155 A.D.3d 459
Supreme Court, Appellate Division, First Department, New York.

ILLINOIS UNION INSURANCE CO., et al.,
Plaintiffs–Appellants–Respondents,
v.
GRANDVIEW PALACE CONDOMINIUMS
ASSOCIATION, etc.,
Defendant–Respondent–Appellant.
[And Other Actions].

Nov. 14, 2017.

Synopsis

Background: Primary insurer and excess insurer commenced actions against insured **condominium** association, seeking declaratory judgment that they were not obligated to provide coverage under property insurance policies for insured's loss caused by fire, and asserted claims arising under protective safeguards endorsement and based on insureds' alleged material misrepresentations in its insurance applications. Actions were consolidated. The Supreme Court, New York County, Jeffrey K. Oing, J., 2016 WL 7188554, denied parties' motions for summary judgment. Insurers appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] protective safeguards endorsement (PSE) that unambiguously required as condition of insurance that insured maintain automatic sprinkler systems in complete working order in all buildings in its multi-building **condominium** complex precluded coverage, and

[2] excess insurer provided sufficient consideration to insured for PSE, even if there was material change in coverage.

Affirmed as modified.

West Headnotes (2)

[1] **Insurance**
Precautions against loss in general

Protective safeguards endorsement (PSE) that unambiguously required as condition of insurance that insured **condominium** association maintain automatic sprinkler systems in complete working order in all buildings in its multi-building **condominium** complex precluded coverage for insured under property insurance policies after insured complex suffered loss caused by fire, where some buildings did not have sprinkler systems and others had only limited sprinkler systems and not all of them were working properly.

Cases that cite this headnote

[2] **Insurance**
Consideration

Excess insurer provided sufficient consideration to insured **condominium** association for protective safeguards endorsement (PSE) that unambiguously required as condition of insurance that insured maintain automatic sprinkler systems in complete working order in all buildings in its multi-building **condominium** complex, assuming there was material change in coverage even though initial and subsequent primary property insurance policies contained requirement of fully functional sprinkler systems in all buildings in defendant's complex, by not canceling its excess insurance policy, as it had right to do, when other insurer cancelled its primary property insurance policy.

Cases that cite this headnote

Attorneys and Law Firms

****5** Foran Glennon Palandech Ponzi & Rudloff, New York (Matthew Ponzi of counsel), for **Illinois Union** Insurance Co., appellant-respondent.

Mound Cotton Wollan & Greengrass LLP, New York (Philip C. Silverberg of counsel), for Great American **Insurance Company** of New York, appellant-respondent.

****6** Reed Smith LLP, New York (Brian A. Sutherland of counsel), for respondent-appellant.

RICHTER, J.P., MAZZARELLI, KAHN, MOULTON, JJ.

Opinion

***459** Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered December 12, 2016, which denied plaintiffs' motion for summary judgment declaring that they are not obligated to provide coverage under the policies for defendant's loss caused by a fire, and denied defendant's cross motion for summary judgment dismissing the claims arising under the protective safeguards endorsement or based on its alleged material misrepresentations in its insurance applications, unanimously modified, on the law, to grant plaintiffs' motion and declare that they are not obligated to cover defendant's loss, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The property insurance policy issued to defendant by plaintiff **Illinois Union Insurance Company** contained a protective safeguards endorsement (PSE) that unambiguously required as a condition of insurance that defendant maintain automatic sprinkler systems in complete working order in all buildings in its multi-building **condominium** complex. The investigation into the fire that spread through the complex causing extensive damage determined, inter alia, that some of the buildings did not have sprinkler systems and others had only limited sprinkler systems and not all of them were working properly. **Illinois Union**, the primary insurer, and Great American **Insurance Company** of New York, the excess insurer, denied coverage for the loss on the ground that defendant failed to comply with the PSE.

[1] We reject defendant's attempts to create ambiguity in the PSE where none exists (*see Slattery Skanska Inc. v. American Home Assur. Co.*, 67 A.D.3d 1, 14, 885 N.Y.S.2d 264 [1st Dept.2009]), for example, by arguing that the multiple buildings in the complex are actually ***460** multiple coverage locations, so that the absence of sprinklers in one building does not mean that coverage is excluded for all buildings with sprinklers.

We reject defendant's attempts to create coverage where none exists under the policy by arguing that plaintiffs waived the PSE or are otherwise estopped to invoke it (*see Albert J. Schiff Assoc. v. Flack*, 51 N.Y.2d 692, 698, 435 N.Y.S.2d 972, 417 N.E.2d 84 [1980]; *Matter of U.S. Speciality Ins. Co. [DeNardo]*, 151 A.D.3d 1520, 57 N.Y.S.3d 743 [3d Dept.2017]).

[2] Defendant argues that Great American should be precluded from enforcing the PSE because the addition of the PSE to the excess policy materially changed the excess policy, and defendant received no consideration for the change. Our review of the relevant policies finds no support for this argument. Primary insurance coverage was initially provided to defendant by nonparty Aspen American **Insurance Company**. **Illinois Union** replaced the coverage after Aspen cancelled its policy. Both the Aspen and the **Illinois Union** policies contained the requirement of fully functional sprinkler systems in all buildings in defendant's complex. Even if we were to find that there was a material change in coverage, we would conclude that Great American provided sufficient consideration to defendant by not cancelling its excess policy, as it had the right to do, when Aspen cancelled its primary policy (*see All Terrain Props. v. Hoy*, 265 A.D.2d 87, 94, 705 N.Y.S.2d 350 [1st Dept.2000]).

All Citations

155 A.D.3d 459, 65 N.Y.S.3d 5, 2017 N.Y. Slip Op. 07957

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