

**Matter of Merrimack Mut. Fire Ins. v 148 Magnolia,
LLC**

2010 NY Slip Op 32039(U)

July 30, 2010

Sup Ct, NY County

Docket Number: 104598/09

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

MEMORANDUM DECISION
INSURANCE
148 MAGNOLIA

INDEX NO. 104598/10
MOTION DATE 5/3/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this petition motion to/for declaratory judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-3</u>
<u>4-7</u>

Cross-Motion: Yes No
+ adjudge

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the enacted memorandum decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1-19).

Dated: 7/30/10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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 55

-----X

In the Matter of
MERRIMACK MUTUAL FIRE INSURANCE,

Petitioner,

Index No.: 104598/09

-against-

148 MAGNOLIA, LLC, LOGEO ASSOCIATES,
LLC, RYFI, LLC and TOJA ENTERPRISES,
LLC,

DECISION, ORDER and
JUDGMENT

Respondents

JANE S. SOLOMON, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Office (Room
1212).

Petitioner Merrimack Mutual Fire Insurance Company (Merrimack) seeks a declaratory judgment that it is not obligated to defend or indemnify respondents in the actions *146 Chambers Owners, LLC v 148 Magnolia, LLC* (N.Y. County Index No. 600288/08) and *Seneca Ins. Co. v Chambers Owners, LLC* (N.Y. County Index No. 101854/08); that respondents breached a written agreement with Merrimack under which it was agreed that Merrimack could withdraw the defense it provided to respondents in the event that Merrimack was successful in the action titled *148 Magnolia, LLC v Merrimack Mutual Fire Ins.* (N.Y. County Index No. 111200/07, hereinafter the *148 Magnolia Action*); and for a declaration pursuant to Insurance Law § 3105 that the insurance policy it issued to respondents is void *ab initio* due to material misrepresentations in the application for insurance.

When this petition was commenced by order to show cause, the court issued a temporary restraining order staying the three above-referenced actions pending a hearing of this motion. This motion was heard on May 3, and the stay was continued with respect to the *146 Chambers Owners, LLC* and *Seneca Ins. Co.* matters, and a pre-trial conference was scheduled for July 26, 2010 in the *148 Magnolia* Action.

These lawsuits arise from a fire that began at 148 Chambers Street in Manhattan (the Premises), a building owned and being renovated by respondents, on May 4, 2007. The facts are set forth in some detail in a decision and order issued in the *148 Magnolia* Action, dated March 8, 2010 (see Decision and Order, Order to Show Cause, Ex. H, hereinafter referred to as the Underlying Decision). As relevant here, the fire began in connection with the renovation work at a time when the fire suppression system was disabled. The Premises were damaged, as were neighboring buildings, resulting in lawsuits against respondents by the owners of neighboring properties and their subrogees.¹

Merrimack issued a business owner's insurance policy to respondents with coverage for the Premises. The policy did not cover unoccupied buildings, and was not a builder's risk policy

¹ The *146 Chambers Owners, LLC* and *Seneca Ins. Co.* matters.

appropriate for the gut renovation respondents undertook on the Premises. Merrimack disclaimed coverage.

Respondents commenced the *148 Magnolia* Action against Merrimack for breach of contract in refusing to cover the claims against the policy, and for negligence in failing to provide the correct coverage. Respondents also sued their insurance broker, another broker involved in procuring the Merrimack policy, and a construction contractor hired to perform work at the premises (see, Summons and Complaint in the *148 Magnolia* Action, attached to Order to Show Cause at Ex. D).

In the *148 Magnolia* Action, Merrimack moved for summary judgment dismissing the complaint and all cross-claims as against it, and for declaratory judgment that Merrimack was not obligated to defend or indemnify respondents' claims for property damage due to fire loss and business interruption. In the Underlying Decision, Merrimack's motion was granted in all respects but one: declaratory judgment was not granted because it had not been pleaded. The complaint and all cross-claims were dismissed as against Merrimack, but the *148 Magnolia* Action continues as against respondents' insurance broker, RAL Services, Inc., and the contractor.

Before Merrimack made its summary judgment motion in the *148 Magnolia* Action, it entered into an agreement with respondents' counsel as evidenced by a letter dated April 25,

[* 5]

2008 (see, Letter from Michael E. Stern, Esq.; Order to Show Cause, Ex. G). It was agreed that if Merrimack was successful in the *148 Magnolia* Action, respondents would allow Merrimack to withdraw the defense it was providing in the *146 Chambers Owners, LLC* and *Seneca Ins. Co.* matters without the necessity of a court order. "In that eventuality," they further agreed, Merrimack would not seek to recover the amounts it expended in defense of respondents in those actions, and respondents would make no further claims that Merrimack was responsible to defend or indemnify respondents in any other action commenced as a result of the May 4, 2007 fire. The agreement is signed on behalf of the respondents herein by Craig A. Blumberg, their attorney in this action and in the *148 Magnolia* Action.

