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SCANNED ON 2/22/2004

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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

0121969/2002

CORAL & STONES UNLIMITED
VS
LLOYD'S

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were 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 and cross motion are decided in accordance with the attached decision and order

FILED
DEC 22 2004
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/16/04

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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CORAL & STONES UNLIMITED CORP.,

Plaintiff,

Index No. 121969/02

-against-

CERTAIN UNDERWRITERS AT LLOYDS VIA MARSH SA, BRUSSELLS, BELGIUM/ UNDERWRITERS AT LLOYD'S VIA HSBC LONDON, UK.,

Defendants.

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Emily Jane Goodman, J.:

In this action for breach of contract, in which plaintiff seeks to recover for a loss under a jewelers block insurance policy, defendants move for summary judgment, and for leave to amend their answer. Plaintiff cross-moves for summary judgment, and an order striking defendants' affirmative defenses.

Plaintiff Coral & Stones Unlimited Corp. (Coral) is in the business of the wholesale selling of, among other things, jewelry and diamonds. Defendants Certain Underwriters at Lloyds via Marsh SA, Brussells, Belgium/Underwriters at Lloyd's via HSBC London, UK. (Lloyds's) are in the business of underwriting and issuing insurance policies.

The instant action involves a jewelers block policy issued by Lloyd's to Coral covering the period from April 20, 2001

through April 20, 2002. A jewelers block policy is an all risk policy, which insures for all risks to the insured's stock, unless a specific exclusion applies. *See Star Diamond, Inc. v Underwriters at Lloyd's, London*, 965 F Supp 763 (ED Va. 1997). In this motion, Lloyd's alleges that Coral made a misrepresentation of fact on its application which voids the policy ab initio. Lloyd's seeks leave to amend its answer to add the previously unpled affirmative defense of misrepresentation, and seeks summary judgment on this defense. Lloyd's also claims that two exclusions in the policy bar Coral's recovery under the policy, following a theft of $350,000 in jewelry on November 8, 2001.

Coral conducts its business in Miami, Florida. During the relevant period, it employed two salesmen to sell its inventory outside of Florida. It is undisputed that Coral, on its application to procure the jewelers block policy, represented that, out of the 12-month period preceding the application, its two salesmen carried an average of $50,000 to $150,000 of Coral's merchandise off-premises (i.e., off the premises in Florida) for no more than 30 days. However, in his deposition, one of Coral's salesmen, Jose Catoya (Catoya), who resides in New Jersey, stated that, for at least 15 years, he had possession of between $100,000 and $300,000 of Coral's jewelry for the balance of the year, conducting business, for the most part, in New Jersey and

New York City, flying to Florida only about six to seven times a year to replenish his stock.[1] Catoya testified that he sold Coral's jewelry Mondays through Fridays, keeping the merchandise in the vaults of several jewelers at night, when he was not carrying it for purposes of sale. Coral does not dispute any of Catoya's testimony as to these matters.

According to Catoya's deposition testimony, the loss for which Coral seeks recompense occurred as follows: Catoya was traveling with $350,000 worth of jewelry in the trunk of his car, on his way to deposit the jewelry in the vault of a jewelry store. At approximately 4:30 P.M., before he had made the deposit, he stopped to have his car washed at a car wash in Newark, New Jersey. After his car had been washed, Catoya parked the car in front of the car wash, with the door open, the keys in the ignition, and a steering wheel restraint device, known as the Club, on the floor of the car, while the car wash employees cleaned and vacuumed the vehicle's interior.

During this time, Catoya was allegedly standing behind the car, talking with the owner of the car wash, who was an acquaintance. After the car wash's employees had finished with the car's interior, Catoya continued to talk with the car wash's owner, while the car's door remained open, with the keys still in

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[1]See Tr of Jose Catoya, dated April 27, 2004, at 4,8,10, 11-12,15, 17).

the ignition. According to Catoya, the discussion involved dents in the car's rear bumper, which Catoya wished to have repaired. Catoya claims that, while he remained in conversation with the car wash's owner, and while he was standing to the rear of the car, with his left hand on the vehicle, someone entered the car, and drove it away at great speed. Catoya states that he did not see anyone entering the car prior to its theft. The vehicle was later recovered, although the jewelry was missing.

New York Insurance Law (Insurance Law) § 3105(a) states that:

> [a] representation is 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. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.

Insurance Law § 3105(b) states that:

> [n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

Lloyd's claims that Coral misrepresented the number of days which its merchandise had been off-premises during the 12 months preceding the application, and that, had it known that Coral had made this misrepresentation, it would not have issued the jewelers block policy. Therefore, according to Lloyd's, the misrepresentation was material because "knowledge by the insurer

of the facts misrepresented would have led to a refusal by the insurer to make such contract." Insurance Law 3105(b); *see Mehta v New York Life Insurance Company*, 203 AD2d 8 (1st Dept 1994)(where the evidence demonstrates that insurer would not have issued the policy had it been aware of the true facts, the misrepresentation is material); *see also Designcraft Jewel Industries, Inc. v St. Paul Fire and Marine Insurance Company*, 59 AD2d 857 (1st Dept 1977), *affd* 46 NY2d 796 (1978)(summary judgment in favor of insurer affirmed based on the insured's material misrepresentation regarding the value of its jewelry because the company would not have issued the policy that it did had it known the inventory's true value, but rather would have charged a higher premium); *Wilberg Jewelry Corp. v The Palatine Ins. Co., Ltd.*, 205 F. Supp. 696 (SDNY 1962) (complaint by insured dismissed based on its material misrepresentation regarding the number of days the jewelry was off-premises and the average amount carried because the insurer would not have issued the policy that it did had it known those facts, but rather would have charged a higher premium); *M. Chalom & Son, Inc. v St. Paul Fire & Marine Ins. Co.*, 285 F2d 909 (2d Cir 1961)(summary judgment in favor of insurer affirmed based on the insured's material misrepresentation regarding the value of the jewelry inventory because the company would not have issued the policy that it did had it known the inventory's true value, but rather

would have charged a higher premium).

In support of its contention that Insurance Law § 3105(b) requires the dismissal of Coral's action, Lloyd's produces the affidavit of Lieve Maurus, an underwriter for the lead underwriter of the jewelers block policy issued to Coral. The underwriter states that Lloyd's would not have insured Coral for the risk of off-premises loss for a premium of $2,380 per year, which it charged as a result of the misrepresentation, but would, according to its underwriting practices, have charged Coral at least $20,106. Accordingly, Lloyd's seeks to amend its answer to plead the affirmative defense of misrepresentation, to reflect the fact that Coral's salesman was in possession of Coral's jewelry far in excess of the 30 days per year represented by Coral.

Coral objects to Lloyd's arguments concerning the affirmative defense of misrepresentation on several grounds. Coral argues that Lloyd's should not be permitted to amend its complaint at this late date, after the filing of the note of issue, and that Coral will be prejudiced by the granting of leave to amend; that the proposed amendment is lacking in merit; that summary judgment cannot be granted on an affirmative defense not pleaded; that Lloyd's has failed to provide sufficient evidence on its motion that it would not have issued the policy had it known of the misrepresentation; and that Lloyd's cannot be

allowed to remedy this defect in its reply papers.

Leave to amend should be freely given, absent surprise or prejudice to the side objecting to amendment. *Ancrum v St. Barnabas Hospital*, 301 AD2d 474 (1st Dept 2003). However, leave to amend will be denied if the pleading is "palpably insufficient as a matter of law." *Id.* at 475; *see also Pasalic v O'Sullivan*, 294 AD2d 103 (1st Dept 2002). On the other hand, "[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt." *Sample v Levada*, 8 AD3d 465, 467-468 (2d Dept 2004).

Coral claims that Lloyd's was first apprised that Catoya carried Coral's merchandise off-premises for more than 30 days a year on September 6, 2002, when Lloyd's took an initial deposition of Catoya, and thus, that Lloyd's waited an unconscionable time before making the present motion. Lloyd's, on the other hand, maintains that it only discovered the misrepresentation at a later deposition, taken on April 27, 2004.

An examination of the evidence reveals that Catoya, at his first deposition, was expressly asked to testify as to his sales routine as of the time of the loss, in November 2001, during which he claimed to have sold Coral's jewelry regularly from Monday through Friday. Although it became apparent at Catoya's deposition on April 27, 2004 that this had been Catoya's practice

for many years, as Lloyd's points out, Catoya, in his first deposition, did not address the relevant time period of January 2000 through January 2001, 12 months prior to Coral's application. There is, therefore, no concrete evidence that Lloyd's became aware at the time of his first deposition that Catoya carried Coral's jewelry off-premises for most of the year as a regular practice prior November 2001.

Regardless, even if Lloyd's knew this fact in September 2002, Coral has not explained how Lloyd's' delay in making the motion to amend prejudiced Coral in any way, except to complain that a delay had taken place. However, it is well settled that "mere lateness in not a barrier to amendment." *National Union Fire Insurance Co. of Pittsburgh, Pa. v Schwartz*, 209 AD2d 289, 290 (1st Dept 1994). In the present case, although a note of issue has been filed, the case has not been scheduled for trial, and this court does not see how Lloyd's' alleged delay harms Coral in any manner, except to require them to respond to the motion. Therefore, amendment will be considered. Further, it cannot be said that the amendment is "patently lacking in merit" when Coral makes no effort to deny that its statement regarding the number of days which its salesman carried jewelry off-premises was false.[2]

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[2]Coral also appears to have misrepresented the dollar amount of jewelry which its salesmen regularly carried on sales trips, but the parties have not discussed this point.

Coral argues that Lloyd's should not be permitted to amend its answer because the affidavit of its underwriter attesting to Lloyd's' underwriting practices is insufficient evidence, in and of itself, to establish that the policy would not have been issued had Lloyd's been aware of the misrepresentation. Indeed, the rule in New York is that "[c]onclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law." *Curanovic v New York Central Mutual Fire Insurance Company*, 307 AD2d 435, 437 (3d Dept 2003); *see also Carpinone v Mutual of Omaha Insurance Company*, 265 AD2d 752, 755 (3d Dept 1999).

Goaded by Coral's recitation of the above rule, Lloyd's provides documentation in the reply affidavit of its underwriter of its underwriting practices. Coral's response to this evidence is to recite the general rule that a court may not consider material raised for the first time in reply papers. *See e.g. Wal-Mart Stores, Inc. v United States Fidelity and Guarantee Company*, ___ AD3d ___, 2004 WL 2303787 (1st Dept 2004). However, in the present instance, Coral has been afforded ample opportunity to respond to Lloyd's' reply, and has failed to object to the reply's content, and so, the documentation, although presented initially in Lloyd's' reply papers, may fairly be considered. *See Crowther v City of New York*, 262 AD2d 519 (2d Dept 1999); *Orix Credit Alliance, Inc. v Grace Industries, Inc.*,

232 AD2d 537 (2d Dept 1996). Consequently, as Lloyd's has presented evidence to back its proposed amendment, it has established that no questions of fact exist as to the materiality of plaintiff's misrepresentation. Under all of these circumstances, amendment is appropriately granted.

Even if Lloyd's had not sought to amend its answer, the affirmative defense of misrepresentation could be considered on the motion, as it is settled that summary judgment can be granted on an unpleaded defense "where, as here, the opponent of the motion has not been surprised and fully opposed the motion." *Joan Hansen & Co., Inc. v Everlast World Boxing Headquarters Corp.*, 2 AD3d 266, 538 (1st Dept 2003); *Feliciano-Delgado v New York Trades Hotel Council and Hotel Association of New York City Health Center, Inc.*, 281 AD2d 312 (1st Dept 2001). Coral cannot claim to be surprised by its own undisputed misrepresentation.

> "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 , 441 [1968]; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (*Glick & Dolleck v Tri-Pac*, 22 NY2d at 441). On a summary judgment motion, the moving party must set forth evidence that there is no factual issue and that it is entitled to summary judgment (*Zuckerman v City of New York*, 49 NY2d at 560-562). If the moving party establishes a basis for a grant of summary judgment, the opposing party must present evidence that there is a triable issue (*id.*).

Forrest v Jewish Guild for the Blind, ___ NY2d ___, 2004 WL

2381195.

In the present case, defendants have set forth a sufficient prima facie case for summary judgment, by showing that the representations made by Coral on its application were false and material in that Lloyd's would not have issued the policy as it did had it known the amount of days that the jewelry was off-premises in the 12 months preceding the application, since the premium charged would have been substantially higher. As previously noted, the application indicated that Catoya took the inventory off-premises for 30 days, whereas Catoya indicated at his deposition that he worked out of New Jersey and New York and therefore took the inventory off-premises on a regular basis. As a result, the policy of insurance is void ab initio under Insurance Law § 3105(b). Coral has made no attempt to refute Lloyd's' claim that Coral's representation regarding the amount of time that Catoya was in possession of Coral's jewelry was false, and has failed to refute Lloyd's' showing that the misrepresentation was material. In fact, Rafael Bild, the principal of Coral, admits in his Affidavit of that Catoya lived in New Jersey and traveled with the inventory on a daily basis, only traveling out of the area in which was located approximately 30 days per year. Although Coral maintains that the issue of material misrepresentation is an issue for the jury, where defendant presents a prima facie case and there is no evidence to

the contrary, there is no question of fact to be submitted to the jury.[3] *See Essex Refining Corp. v Home Ins. Co.*, 41 NY2d 1036 (1977)(summary judgment properly granted on material misrepresentation where it was clear from the insurer's rating manual that had the true size of plaintiff's jewelry inventory been revealed, the premium charged would have been higher). In consequence, Lloyd's is entitled to summary judgment dismissing the complaint. As a result of this finding, it is unnecessary to discuss Lloyd's' alternate argument of breach of warranty under Insurance Law § 3106. Nor is it necessary to discuss the applicability, if any, of the exclusions in the jewelers block policy.

Coral's remaining arguments as to why summary judgment should be denied Lloyd's, and granted to Coral, are without merit, and need not be addressed. However, the court notes that Coral's argument that Lloyd's acted in bad faith in its

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[3]Acceptance of premiums after the insurer knows that there has been a breach of the policy is generally a waiver of the right to avoid the policy. *See Guardian Life Ins. Co v Weiser*, 51 NYS2d 771 (Sup Ct, New York County 1941), affd 268 AD 901 (NY App. Div. 1944). Bild maintains in his Affidavit that Lloyd's "has been well aware that my salesman Jose Catoya, who resided in New Jersey, traveled with the goods on a daily basis" and in "the prior losses and prior statements the same information that Jose Catoya traveled with the goods every day in his geographic location was given to this Defendant [who] never raised any objection." However, this allegation fails to raise an issue of waiver because nothing therein indicates the time period in which the knowledge was obtained, nor what statements or losses would lead Lloyd's to conclude that Catoya traveled with the jewelry on a daily basis.

investigation of the loss is particularly baseless.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to defendants as calculated by the Clerk of the Court; and it is further

ORDERED that plaintiff's cross motion is denied in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 15, 2004

ENTER:

J.S.C.

EMILY JANE GOODMAN