

2018 WL 5283415 (N.Y.Sup.), 2018 N.Y. Slip Op. 32668(U) (Trial Order)  
Supreme Court of New York.  
Queens County

**\*\*1** Francisco PEREZ, Plaintiff,  
v.  
CASTLEPOINT INSURANCE COMPANY, N.Y.A. Services Inc., and Simon Agency N.Y. Inc., Defendants.

No. 712369/16.  
September 21, 2018.

**Trial Order**

Present: Honorable [Darrell L. Gavrin](#), Justice.

\*1 [This opinion is uncorrected and not selected for official publication.]

IA PART 27

Motion Date May 22, 2018

Motion Cal. No. 12

Motion Seq. No. 2

The following papers numbered E46 to E65, E68 to E73 and E75 read on this motion by defendant, Castlepoint Insurance Company (“defendant”), for summary judgment dismissing plaintiff’s complaint as against defendant, pursuant to [CPLR 3212](#).

***Papers Numbered***

Notice of Motion - Affirmation - Exhibits - Memorandum of Law ..... E46 - E65

Affirmation in Opposition - Exhibits - Memorandum of Law ..... E68 - E73

Reply Affirmation..... E75

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This action is for breach of contract and negligence. Plaintiff is the owner of premises located at 31-14 103<sup>rd</sup> Street, East Elmhurst, New York 11369 (“subject premises”), in the County of Queens, City and State of New York. On October 18, 2015, the subject premises was damaged as a result of a fire. Plaintiff subsequently submitted a claim against the insurance policy which defendant denied.

Defendant moves for summary judgment on the basis that the insurance policy was issued only as a result of a material

misrepresentation by plaintiff, which rendered the policy void from its inception.

On a motion for summary judgment, the proponent “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). Once the proponent has met its burden, the opponent must then produce competent evidence in admissible form to establish the existence of a trial issue of fact (see **\*2** *Human v Queens County Bancorp, Inc.*, 307 AD2d 984 [2d Dept 2003], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]). To establish its right to rescind an insurance policy, an insurer must demonstrate that had it known the facts misrepresented, it would not have issued the policy (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993 [2d Dept 2011]; Insurance Law § 3105[b]).

In the case at bar, defendant has met its *prima facie* burden evidencing entitlement to summary judgment herein. In support of its motion, defendant submits, among other things, a copy of the Dwelling Fire Application and deposition testimony of plaintiff. The record reflects that the policy provided coverage for a one-family dwelling as was represented in the insurance application when in fact, the subject premises was a three-family dwelling.

In opposition, plaintiff failed to raise an issue of fact. Plaintiff’s contention that his broker completed the application and signed it on plaintiff’s behalf without plaintiff’s authority, does not warrant denial of the instant motion. “[A] material misrepresentation, even if innocent or unintentional, is sufficient to warrant rescission of an insurance policy” (*Joseph v Interboro Ins. Co.*, 144 AD3d 1105 [2d Dept 2016]). Indeed, plaintiff “ratified the representation contained in the [A]pplication by accepting the policy for [a one-family home] and permitting it to be renewed for years thereafter on the same terms” (*Morales v Castlepoint Ins. Co.*, 125 AD3d 947 [2d Dept 2015]). Moreover, contrary to plaintiff’s interpretation, the underwriting guidelines’ eligibility reference to “one and two owner and tenant-occupied dwellings” cannot be inferred to mean a three-family dwelling.

**\*2** Accordingly, this motion by defendant for summary judgment is granted and the complaint is dismissed only as against defendant, Castlepoint Insurance Company.

The amended caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF QUEENS

FRANCISCO PEREZ, Plaintiff,

- against -

N.Y.A. SERVICES INC. and SIMON AGENCY N.Y. INC., Defendants.

Dated: September 21, 2018

<<signature>>

DARRELL L. GAVRIN, J.S.C.