After the Underlying Decision issued, Merrimack wrote to *148 Magnolia* and stated that, "per prior written agreement, we hereby withdraw from providing a defense" in the *146 Chambers Owners, LLC* and *Seneca Ins. Co.* action (Letter from Mark E. O'Malley, CPCU, dated March 26, 2010, Order to Show Cause, Ex. I). Respondents' attorney responded by demanding that Merrimack immediately rescind the March 26, 2010 letter and continue to provide a defense as required by the Merrimack policy (Letter from Craig A. Blumberg, Esq., dated April 5, 2010, Order to Show Cause, Ex. J). He also threatened to commence new lawsuits in

federal court alleging breach of contract and bad faith if the defenses were withdrawn (*id.*).

This proceeding was commenced soon thereafter.

Respondents contend that because one of the elements of relief sought in Merrimack's motion for summary judgment in the 148 *Magnolia* Action was not granted, Merrimack cannot claim that it was successful. Also, the Underlying Decision granted summary judgment to Merrimack dismissing the complaint and cross-claims against it, but did so without adopting each of the contentions made by Merrimack. In particular, Merrimack had argued that it owed no duty to cover the loss because of respondents' breach of a protective safeguard endorsement in the policy, and that it was entitled to a declaration that the policy does not cover property undergoing renovations so it did not cover the sustained loss. The Underlying Decision held in Merrimack's favor on the issue that it owed no duty to cover the loss due to "evidence that the sprinkler system was disabled for a significant period of time before the fire is uncontested . . . (and) (t)he policy language requiring plaintiffs to maintain an operational sprinkler system in the Premises is clear and enforceable" (Underlying Decision, 4-5). In finding that Merrimack had no contractual duty to respondents in connection with the claims against the policy, the court did not need to separately address the question of whether the Merrimack policy could have covered losses incurred in

connection with a gut renovation of the Premises. The request for declaratory judgment on the latter issue was denied on the procedural basis that no claim for declaratory judgment was pleaded (*id.*, 5-6).

Respondents' argument that Merrimack did not succeed in the *148 Magnolia* Action, and that the Underlying Decision was not favorable to Merrimack, is utterly without merit. If respondents considered the renovation coverage issue to be paramount and determinative of their dispute, it could have sought reargument on that issue on the grounds that the court failed to apprehend the true nature of their dispute (CPLR 2221). They did not, and its opposition to this petition fails to articulate any basis upon which it could be said that Merrimack was unsuccessful in the *148 Magnolia* Action such that it is obligated to continue to provide a defense in the *146 Chambers Owners, LLC* and *Seneca Ins. Co.* actions under the terms of the April 25, 2008 agreement.

Merrimack's request for a declaration that the Policy is void *ab initio* pursuant to Insurance Law § 3105 is denied. For the insurer to be entitled to rescind the policy *ab initio*, it must identify a material misrepresentation in the application that was intended to defraud the insurer (*Dwyer v First Unum Life Ins. Co.*, 41 AD3d 115 [1st Dept., 2007]). The insurer also has the burden to show that the alleged misrepresentation is material, i.e., that knowledge by the insurer of the actual facts

which the applicant misrepresented in the application would have led to a refusal by the insurer to issue the policy (Insurance Law § 3105[b], and see *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, [1st Dept, 2009]).

Merrimack submits a copy of the same unsigned "affidavit" of its employee, Tom Majerison III, submitted in Merrimack's motion for summary judgment in the *148 Magnolia* Action, together with copies of documents relating to the Merrimack policy, a copy of the policy itself, and a copy of Majerison's deposition transcript from the *148 Magnolia* Action. While the policy and Majerison's deposition testimony help explain Merrimack's underwriting policies, suggesting that it did not insure buildings undergoing construction and would not have issued a policy to respondents had it known that a complete renovation was contemplated. Therefore, the question of whether the Premises were under construction is a material fact under Insurance Law § 3105. However, the petition lacks evidence in admissible form that respondents made material misrepresentations with the intent to defraud Merrimack.

Accordingly, it hereby is

ORDERED, ADJUDGED and DECLARED that

1. Merrimack is not obligated to defend or indemnify respondents in the *146 Chambers Owners, LLC* and *Seneca Ins. Co.*

actions, or in any claim resulting from the May 4, 2007 fire at the Premises; and

2. Under the terms of the written agreement between Merrimack and respondents, dated April 25, 2008, Merrimack was successful in the 148 Magnolia Action and is entitled to withdraw its defense of respondents in the 146 Chambers Owners, LLC and Seneca Ins. Co. actions without further court order; and

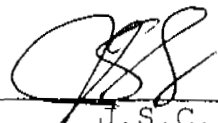
3. Merrimack has not established that it is entitled to a declaration in its favor that the subject policy is void ab initio pursuant to Insurance Law § 3105; and

4. The stays of the 146 Chambers Owners, LLC and Seneca Ins. Co. actions are lifted, and respondents' counsel is directed to serve a copy hereof with notice of entry upon the parties to those actions, by no later than August 20, 2010; and

5. Compliance conferences in the 146 Chambers Owners, LLC and Seneca Ins. Co. actions are scheduled together with a pre-trial conference in the 148 Magnolia Action, to be held in Part 55 on August 31, 2010 at 10 AM.

Dated: July 30, 2010

ENTER:



J.S.C.
JANE S. SOLOMON

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).