SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

5512 OEAAJB CORP.,

Plaintiff,

- against -

HAMILTON INSURANCE COMPANY and INTER INSURANCE AGENCY,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 606397/17
Motion Seq. Nos.: 01, 02
Motion Dates: 02/22/18
03/08/18

HAMILTON INSURANCE COMPANY ,

Third-Party Plaintiff,

- against -

BRIAN OKANE,

Third-Party Defendant.

INTER INSURANCE AGENCY,

Third-Party Plaintiff,

- against -

INTERNATIONAL UNDERWRITING AGENCY, INC.,

Third-Party Defendant.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition to Motion (Seq. No. 01), Affidavit and Memorandum of Law and Exhibits	2
Reply Affirmation to Motion (Seq. No. 01) and Memorandum of Law	3
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	4
Affidavit in Opposition to Cross-Motion (Seq. No. 02) and Memorandum of Law	5
Reply Affirmation to Cross-Motion (Seq. No. 02)	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant/third-party plaintiff Hamilton Insurance Company ('Hamilton") on the issue of liability. Defendant/third-party plaintiff Hamilton opposes the motion.

Defendant/third-party plaintiff Inter Insurance Agency ("Inter") cross-moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment as against defendant/third-party plaintiff Hamilton. Defendant/third-party plaintiff Hamilton opposes the cross-motion.

Plaintiff commenced the instant action with the filing of a Summons and Complaint against on or about June 30, 2017. *See* Plaintiff's Affirmation in Support Exhibit F. Defendant/third-party plaintiff Hamilton served its Answer To Complaint With Counterclaims, Cross-Claims and Third-Party Complaint on or about September 7, 2017. *See* Plaintiff's Affirmation in Support Exhibit G. Defendant/third-party plaintiff Inter filed and served an Answer with Cross Claims on or about September 11, 2017. *See* Plaintiff's Affirmation in Support Exhibit H. Defendant/third-party plaintiff Inter filed and served a Third Party Complaint on or about January 9, 2018. *See* Plaintiff's Affirmation in Support Exhibit I.

In support of plaintiff's motion (Seq. No. 01), its counsel submits, in pertinent part, that, "[i]n September of 2016, 5512 applied for insurance through defendant Inter Insurance Agency ("IIA") and Hamilton issued a policy of insurance covering the premises known as 5512 Merrick Road, Massapequa, New York (hereinafter 'the insured premises'). On January 20, 2017, the subject premises was extensively damaged as the result of a fire. A claim was submitted to Hamilton. While the carrier issued an advance of $100,000.00 and subsequently instructed its adjuster to obtain proof of loss for the remaining building policy limit of $1,000,000.00, the claim came to a screeching halt when a request was made for confirmation that the insured premises contained an automatic sprinkler system. Because it did not, Hamilton denied 5512's claim based on its conclusion that 5512 had made material misrepresentations in the submission of its application for insurance. More specifically, Hamilton took the position that the policy was void *ab initio*, because 5512's application stated that these premises were '100% sprinklered' when, in fact, they were not."

Counsel for plaintiff argues, in pertinent part, that, "[w]hile 5512 concedes that the insured premises did not contain an automatic sprinkler system, even if a material misrepresentation was made in this matter, which is disputed, Hamilton has waived its right to assert this defense in this action. Furthermore, Hamilton is estopped from relying on such defense, by virtue of its inconsistent and pre-meditated post-loss actions with respect to the property and the policy. The subject policy, issued by Hamilton, allegedly contained a protective safeguard endorsement, requiring 5512 to maintain a working automatic sprinkler system at the insured premises. Based upon Hamilton's investigation and conclusion that the premises were not '100% sprinklered' as provided for in the application, the claim was denied. Of moment is the fact that both the denial letter and its Answer only allege material misrepresentation as a

defense to 5512's claim. Nonetheless, despite its express position, Hamilton's actions have belied its claims. In addition to Hamilton's decision to retain the premium paid by 5512 for the active policy, it has curiously renewed the subject policy for an entire year, from September 14, 2017 to September 14, 2018. Such actions are fatal to its material misrepresentation defense. It is a well settled rule of New York Insurance law that 'the continued acceptance of premiums by the carrier after learning of the facts which allow for the rescission of the policy, constitutes a waiver of, or more properly an estoppel against, the right to rescind.' [citation omitted].... Similarly, it has been held that where an insurance carrier holds premium money indefinitely while it alleges the policy is void, such conduct is inconsistent with the position that the contract is invalid. [citation omitted]. Here, Hamilton was made aware that the insured premises was not '100% sprinklered' in April of 2017, and based the totality of its June 26, 2017 denial on this fact. However, notwithstanding what it knew and when it knew it, Hamilton not only failed to return premiums to 5512 after issuing its disclaimer, but took the contrary and affirmative steps of renewing the policy in September of 2017, and accepting subsequent premium payments by 5512 on September 25, 2017 ($860.80), November 2, 2017 ($378.04) and December 27, 2017 ($848.23).... Hamilton's acceptance of premiums and issuance of a renewal policy **AFTER** it had denied coverage to 5512 on material misrepresentation grounds, constitutes a waiver of such defense as a matter of law. [citations omitted]. By reason of the foregoing, even if the application submitted to Hamilton did contain a material misrepresentation, which is disputed, Hamilton's failure to return 5512's premiums combined with its pre-meditated decision to renew the policy and accept premiums after July of 2017 constitutes an express waiver of its right to assert such a defense, and Hamilton must be estopped from doing so as a matter of law. And because Hamilton is estopped from asserting its material misrepresentation defense, without any other viable defenses to the claim, 5512 is entitled to summary judgment on the issue of liability as a

matter of law."

In further support of the motion (Seq. No. 01), plaintiff submits the Affidavit of Paul Sortino ("Sortino"), President of plaintiff corporation. Sortino asserts, in pertinent part, that, "5512 acquired the insured premises on or about September 29, 2016. The insured premises was a commercial building, subdivided into several offices. The building was largely tenanted at the time of 5512's purchase, with the exception of certain space which we intended to use for our own offices. Prior it is acquisition, my partner and I owned other properties and had always utilized a State Farm agent to procure our insurance. However, because this particular building was located near the water, State Farm refused to issue a policy. Our State Farm agent, with whom we had a relationship, referred us to Defendant Inter Insurance Agency ('IIA') to assist us in obtaining a policy for the insured premises. On this recommendation, I contacted Inter Insurance to obtain a quote for coverage at the subject premises. While I was asked some general questions about the building to be insured, I was **NEVER** asked whether the insured premises were sprinklered. Had I been asked such question, I would have answered in the negative. Nor was I ever provided with an application to review or sign by IIA. While a copy of a document that purports to be an application signed by me has been provided to me, I can state, unequivocally, that this document was not signed by me, and that at no time did I ever give permission to someone to sign this application on my behalf. Hamilton issued a policy covering the insured premises for the period (*sic*) September 14, 2016 through September 14, 2017.... After we learned about the fire, we searched our offices for a copy of the Hamilton policy, It turns out that the policy had never been sent to us. That day, Brian Patrick e-mailed a copy to me, and we placed Hamilton on notice of the loss. Hamilton subsequently issued us a $100,000.00 advance, and, sometime in April of 2017, instructed us to prepare and submit a proof of loss for the building claim in the amount of the policy limits of $1.1 million dollars. After this proof had

