CTo commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X
GEMINI INSURANCE COMPANY

Plaintiff,

DECISION AND ORDER
Index No.: 60041/17

-against-

MACQUESTEN DEVELOPMENT, LLC, VAN SINDEREN PLAZA LLC, AND BEST DEVELOPMENT GROUP, LLC,

Defendants.
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LOEHR, J.

The trial of this matter was held before this Court, without a jury, on March 11 & 12, 2019. Post trial submissions were made on April 30, 2019 and the Court now makes the following findings of fact and conclusions of law.

In this action, Plaintiff Gemini Insurance Company seeks payment of $259,536 as the Minimum Earned Premium (M.E.P.) on project specific, multi-year insurance policies Plaintiff claims Defendants Macquesten Development, LLC, Van Sinderen Plaza, LLC and Best Development Group, LLC (the "Developer") placed with Plaintiff for general liability and excess liability coverage on a $38,000,000 low income housing project known as Van Sinderen Plaza in Brooklyn, New York (the "Project"), through a broker and then cancelled.

The Developer, by its principal, Rella Fogliano, testified at trial. Also testifying on behalf of Developer was Joseph Apicella, who, as an outside consultant, assisted Fogliano in managing certain aspects of the Project in terms of permits, governmental communication and insurance. Apicella's testimony established that he did recommend to Rella that she consider placing the insurance on the Project with Levitt-Fuirst Associates ("LFA") , an insurance broker where his daughter, Jennifer, was a sales person. As a result thereof, the Developer agreed to try LFA

rather then utilize its usual wholesale insurance broker. That notwithstanding, Both Apicella and Fogliano testified that Apicella did not have the authority to bind the insurance on behalf of the Developer. Moreover, Fogliano testified, confirmed by emails to LFA that only Fogliano could finalize and obligate the placement of the insurance on the Project and Apicella confirmed that limitation.

Under the Insurance Law, as an Insurance Broker, LFA could not deal with first line insurance companies, but had to deal through RT Specialties, a wholesale broker, who then dealt with first line companies which, in this instance, included Plaintiff. The evidence included multiple emails in May and June, 2016, discussing various proposals with variations in coverage, deductible amounts and the like. Michael Paleze of LFA dealt directly with and communicated with Fogliano or Apicella during that period. Proposals were exchanged including one on June1st which was submitted to Apicella who presented it to Fogliano who signed certain attachments to the proposal anticipating that it would result in a quote that could be reviewed by all lenders and government agencies concerned with the Project as required prior to the actual closing on the Project, then scheduled for June 15. The June 1st proposal was transmitted back to LFA by Apicella with encouraging words to pursue it. Apicella also corresponded by email with his daughter, Jennifer, evidencing their hope that she would be getting credit as a sales person.

The potential for confusion in the placement of the insurance coverage is now apparent. Macquesten, as Developer, and operating on behalf of Van Sinderen Plaza and Best Development Group, LLC, was dealing with various city agencies prior to the Project closing, including which land for the Project was to be consolidated, and the financing to be secured, and the approval of insurance. Insurance was also subject to approval by the lender for the Project, Bank of America. Thus, when Fogliano instructed LFA that "everything must pass through me" accompanying emails referencing insurance for the Project were all subject to that restriction. Nevertheless, there were instances where LFA did not include Fogliano on emails indicating that it was binding insurance for Macquesten. Moreover, LFA was not authorized to deal directly with Plaintiff but had to operate through the wholesale insurance broker, RT Specialties. It was also known that the Developer was seeking competing bids and, thus, it can be reasonably inferred that FLA sought to act quickly to beat any competitive bids. Plaintiff claims it relied on communications that it had with RT Specialities who received instructions from LFA. Plaintiff submitted no evidence – nor even claimed – that LFA or R T Specialties had apparent authority to bind the insurance on behalf of the Defendants. LFA having failed to obtain the authorization

