[* 1]

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

HON. JUDITH J. GISCHE

PRESENT: _____ Justice PART 10

Index Number : 101009/2003

MARKEL INSURANCE COMPANY

vs

GFM CONSTUCTION INC

Sequence Number : 1

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/30/05

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

s 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~~

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

AUG 23 2005

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

Dated: AUG 16 2005

_____ J.S.C.

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: PART 10

----------x

MARKEL INSURANCE COMPANY,

Plaintiff,

-against-

GFM CONSTRUCTION, INC.,

Defendant.

----------x

DECISION/ORDER
Index No.: 101009/03
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Plf's Notice of Motion, Affid. (RJS, Jr.), Exhs.	1
Plf's Memo. of Law	2
Def's Affirm. in Oppos., Exhs.	3
Plf's Reply Affirm., Reply Affid. (RJS, Jr.), Exhs.	4
Def's Reply Affirm. in Support, Affirm. of Svc.	5

Gische, J.:

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff has filed this action for breach of contract, seeking unpaid premiums on a policy of insurance it issued to defendant. Defendant has interposed its answer which includes certain affirmative defenses, including lack of personal jurisdiction. Plaintiff has now moved for summary judgment. CPLR § 3212. Defendant has crossed moved

to dismiss the complaint for lack of personal jurisdiction.[1] CPLR § 3211 (a)(8).

DISCUSSION

A. Cross-Motions to Dismiss for Lack of Jurisdiction

Before the court can consider the underlying merits of this action, it must first determine whether it has personal jurisdiction over the defendant. The facts regarding jurisdiction are not seriously disputed.

Defendant is a corporation that is organized and authorized to do business in the State of New Jersey. It does not regularly do business in New York. In connection with procuring this policy of insurance it contacted Turner Insurance ("Turner"), a broker with offices in New Jersey. As part of Turner's efforts to obtain insurance for defendant, it contacted Hartan Brokerage, Inc. ("Hartan"), an insurance agency with offices in New York. Representatives of Hartan came to New Jersey to call upon Turner and/or defendant.

Hartan, from its New York offices, sought to obtain insurance from plaintiff on defendant's behalf. Correspondence ensued between plaintiff and Hartan. The negotiations concluded when the insurance policy that is the subject of this action was actually issued. The policy lists Hartan as the "Producer".

Hartan was an agent of defendant's agent Turner. The issue is whether Hartan's actions in New York State made on behalf of defendant were sufficient to confer

---

[1]Although no Notice of Cross-Motion was served and filed, it appears that the required fee for the cross-motion was paid and that plaintiff was on notice of the relief requested, because the issues are substantively addressed in reply papers. The court will therefore consider the cross-motion on the merits.

personal jurisdiction over defendant.

As a New Jersey corporation that does not regularly do business in New York State, defendant is considered a non-domiciliary for jurisdictional purposes. As a non-domiciliary, defendant is only susceptible to suit in the New York Courts if the requirements of New York's Long Arm Jurisdiction Statute, found in CPLR § 302 (a), are met. Insofar as relevant here CPLR § 302 (a) provides as follows:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent: 1. Transacts any business within the state or contracts anywhere to supply goods or services in the state; ..."

In general, an insurance broker is considered the agent of the insured. Ribacoff v. Chubb Group of Ins. Companies, 2 AD3d 153 (1st dept. 2003). Here defendant claims that Turner was it's insurance agent and that Hartan was, at most, the agent of its agent. Defendant argues that Hartan's activities in New York State are, therefore, insufficient to confer jurisdiction over it.

The court holds activities of an agent of an agent, when undertaken on behalf of the common principal, will form the basis for long arm jurisdiction over that principal. The statute expressly provides that jurisdiction may be established by an agent's acts which constitute transacting business within the state. To the extent that Hartan's actions were expressly undertaken on defendant's behalf, they are attributable to defendant, notwithstanding that Hartan may have been actually retained by another agent of defendant.

In this regard the court notes that no showing of a formal agency relationship is required in order to confer long arm jurisdiction. It is sufficient that the agent acted with

the knowledge and consent of the principal and that such principal exercised some control over the agent in the matter. Kreutter v. McFadden Oil Corp., 71 NY2d 460 (1988); see also: McKinney's Practice Commentary, CPLR § 302; Alexander, V; C320:4 p.126. These requirements were met. Clearly defendant authorized Turner to do what was necessary to procure insurance, even to use the services of a further agent. Defendant knew about Hartan and was clearly in control of the matter, since it agreed to and made the initial payment for the insurance procured by Hartan. The court holds that Hartan was defendant's agent.

While the fact that Hartan maintained an office in New York State does not, in itself, confer jurisdiction over defendant, the fact that Hartan transacted business in New York which bears a direct nexus to defendant procuring the insurance policy that underlies this action does so confer jurisdiction. McGowan v. Smith, 52 NY2d 268 (1981). Hartan engaged in purposeful activity on defendant's behalf in New York State by directly negotiating the insurance coverage and by sending and receiving information through the mail from plaintiff. This activity was directly related to defendant obtaining the policy of insurance which is the subject of this action. Ehrlich-Bober & Co. v. University of Houston, 49 NY2d 574 (1980).