been signed, our adjuster received a call from Hamilton's adjuster seeking confirmation that the premises were 100% sprinklered because the policy, which had not been sent to us beforehand, purported to contain a protective safeguard that the premises had an automatic sprinkler system. This is the first time I was ever made aware of this. We advised our adjuster that the premises did not have an automatic sprinkler system. He subsequently provided us a copy of the application.... This was the first time I saw this document. As stated previously, the signature on the last page is not mine. After reviewing some additional documents we provided, by letter dated June 26, 2017, Hamilton denied coverage to 5512 for the damages sustained to the subject premises by virtue of the January 20, 2017 fire.... 5512's claim was denied on the alleged ground of material misrepresentation in the application. 5512 never received any return premium from Hamilton after the issuance of the denial letter. Additionally, upon expiration of the policy term, Hamilton renewed 5512's policy for another year, from September 14, 2017 to September 14, 2018.... Payments were made by 5512 on this renewal and accepted by Hamilton,.... Hamilton was certainly made aware, by the spring of 2017, that the insured premises did not contain an automatic sprinkler system; its acquisition of this knowledge served as the basis of its coverage disclaimer. Yet, notwithstanding this knowledge, and the fact it denied our claim by letter dated June 26, 2017, Hamilton not only failed to cancel our policy from inception, it took the complete opposite and affirmative step of renewing our coverage nine (9) months after the loss and almost three (3) months after its denial letter." *See* Plaintiff's Affidavit in Support Exhibits A-E.

In opposition to plaintiff's motion (Seq. No. 01), counsel for defendant/third-party plaintiff Hamilton argues, in pertinent part, that, "[a]t the outset, OEAAJB's motion for partial summary judgment fails because Hamilton has not waived its right to seek rescission of Business Owner Policy number DTHIBP-00107-01 (the 'Hamilton Policy 01'). At the time Hamilton declined coverage of OEAAJB's loss of its office building due to extensive fire damage under

Hamilton Policy 01, contrary to OEAAJB's assertion, ***Hamilton did not rescind or cancel the policy***. Rather, all premium payments on *that* policy were accepted *before* Hamilton discovered OEAAJB's material misrepresentations in its application for insurance and *before* Hamilton disclaimed coverage. Then, Hamilton promptly sought rescission in this instant matter as a counter-claim against OEAAJB. Even if there was merit to OEAAJB's argument (which there is not), OEAAJB's novel proposition that acceptance of premium payments of a different policy (Hamilton Policy 02) *estops* Hamilton from asserting its defense that OEAAJB's material misrepresentation precludes (*sic*) coverage is unsupported. OEAAJB fails to make the requisite showing that Hamilton should be estopped from asserting its affirmative defenses, as it fails to state, much less establish that it was prejudiced by Hamilton's conduct. The Court should therefore deny OEAAJB's motion for partial summary judgment. OEAAJB's request for partial summary judgment fails for another reason. Even taking OEAAJB's word that the acceptance of premium payments on *another* policy somehow did anything, precedent holds that Hamilton at most waived its counter-claim for rescission of Hamilton Policy 01, but can still maintain its defense that OEAAJB made material representations 'to defeat recovery' under the policy. But as to OEAAJB's contention of Hamilton's waiver of rescission, triable issues of material fact exist, at a minimum, as to whether Hamilton's recent conduct of erroneously renewing coverage and accepting premium payments (through its general agent Dovetail Insurance Corp. (hereinafter, 'Dovetail')), before cancelling Hamilton Policy 02 (based on the fact there are no insurable premises) precludes it from asserting its claim for rescission of Hamilton Policy 01."

Counsel for defendant/third-party plaintiff Hamilton further contends that, "[p]er the Hamilton's 'Business Owners Policy Eligibility and Underwriting Guidelines' the type of insurance provided and the calculation of premiums specifically contemplate whether a commercial property is 'sprinklered' or 'non sprinklered.' ... Accordingly, International

Underwriting Agency provided OEAAJB, through Inter Insurance, a quotation of premium cost based on the subject premises having a sprinkler system. Then, on or about September 14, 2016, International Underwriting Agency submitted on behalf of OEAAJB an application to Dovetail Insurance Corp. (hereinafter, 'Dovetail'), a general agent on behalf of Hamilton. The application noted that the commercial property is 'sprinklered'.... Based on the representations in the application, Hamilton (through Dovetail) issued Policy DTIHIB-00107-01 (*sic*) (hereinafter, the 'Hamilton Policy 01'), for a policy period from September 14, 2016 to September 14, 2017.... The Hamilton Policy 01 contained an endorsement 'that changes the policy', among others, titled 'Protective Safeguards.' The 'Protective Safeguards' required the policy holder 'to maintain the protective device': the automatic sprinkler system.... Dovetail, as Hamilton's general agent, oversaw Hamilton Policy 01.... Dovetail acts as the intermediary between Hamilton and its insureds." *See* Defendant/Third-Party Plaintiff Hamilton's Memorandum of Law in Opposition to Motion (Seq. No. 01) Exhibits 1-4.

Counsel for defendant/third-party Hamilton adds that, "[g]iven that the office building was a total loss under the policy, the claim was required to go through underwriting review. At this point, on or about April 25, 2017, the question was raised by the underwriter as to why the building would be a total loss had there been a sprinkler system in place, as the application indicated that such system was present. It then came to light per OEAAJB's public adjustor that the building did not contain a sprinkler system, contrary to the application for insurance. Based on the foregoing, a reservation of rights letter was promptly prepared and sent to OEAAJB on May 12, 2017, explaining that a material misrepresentation may have been made in the application in relation to the subject premises containing a sprinkler system and that further investigation was required.... After further investigation, Hamilton determined the loss was not covered under the policy due to the material misrepresentation that the subject premises was

100% sprinklered, when in fact no sprinkler system existed. A letter declining coverage as to the loss, dated June 26, 2017, was prepared by counsel and sent to OEAAJB.... While Hamilton noted that it could elect to cancel the policy due to the material misrepresentation, 'Hamilton has elected to continue to reserve the right to cancel the policy.' ... On June 30, 2017, OEAAJB commenced this action against Hamilton and Inter Insurance.... OEAAJB alleged two breach of contract causes of action (*sic*) Hamilton Policy 01.... Hamilton timely answered on September 3, 2017,.... Hamilton did not raise an affirmative defense that it rescinded the Hamilton Policy 01, the policy at issue in OEAAJB's Complaint, nor has Hamilton *ever* rescinded Hamilton Policy 01. Rather, in its Answer, Hamilton also asserted various counter-claims against OEAAJB, wherein Hamilton seeks a judicial determination and declaration that Hamilton Policy 01 is rescinded and *void ab intio* based on OEAAJB's material misrepresentations in the application for Hamilton Policy 01.... Upon a judicial determination and declaration that Hamilton Policy 01 is rescinded, Hamilton will return any premium payments paid under Hamilton Policy 01.... Due to the fact that the subject premises had been deemed a total fire loss and thus, there was no longer insurable premises available (*sic*) coverage under the existing policy, the policy was not set to unilaterally renew in September, 2017. OEAAJB's insurance broker, Inter Insurance could (and on information and belief did) nonetheless initiate a request for renewal on the Dovetail platform, thereby generating a new policy for the period (*sic*) September 14, 2017 to September 14, 2018, Policy No. DTHIB-00101-2 (*sic*) (hereinafter, the 'Hamilton Policy 02')].... While Dovetail was made aware of the Claim of Loss, dated January 20, 2017, a policy holder's claim of loss does not automatically cancel or flag a policy for non-renewal. Thus, while coverage for OEAAJB was not set to unilaterally automatically renew on Dovetail's end, OEAAJB's request for renewal went through. Such oversight can occur as Hamilton and Dovetail relies (*sic*) upon the ethical conduct required of insurance brokers to submit truthful and accurate information,

which would include OEAAJB's licensed insurance broker, Inter Insurance.... In this instance, even though Inter Insurance knew the insured's claim of loss resulted in a total fire loss of the subject premises rendering the premises uninsurable under a Hamilton Business Owner's Policy (as was Hamilton Policy 01), Inter Insurance nonetheless initiated the renewal, resulting in the issuance of the new policy Hamilton Policy 02. Included in Hamilton Policy 02 was the same endorsement as in Hamilton Policy 01, titled 'Protective Safeguards,' which required OEAAJB 'to maintain the protective device': the automatic sprinkler system.... Immediately after the effective date of Hamilton Policy 02, on September 18, 2017, Inter Insurance e-mailed underwriter International Underwriting Agency, requesting that the Protective Safeguards endorsement be removed. On October 2, 2017, an endorsement issued for Hamilton Policy 02 and the premium was increased.... Shortly thereafter, Hamilton learned of Hamilton Policy 02 after an audit of Dovetail records. On or about November 28, 2018 (*sic*), Hamilton directed Dovetail to issue a Notice of Cancellation because there are no premises to insure due to total fire loss of the subject premises.... Hamilton, through Dovetail, issued its Notice of Cancellation, mailed on December 20, 2017 and effective January 5, 2018, explaining the reason for cancellation is no insurable premises.... Based on the cancellation of Hamilton Policy 02, Hamilton returned pro rata premium payments.... If and when the Court determines and declares that Hamilton Policy 01 is rescinded, Hamilton will return any premium payments paid under Hamilton Policy 02, as the policy should never have (*sic*) renewed where no valid insurance coverage existed." *See* Defendant/Third-Party Plaintiff Hamilton's Memorandum in Law in Opposition to Motion (Seq. No. 01) Exhibits 5-12.

In further opposition to plaintiff's motion (Seq. No. 01), defendant/third-party plaintiff Hamilton submits the Affidavit of Melissa Hill, Senior Vice President, Chief Resolution Officer at Blackboard Insurance Company f/n/a Hamilton USA. *See* Defendant/Third-Party Plaintiff

Hamilton's Affidavit in Opposition.

Counsel for defendant/third-party plaintiff Hamilton argues, in pertinent part, that "[p]laintiff 5512 OEAAJB CORP. (hereinafter, 'OEAAJB' or the 'insured') ignores the elephant in the room seeking partial summary judgment: while Defendant HAMILTON INSURANCE COMPANY (hereinafter, 'Hamilton') declined coverage of OEAAJB's loss of its office building due to extensive fire damage under Business Owner Policy number DTHIBP-00107-01 (the 'Hamilton Policy 01'). ***Hamilton did not at that time rescind or cancel the policy***. Rather, all premium payments on *that* policy were accepted *before* Hamilton disclaimed coverage. Then, Hamilton promptly sought rescission in this instant matter as a counter-claim against OEAAJB. Thus, at the outset, OEAAJB's motion for partial summary judgment fails because Hamilton has not waived its right to seek rescission of Hamilton Policy 01. In any event, even if there was merit to OEAAJB's argument (which there is not), OEAAJB's novel proposition that acceptance of premium payments on a different policy Business Owner Policy number DTHIBP-00107-02 (the 'Hamilton Policy 02') *estops* Hamilton from asserting its defense that OEAAJB's material misrepresentations precludes coverage is not supported by law or logic. OEAAJB fails to make the requisite showing that Hamilton should be estopped from asserting its affirmative defenses, as it fails to state, much less establish that it was prejudiced by Hamilton's conduct. The Court should therefore deny OEAAJB's motion for partial summary judgment. OEAAJB's request for partial summary judgment fails for another reason. Even taking OEAAJB's word that acceptance of premium payments on *another* policy somehow did anything, precedent holds that Hamilton at most waived its counter-claim for rescission of Hamilton Policy 01, but can still maintain its defense that OEAAJB made material representations 'to defeat recovery' under the policy. But as to OEAAJB's contention of Hamilton's waiver of recision, triable issues of material fact exist, at a minimum, as to whether Hamilton's recent conduct of erroneously renewing coverage and

accepting premium payments (through its general agent Dovetail Insurance Corp. (hereinafter, 'Dovetail'), before cancelling Hamilton Policy 02 (based on the fact there are no insurable premises) precludes it from asserting its claim for rescission of Hamilton Policy 01."

Counsel for defendant/third-party plaintiff Hamilton further argues that, "[i]gnoring that OEAAJB itself caused the renewal of insurance, OEAAJB now seeks to take advantage of its purported premium payments to Hamilton under Hamilton Policy 02 to claim that Hamilton's supposed rescission of the insurance coverage cannot stand. However, where OEAAJB gets it wrong is that Hamilton Policy 01, the policy at issue in this case, *was never rescinded.* Rather than wholesale rescind Hamilton Policy 01 at the time Hamilton declined coverage, Hamilton elected to seek a court determination that rescission is appropriate *before* unilaterally rescinding Hamilton Policy 01 based on OEAAJB's material misrepresentation. Upon a court determination that rescission is in fact warranted, Hamilton will return any premium payments paid under Hamilton Policy 01 and subsequently, under Hamilton Policy 02, as this policy should never have (*sic*) issued where no valid insurance coverage existed."

Counsel for defendant/third-party plaintiff Hamilton contends that, "OEAAJB fails to make *any* showing that estoppel applies. '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.' [citations omitted]. Moreover, the insured must show that 'the defendant intentionally relinquished its right to rely on [an] exclusion.' or a condition precedent to the issuance of insurance coverage. [citation omitted]. Indeed, the courts are clear that '[e]stoppel requires proof that the insured has suffered prejudice by virtue of the insurer's conduct,' yet OEAAJB states no facts (nor does it present any supporting evidence) that it has been prejudiced, nor could it. [citations omitted]. Absent from OEAAJB's motion and supporting papers is any

discussion that Hamilton intentionally relinquished its right to decline coverage or otherwise lulled OEAAJB into sleeping on its rights when Hamilton accepted premium payments on a *separate* policy, which OEAAJB unilaterally modified.... The fact that Hamilton (though its general agent Dovetail) erroneously issued a new policy, Hamilton Policy 02, and accepted three premium payments from OEAAJB on a (*sic*) *that* policy does not change the factual analysis that Hamilton did not continue to accept premium payments on Hamilton Policy 01 *after* it declined coverage under the policy. Nor was there any delay declining coverage."

In reply to defendant/third-party plaintiff Hamilton's opposition, counsel for plaintiff submits, in pertinent part, that, "Hamilton begins by arguing that it has not waived its right to seek rescission of the subject policy, because at the time it denied coverage for the subject loss it did not formally seek to 'rescind or cancel the policy.' This is distinction without a difference; a carrier's claim of material misrepresentation brings with it the intention to void the policy *ab initio*. Thus, whether formal steps were undertaken to rescind the policy or not is irrelevant, as such purpose is inherent in the very defense asserted. In a desperate attempt to stave off summary relief, Hamilton asserts that because all premium payments on the policy in effect at the time of the loss were accepted before Hamilton discovered the alleged material misrepresentations, it did not accept payments on the subject policy after it became aware of facts that supported a denial. Hamilton further states that it promptly sought rescission as a counterclaim in the instant matter. However, Hamilton's claims are belied by the record *sub judice*. Here, Hamilton denied 5512's loss, solely on grounds of material misrepresentation, by letter dated June 26, 2017, and filed its Answer, containing the counterclaim for rescission, on September 7, 2017. Then, a week later, on September 14, 2017, it took the pre-meditated and affirmative step, in direct contravention to its stated position in both its denial letter and Answer, and renewed the policy for another term. Hamilton thereafter, on September 25, 2017, November 2, 2017 and December 27, 2017

accepted premium payments from 5512 for this policy.... Hamilton argues that the last premium payment accepted for the subject policy was on April 24, 2017, prior to it becoming aware that the subject premises was not '100% sprinklered' as represented in the application. However, this completely ignores the fact that the very same policy that was in effect on the date of the loss in January of 2017 was renewed for an entire year, from September 14, 2017 to September 14, 2018, **after** Hamilton learned of this alleged misrepresentation. While Hamilton has the audacity to argue that the renewal policy, insuring the same premises against the same risks of loss for the same coverage limits, was actually a new policy, this is fake news. The fact of the matter is that the renewal policy is merely an extension of the policy that was previously in effect, containing the identical policy number, with only a change at the end from '01' to '02,' denoting the policy is in its second year. More telling is the fact that the policy insures the same premises, for the same coverages for the same coverage amounts.... It is noteworthy that there is no allegation that 5512 sought to hide the fact that the premises were not sprinklered.... [T]here was no indication in the loss file as to whether or not anyone confirmed if in fact the subject premises did contain an automatic sprinkler system.... Hamilton attempts to avoid the inevitable by taking the inconsistent position that despite the fact that it was denying coverage on material misrepresentation grounds, it was not actually cancelling the policy at that time, but, rather, merely reserving its right to cancel the policy. This is simply absurd. On June 26, 2017, Hamilton was fully aware: (1) that the application contained a representation that the premises was '100% sprinklered;' (2) that the subject premises was in fact not sprinklered; and (3) that it was denying coverage based solely (*sic*) this alleged material misrepresentation in the application. The intended result of a denial based upon material misrepresentation is that the policy is void *ab initio*, from its inception, as if it was never in effect. Hence, the denial of this property claim for misrepresentation in the application goes hand in hand with the rescission of the policy, whether

stated in the denial letter or not. Hamilton's attempt to bifurcate, so to speak, this issue - making the issue of rescission and misrepresentation separate and distinct, is not rooted in any case law and is actually in contravention of the case law of this State as can be seen from the Memorandum of Law in support of Plaintiff's motion and the accompanying Reply Memorandum of Law."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable

issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept.1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Generally, where an insurer knowingly accepts a premium after learning of a circumstance allowing it to avoid the policy, the insurer will be deemed to have waived the right to cancel or rescind the policy, or to be estopped from doing so. *See Security Mut. Life Ins. Co. of New York v. Rodriguez*, 65 A.D.3d 1, 880 N.Y.S.2d 619 (1st Dept. 2009). An insurer's attempt to both accept premiums and reserve its right to rescind the policy for alleged misrepresentations is unenforceable for lack of mutuality and timeliness. *See McNaught v. Equitable Life Assur. Society of United States*, 136 A.D. 774, 121 N.Y.S. 447 (2d Dept. 1910). An insurer waives its right to rescind when it knowingly accepts premium payments for several months following the discovery of alleged misrepresentations on which it claims to have relied when it issued the policy. *See Continental Ins. Co. v. Helmsley Enterprises, Inc.*, 211 A.D.2d 589, 622 N.Y.S.2d 20 (1st Dept. 1995). *See also U.S. Life Ins. Co. in City of New York v. Blumenfeld*, 92 A.D.3d 487, 938 N.Y.S.2d 84 (1st Dept. 2012).

In the instant action, defendant/third-party plaintiff Hamilton contends that the policy it issued to plaintiff on September 14, 2017, approximately five (5) months after it learned of the alleged material misrepresentation that the subject premises were not one hundred percent (100%) "sprinklered," was a separate and distinct policy from the one issued to plaintiff in September of 2016. The Court finds no merit to this argument. Upon a review of the subject insurance policies, it is evident that said policies are identical, save for the fact that plaintiff did not take additional terrorism insurance coverage with the September 2017 policy. *See* Defendant/Third-Party Plaintiff Hamilton's Memorandum of Law in Opposition to Motion (Seq. No. 01) Exhibits 4 and 9. The policy issued in September of 2017 was an extension of the policy that was previously in effect; defendant/third-party plaintiff Hamilton merely changed the policy number from 01 to 02 and nothing more.

The Court further finds that, by issuing the renewal policy in September of 2017 and accepting premiums on said policy for a period of three (3) months, defendant/third-party plaintiff Hamilton has waived its right to assert its material misrepresentation defense. *See Security Mut. Life Ins. Co. of New York v. Rodriguez, supra*; *Continental Ins. Co. v. Helmsley Enterprises, Inc., supra.*

Plaintiff, in its motion (Seq. No. 01), demonstrated *prima facie* entitlement to summary judgment against defendant/third-party plaintiff Hamilton on the issue of liability. Therefore, the burden shifted to defendant/third-party plaintiff Hamilton to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

After applying the law to the facts in this case, the Court finds that defendant/third-party plaintiff Hamilton failed to meet its burden to demonstrate an issue of fact which precludes summary judgment for plaintiff on the issue of liability against it.

Accordingly, plaintiff's motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant/third-party plaintiff Hamilton on the issue of liability, is hereby **GRANTED**.

The Court will now address defendant/third-party plaintiff Inter's cross-motion (Seq. No. 02) for summary judgment as against defendant/third-party plaintiff Hamilton.

In support of the cross-motion (Seq. No. 02), counsel for defendant/third-party plaintiff Inter submits, in pertinent part, that, "[i]nitially, IIA [defendant/third-party plaintiff Inter] supports and adopts the essential arguments, facts and case law cited in the Motion for Summary Judgment filed by Plaintiff 5512 OEAAJB Corporation (hereinafter 'OEAAJB'), solely with respect to Defendant Hamilton Insurance Company's renewal of Plaintiff's policy of insurance.... As argued in the Affirmation in Support submitted by Johnathan C. Lerner [counsel for plaintiff] the sole reason for Hamilton's denial of coverage for OEAAJB's claim, under the subject insurance policy, was the alleged material misrepresentations in Plaintiff's application for insurance, which indicated that the subject property was '100% sprinklered.' Upon learning that the subject property did not, in fact, have a sprinkler system, Hamilton, rather than seeking to rescind the subject policy as void *ab initio*, took the contrary and unexplainable steps of choosing to keep the policy in effect ... and subsequently offering to renew the subject policy, in its entirety, under the same terms, for another policy year.... It was not until IIA proactively requested that Hamilton remove the 'Protective Safe Guards' did Hamilton change the terms of Plaintiff's insurance policy, after the policy's effective date of September 14, 2017.... It is evident from Hamilton's actions in failing to rescind the subject insurance policy, immediately after learning of the alleged material misrepresentations, and in choosing to renew the subject policy under identical terms for another year, that Hamilton did not materially rely upon said alleged misrepresentations as required by Insurance Law §3105. As such, summary judgment must be

granted.... By April of 2017, Hamilton was aware that the subject premises were not '100% sprinklered.' Hamilton's June 26, 2017 denial of coverage letter rested solely on this fact. Despite disclaiming coverage upon the grounds that Plaintiff allegedly made material misrepresentations in its application for insurance, Hamilton failed to cancel/rescind the policy, return the premiums Plaintiff had paid, and subsequently renewed the policy under identical terms. Hamilton did not render any changes to the renewed policy until after it was already in effect, and after IIA affirmatively requested, via email, that Hamilton remove the protective safeguards, ..., that too (*sic*) a month after the effective date of September 14, 2017, on October 14, 2017.... It is evident that regardless of whether Plaintiff's application for insurance contained any material misrepresentations, Hamilton's failure to return the aforementioned premiums, affirmative actions in renewing the subject policy in its entirety, and continuing to collect premiums under said policy constitutes a waiver of right to assert a defense of rescission and materiality. As such Hamilton must be estopped from doing so as a matter of law. As Hamilton's defenses rely solely on material misrepresentations, based on the above, IIA's motion for summary judgment should be granted." *See* Defendant/Third-Party Plaintiff Inter's Affirmation in Support Exhibits E-G.

Defendant/third-party plaintiff Hamilton opposes defendant/third-party plaintiff Inter's cross-motion (Seq. No. 02), making the same arguments it made in opposition to plaintiff's motion (Seq. No. 01).

For the reasons provided above in the Court's granting of plaintiff's motion (Seq. No. 01) for summary judgment on liability against defendant/third-party plaintiff Hamilton, the Court hereby holds the same with respect to defendant/third-party plaintiff Inter's cross-motion (Seq. No. 02).

Accordingly, defendant/third-party plaintiff Inter's cross-motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment as against defendant/third-party plaintiff Hamilton, is also hereby **GRANTED**.

All parties shall appear for a Certification Conference in IAS Part 32, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on July 10, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 26, 2018

ENTERED
JUN 27 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE