Island Rail Terminal Inc. v Seneca Specialty Ins. Co.
2020 NY Slip Op 30911(U)
April 3, 2020
Supreme Court, New York County
Docket Number: 155954/2014
Judge: Tanya R. Kennedy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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ISLAND RAIL TERMINAL INC. and EASTERN RESOURCE RECYCLING, INC.,

Plaintiffs,

-against-

SENECA SPECIALTY INSURANCE COMPANY and TCE INSURANCE SERVICES, INC.,

Defendants.

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INDEX NO. 155954/2014

MOTION SEQ. NO. 006, 007, 008

DECISION and ORDER

TCE INSURANCE SERVICES, INC.

Third-Party Plaintiff,

-against-

MARIO GINO, GLN WORLDWIDE, LTD., and MULTI-LINE COVERAGE CORP.

Third-Party Defendants.

Third-Party
Index No. 595256/2015

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HON. TANYA R. KENNEDY, J.S.C.:

INTRODUCTION

This action arises from Defendant, Seneca Speciality Insurance Company's ("Seneca"), denial of coverage for losses that plaintiffs, Island Rail Terminal, Inc. ("Island Rail") and Eastern Resource Recycling, Inc. ("Eastern Recycling") (together, plaintiffs) sustained following an October 22, 2013 fire which occurred at 80 Emjay Boulevard, in Brentwood, New York ("the Premises").

Defendant, GLN Worldwide, Ltd. ("GLN"), moves for summary judgment, pursuant to CPLR 3212, dismissing the amended third-party complaint and cross-claims as asserted against it (motion sequence 006).

Defendant/Third-Party Plaintiff, TCE Insurance Services, Inc. ("TCE"), moves for summary judgment, pursuant to CPLR 3212: (1) dismissing the amended complaint as asserted against it; (2) dismissing the cross-claims Seneca asserted against it; (3) in its favor on its amended third-party complaint against GLN; (4) dismissing GLN's counterclaims against it in the third-party action; and (5) amending the caption in the third-party action to reflect the discontinuance of the claims asserted against third-party defendants, Mario Gino ("Gino") and Multi-Line Coverage Corp. ("Multi-Line") (motion sequence 007).

Seneca moves for summary judgment, pursuant to CPLR 3212: (1) dismissing the amended complaint as asserted against it and the cross-claims TCE asserted against it; (2) in its favor on its counterclaim against plaintiffs; and (3) declaring, *inter alia*, that the insurance policy Seneca issued to plaintiffs is void *ab initio* and that Seneca owes no coverage obligation to plaintiffs under such policy (motion sequence 008).

The court held oral argument on the motions, which are consolidated for disposition and decided in accordance with the following.

FACTUAL BACKGROUND

Obtaining the Policy

Plaintiffs operated a business at the Premises wherein trucks delivered mixed solid waste, primarily demolition and construction site debris, that was sorted and transferred by rail or trucks to landfill or various recycling facilities (Inspection Report, NYSCEF Doc. No. 197).

In September 2013, GLN representative, Gary Schwartz ("Schwartz"), was informed that State National Insurance Company discontinued its property program and would not renew plaintiffs' property coverage (Email, dated September 5, 2013, NYSCEF Doc. No. 156). Plaintiffs' retail insurance broker, TCE, then filled out a Commercial Insurance Application to procure new insurance, which TCE sent to GLN representative Gary Schwartz ("Schwartz"), (Email, NYSCEF Doc. No. 157). Schwartz then forwarded the application to Seneca's underwriter, Tony Steffa ("Steffa") (*id.*).

On September 12, 2013, Steffa asked Schwartz some questions to facilitate the application process in the following email exchange:

> "What type of refuse products are handled at this location?
> Do they do nay [sic] recycling at this location?
> If so what type of refuse is being recycled??
> Property Loss Runs for the last three to five years? Please forwars [sic]"
>
> (E-mails dated September 12, 2013, NYSCEF Doc. No. 322).

Schwartz responded that same day, stating:

> "THEY HANDLE MOSTLY CONSTRUCTION DEBRIS. NO HAZARDOUS MATERIAL. NO STORAGE OF MATERIAL TRUCKS THEN TRANSPORT TO A RECYCLING PLANT RIVERHEAD LINY. BLDG 100% SPRINK. NO PRIOR LOSSES FOR THE YEAR GLN WROTE THIS ACCOUNT. WILL FORWARD ASAP. ALSO ATTACHED IS STATE NATIONAL OFFER TO EXTEND. 10000 PREMIUM NEEDED. CAN GET YOU A 3YR NO LOSS LETTER BEYOND STATE NATIONAL 1YR LOSS HISTORY ON ORDER. ADVISE PLEASE"
>
> (*id.*).

Thereafter, Seneca issued a commercial property insurance policy covering the Premises for the period from September 14, 2013 to September 14, 2014, with a coverage limit of $2,514,000.00 (the "Policy") (Policy, NYSCEF Doc. No. 249). The common policy declaration described the business as a "Construction Debris Transfer Station" (*id.*). Plaintiffs represented

under a section of the Policy entitled "Commercial Real Estate Warranties" that "[t]here is no recycling operation nor handling of hazardous materials" at the Premises (*id.*).

Seneca retained a company to inspect the Premises and prepare an inspection report (Inspection Report, NYSCEF Doc. No. 197). The purpose of conducting an inspection was to verify the information plaintiffs submitted in the insurance application was "accurate, true and acceptable" (Alicks EBT Transcript, P. 35, L. 10-12, NYSCEF Doc. No. 225).

Under the sub-heading "Protection," the October 11, 2013 Inspection Report stated:

> "The transfer station has a non-automatic sprinkler system with fire department connection. There is no automatic fire detection system. Battery smoke detectors are not provided. Portable fire extinguishers are provided . . ."

(Inspection Report, P. 2, NYSCEF Doc. No. 197).

The Inspection Report included photographs of the Premises depicting piles of debris and waste housed inside the transfer station (*id*., P. 18).

On October 18, 2013, Kathleen Alicks ("Alicks"), Seneca's Vice President and Northeast Manager, sent Steffa the following email:

> "[p]lease get off this account. Per our conversation steve does not like this account. In the future we are not entertaining this type of risk. The sprinklers are not automatic and there is no fire detection system. In the meantime please secure facultative reinsurance excess of $250,000"

(Emails, NYSCEF Doc. No. 198).

Steffa testified at his deposition that he determined it would be more expedient to request that GLN replace coverage rather than secure facultative reinsurance (Steffa EBT Transcript, P. 77, L. 3-9, NYSCEF Doc. No. 319). The fire occurred at the Premises four days later, necessitating its demolition.

Seneca Denies Coverage

Seneca received notice of the fire on October 23, 2013 (Property Loss Notice, NYSCEF Doc. No. 348). Following an investigation, Seneca issued a letter on May 14, 2014, disclaiming coverage ("disclaimer letter") (Disclaimer Letter, NYSCEF Doc. No. 178). Seneca maintained in the disclaimer letter that the Policy was void *ab initio* because plaintiffs misrepresented, among other things, on the insurance application that there were no uncorrected fire code violations at the Premises (*id.*, P. 2).

The disclaimer letter also stated:

> "As an additional underwriting matter, Seneca's underwriter wrote by email to the insured's broker on September 12, 2013 inquiring whether there was recycling performed at the location and whether the insured had any prior losses. The underwriter had also inquired as to the fire suppression system at the premises. *By email of September 12, 2013, the broker misrepresented as to recycling operations at the premises, that the building was 100% sprinklered and that there were no prior losses*. The broker reconfirmed the information regarding the sprinklers by an email of September 13th. Seneca has learned that these representations were also false in material respects"

(*id.*, P. 2-3 [emphasis added]).

The disclaimer letter further cited a clause in the insurance contract titled: "CONCEALMENT, MISREPRESENTATION OR FRAUD," which stated, in effect, that the coverage was voidable if at any time the insureds intentionally concealed or misrepresented a material fact (*id.*, P. 6).

PROCEDURAL HISTORY

Plaintiffs commenced the instant action against Seneca and TCE on June 18, 2014. The amended complaint asserts a claim against Seneca for breach of the policy (first cause of action) and claims against TCE for negligence in procuring the policy (second cause of action) and breach of contract (third cause of action) (Amended Complaint, ¶¶ 7-27, NYSCEF Doc. No. 267).

Seneca filed its answer to the amended complaint on October 31, 2014, which included cross-claims against TCE for apportionment, contribution, and indemnification (Seneca Answer to Amended Complaint, NYSCEF Doc. No. 143). Seneca also asserted a counterclaim against plaintiffs for a judgment declaring the Policy as void *ab initio* and that no coverage exists under the Policy (*id.*).

TCE filed its answer to the amended complaint on October 27, 2014, which included cross-claims against Seneca for apportionment, contribution, and indemnification (Answer, NYSCEF Doc. No. 142). TCE also commenced a third-party action on May 11, 2014 against GLN for contribution and indemnification (Amended Third-Party Complaint, NYSCEF Doc. No. 145).[1] GLN also asserted a counterclaim against TCE for contribution and indemnification (GLN Answer to Amended Third-Party Complaint, NYSCEF Doc. No. 147).

GLN moves for summary judgment to dismiss the amended third-party complaint and cross-claims as asserted against it (motion sequence 006). TCE and Seneca also move for summary judgment to dismiss the amended complaint and cross-claims and/or counterclaims insofar as asserted against them (motion sequence 007 and 008, respectively).

ARGUMENTS

GLN's Motion for Summary Judgment (Motion Sequence 006)

GLN moves for summary judgment, pursuant to CPLR 3212, dismissing TCE's amended third-party complaint and the cross-claims asserted against it. Particularly, GLN maintains that TCE is unable to establish that GLN failed to exercise due care in its role as wholesale broker and liaison between TCE, as retail broker, and Seneca (DeFilippo Supporting Affirmation, ¶70, NYSCEF Doc. No. 135).

[1] TCE also named Gino and Multi-Line as defendants in the third-party action. On July 6, 2015, TCE discontinued the third-party action against Gino and Multi-Line (Notice of Discontinuance, NYSCEF Doc. No. 149).

The agreement between TCE and GLN stated that: "in providing coverage [GLN was] relying upon the accuracy of information provided by the insured through [TCE]" and that it was TCE's responsibility "to disclose to [GLN] the existence of any conditions which [it] is or reasonably should be aware of that may affect the insurability of the insured" ("Agreement") (Agreement, ¶ VII, NYSCEF Doc. No. 165).

Under the Agreement, GLN would "indemnify and hold harmless [TCE] . . . from and against any and all claims, damages, liabilities, including reasonable attorney's fees, costs or other expenses incurred by [TCE] arising directly from any acts, omissions or breach of this Agreement by [GLN] to the extent that [GLN] is legally liable" (*id*., ¶ XI).

GLN maintains that it had no direct contact or communications with plaintiffs, and that TCE provided it with all of the information contained in the plaintiffs' insurance information, which GLN then forwarded to Seneca, and that GLN procured the exact policy which TCE requested it to obtain (DeFilippo Supporting Affirmation, ¶¶5, 6, 9). As such, GLN maintains that its duty to indemnify TCE under the Agreement was not triggered because it exercised due care in procuring the requested coverage and relied upon the information it obtained from TCE, which GLN then forwarded to Seneca (*id*., ¶¶59-61, 77, 79).

Although TCE does not dispute that it provided GLN with the information set forth in the insurance application, TCE argues in opposition that issues of fact exist as to whether GLN breached the duty of care it owed to TCE in procuring coverage for plaintiffs. Particularly, TCE maintains the evidence establishes that Schwartz possibly provided Seneca with incorrect information in the application process, which caused him to lose his job (TCE Memorandum of Law in Opposition, P. 7, NYSCEF Doc. No. 324). According to TCE, Schwartz may have

imparted incorrect information which Seneca maintains constituted misrepresentations in the insurance application (*id.*, P. 8).

TCE further argues that the evidence indicates that Schwartz never advised Gino that Seneca wished to remove itself from the account (*id.*). TCE maintains that Schwartz's failure to inform Gino of Seneca's intentions possibly resulted in inadequate coverage for plaintiffs (*id.*, P. 7). As such, TCE maintains GLN is not entitled to summary judgment dismissal.

TCE's Motion for Summary Judgment (Motion Sequence 007)

TCE moves for summary judgment, pursuant to CPLR 3212: (1) dismissing the amended complaint as asserted against it; (2) dismissing the cross-claims Seneca asserted against it; (3) in its favor against GLN on its amended third-party complaint; (4) dismissing GLN's counterclaims against it in the third-party action; and (5) amending the caption in the third-party action to reflect the discontinuance of its claims against Gino and Multi-Line.

TCE argues it was not the proximate cause of plaintiffs' injuries since Seneca wrongfully denied coverage and rescinded the Policy (TCE Supporting Memorandum of Law, P. 10, NYSCEF Doc. No. 212). TCE also maintains that no misrepresentations were made in the application and even if misrepresentations were made, the evidence fails to establish that the misrepresentations were material to warrant rescission, and that Seneca's existing underwriting policies would not have prevented Seneca from issuing the Policy.

TCE also argues that Seneca had knowledge of plaintiffs' recycling operations when it received the Inspection Report, and, thus, waived its right to rescind the Policy upon such ground (*id.*, P. 19-20). As such, TCE argues it is entitled to summary judgment.

In opposition, plaintiffs argue that in the event Seneca is able to show that it properly denied coverage, material questions of fact exist as to whether Gino and TCE were negligent in procuring coverage (Blumberg Affirmation in Opposition, ¶¶ 3, 43, NYSCEF Doc. No. 281).

Seneca also opposes TCE's motion, arguing that it properly denied coverage based upon plaintiffs' material misrepresentations regarding uncorrected fire code violations and breach of the warranty against recycling operations (Seneca Brief in Opposition, P. 4, NYSCEF Doc. No. 291). Seneca also argues that TCE had actual knowledge that plaintiffs' operations breached the warranty when it procured the Policy (*id*., P. 14). With respect to TCE's waiver argument, Seneca maintains that the seven month period between the receipt of the Inspection Report and issuance of the disclaimer letter was due to Seneca's diligent investigation of plaintiffs' claim (id., P. 19).

GLN also submits opposition papers and presents the same arguments raised in support of its own motion for summary judgment.

Seneca's Motion for Summary Judgment (Motion Sequence 008)

Seneca moves for summary judgment, pursuant to CPLR 3212, dismissing the amended complaint and cross-claims asserted against it; on its counterclaim against plaintiffs, and declaring, *inter alia*, the Policy was void *ab initio* and that it owes no coverage obligation to plaintiffs under the Policy. Seneca maintains that it properly denied coverage because plaintiffs misrepresented that no uncorrected fire code violations existed at the Premises, and breached the warranty against conducting recycling operations.

Plaintiffs argue in opposition that they did not set forth any misrepresentations on their insurance application or breach the warranty against recycling operations. Plaintiffs also argue that the term "recycling" is subject to varying interpretations, and is not defined in Seneca's Policy or underwriting guidelines (Blumberg Affirmation in Opposition, ¶¶39-40, NYSCEF Doc.

No. 281). Plaintiffs also argue that even if the Court found that they made a misrepresentation, any such misrepresentation was not material within the meaning of Insurance Law § 3105(b)(1).

TCE also opposes Seneca's motion and relies upon the same arguments raised in support of its summary judgment motion. Further, TCE argues that Seneca's motion should be denied since it failed to annex TCE's amended answer to the motion papers.

DISCUSSION

Summary Judgment Standard

"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 . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]).

Construction of Insurance Contracts

In determining the parties' rights under an insurance policy, the Court is guided by the rules of contract interpretation because insurance policies are contracts made between the insurer and the insured (*see Gilbane Bldg. Co./TDX Constr. Corp. v St. Paul Fire & Mar. Ins. Co.,* 143 AD3d 146, 150-151 [1st Dept 2016]).

In accordance with the general principles of contract law, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citations omitted]). A contract is unambiguous where the language expresses a "definite and precise meaning, unattended by danger of misconception in the purport of the policy

itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

To the contrary, ambiguous language is susceptible to at least "two reasonable interpretations" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]) and "the test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy" (*Matter of Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-327 [1996]). Where the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer (*see White v Continental Cas. Co.*, *supra* at 267). However, language which provides for exceptions to coverage must be accorded "a strict and narrow construction," and is "not to be extended by interpretation or implication" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]).

Rescission of an Insurance Policy based on Material Misrepresentation by the Insured

"[A] material misrepresentation made at the time an insurance policy is being procured may lead to a policy being rescinded and/or avoided. Even innocent misrepresentations are sufficient to allow an insurer to avoid the contract of insurance or defeat recovery thereunder" (*128 Hester LLC v New York Mar. & Gen. Ins. Co.*, 126 AD3d 447, 447 [1st Dept 2015] [internal quotation marks and citations omitted]; *see Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 436-437 [3d Dept 2003]; *Tennebaum v Insurance Corp. of Ireland*, 179 AD2d 589, 592 [1st Dept 1992]).

Insurance Law §3105(b)(1) provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material," and "[n]o misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract" (Insurance Law

§3105[b][1]). "[M]aterial misrepresentations . . . if proven, would void the . . . insurance policy ab initio" (*Meah v A. Aleem Constr., Inc.*, 105 AD3d 1017, 1019 [2d Dept 2013] [internal quotation marks and citations omitted]).

The materiality of a misrepresentation is ordinarily a question for the jury but when the evidence is clear and substantially uncontradicted, the question can become a matter of law for the court to decide (*see Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216-17 [1st Dept 1976], affd *Process Plants Corp. v Beneficial Natl. Life Ins. Co.*., 42 NY2d 928 [1977]).

In determining whether a misrepresentation is material, it is insufficient for the insurer to rely upon the conclusory statements of its employees, or other persons under their control, that an alleged misrepresentation was material to its decision-making process (*see Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1064 [2d Dept 2009]). Rather, the insurer "must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*2900 Stillwell Ave., LLC v US Underwriters Ins. Co.*, 172 AD3d 1143, 1144 [2d Dept 2019]).

Preclusion of Coverage based on Breach of Insurance Policy Warranty

An insured's breach of a warranty does not necessarily relieve the insurer of its obligations under the policy unless said breach "materially increases the risk of loss, damage or injury within the coverage of the contract" (Insurance Law §3106 [b]; *see Anjay Corp. v Those Certain Underwriters at Lloyd's of London Subscribing to Certificate No. HN01AAF4393*, 33 AD3d 323, 324 [1st Dept 2006] [internal quotations marks omitted]).

While the question of materiality is ordinarily a question for the jury, if the materiality is "clear and substantially uncontradicted," then a court can determine such question as a matter of

law (*Continental Ins. Co. v RLI Ins. Co.*, 161 AD2d 385, 387 [1st Dept 1990]). The insurer has the burden to prove the materiality of the alleged breach (*see Anjay Corp. v Those Certain Underwriters at Lloyd's of London subscribing to Certificate No. HN01AAF4393*, *supra* at 324).

Liability of Insurance Brokers and Agents

"Generally, the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy v Kuhn*, 90 NY2d 266, 270 [1997]).

Under New York law, an insured can pursue a claim against their insurance broker under either a theory of breach of contract or negligence (*see Bruckmann, Rosser, Sherrill & Co. v Marsh USA Inc.*, 65 AD3d 865, 866 [1st Dept 2009].

The insured can recover damages for breach of contract where the broker is contracted to "procure adequate insurance… [and] the policy obtained does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss" (*id.* [internal quotation marks and citations omitted]). Alternatively, the insured can recover damages for negligence where the broker or agent fails to exercise due care in procuring insurance (*id.*).

ANALYSIS

Analysis of GLN's Motion

TCE alleged in its Amended Third-Party Complaint that its employee, Gino, "caused an application of insurance to be submitted to GLN," which GLN then forwarded to Seneca (Amended Third-Party Complaint, ¶¶ 19-20, NYSCEF Doc. No. 145).

The evidence indicates Gino testified at his deposition that TCE prepared the insurance application and that he had no reason to believe GLN amended any information on the application

(Gino EBT Transcript, P. 164, L. 6-9, NYSCEF Doc. No. 152). Gino also testified that GLN fulfilled its obligations as the wholesale broker in procuring the Policy for the amount TCE and plaintiffs both requested (*id*., P. 167).

Gino further testified the Premises was 100% sprinklered, and that he provided Schwartz with such information (Gino EBT Transcript, P. 102, L. 9-15; P. 138, L. 3 to P. 140, L. 4; P. 165, L. 5-12, NYSCEF Doc. No. 152). Further, Steffa testified he never asked Schwartz whether an automatic sprinkler system existed at the Premises, and that Schwartz did not set forth any such representation (Steffa EBT Transcript, P. 63, L. 19 to P. 64, L. 4, NYSCEF Doc. No. 319). Rather, Steffa asked Schwartz if the building was 100% sprinklered and Schwartz responded in the affirmative (*id*., P. 63, L. 19-24).

Regarding Schwartz's representation in the September 12, 2013 email of no losses at the Premises the prior year, Gino and plaintiffs' President, Vincent Maggio, Jr. ("Maggio") both testified no losses or claims occurred at the Premises during the past three years (Gino EBT Transcript, P. 145, L.13-25, NYSCEF Doc. No. 152; Maggio EBT Transcript, P. 103, L. 17 to P. 104, L. 2, NYSCEF Doc. No. 192).

As for Schwartz's representation in his September 12, 2013 email regarding operations at the Premises, such representation is consistent with Gino's testimony. Gino testified plaintiffs used the Premises to separate recyclables from construction debris and to transport such materials (Gino EBT Transcript, P. 49, L. 10 to P. 50, L. 16, NYSCEF Doc. No. 152). Gino also testified he informed Schwartz that no hazardous materials were handled at the Premises (*id*., P. 146, L. 2-12). In every instance, Schwartz forwarded information which plaintiffs provided or considered accurate.

TCE also acknowledges Gino advised Schwartz of the nature of plaintiffs' operations at the Premises, and the application for insurance identified the "NATURE OF BUSINESS/ DESCRIPTION OF OPERATIONS BY PREMISE(S)" as a "transfer station" (Ziolkowski Opposing Affirmation, ¶ 37, NYSCEF Doc. No. 311; Application, P. 1, NYSCEF Doc. No. 240). Here, the information Schwartz provided in the September 12, 2013 e-mail neither contradicts the description in the application, nor Gino's testimony about the operations conducted at the Premises.

Moreover, such representations are consistent with Maggio's and Dominic Testa ("Testa"), Island Rail's operations manager, description of the operations conducted at the Premises (Maggio EBT Transcript, P. 193, L. 2 to P. 194, L. 4, NYSCEF Doc. No. 192; Testa EBT Transcript, P. 30, L. 12 to P. 38, L. 5, NYSCEF Doc. No. 193; Maggio Affidavit, ¶ 4, NYSCEF Doc. No. 282).

Although GLN owed TCE a duty to obtain the requested coverage within a reasonable time and to notify TCE if it was unable to so do (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]), the evidence establishes that GLN did not breach any duty to TCE. GLN established its *prima facie* entitlement to summary judgment dismissal of the third-party complaint and the cross-claims asserted against it because the evidence demonstrates that: (1) TCE provided GLN with the information contained in the plaintiffs' insurance information, which GLN reasonably relied upon, and then forwarded to Seneca; and (2) GLN procured the exact policy which TCE requested it to obtain.

TCE argues in opposition that Steffa testified at his deposition that Schwartz possibly provided him with inaccurate information (Steffa EBT Transcript, P. 42, L. 3 to P. 43, L. 8, NYSCEF Doc. No. 319). However, such contention is speculative and insufficient to raise an issue of fact (*see generally*, *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Also without merit is TCE's contention that GLN was negligent because Schwartz failed to notify Gino of Seneca's request to cancel the Policy after inspecting the Premises. The law is clear that brokers owe "no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Voss v Netherlands Ins. Co.*, 22 NY 3d 728, 734 [2014] [internal quotation marks and citation omitted]).

Therefore, the Court grants GLN's motion for summary judgment dismissing the amended third-party complaint and the cross-claims as asserted against it.

Analysis of TCE's Motion

TCE moves for summary judgment seeking, *inter alia*, dismissal of plaintiffs' Amended Complaint and Seneca's cross-claims as asserted against it. Seneca argues in opposition that it properly denied coverage because plaintiffs misrepresented that no prior uncorrected fire code violations existed at the Premises. However, the Court finds TCE neither breached any contract nor duty of care based upon the following discussion.

Maggio testified no fire code violations existed in September 2013 (Maggio EBT Transcript, P. 199, L. 8-22, NYSCEF Doc No. 192). Maggio also averred in his affidavit that the Town of Islip issued a violation for the Premises in November 2012 "because the piles were over the allowed height for the fire suppression system" (Maggio Affidavit, ¶ 21, NYSCEF Doc. No. 282). However, Maggio further averred in his affidavit that the violation "had been addressed and taken care of, was closed and no longer an open issue" prior to the date plaintiffs applied for the Policy (*id.*, ¶ 22).

Further, Gino testified that Testa advised him that no fire code violations existed (Gino EBT Transcript, P. 127, L. 3-23, NYSCEF Doc. No. 152). This evidence establishes that the information as to whether uncorrected fire code violations existed was consistent with plaintiffs'

representations and the information they provided to Gino. As previously discussed, the evidence establishes plaintiffs provided TCE with the information which TCE forwarded to GLN, and that GLN provided Seneca with such information.

Seneca also argues in opposition that it properly denied coverage because plaintiffs breached the warranty against conducting recycling operations at the Premises. Initially, the Court notes the application for insurance described the operations as a "transfer station" and failed to ask whether recycling occurred there (Application, NYSCEF Doc. No. 240). The Court also notes Steffa asked Schwartz in his September 12, 2013 email whether plaintiffs conducted recycling at the Premises and Schwartz responded no such activity occurred there. In addition, Schwartz's description of the Premises in his September 12, 2013 email and the nature of plaintiffs' operations is consistent with Seneca's Inspection Report which characterized the Premises as "a solid waste transfer facility," and indicated that debris was "sorted and shipped out to the appropriate recycling facility by truck or rail" (Inspection Report, P. 2, NYSCEF Doc. No. 197).

The Court further notes that the term "recycling" is not defined in Seneca's underwriting guidelines and that Seneca representatives provided conflicting definitions of such term at their respective depositions. Rodney Patterson, Seneca's Property Claims Supervisor, and Gregory Crapanzano, Seneca's Vice President of Property Claims, Senior Technical Claims Executive, both testified the term consisted of melting down and/or sorting of materials (Patterson EBT Transcript, P. 8, L. 4-5; P. 65, L. 8-13, NYSCEF Doc. No. 201; Crapanzano EBT Transcript, P. 8, L. 23-25; P. 59, L. 21-23, NYSCEF Doc. No. 202). Alicks testified the term included sorting of materials and that the Premises was improperly classified as a "transfer station" (Alicks EBT Transcript, P. 52, L. 12 to P. 53, L. 19, NYSCEF Doc. No. 195). Steffa testified the Premises was

properly classified as a "transfer station" and that it was not a recycling center (Steffa EBT Transcript, P. 128, L. 20-24, NYSCEF Doc. No. 319).

Steffa further testified the term "recycling" included the breaking down of materials (*id*., P. 46, L. 12-17), which Maggio and Testa both testified did not occur at the Premises (Maggio EBT Transcript, P. 193, L. 2-24, NYSCEF Doc. No. 192; Testa EBT Transcript, P. 35, L. 4-12, NYSCEF Doc. No. 193). Maggio and Testa's testimony, as well as Maggio's affidavit, establish plaintiffs sorted recyclable materials from construction debris and transported same to third-parties by truck and rail (*id*.; Maggio Affidavit, ¶4, NYSCEF Doc. No. 282).

For these reasons, and those further developed in the analysis of motion sequence 008, the Court finds the term "recycling" is ambiguous. Therefore, inasmuch as Seneca failed to raise a triable issue of fact to TCE's *prima facie* showing, the Court grants that branch of TCE's summary judgment motion to dismiss the Amended Complaint and Seneca's cross-claims as asserted against it. The remaining branches of the motion are denied as moot since the third-party complaint is dismissed as against GLN, and the action has been discontinued as against Gino and Multi-Line.

Analysis of Seneca's Motion

Although CPLR 3212(b) requires a summary judgment motion must be supported by copies of the pleadings, "the court has discretion to overlook the procedural defect of missing pleadings when the record is sufficiently complete" (*Washington Realty Owners, LLC v. 260 Wash. St.*, LLC, 105 AD3d 675, 675 [1st Dept 2013] [internal quotation marks and citations omitted]). Here, the record is sufficiently complete because "a complete set of the papers is available from the materials submitted" (*id.*, *see Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012]; *Pandian v New York Health & Hosps. Corp.*, 54 AD3d 590, 591 [1st Dept 2008]).

Misrepresentation Analysis

Among the papers Seneca submits in support of the motion is the September 10, 2013 application for insurance, wherein plaintiffs represented no uncorrected fire code violations existed at the Premises (Application, P. 2, question 9, NYSCEF Doc. No. 240). Seneca also submits a misdemeanor information, dated December 19, 2012 (NYSCEF Doc. No. 229) and a violation payment receipt, dated September 11, 2013 (NYSCEF Doc. No. 237).

The Fire Marshal for the Town of Islip filed the misdemeanor information charging Island Rail with violating the Fire Code of the State of New York due to "combustible storage" at the Premises being piled "in excess of 12 feet" (NYSCEF Doc. No. 229). The misdemeanor information indicated that the "maximum allowable amount of combustible storage for the structure" was 12 feet "due to the strength of the installed fire sprinkler system;" and that the debris at the Premises exceeded said amount, rendering the building "hazardous" (*id.*). The misdemeanor information further indicated the violation was punishable by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both (*id.*).

Seneca also submits a September 11, 2013 receipt indicating Island Rail tendered a $1,000.00 payment to the Town of Islip regarding the fire code violation set forth in the misdemeanor information (NYSCEF Doc. No. 237). Accordingly, Seneca maintains the aforementioned documents establish that an uncorrected code violation existed at the Premises when they submitted the insurance application because plaintiffs paid the fine the following day.

Seneca also contends the testimony of operations manager Testa and photos of the Premises establish that the fire code violation remained uncorrected. Testa testified while plaintiffs paid the $1,000.00 fine, no further action was taken to update the fire suppression system (Testa EUO Transcript, P. 73, L. 16 to P. 74, L. 2, NYSCEF Doc. No. 236). In addition, Seneca argues the

October 11, 2013 photos of Premises depict large piles of debris and illustrate that plaintiffs continued to pile combustible materials in violation of the fire code after submitting the application for insurance (Inspection Report, P. 18, NYSCEF Doc. No. 197).

Seneca also relies upon a January 7, 2013 New York State Department of Environmental Conservation ("DEC") inspection report indicating, *inter alia*, piles over 20 feet tall at the Premises (DEC Report, NYSCEF Doc. No. 230); a April 17, 2013 DEC inspection report stating "the onsite waste needs to be reduced" (DEC Report, NYSCEF Doc. No. 231); a DEC Notice of Violation, dated May 14, 2013, stating "both construction and demolition debris and municipal solid waste were stored "in excess of the authorized amounts" (Notice of Violation, NYSCEF Doc. No. 233); and an October 11, 2013 DEC inspection report stating the amount of waste at the Premises exceeded "the authorized amount" and that solid waste was "stored higher than the concrete push walls" (DEC Report, NYSCEF Doc. No. 234).

Seneca further references certain language from the endorsement in the Policy to maintain no coverage exists because recycling occurred at the Premises. The relevant language provides: "As a condition of this insurance, *you warrant that . . . [t]here is no recycling operation* nor handling of hazardous materials" (Policy, NYSCEF Doc. No. 249 [emphasis added]). The endorsement further includes an exclusion for failure to comply with the warranty, indicating Seneca "will not pay for loss or damage (or any resulting expenses) caused by or resulting from any covered peril in the event of a breach of any of the warranties" (*id.*).

At this stage, the Court is unable to determine whether this factual misrepresentation is material. This question can only be resolved by close examination of Seneca's underwriting manual since:

> "[t]o establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting

> manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application"
>
> (*Parmar v Hermitage Ins. Co*., 21 AD3d 538, 540 [2d Dept 2005]).