The court holds that New York has long arm jurisdiction over defendant to adjudicate the merits of their dispute regarding insurance premiums. The cross-motion to dismiss the action for lack of personal jurisdiction is therefore, denied.

B. Motion for Summary Judgment

Plaintiff asserts that it is entitled to summary judgment on its claim that defendant has failed to pay premiums in the amount of $28,583.00 under of policy of insurance that it issued. Defendant opposes the motion claiming, primarily, that it was his understanding that the premiums would be charged at a composite and not single rate. His calculations would result in a much lower premium, which he claims he has already paid. Defendant also claims that if under the contract he is required to pay a single rate, he was fraudulently induced into signing such contract by promises that the rate would in fact be a lower composite rate.

On a motion for summary judgment the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, does it then shift to the party opposing summary judgment to establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, the motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). If the proponent meets its burden then the opposition must lay bare its proof to raise real issues of fact and not just shadowy semblances.

The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 NY2d 395 (1957). In

analyzing these issues the court must be respectful that granting the motion is the functional equivalent of a trial, which makes it a drastic remedy that should only be granted where there no doubt about the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

It is undisputed that on or about February 9, 2001 plaintiff issued policy #01GLP1005303 to defendant for the policy period beginning February 5, 2001 and ending February 5, 2002. The policy provides that the premium will be at a rate of $16.67 per $1,000 of defendant's gross receipts. Defendant paid $25,000 which is designated in the policy as a "Minimum Annual Premium" and also a "Total Advance Premium". The policy also indicates that the premium basis is "$1,500,000". Plaintiff claims that the advance premium was calculated on defendant's anticipated gross revenues of $1,500,000 for the applicable policy period. The policy also gave plaintiff the right to audit defendant's books and records as they relate to the policy.

Plaintiff did conduct such an audit and found that defendant's gross receipts for the policy period were $3,214,329, more than double of what was anticipated when the policy was written. Plaintiff claims that by applying the agreed upon rate of $16.67 per $1,000 of gross revenues, and giving defendant credit for the $25,000 paid, there is an additional $28,583.00 owed to it.

Defendant does not deny most of the facts claimed by plaintiff. It acknowledges that the policy was issued. It acknowledges that it paid $25,000 as an advance premium. It acknowledges that gross receipts during the period of policy coverage were $3,214,329.

It disputes the rate of $16.67. It claims that Mr. Meshia, president of the company, believed that the rate was subject to audit and that it would be a "composite" rate based upon the nature of the work actually done within the policy period. It claims that work actually done to generate those additional revenues was not as risky as the work for which the insurance company charged the highest rate. Defendant relies upon post policy correspondence between Mr. Meshia and plaintiff to prove its claims.

Plaintiff argues that the policy is clear on its face and that there is no indication that the rate would be revisited. Moreover, it claims that because the rate was clearly stated in the policy declarations and it was in accordance with the quote given by the insurance company before the policy was issued, defendant cannot seriously claim that he was fraudulently induced into entering into the policy.

The court finds that plaintiff has proven its *prima facie* entitlement to the premiums sought and that defendant has failed to come forth with proof in admissible form that raises any issue of material fact.

The contract on its face sets forth a rate of $16.67. There is no indication that the rate is subject to further audit in either the policy itself or any of the documents that existed before the policy was actually issued. The documents proffered by defendant in support of his claim only came after the policy was issued and defendant was already contesting that he owed premiums. Moreover, even they do not prove that plaintiff ever intended to revisit the rate set out in the policy.

Nor has defendant proven a defense of fraudulent inducement. In order to prove fraudulent inducement, defendant is required to show that plaintiff made a misrepresentation or material omission of fact, which was known to be false, made for

the purpose of inducing the other party to justifiably rely upon it and resulting in injury. Lama Holding Company v. Smith Barney ,88 NY2d 413 (1996). At bar, there is no reliable proof that prior to the policy issuing, plaintiff represented to defendant and/or his agents, that the rate would be something different than what was actually reflected in the policy. In any event when the rate came though on the policy different than what defendant expected, he could have rejected the policy at that time. Instead he went forward and enjoyed the full benefit of the policy coverage during its term and only now that he has enjoyed the full benefits of coverage is he refusing to pay the additional premium amounts due. Under the circumstances defendant cannot show that he was justified in relying upon the alleged misrepresentation, especially when the actual policy has different terms than he claims he expected.

The court, therefore, grants plaintiff summary judgment.

CONCLUSION

In accordance with this decision it is hereby:

ORDERED that plaintiff's motion for summary judgment is hereby GRANTED. The Clerk of the court is directed to enter a money judgment in favor of plaintiff, Markel Insurance Company and against defendant, GFM Construction, Inc., in the sum of $28,583.00, plus prejudgment interest from February 5, 2002 and statutory costs and disbursements of this action; and it is hereby

ORDERED that defendant's cross-motion to dismiss, based upon lack of personal jurisdiction, is DENIED.

This decision constitutes the order of the court.

Dated: New York, New York
August 16, 2005

So Ordered

HON. JUDITH J. GISCHE, J.S.C.