Burlington Ins. Co. v Clearview Maintenance & Servs. Inc.
2015 NY Slip Op 32880(U)
March 16, 2015
Supreme Court, Richmond County
Docket Number: 150381/14
Judge: Kim Dollard
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

-against-

CLEARVIEW MAINTENANCE & SERVICES INC.,

Defendant.

----------x

DCM Part 4
Present:
Hon. Kim Dollard

AMENDED
DECISION AND ORDER

Index No. 150381/14
Motion No. 3526-001

The following papers numbered 1 to 3 were fully submitted on the 9th day of January, 2015:

	Pages Numbered
Notice of Motion for Summary Judgment by Plaintiff, with Supporting Papers and Exhibits (dated October 23, 2014)	1
Affirmation in Opposition by Defendant, with Supporting Papers, Exhibits and Memorandum of Law (dated December 16, 2014)	2
Reply Affirmation by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated January 5, 2015)	3

Upon the foregoing papers, plaintiff's motion for summary judgment is granted and defendant's counterclaims are dismissed.

This is an action to recover the sums alleged to be owed plaintiff-insurer as additional premiums on two general liability insurance policies covering defendant's roofing business. To the extent relevant, plaintiff issued two general liability insurance policies to defendant, the first (Policy No. HGL0032579), effective October 19, 2012 through October 19, 2013, at an estimated premium of $47,500 (hereinafter, the "first policy") (*see* Plaintiff's Exhibit "1"), and the second

(Policy No. HGL0036229), effective October 19, 2013 to February 15, 2014, at an estimated premium of $52,500 (hereinafter, the "second policy") (*see* Plaintiff's Exhibit "3"). According to plaintiff, both sums were calculated on an estimated amount of exposure based on defendant's expected gross sales during the policy period, and were subject to audit at the end of the policy year to determine plaintiff's actual exposure, i.e., the total premium based on defendant's actual gross sales. In answer to the complaint, defendant challenges plaintiff's calculation and has asserted counterclaims for damages arising out of plaintiff's alleged use of a "bait and switch" fee structure which, it is further alleged, constitutes a fraudulent and deceptive act or practice in violation of General Business Law § 349 (*see* Defendant's Verified Answer to Amended Complaint and Counterclaims).

In support of its motion for summary judgment, plaintiff has submitted the affidavit of Joel M. Richardson, Jr., its accounts receivable and collections manager, who attests that the deposit towards the premium for each policy was based on plaintiff's estimated exposure, as measured by an estimate of the insured's anticipated gross sales during the relevant policy period, and were expressly stated to be "subject to audit at the conclusion of the policy term in order to determine [plaintiff's] actual Exposure" and the concomitant premium (*see* Affidavit of Joel M. Richardson, Jr. at paras 4, 11). According to Richardson, "[t]he premium is developed by multiplying the agreed upon rate or rates by each $1,000 of Exposure" (id.). Here, it is claimed that the agreed upon composite rate for defendant's first policy was $158.334 per $1,000 in gross sales (id. at 5) and, based on an audit performed on November 14, 2013, it was determined that plaintiff's actual Exposure (as measured by defendant's gross sales) was $1,693,441.00 (id. at 8; *see also* Plaintiff's Exhibit "2"). It is further claimed that after multiplying the actual exposure by the composite rate,

the total audited premium for October 2012 - October 2013 was $268,129.00 (id. at 9).[1] With regard to the second policy, the composite rate agreed upon was $175.00 per $1,000 in gross sales (id. at 12).[2] Based on an audit performed on May 8, 2014, it was determined that plaintiff's actual Exposure (gross sales) was $338,891.00 prior to cancellation, (id. at 16; *see also* Plaintiff's Exhibit "4"), and after multiplying the actual exposure by the composite rate, the total audited premium on the second policy through the date of cancellation was found to be $59,306.00 (id. at 17). Further calculation,[3] yielded a balance due on the second policy of $43,792. Accordingly, the total owed on both policies is claimed to be $272,805.08 (id. at 18).

Based on the Richardson affidavit, copies of the respective policies, and the auditor's statements, it is the opinion of this Court that plaintiff has established its prima facie entitlement to judgment as a matter of law for the sum stated in the complaint. More particularly, these submissions are sufficient to establish that based on the audits conducted in accordance with the terms of the respective policies, defendant would owe plaintiff the additional sum of $272,805.08 in unpaid premiums (*see Burlington Ins Co v. Casur Corp*, __AD3d__, 2014 NY Slip Op 08951 [2nd

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[1]When the total audited premium of $268,129.00 is credited with defendant's payment of the advance premium ($47,500.00), an additional premium of $220,629.00 was found to be required. However, after surplus lines taxes and fees were applied, a total of $229,012.90 was claimed to be due and owing on the first policy (*see* Affidavit of Joel M. Richardson, Jr. at para 9, *see also* Plaintiff's Exhibit "2").

[2]The second policy was cancelled on February 15, 2014. However, it is not clear as to whether the cancellation was made at the request of the premium finance company or defendant.

[3]Here, the total audited premium of $59,306.00 was credited with the sum of $17,117.00 (the balance of the deposit paid by premium finance company), leaving an additional premium of $42,189.00 due and payable. Again, the addition of surplus lines taxes and fees brought plaintiff's claimed balance to $43,792.18 (*see* Affidavit of Joel M. Richardson, Jr. at para 17, *see also* Plaintiff's Exhibit "4").

Dept]).

In opposition, Mojsi Marke, defendant's president, attests that on or about October 1, 2012, he applied for a commercial general liability insurance policy through someone named Najeeb Cabbad, "a person [he] understood to be an agent of the insurance companies who would write the policy, including plaintiff Burlington" (*see* Affidavit of Mojsi Marke, para 3). Marke further maintains that he provided information to Cabbad regarding his insurance requirements, and the latter filled-in the application (id. at 3-4). A copy of the application reveals that in question number 11, Marke was asked for defendant's "receipts for [the] previous three years", to which he responded as follows: $300,000 for 2012, $300,000 for 2011 and $250,000 for 2010 (id. at 4). According to Marke, he "understood that the questionnaire asked for information [about defendant's] receipts for the roofing work only,... [and] that [plaintiff's] insurance premium... would be based on [the] $300,000... [received for] roofing work" (id. at 4-5). Further, defendant's president claims that it was not until after the audit that plaintiff "made [it] clear to [him] that the adjusted annual premium was based on all gross sales, including the roofing material (without roofing labor) that [defendant] also sell[s]" (id. at 9). Thus, Marke protests that the gross sales number employed by plaintiff to calculate its total exposure incorrectly includes monies received for other than roofing work (id. at 12). Once Marke understood that plaintiff's adjustable premium was based on the company's total gross sales rather than its roofing work or roofing payroll alone, he immediately cancelled the second year of coverage (id. at 10).

Based on the foregoing, defendant has failed to raise a triable issue of fact (*cf. Essex Ins Co v. Laruccia Constr, Inc.*, 71 AD3d 818 [2nd Dept 2010]).

The court's principal objective in interpreting a contract is to determine the parties' intent

from the language which they employed in order to fulfill their reasonable expectations. Accordingly, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain and ordinary meaning of its terms (*see Prakhin v. Fulton Towers Realty Corp*, 122 AD3d 601, 602 [2nd Dept 2014]). Manifestly, the role of the court is not to add, excise or distort the meaning of the terms that the parties chose to include, thereby creating a new contract under the guise of construction (id.). The interpretation of a contract presents a question of law for the court (*see Essex Ins Co v. Laruccia Constr, Inc.*, 71 AD3d at 818).

Here, both of plaintiff's policies include a "Composite Rate Endorsement" form, which provides, in relevant part, that "[t]he exposure shown in the Schedule is an estimate. Upon expiration of the policy, [plaintiff] will compute the earned premium by applying the composite rate shown below to the actual amount of the exposure as developed by final audit, subject to our retaining any applicable minimum earned premium" (*see* Plaintiff's Exhibits "1", "3", Form No. IFG-I-0152 09 09). The composite rate is further stated to "include all of your business operations and premises unless they are specifically excluded from this policy or if charged and scheduled separately under the non-adjustable premium" (id.). The composite rates indicated in these policies are $158.334 per $1,000 in gross sales and $175.00 per $1,000 in gross sales, respectively. Moreover, the "Commercial General Liability Coverage Form" specifically defines the insured's work as "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations" (*see* Plaintiff's Exhibits "1", "3", Form No. CG00011207).

To the extent that defendant argues that it believed Najeeb Cabbad to be an agent acting on plaintiff's behalf, it has failed to allege any misrepresentations on its part. Moreover, an insurance

broker is generally considered to be an agent of the insured, and will be held to have acted as the insurer's agent only where there is some evidence of action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred *(see Rendeiro v. State-Wide Ins Co*, 8 AD3d 253 [2nd Dept 2004]). In this case, there is no such indication, as Cabbad merely completed the application with the information provided by Marke.

Turning to the counterclaim premised upon plaintiff's alleged violation of General Business Law §349, defendant had failed to assert any deceptive act or practice on plaintiff's part. Moreover, the elements of a cause of action to recover damages for deceptive business practices under General Business Law §349 are (1) that defendant engaged in a deceptive act or practice, (2) the challenged act or practice was consumer-oriented, and (3) plaintiff suffered an injury as a result of the deceptive act or practice (*see Valentine v. Quincy Mut Fire Ins Co*, __AD3d__, 2014 NY Slip Op 08984 [2nd Dept 2014]). Again, none of these elements have been shown to exist in the case at bar, where it was defendant's unilateral misunderstanding that "gross sales" was limited in meaning to gross receipts from roofing work which lies at the core of this dispute.

Lastly, the Court rejects defendant's argument that the motion is premature. A party contending that a motion for summary judgment is premature is required to demonstrate that additional discovery might lead to relevant evidence, or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant (*see* CPLR 3212[f]; *Burlington Ins Co v. Casur Corp*, __AD3d__, 2014 NY Slip Op 08951 [2nd Dept]). Here, defendant seeks to conduct depositions in order "to ascertain if in fact the plaintiffs were aware that [defendant] had misunderstood the forms that they were submitting" (*see* Affirmation of Peter M. Kutil, Esq., p 3; emphasis added). A party's mere hope or speculation that evidence sufficient to defeat a motion for

summary judgment may be uncovered during the discovery process is insufficient to defeat the motion (id.).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that defendant's counterclaims are dismissed; and it is further

ORDERED judgment in favor of plaintiff in the sum certain amount of $272,805.08 plus interest from the date of the summons and complaint.

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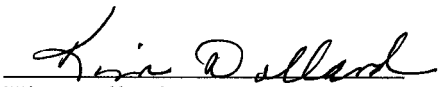

Kim Dollard, A.J.S.C.

Dated: March 16, 2015