of Fogliano, no-one was authorized to bind the Developer, either Macquesten or the other Defendants, with respect to the insurance for the Project. Plaintiff did not establish the execution of documents on behalf of the Developer authorizing Plaintiff to issue insurance policies. The evidence was further confused by multiple references to "binders" with attached notices relating to excess lines, placement and total cost forms, rejections of terrorism coverage and reference to the fact that insurers admitted in New York State were not available in all instances, but that non-admitted companies could furnish part of the requisite insurance. None of the various binders indicated a specific acceptance of coverage. The "total cost form" which contained policy premium, policy cost figures and a footnote for "fully earned fees" and provided for their non-refundability did not contain any reference to minimum earned premiums and did not designate the policy premium as a fully earned item. Moreover, the gravamen of Plaintiff's case relied upon binders that were never delivered to the Developer and were not signed by Fogliano. The binders that were issued by Plaintiff provided "this authorization may not include all of the terms and conditions requested in your submission" and were further limited as being "valid until 6/20/2016," some 12 days after the date they were issued. This ambiguity was not explained beyond a suggestion that it may have been a mistake. RT Specialities could not explain why that statement was contained on the binders but acknowledged that the insured had the right not to accept the coverage (*see In the Matter of Express Industries v New York State Department of Transportation*, 93 NY2d 584 [1994][ambiguity of terms shows no meeting of minds and thus no contract]); *Reznik v Bluegreen Resorts Management, Inc.*, 154 AD3d 891, 893 [2d Dept 2017].

Additionally, after review by the Lenders for the Project and involved agencies, changes were required, including the resolution of an issue as to whether Plaintiff was an "admitted insurer" in New York State as required by the various New York agencies involved in approving the Project. Plaintiff conceded that it was not an "admitted carrier" but LFA advised that Plaintiff was able to write a policy that was the equivalent of an "admitted policy." And when LFA purported to confirm that the policy was bound as of June 7th, the Developer formally cancelled and withdrew from the policy on June 15th contending that the closing would not take place until later in June and, therefore, all else notwithstanding, there was no necessity for there to be a policy in force then as it did not then have any insurable risk yet to be covered.

The coverage claimed by Plaintiff provided that upon cancellation of the policies 35% of the premium would be due and owing as a "minimum earned premium." Plaintiff contended that

such clauses were standard practice and a necessity to cover their effort in putting together the time and effort spent in preparing the proposal. Testimony also referred to other bids received by Defendant that contained only a 20% earned premium provision.

Regardless of whether Defendants had an insurable interest in the Project for the period Plaintiff claims it provided coverage, this Court finds the testimony of Fogliano and Apicella credible that Fogliano made it clear that final insurance decisions had to go through her – and that was conceded by Michael Paleze, the sales person operating on behalf of LFA. Moreover, while Sean Zampino, Paleze's supervisor at LFA , contended that the insurance had been properly bound, he conceded that no actual policy was ever furnished to the Developer nor was any policy actually issued or produced by Plaintiff or placed in evidence at trial. Moreover, while Plaintiff assigned an "interim policy number," that number was not representative of a specific policy.

The credible evidence establishes that Fogliano explicitly reserved the right to have the sole authority to bind the policy, which she never did. As manifest in the exchange of various proposals and emails, there never was a meeting of the minds, and the Developer had ample basis to believe that the proposals were all tentative and subject to the approval of all the various lenders and agencies involved in the project. Moreover, those approvals were not final until the actual time of the closing of the project in late June.

Furthermore, the ambiguity in the insurance binder which must be held against the insurer, as drafter, and, indeed, the terms of the binder were never finalized: allowing the authorization of the binders to remain open for a period of 12 days was an implicit acknowledgment that the Developer had that period of time to accept those binders; and that was never done. Nor does the Developer's use of a temporary binder to obtain permission to put fencing around the Project establish existence of a full actual policy upon which to base Plaintiff's claim.

In sum, there was no meeting of the minds as to the premium for the policies, the deductibles, the licensing of the insurer, or the coverages called for. And thus, no contracts and no insurance policies(*Silber v New York Life Ins. Co.*, 92 AD3d 436, 440 [1st Dept 2012]). The insurance policies were never issued, the terms and conditions were never finalized or authorized by Fogliano who retained the exclusive right to do so. Finally, Plaintiff produced no evidence in support of its claim of misrepresentation against the Defendants. Accordingly, the Complaint is

dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
August 6, 2019

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