

**Towne Bus Corp. v Insurance Co. of Greater
N.Y.**

2008 NY Slip Op 30178(U)

January 18, 2008

Supreme Court, New York County

Docket Number: 0120333/1999

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 120333/1999

TOWNE BUS

vs

INSURANCE COMPANY OF GREATER

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 denied on
attached

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/18/08

[Signature]

[Signature]

EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
 TOWNE BUS CORP.,

Plaintiff,

-against-

Index No. 120333/99

INSURANCE COMPANY OF GREATER NEW
 YORK,

Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

In this action, plaintiff Towne Bus Corp., an insured under a workers' compensation liability insurance policy, seeks the recovery of a policyholder dividend on a renewal policy. Defendant Insurance Company of Greater New York, the insurer, now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. For the following reasons, the motion is granted.

BACKGROUND

The underlying facts are not in dispute. Plaintiff purchased a workers' compensation and employers' liability policy (policy #6631003142) from defendant, with a policy period from February 1, 1996 through February 1, 1997 (the original policy) (Hess Affirm., Exh. A, Information Page). Plaintiff was the named insured. The insurance applied to claims brought under the Workers' Compensation Law of the State of New York (*id.*). At the end of that policy period, defendant renewed plaintiff's policy for another year, for a period from February 1, 1997 through February 1, 1998 (the renewal policy) (Hess Affirm., Exh. B, Information Page).¹

¹ The policies state that "[t]his policy includes . . . the Information Page and all endorsements and schedules listed there" (Hess Affirm., Exh. A, General Section [A]; Hess

Part Six of the renewal policy permitted plaintiff to cancel the policy (*id.*, Part Six-Conditions [D] [1]). The renewal policy states that the “policy period will end on the day and hour stated in the cancelation notice” (*id.*, Part Six-Conditions [D] [3]).

The policies were “audit premium” policies, where the insured pays estimated premiums, known as deposit premiums, based on estimated payroll for the coming year. After termination of the policy, the insurer audits the policy to determine the earned premium (the actual amount of premium owed to the insurer based on actual payroll information), and generally either refunds the difference to the insured or requires the insured to pay an additional amount. Specifically, Part Five of the renewal policy provides, in relevant part, that:

The 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 and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

(*id.*, Part Five-Premium [E]). It further states that, if the insured cancelled the policy, final premium would be determined in the following way unless defendant’s manuals provided otherwise: “final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancelation table and procedure. Final premium will not be less than the minimum premium” (*id.*, Part Five-Premium [E] [2]).

With regard to dividends, the renewal policy states, as in the original policy, that:

Dividend: You shall participate in the earnings of the Company to such extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with Law and as made applicable to this policy provided that

Affirm., Exh. B, General Section [A]).

you shall have complied with all of the terms of this policy with respect to the payment of premium.

(*id.*, policy jacket [emphasis in original]).

By letter dated September 15, 1997, plaintiff cancelled its renewal policy effective October 15, 1997, several months before the expiration of the policy. An endorsement reflects that the renewal policy was cancelled at plaintiff's request. Plaintiff replaced its coverage with another insurance carrier.

On October 1, 1997, defendant held a meeting of its Board of Directors, at which it passed a resolution concerning payment of dividends on workers' compensation policies. The minutes state that:

[T]he Company shall pay a dividend upon Workers Compensation policies written or renewed by the Company and canceled or expiring during the period October 1, 1997, through December 31, 1997, both dates inclusive, as follows:

...

- (B) On policies upon risks in the State of New York, a dividend plan that is identified as a Workers' Compensation Flat Percentage Dividend Plan, a dividend of 8% of the earned premium on all coverages, upon risks which develop a final annual audited earned premium of \$50,000.00 or more;

...

Provided, however, that:

...

- (3) No dividend shall be payable on policies or renewals thereof which have been canceled prior to their full term of one year, unless such policy or renewal has been canceled after being in effect for six months by the Company upon its initiative for reasons other than non-payment of premium, or unless such policy or renewal has been immediately replaced by another policy written by the Company or its parent.

(Hess Affirm., Exh. C, 10/1/97 Minutes of Board of Directors of Insurance Company of Greater New York, at 2, 3, 4).

Plaintiff thereafter brought the present action. The complaint contains one cause of action for breach of contract for failure to pay dividends on the renewal policy, and seeks damages in an amount of \$90,000. Defendant counterclaimed against plaintiff for \$7,104 in unpaid premiums. However, defendant thereafter refunded \$18,375.95 to plaintiff for unused premium for the renewal policy, and plaintiff does not dispute that it was paid the correct amount for the unused premium (Marksohn Aff., ¶ 4). Thus, the only issue to be resolved is plaintiff's entitlement to a dividend on the renewal policy.

