

**Holyoke Mut. Ins. Co. in Salem v Works Home
Improvement**

Co., Inc.

2010 NY Slip Op 31007(U)

April 13, 2010

Supreme Court, Nassau County

Docket Number: 19964/06

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

HOLYOKE MUTUAL INSURANCE COMPANY
IN SALEM,

Motion Sequence #2
Submitted February 17, 2010
XXX

Plaintiff,

-against-

INDEX NO: 19964/06

THE WORKS HOME IMPROVEMENT COMPANY,
INC. ANNA MAZZIO, THE HIGHLANDS HOMEOWNERS
ASSOCIATION, INC., THE HIGHLANDS CONDOMINIUM
A and B1-V, SYLVAN GARDENS, THE RANCHES
HOMEOWNERS ASSOCIATION, STERLING WOODS
HOMEOWNERS ASSOCIATION, Fox MEADOWS
HOMEOWNERS ASSOCIATION, THE HAMLET
HOMEOWNERS ASSOCIATION, TIMBERIDGE
HOMEOWNERS ASSOCIATION, TOWN & COUNTRY
HOMEOWNERS ASSOCIATION,

Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4-7
Affs in Reply.....	9-12

Upon the foregoing papers, it is ordered that this motion by plaintiff Holyoke Mutual Insurance Company pursuant to CPLR 3212, 3001 granting summary judgment and/or declaring, *inter alia*, that a certain policy of insurance issued to co-defendant The Works

Home Improvement Company, Inc. ["The Works"], is void *ab initio*, and that the plaintiff is therefore not required to defend or indemnify The Works with respect to an underlying action entitled, *Mazzio v. Highlands Homeowners's Association and Condos*, pending in the Supreme Court, Suffolk County, under Index No. 12350-05, is granted.

In April of 2005, the plaintiff Holyoke Mutual Insurance Company [the "plaintiff" or "Holyoke"], issued to its insured, "The Works Home Improvement Company Inc" ["The Works"], its so-called "business owners" policy. Among other things, the policy provided stated coverage for contractor's liability with the policy classification "Carpentry-Interior" and also contains a contractor's tools and equipment endorsement.

Holyoke contends that it wrote the subject policy based upon the specific facts and representations contained in an April 2002, application containing information provided by The Works' President, David Kraus. In relevant part, the original 2002 application represented that Kraus was The Works' sole employee with no staff, and the company did not utilize subcontractors. The application particularizes the activities conducted by the business as "100% residential" and further breaks down that percentage as "33% Tile; 33% Siding Installation; 33% Carpentry".

A "Contractor's Liability Survey" prepared for Holyoke by the UIS Group, Inc. in 2002 contains a list of check boxes next to various types of contractor activities. The box entitled "carpentry," contains the figure "100," denoting that all or 100% of The Works' contractor-activities are concentrated in the area of carpentry. Notably, all other check boxes – including one entitled "Snow Plowing – were left blank.

After the policy was originally issued to The Works in 2002, it was annually renewed thereafter until the 2004. Prior to each annual renewal, Holyoke and/or third-party agencies acting on its behalf, conducted pre-renewal audit analyses and claims history review, after which the policy was renewed for a final, one-year period commencing, April 2005.

According to Holyoke, Kraus was interviewed during a June 2003, pre-renewal audit conducted by CP Commercial Specialists ["CP"]. In the "exit" interview conducted by CP, Kraus allegedly represented that he had no staff; no 1099 income, "no change in operations" to date; and no "cash," temporary or "leased" employees.

Significantly, the record establishes that Kraus had performed commercial snow removal work as early as the mid-1980's – well prior to the issuance of the Holyoke policy. Kraus testified that he had a separate trade name for his unincorporated snow removal business, which was known as "Snow Removal by David Kraus". According to Kraus, he always "kept * * * [his] snow plowing business separate from [his] carpentry [business], *i.e.*, "the Works". In fact, it was a "completely different" business in his mind.

Kraus recalled that he may have filed something with the Town of Brookhaven relating to his snow plowing business and also stated that he might have operated that business at one point as a partnership with his ex-wife. Significantly, he "never cancelled" the name "Snow Removal by David Kraus" and believed that "it's [the name] still in existence".

When he applied for the Holyoke policy, he purposely did not disclose "information regarding * * * [his] snow plowing business * * * because * * * [he] thought they were

separate businesses” and that the information was not relevant. In fact, it was his understanding that upon purchasing coverage from Holyoke, he was acquiring insurance solely “for * * * [his] home improvement business and not for * * * [his] snow plowing business”.

Kraus apparently began snow plowing in the mid-1990's for a condominium complex known as the Highland Condominiums located in Port Jefferson, New York. He later entered into written contracts with the Condominium Board of Managers, pursuant to which he agreed to plow the complex grounds.

While some of the snow removal contracts were drafted on “The Works” letterhead, Kraus testified that he used that letterhead only because he had also done carpentry work for the condominium and because it just “seemed easier” to bill with the same [“The Works”] letterhead. In hindsight, Kraus stated that it was a mistake to use “The Works” letterhead in his snow plow billings with the Highlands since “[t]he plowing has always been separate”.

In conjunction with the snow plowing, Kraus used two or three plow vehicles, hired and/or paid a number of workers; and on occasion, retained third parties to assist him when necessary – including a sanding subcontractor. Notably, and at Kraus' request, Highlands was added as an additional insured under the Holyoke policy in 2004.

In February of 2005, Anna Mazzio allegedly fell on ice and snow which had accumulated in the Highland's parking lot. Thereafter, by summons and verified complaint dated May 2005, Mazzio commenced an action in the Supreme Court, Suffolk County, against the Highlands Homeowners' Association [“Highlands”] Highlands subsequently

instituted a third-party action against The Works.

Upon receipt of the Mazzio complaint in February of 2006, Holyoke first ascertained that The Works was performing snow removal work.

By letter dated March 1, 2006, Holyoke informed Kraus that it would be denying coverage inasmuch as the snow plowing activity out of which the claim arose was not a covered risk under the policy issued to the Works.

Additionally, and apart from its disclaimer of coverage relative to the specific Mazzio incident, Holyoke further advised Kraus that, in fact, it was declaring the policy "to be void *ab initio*" based upon the allegedly material misrepresentations and/or false statements Kraus made relative to the business activities conducted by the Works, *i.e.*, his alleged failure to disclose that The Works performed snow plowing activities, hired additional employees; and retained subcontractors. Holyoke is currently defending The Works in the Mazzio action – albeit under a reservation of rights in accord with the rationale mentioned above.

With respect to the underwriting of the policy, Holyoke has submitted the deposition of Christine Marie Bussone, Vice President of commercial lines underwriting. In 2002, when the policy was originally issued, Holyoke maintained an underwriting document which Bussone described as a "commercial lines manual".

According to Bussone, Holyoke did not write snow removal coverage under its business owners line of policies in New York; nor had it filed for permission to write that sort of policy in New York.

Significantly, the subject commercial lines manual contains a section entitled, "Business Owners Policy New York, Eligibility and Binding Authority," which lists – or refers to other sections which list – the various contractor categories eligible for business owners coverage in New York. There is no reference to snow plowing as an eligible category or work. Although snow plowing is not explicitly referenced as a stated "exclusion" in the commercial lines manual, there is specific language under the "ineligible" contractor subsection which provides that any contractor risk not expressly mentioned as "eligible" would "not be considered eligible under this [business owners] program".

Based on its coverage and eligibility guidelines, Ms. Bussone stated that if Holyoke had been aware that The Works was engaged in snow plowing activities, it would never have issued the policy. Rather, the policy had been issued based upon Kraus' representations that he was a sole proprietor/employee of a small, residential home improvement business primarily engaged in carpentry, tiling and/or the installation of siding, *i.e.*, "33% Tile; 33% Siding Installation; 33% Carpentry".

Prior to issuing a renewal policy, Holyoke would, *inter alia*, conduct an audit of its proposed insured and also consider the applicant's claims/loss history. With respect to the Works, the record establishes that Kraus filed a claim on behalf of The Works in December of 2003 based upon the theft of a truck equipped with a snow plow blade – for which payment in the sum of approximately \$24,000.00 was later made in April of 2004.

At the time the 2003 claim was submitted, an internal adjusting/claims question apparently arose as to whether a snowplow would be covered item under the policy's "contractor's tools" endorsement. Holyoke's claims/adjusting Department ultimately

concluded that the item was, in fact, a covered tool under the policy.

At some point in 2005-2006, Holyoke discontinued writing most business owners policies in New York, which had previously encompassed various contractor trades and classes, including carpentry. A formal notice to this effect was sent to Kraus at some point in early 2006.

Thereafter, by summons and complaint dated November, 2006, Holyoke commenced the within action for stated declaratory relief and judgment to the effect that the subject policy was void *ab initio*, based upon Kraus' allegedly materially false statements relative to The Works' business activities and functions.

The Works has answered, denied the material allegations of the complaint and interposed various affirmative defenses, including defenses predicated upon waiver, estoppel and ratification.

Holyoke now moves for summary judgment on the foregoing theory. The motion should be granted.

“[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation” (*Varshavskaya v Metropolitan Life Ins. Co.*, 68 AD3d 855, quoting from, *Zilkha v Mutual Life Ins. Co. of N.Y.*, 287 AD2d 713, 714 see also, *Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1064; *Kiss Const. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414; *Schirmer v. Penkert*, 41 AD3d 688; Insurance Law § 3105[b], [c]).

A misrepresentation is material as a matter of law, when upon producing documentation concerning its underwriting practices, the insurer demonstrates “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; Insurance Law § 3105[c] see also, *Varshavskaya v Metropolitan Life Ins. Co.*, *supra*, 68 AD3d 855; *Gorra v New York Life Ins. Co.*, 276 AD2d 469, 470).

Further, and “[i]n the context of insurance, ‘[a]n insured cannot remain silent while cognizant that his insurance application contains misleading or incorrect information’” (*Dong Sheng Lu v Equitable Co., Inc.*, 6 AD3d 650, 651, quoting from, *Atlantic Life Ins. Co. of Am. v Katz*, 163 AD2d 283, 284-285 see, *Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115, 116).

With these principles in mind, the Court agrees that Holyoke has established its *prima facie* entitlement to judgment as a matter of law on its claim for stated declaratory relief (*Varshavskaya v Metropolitan Life Ins. Co.*, *supra*; *Kiss Const. NY, Inc. v Rutgers Cas. Ins. Co.*, *supra*; *Roudneva v Bankers Life Ins. Co. of New York*, 35 AD3d 580, 581; *Dwyer v First Unum Life Ins. Co.*, *supra*; *Bleecker Street Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 232-233).

More particularly, Holyoke has submitted the deposition of its Vice President of commercial lines underwriting, who testified, *inter alia*, that if Holyoke had been aware that The Works was performing snow removal activities, it would not have issued the subject policy (*Kiss Const. NY, Inc. v Rutgers Cas. Ins. Co.*, *supra*; *Dwyer v First Unum Life Ins. Co.*, *supra*; *Bleecker Street Health & Beauty Aids, Inc. v Granite State Ins. Co.*, *supra*, 38 AD3d 231; *Shabashev v New York Life Ins. Co.*, 150 AD2d 673).

In further support of its motion, Holyoke has produced the then governing “commercial lines” materials enumerating the various classes of contractors eligible for Business Owners coverage. Significantly, those guidelines do not include snow removal contractors and later define “ineligible” contractors as, *inter alia*, those not included in the foregoing, definitional list. The Works concedes that there is no evidence that Holyoke wrote commercial snow plowing coverage under its business owners policy category at the time.

Further, a review of the initial, 2002 application reveals that in the “applicant information” section, directly above Kraus’ signature, Kraus represented that the nature of The Works’ business was, “100% residential” and in particular, “33% Tile; 33% Siding Installation; 33% Carpentry”. In subsequent audit analyses conducted prior to policy renewals, Kraus was quoted as again confirming the foregoing descriptive account of The Works’ business activities and functions (*see generally, Dwyer v First Unum Life Ins. Co., supra*, at 116; *Gorra v New York Life Ins. Co., supra*; *Boyd v Allstate Life Ins. Co. of New York*, 267 AD2d 1038).

Although The Works admits that Kraus failed to disclose his snow removal activities, *inter alia*, it nevertheless argues that Holyoke was “fully aware” that The Works engaged in snow removal activities – based upon the 2003 snow plow claim. However, the mere payment of the theft claim pursuant to a contractor-tools endorsement, does not establish that Holyoke knew or should have known that The Works was conducting a full-blown, commercial snow plowing enterprise – particularly since Kraus represented to Holyoke’s auditors that The Works’ business had not changed since 2002.

More fundamentally – and crediting Kraus’ sworn deposition testimony – the snow plowing activities at issue were not performed by the business entity for which the subject policy was written. Rather, and as Kraus himself repeatedly testified, the snow removal work at the Highlands was actually performed by a “completely” separate and distinct business entity, *i.e.*, “Snow Removal by David Kraus”. Indeed, Kraus consistently stated that when he submitted the Holyoke application – and omitted reference to the snow plowing – he knew and believed he was applying for coverage relating solely to his home improvement/carpentry business – not for a discrete snow plowing business which he “always kept separate from the home improvement company * * *”. It follows that if the snow plowing was performed by a distinct entity known as “Snow Removal by David Kraus”, then the subject claim arises from the conduct of an uninsured entity for which coverage is therefore not available.

Kraus cannot repeatedly testify, on the one hand, that an entirely different, uninsured entity actually performed the snow plowing, but then, at the same time, implicitly assert that The Works also performed the very same plowing function, particularly after he represented that The Works’ insurable activities were exclusively limited to carpentry/home improvement contracting and that both entities were “completely” separate.

Lastly, although The Works concedes that Holyoke “has honored the procedural niceties applicable to rescissions of coverage, co-defendant Highland claims that Holyoke’s March, 2006 disclaimer was untimely (*see*, Insurance Law § 3420[d][2] *see generally*, *Continental Cas. Co. v Stradford*, 11 NY3d 443, 448-449; *First Financial Ins. Co. v Jetco Contracting Corp.*, 1 NY3d 64, 69-69). The Court disagrees.

While "The Works" was impleaded by the Highland in January 2006, Holyoke has established that it received notice of the third-party complaint on February 6, 2006 and that it then disclaimed shortly thereafter, by letter mailed dated March 1, 2006.

The Court has considered the defendants' remaining contentions and concludes that they are insufficient to defeat Holyoke's motion for summary judgment.

Accordingly, it is,

ORDERED the motion pursuant to CPLR 3212 by the plaintiff Holyoke Mutual Insurance Company for summary judgment declaring, *inter alia*, that a certain policy of insurance issued to co-defendant The Works Home Improvement Company, Inc ["The Works"], is void *ab initio*, is granted, is it is further

ORDERED and declared that the plaintiff is therefore not required to defend or indemnify The Works with respect to an underlying action pending in the Supreme Court, Suffolk County, under Index No. 12350-05 entitled *Mazzio v. Highlands Homeowners's Association and Condos, et., al.*

Dated: April 13, 2010



UTE WOLFF LALLY, J.S.C.

ENTERED

APR 19 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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