

**US Underwriters Ins. Co. v Harborside Holding P.J.,  
LLC.**

2017 NY Slip Op 33094(U)

October 13, 2017

Supreme Court, Suffolk County

Docket Number: 15-603821

Judge: Sanford Neil Berland

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**E-FILE**

SHORT FORM ORDER

INDEX NO.: 15-603821

SUPREME COURT - STATE OF NEW YORK  
PART 6- SUFFOLK COUNTY

**PRESENT:**

Hon. Sanford Neil Berland, A.J.S.C.

US UNDERWRITERS INSURANCE  
COMPANY,

Plaintiff(s),

-against-

HARBORSIDE HOLDING P.J., LLC.,

Defendant(s).

**ORIG. RETURN DATE:** November 15, 2016  
**FINAL RETURN DATE:** January 10, 2017  
**MOT. SEQ. #:** 001 MD

**PLTF'S ATTORNEY:**  
**MEYERS, SAXON & COLE**  
**3620 Quentin Road**  
**Brooklyn, New York 11234**

**DEFT'S ATTORNEY:**  
**GRUENBERG KELLY DELLA**  
**700 Koehler Avenue**  
**Ronkonkoma, New York 11779**

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant, dated October 24, 2016, and supporting papers; (2) Answering Affidavits made by plaintiff, dated December 23, 2016, and supporting papers; (3) Replying Affidavits made by defendant, dated January 9, 2017, and supporting papers; it is,

**ORDERED** that the motion by defendant Harborside Holding P.J., LLC, made pursuant to CPLR 3212 seeking summary judgment on the issue of liability is denied; and it is further

**ORDERED** that the parties are to appear for a compliance conference on **Tuesday, October 17, 2017 at 9:30 A.M. before Part 6** located in the Cromarty Court Complex at 210 Center Drive in Riverhead.

This is an action brought by US Underwriters Insurance Company (Underwriters) to recover unpaid amounts, totaling \$85,652.00, that it claims the sole defendant, Harborside Holding P.J., LLC (Harborside), owes it for insurance coverage that Harborside allegedly requested US Underwriters to provide. According to Underwriters, that coverage was embodied in a property and casualty insurance policy ("the policy") issued to Harborside and another entity and insuring the premises located at 111 West Broadway in Port Jefferson, New York ("the premises"). The matter is before the court on Harborside's motion for summary judgment in its favor dismissing the complaint. Harborside contends that the application for the insurance policy was not signed by Harborside and that the purported signature of its principal, Thomas Schafer, on the application, dated July 19, 2012, and on two other documents - an insurance coverage premium quote/bind request dated 7/20/2012 and a Terrorism Insurance Coverage

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declination dated 7/19/2012 - are forgeries, rendering the alleged contract between the parties void *ab initio*. Further, Harborside maintains that it was formed for the sole purpose of owning the premises, that it has no involvement with the premises other than ownership of the land, that it “exists solely as a land owning entity” and has no employees, and that it never entered into any agreement with Underwriters to purchase insurance and never made any payments to it for a contract of insurance. In support of its motion, Harborside submits the pleadings, a purported “Affidavit” of Harborside signed by Mr. Schafer “on behalf of Harborside Holding P.J., LLC in his capacity as Managing Member,” and an affidavit, with exhibits, of Dennis J. Ryan, a board certified forensic document examiner (the “Ryan Affidavit”).

Underwriter’s Verified Complaint is bare bones and minimally revelatory, consisting of a generic introductory clause, four single-sentence paragraphs, a cautionary debt-collection statement and an *ad damnum* clause. The first two paragraph-sentences allege merely the plaintiff’s jural status, i.e., “Plaintiff is a corporation,” and alternative generic bases for venue. The only substantive, albeit terse, allegations are the following:

3. That defendant(s) on or about 7/20/13 did request the plaintiff to provide insurance.

4. Upon information and belief, defendant(s) defaulted under the terms of the agreement by failing to make the payments & there is now due and owing a balance in the specific sum \$85,652.00”.

In opposition to Harborside’s motion, Underwriters substantially amplifies, and to some extent modifies, its allegations. Through an affirmation of its attorney and the affidavit of its Vice President of Underwriting Services, John Colaprete, it asserts, *inter alia*, that the application dated July 19, 2012, for a commercial property and general liability insurance policy with liquor liability coverage, was submitted by Harborside through a broker in Bellport, New York and was received by Underwriters, which, according to Colaprete, “for all intents and purposes believed the application was signed by Tom Schafer on behalf of Harborside Holding P.J., LLC and West Broadway Tavern Corp. . . .” The application, in the section calling for “Description of Operations,” states, in pertinent part, “fine restaurant with Piano Bar and late night dancing on Friday and Saturday . . .” Underwriters issued the requested policy, naming both entities as insureds, for a term of one year, commencing July 20, 2012 and running through July 20, 2013. The “estimated” premium for the year, based on the information supplied in the application and subject to audit,” was \$17,883.00.

According to Colaprete, Harborside eventually participated in such an audit and renewed the policy for another term. Harborside denies that it did either, but Colaprete avers that after three unsuccessful attempts - in August and November of 2013 and February of 2014 - it succeeded in meeting with Schafer on April 1, 2014 and “conducted a physical annual audit” at that time. As a result of the audit, which showed greater actual food/liquor and liquor sales for the audit period - August 1, 2012 through August 1, 2013 - than were projected in the application

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(\$2,319,599 versus \$500,000 and \$793,580 versus \$100,000, respectively), the premium for the first annual policy period was increased by \$39,677.00, to \$57,560.00. Also as a result of the audit and Mr. Schafer's alleged authorization of it, the policy, according to Colaprete, was renewed for a second one-year term, but, because of the greater than projected sales that the audit revealed, the second-year policy premium, which had been estimated at \$19,644.00, was revised to \$65,619.00, an increase of \$45,975.00. Inasmuch as the total amount sought by Underwriters in this action is the sum of the two post-audit premium increases, \$85,652.00, it would appear that the estimated premiums were paid in each of the two years. (Although Underwriters in its motion papers is silent on this point, and Harborside in opposition to the motion twice asserts that it "has never made any payments to the plaintiff for a contract of insurance" (emphasis supplied), Harborside does aver, in the Fourth Affirmative Defense of its Verified answer, "[t]hat to the extent [Harborside] had entered into any agreement with [Underwriters] via a broker, that agreement was paid in full.") In addition, according to Colaprete, Harborside submitted to Underwriters, and Underwriters paid, two claims under the policy, one for \$40,000.00, with an August 3, 2013 date of loss, the other for \$22,500.00, with a March 9, 2014 date of loss. In light of the many disputed factual issues it cites concerning the acquisition, placement and utilization of the insurance coverage and compliance with its terms, Underwriters requests that Harborside's motion be denied, that discovery, including the deposition of Mr. Schafer, be allowed to proceed, and that Harborside and its attorneys be sanctioned under NYCRR § 130-1.1 for bringing what they claim is a frivolous motion without factual basis. In addition to the Colaprete affidavit and its attorney's affirmation, Underwriters has submitted, in support of its position, *inter alia*, copies of various declarations and endorsements for the second one-year term, which, among other things, show a policy effective date of July 20, 2013 and include both a signed insurance coverage premium quote/bind request dated July 20, 2013 and a Policy Cancellation Endorsement dated August 27, 2014 and giving June 23, 2014 as the "Cancellation Date of Policy"; a copy of the audit summary of April 1, 2014; and copies of the above-referenced claim-payment checks, which were dated, respectively, June 12, 2014 and May 1, 2015, and made payable to third parties and their respective attorneys.

In reply to Underwriter's contentions, and in further support of its motion, Harborside has submitted another affirmation of its attorney, as well as a further purported "Affidavit" of its own, also signed by Schafer in a purported representative capacity and repeating many of its prior assertions *in haec verba*. It asserts that it is an "out-of-possession landowner of the premises" that does not own or operate a restaurant, possess a liquor license or sell food or alcohol, and that it could not - and did not - participate in an audit of the "disputed policy," never applied for or renewed that policy, never made any payments to plaintiff for the policy and never made any claims under it. There is, however, no assertion that the signature on the April 1, 2014 "Audit Visit Verification," which was not addressed in the Ryan Affidavit, is not authentic, or that the July 20, 2013 premium quote/bind request was not genuinely signed by or on behalf of Harborside.

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The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form... and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

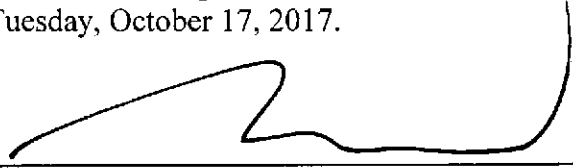
Harborside seeks to rely on the principle that where a forged signature has been found on a contract, there can be no meeting of the minds and as such the forgery renders that contract void *ab initio* (*see Orlosky v Empire Sec. Sys.*, 230 AD2d 401, 657 NYS2d 840 [3d Dept 1997]; *Ticor Tit. Guar. Co. v E.F.D. Capital Group*, 210 AD2d 841, 621 NYS2d 128 [3d Dept 1994], *lv. denied* 85 NY2d 809, 810 [1995]), *i.e.*, “null from the beginning, as from the first moment when a contract is entered into” (*Black’s Law Dictionary* [9th ed 2009]). Here, however, Harborside’s attempted invocation of that principle is confounded by evidence indicating, among other things, not only that the policy was issued, but that it was renewed for a second annual term, that claims were submitted and paid under it, that an audit was conducted, and that at least some portion of each year’s premiums was paid. Indeed, whether the core issue is framed as one of contract formation or, more simply, as the extent to which, if at all, Harborside is liable for the unpaid premiums Underwriters claims it is owed, it is clear that Harborside has failed to meet its burden, under CPLR 3212, to eliminate any triable issue of fact and to demonstrate that it is entitled to judgment in its favor as a matter of law. As a threshold matter, the affidavit of Dennis Ryan, which concludes that “Thomas Schafer did not sign his name to the Q1 Warrant Statement, Q-2 Disclosure Statement or the Q3 Binder,” is, at best, vague and wholly conclusory, in each instance relying on the same generic catalogue of handwriting characteristics followed by the summary, and unexplained, assertion that “there are no significant similarities.” Moreover, there are at least two potentially relevant signatures the authenticity of which Mr. Ryan does not address - the April 1, 2014 Audit Visit Verification and the July 20, 2013 premium quote/bind request, and even with respect to one of the three signatures he does purport to address, the corresponding document annexed to his affidavit as an exhibit, and which he calls the “Q-2 Disclosure Statement,” appears to be dated nearly a year later than the document described in his affidavit. No less significantly, even assuming that the two Harborside “affidavits” ostensibly signed by Mr. Schafer in a representative capacity are cognizable and can be received in support of a motion for summary judgment (*but see* CPLR 3212[b]), second

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sentence), issues of fact precluding summary judgment are evident, including the terms of the relationship, if any, between Harborside and West Broadway Tavern Corp. (the other named insured entity on the policy) and Mr. Schafer's relationship, if any, with the latter, and their respective relationships, *vel non*, with, and instructions, if any, to the placing broker; the history of premium payments, if any, for the policy; and the particulars of the insurance claims that Underwriters contends, but Harborside denies, were submitted to Underwriters under the policy by Harborside, and by whom and on whose behalf those insurance claims were submitted and against whom the underlying claims had been asserted. In short, any motion for summary judgment at this juncture is, at best, premature, as is the request in plaintiff's opposing papers for sanctions pursuant to 22 NYCRR §130-1.1, a request that, in any event, requires a motion or cross-motion (*see id.*, §130-1.1(d)).

Accordingly, defendant's motion made pursuant to CPLR 3212 is denied in its entirety, without prejudice to renewal, if defendant is so advised, after necessary discovery has been taken and upon papers meeting the requirements of CPLR 3212[b]. Should the motion be renewed, a copy of this decision shall be annexed thereto as an exhibit. The parties are reminded of the previously scheduled compliance conference on Tuesday, October 17, 2017.

Dated: 10/13/2017  
Riverhead, New York

  
HON. SANFORD NEIL BERLAND, A.J.S.C.

       FINAL DISPOSITION        XX   NON-FINAL DISPOSITION