Defendant moves for summary judgment, contending that the issuance of a dividend was within its discretion under case law and under the language of the dividend provision. Thus, plaintiff did not qualify pursuant to the dividend resolution, since plaintiff cancelled the policy prior to the expiration of its full term.²

Plaintiff contends first that it expected to share in dividends on a pro rata basis. According to plaintiff, defendant's construction of the dividend provision of the policy impermissibly places plaintiff at defendant's mercy, because every contract contains an implied obligation of good faith and fair dealing. And, the dividend provision only requires that it complied with all of the terms of the policy with respect to the payment of premiums, which it

²Defendant also submits affidavits stating that an audit of the original policy determined that the total earned premium was \$1,117,245, less a deposit premium of \$1,155,251, which left a credit of \$38,006 to plaintiff. Plaintiff's dividend in the sum of \$167,587 for the original policy was then added to that credit, for a total credit of \$205,593 for the original policy (Salik Aff., ¶ 3; D'Onofrio Aff., ¶¶ 5-6). However, plaintiff's only claim is with respect to the renewal policy, not the original policy (Complaint, ¶¶ 6-8).

undisputedly did. Second, plaintiff was never provided with a copy of the renewal policy, and thus it would be unjust to bind it to terms of which it was not aware. Third, the language of the policy is ambiguous in that it did not provide plaintiff with notice of the severe financial consequences of early cancellation. In addition, plaintiff requests, through its attorney's affirmation and without serving a separate notice of cross motion, that summary judgment be granted in its favor.

In reply, defendant does not dispute plaintiff's assertion that it was never provided with a copy of the renewal policy, but argues that it knew the terms because the original policy was automatically renewed by operation of Workers' Compensation Law § 54 for a one-year period on the same terms.

DISCUSSION

An insurance "dividend" is an adjustment of the premium between the original estimate and the actual amount found to have been necessary in retrospect (*Kern v John Hancock Mut. Life Ins. Co.*, 8 AD2d 256, 259 [1st Dept 1959], *affd* 8 NY2d 833 [1960]). In other words, an insurance dividend is a partial return to the policyholder of the amount it was charged for the insurance (*Spencer, White & Prentis, Inc. v City of New York*, 262 App Div 285, 286 [1st Dept], *lv denied* 262 App Div 992 [1941]; *Scholem v Prudential Ins. Co.*, 172 Misc 664, 665 [Sup Ct, NY County 1939]). Therefore, the distribution of an insurance dividend is not akin to a division of surplus among stockholders of record (*Kern*, 8 AD2d at 259). "The declaration of a dividend upon a policy reduces pro tanto the cost of insurance to the holder of the policy. That is its purpose and effect" (*Rhine v New York Life Ins. Co.*, 273 NY 1, 13 [1936]).

Defendant contends that the courts have upheld the power of an insurer's Board of

* 7]

Directors to declare policyholder dividends. It is true that an insurer's directors have broad discretion as to the determination of surplus, how much of the surplus should be retained by the company, and how much of the surplus should be distributed to policyholders³ (*Rhine*, 273 NY at 8; *Greeff v Equitable Life Assur. Socy.*, 160 NY 19, 32 [1899]; *Kern*, 8 AD2d at 262; *see generally* 5 Couch on Ins. § 80:51 [3d ed 2007]). The distribution to policyholders of surplus is known as "equitable apportionment" (*Rhine*, 273 NY at 8 [internal quotation marks omitted]). Courts will not interfere unless there has been bad faith, willful neglect, or abuse of discretion (*Greeff*, 160 NY at 32). However, plaintiff is not challenging the manner in which defendant computed the dividend, nor is it seeking to compel defendant to declare the dividend in some other manner. Rather, plaintiff is suing defendant for breach of contract for its share of the dividends on the renewal policy (*see Kern*, 8 AD2d at 263).

Insurance Co. of Greater N.Y. v Glen Haven Residential Health Care Facility (253 AD2d 378 [1st Dept 1998]), relied upon by defendant, is not dispositive of the issues in this case. There, the Appellate Division, First Department, stated that "[w]e also agree with the IAS Court that the payment of dividends was within plaintiff's discretion, and that plaintiff was justified in refusing to pay a dividend to defendant based on defendant's failure to meet its obligation to pay the premium" (*id.* at 379). A review of the record on appeal reveals that the dividend provision in that case was identical to the one in this case. Here, in contrast, defendant does not dispute that plaintiff paid its premium until the date of cancellation, when the policy period ended. In

³"The purpose of this retention of 'surplus' funds . . . is to cover all the insurer's risks and obligations, as well as to insure the security of its policyholders in the future as well as the present, and to cover any contingencies that may arise, or that may be fairly anticipated" (5 Couch on Ins. § 80:51 [3d ed 2007]). In determining the amount of surplus to be credited as dividends, the insurer typically considers the amount of premiums paid (*id.*, § 80:54).

fact, defendant remitted \$18,375.95 in unused premium to plaintiff after the renewal policy was cancelled.

