

Rutgers Cas. Ins. Co. v Geo-Tech Indus. Corp.

2008 NY Slip Op 31065(U)

March 27, 2008

Supreme Court, New York County

Docket Number: 0106584/2005

Judge: Leland G. DeGrasse

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

LELAND DeGRASSE

PRESENT: _____
Justice

PART 25

Rutgers Casualty
Ins Co

Geo-Tech Industrial Corp

INDEX NO. 106584/05
MOTION DATE _____
MOTION SEQ. NO. 03
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

DECISION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

MAR 27 2008

Dated: _____

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

Check if appropriate: DO NOT POST

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

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

-----X
RUTGERS CASUALTY INSURANCE COMPANY :

Index No.: 106584/05

Plaintiff, :

-against- :

GEO-TECH INDUSTRIAL CORP. and :
IDI CONSTRUCTION CORP., :

Defendants. :

-----X
GEO-TECH INDUSTRIAL CORP., :

Index No.: 590397/06

Third-Party Plaintiff, :

-against- :

ROBERT P. BRADY AGENCY, INC., BUCKINGHAM :
BADLER ASSOCIATES, INC. and BUCKINGHAM OF :
LONG ISLAND, LLC. :

Third-Party Defendants. :

-----X

DeGRASSE, J.:

Law Office of James J. Corbett, Bellmore (James J. Corbett of counsel),
for defendant/third-party plaintiff

Yoeli & Gottlieb, LLP, New York City (Richard J. Gottlieb of counsel),
for plaintiff

Defendant/third-party plaintiff Geo-Tech Industrial Corp. ("Geo-Tech") moves, pursuant to
CPLR 3212, for an order granting summary judgment dismissing the complaint of Rutgers Casualty
Insurance Company ("Rutgers"), and declaring that Rutgers is obligated to (1) defend and indemnify

Geo-Tech in the action of *The 620 Broadway Housing Corporation, et al. v Rusabo 610 LLC, et al.*, (index No.120942/03) which is pending in this court¹ (the “Broadway action”), and (2) reimburse Geo-Tech for the costs and attorney’s fees incurred in defending the instant action.

In October 2003, Geo-Tech was hired to perform subcontract work, which included soil stabilization, in connection with a demolition and construction project located at 610 Broadway in Manhattan. In December 2003, the owner and shareholders of 620 Broadway commenced the Broadway action alleging that they sustained property damages as a result of the demolition work performed at 610 Broadway. Thereafter, IDI Construction Company, Inc. (“IDI”), a named defendant in the Broadway action, initiated a third-party action against Geo-Tech and the other subcontractors who performed work at the construction site, seeking contribution and/or indemnification for any damages for which IDI might be held liable. Geo-Tech then notified Rutgers, its general commercial liability insurer, of the Broadway action and demanded that Rutgers provide it with a complete defense and indemnification with respect to the claims asserted against it arising out of the alleged property damages claim. A copy of the insurance policy bearing policy number SKP-3101823 11, which is attached to plaintiff’s moving papers, reveals that the original contract of insurance took effect for the policy period May 30, 2002 to May 30, 2003. At the time of the accident, Geo-Tech was insured under the policy which had been renewed for another year.

¹According to the affirmation of Geo-Tech’s counsel, the action was settled in July 2007 for the sum of \$8,000,000 with Geo-Tech responsible for paying \$100 of the settlement amount.

After receiving Geo-Tech's claim, Rutgers retained the Law Office of Bivona & Cohen, P.C. ("Bivona & Cohen") to defend Geo-Tech in the Broadway action. On October 14, 2004, Bivona & Cohen served an answer in the Broadway action on behalf of Geo-Tech. Thereafter, in a letter dated January 10, 2005, Rutgers wrote to Geo-Tech stating that it could not continue to provide Geo-Tech with a defense in the Broadway action and would seek to void the insurance contract because of a material misrepresentation made on Geo-Tech's 2002 insurance application. In particular, Geo-Tech indicated that the nature of its business was that of a "Painting Contractor" and failed to disclose that its business included soil stabilization procedures even though it had performed that type of work on three projects in 2001 and on two projects in 2003. Rutgers further asserted that if it had been provided with full disclosure as to the nature and scope of Geo-Tech's business operations, it would have refused to issue the policy to Geo-Tech.

