

**Atlantic Mutual Insurance Company v Campaniello
Enterprises, Inc.**

2005 NY Slip Op 30220(U)

December 22, 2005

Supreme Court, New York County

Docket Number:

Judge: Jane S. Solomon

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

PRESENT: Hon. Solomon
Justice

PART 55

ATLANTIC MUTUAL INS. CO.

INDEX NO. 602705/03

- v -

CAMPANIELLO ENTERPRISES, INC.

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Summary Judgment

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| <u>1-3</u> |
| <u>4-7</u> |
| <u>8-11</u> |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum, decision and order.

NB 1-23-06 @ noon P.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 1/2/06

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
JAN 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 55

-----X
 ATLANTIC MUTUAL INSURANCE COMPANY,

DECISION AND ORDER

Plaintiff,

-against-

Index No. 602705/03

CAMPANIELLO ENTERPRISES, INC.,
 CAMPANIELLO IMPORTS OF FLORIDA, INC.,
 THOMAS CAMPANIELLO and SANDRA CAMPANIELLO,

Defendants.

-----X

JANE S. SOLOMON, J.:

Plaintiff Atlantic Mutual Insurance Company (Atlantic) moves for summary judgment to collect earned premiums¹ for two insurance policies; defendants, Campaniello Enterprises, Inc., Campaniello Imports of Florida, Inc. (the Campaniello Entities), Thomas Campaniello and Sandra Campaniello (the Individual Defendants) (the Campaniello Entities and the Individual Defendants are sometimes collectively called "the Defendants"), originally cross-moved for summary judgment dismissing the complaint.

According to the complaint, on May 4, 2001, Atlantic issued a workers compensation insurance policy for the year ending May 4, 2002, naming the Campaniello Entities as the insureds (this Policy # 400 52 49 08 is "Policy 1"), upon instruction from third-party defendant FOA & Son, Inc. (FOA),

¹An earned premium represents coverage already provided, and is calculated retrospectively.

Defendants' insurance broker. On the same day, Atlantic issued a "wholesalers policy," for the same one year period, naming the Campaniello Entities and the Individual Defendants as the insureds (this Policy # 769 00 89 11 is "Policy 2"), also allegedly upon instruction from FOA.

By an interim order dated May 9, 2005, the court adjourned argument on the summary judgment motion to July 25, 2005 to permit the deposition of FOA, which was not a party to this action, and for further submissions following the deposition. Defendants commenced a third-party action against FOA, and submit an affidavit of service showing that the third-party summons and complaint was served together with the other pleadings herein on July 29, 2005.

Defendants also moved (motion sequence 002) to stay determination of Atlantic's motion pending the appearance and answer of FOA, and its being made a party to the first motion. As granting a stay would obviate the motion for summary judgment, the second motion will be addressed first.

The Motion to Stay Proceedings

Defendants seek a stay upon the allegation that they realized only recently that FOA may have exceeded its actual authority in procuring from Atlantic the policies at issue on their behalf. However, they fail to show how the outcome of the summary judgment motion is related to the actual authority

granted to FOA, or why it would be just to grant such a stay (see CPLR 2201). Atlantic's recovery, as will be demonstrated below, is not based upon whether FOA had actual authority, but whether FOA had apparent authority, and whether Atlantic's reliance on such apparent authority was reasonable.

Atlantic submits substantial and probative evidence that Defendants knew that FOA ordered the insurance policies, and may not be able to recover from FOA. See Soffer Affirmation in Opposition, Exhibits 1 and 2. While this evidence tends to show that the third-party complaint may be without merit,² it does not wholly refute the proposition that FOA may be liable to Defendants for exceeding its actual authority. See CPLR 1007.

The determination of Atlantic's motion for summary judgment will not prejudice Defendants' claim that FOA exceeded its actual authority, or their ability to recover if they can prove that FOA exceeded its authority. Accordingly, the motion to stay determination of Atlantic's motion for summary judgment is denied.

The Summary Judgment Motion and Cross-Motion

A. First Cause of Action: Workers Compensation Policy

²Indeed, the court notes that the proffered evidence apparently supports Atlantic's motion, in that it tends to show that Thomas Campaniello knew the policies had been issued. Nonetheless, the evidence may not properly be considered upon Atlantic's motion for summary judgment, as neither Defendants, nor FOA, have had any opportunity to respond to the evidence in that context.

(Policy 1)

The first cause of action seeks to collect \$1,093 as an additional premium on Policy 1, earned over the original estimated premium of \$2,636, already paid. Plaintiff originally relied upon the affirmation of Nancy E. Hahon, who stated that the amount was based upon a payroll audit. Plaintiff has since admitted that no such audit ever took place, and that the very document upon which the claim was made states that an audit was unobtainable. See Hahon Affidavit, ¶7, and Exhibit 3.

Plaintiff argues, however, that because Campaniello Enterprises refused to produce the payroll books and records required for a Workers Compensation premium audit, Atlantic is justified in estimating the exposure and billing premiums at 150% of the original estimate. In support, Atlantic relies upon Commissioners of the State Insurance Fund v Global Distributors, Inc. (NYLJ, February 24, 1992, at 35, col 5). This reliance is misplaced.

In Commissioners, the defendants refused to allow access their books during the course of discussion; this case is not at that point. Rather, Defendants here told plaintiff that they refused to allow the inspection "because [the Campaniello Entities do] not have a policy with Atlantic Mutual." Moreover, they state that they are unaware of any request by Atlantic to do an audit of Campaniello Imports of Florida, Inc.'s books and

records. Next, as opposed to the circumstances before me, in Commissioners, where the defendants claimed not to have the proper documents at all, the court would not allow the defendants to profit from their failure to maintain records. Defendants here have made no such claim.

Finally, in Commissioners, the court found that "[u]nder the circumstances, the defendant cannot be permitted to profit from plaintiff's dilemma, brought about as a result of defendant's breach of the insurance policy, and so should not be allowed to challenge plaintiff's estimates." Here, there is no established breach of Policy 1.

Atlantic's suggestion that the Campaniello Entities are required to produce their books in order to avoid summary judgment also is misguided. It is Atlantic that must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 (1985). Only then does the burden shift to the defendants to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Atlantic has submitted Policy 1, and Campaniello Imports of Florida, Inc. has not denied having been insured under

it. Policy 1 states that "[t]he premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis . . ." See Hahon Affidavit, Policy 1, Exhibit 2, at 21.

Atlantic is entitled to summary judgment on liability only. The actual amount due should be determined at trial. *Id.*

B. Second Cause of Action: Wholesalers' Policy (Policy 2)

The second cause of action is for an earned premium of \$36,467.23 on Policy 2, for which Atlantic and Defendants agree no payment ever was made. Defendants contend they never ordered this policy, but only asked FOA for an estimate of the premiums on such a policy. According to Thomas Campaniello, when the premium turned out to be too expensive, he told FOA that he did not want the Policy.³

Atlantic maintains, and FOA confirms, that Policy 2 was ordered by FOA as Defendants' broker. It argues that, except for the payment of premiums, the broker is deemed to be the agent of the insured, and as long as FOA had apparent authority, Defendants are bound by its having ordered Policy 2.

Atlantic relies upon Aetna Life Ins. Co. v Harris &

³FOA has acknowledged, through its account representative, Richard J. Impastato, that Thomas Campaniello probably told FOA that he was dissatisfied with the proposed premium. See Soffer Supplemental Affirmation, Exhibit 1, Deposition of Richard J. Impastato, at 11-12.

Reichard Fur Dyers (151 Misc 443, 444 [City Ct, NY County 1934]), which states that "[t]he general rule is that a broker employed to secure insurance is the agent of the insured and not of the insurer. He is deemed the agent of the company only for the purpose of delivering the policies and collecting the premiums due thereon." See also 68 NY Jur 2d, Insurance §380.

Atlantic then argues (relying on Globe & Rutgers Fire Ins. Co. v Warner Sugar Ref. Co., 187 App Div 492, 494-495 [1st Dept 1919]) that FOA was cloaked with apparent authority, and that Thomas Campaniello's alleged instructions not to procure Policy 2 might allow Defendants to recover from FOA, but not to deny judgment to Atlantic. That case is inapposite because several transactions by the broker for the insured with the same insurer had occurred. Here, FOA's account representative states that the transaction was in the first year FOA had placed coverage through Atlantic. Soffer Supplemental Affirmation, Exhibit 1, Deposition of Richard J. Impastato, at 78-79. This gives rise to a question of fact as to the apparent authority of FOA to procure Policy 2.

Moreover, in Globe & Rutgers Fire Ins. Co., the court acknowledged that questions as to whether an agent was under instructions, or whether reliance upon the agent's apparent authority was justified are for the jury. Id. at 496; see also Hallock v State, 64 NY2d 224, 231 (1984) (third party dealing

with agent may rely on apparent authority only to the extent that such reliance is reasonable).

Here, there are questions both as to whether FOA ever received instructions to order Policy 2 (Thomas Campaniello has sworn that no such instructions were given, and FOA does not have any record or specific recollections of any such instruction), and as to whether Atlantic's reliance upon the apparent authority of FOA was reasonable. As such, summary judgment on the second cause of action, for recovery under Policy 2, is denied.

Defendants' cross motion for summary judgment dismissing the complaint in its entirety also is denied. As to the first policy, liability is established; as to the second, factual questions exist. Their reliance on alleged deficiencies in the complaint and the proofs accompanying Atlantic's motion for summary judgment is, as a matter of law, an insufficient basis upon which to grant summary judgment in their favor. Cincotta v City of New York, 292 AD2d 558, 559 (2nd Dept 2002) (motion based solely on claimed deficiencies in the plaintiff's proof should be denied without regard to the sufficiency of the opposing papers).

Rather, upon their cross motion, Defendants are required to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate

the absence of any material issues of fact. Winegrad, 64 NY2d at 853 (1985); Zuckerman, 49 NY2d at 562. Defendants' fail in this regard.

Accordingly, it hereby is

ORDERED that the motion of plaintiff, Atlantic Mutual Insurance Company, for summary judgment to collect earned premiums for two insurance policies from defendants, Campaniello Enterprises, Inc., Campaniello Imports of Florida, Inc., Thomas Campaniello, and Sandra Campaniello (motion sequence number 001), is partially granted to the extent that plaintiff is granted summary judgment as to liability only with respect to Workers Compensation Policy # 400 52 49 08, and it is otherwise denied; and it further is

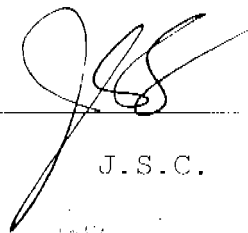
ORDERED that the cross motion of defendants, Campaniello Enterprises, Inc., Campaniello Imports of Florida, Inc., Thomas Campaniello, and Sandra Campaniello, for summary judgment dismissing the complaint (motion number sequence 001) is denied; and it further is

ORDERED that the motion of defendants, Campaniello Enterprises, Inc., Campaniello Imports of Florida, Inc., Thomas Campaniello, and Sandra Campaniello, to stay the motion for summary judgment (motion number sequence 002) is denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY 10007, on January 23, 2006 at noon; Defendants shall notify counsel for the third-party defendant.

Dated: December *22nd*, 2005

ENTER:



J.S.C.
[Faint handwritten text]

FILED
JAN 03 2006
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NEW YORK