

Great Am. Ins. Co. of N.Y. v L. Knife & Son, Inc.

2015 NY Slip Op 30606(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 157164/13

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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GREAT AMERICAN INSURANCE COMPANY OF
NEW YORK,

Plaintiff,

-against-

DECISION and ORDER

Index No. 157164/13
Motion Seq. No. 002

L. KNIFE & SON, INC. and
U.B. Distributors, LLC,

Defendants.

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SALIANN SCARPULLA, J.:

This is an action for a declaratory judgment by plaintiff Great American Insurance Company of New York (“Great American”) in connection with an excess flood insurance policy issued to defendants L. Knife & Son, Inc. (“L. Knife”) and U.B. Distributors, LLC (UB) (collectively, “defendants”). Plaintiff moves, pursuant to CPLR 3212, for an order granting summary judgment declaring that the policy is void *ab initio* because of a material misrepresentation, and dismissing defendants’ counterclaims for a declaratory judgment and breach of contract. For the reasons stated below, the motion is denied.

Background

L. Knife is the parent corporation of UB, which is a beer and liquor distributor with a warehouse located at 1213-1217 Grand Street in Brooklyn, New York (“the Premises”). Defendants state that, because the Premises is located very close to the Gowanus Canal, they have maintained primary and excess flood insurance since 2002.

In November 2007, L. Knife, through its insurance broker, TGA Cross, obtained a primary flood policy under the National Flood Insurance Program. TGA Cross then contacted Keith Morrell of Swett & Crawford, which is a wholesale insurance broker, to obtain excess flood insurance for L. Knife. Mr. Morrell provided TGA Cross with an application for excess flood insurance from Great American.

Mary Coates, of TGA Cross, submitted an application for excess insurance to Great American, seeking \$4 million in coverage for the Premises and \$2.5 million in coverage for the contents of the Premises. It is undisputed that the line on the application titled “contents value” was left blank.

According to Great American, one of its underwriters, James Luiz, was informed in an email from Mr. Morrell that the value of the contents was \$3 million. However, defendants submit affidavits from Coates and from Jeffrey Annis, L. Knife’s Vice President of Administration, stating that neither of them is aware of how Mr. Morrell arrived at that value and neither of them discussed with him how he arrived at that value

for the contents of the Premises. Notably, neither side has submitted an affidavit from Mr. Morrell addressing this issue.

Luiz states that he originally declined the application because of the risk associated with the Premises. Specifically, he states that the Premises is located in what is referred to as a Flood Zone A, which, the parties agree, is the highest risk designation that can be attributed to a property. Further, he states that, as a liquor distributor, defendants' stock is very susceptible to loss because resale of such products is highly restricted even after a minor loss. Luiz states that he reconsidered defendants' application after Morrell informed him that the inventory was stacked on pallets and had a total value of \$3 million.

On December 17, 2007, Great American issued an excess flood policy with effective dates of December 31, 2007 through December 31, 2008. The premium for the policy was \$22,820, which, according to Luiz, was based on a total insurable value of \$7 million. On January 31, 2008, Great American conducted an inspection of the Premises and its contents. It is undisputed that the inspection did not result in any changes to the amount of coverage under the policy or the amount of the premium.

The policy was renewed four times. According to Great American, each renewal was based on a total insurable value of \$7 million

On October 29, 2012, defendants suffered significant damage to the Premises and its contents as a result of Hurricane Sandy. On October 30th, L. Knife submitted a claim to Great American for approximately \$5 million.

On August 6, 2013, Great American notified L. Knife that the claim was denied and that the policy was void from its inception due to an alleged material misrepresentation on the original 2007 application. Great American stated that its investigation determined that the total value of the Premises and its contents during the period of the relevant renewal policy was nearly \$13 million, rather than the \$7 million allegedly relied on by Great American in writing the policy.

Great American commenced this action in August 2013, seeking a declaration that the policy is void *ab initio* on account of defendants' alleged material misrepresentations. In their answer, defendants asserted counterclaims for a declaratory judgment that the policy is in full force and effect, and for breach of the insurance contract.

Discussion

Great American now moves for summary judgment seeking a declaration that the policy is void *ab initio* because of a material misrepresentation. Specifically, Great American contends that defendants under-reported the value of the property to be insured in both the original application for insurance and during the renewal process. They assert that the value of the property is an important factor that is relied on by Great American in

determining whether or not to issue a policy for a particular risk. If the policy is issued, the value of the property is used to calculate the premium to be charged.

Great American contends that defendants' material misrepresentation induced Great American into issuing a policy that it otherwise would not have issued, and misled Great American into issuing that policy for a premium that was significantly less than the premium that would have been charged had the correct values been reported.

“[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented.” *Smith v. Guardian Life Ins. Co. Of Am.*, 116 A.D.3d 1031, 1031 (2d Dep’t 2014) (internal quotation marks and citation omitted); *Kiss Const. NY, Inc. v. Rutgers Cas. Ins. Co.*, 61 A.D.3d 412, 412 (1st Dep’t 2009).

“To establish materiality as a matter of law, the insurer must 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.” *Id.* at 1031-32. “Whether a misrepresentation is material is generally a question of fact for the jury.” *Id.* at 1031.

In the case at hand, questions of fact exist which preclude a granting of summary judgment. Specifically, it is not clear, as a threshold matter, whether defendants misrepresented any facts.

The gravamen of the complaint is that defendants misrepresented the total insurable value of the Premises and its contents. However, Great American has not set forth any actual representations from either of the defendants as to the value of the contents of the Premises. Instead, it is undisputed that, while defendants sought \$2.5 million in coverage for the contents, the line on the original application titled "contents value" was left blank.

Great American contends that it was informed by Keith Morrell that the value of the contents was \$3 million. However, Mr. Morrell was a wholesale broker contacted by defendants' insurance broker. Thus, it is not clear at this point what authority he had to speak on behalf of defendants. Moreover, plaintiff has not submitted an affidavit from Mr. Morrell addressing this issue.

Even assuming that a misrepresentation occurred, Great American has not demonstrated as a matter of law that it was material. Great American contends that it would not have issued the policy if it had known the actual total insurable of the Premises and its contents. However, this is contradicted by its issuance of the policy despite the line for "contents value" being left blank.

Further, while Great American submits affidavits from Mr. Luiz and other employees, as well as copies of its underwriting guidelines, to demonstrate that it would not have issued the policy, that assertion is contradicted by evidence submitted by defendants. Among other things, defendants submit an affidavit from Daniel Spragg, whom they assert is an insurance industry expert. Mr. Spragg states that Great American failed to follow its underwriting guidelines not only when it first accepted this risk, but when it renewed the policy for four successive years thereafter. He also states the basis on which Great American bound this risk and issued the policy, had nothing to do with any consideration of the total insurable value of the Premises and contents.

In light of the conflicting evidence submitted by the parties, the court finds that summary judgment is not warranted. The issue of whether defendants materially misrepresented any facts such as would void the policy remains a question of fact. *See Smith v. Guardian Life Ins. Co.*, 116 A.D.3d at 1031.¹

In accordance with the foregoing, it is

ORDERED that plaintiff Great American Insurance Company of New York's motion for summary judgment declaring that the policy is void *ab initio*, and dismissing defendants' counterclaims is denied; and it is further


¹ The Court notes that Great American moved for summary judgment prior to the close of discovery. The parties are directed to resume discovery in this action.

ORDERED that counsel are directed to appear for a status conference at 60 Centre Street, Room 208, on May 13, 2015 at 2:15pm.

This constitutes the decision and order of this Court.

Dated: New York, New York
April 17, 2015

ENTER


Saliann Scarpulla, J.S.C.