Policy was changed to MIC. The Policy with MIC was renewed each year including for the period of March 21, 2016 through March 21, 2017. The Policy provides coverage for a 2 Family dwelling, and the Declarations describe the Premises as "2 Family." Although plaintiffs submitted an application for, and received insurance for, a two-family dwelling, the Premises was configured as a three-family at the time of the application. The unambiguous Policy language requires that, in order for the dwelling to be covered, it must be a one or two family dwelling. At their depositions, plaintiffs acknowledge that, at the time of the fire, the premises was a three family dwelling. Accordingly, MIC defendant claims that the Policy does not cover the plaintiffs' loss since the premises was not a 2 family dwelling, and the complaint must be dismissed as against MIC.

Plaintiffs oppose this motion, claiming that no misrepresentation was made to MIC, in that plaintiffs never submitted an application for insurance to MIC. The application which the movant relies upon for its argument was not made to MIC, but to another insurance carrier. Moreover, even if plaintiffs had, arguendo, submitted an application to MIC stating that the premises are a two family home, there is insufficient proof of materiality submitted on this motion, in that no application was submitted to MIC, but that MIC issued its own policy it inspected the premises prior to the loss, and agreed that it met MIC's underwriting guidelines. Plaintiffs also claim that MIC's agents, the co-defendants, were aware that the premises had been converted from a two family to a three family dwelling, and so no misrepresentation actually occurred. Plaintiffs also claim that the motion for summary judgment is premature as there exists

outstanding discovery necessary to respond to this motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d *562 (2d* Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Here, the provisions at issue in the instant policy are not ambiguous. The policy defines the insured location as, inter alia, a 2 Family dwelling. As the parties do not dispute that the dwelling is not a 2 Family dwelling, but rather a 3 family dwelling, MIC properly concluded that the subject premises was not covered under the policy and properly disclaimed on that basis. Marshall v. Tower Ins. Co. of N.Y., 44 A.D.3d 1014 (2d Dept 2007). Contrary to the plaintiffs' contention, they ratified the representations contained in the application by accepting the policy for a 2 Family dwelling and permitting it to be renewed for years thereafter on the same terms, despite the dwelling be a 3 Family dwelling. *See,* Morales v Castlepoint Ins. Co., 125 A.D.3d 947 (2d Dept 2015).

Moreover, contrary to plaintiffs' claim the co-defendants were not agents of MIC, rather, brokers are deemed to be agents of the insured. *See*, Gershow Recycling Corp. v. Transcontinental Ins. Co., 22 A.D.3d 460 (2d 2005). Thus, any awareness they had of the true nature of the premises is not imputed to MIC. Similarly, plaintiffs' claim that MIC has waived or is estopped from denying coverage is without merit. The inspection was of the exterior of the dwelling only, and there is no duty on the insurer to inspect the premises. Rather, an insurer may rely on the presumption that the insured has truthfully stated all material facts and is not required to make inquiries. Furthermore, where the issue is the existence or nonexistence of coverage, as in the instant case, the doctrine of waiver is simply inapplicable. Albert J. Schiff Associates, Inc. v. Flack, 51 N.Y.2d 692 (1980).

Plaintiffs also fail to allege any facts that support an estoppel argument. Under the principles of estoppel, an insurer, though in fact not obligated to provide coverage, may be precluded from denying coverage upon proof that the insurer "by its conduct, otherwise lulled [the insured] into sleeping on its rights under the insurance contract" Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 968 (1988). *See, also*, Provencal, LLC v Tower Ins. Co. of N.Y., 138 A.D.3d 732 (2d Dept 2016). Plaintiffs allege nothing to suggest MIC was providing

coverage to a 3 Family dwelling, and not a 2 Family dwelling, as under the Policy. Emphasizing this fact is the inspection report provided by plaintiffs that indicates the inspected Premises was a 2 Family dwelling. Nor do plaintiffs clearly allege or provide proof that they suffered prejudice by MIC's conduct. *Id.*

Finally, plaintiffs have not demonstrated that further discovery may lead to evidence that is relevant to the claims asserted in the instant action, or that any relevant evidence is within the exclusive control of MIC. CPLR 3212(f), provides, in pertinent part, that, " Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." Cajas-Romero v. Ward, 106 A.D.3d 850, 852 (2d Dept. 2013) (citations omitted). Here, plaintiffs assert that they need brokerage agreements and depositions and the "opportunity to discover the circumstances of MIC's alleged reliance on the application," and "Defendant's standards for determining in similar cases whether a property constitutes a two or three family dwelling." None of this evidence is relevant to the only issue here: that the Premises was a three-family dwelling, while the Policy covered a two family dwelling. A fact that plaintiffs have conceded. As such, their mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion.

For the reasons set forth above, the motion by MIC for summary judgment in its favor and dismissal of the complaint as against MIC, is granted.

Dated: February 6, 2019

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ROBERT I. CALORAS, J.S.C

FILED
FEB 19 2019
COUNTY CLERK
QUEENS COUNTY