

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34742
H/W/ct/kmb

_____AD3d_____

Argued - March 30, 2012

PETER B. SKELOS, J.P.
ANITA R. FLORIO
L. PRISCILLA HALL
SANDRA L. SGROI, JJ.

2011-02890

DECISION & ORDER

31-01 102nd Street Associates, Inc., plaintiff, v Ace European Insurance Group, also known as Ace European Insurance Company, respondent, et al., defendant, R&W Brokerage, Inc., et al., appellants.

(Index No. 1460/10)

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville, N.Y. (Michael G. Walker of counsel), for appellant R&W Brokerage, Inc.

Keidel, Weldon & Cunningham, LLP, White Plains, N.Y. (Stephen C. Cunningham and Stephen J. Romano of counsel), for appellant Thomas A. Petropole Insurance Agency.

Cozen O'Connor, New York, N.Y. (Melissa F. Brill of counsel), for respondent.

In an action, inter alia, for a judgment declaring that a loss to the plaintiff's property, as claimed by the plaintiff, is covered under a certain insurance policy issued by the defendant Ace European Insurance Group, also known as Ace European Insurance Company, the defendants R&W Brokerage, Inc., and Thomas A. Petropole Insurance Agency separately appeal from an order of the Supreme Court, Queens County (Flaherty, J.), dated December 15, 2010, which granted the motion of the defendant Ace European Insurance Group, also known as Ace European Insurance Company, for summary judgment declaring that the loss to the plaintiff's property, as claimed by the plaintiff, is not covered under the insurance policy and denied their respective cross motions, in effect, for summary judgment dismissing the third affirmative defense asserted by that defendant, which alleged that the plaintiff made a material misrepresentation in its application for insurance. Justice Hall has been substituted for former Justice Belen (*see* 22 NYCRR 670.1[c]).

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also known as ACE EUROPEAN INSURANCE COMPANY

ORDERED that the order is affirmed, with one bill of costs.

The defendant Ace European Insurance Group, also known as Ace European Insurance Company (hereinafter Ace), established, prima facie, that the plaintiff made a material misrepresentation in its application for insurance and that, based on the relevant underwriting policies, Ace would not have issued the subject policy to the plaintiff had the correct information been disclosed in the application. Thus, Ace made a prima facie showing that the subject insurance policy is void ab initio (*see* Insurance Law § 3105[b][1]; *Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1063). In opposition to Ace's motion, the plaintiff and the appellants failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted Ace's motion for summary judgment declaring that the loss to the plaintiff's property, as claimed by the plaintiff, is not covered under the insurance policy that Ace issued to the plaintiff. For the same reason, the Supreme Court properly denied the appellants' cross motions for summary judgment dismissing Ace's third affirmative defense, which alleged that the plaintiff made a material misrepresentation in its application for insurance.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Queens County, for the entry of a judgment declaring that the loss to the plaintiff's property, as claimed by the plaintiff, is not covered under the insurance policy issued by Ace to the plaintiff (*see Lanza v Wagner*, 11 NY2d 317, 334, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

SKELOS, J.P., FLORIO, HALL and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court