Thus, the court turns to the terms of the renewal policy. “Workers’ compensation insurance policies are no more than contracts, and as such are governed by the ordinary rules of contractual construction” (*Commissioners of State Ins. Fund v Photocircuits Corp.*, 20 AD3d 173, 180-181 [1st Dept 2005]). Where the terms of an insurance contract are clear and unambiguous, they must be given their plain and ordinary meaning, and the interpretation of such terms is an issue of law for the court (*see City of New York v Continental Cas. Co.*, 27 AD3d 28, 31 [1st Dept 2005]).

An unambiguous provision is one that is not “reasonably susceptible of more than one interpretation” (*McCabe v Witteveen*, 34 AD3d 652, 654 [2d Dept 2006] [internal quotation marks and citation omitted]; *see also Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 131 [1st Dept 2006], quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978], *rearg denied* 46 NY2d 940 [1979] [“contract is unambiguous if the language has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion’”]). “[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy” (*Penna v Federal Ins. Co.*, 28 AD3d 731, 732 [2d Dept 2006], quoting *Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]). But a literal construction which places one party at the mercy of the other should be avoided, if possible (*McGrail v Equitable Life Assur. Socy. of U. S.*, 292 NY 419, 424, *rearg denied* 293 NY 663 [1944]; *Lowy & Donnath v City of New York*, 98 AD2d 42, 45 [1st Dept 1983], *affd* 62

NY2d 746 [1984]; *Jacobowitz v Mutual Benefit Health & Acc. Assn.*, 10 AD2d 159, 162 [1st Dept 1960]).

If the terms of an insurance contract are ambiguous, the terms must be construed in favor of the insured and against the insurer, the drafter of the policy language (*Marshall v Tower Ins. Co. of N.Y.*, 44 AD3d 1014, 1015 [2d Dept 2007]; *Tower Ins. Co. of N.Y. v Breyter*, 37 AD3d 309 [1st Dept 2007]; *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006]). However, the terms of an insurance contract are not ambiguous simply because the parties interpret the language differently (*Commercial Union Ins. Co. v Liberty Mut. Ins. Co.*, 36 AD3d 645, 645-646 [2d Dept 2007]).

In the instant case, the renewal policy states that plaintiff “shall participate in the earnings of the Company to such extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with Law and as made applicable to this policy provided that [plaintiff] shall have complied with all of the terms of this policy with respect to the payment of premium” (Hess Affirm., Exh. B, policy jacket). The plain language of this provision is clear and unambiguous. Although the provision states that plaintiff “shall” participate in the earnings of the Company, this phrase is clearly modified by “*upon such conditions as shall be determined by the Board of Directors of the Company.*” Any reasonable insured would read this provision to mean that defendant’s Board of Directors had the discretion to make payments of any dividends, and that dividends were not guaranteed. The court is not free to rewrite the insurance contract based upon plaintiff’s subjective interpretation of the policy language or notions of fairness (*see Broad St., LLC*, 37 AD3d at 131, quoting *Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 49 [1st Dept], *affd* 66 NY2d 1020 [1985] [“[a] court, no matter how well intentional, cannot create

policy terms by implication or rewrite an insurance contract. Nor should a court disregard the provisions of an insurance contract which are clear and unequivocal”]). While the covenant of good faith and fair dealing is implicit in every contract, it cannot be used to add terms to a contract between two sophisticated parties, as here (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 73 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]). Moreover, plaintiff was aware of the terms of the renewal policy since the relevant terms were identical to those in the original policy, and the original policy was automatically renewed in the absence of notice of defendant’s intention not to renew that policy (*see Workers’ Compensation Law* § 54 [5]).

On October 1, 1997, the Board of Directors made a resolution to pay dividends on policies covering risks in New York, but not for “policies or renewals thereof which have been canceled [by the insured] prior to their full term of one year, . . . [] unless such policy or renewal has been immediately replaced by another policy written by the Company or its parent” (Hess Affirm., Exh. B, at 4). Plaintiff cancelled its policy approximately eight months into the renewal policy, and did not replace its policy with defendant, and thus, did not pay premiums for the entire one-year period of the renewal policy. Notably, plaintiff does not allege or claim here that defendant abused its discretion or made this determination in bad faith (*see Rhine*, 273 NY at 8).⁴ Therefore, plaintiff was not entitled to a dividend.

Accordingly, it is

ORDERED that the motion by defendant Insurance Company of Greater New York for

⁴Plaintiff appears to argue that defendant unfairly discriminated against it by failing to pay a dividend, relying upon *Fidelity & Cas. Co. of N.Y. v Metropolitan Life Ins. Co.* (42 Misc 2d 616 [Sup Ct, NY County 1963]). However, that case dealt with equitable apportionment of dividends (*id.* at 627). In this case, plaintiff did not receive any dividends at all, and does not claim that any insured that cancelled early did in fact receive any dividends.

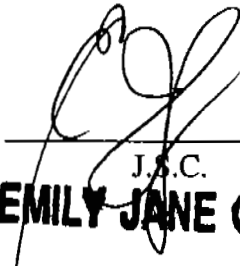
summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: January 18, 2008

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JAN 23 2008
NEW YORK
COUNTY CLERK'S OFFICE