

East Kingsbridge Grocery, Inc. v Popular Brokerage Corp.

2009 NY Slip Op 31982(U)

August 24, 2009

Supreme Court, New York County

Docket Number: 601742/07

Judge: Joan A. Madden

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

PRESENT: How ~~Joan~~ Joan A. Milder

PART 11

Index Number : 601742/2007
EAST KINGSBRIDGE GROCERY
 VS.
POPULAR BROKERAGE
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____
 MOTION DATE 4-23-09
 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 decided in accordance

FILED

AUG 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 24, 2009

[Signature]
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 11

-----X
EAST KINGSBRIDGE GROCERY, INC., d/b/a and
a/k/a GM KINGSBRIDGE GROCERY CORP.,

Index No. 601742/07

Plaintiff,

- against -

POPULAR BROKERAGE CORP.,

Defendant.

-----X
JOAN A. MADDEN, J.:

Defendant Popular Brokerage Corp. (Popular Brokerage) moves pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint alleging its failure to procure insurance coverage. Plaintiff GM Kingsbridge Grocery Corp. (GM Kingsbridge)¹ opposes the motion, which is granted for the reasons set forth below.

Background

Popular Brokerage is a corporation which conducts business as an insurance broker/agent, licensed to sell insurance on behalf of insurance companies in the State of New York. East Kingsbridge Grocery, Inc. (East Kingsbridge) was a grocery store located at 73 East Kingsbridge Road, Bronx, New York. In 2005 and 2006, Popular Brokerage acted as a broker to provide insurance coverage for East Kingsbridge for liability and the contents of its grocery store

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It appears from the record that the named plaintiff, East Kingsbridge Grocery, Inc., is the prior owner of the premises and no longer has an insurable interest in the premises at issue. For the purposes of this motion and to avoid confusion, the court will herein refer to the plaintiff as GM Kingsbridge, the entity that owned the premises at the time of the fire giving rise to the underlying dispute.

business. In September 2006, Ameen Nagi, the owner of East Kingsbridge, sold the store to GM Kingsbridge by bulk bill of sale.

Yahya Abdullah (Abdullah), the manager of GM Kingsbridge, states in his affidavit that, in September 2006, he contacted Popular Brokerage to inform it of the change in ownership. According to Abdullah, a representative at Popular Brokerage told him that the store was insured and further assured him that she would change the name on the insurance policy. (Abdullah Affidavit, ¶ 6).

Abdullah states that in or around December 2006, he received an insurance policy renewal certificate from Morstan General Agency Insurance (Morstan) for the period from January 16, 2007 until January 16, 2008. However, this renewal certificate was for East Kingsbridge, and it erroneously listed the store's address as 76 East Kingsbridge Road. Abdullah states that he called Popular Brokerage to inform it that the renewal certificate was not accurate and that both the name and mailing address needed to be changed. (Abdullah Affidavit, ¶ 7). Abdullah states that he understood this renewal certificate to indicate that GM Kingsbridge was insured. (*Id.* at ¶ 8).

Abdullah states that on February 10, 2007, a messenger from Popular Brokerage hand delivered a premium payment receipt, a premium payment options sheet, and an ACORD application² to the store. (Abdullah Affidavit, ¶ 12). Abdullah further states that the messenger discussed premium finance payment options with him and that he agreed to sign the papers, but requested that Popular Brokerage should first correct the address, which again incorrectly listed the store's address as 76 East Kingsbridge Road. According to Abdullah, the messenger advised

² Abdullah specifically received ACORD Application 125, which is a general commercial insurance application.

him that the insurance “was in place” and that Popular Brokerage would correct the address and bring the papers back on Monday. (Id. at ¶ 15). Abdullah maintains that he verbally accepted the proposal and that this verbal acceptance would be enough to ensure coverage. (Id. at ¶ 19). Abdullah further maintains that he was told that he did not have to pay the premium to bind coverage. (Id. at ¶ 27).

