

**Starr Ins. Holdings, Inc. v United States Specialty
Ins. Co.**

2019 NY Slip Op 30475(U)

February 26, 2019

Supreme Court, New York County

Docket Number: 652164/2016

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

STARR INSURANCE HOLDINGS, INC., and STARR INDEMNITY & LIABILITY COMPANY, Plaintiffs, - v - UNITED STATES SPECIALTY INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, and WESTCHESTER FIRE INSURANCE COMPANY, Defendants. INDEX NO. 652164/2016 MOTION DATE 09/17/2018, 09/18/2018 MOTION SEQ. NO. 003 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 205, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 278, 280, 283

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 204, 206, 248, 249, 250, 251, 252, 253, 254, 272, 273, 275, 276, 277

were read on this motion to/for SUMMARY JUDGMENT

OSTRAGER, J.:

The motions for summary judgment (seq. nos. 003 and 004, respectively) by defendants U.S. Specialty Insurance Company ("U.S. Specialty") and Great American Insurance Company ("Great American) are granted for the reasons stated below. This action was previously discontinued without prejudice against the third defendant, Westchester Fire Insurance Company (NYSCEF Doc. No. 71).

Plaintiffs Starr Indemnity & Liability Company ("Starr") and its parent, Starr Insurance Holdings, Inc., brought this suit to recover Starr's purported losses under a fidelity bond issued

by defendants U.S. Specialty Insurance and Great American (“the Bond”). The Bond insures plaintiffs against loss resulting directly from dishonest or fraudulent acts by an “Employee.”¹ Plaintiffs, however, basically seek coverage not for a fidelity loss, but for breaches of contract and fiduciary duty arising from dishonest and fraudulent acts that Starr was aware of *before* the Bond incepted.

On August 1, 2012, Starr commenced insuring warranty contracts purchased by buyers of consumer electronics. It entered the warranty market with an experienced warranty producer/broker, Global Warranty Group LLC and its affiliates (collectively “GWG”). GWG sold service contracts and loss/theft insurance for Starr through its network of dealers, as a managing general agent (“MGA”) and/or broker, and administered claims made on those contracts. Charles Pipia was known by Starr to be the person who operated and controlled GWG. The terms of GWG’s contract with Starr required GWG to set up separate trust accounts for the claim funds furnished by Starr to GWG and the premiums collected by GWG that were to be remitted to Starr within 60 days from the sale of a contract.

Early on in its relationship with GWG, Starr knew that GWG had cash flow problems arising from an agreement with a prior insurer, Fortegra. Starr knew that GWG was not receiving new premiums from Fortegra business, that Fortegra was withholding all claim funding, and that GWG was required to pay claims on the legacy contracts that Fortegra insured.

By May 2013, Starr discovered how GWG was managing its cash flow problem. Starr learned that GWG was commingling in GWG’s general operating account claim funds that Starr

¹ It is questionable whether GWG was an “Employee” under the Bond’s definition, which excludes agents or brokers and includes third-party administrators (“TPA”) who “solely” performed TPA services for the insured. GWG was an MGA and/or broker who also provided MGA/broker services for Starr. The Court’s decision does not turn on this issue of whether GWG is an “Employee.”

was advancing to GWG with premiums GWG owed to Starr. Starr further learned during 2013 that GWG was paying all of its liabilities from that account, including sums due on Fortegra's claims. Finally, contemporaneous e-mail correspondence established that Starr knew that GWG was paying premiums to Starr with funds Starr had transferred to GWG to pay claims, in breach of GWG's contract with Starr. Starr determined that this was what GWG was doing during its review of GWG on May 16, 2013. A November 21, 2013 audit review confirmed that GWG had continued these prohibited practices. The members of Starr's management, as well as at least one member of Starr's Legal Department, had either actual or constructive knowledge of what GWG was doing.

The Bond incepted on January 1, 2014. If GWG's activities were dishonest, as Starr claims, under New York law the Bond never covered post-January 1, 2014 conduct by GWG because Starr learned before the Bond incepted that GWG had committed dishonest acts. Starr's knowledge of any dishonest act by GWG is sufficient to trigger the termination clause in the Bond; knowledge of a theft is not required under the Bond's terms. Starr's assertion that the "critical missing facts" are that it did not know funds maintained in the claims account were insufficient or used by GWG for impermissible uses is untenable on this summary judgment record. Starr's contention that it was ignorant of GWC's wrongdoing is flatly contradicted by indisputable evidence to the contrary. Starr's legal position that the insurers may be liable on the Bond because Starr did not know of a theft and corresponding loss is not the law in New York. *See Capital Bank & Trust Co. v. Gulf Ins. Co.*, 91 A.D.3d 1251 (3d Dep't 2012) ("no loss" is required to trigger a termination provision).

Even if knowledge of theft was "critical," the record establishes that Starr learned in 2013 that over \$747,000 was missing from the account GWG had told Starr was for Starr's benefit

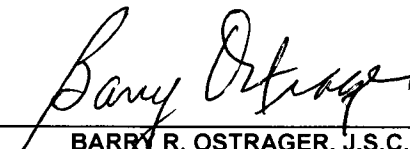
only.² Starr also learned that GWG and Pipia were raiding the purported claims account by diverting funds from that account to a GWG general operating account and recycling claim funds from Starr to pay premiums. Indeed, Starr received a series of e-mails on November 18, 2013, one of which stated: “We have to send them [GWG] this cash so they can pay it back to us in a few days in their premium payment! Ridiculous!”

Because Starr “discovered” GWG’s alleged dishonest acts which gave rise to Starr’s claims before the Bond period (January 1, 2014 to January 1, 2015), the Bond is exonerated, and Starr’s August 21, 2014 notice of loss and proof of loss deemed submitted on November 24, 2014 were properly rejected by defendants. Starr concedes that in 2013 its officers and employees had the information and documents upon which Starr now relies (and upon which its expert, Alan Gray, relied) in support of its claim. The record of contemporaneous Starr business records show that Starr officers and employees were specifically aware in 2013 of GWG’s Fortegra-related cash flow problem and the way GWG was handling Starr program funds, ways that Starr now calls dishonest. Starr also concedes that its Legal Department learned in December 2013 that Charles Pipia was a convicted felon. Starr claimed these same activities constituted “dishonest and/or fraudulent acts” only after GWG collapsed in the summer of 2014 and was unable to make any more premium payments to Starr. In short, Starr continued to do business with GWG despite all it knew in 2013, and it must bear the consequences, not the insurers.

² On November 14, 2013, Starr’s Criswell showed Starr VP Ryan and Pipia that as of September 2013 “\$747,076.55” should have been in what Starr was told was the claim account for Starr, but that amount was not in the claim account. On December 16, 2013 Starr’s Mike Ryan told GWG that “[Starr’s] records indicate that as of the end of November there should be \$800k in the claims account vs. the \$63k that is actually in the account.

Starr’s contorted efforts to transform indisputable facts into disputed issues of material fact fails the “red face” test. Starr is a sophisticated multi-line insurer that is completely conversant with the controlling principles of law that relate to Fidelity Bonds. The extensive deposition and documentary record in this case which includes thousands of pages of deposition transcripts and a larger volume of documents contain dispositive admissions from Starr executives and employees that leaves no room for the Court to deny defendants’ motions for summary judgment. The law and the undisputed facts entitle defendants to summary judgment, and the action is therefore dismissed with prejudice. The Clerk is directed to enter judgment accordingly.

2/26/2019
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE