

**MEM Realty of Westchester, LLC v Union Mut. Fire  
Ins. Co.**

2020 NY Slip Op 35172(U)

January 10, 2020

Supreme Court, Westchester County

Docket Number: Index No. 69944/18

Judge: Linda S. Jamieson

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NYSCEF DOC. NO. 45

To commence the statutory time period for appeals as  
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copy of this order, with notice of entry, upon all parties.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**

-----X  
MEM REALTY OF WESTCHESTER, LLC,

Index No. 69944/18

Plaintiff,

-against-

DECISION AND ORDER

UNION MUTUAL FIRE INSURANCE COMPANY, and  
TONY D. MELANDRO D/B/A MELANDRO HOME  
INSPECTIONS & AIR TESTING,

Defendants.

-----X  
TONY D. MELANDRO D/B/A MELANDRO HOME  
INSPECTIONS & AIR TESTING,

Third-Party Plaintiff,

-against-

JONATHAN ESCALANTE, THOMAS OSBECK, KELLER  
WILLIAMS NY REALTY, ALFRED BRUNO et al.,

Third-Party Defendants.  
-----X

The following papers numbered 1 to 3 were read on this  
motion:

| <u>Paper</u>  | <u>Number</u> |
|---|---------------|
| Notice of Motion, Affidavits, Affirmation, Exhibits and |               |
| Memorandum of Law                                       | 1             |
| Affirmation and Exhibits in Opposition                  | 2             |
| Affirmation in Reply                                    | 3             |

Defendant Union Mutual Fire Insurance Company ("Union")  
brings its motion seeking (1) summary judgment in its favor

against plaintiff and defendant/third-party plaintiff Tony D. Melandro ("Melandro"); (2) summary judgment in its favor on its counterclaim; (3) a declaration that an insurance policy that it issued to plaintiff is void *ab initio*; (4) a declaration that there is no coverage for plaintiff's December 23, 2017 claim because the policy is void *ab initio*; and (5) to dismiss the complaint as against it (which appears to be redundant of its first request for relief).

Plaintiff is the owner of real property in New Rochelle which it had purchased in foreclosure. The premises suffered burst pipes and flooding on December 23, 2017. This was just after Melandro had done a home inspection on the property. Plaintiff alleges in the complaint that Melandro turned on the water in the premises, but did not drain the water thereafter. Plaintiff also alleges in the complaint that the temperature in the home was below freezing, and there was no heat on in the home.

Union issued an insurance policy to plaintiff for the premises, with coverage effective from January 20, 2017 through January 20, 2018 - a period which covers the incident.<sup>1</sup> At the

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<sup>1</sup>In its motion, Union relies heavily on a renewal policy that it issued to plaintiff, effective from January 2018 through January 2019. It argues that this policy is void because plaintiff stated on the application, executed in December 2017, that the property was not vacant. Although this policy does not cover the time period of the incident, Union is correct that it is void because of this misstatement. Union is also correct that it must refund to plaintiff the premium that it paid for this policy.

time of the application, plaintiff answered accurately when it stated that the premises was not vacant. At his deposition, plaintiff's principal testified that the occupant of the home moved out in the summer, possibly in June or July 2017. Union relies on this testimony in support of its position that the premises had been vacant for more than 60 days at the time of the incident. However, in opposition, plaintiff submits documentary evidence which contradicts the testimony - a copy of an Order to Show Cause filed in September 2017 by the occupant of the premises seeking to stay an eviction. Clearly, then, plaintiff's principal was incorrect when he testified that the occupant moved out over the summer, in June or July 2017. There is no evidence submitted to the Court on this motion indicating when the eviction actually occurred. There is, thus, no way for the Court to determine, as a matter of law, whether the premises was vacant for 60 days prior to the incident.

Union argues that it is entitled to deny coverage because the premises were vacant for more than 60 days at the time of the incident, under the section entitled "Vacancy Provisions." As stated, given the factual dispute, this is not a basis on which the Court can grant Union summary judgment. However, there is a second provision on which Union also relies, the "WATER DAMAGE EXCLUSION" endorsement. This endorsement excludes from coverage any damages if the premises were vacant at the time of the loss

if such damage were caused by "water . . . that flows from plumbing, heating, air conditioning or other equipment . . . caused by or resulting from freezing." There is no dispute that the premises were vacant on December 23, 2017. And there is no dispute that the damage was done by water flowing "from plumbing, heating, air conditioning or other equipment caused by or resulting from freezing." Accordingly, the Court grants Union's motion for summary judgment, and dismisses the complaint as against Union, as well as any claims against Union filed by Melandro.

Dated: White Plains, New York  
January 10, 2020

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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