SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

DORCHESTER, L.L.C.,

Plaintiff,

-against-

HERZKA INSURANCE AGENCY, INC.,

Defendant.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 607478/16

MOTION DATE: 1/16/19
Motion Sequence 007

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Support.....X
Memorandum of Law in Support.....X
Affirmation in Opposition.....X
Memorandum of Law in Support.....X
Reply Memorandum of Law.....X

Motion by plaintiff Dorchester, LLC for partial summary judgment on its first and second causes of action and dismissing defendant's ninth affirmative defense is **granted** in part and **denied** in part.

This is an action against an insurance broker for negligence. Plaintiff alleges that the broker's negligence resulted in a misrepresentation in the application for insurance, which allowed the insurer to disclaim coverage under the policy.

Plaintiff Dorchester, LLC is the owner of an apartment building located at 9-17 St. Paul's Road North in Hempstead. In 1998, Dorchester purchased the property from Adelphi University, which had used it as a dormitory. Dorchester, or its affiliates, own numerous apartment buildings. Bradford Mott is the sole member of Dorchester. Beginning in 2009, defendant Herzka Insurance Agency, Inc. became Dorchester's insurance broker.

DORCHESTER v HERZKA INSURANCE **Index No.: 607478/16**

Between October 2010 and June 2013, Herzka electronically transmitted 13 insurance applications to Distinguished Programs Insurance Brokers, an underwriting agent for Great American Insurance Company (Doc 50 at 5). The applications were for umbrella and excess liability policies covering apartment buildings owned by Mott through Dorchester or its affiliates.

In March 2012, Dorchester's lender required it to obtain a $5 million umbrella and excess liability policy covering four buildings, including the St. Paul's Road property, as a condition of refinancing the four buildings. On March 21, 2012, Herzka electronically submitted an application for an umbrella and excess liability policy covering the four buildings (Doc 255). Each application contained language stating that the buildings were "not eligible" for coverage, if they had not had their electrical systems "updated in the last 25 years" or they included "single room occupancy" (Id). Although the application contained a line for the applicant's, i.e. Dorchester's, signature, it was unsigned.

On June 27, 2012, Great American issued a certificate of coverage, covering 23 apartment buildings owed by Dorchester or its affiliates, including St. Paul's Road (Doc 41). The coverage provided was a $5 million umbrella and excess liability policy, which was excess to a primary policy for $1 million issued by Starr Indemnity & Liability Company, and was for the period August 19, 2012 through August 19, 2013 (Id). The certificate of insurance refers to a "master policy," issued to Distinguished Properties Umbrella Managers. Although Dorchester did not receive the master policy, it concedes that it received the certificate of coverage.

The certificate of insurance was forwarded by Herzka to Dorchester by email dated August 15, 2012 (Doc 261). The email states, "We strongly recommend that you review your policy coverage, conditions, [and] exclusions very carefully and advise of any changes and/or corrections" (Id).

On February 9, 2013, a fire occurred in the building, as a result of an unattended candle lit by one of the tenants. The fire resulted in the filing of three actions against Dorchester for personal injury and wrongful death, the Frias, Barillas, and Ramirez actions. Mott was named as a defendant in each of the actions.

On July 21, 2014, Great American commenced an action against Dorchester in the federal court for rescission of the umbrella and excess liability policy based upon misrepresentations in the insurance application. In the rescission action, Dorchester filed a third-party complaint against Herzka for negligence and breach of contract. On June 23, 2015, at a mediation at which Herzka was present, the Frias action was settled for $1,750,000

and the Barillas action was settled for $150,000 (Doc 48 at ¶ 47-48). Subsequent to the mediation, the Ramirez action was also settled for $1,750,000.

In the rescission action, Dorchester moved for summary judgment, claiming that it was unaware of the "contents" of the St. Paul's insurance application until after the rescission action was filed (Doc 195 at ¶ 21). Herzka did not submit any papers in connection with the summary judgment motion in the rescission action (Doc 179 at ¶ 17).

On August 30, 2016, Judge Hellerstein denied Dorchester's motion for summary judgment with respect to Great American's claim for rescission. Upon searching the record, the court "sua sponte" granted Great American summary judgment, rescinding the policy based upon misrepresentations with regard to single room occupancy and failure to upgrade the electrical system. Judge Hellerstein found that Dorchester had knowledge of the electrical system not being upgraded and single room occupancy at St. Paul's Road, that Dorchester's agent, Herzka, stated otherwise on the insurance application, and that these representations were material (Doc 68 at 6-7). Judge Hellerstein ruled that these misrepresentations, "even if made negligently rather than intentionally," were sufficient for rescission" (Id at 8).

On August 31, 2016, Judge Hellerstein dismissed the third-party complaint for lack of pendent jurisdiction and tolled the statute of limitations for 30 days, to allow Dorchester to commence a state court action against Herzka. On February 2, 2017, Dorchester and Great American settled the rescission action, with Great American paying Dorchester $150,000 (Doc 210). The rescission of the policy was not effected by the settlement.

The present action was commenced on September 28, 2016. Dorchester alleges that Herzka submitted the insurance application covering the St. Paul's property to Great American without verifying the accuracy of the information and without giving the insured an opportunity to review it for accuracy (Complaint ¶ 2). Dorchester alleges that, as a result of Herzka's negligence, Great American rescinded the insurance on the ground of misrepresentation, namely the application falsely stated that the electrical system in the St. Paul's building had been updated within the last 25 years, and there was no single room occupancy in the building. Plaintiff asserts claims for negligence, breach of contract, and indemnification. Plaintiff seeks to recover its damages caused by its non-coverage under the excess liability policy. In its answer, defendant Herzka asserted various defenses, including its ninth defense, that plaintiff's damages were caused, in whole or in part, by plaintiff's "affirmative wrongdoing," or negligence (Doc 3 at ¶ 23).

DORCHESTER v HERZKA INSURANCE **Index No.: 607478/16**

By notice of motion dated September 26, 2018, plaintiff Dorchester moves for partial summary judgment as to liability on its negligence and breach of contract claims and dismissing defendant's ninth affirmative defense, of affirmative wrongdoing, or negligence. Dorchester submits the affidavit of its field manager, Evelyn Gillespie, who requested the insurance on behalf of Dorchester. Gillespie states that Herzka never disclosed to her, or anyone at Dorchester, that buildings which had not had their electrical systems upgraded in 25 years, or which contained single room occupancy, were not eligible for the requested insurance. Dorchester argues that, by carelessly completing the insurance application and submitting it to the insurer with a misrepresentation, Herzka failed to exercise due care as a matter of law. Dorchester argues that Herzka breached its contract to provide insurance by failing to obtain insurance which would cover the loss.

In opposition, defendant argues that Dorchester failed to review the application and insurance policy. Additionally, defendant argues that Mott was a "sophisticated real estate investor," who should have known that the St. Paul's property did not qualify for the requested insurance.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (**JMD Holding Corp. v. Congress Financial Corp.**, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers(Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (**Alvarez v. Prospect Hospital**, 68 NY2d 320, 324 [1986]).

Under the doctrine of issue preclusion, or collateral estoppel, a party will be precluded from re-litigating an issue if 1) the identical issue was necessarily decided adversely in the prior action and is decisive in the present action, and 2) the precluded party must have had a full and fair opportunity to contest the prior determination (**Montoya v JL Astoria Sound, Inc.**, 92 AD3d 736 [2d Dept. 2012]). The burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate in the prior action (**Ryan v N.Y. Telephone Co.**, 62 NY2d 494 [1984]).

The issue of misrepresentations in the insurance application, based upon failure to upgrade the electrical system within 25 years and the existence of single room occupancy, are identical in the action before Judge Hellerstein and the present action. Judge

Hellerstein's finding that there was a material misrepresentation in the insurance application was necessary and decisive to his determination to rescind the policy.

Among the factors to be considered on the question of full and fair opportunity to litigate are the amount of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, differences in applicable law, and the foreseeability of future litigation (**Shaid v Con Ed**, 95 AD2d 610 [2d Dept. 1983]). Herzka was not a party to the personal injury/wrongful death actions. However, because Herzka was present at the June 2015 mediation, it was well aware of the extent of plaintiff's claim at the time of Dorchester's summary judgment motion in the rescission action. The forum of the prior litigation was a United States District Court. Although the ruling as to material misrepresentation in the insurance application was made on summary judgment, Herzka had ample opportunity for discovery prior to Judge Hellerstein's ruling. Herzka's lack of initiative in the rescission action, in failing to make a motion to dismiss the third-party complaint, or even to submit papers on the issue of the materiality of the misrepresentation, is not a basis to deny preclusion. Since Dorchester had already filed a third party complaint against Herzka, Herzka clearly had reason to foresee future litigation. For all of these reasons, defendant Herzka had a full and fair opportunity to litigate in federal court. Herzka is thus precluded from relitigating the issue of material misrepresentation in the present action.

However, Judge Hellerstein noted that, "The third party complaint raises different issues that will have to be litigated-the conversations and relationship between Dorchester and Herzka, as principal and agent-as opposed to the question of misrepresentations on the insurance application addressed in [the rescission] action" (Doc 56 at 2-3). Thus, Judge Hellerstein did not reach the issues of negligence on the part of Herzka, or comparative fault on the part of Dorchester. Plaintiff's theory of negligence is failure to verify the accuracy of statements concerning the condition of a building in an insurance application, or even to inquire of the insured as to the condition of the premises. Plaintiff claims that defendant's failure to verify or inquire was the "proximate cause" of the lack of insurance coverage. Because Judge Hellerstein did not reach the issue of negligence, his decision is not collateral estoppel on the issue of proximate causation. The issues of negligence, proximate causation, and comparative fault survived the rescission action.

An insurance broker may be held liable under theories of negligence or breach of contract for failing to procure insurance upon a showing by the insured that the broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction (**Giamundo v Cleveland Dunn**, 157 AD3d 867 [2d Dept. 2018]).

DORCHESTER v HERZKA INSURANCE **Index No.: 607478/16**

The broker breaches its duty of due care to the insured by negligently or intentionally misrepresenting facts in connection with obtaining insurance coverage (**Seneca Ins Co v Certified Moving & Storage**, 138 AD3d 504 [1st Dept 2016]). Thus, the broker is under a duty to review the insurance application for accuracy, or provide the insured with the opportunity to do so before submitting it to the insurer (**Bleecker Street Health & Beauty Aids v Granite State Ins**, 38 AD3d 231, 233 [1st Dept 2007]).

Dorchester has established prima facie that Herzka violated its duty of due care by failing to review the insurance application for accuracy, or providing Dorchester with the opportunity to review the application for accuracy, prior to submitting the application to Distinguished Programs, or Great American.

On a motion for summary judgment in a negligence action, plaintiff need not establish prima facie freedom from comparative fault, but must nonetheless establish prima facie that defendant was negligent and its negligence was a proximate cause of the loss (**Tsyganash v Auto Mall Fleet Mgmt**, 163 AD3d 1033[2d Dept 2018]). Thus, Dorchester must establish prima facie that Herzka's negligence was a proximate cause of the rescission of the policy.

Dorchester submits the affidavit of its Field Manager and former bookkeeper, Evelyn Gillespie, who was responsible for communicating with Herzka (Doc 251). Gillespie states that Herzka's four prior applications for primary insurance did not contain questions concerning updates to the electrical system or single room occupancy. Gillespie states that the March 2012 application for an umbrella policy was the first application for an excess liability policy that was ever submitted on behalf of Dorchester or its affiliates. Gillespie states that Dorchester was not aware of the contents of the March 2012 insurance application until August 14, 2014, after the rescission action was filed (Doc 251 at ¶ 23).

Based upon Gillespie's affidavit, the court concludes that Dorchester has established prima facie that Herzka's failure to verify the information in the insurance application was a proximate cause of Great American's rescission of the policy. The burden shifts to Herzka to show evidence of a triable issue as to proximate causation of the rescission.

In opposition, defendant fails to offer any evidence that Dorchester was aware of the statements in the insurance application that the electrical system has been updated within the last 25 years, or that the building did not contain single room occupancy. Therefore, Herzka has failed to offer any evidence that its negligence was a proximate cause of the rescission of the insurance policy. However, Herzka's warning to Dorchester in the August 2012 email,

DORCHESTER v HERZKA INSURANCE **Index No.: 607478/16**

as well as Mott's prior experience in real estate investing, are sufficient to raise a triable issue as to whether Dorchester was guilty of comparative fault.

Accordingly, plaintiff's motion for partial summary judgment is **granted** to the extent of liability on its first cause of action for negligence. Plaintiff's motion to dismiss defendant's ninth defense is **denied**. At trial, the issues of comparative fault and damages remain open.

Plaintiff has failed to establish prima facie that Herzka entered into an agreement to obtain an umbrella policy, without exclusions for buildings with 25 year old electrical systems and single room occupancy. Accordingly, plaintiff's motion for partial summary judgment on its second cause of action for breach of contract is **denied**.

Any argument not addressed herein is deemed to be without merit.

So ordered.

Date: JAN 25 2019

Stephen A. Bucaria
J.S.C.

ENTERED
JAN 25 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE