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Editor's Note: The material contained in this publication is provided as information only, and is not intended to be construed or relied upon as legal advice in any manner. Always consult an attorney with the particular facts of a case before taking any action. The material contained in this publication was not necessarily prepared by an attorney admitted to practice in the jurisdiction of the material contained in the publication.

URB NEWS

BOP Manual

- The BOP Manual has recently been filed with the New York Department of Financial Services.

Forms Recently Approved

- CL-101 Ed. 8/18 – Cyber Insurance Supplemental Extended Reporting Period Endorsement

Forms Recently Filed

- FL-55 Ed. 9/18 – Replacement Cost Provision – Coverage C – Personal Property
- FL-375 Ed. 9/18 – Siding and Roofing Matching

Forms Projects In Progress

- Updated LS Form Series
- ML and LS Unmanned Aircraft Limited Liability Coverage Endorsements
- ML Home Business
- ML Home Sharing
- LS Customer Goods Legal Liability
- LS Sale and Disposal Operations Legal Liability

Forms Projects In Development

- Agritainment Program
- Personal Liability on a Commercial Policy
- FL Extender Endorsement

We will keep you posted as these projects progress. ◆

APPELLATE COURT RULES ON CREDIBILITY ISSUE IN INSURER'S FAVOR

Editor's Note: In the case of *Finley v Erie & Niagara Ins. Assn.*, 2018 NY Slip Op 04474 [162 Ad3d 1644] the Supreme Court, Appellate Division, Fourth Department upheld the lower court to affirm the grant of summary judgement to the insurer. The insured's home burned down. The insurer asked for a sworn proof of loss. When it was not received within the required 60-day period, the insurer disclaimed coverage. The insured sued and testified during his deposition that he had submitted the sworn proof of loss in a timely manner, although he had not done so. Ordinarily, credibility is an issue of fact for the jury. In this case, the appellate court reasoned that neither that court nor the motion court were "required to shut its eyes to the patent falsity of a defense". The decision of the Supreme Court, Appellate Division, Fourth Department is below.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 6, 2017. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this breach of contract action arising from defendant's denial of a claim made by plaintiff on a fire insurance policy, plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint. Contrary to plaintiff's contention, Supreme Court properly granted the motion.

Initially, we note that plaintiff failed to preserve for our review his contentions that the court erred in considering sworn statements submitted by plaintiff's first attorney, and that defendant is estopped from asserting the lack of a sworn proof of loss as an affirmative defense because defendant extended a settlement offer prior to litigation. Those contentions may not be raised for the first time on appeal where, as here, they " 'could have been obviated or cured by factual showings or legal countersteps' " in the motion court (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). We further note that, at oral argument before the motion court, plaintiff withdrew his cross motion, and he therefore has waived his present contention with respect to the cross motion (*see e.g. Andrew v Hurh*, 34 AD3d 1331, 1331-1332 [4th Dept 2006], *lv denied* 8 NY3d 808 [2007], *rearg denied* 8 NY3d 1017 [2007]; *Grimaldi v Spievogel*, 300 AD2d 200, 200 [1st Dept 2002]).

We reject plaintiff's contention that the court erred in granting the motion. " 'It is well settled that the failure to file sworn proofs of loss within 60 days of the demand therefor constitutes an absolute

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defense to an action on an insurance policy absent a waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense' " (*Bailey v Charter Oak Fire Ins. Co.*, 273 AD2d 691, 692 [3d Dept 2000]; *see Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210 [1984]; *Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457 [4th Dept 2012]). Defendant, as the party seeking summary judgment, met its initial burden on the motion by establishing that plaintiff failed to provide a sworn proof of loss within the requisite time (*see generally Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 914 [4th Dept 1997]), and that defendant did not waive the requirement. In response, plaintiff failed to raise a triable issue of fact whether he substantially complied with the proof of loss requirement (*cf. Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]).

We reject plaintiff's contention that he raised a triable issue of fact by submitting his deposition testimony in which he averred that he timely submitted the requisite proof of loss to defendant, and that the court made an improper credibility determination in rejecting that testimony and his testimony regarding a lack of knowledge of the cause of the fire. Although "we agree with the general premise that credibility is an issue that should be left to a [factfinder] at trial, 'there are of course instances where credibility is properly determined as a matter of law' " (*Sexstone v Amato*, 8 AD3d 1116, 1117 [4th Dept 2004], *lv denied* 3 NY3d 609

[2004]). Neither this Court nor the motion court is " 'required to shut its eyes to the patent falsity of a defense' " (*id.*, quoting *MRI Broadway Rental v United States Min. Prods. Co.*, 242 AD2d 440, 443 [1st Dept 1997], *affd* 92 NY2d 421 [1998]). Here, we conclude that the court properly determined that plaintiff's deposition testimony was "self-serving and incredible on these points, permitting summary judgment in favor of" defendant (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 439 [3d Dept 2003]; *see Rickert v Travelers Ins. Co.*, 159 AD2d 758, 759-760 [3d Dept 1990], *lv denied* 76 NY2d 701 [1990]).

Click here to read this case in its entirety.◆

APPELLATE COURT HOLDS MATERIAL MISREPRESENTATION VOIDS POLICY

Editor's Note: In the case of *Piller v Otsego Mut. Fire Ins. Co.*, 2018 NY Slip Op 05615 the Supreme Court, Appellate Division, Second Department upheld the lower court to affirm that the subject insurance policy was void ab initio and that the defendant Otsego Mutual is not obligated to defend or indemnify the plaintiffs regarding their claim. The plaintiffs purchased a townhouse in 2002 and obtained homeowner's insurance with the defendant. The plaintiffs represented in their application that the townhouse was their primary residence. Plaintiffs made a claim for water damage to the property in 2011. After investigation, Otsego Mutual determined that plaintiffs never lived at the townhouse and that it had been occupied by their daughter and her family since 2002. Otsego Mutual advised plaintiffs it was disclaiming coverage and voiding the policy due to their failure to disclose the true nature of the residency. The Pillers sued for recovery of their loss and Otsego Mutual counterclaimed. The decision of the Supreme Court, Appellate Division, Second Department is below.

In an action, inter alia, to recover damages for breach of contract, the plaintiffs appeal from an order of the Supreme Court, Kings County (Bernard Graham, J.), dated January 8, 2016. The order, insofar as appealed from, granted the motion of the defendant Otsego Mutual Fire Insurance Company for summary judgment on its counterclaim for a judgment declaring that the subject insurance policy was void ab initio and that it was not obligated to defend or indemnify the plaintiffs regarding their claim thereunder, and dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed from, with costs, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the subject insurance policy was void ab initio and that the defendant Otsego Mutual Fire Insurance Company is not obligated to defend or indemnify the plaintiffs regarding their claim thereunder.

In 2002, the plaintiffs purchased a townhouse in Monsey. They filled out an application for homeowners' insurance with the defendant Otsego Mutual Fire Insurance Company (hereinafter Otsego Mutual). In the application, the plaintiffs represented, among other things, that the townhouse was their primary dwelling, that it was a single family dwelling, that it was occupied daily by the owner, and that they did not own, occupy, or rent any other residences. Based on that information, Otsego Mutual issued the insurance policy, with the plaintiffs as the named insureds. The insurance policy was continually renewed.

In 2011, the plaintiffs made a claim under the insurance policy for water damage sustained when a pipe broke. In investigating the claim, Otsego Mutual discovered that the plaintiffs had never lived at the townhouse. Instead, they lived in Brooklyn, and the townhouse had been continually occupied since 2002 by their daughter and her family. Therefore, Otsego Mutual informed the plaintiffs that it was disclaiming coverage and voiding the policy because the plaintiffs had

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failed to disclose, inter alia, that (1) the townhouse was not their primary residence, (2) the townhouse was not owner-occupied, and (3) they owned and occupied a separate residence.

In January 2012, the plaintiffs commenced this action against Otsego Mutual and another defendant alleging, inter alia, breach of contract. Based on the material misrepresentations the plaintiffs had made in their insurance application that the townhouse was owner-occupied, Otsego Mutual asserted a counterclaim for a judgment declaring that the insurance policy was void ab initio and that it was not obligated to defend or indemnify the plaintiffs regarding their claim thereunder, and then moved for summary judgment on its counterclaim and dismissing the complaint insofar as asserted against it. Finding that the plaintiffs had made material misrepresentations on their insurance application, the Supreme Court, inter alia, granted Otsego Mutual's motion. The plaintiffs appeal.

"To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy" (*Joseph v Interboro Ins. Co.,* 144 AD3d 1105, 1106 [internal quotation marks omitted]; *see Interboro Ins. Co. v Fatmir,* 89 AD3d 993, 993-994; *Novick v Middlesex Mut. Assur. Co.,* 84 AD3d 1330, 1330; *Varshavskaya v Metropolitan Life Ins. Co.,* 68 AD3d 855, 856). "A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105[a]; *see Morales v Castlepoint Ins. Co.,* 125 AD3d 947, 948). "A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented" (*Interboro Ins. Co. v. Fatmir,* 89 AD3d at 994; *see* Insurance Law § 3105[b][1]; *Novick v Middlesex Mut. Assur. Co.,* 84 AD3d at 1330; *Varshavskaya v Metropolitan Life Ins. Co.,* 68 AD3d at 856). "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, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*Morales v Castlepoint Ins. Co.,* 125 AD3d at 948 [internal quotation marks omitted] ; *see Joseph v Interboro Ins. Co.,* 144 AD3d at 1106; *Interboro Ins. Co. v Fatmir,* 89 AD3d at 994; *Schirmer v Penkert,* 41 AD3d 688, 690-691).

Otsego Mutual established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the plaintiffs' application for insurance contained a material misrepresentation regarding whether the townhouse would be owner-occupied and that it would not have issued the subject policy if the application had disclosed that the townhouse would not be owner-occupied (*see Joseph v Interboro Ins. Co.,* 144 AD3d at 1106; *Morales v Castlepoint Ins. Co.,* 125 AD3d at 948; *Interboro Ins. Co. v. Fatmir,* 89 AD3d at 993-994).

In opposition, the plaintiffs failed to raise a triable issue of fact. The plaintiffs' contention that Otsego Mutual was required to establish that their

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misrepresentation was willful lacks merit. With limited exception not applicable here, "a material misrepresentation, even if innocent or unintentional, is sufficient to warrant rescission of an insurance policy" (*Joseph v Interboro Ins. Co.,* 144 AD3d at 1107; *see Smith v Guardian Life Ins. Co. of Am.,* 116 AD3d 1031, 1032; *Security Mut. Ins. Co. v Perkins,* 86 AD3d 702, 703; *Precision Auto Accessories, Inc. v Utica First Ins. Co.,* 52 AD3d 1198, 1201; *McLaughlin v Nationwide Mut. Fire Ins. Co.,* 8 AD3d 739, 740; *see also* Insurance Law § 3105).

The plaintiffs' remaining contention is improperly raised for the first time on appeal.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the subject insurance policy was void ab initio and that the defendant Otsego Mutual Fire Insurance Company is not obligated to defend or indemnify the plaintiffs regarding their claim thereunder.

Click here to read this case in its entirety. ◆

DFS ISSUES CIRCULAR LETTER NO. 11 (2018)

On August 10, 2018 the New York Department of Financial Services, Insurance Division issued a circular letter regarding Inclusion of Loss-of-Use Costs in Calculating Damage to Property in Relation to Surcharge Threshold. This circular letter is related to auto insurance.

Click here to view the Circular Letter. ◆

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