The Court notes Alicks testified, among other things, that Seneca did not maintain written underwriting policies to address fire code violations (Alicks EBT Transcript, P. 98, L. 19 to P. 99, L. 17, NYSCEF Doc. No. 225). Alicks also testified, *inter alia*, she was unable to provide any examples of prior instances in her assigned unit where Seneca refused to insure a property or refused to insure a property at the same premium rate after receiving knowledge of a fire code violation (*id*.) Alicks further testified that Seneca's underwriters evaluated risks based upon potential hazards, including fire, in deciding whether to insure a particular property (*id*., P. 37, L. 17 to P. 38, L. 6).

Alicks also averred in her affidavit that Seneca would not have issued the Policy if it had knowledge of the uncorrected fire code violation because of the increased risk of fire loss. Particularly, Alicks averred that it would be unreasonable for any property insurer to insure a property against a risk of fire if the property had one or more uncorrected fire code violations based upon her "experience as a commercial property underwriter in the insurance industry," as well as upon common sense (Alicks Affidavit, ¶¶ 9-13, NYSCEF Doc. No. 243).

Seneca maintains that although its underwriting guidelines fail to specifically mention fire code violations, the guidelines address a fire risk since the guidelines indicate, as follows:

> "Determination of Risk: The underwriter must determine and identify in the file at the time of acceptance what constitutes one risk. One risk shall always be determined from the standpoint of the peril of fire"
>
> (Underwriting Guidelines, P. 1947, NYSCEF, Doc. No. 259).

Seneca further maintains the underwriting guidelines specify that "fire resistive" and "non-combustible" constitute separate "construction" categories for risk (*id.* at P. 1943, 1945, 1947, 1952).

The materiality of a misrepresentation is ordinarily a jury question (*see Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD 3d 412, 413-414 [1st Depr 2009]; *Kroski v Long Island Sav. Bank FSB*, 261 AD 2d 136, 136 [2d Dept 2009] and "[c]onclusory statements by insurance company employees, unsupported by documentary evidence, are insufficient to establish materiality as a matter of law" (*Barkan v New York Schools Ins. Reciprocal*, *supra* at 1064).

Here, Alicks failed to identify a specific underwriting guideline discussing fire code violations in her deposition testimony or affidavit. In fact, Alicks conceded no written guidelines discussing fire code violations existed and that Seneca did not maintain any "underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*2900 Stillwell Ave., LLC v U.S. Underwriters Ins. Co.*, *supra* at 1144). Alicks was further unable to provide any examples of Seneca refusing to insure a property at the same premium rate when it discovered fire code violations existed.

Here, the Court finds Seneca has not demonstrated it would not have issued the Policy if it had knowledge of the violation to establish plaintiffs' misrepresentation was "material" within the meaning of Insurance Law §3105(b)(1).

Breach of Warranty Analysis

Seneca further maintains it is entitled to deny coverage because plaintiffs breached the warranty that: "[t]here is no *recycling operation* nor handling of hazardous materials" (Policy, Endorsement, P. 1, NYSCEF Doc. No. 249 [emphasis added]).

The Court notes that Maggio described recycling operations at the Premises as follows:

> "Loads were dumped on either side of that and they would go up that belt where people would, by hand, sort out different commodities, being paper, metal, cardboard, plastic. And they would go into the bins underneath it. And the different streams of waste would go either to the right or to the left. What was left over would be loaded into rail cars. So your recycling stayed on the floor and the other stuff went to the garbage.

(Maggio EBT Transcript, P. 40, L. 5-16, NYSCEF Doc. No. 192).

However, the evidence herein fails to establish recycling occurred at the Premises. As previously discussed herein, the term "recycling" is ambiguous and susceptible to differing interpretations. In addition, such term is not defined in any written guidelines or in the Policy (Alicks EBT Transcript, P. 223, L. 14-17, NYSCEF Doc. No. 225). Inasmuch as the term "recycling" is ambiguous, it must be interpreted in favor of the insured (*see White v Continental Cas. Co.*, *supra* at 267).

Since Seneca failed to sustain its prima facie burden, the sufficiency of the opposing papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, *supra* at 853). Therefore, the Court denies Seneca's motion in its entirety.

CONCLUSION

Accordingly, it is

ORDERED that Third-Party Defendant GLN Worldwide, Ltd.'s motion for summary judgment to dismiss the amended third-party complaint and cross-claims as asserted against it is granted (motion sequence No. 006), and the amended third-party complaint and cross-claims are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of Defendant TCE Insurance Services, Inc.'s motion for summary judgment to dismiss the amended complaint and cross-claims insofar as asserted against

it is granted (motion sequence 007), the amended complaint and cross-claims are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the remaining branches of the motion are denied as moot and it is further

ORDERED that Defendant Seneca Specialty Insurance Company's motion for summary judgment is denied in its entirety (motion sequence No. 008); and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this action is referred to Part 40 for trial.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
April 3, 2020

ENTER:

Hon. Tanya R. Kennedy
J.S.C.

HON. TANYA R. KENNEDY