SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

---X

ADIRONDACK INSURANCE EXCHANGE,

Plaintiff,

- v -

MARIO DIMARCO,

Defendant.

---X

INDEX NO. 651162/2021

MOTION DATE 05/13/2022, 07/01/2022, 08/09/2022

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

MARIO DIMARCO,

Plaintiff,

-against-

MICHAEL G. MONTAG INSURANCE AGENCY, INC. d/b/a MGM ASSOCIATES OF ROCHESTER a/k/a MGM INSURANCE ASSOCIATES,

Defendants.

---X

Third-Party
Index No. 595455/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 70, 71, 72, 84, 85, 92

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 74, 75, 77, 78, 79, 80, 81, 82, 83, 87, 88, 91, 93

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 73, 76, 86, 89, 90, 94, 95

were read on this motion to/for MISCELLANEOUS.

I. INTRODUCTION

In this insurance coverage action, the plaintiff, Adirondack Insurance Exchange, seeks a judgment declaring that the insurance policy it issued to the defendant Mario DiMarco ("DiMarco") does not provide coverage for DiMarco's claim for real property loss stemming from a fire at one of his two adjacent residential properties. The plaintiff moves pursuant to CPLR 3212 for summary judgment on its sole cause of action for declaratory judgment and to dismiss DiMarco's two counterclaims for policy reformation and breach of contract; and pursuant to CPLR 3211(a)(7) for dismissal of the counterclaim and cross-claim for policy reformation asserted by DiMarco and third-party defendant Michael G. Montag Insurance Agency, Inc. ("MGM"), respectively (MOT SEQ 001). DiMarco and MGM both oppose the motion, and DiMarco cross-moves, pursuant to CPLR 3025(b), for leave to amend his answer to add further factual allegations in support of his counterclaim for policy reformation (the "first cross-motion"), which cross-motion is in turn opposed by the plaintiff. DiMarco also separately moves pursuant to CPLR 3025(b) for leave to amend his answer to add a third counterclaim for breach of contract (MOT SEQ 003), which motion is also opposed by the plaintiff.

Additionally, MGM moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss DiMarco's third-party complaint (MOT SEQ 002). DiMarco opposes this motion as well and again cross-moves pursuant to CPLR 3025(b) for leave to amend his third-party complaint to add further factual allegations in support of his first cause of action for negligence and to add a properly pleaded cause of action for negligent misrepresentation (the "second cross-motion"), which cross-motion is in turn opposed by MGM.

For the reasons that follow, the plaintiff's summary judgment motion is granted and DiMarco's two motions to amend his answer are denied; MGM's motion to dismiss the third-

party complaint is granted in part; and the second cross-motion to amend the third-party complaint is granted.

II. BACKGROUND

The following facts are based on the plaintiff's submissions in support of its motion for summary judgment, which include, *inter alia*: DiMarco's application for insurance, submitted on or about December 30, 2014; MGM's insurance proposal, dated January 9, 2015; inspection reports of the premises to be insured; copies of the insurance policy issued to DiMarco and renewed annually for the period January 17, 2015 to January 17, 2021; the affidavit of Brett Hammond, the plaintiff's Personal Lines Underwriting Manager; a copy of the plaintiff's underwriting guidelines; property assessment data for DiMarco's two adjacent properties; the plaintiff's denial letter; and the pleadings herein.

On or about December 30, 2014, DiMarco submitted an application for several types of insurance, including homeowners insurance for the property located at 8888 Ridge Road, North Rose, New York 14516 (the "Premises"), to his broker, MGM. In the application, DiMarco represented that he resided at the Premises and that he did not own any other residences. In response, MGM presented DiMarco with an Insurance Proposal that included his application, as well as an Optional Coverage and Endorsement Section providing for coverage up to a limit of $150,000 for an "Other Structure On Residence Premises," with a description of such "other structure" as "storage." An exterior and interior inspection of the Premises was conducted, which documented a pair of structures on the Premises—the house in which DiMarco resided and a freestanding two-car garage/shed. Thereafter, the plaintiff issued DiMarco a policy for the Premises for the period 2015-2016, and renewals of the policy were issued annually through the period 2020-2021 (collectively, the "Policy").

The Policy, by its express terms, provides homeowners insurance coverage for DiMarco's dwelling on the "residence premises" as defined in the Policy Declarations, as well as other structures on the "residence premises" set apart from the dwelling. The Policy Declarations pages, in turn, define the "residence premises" as the Premises and, consistent with MGM's Insurance Proposal, include an endorsement for $150,000 in additional coverage for "Other Structures On Residence Premises," with a description of such "other structures" as "storage."

On December 6, 2020, DiMarco submitted a claim under the Policy for fire damage to a second residence he owned located at 8960 Ridge Road, North Rose, NY 14516 (the "Loss Location"). Though they are adjacent to each other, it is undisputed, and confirmed by property assessment data, that the Loss Location and the Premises are located on different lots. On February 8, 2021, the plaintiff sent DiMarco a letter stating that his claim was denied because the Loss Location was not DiMarco's residence premises, as defined in the Policy Declarations pages. DiMarco disputed the plaintiff's denial of coverage.

Thereafter, on February 4, 2021, the plaintiff commenced this action seeking a declaration that DiMarco's claim for damage to the Loss Location was barred because it is not the property covered under the Policy. On May 14, 2021, DiMarco filed his Answer with Counterclaims seeking reformation and breach of contract. On May 17, 2021, DiMarco filed a Third-Party Complaint against MGM, alleging, in essence, that he had requested that MGM obtain insurance coverage for both the Premises and the Loss Location, and that MGM was negligent in only obtaining coverage for the Premises and in (mis)representing that the Policy also provided coverage for the Loss Location. On August 13, 2021, MGM filed its Answer with

Cross-Claims, asserting a cross-claim against the plaintiff for reformation. These motions then ensued.

III. LEGAL STANDARD

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat the motion. Zuckerman v City of New York, supra.

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019), quoting Fontanetta v John Doe 1, supra.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference," and determine only whether the facts, as alleged, fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). The burden is on the party opposing the motion to establish substantial prejudice or surprise if leave to amend is granted. See Forty Cent. Park S., Inc. v Anza, 130 AD3d 491 (1st Dept. 2015).

IV. DISCUSSION

A. The Plaintiff's Summary Judgment Motion

The plaintiff's motion for summary judgment is granted. "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on

its face must be enforced according to the plain meaning of its terms.'" MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009), quoting Greenfield v Philles Records, 98 NY2d 562, 569 (2002). This is equally true of an insurance contract. See Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., 36 AD3d 441, 442 (1st Dept. 2007) ("It is well established that when interpreting an insurance contract, as with any written contract, the court must afford the unambiguous provisions of the policy their plain and ordinary meaning[.]"). "Moreover, provisions contained in an insurance policy which limit coverage to certain premises are enforceable." Id.

Here, the Policy unambiguously limits DiMarco's homeowners insurance coverage to the dwelling and other structures located at the "residence premises," which is expressly defined as the Premises, *ie*, 8888 Ridge Road, North Rose, New York 14516. There is no mention of the Loss Location anywhere in the Policy. DiMarco's insistence that coverage for the Loss Location is provided by the Policy's "other structures" endorsement is misplaced, as the additional coverage provided for "other structures" is itself expressly limited to other structures "on the residence premises." Plainly, this cannot include the Loss Location, as it is undisputed that the Loss Location and the Premises are two separate and distinct properties. "An unambiguous "'residence premises' provision ... must be accorded its plain and ordinary meaning." Vela v Tower Ins. Co., 83 AD3d 1050, 1051 (2nd Dept. 2011); compare Dean v Tower Ins. Co., 19 NY3d 704 (2012) ["residence premises" provision that does not define "resides" is ambiguous]. Indeed, in his affidavit, Brett Hammond, the plaintiff's underwriter, avers that the underwriting guidelines applicable to the Policy do not even allow for coverage of two separate properties under a single policy.

Accordingly, the plaintiff has demonstrated its *prima facie* entitlement to summary judgment declaring that the Policy does not cover DiMarco's insurance claim for the fire damage to the Loss Location. Further, and for the same reasons, the plaintiff has demonstrated its entitlement to judgment dismissing DiMarco's counterclaim for breach of contract based on the plaintiff's denial of his insurance claim.

The plaintiff has likewise established that both DiMarco's counterclaim and MGM's cross-claim for reformation are subject to dismissal for failure to state a claim. "A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake." Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 443. "In the case of mutual mistake, it must be alleged that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement, whereas in the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement." Id. (internal quotation marks and citations omitted). Whether based upon mistake or fraud, a claim for reformation must be pleaded with the requisite particularity necessitated under CPLR 3016(b). See Simkin v Blank, 19 NY3d 46, 52 (2012); Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 443. "The burden upon a party seeking reformation is a heavy one . . . [because] [t]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties." Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 442-43 (internal quotation marks omitted). "Moreover, once an insurance policy has been received, it constitutes presumptive knowledge of its terms and limits." Id. at 443.

Both DiMarco and MGM appear to allege a theory of mutual mistake, asserting in conclusory fashion that both DiMarco and the plaintiff intended for the Policy to cover the Loss Location. However, neither DiMarco nor MGM plead their claims for reformation with the particularity required under CPLR 3016(b). In particular, neither sets forth specific factual allegations stating that, prior to the issuance of the Policy, DiMarco communicated on any specific date, by any specific means, to either MGM or the plaintiff, that he wanted the Loss Location covered by the Policy, and, perhaps more importantly, that on any specific date, by any specific means, a specific representative of the plaintiff agreed to provide such coverage, let alone to do so under the same Policy insuring the Premises.

To the contrary, the evidence submitted by the plaintiff demonstrates that DiMarco's application for insurance only sought coverage for the Premises and "Other Structures on the Residence Premises," and gave no indication that coverage was also sought for the Loss Location. Indeed, DiMarco, in his application, expressly denied that he even owned any other residences. Similarly, the inspection report prepared in connection with the issuance of the Policy was limited to the Premises and made no mention of the Loss Location. And the Policy itself, which is the best evidence of the plaintiff's intent, expressly limits coverage to the Premises. Further, the unrebutted affidavit of the plaintiff's underwriter states that the applicable underwriting guidelines did not allow for coverage of two separate properties under a single homeowners insurance policy. In short, neither DiMarco nor MGM allege specific facts in support of their conclusory assertions that the plaintiff intended to insure the Loss Location under the same Policy that provided coverage for the Premises, and the evidence before the court uniformly demonstrates that the plaintiff only intended for the Policy to cover the Premises and was unaware of DiMarco's alleged desire to also insure the Loss Location.

Moreover, both DiMarco and MGM had the Policy since early 2015 and are thus presumed to have knowledge of its terms and limits, including its express limitation of coverage to the "residence premises." See Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 443. And yet, there is no allegation in either of their pleadings that either DiMarco or MGM ever directed the plaintiff to change the policy coverage to include the Loss Location, so as to conform the coverage to the parties' alleged mutual intent and rectify their purported mistake. See id. (denying reformation claim on this basis in factually analogous case).

For these same reasons, DiMarco's first cross-motion for leave to amend his answer to add additional factual allegations in support of his reformation counterclaim is denied. DiMarco's proposed amended answer still fails to plead mutual mistake with the requisite particularity, as it continues to lack specific factual allegations stating that, prior to the issuance of the Policy, DiMarco communicated on any specific date, by any specific means, to either MGM or the plaintiff, that he wanted the Loss Location covered by the Policy, and that on any specific date, by any specific means, a specific representative of the plaintiff agreed to provide such coverage under the Policy.

Both DiMarco and MGM argue that the plaintiff's motion should be denied as premature, at least insofar as it seeks the dismissal of their respective counterclaim and cross-claim for reformation, because discovery is not yet complete. These arguments are unavailing. "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 AD3d 850, 852 (2nd Dept. 2013). "The mere hope . . . that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough." Frierson v Concourse

Plaza Assocs., 189 AD2d 609, 610 (1st Dept. 1993) (internal quotation marks omitted). Rather, the party opposing summary judgment must show that there is "a likelihood of discovery leading to such evidence[.]" Id.

DiMarco and MGM speculate at length about additional discovery that they hope will demonstrate the plaintiff's intent to insure the Loss Location under the Policy, but neither demonstrates any actual likelihood that further discovery will uncover such evidence. This is unsurprising. As already discussed, the plaintiff's evidence demonstrates that the insurance application documents submitted to it provided no notice of DiMarco's alleged desire to insure the Loss Location, there are no specific allegations that either DiMarco or MGM communicated such a desire to the plaintiff, and even if such unalleged communications did occur, evidence of such communication would not be in the plaintiff's exclusive control. Moreover, no amount of additional evidence would alter the fact that both DiMarco and MGM are presumed to have knowledge of the Policy's terms, including its express limitation of coverage to the "residence premises," and yet remained silent for six years and made no attempt to have the plaintiff amend its coverage to include the Loss Location. See Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 443.

Accordingly, the plaintiff's motion, pursuant to CPLR 3212 and 3211(a)(7), for summary judgment declaring that the Policy does not cover DiMarco's insurance claim for the fire damage to the Loss Location, and to dismiss DiMarco's counterclaims and MGM's cross-claim (MOT SEQ 001), is granted; and DiMarco's first cross-motion for leave to amend his answer is denied.

B. MGM's Motion to Dismiss

MGM's motion to dismiss the third-party complaint is granted to the extent of dismissing the second, third, and fourth causes of action therein, as the dismissal of those claims is unopposed by DiMarco. However, the motion is denied insofar as it seeks dismissal of the first cause of action for negligence.

"[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so[.]" Am. Bldg. Supply Corp. v Petrocelli Grp., Inc., 19 NY3d 730, 735 (2012) (internal quotation marks omitted). "To set forth a case for negligence . . . against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy." Id. Here, although not pleaded with the specificity required to support a claim for reformation, DiMarco's allegation that he requested that MGM procure an insurance policy for both the Premises and the Loss Location is sufficient to state a claim for negligence.

MGM's argument that DiMarco's claim for negligence is barred by the statute of limitations is unavailing. DiMarco's negligence claim is subject to a three-year statute of limitations. See CPLR 214(4). "[W]here, as here, a claim against an insurance agent or broker relating to the failure of insurance coverage sounds in tort, the injury occurred and the plaintiffs were damaged when coverage was denied." Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc., 86 AD3d 527, 530 (2nd Dept. 2011) (internal quotation marks omitted); see Lavandier v Landmark Ins. Co., 26 AD3d 264, 264 (1st Dept. 2006). The plaintiff denied DiMarco's claim for homeowners coverage for the Loss Location on February 8, 2021, and DiMarco thereafter filed his third-party complaint on May 17, 2021, within the three-year statute of limitations.

Similarly unavailing is MGM's argument that DiMarco's negligence claim is barred by his receipt of the Policy without complaint. While DiMarco's receipt of the Policy and presumed knowledge of its contents is dispositive of the contract claims vis-à-vis the plaintiff (see Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co., supra at 443), the same is not true of DiMarco's negligence claim against MGM. In Am. Bldg. Supply Corp. v Petrocelli Grp., Inc., supra, the Court of Appeals rejected this very argument, holding that the plaintiff, who alleged that he had requested specific coverage from his broker and, upon receipt of the policy did not read it and lodged no complaint, could nevertheless maintain a negligence claim against the broker. The Court reasoned that "an insured should have a right to look to the expertise of its broker with respect to insurance matters[,]" and thus "[t]he failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker [for negligence]." Id. at 736-37 (internal quotation marks and citations omitted).

Likewise, and for the same reason, DiMarco's claim is not barred based on the terms of the Insurance Proposal that MGM presented to him. MGM argues that the proposal provided for additional coverage for an "Other Structure On Residence Premises," and that it satisfied its duty to DiMarco by obtaining the Policy, which provided for such additional coverage. However, the term "residence premises," while expressly defined in the Policy, was not similarly defined in the Insurance Proposal. DiMarco alleges that he understood and/or was led to believe that this language referred to the Loss Location, in accordance with his purported request to MGM to procure coverage for this second residence as well. Absent an express definition, and given an insured's right to look to the expertise of his insurance broker, the term "residence premises," as it appears in the Insurance Proposal, is too ambiguous to allow the court to conclude, as a matter

of law, that the coverage MGM was asked to procure was limited solely to the Premises, and did not also include the Loss Location.

DiMarco's second cross-motion, which seeks leave to amend his third-party complaint to add a properly pleaded cause of action for negligent misrepresentation, is granted. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007). The Court of Appeals has held that a special relationship may develop between an insurance broker and his client that may impose on the broker additional duties beyond those imposed by common law, and that one situation that may give rise to such a special relationship is where there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent. See Voss v Netherlands Ins. Co., 22 NY3d 728, 734-35 (2014), citing Murphy v Kuhn, 90 NY2d 266, 272-73 (1997).

Here, the proposed amended third-party complaint alleges that DiMarco specifically asked MGM whether it could obtain a single insurance policy that would provide coverage for both the Premises and the Loss Location; that, in providing him with the Insurance Proposal, MGM informed DiMarco that the proposal was for a single policy that would cover both the Premises and the Loss Location; that representation was incorrect; and DiMarco relied on that misrepresentation in obtaining and subsequently renewing the Policy, and in not seeking an additional policy to cover the Loss Location. These allegations are sufficient to state a claim for negligent misrepresentation. Moreover, and for the same reasons discussed above in connection with the negligence claim, DiMarco's negligent misrepresentation claim, which is also subject to

a three-year statute of limitations, is not time-barred, nor is it barred by DiMarco's receipt of the Policy.

Accordingly, MGM's motion to dismiss, pursuant to CPLR 3211(a)(1), (5), and (7) (MOT SEQ 002), is granted to the extent of dismissing the second, third, and fourth causes of action in the third-party complaint, and is otherwise denied; and DiMarco's second cross-motion for leave to amend his third-party complaint is granted.

C. DiMarco's Motion to Amend His Answer

DiMarco's motion for leave to amend his answer to add a third counterclaim for breach of contract is denied. In addition to insuring DiMarco's dwelling and other structures on the "residence premises," the Policy also provides coverage for DiMarco's personal property anywhere in the world, with a coverage limit of $232,799. However, the Policy's personal property coverage is expressly limited to just 10% of the overall coverage limit for any personal property "usually located at an 'insured's' residence, other than the 'residence premises[.]'" Following the fire at the Loss Location, DiMarco also submitted a personal property claim to the plaintiff for the contents of the house, which, he alleges, had a value of between approximately $54,000 and $88,000. However, the plaintiff only paid DiMarco $23,279.90 for the damage to his personal property—*i.e.*, 10% of the overall coverage limit—because the claimed contents of the Loss Location was personal property at a residence owned by DiMarco other than the "residence premises." DiMarco now seeks leave to assert a claim alleging that the plaintiff breached the Policy by only paying him 10% of the overall coverage limit on his personal property, arguing that the 10% of coverage limitation was inapplicable because he used the Loss Location for storage and not as an actual residence.

DiMarco's proposed amended counterclaim is futile and without merit. By its express terms, the Policy's coverage for personal property was limited to 10% of the coverage limit for any property kept at an insured's residence other than the residence premises. An insured of ordinary intelligence and experience reasonably would expect the phrase "an 'insured's' residence, other than the 'residence premises'" to apply to any residential premises owned by the insured, regardless of how the premises are used or whether the insured occupies the premises. This would be the "plain and ordinary meaning." Vela v Tower Ins. Co., supra at 1051. Indeed, while the court has found no New York decisions that address this specific policy language, courts in other jurisdictions have held that this language applies to all residential premises owned by the insured, regardless of whether the premises are used or occupied by the insured. See Zulick v Patrons Mut. Ins. Co., 287 Conn. 367, 374-75 (2008); Entwistle v Safety Indem. Ins. Co., No. 13-2526-D, 2015 WL 1602599, at *5 (Mass. Sup. Mar. 31, 2015), citing Surabian Realty Co., Inc. v NGM, Ins. Co., 462 Mass. 715, 718 (2012).

Accordingly, DiMarco's motion pursuant to CPLR 3025(b) for leave to amend his answer (MOT SEQ 003) is denied.

V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff Adirondack Insurance Exchange's motion, pursuant to CPLR 3212 and 3211(a)(7), for summary judgment on its sole cause of action for declaratory judgment, and to dismiss defendant Mario DiMarco's counterclaims and third-party defendant Michael G. Montag Insurance Agency, Inc.'s cross-claim (MOT SEQ 001), is granted, and DiMarco's counterclaims and MGM's cross-claim are hereby dismissed; and it is further

ADJUDGED and DECLARED that defendant Mario DiMarco is not entitled to recover for damage to his real property located at 8960 Ridge Road, North Rose, NY 14516 under the subject insurance policy issued to him by the plaintiff; and it is further

ORDERED that defendant Mario DiMarco's cross-motion under MOT SEQ 001 for leave to amend his answer is denied; and it is further

ORDERED that third-party defendant Michael G. Montag Insurance Agency, Inc.'s motion, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the third-party complaint (MOT SEQ 002), is granted to the extent of dismissing the second, third, and fourth causes of action in the third-party complaint, and is otherwise denied; and it is further

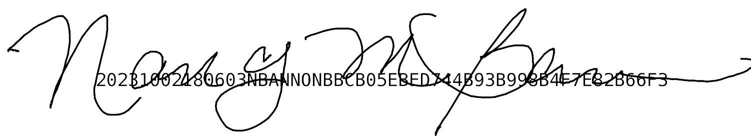
ORDERED that defendant Mario DiMarco's cross-motion under MOT SEQ 002 for leave to amend his third-party complaint is granted, and the proposed amended third-party complaint appended to the motion papers at NYSCEF Doc. No. 79 is deemed served upon the third-party defendant as of the date of this order, and it is further

ORDERED that defendant Mario DiMarco's motion for leave to amend his answer (MOT SEQ 003) is denied; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on December 21, 2023, at 11:30 a.m. and it is further

ORDERED that the Clerk shall enter judgment and mark the file accordingly.

This constitutes the Decision, Order, and Judgment of the court.



10/2/2023
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:

☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
☐ GRANTED	☐ DENIED		☒ GRANTED IN PART	☐ OTHER	