Miguel Peribanez (Peribanez), President of Popular Brokerage, states in his affidavit that he did not find out about the change in ownership between East Kingsbridge and GM Kingsbridge until approximately January 17, 2007. (Peribanez Affidavit, ¶ 6). According to Peribanez, on the same day that he found out about the sale, Gamal Ali, the principal owner of GM Kingsbridge, solicited from Popular Brokerage an insurance quote for GM Kingsbridge. (Id. at ¶ 7). Popular Brokerage began to provide GM Kingsbridge with quotes from various insurance companies, but GM Kingsbridge rejected these quotes. (Id. at ¶¶ 8-10). GM Kingsbridge does not deny that it requested and received these quotes from the end of January through February 10, 2007. (Abdullah Affidavit, ¶ 17).

According to Peribanez, GM Kingsbridge contacted him on February 9, 2007, to solicit another quote. On February 10, 2007, Peribanez sent a messenger to hand deliver a proposed insurance plan to GM Kingsbridge. (Peribanez Affidavit, ¶ 11). According to Peribanez, the messenger reported back to him that GM Kingsbridge had rejected the quote, and that GM Kingsbridge was still shopping around and wanted another proposal delivered by Monday or Tuesday. (Peribanez Deposition, 161). *GM Kingsbridge denies that it ever rejected the quote proposed by Popular Brokerage.* (Abdullah Affidavit, ¶¶ 17, 19).

On February 11, 2007, a fire allegedly destroyed everything in GM Kingsbridge's store. According to Peribanez, on February 12, 2007, Abdullah and Ali went to Peribanez's office and told him that a fire had destroyed all of their store's contents. Peribanez states that they asked him to issue them an insurance policy and to back-date it so that it would cover the date of the fire, but he refused to do so and informed them that they were not covered by insurance for the damage to the store. (Peribanez Affidavit, ¶ 12).

On or around May 24, 2007, GM Kingsbridge filed a summons and complaint against Popular Brokerage consisting of three causes of action: negligence, breach of contract and misrepresentation. GM Kingsbridge asserts that it sustained at least \$119,899.40 in damages with respect to personal property, that Popular Brokerage breached its agreement to renew the insurance contract that it had with the prior owner of the premises, and that Popular Brokerage negligently failed to provide GM Kingsbridge with insurance coverage. GM Kingsbridge also alleges that if there was no coverage, then the messenger from Popular Brokerage misrepresented that GM Kingsbridge had properly completed and filed all necessary documents in applying for insurance and that coverage was effective.

Popular Brokerage argues that a broker only has a duty to its contracted clients and that it never had a contract or agreement with GM Kingsbridge.³ Additionally, Popular Brokerage argues that the statements in Mr. Abdullah's affidavit should be rejected as a matter of law such statements are contradicted by the documentary evidence demonstrating that in order to renew or obtain insurance coverage GM Kingsbridge was required to make premium payments and that

³ Popular Brokerage also argues that although it previously held a contract with East Kingsbridge, East Kingsbridge is not a proper plaintiff to this action as it no longer has an insurable interest in the premises. However, the court need not reach this issue as the complaint is dismissed for the reasons stated in the decision.

just prior to the fire GM Kingsbridge was seeking additional quotes from various insurance companies.

Popular Brokerage further asserts that GM Kingsbridge seeks damages in excess of the coverage offered in its quotes, and argues that its liability should at least be limited to the amount and type of coverage requested (which in this case was a \$75,000 policy). Lastly, Popular Brokerage asserts that GM Kingsbridge is unable to establish damages, given the failure to provide any actual proof of “existence, ownership, destruction or value of any items allegedly damaged or destroyed in the fire.” (Popular Brokerage Affirmation, ¶ 7).⁴

In opposition, GM Kingsbridge argues that Mr. Abdullah’s statements that his store was insured are in fact supported by documentary evidence, specifically (1) the brokerage receipt for payment, (2) the premium payment options sheet from Popular Brokerage, (3) an invoice to Popular Brokerage for the renewal policy for East Kingsbridge, (4) the proposal for insurance from Popular Brokerage and (5) the ACORD application for GM Kingsbridge.

GM Kingsbridge maintains that Mr. Abdullah’s signature was not needed on the proposal or on the ACORD application in order to bind coverage, nor did any payments need to have been made in order for coverage to take effect. In support of these claims, GM Kingsbridge relies on the deposition testimony of Popular Brokerage’s President, most notably Peribanez’s testimony that a “proposal does not need to be signed to bind coverage, the client just needs to accept it,”

⁴ Popular Brokerage notes that GM Kingsbridge has produced only one invoice to the amount of \$4,414.00 for the purchase of inventory allegedly present in the store at the time of the fire, and its other invoices are dated from five months prior to the fire, yet GM Kingsbridge claims that it lost \$41,000 in inventory. Popular Brokerage further notes that GM Kingsbridge purchased the grocery, including all fixtures, chattels, equipment, stock in trade, merchandise and inventory for a total of \$50,000, yet GM Kingsbridge claims that it lost \$77,350 in equipment alone. Popular Brokerage argues that GM Kingsbridge’s estimates are completely inaccurate and cannot sufficiently counter Popular Brokerage’s affirmative defense of failure to mitigate.

(Peribanez Deposition, 200), that the proposal is only written after the application is done (Id. at 114-15) and that “without any payments made” a policy will automatically renew (Id. at 128).

Concerning the sufficiency of its proof towards the damages it allegedly suffered as a result of the fire, GM Kingsbridge argues that it has provided sufficient evidence, including the testimony of Ameen Nagi as to value of the equipment and the machinery prior to when he sold the store, testimony of Abdullah with regard to the same, inventory in the store current to

September 2006, and quotations from a restaurant manufacturing company for the value of many of the equipment items. (Plaintiff’s Exhibits A, B, C, G.).

In reply, Popular Brokerage argues that GM Kingsbridge quotes Peribanez’s deposition testimony out of context and that GM Kingsbridge could not have had a completed insurance policy without having paid the premium or completed its ACORD application. In support of these arguments, Popular Brokerage cites Peribanez’s affidavit, in which he states that Popular Brokerage must receive, at minimum, a completed ACORD application, Notice of Terrorism Insurance Policy Disclosure Coverage, and a check for the premium payment before coverage can be bound. (Peribanez Affidavit, ¶ 15).

In addition to Mr. Peribanez’s affidavit, Popular Brokerage notes that the quote sent by Morstan to Popular Brokerage in late January, 2007, (Defendant’s Exhibit L), also states that to bind coverage, a signed application, notice of excess line placement and total cost, completed affidavits, a signed terrorism form, and 30% premium deposit all must be provided.

Discussion

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.”

(Dallas-Stephenson v. Waisman, 39 AD3d 303, 306 [1st Dept 2007] (citing Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851, 853 [1985])). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material issues of fact.’” (People v. Grasso, 50 AD3d 535, 545 [1st Dept 2008] (quoting Zuckerman v. City of New York, 49 NY2d 557, 562 [1980])). In considering a summary judgment motion, evidence should be viewed in the “light most favorable to the opponent of the motion.” (Id. at 544.)

Summary judgment may be granted only if the evidence establishes as a matter of law that no issue of fact remains as to whether there was an agreement between the parties. (See, e.g., Mickey’s Rides-N-More, Inc. v. Anthony Viscuso Brokerage, 17 AD3d 328, 330 [2nd Dept 2005]). Insurance agents, in particular, “have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of an inability to do so.” (Murphy v. Kuhn, 90 NY2d 266, 270 [1997]). However, agents have no further obligation to obtain additional coverage for their clients. (Id.) Moreover, the burden is on the customer to initiate seek and obtain appropriate coverage. (Id.)

Under this standard, Popular Brokerage sufficiently makes a prima facie case demonstrating that it is not liable to GM Kingsbridge on the bases of negligence, breach of contract or misrepresentation. Popular Brokerage demonstrates through documentary evidence that the name on the insurance policy for East Kingsbridge was never changed to GM Kingsbridge, as the renewal certificate sent in December 2006 to 73 East Kingsbridge Road was made out to East Kingsbridge. Popular Brokerage additionally provides evidence that GM

Kingsbridge did not rely on the renewal of East Kingsbridge's policy, as GM Kingsbridge was actively soliciting quotes from Popular Brokerage from the end of January 2007 until the time of the fire. Popular Brokerage also submits evidence that GM Kingsbridge never obtained a new insurance policy, as it is undisputed that GM Kingsbridge never signed an application nor did it pay a premium, both necessary steps towards binding coverage of a new insurance policy.

The burden therefore shifts to GM Kingsbridge to establish that there is a material issue of fact as to Popular Brokerage's liability in order to defeat Popular Brokerage's summary judgment motion. GM Kingsbridge has not meet its burden.

GM Kingsbridge argues that it had an agreement with Popular Brokerage that East Kingsbridge's renewed policy would cover GM Kingsbridge and would still be applicable on the date of the fire. In support of this argument, GM Kingsbridge asserts that it was informed by Popular Brokerage's representative in September 2006 that the name on the policy would change and it would be covered. GM Kingsbridge additionally submits a renewal certificate and an invoice that it received in December 2006. However, the renewal certificate clearly indicates it is only good "in consideration of the payment of the premium shown below," (Plaintiff's Exhibit E), and the invoice also states that "30% of the renewal premium and any premium due on the expiring policy must be paid prior to the renewal effective date to avoid cancellation and earned premium." (Plaintiff's Exhibit K). It is undisputed that GM Kingsbridge did not submit a premium payment. Accordingly, even if East Kingsbridge's insurance policy did cover GM Kingsbridge, it expired in January 2007 since no premium was paid and did not provide coverage to GM Kingsbridge in February 2007, at the time of the fire.

GM Kingsbridge further claims that the documentation it received on February 10, 2007, the day before the fire, along with a verbal reassurance from Popular Brokerage's messenger, sufficiently indicated that it was insured. In support of this claim, GM Kingsbridge relies on Mr. Abdullah's statements and encloses insurance quotes, a premium invoice receipt and payment plan, and also an ACORD application, which GM Kingsbridge asserts is an application prepared after a client accepts a proposal. However, this documentation is insufficient to raise an issue of fact as to whether there was an agreement by Popular Brokerage on February 10, 2007, to obtain insurance for GM Kingsbridge. The premium invoice receipt submitted by GM Kingsbridge states that the "due date" is January 14, 2007, indicating a premium payment was due. (Plaintiff's Exhibit F). Additionally, the premium payment plan received by GM Kingsbridge also demonstrates that 25% of the premium payment is "due now." (Plaintiff's Exhibit G.) The ACORD application bears no indication of an accepted proposal, as it specifically states "carrier to be determined" and also provides the status of the transaction as "quote." (Plaintiff's Exhibit N). Thus, on its face, the ACORD application is merely used to solicit quotes electronically and is not a completed application.

Moreover, GM Kingsbridge's alleged belief that there was an existing insurance policy was in place from the store's prior owners is controverted by evidence that it solicited new quotes from Popular Brokerage, even as of February 9, 2007. As documentary proof of GM Kingsbridge's solicitations, Popular Brokerage submits e-mail quotes sent on January 22, 2007, from Morstan (Plaintiff's Exhibit M), and from Colonial Cooperative Insurance Company (Colonial). In particular, the quote from Morstan states "Quote Only - Not Binding" and "To Bind coverage, please provide the following: . . . deposit 30%." The e-mail from Colonial also

dictates, “[t]hank you for the opportunity to quote your customer’s insurance coverages . . . [w]e must request signed applications and required supplemental within 30 days of binding. Down payment of 25% is required to issue policy.” (Defendant Exhibit L). Not only does this indicate that GM Kingsbridge did not have an expectation that by the prior store’s insurance plan renewed, it also demonstrates that a signed application and premium payment were necessary to assure binding of the policy.

GM Kingsbridge also incorrectly relies on the deposition testimony of Popular Brokerage’s President, Peribanez, in support of its claims. GM Kingsbridge notes that Peribanez testified that a “proposal does not need to be signed to bind coverage.” (Peribanez Deposition, 200). However, he explained that the proposal was simply “information from all over ...it more or less explains the coverage offered” (*Id.*). In contrast, he testified that if the client wants coverage, and accepts a proposal, then “that’s when we ask the person to sign...the application” (*Id.* at 200-201). Despite this testimony, GM Kingsbridge further contends that according to Peribanez a proposal is written only after the application is done, implying that the drafting of an proposal indicates that the ACORD application is complete. (*Id.* at 114-15). However, in this testimony, Peribanez was not referring to a completed application to be signed by the client but rather a client’s initial solicitation for a quote to the insurance company, which he termed an “application.”

Lastly, GM Kingsbridge contends that according to Peribanez a policy will renew “without any payments made.” (*Id.* at 128). However, his testimony indicates that even if GM Kingsbridge were covered under East Kingsbridge’s insurance policy, and even if renewal were

automatic and temporarily binding, the policy expired soon after GM Kingsbridge's failure to deposit its premium payment.⁵ (Id., at 177-178).

Indeed such testimony is consistent with the renewal certificate provided to GM Kingsbridge from Morstan that renewal was subject to payment from the renewal premium. Additionally, the cancellation request/policy release created by Popular Brokerage indicates that insurance policy was cancelled January 16, 2007, shortly after the renewal. (Plaintiff's Exhibit

O).

Finally, regarding the alleged oral assurances made by the messenger for Popular Brokerage to Mr. Abdullah, GM Kingsbridge's assertions that verbal acceptance is sufficient to obtain coverage and that no premium needed to be paid are not a reasonable basis for a misrepresentation claim. Specifically, the documentary evidence admittedly received by GM Kingsbridge demonstrates that in order to renew the policy or obtain coverage, payment was required. Under these circumstances, it cannot be said that GM Kingsbridge's reliance on the purported statements from a messenger, which GM Kingsbridge never directly sought to confirm with Popular Brokerage or with Morstan, was reasonable. (See Orlando v. Kukiela, 40 AD3d 829 [2d Dept 2007][justifiable reliance is an essential element of misrepresentation claim]; Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 19 AD3d 1056, 1058 [4th Dept 2005][insurance

⁵ Mr. Peribanez appears to provide the same explanation later in his own testimony:

Q: Did the policy . . . automatically renew . . . and then later have to be cancelled?

A: The policy renews automatically.

Q: So, yes it's renewed?

A: It renewed automatically.

Q: And then it had to be cancelled?

A: No, it, it will be cancelled if no money is received.

(Peribanez Deposition, 177-78).

broker could not be held liable for negligent or fraudulent misrepresentations of coverage absent a showing of reasonable reliance by the insured]).

Although GM Kingsbridge contends that insurance was in place on the date of the fire, the record does not support this assertion, nor GM Kingbridge's claim that Popular Brokerage breached any duty to obtain coverage for it in light of its failure to make any premium payments or to sign an application.

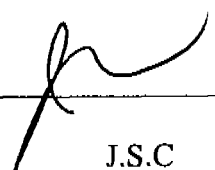
In view of the above it is

ORDERED that defendant Popular Brokerage's motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the complaint is dismissed with costs and disbursements to Popular Brokerage as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 24, 2009



J.S.C

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