SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

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BARRY INN REALTY, INC.,

Plaintiff,

-against-

DECISION / ORDER
Index No. 21638/2016E

ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY and M.G.I. BROKERAGE, INC.,

Defendants

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The following papers numbered 1 to 7 read on the below motion noticed on March 27, 2017 and duly submitted on the Part IA15 Motion calendar of **June 1, 2017**:

Papers Submitted	Numbered
Endurance Motion, Aff., Memo. of Law, Exhibits	1,2,3
Pl.'s Aff. in Opp., Exhibits	4,5
Endurance's Reply Memo of Law	6

Upon the foregoing papers, defendant Endurance American Speciality Insurance Company ("Endurance") moves for summary judgment, dismissing the complaint of the plaintiff Barry Inn Realty, Inc. ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

Plaintiff is the owner of the premises located at 1129 Longwood Avenue in the Bronx, New York (the "Property"). Endurance is an insurer who issued a first-party property insurance policy to Plaintiff for the Property for the period December 29, 2015 to December 29, 2016. On January 1, 2016, three days after the policy went into effect, there was a fire at the Property for which Plaintiff submitted a claim under the policy. After conducting an investigation, Endurance discovered that Plaintiff made material misrepresentations on its application for insurance coverage. Endurance thus sent a letter to Plaintiff rescinding the policy as of it its inception date. Because the policy was considered void, Endurance did not consider coverage for any claims submitted thereunder. While it endeavored to refund Plaintiff its premium in the amount of $2,782, Endurance subsequently advised that the premium had never been paid to it, and

therefore no refund was issued. Plaintiff thereafter commenced this breach of contract action against Endurance and co-defendant MGI Brokerage, Inc. ("MGI").

Endurance now moves for summary judgment, dismissing Plaintiff's complaint. Endurance alleges that the insurance policy it issued to Plaintiff is void because, as a matter of law, Plaintiff made material misrepresentations in its application for insurance. Specifically, the application stated that (1) Plaintiff did not have any insurance coverage declined in the previous three years with respect to the Property, and (2) Plaintiff did not have any insurance claims or losses for the Property during the prior three years. Endurance states that both of these representations have proved to be false. While investigating Plaintiff's claim, it was discovered that Plaintiff submitted a property insurance damage claim to another carrier, United Specialty Insurance Company ("United Specialty") for $300,000 in property damage at the Property. The claim was subsequently denied, resulting in litigation. Endurance notes that these facts have been confirmed by Plaintiff in a Notice to Admit, therefore it is undisputed that Plaintiff made a misrepresentation in its insurance application. Endurance also submits an affidavit from its underwriter along with excerpts of its' underwriting guidelines. The underwriter confirms that internal guidelines would have prevented Endurance from issuing the policy to Plaintiff if the application had informed Endurance that Plaintiff had submitted a prior claim in excess of $25,000 over the past three years. Endurance, accordingly, contends that Plaintiff's misrepresentation was material, and therefore Endurance was entitled to deny coverage and rescind the policy as void. Endurance thus argues that it is entitled to summary judgment.

In opposition to the motion, Plaintiff submits an affidavit from its principal Shlomo Denti. Mr. Denti states that Plaintiff engaged the services of co-defendant MGI to procure Plaintiff a property insurance policy for the Property. Denti states that MGI submitted the application for insurance on Plaintiff's behalf, and the information in the application was entirely filled out by MGI. Denti states that he was never asked if the Property had ever sustained a prior loss, and if he was asked, he would have stated that the Property sustained a loss in August 2013 and a claim was submitted to Plaintiff's insurance carrier at the time. Denti notes that he did not personally sign the application for insurance. Plaintiff argues that any search conducted by Endurance prior to issuing the policy would have uncovered the prior loss.

Plaintiff further argues that this motion must be denied as premature because discovery is incomplete. Plaintiff asserts that it must have an opportunity to question Endurance's underwriter about the various underwriting guidelines which have been set forth in Endurance's motion in chief, and the Court can not simply accept as true the statements contained in the underwriter's affidavit. Plaintiff further notes that it is awaiting discovery responses from co-defendant MGI, and "it is unclear what, if any, documents MGI, as a licensed insurance broker working with Endurance, may have in its possession regarding the various policies issued by Endurance as well as the methodologies and guidelines with which the insurer operates" when issuing similar policies. Since Endurance's motion is entirely based on factual claims made by its underwriter, and its underwriting guidelines, Plaintiff assertions that it must be given the opportunity to depose an individual from Endurance's underwriting department, and to obtain any additional outstanding discovery.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's*

Hospital, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Where an applicant for insurance coverage makes a material misrepresentation at the time the insurance policy is being procured, the insurance policy may be rescinded and/or avoided (*see 128 Hester LLC v. New York Mar. & Gen. Ins. Co.*, 126 A.D.3d 447, 447 [1st Dept. 2015]; CPLR 3105[b]). An insurer need not establish that the mispresentations were wilful in order to rescind the insurance contract (*id.*, see also *Prescion Auto Accessories, Inc. v. Utica First Ins. Co.*, 52 A.D.3d 1198, 1201 [4th Dept. 2008]). On a motion for summary judgment, the party seeking rescission bears the burden of submitting evidentiary proof in admissible form that the insured-applicant made a misrepresentation during the application process that was "material" (*id.*, see also *Zilkha v. Mutual Life Ins. Co. of New York*, 287 A.D.2d 713 [2nd Dept. 2001]). A misrepresentation is "material" if the insurer would not have issued the policy had it known the facts that were misrepresented (*Zilkha v. Mutual Life Ins. Co. of New York, supra* at 714). The question of whether a misrepresentation is material or ordinarily a question of fact for the jury (*id*). However, an insurer can establish materiality as a matter of law if it presents documentation concerning its underwriting practices that show that it would not have issued the policy if the correct information had been disclosed in the application (*see 128 Hester LLC v. New York Mar. & Gen. Ins. Co.*, 126 A.D.3d 447, citing *Chester v. Mutual Life Ins. Co. of New York*, 290 A.D.2d 317, 317 [1st Dept. 2002]).

In this case, Endurance satisfied its initial summary judgment burden by tendering evidence in admissible form that Plaintiff made a material misrepresentation in its application for insurance coverage. The insurance application inquired about whether there was "any policy or coverage declined, cancelled or renewed during the period prior to three (3) years for any premises or operations" and Plaintiff responded "N" indicating "no." The application also asked the application to "enter all claims or losses (regardless of fault and whether or not insured) or occurrences that may give rise to claims for the last three years." The applicant checked off a box denoting that there had been no claims or losses or occurrences that may give rise to claims for the last three years. In support of its motion, Endurance has provided evidence that these

responses were false. In response to a Notice to Admit, Plaintiff admitted (1) that the insurance application was prepared on its behalf; (2) that on or about August 8, 2013, the Property sustained damages for which Plaintiff submitted an insurance claim to United Speciality; (3) that United Speciality initiated a lawsuit in the United States District Court for the Southern District of New York pertaining to that claim, and (4) Plaintiff interposed an Answer with Counterclaims, including a counterclaim for $300,000 for breach of contract due to United Speciality's failure to indemnify Plaintiff to the damages sustained to the Property. Furthermore, Endurance submits an affidavit of its Vice President/Underwriting Lead, Theodore Kuhn IV, who states that Endurance's Property Underwriting Procedural & Binding Authority Manual was in effect at the time this policy was issued. Those underwriting guidelines – annexed to the affidavit- contain a provision "Prior Loss History" which states that Endurance was to decline any risk with more than two claims in the past three years, or had one or more claims totaling over $25,000 of loss, including loss reserves, but not including loss adjustment expenses, in the last three years. Mr. Kuhn states that, in accordance with those provisions, Endurance would not have issued the insurance policy to Plaintiff if that application had informed Endurance that Plaintiff submitted a claim to United Speciality within three years of the application, which was in excess of $25,000. The foregoing demonstrates, prima facie, that Plaintiff made material misrepresentations on its insurance application, and thus Endurance was entitled to rescind the policy as of its inception date because the policy was void.

In opposition to the motion, Plaintiff fails to raise a triable issue of fact. Plaintiff does not dispute that the information contained in the insurance application was incorrect, but alleges that the misrepresentations were attributable to its insurance broker MGI Brokerage, Inc. ("MGI") who was entirely responsible for filling out the application. This contention is unavailing. It is settled that an insured "ha[s] a duty to review the entire application and to correct any incorrect or incomplete answers" (*see Precision Auto Accessories, Inc.*, 52 A.D.3d at 1201, citing *Curanovic v. New York Cent. Mut. Fire Ins. Co.*, 307 A.D.2d 435, 437 [3rd Dept. 2003]). Plaintiff's principal here did not fulfill this duty as he fails to allege that he ever reviewed the insurance application to confirm its accuracy (*id*). Furthermore, even if Plaintiff's principal did not actually sign the application, he does not deny that Plaintiff accepted the issuance of the

policy to cover the Property, and therefore Plaintiff ratified the representations made in the application (*see Morales v. Castlepoint Ins. Co.*, 125 A.D.3d 947, 948 [2nd Dept. 2015], citing generally *Holm v. C.M.P. Sheet Metal,* 89 A.D.2d 229, 232 [4th Dept. 1982]; Restatement [Third] of Agency, §4.07, Comment *b*; 12 Richard A. Lord, Williston on Contracts §35:22[4th ed]). Plaintiff also states that "any search conducted by Endurance prior to issuing the policy" would have uncovered the prior loss, however Plaintiff does not argue that Endurance had a legal obligation to conduct such an investigation before issuing the policy.

Plaintiff argues that the motion must be denied as premature, as discovery is incomplete and depositions have yet to be conducted. Under CPLR 3212(f), "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." A plaintiff alleging that a motion is premature for want of discovery must demonstrate that the needed proof is in the exclusive knowledge of the moving party, that the claims in opposition are supported by more than mere hope or conjecture, and that the party has at least made some attempt to discover facts at variance with the moving party's proof (*see Voluto Ventures LLC. v. Jenkens, Gilchrist Parker Chapin LLP*, 44 A.D.3d 557, 557 [1st Dept. 2007][internal citations omitted]). In this case, Plaintiff argues that this Court should not rely on the "self serving" affidavit from Kuhn without giving Plaintiff a chance to question him "about [the] underwriting guidelines." Plaintiff also asserts that it has yet to receive discovery responses from MGI. Plaintiff, however, does not provide any evidentiary basis whatsoever to support its contention that questioning the underwriter concerning the underwriting guidelines or the documentary evidence from MGI may reveal evidence at variance with Endurance's proof. It is not disputed that Plaintiff's application for insurance coverage contained misrepresentations. Endurance properly demonstrated that those misrepresentations were material by providing an affidavit from its underwriter along with documentary evidence in the form of excerpts from its underwriting guidelines. Such evidence, by itself, is sufficient to carry an insurer's prima facie summary judgment burden on this issue (*see, e.g., 128 Hester LLC v. New York Marine and General Ins. Co.*, 126 A.D.3d 447, 447; *Precision Auto Accessories, Inc.*, 52 A.D.3d at 1198; *Arch Speciality Ins. Co. v. Kam Cheung Constr. Inc.*, 104 A.D.3d 599, 599 [1st Dept. 2013]). Plaintiff's opposition only consists of hope

or conjecture which is insufficient to avail itself of CPLR 3212(f) (*see W&W Glass Systems, Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530, 531 [1st Dept. 2012][summary judgment cannot be avoided based on speculation that further discovery may uncover something]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Endurance's motion for summary judgment is granted, and it is further,

ORDERED, that Plaintiff's complaint and any cross-claims asserted against Endurance only are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: September 21, 2017

Hon. Mary Ann Brigantti, J.S.C.