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No. 188
American Building Supply Corp.,
Appellant,
v.
Petrocelli Group, Inc.,
Respondent,
Pollak Associates,
Defendant.

Stuart S. Zisholtz, for appellant.
Stephen C. Cunningham, for respondent.
Defense Association of New York, Inc., amicus curiae.

CIPARICK, J.:

In this appeal, we are asked to determine if an action for negligence and breach of contract lies against an insurance broker for failure to procure adequate insurance coverage where the insured received the policy without complaint. We hold, where issues of fact exist as to a request for specific coverage,

that the insured can maintain such an action and defendant's motion for summary judgment should be denied.

I.

Plaintiff American Building Supply Corp. (ABS) is a business which sells and furnishes building materials to general contractors. Plaintiff is located both in Manhattan and the Bronx. This action only concerns the premises located in the Bronx, where plaintiff is the sole tenant of a building it subleased from DRK, LLC (DRK), which had procured the property by entering into a lease agreement with the New York City Industrial Development Agency (NYCIDA). Pursuant to the lease agreement between DRK and NYCIDA, DRK was, among other things, required to procure general liability insurance from a carrier licensed to do business in the State of New York in the minimum amount of $5,000,000 for bodily injury and property damage. The sublease agreement between ABS and DRK, both owned and managed by the same person, noted that the sublessee consented to all the terms of the lease agreement.

Prior to October 2004, Pollack Associates, not a party to this appeal, was plaintiff's insurance broker and procured a policy with the Burlington Insurance Company (Burlington), an excess line carrier not licensed in the State of New York. DRK was named an additional insured under the policy. The policy did not comply with the requirements set forth by the lease agreements and was subsequently cancelled due to nonpayment of

premiums. In October 2004, plaintiff hired defendant Petrocelli Group, Inc. to replace Pollack as its insurance broker. Defendant arranged to reinstate the Burlington policy. Plaintiff claims that in its discussions with defendant regarding a new policy, it specifically requested general liability coverage for its employees in case of injury, as required by the lease agreements. Plaintiff also alleged that it informed defendant that only employees entered the premises, never customers, as no retail business was conducted at the Bronx location. Finally, plaintiff avers that defendant visited the premises and had assured NYCIDA that the insurance deficiencies would be corrected when the policy was up for renewal.

Defendant then renewed the Burlington policy for the period of June 14, 2005 through June 14, 2006. The policy was essentially the same as plaintiff had previously received through Pollack. The policy contained a cross liability exclusion clause that provided: "This insurance does not apply to any actual or alleged 'bodily injury', 'property damage', 'personal injury' or 'advertising injury' to . . . A present, former, future or prospective partner, officer, director, stockholder or employee of any insured." Plaintiff did not read the insurance policy upon receipt, nor did the broker.

In October 2005, one of plaintiff's employees was injured at the Bronx facility in the course of performing his duties. Burlington disclaimed coverage based upon the cross-

liability exclusion. DRK sought a declaratory judgment against Burlington seeking a determination that Burlington was obligated to defend and indemnify plaintiff. Burlington moved for summary judgment. Supreme Court denied the motion and ordered Burlington to defend and indemnify plaintiff. The Appellate Division reversed, holding that Burlington had no duty to defend or indemnify based on the cross liability exclusion clause (see DRK, LLC v Burlington Ins. Co., 74 AD3d 693 [1st Dept 2010] lv denied 16 NY3d 702 [2011]).

Plaintiff next commenced this action against its broker for negligence and breach of contract in connection with defendant's procurement of insufficient insurance. Following discovery, defendant moved for summary judgment dismissing the complaint. Supreme Court denied the motion, holding that "an issue of fact exists which precludes summary judgment." Specifically, the court found that plaintiff testified that it informed defendant it required coverage if any employee injured himself or herself and that a jury could rationally conclude that plaintiff made a specific request for such coverage to defendant. The Appellate Division reversed, holding that although issues of fact may exist as to plaintiff's request for specific coverage, plaintiff's failure to "read and under[stand] [the] policy . . . precludes recovery in this action (American Bldg. Supply Corp. v Petrocelli Group, Inc., 81 AD3d 531, 531-532 [1st Dept 2011]). We granted leave to appeal (17 NY3d 711 [2011]) and now reverse.

II.

"[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (Murphy v Kuhn, 90 NY2d 266, 270 [1997]). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy (see Hoffend & Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152, 155 [2006]). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (id. at 158).

Here, plaintiff testified, at its deposition, that it specifically requested "general liability for the employees . . . if anybody was to trip and fall and get injured in any way." Plaintiff also testified that defendant was aware of ABS's operations, i.e., that there were no retail sales to the public at the premises and that the only persons at the premises were plaintiff's employees. Defendant, of course, maintains that the procured coverage satisfied plaintiff's request. Like the courts below, we conclude that issues of fact exist as to whether plaintiff specifically requested coverage for its employees in case of accidental injury and defendant, being aware of such request, failed to procure the requested coverage.

This would be a more difficult case if it rested on plaintiff's uncorroborated word alone. Here, however, the evidence arguably supports plaintiff's claim. Since no one but employees ever entered the premises, the coverage defendant obtained, which excluded coverage for injuries to employees, hardly made sense.

III.

Defendant maintains, however, that plaintiff's claim is barred by its receipt of the insurance policy without complaint. In Hoffend we left open the question of whether a plaintiff who has received an insurance policy and had an opportunity to read it and had not requested any changes is barred from recovery (see 7 NY3d at 157). Various appellate courts have held that once an insured has received his or her policy, he or she is presumed to have read and understood it and cannot rely on the broker's word that the policy covers what is requested (see Busker on Roof Ltd. Partnership Co. v Warrington, 283 AD2d 376, 376-377 [1st Dept 2001]; Rotanelli v Madden, 172 AD2d 815, 817 [2d Dept 1991] lv denied 79 NY2d 754 [1992]; Madhvani v Sheehan, 234 AD2d 652, 654-655 [3d Dept 1996]; Chase's Cigar Store v Stam Agency, 281 AD2d 911, 912 [4th Dept 2001]). However, other appellate courts have been more forgiving and have held that receipt and presumed reading of the policy does not bar an action for negligence against the broker (see Kyes v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736, 737-738 [3d Dept 2000]; Reilly v Progressive Ins.

Co., 288 AD2d 365, 366 [2d Dept 2001]). This may be such a case.

The facts as alleged here, that plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint, should not bar plaintiff from pursuing this action. While it is certainly the better practice for an insured to read its policy, an insured should have a right to "look to the expertise of its broker with respect to insurance matters" (Baseball Off. of Commr. v Marsh & McLennan, 295 AD2d 73, 82 [1st Dept 2002]; see also Bell v O'Leary, 744 F2d 1370, 1373 [8th Cir 1984]). The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker (see Baseball Off. of Commr. 295 AD2d at 82).

Because there are issues of fact as to whether plaintiff requested specific coverage for its employees and whether defendant failed to secure a policy as requested, we conclude that summary judgment is inappropriate in this matter. We further conclude that plaintiff's failure to read and understand the policy should not be an absolute bar to recovery under the circumstances of this case.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the motion by defendant Petrocelli Group, Inc. for summary judgment denied.

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PIGOTT, J. (dissenting):

It seems to me elementary that before you can complain about the contents of any contract, you should at least have read it. Nearly 100 years ago we held that when an insured receives an insurance contract, he or she has a duty to read and examine its contents (see Metzger v Aetna Ins. Co., 227 NY 411, 416 [1920]). There, we held that the insured is "conclusively presumed" to know the contents of the insurance contract and assent to it, when he or she signs or accepts the contract (id.).

While it is true that, until now, this Court had yet to decide whether the presumption applies to protect an insurance broker that has allegedly failed to obtain requested coverage, several appellate courts have considered the issue and appropriately applied the presumption (see McGarr v The Guardian Life Ins. Co. of Am., 19 AD3d 254, 256 [1st Dept 2005]; Laconte v Bashwinger Ins. Agency, 305 AD2d 845 [3d Dept 2003]; Busker on the Roof Ltd. Partnership Co. v Warrington, 283 AD2d 376 [1st

Dept 2001]).

The majority offers no compelling reason why this basic requirement, i.e. that you read the thing, should not obtain in cases involving an insurance broker. Although an insured may claim to have relied upon the broker's experience and knowledge in certain circumstances, we have made clear that insureds are in a better position to know both their own assets and ability to protect themselves than agents or brokers (Murphy v Kuhn, 90 NY2d 266, 273 [1997]). Agents and brokers are not "personal financial counselors and risk managers, approaching guarantor status" (id.). The relationship between a broker and an insured is not one in which continuing obligations to advise might exist but, rather, is an ordinary commercial relationship that does not give rise to a duty to provide such ongoing guidance (see id. at 270-271; see also Kimmell v Schaefer, 89 NY2d 257, 263-264 [1996]).

There are, of course, limitations on the presumption rule. For example, the presumption is overcome when a broker fails to correct a clear misimpression created by a binder (see Arthur Glick Truck Sales v Spadaccia-Ryan-Haas, Inc., 290 AD2d 780 [2002]), or when a broker makes an affirmative misrepresentation regarding coverage in response to questioning by the client after reviewing the policy (Kves v Northbrook Prop. & Cas. Ins. Co., 278 AD2d 736 [2000]). Those limitations are not alleged here.

By permitting ABS to evade the conclusive presumption rule, the majority in essence allows an insured, months and possibly years after a policy is procured, to complain, following a loss, that it made a request of its broker for the relevant coverage but it was not forthcoming. This will almost always result in a "he said-she said" battle of what occurred during coverage discussions between the insured and broker.

In short, I agree with the Appellate Division that Petrocelli demonstrated its prima facie entitlement to judgment as a matter of law. It submitted the renewal policy to ABS and ABS concedes that it received it. Thus, ABS was conclusively presumed to know the contents, including the exclusions, of the policy. In opposition, ABS failed to raise a triable issue of fact. Had ABS read the policy, and claimed not to have understood the cross-liability exclusion and that Petrocelli misled it with respect to the meaning thereof, a clear question of fact would have been presented. However, ABS does not dispute receipt of the policy and admitted that it did not review it; and, as the Appellate Division noted, the record failed to demonstrate any exception to the presumption that ABS assented to the policy terms.

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Order reversed, with costs, and motion by defendant Petrocelli Group, Inc. for summary judgment denied. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Read and Smith concur. Judge Pigott dissents and votes to affirm in an opinion in which Judge Graffeo concurs.

Decided November 19, 2012