Burlington Ins. Co. v 3690 Jad Food Corp.
2015 NY Slip Op 30395(U)
February 23, 2015
Sup Ct, Bronx County
Docket Number: 83751/14
Judge: John A. Barone
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-12

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THE BURLINGTON INSURANCE COMPANY,

MEMORANDUM DECISION
Index No. 83751/14

Plaintiff,

-against-

3690 JAD FOOD CORP. dba C-TOWN,

Defendant.

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HON. JOHN BARONE:

Plaintiff's motion for summary judgment is decided as follows:

Plaintiff issued a commercial liability policy, effective from May 1, 2011 to May 11, 2012, to defendant, which operated a supermarket. The premium for the policy was dictated by defendant's gross sales during the policy period. Based on the $2,500,000 estimate contained in defendant's application submitted to plaintiff, the advance premium was set at $58,017, which defendant paid. Under the policy, defendant's actual gross sales were subject to an audit at the close of the policy period; if the actual gross sales exceeded the estimated gross sales, an additional premium payment would be owed to plaintiff. Plaintiff performed the audit and concluded that defendant's actual gross sales greatly exceeded the estimated gross sales used to calculate the advance premium. As a result, plaintiff determined that defendant owed it an additional $56,121.54. Defendant did not comply with plaintiff's demand for the additional payment, and plaintiff commenced this action against defendant to recover that unpaid premium.

Plaintiff seeks summary judgment on the complaint. In support of the motion, plaintiff

submits the affidavit of its account receivable and collections manager, a copy of the policy, documents relating to the audit, and a break-down of the calculations of the advance premium and the additional sum due as a result of the audit.

Defendant opposes the motion, arguing that it requested from its brokers, third-party defendants BCC Group, Inc. and BCC Facilities, Inc. ("BCC"), a general comprehensive liability insurance policy with a fixed premium that was based on the square footage of the insured premises, but the policy procured from plaintiff proved to have a variable premium based on the gross sales. Defendant also argues that the application for insurance that it submitted to plaintiff was altered after defendant's principal signed it. Specifically, defendant maintains that it did not make a representation regarding its estimated gross sales, yet an estimate ($2,500,000) was inserted into the application, and was used as the basis to calculate an advance premium. In this vein, defendant asserts that it never made any representation to either BCC or plaintiff regarding defendant's gross sales, and surmises that either BCC or plaintiff inserted the estimate without defendant's authorization. Thus, defendant argues that triable issues of fact exist regarding whether the application was altered, whether plaintiff was negligent in not verifying the representation of gross sales with defendant, and whether defendant was fraudulently induced into entering into the policy.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the complaint. The affidavit of plaintiff's accounts receivables and collections manager, the policy, and the documents relating to the audit, establish (1) that plaintiff issued a binding commercial liability policy to defendant; (2) that defendant was contractually obligated to pay an additional premium based on a post-policy period audit; (3) that the audit was duly performed; (4) the amount of the additional premium; and (5) that the additional premium is outstanding (*see Evanston Insurance Co. v Po Wing Hong Food Market, Inc.*, 21 AD3d 333 [1st

Dept 2005]; *see also Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965 [2d Dept 2014]).

In opposition, defendant failed to raise a triable issue of fact. Initially, to the extent defendant believes and can establish that BCC was negligent (or worse) in failing to procure the coverage defendant desired, in representing to plaintiff an estimate of defendant's gross sales, or altering the application submitted to plaintiff, defendant's remedy is an action against BCC, defendant's broker (*see generally Voss v Netherlands Insurance Co.*, 22 NY3d 728 [2014]).[1]

Defendant's assertion that summary judgment in plaintiff's favor is inappropriate because a triable issue of fact exists regarding whether the application it submitted to plaintiff was altered is without merit. Regardless of whether the application was altered and who altered it, the controlling document as between plaintiff and defendant is the policy itself (*see Evanston Insurance Co. v Po Wing Hong Food Market, Inc.*, *supra*), which defendant was obligated to read before signing (*see Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1 [1988]). Indeed, defendant is bound by the policy's terms absent a valid excuse for not reading it (*see id.*). The policy, which defendant signed, spelled-out the method by which the premium would be calculated, including the significance of the estimated gross sales, which was specified in the policy as $2,500,000. Thus, any alteration of the application was irrelevant in the main action.

For similar reasons, defendant's argument that a triable issue of fact exists regarding whether it was fraudulently induced to enter into the policy is without merit. "To make out the basic elements of a fraudulent inducement claim, a plaintiff must establish that the reliance on the false representation was justified" (*Gonzalez v 40 West Burnside Ave. LLC*, 107 AD3d 542,

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[1]Defendant commenced a third-party action against BBC seeking indemnification or contribution.

544 [1st Dept 2013]). But a party's failure to read a contract precludes it from establishing the justifiable reliance element (*see Bontempts v Aude Const. Corp.*, 98 AD3d 1071 [2d Dept 2012]; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265 [1st Dept 2008]; *Daniel Gale Associates, Inc. v Hillcrest Estates, Ltd.*, 283 AD2d 386 [2d Dept 2001]). Defendant's claim of fraudulent inducement is premised on plaintiff's issuance of a policy with a variable premium and plaintiff's failure to inform defendant that the policy had a variable premium. Had defendant read the policy, it would have learned readily that the policy had a variable premium, and defendant's failure to read the policy precludes any defense of fraudulent inducement in the main action.

Lastly, defendant has not established entitlement to relief under CPLR 3212(f) because defendant has not identified any potential disclosure that could reasonably be expected to demonstrate the existence of a triable issue of fact in the main action.

Accordingly, it is hereby ordered that plaintiff's motion is granted; and it is further,

Ordered that the third-party action is severed from the main action; and it is further,

Ordered that plaintiff is directed to settle judgment on notice.

This constitutes the decision and order of the court.

Dated: 2/23/15

JOHN BARONE, J.S.C.