

**Kiss Construction NY, Inc. v Rutgers Casualty
Insurance Co.**

2006 NY Slip Op 30257(U)

October 24, 2006

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: HERMAN CAHN
Justice

PART 49

Kiss Construction
Plaintiff
- v -
Rutgers Casualty
Defendant.

INDEX NO. 602373/05
MOTION DATE 4/24/06
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

FILED

Cross-Motion: Yes No

OCT 30 2006

NEW YORK
COUNTY CLERK'S OFFICE

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

October 24, 2006

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

-----X

KISS CONSTRUCTION NY, INC.,
Plaintiff,

-against-

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

FILED

Index No.
602373/2005

OCT 30 2006

NEW YORK
COUNTY CLERK'S OFFICE

CAHN, J.:

Plaintiff Kiss Construction NY, Inc. (Kiss Construction) commenced this action for a declaratory judgment that defendant Rutgers Casualty Insurance Company (Rutgers) is obligated to defend and indemnify Kiss Construction in a personal injury action pending in Bronx County Supreme Court (Jose Turbides v Jasvir Singh and Kiss Construction NY, Inc. [Index No. 6219/05]). Kiss Construction seeks damages against all defendants for the failure of Rutgers, defendant BHS Insurance Agency Inc. (BHS), and defendant Buckingham Badler Associates, Inc. (BBA), to secure it with appropriate insurance coverage.

BBA now moves to dismiss the claims and cross claims asserted against it, CPLR 3211 and/or 3212.

Rutgers and BHS each cross-move to dismiss, CPLR 3211 and/or 3212.

BACKGROUND

Kiss Construction, according to its Verified Complaint, "is engaged, inter alia, as a contractor" (see Plaintiff's Verified Complaint, ¶ 1). On May 17, 2002, Kiss Construction applied for

a commercial general liability insurance policy through defendant BHS, a retail insurance broker. Kiss Construction's application for coverage stated that the nature of its business was "Painting-100% - 100% Interior" (see Di Berardino Affirm., Exh. A). The application was signed by a representative of Kiss Construction, as applicant, and a representative of BHS, as producer (id.).

BHS submitted the completed application to BBA, a wholesale insurance broker, which then procured a commercial general liability policy for Kiss Construction from Rutgers (see id., Exh. B). The declarations page of the Rutgers' policy listed Kiss Construction's business as "painting contractor" (id.). The policy, as subsequently renewed, provided coverage for the period between May 30, 2004 and May 30, 2005 (id.).

In early 2005, Jose Turbides commenced the above-mentioned personal injury action against Kiss Construction and the owner of the premises located at 1187 Ogden Avenue in Bronx, New York. The Turbides complaint alleged that on November 11, 2004, Turbides sustained serious injuries when he slipped and/or tripped and fell on the sidewalk/roadway outside the premises (see Dalli Affirm., Exh. B). The complaint further alleged that, prior to the occurrence, defendant Kiss Construction had performed work on the sidewalk/roadway at the premises, which work had included cutting and/or excavation and paving of the

sidewalk and/or roadway. Turbides alleged that his injuries were caused by the negligence of Kiss Construction and the property owner with regard to that work.

Kiss Construction was served with the summons and complaint in Turbides on February 10, 2005, and immediately notified Rutgers, demanding defense and indemnification. On March 2, 2005, Rutgers sent a reservation of rights letter to afford it more time to investigate (see Di Berardino Affirm., Exh. C). The letter first noted that the accident giving rise to the suit had occurred on November 11, 2004, but that Rutgers was not notified until after service of the Turbides complaint. The letter further noted that grounds

also exist to disclaim coverage and void the policy due to misrepresentations you may have made on your application for insurance. In your application . . . you stated that 100% of your business involved interior painting. In [the Turbides] 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, in such event, Rutgers reserved the right to disclaim coverage based on a violation of Section IV (6) of the policy.¹

¹ Section IV (6) of the policy, titled "Representations," provides that,

[b]y accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;

Following its investigation, Rutgers disclaimed coverage by letter dated March 17, 2005 (id., Exh. E). Rutgers indicated that its investigation had revealed that, on the day of the accident, Kiss Construction was engaged in the construction of a three-family home at 1187 Ogden Ave, while, in its application for insurance, Kiss Construction had asserted that 100% of its business involved interior painting only. 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).

Kiss Construction contends that it did not make a material misrepresentation in its application for insurance, and that, to the extent that there was any misinformation in the application, it was the fault of BHS or BBA. Additionally, Kiss Construction alleges that, prior to Rutgers' disclaimer of coverage, none of the defendants had adequately investigated either the facts and circumstances surrounding the occurrence, or the particulars of

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

(id., Exh. B).

Kiss Construction's work, and thus that Rutgers improperly disclaimed coverage.

In addition to seeking a declaratory judgment that it is entitled to defense and indemnification from Rutgers in Turbides, Kiss Construction seeks damages from all the defendants on causes of action alleging breach of contract, violation of General Business Law § 349, and negligence, and against BHS and BBA on a cause of action alleging breach of fiduciary duty, based on their failure to select and/or provide Kiss Construction with the appropriate insurance coverage.

Each of the defendants now seeks to dismiss the claims asserted against it.

DISCUSSION

On a motion to dismiss for failure to state a cause of action (CPLR 3211 [a] [7]), the court must accept the facts alleged as true and accord plaintiff the benefit of every favorable inference (see Leon v Martinez, 84 NY2d 83 [1994]). However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (Skillgames, LLC v Brody, 1 AD3d 247 [1st Dept 2003]; Kliebert v McKoan, 228 AD2d 232 [1st Dept], lv denied 89 NY2d 802 (1996); Franklin v Winard, 199 AD2d 220 [1st Dept 1993]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted

only where the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law (Leon v Martinez, 84 NY2d 83, supra).

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, tendering sufficient evidence to eliminate any material issues of fact from the case" (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 (see Zuckerman v City of New York, 49 NY2d 557 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (id. at 562). However, because issue finding rather than issue determination is key, summary judgment will not be granted where there is any doubt as to the existence of a triable issue, or where such an issue is arguable (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]).

BBA's Motion to Dismiss or for Summary Judgment

BBA contends that the claims asserted against it must be dismissed, as its sole obligation was, as a wholesale broker, to procure the requested coverage for Kiss Construction. BBA contends that it fulfilled its obligation in this regard and, thus, dismissal of Kiss Construction's claims against it,

alleging breach of contract, misrepresentation, negligence and breach of fiduciary duty, is warranted.

In support of its motion, BBA has submitted an affidavit from Jane Sansevero-Dalli, its Vice-President. In her affidavit, Dalli states that, as a wholesale broker, BBA generally did not interact with an underlying insured, but usually was contacted by an introducing, or producing, broker, such as BHS. Dalli avers that in this case, BHS had furnished BBA with the completed application, and that neither BBA, nor any of its brokers, had any part in filling out or completing that application. Dalli further avers that BBA had no direct contact with Kiss Construction and that BBA merely forwarded the application, signed by both Kiss Construction and BHS, to Rutgers, in order to procure the coverage requested.

Kiss Construction argues that BBA's motion should be denied because BBA admittedly played some role in processing the application and, absent discovery, it is yet to be determined whether BBA may have received other information from BHS regarding the nature of Kiss Construction's business, and thus whether BBA breached its contract or was negligent in failing to procure appropriate coverage. Kiss Construction additionally argues that, to the extent that there was misinformation in its application, BBA could have sought an audit to re-verify Kiss Construction's activities and receive accurate information,

thereby avoiding the alleged fraud.

BBA's motion to dismiss is granted. As a general rule, an insurance agent or broker owes its customers 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" (Murphy v Kuhn, 90 NY2d 266, 270 [1997]). Generally, an insurance broker's procurement duty is defined by "the nature of the customer's request for coverage" (see M & E Mfg. Co. v Frank H. Reis Inc., 258 AD2d 9, 11 [3rd Dept 1999]). A broker may be held liable for failing to procure requested coverage under theories of breach of contract or negligence. Generally, to prevail on such claims, an insured must establish that the broker failed to discharge the duty to obtain insurance, either by showing that the broker breached its agreement or failed to exercise due care in the transaction (see Mickey's Rides-N-More v Anthony Viscuso Brokerage, 17 AD3d 328 [2nd Dept 2005]; Reilly v Progressive Ins. Co., 288 AD2d 365 [2nd Dept 2001]). Whether a broker was negligent in procuring a particular policy will depend on the information available to it when the client applied for coverage (see Mullare v Edelman, 133 AD2d 1003 [3rd Dept 1987]).

Here, it is not contended that the coverage that BBA procured was inappropriate given the information provided to it, and the request for coverage, that were contained in the application. The evidence offered by BBA establishes that it

played no part in preparing the application for coverage containing the alleged misrepresentation. Kiss Construction's speculation, that BBA "might" have received some information from BHS about the true nature of Kiss Construction's business, is insufficient to create a triable issue of fact in that regard.

Kiss Construction had ample opportunity to engage in discovery from BBA about what other information, if any, it received.

Absent the existence of a special relationship between the parties, a broker will generally not be held liable to the insured for acts beyond obtaining the requested coverage (Murphy, 90 NY2d at 270). Kiss Construction has produced no evidence to suggest the existence of a special relationship between itself and BBA, sufficient to give rise to a duty beyond that of obtaining the requested coverage. Indeed, the evidence establishes that BBA had no direct contact with Kiss Construction.

Therefore, dismissal of the complaint, as well as any cross claims asserted against BBA, is warranted.

Rutgers' Cross Motion to Dismiss

Rutgers argues that the claims against it should be dismissed, as the evidence confirms that Kiss Construction made a material misrepresentation in its application for insurance, thus rendering the policy void. In any event, Rutgers argues that

[* 11]

dismissal of the action is warranted as Turbides is a necessary party, and plaintiff has failed to join him.

To support its contention that Kiss Construction made a misrepresentation of fact regarding the nature of its business, Rutgers proffers a copy of the application containing the alleged misrepresentation (Di Berardino Affirm, Exh. A), and an affidavit from Michael Seckendorf, a claims investigator for Rutgers (id., Exh. D). In the affidavit, Seckendorf states that, during his investigation of the occurrence, he spoke with Amritpal Singh Sandhu, the president of Kiss Construction. During that encounter, Sandhu provided Seckendorf with a signed statement acknowledging that Kiss Construction was engaged in the complete construction and renovation of buildings, and had been hired by the owner of 1187 Ogden Avenue to erect a three-family residential structure. A copy of Sandhu's statement is attached to, and incorporated within, Seckendorf's affidavit (id.).

To support its contention that the misrepresentation was material in this regard, Rutgers has proffered the affidavit of Vivalde Couto, Vice-President of Commercial Underwriting for Rutgers, and the individual who reviewed the application and authorized and underwrote the commercial general liability policy at issue (id., Exh. F). In his affidavit, Couto states that Kiss Construction never apprised Rutgers that it was involved in general contracting work, or in the general construction of

multi-dwelling structures. Further, Kiss Construction never updated or modified its initial application. Couto further states that had he, or Rutgers, known that Kiss Construction's work involved general contracting and/or the construction of multi-dwelling structures, Rutgers would not have underwritten and issued the policy to Kiss Construction, since Rutgers' underwriting guidelines specifically prohibit the issuance of such policies. In support of this assertion, Couto has attached a copy of a two-page excerpt from a document titled "Skillpac: Artisan Contractors' Package Program," which he asserts contains the pertinent underwriting guidelines (id.). Couto additionally avers that Rutgers "has never underwritten or issued such a policy in the past." (id., ¶ 8).

Kiss Construction argues that Rutgers' motion to dismiss should be denied because it failed to establish that Kiss Construction misrepresented anything at the time the application was submitted, and the documentation submitted by Rutgers fails to establish that the misrepresentation, if any, was material. In any event, Kiss Construction argues that Rutgers' motion should be denied, as Rutgers has failed to address any of its other allegations or causes of action in the motion to dismiss.

Rutgers' motion to dismiss is denied. To establish its right to rescind a policy, an insurer must demonstrate that the insured "made a false statement of fact as an inducement to

making the contract and the misrepresentation was material'” (Federal Ins. Co. v Kozlowski, 18 AD3d 33, 39 [1st Dept 2005], quoting Curanovic v New York Cent. Mut. Fire Ins. Co., 307 AD2d 435, 436 [3rd Dept 2003]). 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 [2nd Dept 2001]). Generally, whether a misrepresentation is material 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]).

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.” Although Kiss Construction was apparently engaged in construction on the date of the occurrence, the evidence proffered by Rutgers does not establish that the representation contained in the application, i.e., that Kiss Construction was engaged solely in painting, was necessarily false at the time the application was made, or renewed.

In any event, Rutgers, as the movant, has the 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]). To meet this burden, an 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 [2nd Dept 2005]; see also Curanovic, 307 AD2d at 437). Thus, to prevail on this motion, Rutgers was required to adduce proof of its underwriting practices with respect to similar applicants (see Tuminelli v First Unum Life Ins. Co., 232 AD2d 547 [2nd Dept 1996]; see also Curanovic, 307 AD2d at 437-438), "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]). Conclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law (see Parmar, 21 AD3d at 540-541; Curanovic, 307 AD2d at 437; Tuminelli, 232 AD2d at 547).

Rutgers' proffer of a two-page excerpt, ostensibly representing the relevant "underwriting guidelines," even when coupled with Couto's averment that coverage would not have been offered had the true nature of Kiss Construction's business been revealed, is insufficient to establish the materiality of the

alleged misrepresentation as a matter of law. Rutgers has proffered no documentation to establish that it has denied coverage under similar circumstances; thus, Couto's averment to that effect is merely conclusory (see Lenhard, 31 AD3d 831, supra; Parmar, 21 AD3d 538, supra; Curanovic, 307 AD2d 435, supra).

Rutgers' motion to dismiss for failure to name a necessary party is denied. Rutgers has not established that Turbides is a necessary party in this action (see e.g. Lieberman v New Amsterdam Casualty Co., 284 App. Div. 1051 [2nd Dept 1954]). In any event, to the extent that Turbides should be considered an indispensable party, Rutgers has not shown that the court could not obtain jurisdiction over Turbides, and that he could not be made a party to this action (see CPLR 1001).

BHS's Cross Motion to Dismiss or for Summary Judgment

BHS argues that the court should dismiss Kiss Construction's breach of contract and negligence claims against it, because the evidence establishes that BHS did what it had contracted to do, i.e., procure the requested commercial general liability insurance policy for Kiss Construction. In support of its motion, BHS has submitted an affidavit from Sharif Sheikh, its president and sole owner, who states that at no time did Kiss Construction, or any of its representatives, advise BHS that Kiss Construction was engaged in construction. Sheikh further avers

that had that fact been made known to BHS, it would never have submitted the application.

BHS additionally argues that Kiss Construction's claims for negligent misrepresentation and breach of fiduciary duty should be dismissed, as Kiss Construction has produced no evidence to establish a "special relationship" between Kiss Construction and BHS, sufficient to sustain these claims. Finally, BHS argues that Kiss Construction cannot claim reliance on any representations of BHS with regard to the coverage afforded under the Rutgers policy, as once it received a copy of the policy, it is presumed to have read, understood, and ratified the contents thereof.

Kiss Construction opposes the motion to dismiss, arguing that BHS was aware of the nature of Kiss Construction's business when it procured the policy and failed to exercise due care in procuring appropriate coverage. Kiss Construction additionally contends that there was a "special relationship" between it and Sharif Sheikh, BHS's principal, that gave rise to additional duties on the part of BHS with regard to the insurance procurement at issue.

In support of its contentions, Kiss Construction has submitted an affidavit from Gurbhej Sandhu, its manager. In his affidavit, Sandhu avers that the relationship between Kiss Construction and Sheikh was much more than a typical customer-

broker relationship. Specifically, Sandhu asserts that between 2002 and 2004, Sheikh had operated not only as Kiss Construction's broker, but had been paid to act as Kiss Construction's accountant, tax preparer, and financial/business advisor, and to provide related professional services. Sandhu avers that, during this period, Sheikh was responsible for scheduling Kiss Construction's assets and liabilities, preparing and filing its tax returns, maintaining its accounting records, and managing its payroll, as well as maintaining its policies of insurance. Sandhu states that, because of Sheikh's familiarity with the nature of Kiss Construction's business, and the scope of its commercial activities, Kiss Construction relied on Sheikh's representations, experience and expertise in each of these areas, and trusted him to obtain the appropriate insurance coverage. Sandhu further avers that when he signed the insurance application at issue, it was blank, as Sheikh had advised that he would fill out the required information. Sandhu avers that at no time did Kiss Construction receive a copy of the policy after it was issued by Rutgers, as Sheikh had advised that he would hold onto the policies in case a question as to coverage arose.

BHS's motion to dismiss or for summary judgment is denied. The parties have presented conflicting accounts as to whether BHS was aware of the nature of Kiss Construction's business when it submitted the application for insurance coverage, and thus

whether BHS exercised due diligence in obtaining the appropriate coverage. Any determination on this issue would require the court to make credibility determinations and findings of fact, which are not appropriate on a motion for summary judgment (Baseball Off. of the 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]).

Additionally, while the Court of Appeals has held that the common-law duty of insurance brokers is limited to timely procuring the requested coverage, the Court also acknowledged that heightened duties may arise in the context of a "special relationship" (Murphy v Kuhn, 90 NY2d 266, supra; Busker on The Roof Ltd. Partnership Co. v Warrington, 283 AD2d 376 [1st Dept 2001]). In Murphy, the Court noted that, in other jurisdictions, such additional duties have been recognized

in exceptional situations where, for example, (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on

(id. at 272 [internal citations omitted]).

Here, Kiss Construction has proffered an affidavit suggesting that Sheikh, BHS's principal, rendered and received compensation for a variety of advisory, financial and

professional services, including insurance advice over a two-year period. This evidence also suggests that Kiss Construction had, if not delegated to Sheikh its insurance decision-making responsibility, at least relied on Sheikh to obtain the appropriate coverage (see Hoffend & Sons, Inc. v Rose & Kiernan, Inc., 7 NY3d 152 [2006]). The affidavit is sufficient to create an issue of fact as to the existence of a heightened duty, based on the existence of a special relationship.

Although an insured, having received a policy, is presumed to have assented to its recited terms (Busker, 283 AD2d 376, supra), Kiss Construction has denied ever receiving a copy of the policy. Again, the conflicting accounts of the principals of BHS and Kiss Construction present issues involving credibility, which cannot be resolved on a motion for summary judgment.

Accordingly, it is

ORDERED that the motion by defendant Buckingham Badler Associates, Inc. to dismiss all claims and cross claims asserted against it is granted, and the complaint is severed and dismissed as against that defendant, with costs and disbursements against plaintiff to that defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

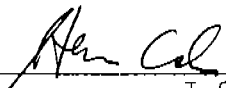
ORDERED that the Clerk is directed to enter judgment in favor of said defendant against plaintiff, and against any other defendant which served a cross-claim against said defendant, dismissing the cross-claim accordingly; and it is further

ORDERED that the cross motions by defendant Casualty Insurance Company and defendant BHS Insurance Agency Inc. to dismiss the claims asserted against them are denied; and it is further

ORDERED that the remainder of this action will continue as to these defendants.

DATED: October 24, 2006

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