On May 12, 2005, Rutgers commenced the present action against Geo-Tech and defendant IDI Construction Corp. ("IDI"). The first cause of action seeks rescission of the commercial general liability policy issued to Geo-Tech based upon its failure to disclose material information on its application for insurance. The second cause of action seeks a declaratory judgment that Rutgers is not obligated to defend and indemnify Geo-Tech in the Broadway action. The complaint alleges that Geo-Tech gave "false and misleading" information in the insurance application by (1) indicating that its "Nature of Business/Description of Operations by Premise(s)," was that of a "Painting Contractor," and (2) only listing "Painting" under the section entitled "Schedule of Hazards."

DISCUSSION

The purpose of a summary judgment motion is “[i]ssue-finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1989]). Thus, “[t]he proponent of a summary judgment motion must make 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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [2002]). In determining whether summary judgment is appropriate, the “Court should draw all reasonable inferences in favor of the nonmoving party” (*see Assaf*, 153 AD2d at 521).

In support of its motion Geo-Tech first argues that until Rutgers’ rescission claim is litigated and determined in its favor, the policy obligation to defend or pay Geo-Tech’s defense costs remains in effect. As such, Geo-Tech claims that Rutgers breached its duty to defend Geo-Tech in the Broadway action. Geo-Tech next argues that it is entitled to be reimbursed for the costs it incurred in the defense of the present declaratory judgment action as a result of being placed in a defensive posture by the legal steps taken by Rutgers in an effort to free itself from its policy obligations. Finally, Geo-Tech maintains that it is entitled to summary judgment dismissing Rutgers’ complaint because its answer to the insurance application question regarding the nature of its business was not

a material misrepresentation warranting rescission of the policy. Specifically, Geo-Tech contends that the “question requesting ‘Nature of Business/Description of Operations by Premises(s)’ is ambiguous as to whether it required Geo-Tech to disclose that it performed soil stabilization work on three occasions prior to the date of the insurance application.” Geo-Tech further contends that since that section of the application provided a ½” x 8” box to respond, “[a] prospective insured, such as Geo-Tech, could not be expected to list every procedure it ever performed in such a small box.” Geo-Tech also contends that the insurance application “did not explicitly ask whether Geo-Tech performed soil stabilization work,” and “Rutgers did not ask any follow up questions after it received Geo-Tech’s application.”

Rutgers, in its attorney’s affirmation in opposition, argues that Geo-Tech is not entitled to summary judgment because “it is axiomatic that whether a question is or is not ambiguous is inherently a question of fact.” Rutgers further argues that “since Geo-Tech has raised the specter of whether there was even a valid insurance contract Geo-Tech cannot be entitled to such relief, as a matter of law.” In support of its contention, Rutgers submits the affidavit of Geo-Tech’s president, John Farmer, dated March 14, 2007, which was submitted in opposition to the summary judgment motion of third-party defendants Buckingham Badler Associates, Inc. (“BBA”) and Buckingham of Long Island, LLC (“BLI”). In his affidavit, Farmer stated that “[n]obody from Geo-Tech filled in, completed or signed the insurance application, and the [p]olicy was not delivered to Geo-Tech.” Farmer further stated that Geo-Tech commenced a third-party action against its insurance agents, BBA and BLI, alleging that they improperly prepared and signed the insurance application.

Under New York Law, any material misrepresentation, even an innocent one, allows “the insurer to avoid the contract of insurance or defeat recovery thereunder” (*Mutual Benefit Life Ins. Co. v JMR Electronics Corp.*, 848 F2d 30, 32 [1988], quoting *Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216 [1976], *affd* 42 NY2d 928 [1977]). “No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material” (Insurance Law § 3105 [b]). A misrepresentation is defined by statute as a false “statement as to past or present fact, made to the insurer ... at or before the making of the insurance contract as an inducement to the making thereof” (Insurance Law § 3105 [a]). “An insured cannot remain silent while cognizant that his insurance application contains misleading or incorrect information” (*North Atl. Life Ins. Co. of Am. v Katz*, 163 AD2d 283, 284 [1990]). Furthermore, where the insurer’s agent fills out the application for the insured, inserting false answers as to material facts, and the insured signs the application, the insured adopts the statements as his own (*Bloom v Mutual of Omaha Ins. Co.*, 161 AD2d 1047 [1990]). An insurer is not estopped from asserting misrepresentation as a ground for rescinding the insurance policy due to the insured’s alleged reliance upon the advice and assurances of the broker in completing the insurance application (*Cutone v Am. Gen. Life Ins. Co. of New York*, 199 AD2d 1032 [1993]). To establish the materiality of an omission or misrepresentation on an insurance application as a matter of law, and thus justification for rescission of the policy, the burden is on the insurer to “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” (*Roudneva v Bankers Life Ins. Co. of New York*, 35 AD3d 580, 581 [2006], *lv denied* 8 NY3d 809 [2007]); *see also* Insurance Law 3105 [c]).

Here, the opposing papers consist only of an affirmation by Rutgers' attorney. It is well settled that the affirmation of an attorney with no personal knowledge of the facts involved has no probative value and should be disregarded (*Zuckerman*, 49 NY2d at 563; *Matter of Johnson v Sharpe*, 66 AD2d 955, 956 [1978]). While an attorney's affirmation, even if made without personal knowledge, may serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in acceptable form (*Zuckerman* 49 NY2d at 563), the conclusory affirmation of Rutgers' counsel which is unsupported by documentary evidence, particularly the insurer's underwriting manual, is insufficient to establish that the misrepresentations were material as a matter of law (see *Carpinone v Mut. of Omaha Ins. Co.*, 265 AD2d 752 [1999]; *Lindenbaum v Equit. Life Assur. Soc. of the U.S.*, 5 AD2d 651 [1958]). Thus, Rutgers has failed to establish that the information omitted from the insurance application was material to Rutgers' determination to issue a policy to Geo-Tech.

Rutgers argues that an issue of fact exists as to whether an enforceable insurance contract was ever effectuated, since Geo-Tech's president averred in his affidavit that the signature on the insurance application was not that of Geo-Tech's president, nor was the policy delivered to Geo-Tech. This argument is devoid of merit because Geo-Tech's motion is premised on the existence of the insurance policy. In this instance, neither party disputes that Rutgers issued a policy to Geo-Tech. Thus, Geo-Tech, by renewing the policy, without objection, for another year, and by paying the premiums thereon, ratified the actions of its insurance agent (see *Paramount Ins. Co. v Brown*, 205 AD2d 464 [1994]).

As to Geo-Tech's request for the costs and attorney's fees incurred in defending this declaratory judgment action, Geo-Tech is entitled to such reimbursement. It is well settled that an insured is entitled to an award of reasonable costs and attorney's fees "when [the insured] has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations" (U.S. Liab. Ins. Co. v Staten Is. Hosp., 162 AD2d 445, 447 [1990], quoting *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]). Here, Rutgers commenced a declaratory judgment action seeking to free itself from the obligation of providing insurance coverage to Geo-Tech. Therefore, Geo-Tech is entitled to recover the reasonable costs and attorney's fees incurred in successfully defending this declaratory judgment action.

CONCLUSION

Based on the foregoing, the motion by defendant/third-party plaintiff Geo-Tech for summary judgment dismissing Rutgers' complaint insofar as asserted against it is granted and the action is dismissed with respect to Geo-Tech. The action is severed and continued with respect to defendant IDI. The Clerk shall enter judgment accordingly.


It is hereby ADJUDGED and DECLARED that Rutgers had a duty to defend and indemnify Geo-Tech in the Broadway action entitled *The 620 Broadway Housing Corporation, et al. v Rusabo 610 LLC, et al.* (Supreme Court, New York County, Index No. 120942/03) under the insurance policy it issued to Geo-Tech; and it is further

ADJUDGED and DECLARED that Rutgers must reimburse Geo-Tech for the costs and expenses incurred by Geo-Tech in the defense of the Broadway action; and it is further

ADJUDGED and DECLARED that Rutgers must reimburse Geo-Tech for the costs and expenses incurred in defending the instant action; and it is further

Pursuant to CPLR 3212 (c) and in light of the equitable nature of the relief sought in this action, this matter is referred to the Special Referee Clerk in the IAS Motion Support Office for assignment to a special referee to hear and determine the amount of Geo-Tech's damages. A money judgment shall be entered in accordance with the special referee's findings without further application to this court. As a condition of the reference, Geo-Tech shall file a copy of the judgment and order to be settled with the Special Referee Clerk within 20 days after entry. Settle judgment and order.

DATED: ~~MAR~~ 27 2008



J.S.C.

HON. LELAND DEGRASSE