STATEMENT OF FACTS

This Court is respectfully referred to the Declaration of Steven Auerbach, the Declaration of Melissa Corwin, Esq. and the Defendants' Counterstatement of Facts for a full recitation of the facts and documents which are the subject of this motion. In sum, Defendants dispute certain facts as set forth in Admiral's motion as follows: The Acord applications submitted to Admiral were never signed or approved by Communities (Auerbach Dec. Par. 8); the Contractor's Questionnaire is a document that was never produced to Admiral and was not a part of its underwriting file (Dolan Dec. Ex. B), or even alleged as having misrepresentations therein in its Complaint (Kinney Dec. Ex. A), and accordingly, could not have been relied upon by Admiral. Finally, the Contractors/Developers Application was completed by Edwards and Company ("Edwards"), not Communities, and after signature by Harvey Auerbach, was further altered by both Edwards and LoVullo Associates, Inc. ("LoVullo") without evidence of any consent by Communities (Auerbach Dec. Par. 9); and the "specimen" contract provided therewith to Admiral, was never used, produced or approved Communities (Id., Par. 10).

Furthermore: Communities' loss history for slip and falls at other locations were not relevant to the subject application (Id., Par. 31); Communities obtained the requisite insurance certificates, as an additional named insured, for all subcontractors on the job with the single exception of Stormin Norman, which omission was upon the advice of Edwards(Id., Par. 24-26); and Communities obtained the requisite written

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rescission; that any failure to obtain insurance certificates or subcontractor agreements was inadvertent, immaterial or at the direction of or due to the fault of Admiral's representatives; that Admiral's claim for rescission is barred because their policy follows form to the Gemini policy and incorporates the Gemini endorsement, which on its face states that an insured's failure to obtain insurance certificates does not alter coverage. (Kinney Dec. Ex. C)(all references to Kinney Dec. shall refer to the Declaration or Justin N. Kinney submitted by Admiral in support of its' motion).

[3] The Brookwood Defendants assert a first counterclaim seeking a declaration that the Admiral Policy follows form to the Gemini Policy, that Communities and BM 10 qualify as additional insureds, that Admiral has a duty to provide coverage and a duty to indemnify for all claims. The Brookwood Defendants further assert that Admiral's attempt to rescind the policy was wrongful and in violation of the contract and of New York State law. The Defendants' second counterclaim is for a declaration that Admiral has waived, or is estopped from asserting, any claim for rescission by reason of its unreasonable delay. The third counterclaim is for reformation of the policy to reflect the proper insured premises as Admiral committed error in using the mailing address instead of the property address. (Kinney Dec. Ex. C).

contract with hold harmless/indemnification agreement and insurance certificate for the only existing claim which could reach Admiral's policy (Id., Par. 29). Thus, all requirements have been satisfied by Communities with respect to the only claim that presents a risk to Admiral.

Moreover, Admiral's underwriting "guidelines" (Dolan Dec. Ex. C) do not support rescission but rather are consistent with Gemini's Independent Contractor's Endorsement, which precludes rescission. Admiral's guidelines require only an adjustment in pricing ("*if they do not meet our 'desirable' standards, you need to make a pricing adjustment") in the event the insured does not, during the application process, meet Admiral's "'desirable' standards". Similarly, Gemini's Endorsement provides that if, after issuance of the policy, the insured does not obtain the requisite insurance certificate(s) then the policy cannot be voided, but an additional premium may be charged. Admiral's policy has no provision which is inconsistent with, or more restrictive than, Gemini's Endorsement. (Dolan Dec. Ex. A). Accordingly, Communities could not have anticipated that coverage would be void for a failure to obtain an insurance certificate from Stormin Norman.

Finally, the record establishes Admiral's unreasonable delay in asserting any right of rescission. For 12 months from April 18, 2011 through April 5, 2012, after Admiral had acknowledged receipt of the Diaz claim and knew Diaz was employed by Stormin Norman (Auerbach Dec. Ex. J), Admiral made no assertion that Communities made misrepresentations on their application notwithstanding Admiral sent at least 5 correspondence to Communities and/or BM 10. (Murphy Dec. Ex. C, D, E, F, G). The notices of the Diaz and McMahon claims (received by Admiral in April, 2011 and August, 2011 respectively) each contained information that each claimant was an employee of Stormin Norman (Auerbach Dec. Ex. J) and accordingly, Admiral was fully aware Stormin Norman coverage was at issue for 12 months before it even asserted any misrepresentations in the application on April 6, 2012 (Murphy Dec. Ex. I). Further, Admiral was advised there was no insurance in place for Stormin Norman on February 24, 2012 (Corwin Dec. Par. 5) and that there was no contract with Stormin Norman on January 6, 2012 (Id., Par. 6). Admiral also produced a

Chartis report dated January 10, 2010 (with no proof of when Admiral became aware of same) stating that Stormin Norman had no insurance and thus Admiral could have had notice since 2010 (Id., Par. 5). Further, Admiral was also given information about the alleged prior losses (which are all a matter of public record) on July 24, 2012. (Auerbach Dec. Par. 36).

Admiral's claim notes indicate they were considering rescinding the policy as early as January 12, 2012 and yet they waited 4 months before reserving their rights to do so on April 6, 2012. (Corwin Dec., Ex. G). Then, for a period of another 10 months until February 20, 2013, Admiral and/or its counsel sent at least 3 letters to Communities, BM 10 and/or their counsel, in which they continued to merely assert a reservation of rights to rescind (Corwin Dec. Par. 7). It was not until February 21, 2013, when Admiral finally attempted to rescind the policy and return Communities' premium (Kinney Dec. Ex Q), more than 1 year after it was aware there was no contract or insurance for Stormin Norman.

ARGUMENT

I. ADMIRAL HAS NO RIGHT TO RESCIND THE SUBJECT POLICY

Rescission is a "drastic and extraordinary remedy", appropriate only where the breach is found to be "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract."Allen v. Westpoint-Pepperell, Inc., 933 F. Supp. 261 (S.D.N.Y. 1996); Canfield v. Reynolds, 631 F.2d 169 (2d Cir. 1980)(citing Callanan v. Powers, 92 N.E. 747 (1910); Nolan v. Sam Fox Pub. Co., 499 F.2d 1394 (2d Cir. 1974)). Rescission is not appropriate where the failure "was not a breach going to the root of the contract." Id. (citing Direction Associates, Inc. v. Programming and Systems, Inc., 412 F. Supp. 714, 719 (S.D.N.Y.1976); Schwartz v. National Computer Corp., 42 A.D.2d 123, 345 N.Y.S.2d 579 (1973)).

Accordingly, while an insurer has a statutory right to rescind under N.Y. Ins. Law § 3106, it may only rescind an insurance policy which was issued in reliance on "material misrepresentations". N.Y. Ins. Law § 3105 (McKinney 1985). The insurer has the burden of establishing both that there has been a

misrepresentation and that the misrepresentation was material. See Aetna Casualty and Surety Co. v. Retail Local 906 of AFL-CIO Welfare Fund, 921 F. Supp. 122 (E.D.N.Y. 1996).

A. The Issue of Rescission Is Not Determinable on Summary Judgment

In order to establish a rescission claim, Admiral must establish that Communities made material misrepresentations on its insurance application. See Goldsmith v. National Container Corp., 287 N.Y. 438 (1942). The question of whether a misrepresentation is material is a question of fact for the jury and not appropriate for summary judgment. See Albany Ins. Co. v. Fashion Ave. Knits,617 N.Y.S.2d 774 (1st Dept. 1994); SEC v. Credit Bankcorp, Ltd., 147 F. Supp. 2d 238 (S.D.N.Y. 2001)(citing In re Payroll Express Corp. v. Aetna Casualty & Sur. Co., 216 B.R. 344, 357 (S.D.N.Y. 1997)).

Moreover, the issue of who bears the responsibility for any alleged misrepresentations on the application must also be determined by a trier of fact. New York courts have recognized causes of action by insureds for negligence against brokers, including wholesale brokers. See e.g. Levine v. American Federal Group, Ltd., 580 N.Y.S.2d 287 (1st Dept. 1992); East 115th St. Realty Corp. v. Focus & Struga Bldg. Devs. LLC, 2008 N.Y. Misc. LEXIS 10814 (Sup. Ct. N.Y. Co. 2008). However, as a general rule, "the question of proximate cause is to be decided by the finder of fact." Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666 (1980); Litts v. Best Kingston General Rental, 777 N.Y.S.2d 556 (3d Dept 2004). Who bears the responsibility for misrepresentations on an application and the precise relationship in fact and practice between the two (2) brokers, as agent(s) for Admiral, cannot be conclusively determined as a matter of law on the record presented. See Royal Indem. Co. v. Deli by Foodarama, Inc., 1999 U.S. Dist. LEXIS 3752 (E.D. Pa. 1999).

B. There Are Disputed Issues of Fact Precluding Summary Judgment in Admiral's Favor

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may

to provide additional insurance coverage in favor of Communities were not false when made. Assuming *arguendo* the lack of contract between Communities and Stormin Norman is contrary to the answer of "yes" on the application which asked whether Communities obtains written contracts with subcontractors (which representation was ambiguous since this was a project specific policy and Communities had not done construction work in 6-7 years), the failure to obtain such a contract was a future event, which cannot constitute a misrepresentation for the purposes of rescission, as discussed *supra*. Therefore, the lack of contract with Stormin Norman cannot support rescission. Moreover, the lack of an insurance certificate from Stormin Norman is controlled by Gemini's Endorsement, which strictly provides that the policy cannot be voided for failure to obtain same. Finally, Communities' collection of over 100 insurance certificates, its procurement of insurance and indemnity agreements from Townehouse/Conserva, and Communities' reliance on Edwards' representation that Stormin Norman insurance was not required all militate against an intent to deceive.

F. Admiral Did not Justifiably Rely on the Alleged Misrepresentations

Admiral's alleged reliance on the application questions regarding *prior use* of subcontractors was improper as this was a new project, at a new location and thus, past representations were inapplicable. Further, the Gemini endorsement (to which Admiral follows form) specifically covers a future failure to obtain insurance by a subcontractor. Admiral's own underwriter acknowledged the risk was project specific, which "meant that there could not have been prior losses at the project as it was a new project" and accordingly, Admiral's purported reliance thereon is unavailing. (Dolan Dec. Par. 24).

Further, Admiral's internal e-mails establish Admiral does not rely on hold harmless agreements in issuing its policies, as it consistently issues binders without having such agreements in place. (Corwin Dec. Ex. I). These e-mails show only that in a rare instance, Admiral will issue a notice of cancellation, and thereafter reinstate the policy after receipt of the agreement (Id., Ex. K). Tellingly, the Admiral policy provides that *even in the event that the insured fails to maintain the underlying insurance* the policy will *still* not be

still be restored as nearly as possible, to their original positions. Id. (citations omitted).

Under New York law, a party's right to rescind a contract for fraud must be exercised within a reasonable time after that party learns of the fraud. See Republic Ins. Co. v. Mates & Pilots Pension Plan, 77 F.3d 48 (2d Cir. 1996); American Home Assurance Co. v. Belvedere Ins. Co., 1990 U.S. Dist. LEXIS 7153 (S.D.N.Y. 1995)(citing Sumitomo Marine & Fire Ins. Co. v. Cologne Resinsurance Co., 75 N.Y.2d (1990)("defendants . . . failed to take steps to assert their alleged right to rescission within a reasonable time, as they were required to do . . . Under these circumstances, they have waived that claim . . ."(citations omitted)); Accusystems, Inc. v. Honeywell Information Systems, Inc., No. 80-5710, LEXIS slip op. At 6 (S.D.N.Y. Oct. 26, 1982 ("The law of contract prohibits an innocent party from avoiding a contract on the ground that it was fraudulently induced if the party fails to rescind within a reasonable time after discovering the misrepresentation"); Gannett Co. v. Register Publishing Co., 428 F. Supp. 818, 824 (D. Conn. 1977)). Thus, "[r]escission to be effective must be announced without unreasonable delay." In re Shick, 232 B.R. 589 (Bankr. S.D.N.Y. 1999) (citing Schenck v. State Line Tel. Co., 144 N.E. 592, 594 (1924); accord Allen v. Westpoint-Pepperell, Inc., 945 F.2d at 47; United States Postal Serv. v. Phelps Dodge Refining Corp., 950 F. Supp. 504, 517-18 (E.D.N.Y. 1997).

An insurer's failure to rescind a policy promptly after obtaining sufficient knowledge of alleged misrepresentations by an insured constitutes ratification of the policy and waiver of any right to rescind. See United States Life Ins. Co. in the City of New York v. Blumenfeld, 92 A.D.3d 487 (1st Dept. 2012). Thus, a finding of ratification or waiver will defeat even a valid claim of misrepresentation where the party seeking to avoid the contract does not take prompt action after discovery of the alleged false statement. SEC v. Credit Bankcorp, Ltd., 147 F. Supp. 2d at 256 (delay of more than a year in deciding whether to rescind is unreasonable). Accordingly, failure to disclaim insurance coverage within a reasonable time after discovering information necessary to rescind waives the right to do so. Id. (citing Whitney v. Continental Ins. Co., 595 F.Supp. 939, 944 (D. Mass., 1984)).

own search of public records prior thereto). (Corwin Dec. Ex. R). Although Admiral reserved its right to rescind in correspondence on April 6, 2012, it failed to exercise that right until February 21, 2013, notwithstanding that internally they discussed an action to rescind starting in March, 2012 (Corwin Dec. Ex. G) and said they were going to "sick [their lawyer] on [Communities] in June, 2012 (Id., Ex. Y).[4] Thus, Admiral finally attempted to rescind the policy and return Communities' premium (Kinney Dec. Ex Q): (a) 1 year and 10 months after it was aware that Diaz's employer was Stormin Norman; (b) 16 months from when it first had knowledge Stormin Norman had no contract or insurance; and (c) 10 months after it first reserved its right to rescind. Accordingly, Admiral treated its purported right to rescind no different than its blanket *pro forma* reservation of rights to disclaim for any other reason in its correspondence. Thus, Communities had no reason to believe, while Admiral continued to "reserve" its right to rescind, that Admiral would ultimately do so. Tellingly, Gemini asserted the same reservation of rights to rescind nearly 5 years ago, and yet defended all 3 claims, has settled the Diaz and McMahon claims for over $1.2 million cumulatively and continues to defend Communities on the Mort claim.

Accordingly, Admiral failed to take steps to rescind within a reasonable time and thus has waived that claim. See 16C Appelman, Insurance Law and Practice, § 9245, at 348; Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Co., 75 N.Y.2d at 304 (1990).

III. THE SUBJECT POLICY SHOULD NOT BE DECLARED VOID

As set forth above, there is no evidence in the record which indicates that Communities made any material misrepresentations on its insurance application. Accordingly, for the same reason its rescission claim fails, its fraud claim fails. It is well settled that a material misrepresentation is a core element of a fraud claim. Pasternack v. Laboratory Corp. of Am. Holdings, 27 N.Y.3d 817, 827 (2016)(fraud includes "a

[4] Admiral's contention they accepted no premiums after they became aware of the alleged misrepresentations has no merit. It is undisputed that Brookwood paid the entire premium for the policy up front and accordingly there were no premiums for Admiral to reject (Corwin Dec. Ex. N). Admiral, did not however, make any offer to return the premium to Brookwood during the 16 months that they sat idle with knowledge of the alleged misrepresentations.