[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 47

Index Number : 600397/2005

CITY OF NEW YORK

VS

COMMERCE & INDUSTRY INSURANCE

Sequence Number : 002

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 is decided per attached

FILED

APR 17 2007

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/5/07

EMILY JANE GOODMAN 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: IAS PART 17

----------X

CITY OF NEW YORK and NYC DEPARTMENT OF SANITATION,

Plaintiffs,

Index No. 600397/05

-against

COMMERCE & INDUSTRIAL INSURANCE COMPANY and RAPID DEMOLITION COMPANY, INC.,

Defendants.

----------X

Emily Jane Goodman, J.S.C:

Plaintiffs City of New York and NYC Department of Sanitation (together, City) seek a declaratory judgment that defendant Commerce & Industrial Insurance Company (C&I) is obligated to insure City for damages arising from an underlying action for personal injuries.

Prior to January 2002, City entered into a contract with Rapid Demolition Company, Inc. (Rapid) to do certain construction work at a construction site owned by City (the site). High-Tech Environmental Services, Inc. (High-Tech) was Rapid's subcontractor. This action arises from the City's claim that it is covered as an additional insured under a policy issued to Rapid and High-Tech by C&I, while C&I maintains the policy was cancelled.

On January 29, 2002, non-party Witold Bolkun (Bolkun), an employee of High-Tech, was injured in an accident on the site.

As a result, Bolkun instituted an action against City entitled *Bolkun v City of New York*, Index Number 117754/02, before this court (the underlying action). City contends that it should be indemnified by C&I for its damages resulting from the underlying action.

City's contract with Rapid provided that Rapid was to obtain insurance including City as an additional insured. C&I issued a commercial general liability policy of insurance to Rapid, policy number 9341816, effective January 29, 2002 (the policy). The initial premium for the policy was $20,000, $15,000 of which was financed by Rapid's premium finance company, Cananwill, Inc. (Cananwill).

The policy contained an additional insured endorsement which afforded coverage to, among others, owners required by Rapid's written contract to be added by the insured as additional insureds to a general liability policy. It is uncontested that City was an additional insured under the policy, without specifically being named as such. C&I claims, however, that it was unaware that City, in particular, was an additional insured under the policy.

On December 17, 2001, a broker, Global Indemnity Insurance Agency (Global), sent a fax to John Dorsey of the John W. Dorsey

Agency (together, Dorsey)[1], which reached Carmelita Mas (Mas), an AIG environmental underwriter[2], cancelling the policy effective December 15, 2001. Thymius Aff., Ex F. The fax read:

> [p]lease cancel the Asbestos Liability for the above captioned insured as of December 15, 2001. The reason being is that the Workers' Compensation Unit of [C&I] decided not to continue on coverage after much deliberation past the renewal date of the policy. In all fairness to the insured, the 25% minimum earned should be waived, and the policy should be cancelled on a pro/rata basis. Please confirm.

Id. The fax contained a "Cancellation Request/Policy Release" form directed to C&I. A second copy of this fax was sent to Mas at C&I on January 15, 2002. *Id.*

On January 24, 2002, Cananwill also sent a request for cancellation of the policy, effective January 25, 2002, apparently as a result of Rapid's failure to pay premiums. Thymius Aff., Ex. G. However, on February 4, 2002, Global issued a Certificate of Insurance (Certificate) to Rapid, indicating that the policy was in effect for the period November 5, 2001 to November 5, 2002. Thymius Aff., Ex. H. The Certificate stated that "[t]his certificate is issued as a matter of information only and confers no right upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." *Id.*

---

[1]City continually refers to Dorsey as C&I's agent. C&I denies that Dorsey was its agent.

[2]C&I and ATG are related companies.

[* 5]

On February 15, 2002, Cananwill sent a "Reinstatement Request" to C&I, asking that its request for cancellation of the policy be rescinded, and that the policy be reinstated "without any lapse in coverage." *Id.*, Ex. I.

On February 27, 2002, Dorsey sent a fax to Mas asking that the policy not be cancelled. Thymius Aff., Ex. K. The fax stated "[p]lease make sure that ASB/GL Policy #9341616 for above assured remains in full force and effect and is not cancelled. Please confirm." *Id.* It also stated, however, in a provision obviously meant for Rapid, that "[o]nly the insurance carrier can reinstate coverage, not Cananwill." *Id.*

On March 8, 2002, City sent notice of the Bolkun accident to Global, with a copy of the Certificate. In the letter, City's general counsel said:

> [City] hereby notifies your firm of this accident pursuant to the terms of the above policies referenced in the enclosed Certificate and demands that the respective carriers assume the obligation of the carrier under the polices identified in the enclosed certificate to protect [City], and its agents and employees.
>
> In notifying you of this accident, I assume that you are the agent of the respective insurance companies. If you are not their agent or do not have the authority to accept this notice, please forward the current addresses of the companies.

Id., Ex. L.

On March 15, 2002, Global sent a "General Notice Liability Notice of Occurrence" form to C&I informing it of the Bolkun

accident. *Id.* On August 21, 2002, City sent a letter to C&I informing it that an action had been commenced against City on August 8, 2002, and that an answer would have to be served.[3] *Id.*

In support of its motion, City annexes a copy of two endorsements to the policy issued by C&I on May 3, 2002 (*id.*, Ex. M); a fax sent to Dorsey by Global stating that "[t]his fax confirms that this policy was not renewed on 11/15/02. Since we received no response on this policy and [*sic*] we are closing our file" (a hand-written note on this letter from Dorsey to Global says "[p]lease note - apparently AIG never cancelled this policy" (*id.*, Ex. N); and two letters to Dorsey from Cananwill, dated February 27, 2003 and March 27, 2003, requesting the return of $15,000 as unearned premium, in which Cananwill states that the policy "has been cancelled since **12/15/01** [emphasis in original]." *Id.*, Ex. O. A notation handwritten on one of these letters by Dorsey, and dated March 10, 2003, says "[p]ayment attached." *Id.*

City maintains that, by virtue of the February 27, 2002 fax, the endorsements, and the belated return of pro-rated premiums, Rapid's policy with C&I was in full force and effect on the date of the January 29, 2002 accident, entitling it to coverage in the

---

[3]City claims that a letter, dated June 25, 2002, was sent as earlier notice to C&I of the Bolkun accident, which letter went unanswered. The motion papers do not contain a copy of this letter.

underlying action as an additional insured. Alternatively, City claims that, in sending the endorsements, and retaining the unearned premium until March 2003, C&I acted in such a manner as either to waive its right to claim that there was no policy in effect, or to estop it from claiming that it does not have to provide a defense for City. City further argues that C&I's refusal to cover City in the underlying action is an example of bad faith, and a breach of the implied covenant of good faith and fair dealing.

C&I maintains that the policy was cancelled by the insured effective December 15, 2001. C&I submits the affidavit of its Regional Casualty Manager with AIG Environmental, Thomas Orabona (Orabona) in opposition. Orabona states that he reviewed the underwriting file and concluded that the first endorsement issued on or about May, 2002 is not inconsistent with cancellation of the policy on December 15, 2001 because the endorsement was retroactive to November 15, 2001 and benefitted the insured. He admits that he has no explanation for the second endorsement issued on or about May, 2002, which added an additional named insured to the policy. However, he argues that because a "Policy Reinstatement Notice" was never issued by C&I, the policy was never reinstated.

II. Discussion

The proponent of a summary judgment motion must "make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact." *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35 (1st Dept 2004); *see Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Upon submission of such evidence, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1st Dept 2004); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Therefore, in order to obtain the declaration City seeks, it must show that the policy was still in effect as of the date of the accident.

As an initial matter, it is necessary to address the issue of agency. City, through its attorney, repeatedly identifies Global as Rapid's agent, while referring to Dorsey as an agent of C&I, in an attempt, it is assumed, to bind C&I as Dorsey's principal. While City does not press the issue of agency in its argument for coverage, the matter should not go ignored. The evidence indicates that Dorsey was not C&I's agent. Orabona attests, in his affidavit, that Global was Rapid's retail broker (as City contends), but that Dorsey is a wholesale broker, and *not* an agent of C&I. Orabona Aff., at 2.

Unless proven otherwise, insurance brokers are agents of the insured, not the insurer. *See e.g. Ribacoff v Chubb Group of Insurance Companies*, 2 AD3d 153 (1st Dept 2003). In the absence of any evidence in the present case that Dorsey was C&I's agent, and in light of the evidence (in the form of Orabona's affidavit) that it was not, there as no question of fact concerning the agency issue. Dorsey was, if anything, Rapid's agent, and its actions did not bind C&I.

Cancellation

The policy reads, under the heading "Common Policy Conditions,"

> A. Cancellation
>
> (1) The first Named Insured shown in the Declarations may cancel this entire policy by mailing or delivering to us advance notice of cancellation.
>
> ***
>
> (4) Notice of cancellation will state the effective date of cancellation. This policy period will end on that date.
>
> (5) If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the First Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.

Orabona Aff., Ex 1. Therefore, the policy gave Rapid the right to cancel the policy unilaterally.

Generally

[p]roof of cancellation [of an insurance policy]

> requires proof of the fact that the insured has transmitted the request (either himself or through an authorized agent) and nothing more, for the sole event which can effect cancellation is the unilateral act of the insured requiring no acceptance, act in reliance, or other conduct by the insurer.

Bellina v Bellina, 105 AD2d 1074, 1075 (4th Dept 1984); *Lehmann v Engel*, 97 AD2d 675 (3d Dept 1983) (notice by insured of cancellation effects cancellation unilaterally); *Hanover Insurance Company v Eggelton*, 88 AD2d 188 (3d Dept), *affd* 57 NY2d 1020 (1982). "No affirmative act on the part of the insurer [is] required. *Lehmann v Engel*, 97 AD2d at 676; *see also Gately-Haire Co. v Niagara Fire Insurance Company of New York*, 221 NY 162 (1917). Further, the date chosen by the insured in its notice of cancellation is the date upon which the cancellation becomes effective. *See Nobile v Travelers Indemnity Company of Hartford Conn.*, 4 NY2d 536 (1958). Based on the case law, the language of the policy, and the record, the policy was cancellable at Rapid's request and Rapid did cancel the policy. Accordingly, the Court addresses City's argument that there was a waiver or estoppel of C&I's right to claim that the policy was cancelled, based on certain actions C&I took after the cancellation of the policy.

Estoppel/Waiver

An estoppel "'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury.'" *Nassau Trust Company v Montrose Concrete Products Corporation*, 56 NY2d 175, 184 (1982), quoting

Triple Cities Construction Company v Maryland Casualty Company, 4 NY2d 443, 448 (1958).

> The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position.

Matter of Shodel J. v Mark D., 7 NY3d 320, 326 (2006).

Further, waiver is "the intentional relinquishment of a known right with both knowledge of its existence and the intention to relinquish it ... . Such a waiver must be clear, unmistakable and without ambiguity [internal quotation marks and citation omitted]." *Matter of Professional Staff Congress-City University of New York v New York State Public Employment Relations Board*, 7 NY3d 458, 465 (2006); *see also Samuel v Samuel*, 33 AD3d 1010 (2d Dept 2006).

City claims that because C&T issued the two endorsements and belatedly refunded the unearned premiums to Rapid, C&I is estopped from claiming, or waived any claim, that there was no policy in effect. City maintains that it was injured because, had it known that the policy was *not in effect* prior to the accident, it would have terminated Rapid as its contractor as its contract allowed, and the accident would never have occurred.

Thus, City argues that C&I should have given it notice that the policy was terminated, and, C&I's failure to do so should result in C&I being estopped from arguing that the policy was cancelled.

However, City cannot say that it relied upon events of which it was ignorant. The endorsements (which were sent after the accident) were not sent to City, and City never argues that it was aware of them. Nor does City claim to have been aware of the return of the unearned premiums sent to Cananwill long after the accident. As for the Certificate, City may not rely on this document to establish coverage. It is well settled that a certificate stating that it is issued for information only, and confers no right upon the certificate owner, is insufficient to establish the existence of insurance coverage. *Halmar Builders of New York, Inc. v Team Star Contractors, Inc.*, 13 AD3d 581 (2d Dept 2004); *Moleon v Kreisler Borg Florman General Construction Company*, 304 AD2d 337 (1st Dept 2003). City cannot shift blame to C&I for Rapid's failure to tell City that Rapid had cancelled the policy, and had then attempted to rescind that cancellation. These actions were not C&I's doing. The policy does not require C&I to notify City of its cancellation, nor was C&I even aware that City was an additional insured. Moreover, although City argues that Rapid was mislead by C&I's actions, only Rapid has the standing to raise this argument and rely on the doctrines of

waiver or estoppel.[4]

Reinstatement

Contrary to City's argument, there is nothing in the policy language which would allow Rapid any unilateral right to reinstate the policy upon its request. City has offered no case law which would suggest that an insurer's silence could serve to reinstate a policy. City's reliance on *Fifty States Management Corp. v Public Service Mutual Insurance Company* (67 Misc 2d 778 [Sup Ct, Erie County 1971]) for the proposition that an insured has some unfettered right to rescind a cancellation of an insurance policy is misplaced. *Fifty States Management Corp.* does not involve an insured's right to rescind a cancelled policy at all, but involves the right, or more correctly, the failure of, an insurer to give appropriate notice of the cancellation of an insurance policy to its insureds.

However, the Court cannot declare that C&I is not obligated to insure City for damages arising from the underlying personal injury action. Notably, C&I has not cross moved for such relief. Although such a failure is not determinative, it is unclear

---

[4]City's argument, that C&I acted in bad faith and breached the duty of good faith and fair dealing, suffers from the same deficiencies as the estoppel/waiver argument. City's argument presumes that C&I had the duty to inform it that the policy was cancelled, so that City would not be mislead into believing that insurance existed. Not only did City not have such an obligation, but City could not have been mislead where it was not even aware of the cancellation and attempt to reinstate the policy.

whether C&I reinstated the policy. Although C&I maintains that the policy may only be reinstated upon issuance of a "Policy Reinstatement Notice," as it was C&I's practice and procedure to do so, C&I does not point to any provision of the policy which mandates issuance of such a Notice as a condition of reinstatement. Whether C&I's issuance of the endorsements after cancellation of the policy is evidence that it reinstated the policy, or, whether the endorsements were issued in error, is undetermined.

Accordingly, it is

ORDERED that the motion is denied.

This Constitutes the Decision and Order of the Court.

Dated: April 5, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN