

Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.

2008 NY Slip Op 31095(U)

April 16, 2008

Supreme Court, New York County

Docket Number: 0602373/2005

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn

PART 49

Justice

Index Number : 602373/2005
KISS CONSTRUCTION NY
vs.
RUTGERS CASUALTY INSURANCE COMPANY
SEQUENCE NUMBER : # 002
COMPEL

INDEX NO. 602373-05

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 16 2008

COUNTY CLERK
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

Dated: April 16, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
KISS CONSTRUCTION NY, INC.,
Plaintiff,

-against-

RUTGERS CASUALTY INSURANCE COMPANY,
BUCKINGHAM BADLER ASSOCIATES, INC.,
and BHS INSURANCE AGENCY, INC.,
Defendants.

-----X
CAHN, J.:

Index No. 602373/05

FILED

APR 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Motion seq. numbers 002 and 003 are consolidated for disposition.

In this action, plaintiff Kiss Construction NY, Inc. seeks, inter alia, a declaratory judgment that defendant Rutgers Casualty Insurance Company is obligated to defend and indemnify it in Jose Turbides v Jasvir Singh and Kiss Construction NY, Inc. (Index No. 6219/2005), a personal injury action currently pending in Bronx County Supreme Court (the Underlying Action).

In motion seq. number 002, Kiss Construction moves for partial summary judgment, CPLR 3212, (i) declaring that Rutgers is obligated to defend Kiss Construction in the Underlying Action; (ii) compelling Rutgers to repay the defense costs that Kiss Construction has incurred to date in the Underlying Action, with interest; (iii) dismissing Rutgers' fifth affirmative defense of rescission; (iv) declaring that Rutgers is required to indemnify Kiss Construction from all losses, costs and expenses incurred in the Underlying Action; and (v) severing and continuing Kiss Construction's claims against defendant BHS Insurance Agency, Inc.

In motion seq. number 003, Rutgers moves for summary judgment in its favor, CPLR 3212.

BACKGROUND

Most of the relevant facts in this case were detailed in a prior decision and order of this court, familiarity with which is presumed.

Briefly, Kiss Construction was “engaged, inter alia, as a contractor” (see Di Berardino Aff, Exh D, ¶ 1). On May 17, 2002, Kiss Construction, through its insurance broker, defendant BHS, applied for a new commercial general liability insurance policy covering its business. Kiss Construction’s application for coverage stated that the nature of its business was “Painting-100% - 100% Interior” (id., Exh A).

A new commercial general liability insurance policy, underwritten by defendant Rutgers, (id., Exh B) was issued to Kiss Construction effective May 30, 2002. The Declaration Page of the policy identified plaintiff’s business solely as “painting contractor” (id.). The policy initially provided commercial general liability insurance coverage for the period May 30, 2002 through May 30, 2003. Thereafter, the policy was renewed for two additional years, first from May 30, 2003 through May 30, 2004, and then from May 30, 2004 through May 30, 2005.

Rutgers did not require Kiss Construction to submit an additional application prior to either renewal. However, prior to the first renewal, in early May 2003, Rutgers’s Underwriting Department did require that Kiss Construction complete a Policyholders’ Report, in which it asked for certain information regarding the number of employees, its annual payroll, and its gross receipts, in order to establish a “Basis of Premium” (id., Exh C).

On August 9, 2004, during the second renewal period, Kiss Construction, through its president and sole shareholder, Amritpal Sandhu, entered into a contract to build a three-family home on certain property owned by Jasvir Singh, located at 1187 Ogden Avenue in Bronx, New

York (id., Exh O). On September 30, 2004, Kiss Construction subcontracted the excavation and construction of the foundation for that project to A. Enterprises (id.). A. Enterprises began work on the foundation in October 2004 (id., Sandhu Depo, Exh F at 98-99).

On November 11, 2004, Jose Turbides allegedly was injured in a slip and fall on the sidewalk/roadway outside the 1187 Ogden Avenue location. In early 2005, he commenced the Underlying Action against Kiss Construction and Jasvir Singh. In his complaint, Turbides alleged that his injuries were caused by the negligence of Kiss Construction and the property owner with respect to certain excavation and paving performed on the sidewalk/roadway of the premises (id., Exh D).

Kiss Construction was served with a summons and complaint in the Underlying Action in early February 2005, and thereafter notified Rutgers, demanding defense and indemnification. On March 2, 2005, Rutgers sent Kiss Construction a "Reservation of Rights" letter acknowledging receipt of the claim and assigning counsel (id., Exh S). The letter advised, however, that Rutgers was reserving its right to disclaim coverage following its investigation of the occurrence, noting that grounds

exist to disclaim coverage and void the policy due to misrepresentations you may have made on your application for insurance. In your application for insurance coverage you stated that 100% of your business involved interior painting. In [the Underlying] Complaint filed herein it is alleged that you were cutting and/or excavating a roadway/sidewalk and were involved with paving the roadway

(id. at 2). The letter stated that Rutgers reserved the right to disclaim coverage based on a violation of Section IV (6) of the policy (id.), which provides that,

[b]y accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations

(see id., Exh B).

On March 17, 2005, after completing its investigation, Rutgers issued a Notice of Disclaimer to Kiss Construction (id., Exh T). The notice asserted that Rutgers's investigation had revealed that, on the day of the accident, Kiss Construction had been engaged in the construction of a three-family home at 1187 Ogden Avenue although, in its application for insurance, Kiss Construction had stated that its business involved 100% interior painting only (id.). The letter stated that,

[i]t was in reliance of this statement that a Commercial Insurance Policy was issued to you. Had we known that your company was actually engaged in the building of homes, this policy would never have been issued. Therefore this constitutes a material misrepresentation and as such we are at this time disclaiming coverage

(id., at 1). The letter further advised that Rutgers would no longer be providing Kiss Construction with a defense or indemnification in the Underlying Action (id.).

On June 30, 2005, Kiss Construction filed the instant action seeking, among other things, a declaratory judgment that Rutgers is obligated to defend and indemnify it in the Underlying Action. In its answer, Rutgers asserted, among other affirmative defenses, a fifth affirmative defense alleging that, “[a]s a result of Plaintiff’s material misrepresentation the Rutgers’ policy is void ab initio” (id., Exh E), and subsequently moved to dismiss the complaint on this ground.

In an order dated October 24, 2006, this court denied Rutgers’s motion to dismiss, finding

that the evidence proffered by Rutgers failed to establish that the representation contained in the insurance application, i.e., that Kiss Construction was engaged solely in painting, was necessarily false at the time the application was made. The court also found that Rutgers had failed to meet its burden of establishing the materiality of the alleged misrepresentation by “clear and substantially uncontradicted evidence” (Carpinone v Mutual of Omaha Ins. Co., 265 AD2d 752, 754 [3rd Dept 1999]), as it had failed to proffer evidence sufficient to show that its underwriting guidelines would have prohibited it from issuing the policy to Kiss Construction, or that it previously had denied coverage to other businesses under similar circumstances.

After completing discovery, both sides make the instant motions for summary judgment.

In motion sequence number 002, Kiss Construction moves for partial summary judgment, declaring that Rutgers is obligated to defend and pay the defense costs that Kiss Construction has incurred to date in the Underlying Action, on the ground that the allegations of negligence in the underlying complaint clearly fall within the scope of coverage provided by the policy, and thus were sufficient to trigger Rutgers’ duty to defend. Plaintiff additionally moves to dismiss Rutgers’ fifth affirmative defense, arguing that Rutgers is estopped or precluded from rescinding the policy because it failed to tender the return of the premium, or to cancel the policy pursuant to either its terms or relevant New York law. In any event, plaintiff argues that, even had Rutgers properly sought to cancel or rescind the policy, any such cancellation or rescission would operate only prospectively under the circumstances present here, where a claim already had been asserted against the policy at the time such rescission was sought. Finally, plaintiff argues, even assuming that there had been a material change in the risk that Rutgers undertook to insure, as Rutgers contends, the appropriate remedy for such a change would be to adjust the policy premium, and

not to cancel or rescind the policy, as Rutgers seeks to do.

In motion seq. number 003, Rutgers moves for summary judgment declaring that it has no duty to defend or indemnify Kiss Construction in the Underlying Action, on the ground that it has now proffered evidence sufficient to establish that Kiss Construction materially misrepresented the nature and scope of its business activities in its application for insurance, and thus that the policy should be rescinded as void. Alternatively, Rutgers argues that because Kiss Construction's activities, involving the construction of multi-family dwellings and general contracting, were ineligible for coverage under its underwriting guidelines, there could be no agreement between the parties to cover such activities; therefore, these activities clearly fall outside the scope of the policy's coverage. Rutgers argues that, since there was never any coverage for these activities, its is entitled to a declaratory judgment that it has no obligation to defend or indemnify Kiss Construction in the Underlying Action, regardless of whether the policy is considered void.

DISCUSSION

A motion for summary judgment will be granted only where the movant has made a prima facie showing of entitlement to judgment as a matter of law by the "tender of evidentiary proof in admissible form" (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), sufficient to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once a movant has made such a showing, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise triable issues of fact (Zuckerman at 562). Issue finding, rather than issue determination, is the Court's function on the motion (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]).

When an insurer discovers that an application contains a material misrepresentation, the insurer may elect to rescind the policy, rendering it void ab initio (Stein v Security Mutual Ins. Co., 38 AD3d 977 [3rd Dept 2007]; Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 436 [3rd Dept 2003]). However, where, as here, the policy has gone into effect and claims have already been asserted against it, thereby altering the status quo, an insurer must await a judicial determination before such rescission can have retroactive, versus merely prospective, effect (see Federal Ins. Co. v Kozlowski, 18 AD3d 33, 39-40 [1st Dept 2005]). Under such circumstances, any obligations that have accrued under the policy, such as the insurer's duty to defend, will continue until such time as the insurer prevails on its claim of right to rescind (id.).

To establish its right to rescind, the insurer must demonstrate that its insured "made a false statement of fact as an inducement to making the contract and the misrepresentation was material" (Federal Ins. Co., 18 AD3d at 39, quoting Curanovic, 307 AD2d at 436).¹ A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented (see Insurance Law § 3105 [b]; Zilkha v Mutual Life Ins. Co. of New York, 287 AD2d 713 [2^d Dept 2001]).

To establish materiality, the insurer must

present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application

(Parmar v Hermitage Ins. Co., 21 AD3d 538, 540 [2^d Dept 2005]). The insurer must also adduce

¹ Insurance Law § 3105 (a) defines a representation as a "statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof."

proof of its underwriting practices with respect to similar applicants (see Tuminelli v First Unum Life Ins. Co., 232 AD2d 547 [2^d Dept 1996]; see also Curanovic, 307 AD2d at 437-38), “which could include documentation showing that the insurer had refused coverage in the past under similar circumstances” (Lenhard v Genesee Patrons Co-op. Ins. Co., 31 AD3d 831, 833 [3rd Dept 2006]). The determination whether a misrepresentation is material generally is a question of fact for the jury (Curanovic, 307 AD2d at 437; Zilkha, 287 AD2d at 714; Process Plants Corp. v Beneficial Natl. Life Ins. Co., 53 AD2d 214 [1st Dept 1976], affd 42 NY2d 928 [1977]).

Rutgers’s motion, insofar as it seeks summary judgment declaring the policy void ab initio, is denied. While Rutgers has proffered adequate documentation to establish that contractors engaged in demolition, foundation work, roofing work, or general contracting were ineligible for coverage under its underwriting guidelines, it has offered only unauthenticated e-mails and correspondence as proof that it refused to underwrite coverage for such activities in the past; these unauthenticated submissions are insufficient to prove Rutgers’s underwriting practices with respect to similar applicants under similar circumstances. Moreover, although Rutgers has produced evidence sufficient to establish that Kiss Construction was engaged, as a general contractor, in the construction of a multi-family dwelling on the date of the occurrence,² the parties have presented conflicting accounts as to when Kiss Construction first became involved in home construction or general contracting activities, and thus, whether it had been involved in such activities at the time it first applied for the commercial general liability policy at issue.

² The fact that Kiss Construction may not, itself, have performed any physical construction work at 1187 Ogden Avenue prior to the date of the occurrence, is irrelevant, as the evidence clearly establishes that Kiss Construction had engaged A. Enterprises and was acting as general contractor on the project.

Specifically, in support of its contention that Kiss Construction had misrepresented the true scope and nature of its business when it applied for the policy, Rutgers has proffered the deposition testimony of Gurbhej Sandhu, the father of Amritpal Sandhu, and the individual who actually had met with BHS on behalf of Kiss Construction to procure the insurance at issue (Di Berardino Aff, Exh G). According to Gurbhej Sandhu, Kiss Construction had performed work as a general contractor during calendar year 2002, i.e., the year that the application for insurance first was made (id. at 172). Rutgers also proffers an affidavit from Michael Seckendorf, the independent claims investigator engaged by Rutgers to investigate the underlying occurrence (id., Exh M). In the affidavit, Seckendorf states that he spoke with Amritpal Sandhu on March 15, 2005, at which time Amritpal Sandhu asserted that Kiss Construction had been performing complete construction and renovation of buildings for “approximately three years” (id.).

In response, plaintiff has proffered an affidavit from Amritpal Sandhu, who asserts that, during its existence, Kiss Construction built a total of only three new homes; each of these buildings required a new building permit; and all the building permits were obtained well after Rutgers first issued the policy at issue to Kiss Construction (see Sandhu Aff ¶ 7). Attached to his affidavit are copies of the permit histories for the three homes, offered as further proof that Kiss Construction was not engaged in new home construction before 2003 (id., Exhs 2-4).

Plaintiff also submits an affidavit from Gurbhej Sandhu, who now states that he was never an owner, officer or employee of Kiss Construction, but handled only “discrete tasks” on Kiss Construction’s behalf, when asked to do so by Amritpal Sandhu (see Sandhu Aff ¶¶ 2-3). Gurbhej Sandhu further avers that he has no personal knowledge of whether Kiss Construction was involved in constructing a building during 2002, and so indicated during his deposition (id.,

¶ 4). As noted by Rutgers, however, certain of Gurbhej Sandhu's current averments and deposition testimony, regarding his limited role in Kiss Construction, appear to contrast with statements he made in two previous affidavits, submitted in opposition to Rutgers's prior motion, in which he identified himself as "a manager of Kiss Construction" (see Di Bernardino Aff, Exhs U, V).³

Despite seeming inconsistencies in plaintiff's accounts of its business in its various submissions during the course of this action, its proffer of conflicting statements regarding when Kiss Construction began working in home construction or as a general contractor compels denial of Rutgers's summary judgment motion, as any determination on this issue would require the Court to make findings of fact and determinations of credibility, which are not appropriate on a motion for summary judgment (Baseball Off. of Commr. v Marsh & McLennan, 295 AD2d 73 [1st Dept 2002]; see also S. J. Capelin Assoc., Inc. v Globe Mfg. Corp., 34 NY2d 338 [1974]).

To the extent that Rutgers seeks summary judgment on the alternative ground that plaintiff's construction and contracting activities, which were ineligible for coverage under its underwriting guidelines, fall outside the scope of coverage afforded under the policy, the motion must also be denied. In MCI LLC v Rutgers Cas. Ins. Co., 2007 WL 2325867, 2007 US Dist LEXIS 59241 (SDNY 2007), the district court, addressing this very issue, noted that

Rutgers' underwriting guidelines set standards for coverage eligibility. They do not define what is and what is not covered by the policy; such limitations are contained in the terms of the policy and the stated exclusions

³ Plaintiff contends that there is no discrepancy in these statements because Gurbhej Sandhu handled isolated tasks for Kiss Construction and, "[i]n this respect, he managed those tasks" (Amritpal Sandhu Aff, ¶ 3).

(id. at *13). Here, as in the policy at issue in that case, the Declaration Page states that

[t]hese Declarations together with the common policy conditions, coverage declarations, coverage form(s) and forms(s) and endorsements, if any, issued, complete the above numbered policy

(Di Berardino Aff, Exh B).

Rutgers identifies no provision or endorsement in the policy that indicates that its underwriting guidelines were necessarily incorporated into, or form part of, the policy. Nor has Rutgers identified any provision or endorsement of the policy that expressly excludes coverage for general contracting or construction activities, or expressly limits coverage to the business description included on the Declarations Page, or the classification of operations used to determine the premium (see e.g. Ruiz v State Wide Insulation & Constr. Corp., 269 AD2d 518 [2^d Dept 2000] [policy coverage limited to painting, where declarations page described business as painting and incorporated by reference an endorsement, entitled "Classification Limitation," which limited the operations from which a claim could arise to those described in the schedule of insurance]).

Here, the Rutgers commercial liability policy provides, in relevant part, that

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply
- b. This insurance applies to 'bodily injury' and 'property damage' only if:

- (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; [and]
- (2) The 'bodily injury' or 'property damage' occurs during the policy period

(Di Bernardino Aff, Exh B).⁴

It is well-settled that an insurer's duty to defend its insured is broader than its duty to indemnify (see Fitzpatrick v Am. Honda Motor Co., 78 NY2d 61 [1991]). The duty to defend arises whenever the underlying complaint alleges facts that fall within the scope of coverage (Federal Ins. Co., 18 AD3d at 40, citing Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 310 [1984]). "If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (BP Air Conditioning Corp. v One Beacon Ins. Group, 8 NY3d 708, 714 [2007], quoting Technicon Elecs. Corp. v Am. Home Assur. Co., 74 NY2d 66, 73 [1989]). An insurer may escape its duty to defend under the policy "only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy" (Judlau Contr., Inc. v Westchester Fire Ins. Co., 46 AD3d 482, 484 [1st Dept 2007], quoting Spoor-Lasher Co. v Aetna Cas. & Sur. Co., 39 NY2d 875, 876 [1976]), and "may be required to defend under the contract even though it may not be required to pay once the litigation has run its course" (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006]).

⁴ The policy defines "bodily injury" to include "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time"; the term "coverage territory" is defined to include the entire United States of America; the term "occurrence" is defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" (*id.*).

The underlying allegations, that Turbides sustained injury due to the negligence of Kiss Construction in excavating and paving on the sidewalk outside 1187 Ogden Avenue, are sufficient to trigger Rutgers's duty to defend under the policy. Therefore, until such time as defendant may prevail on its claim of right to rescind, it remains obligated to defend its insured, and/or pay its defense costs, in the Underlying Action.⁵

In light of the above, plaintiff's motion for partial summary judgment is granted to the extent of declaring that Rutgers is obligated to defend and/or pay Kiss Construction's defense costs in the Underlying Action until it is decided that it was entitled to rescind the policy. However, insofar as plaintiff also seeks summary judgment dismissing Rutgers's fifth affirmative defense, on the grounds that Rutgers is estopped or precluded from rescinding the policy, the motion is denied.

Upon discovery of a material misrepresentation in an application, an insurer may elect to cancel the policy, to leave it in full force and effect until the effective cancellation date, or to rescind the policy, rendering it void ab initio (see Stein v Security Mut. Ins. Co., 38 AD3d 977 [3rd Dept 2007]). An insurer who elects to cancel a policy as of a future date, rather than to rescind it, may thereafter be precluded from seeking rescission (id.). However, it does not follow, as plaintiff appears to contend, that the election not to cancel the policy upon discovery of the misrepresentation precludes the insurer from seeking rescission.

The record reflects that Kiss Construction was first put on notice of Rutgers's defense of

⁵ Should Rutgers prevail in this action, its obligation to defend will be vitiated, and it may be entitled to the return of all legal fees and other moneys expended under the rescinded policy (see Federal Ins. Co. v Tyco Intl. Ltd., 2 Misc 3d 1006[A], 2004 NY Slip Op 50160[U] [Sup Ct, NY County 2004], appeal dismissed sub nom. Federal Ins. Co. v Kozlowski, 18 AD3d 33 [1st Dept 2005]).

rescission in Rutgers's Reservation of Rights letter, when Rutgers stated that "grounds also exist to disclaim coverage and void the policy due to misrepresentations you may have made on your application for insurance" (Di Bernardino Aff, Exh S). Where, as here, Rutgers must await a judicial determination in order to rescind the policy retroactively, it is, at best, arguable, whether Rutgers's failure to tender the return of Kiss Construction's premium, or its subsequent issuance of a letter of non-renewal, should be deemed an estoppel on its right to seek such rescission. Nevertheless, in the event that Rutgers does establish a right to rescind, and the policy is declared void ab initio, Kiss Construction will then be entitled to the return of all premiums and other payments made to Rutgers (see Curiale v AIG Multi-Line Syndicate, Inc., 204 AD2d 237, 238-39 [1st Dept 1994], citing LaRocca v John Hancock Mut. Life Ins. Co., 286 NY 233, 236 [1941]).

Accordingly, it is

ORDERED that the motion for partial summary judgment by plaintiff Kiss Construction NY, Inc. (motion sequence number 002), is granted to the extent of ADJUDGING and DECLARING that defendant Rutgers Casualty Insurance Inc. is obligated to defend and/or pay Kiss Construction's defense costs in Jose Turbides v Jasvir Singh and Kiss Construction NY, Inc. (Index No. 6219/2005) until it is decided that Rutgers is entitled to rescind the policy, and the motion is otherwise denied; and it is further

ORDERED, that the motion for summary judgment by defendant Rutgers Casualty Insurance Inc. (motion sequence number 003) is denied; and it is further

ORDERED, that the remainder of this action will continue; and it is further

ORDERED, that the Clerk shall enter judgement accordingly.

DATED: April 10, 2008

ENTER:



J.S.C.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK