

W&X Evergreen, LLC v United Aline Servs., Inc.

2020 NY Slip Op 31750(U)

May 15, 2020

Supreme Court, Kings County

Docket Number: 507630/2015

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of May, 2020.

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P R E S E N T:

HON. CARL J. LANDICINO,
Justice.

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W&X EVERGREEN, LLC,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 507630/2015

UNITED ALINE SERVICES, INC. AND UNITED
ALINE CO. LTD.,

MOTION SEQ. # 9

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>The following e-filed papers read herein:</u>	<u>NYSEF NO.</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>112-145</u>
Opposing Affidavits (Affirmations) _____	<u>153-159</u>
Other Papers (Memoranda of Law) _____	<u>161-168</u>

Upon the foregoing papers, Defendants, United Aline Services, Inc. and United Aline Co. Ltd. (collectively hereinafter referred to as "UA" or "Defendants") move (Motion Sequence #9) for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint of Plaintiff W&X Evergreen, LLC (hereinafter referred to as "W&X" or "Plaintiff"), and for an order, pursuant to CPLR 3126, precluding the production of documents and testimony by the Plaintiff.

Background

W&X purportedly operated a kitchen cabinet wholesale distribution business at 747 Evergreen Avenue in Brooklyn, New York (hereinafter the "Property"). In spring of 2008, W&X contacted UA, an insurance brokerage firm, to obtain an insurance policy for the Property. On May 23, 2008, UA provided Plaintiff with a commercial insurance application and quote to insure the Property against damage. The quote listed information about the Property including, in pertinent part, the following:

Year Bldg. Built:	1856
# of Stories:	1
Occupancy:	n/a
Total Area:	18,000 sq.ft.
Burglar Alarm:	None
Fire Alarm:	None
Sprinklered:	None

(Defendants' Motion, affidavit of Tommy Tang, Exhibit A).

One of Plaintiff's principals, Xiaoqing Xu, signed the quote and application wherein she certified that she had made reasonable inquiries to obtain the answers to the questions on the application, and certified that the answers were true, correct and complete to the best of her knowledge. After UA sought insurance companies, they ultimately procured an insurance policy from Harleysville Insurance Company (not a party herein) to insure W&X for the period of June 23, 2008 to June 23, 2009 (Harleysville policy). In its complaint, W&X alleges that prior to the time the Harleysville policy was procured, it had advised UA that the subject premises did not have a fire alarm or sprinkler system. Around the time that the Harleysville policy was up for renewal, UA recommended that W&X switch carriers and provided it with a quote

and application package for a policy from Leading Insurance Group Insurance Co. (“LIG”) (not a party herein) as insurer, for the period of June 23, 2009 to June 23, 2010. This policy purportedly included a premium discount for a sprinkler system at the Property. It is undisputed, however, that the Property did not have a functioning sprinkler system in place.

During her deposition, Ms. Xu admitted that she never read the LIG insurance package before she signed the quote and application, and again certified that the answers were true, correct and complete to the best of her knowledge. The LIG policy was subsequently renewed for the period of June 23, 2010 to June 23, 2011. Shortly after renewal, on or about July 1, 2010, the Property was destroyed by a fire. LIG performed an investigation after the fire and discovered that the building’s sprinkler system was not working. LIG thereafter disclaimed coverage for the fire based on what it contended was W&X’s material misrepresentation on the insurance application pertaining to the operation of its fire suppression system.

On or about June 17, 2015, W&X commenced the within action, alleging causes of action for breach of contract and fraud against UA as its insurance broker for the procurement of the LIG policy. Plaintiff alleges that Defendants failed to 1) procure insurance with certain specifications and 2) provide adequate coverage to protect the Plaintiff’s interest. Issue was joined by the service of Defendants’ verified answer on or about August 10, 2015. By court order dated May 30, 2018, all parties were obligated to serve post EBT demands by June 22, 2018 and responses by July 27, 2018. Defendants filed their supplemental demands on June 27, 2018, which included, among other things,

a request for documentation regarding W&X's alleged damages. On or about September 14, 2018 Defendants sent Plaintiff a good faith letter requesting responses to their supplemental demands. Apparently, Plaintiff did not respond to those demands and filed the note of issue on September 28, 2018. The Defendants (Motion Sequence #7) sought to preclude Plaintiff due to its failure to respond. They also sought to extend their time to file a summary judgment motion. By order dated November 27, 2018, the Plaintiff was permitted to respond to Defendants' supplemental discovery request by January 15, 2019, and the parties' time to file summary judgment motions was extended to April 18, 2019. The order also indicated that, in the event Plaintiff failed to comply with the deadlines set forth therein, Defendants could move to preclude further document production.

On March 12, 2019 Defendants (Motion Sequence #8) again moved to preclude Plaintiff's production of any additional documents. On March 28, 2019, the court ordered that, by April 10, 2019, Plaintiff was to provide the documents requested in the motion or an affidavit confirming that it conducted a search for same and was unable to find any documents that were responsive. The order mandated that Plaintiff would be precluded from offering any such documents at trial if it failed to comply. On April 10, 2019, Plaintiff provided some documentation in response, which included an undated estimate to reconstruct improvements at the Property.

In the instant motion, Defendants seek summary judgment dismissing Plaintiff's breach of contract and fraud causes of action, and request that Plaintiff be precluded from producing any evidence as to its alleged damages, based upon its failure to comply with discovery demands.

Discussion

Defendants contend they are entitled to an order granting them summary judgment because Plaintiff is unable to establish its *prima facie* case for its claims based on the evidence and testimony in the record. As to the breach of contract claim, Defendants argue that dismissal is warranted because there is no written contract between the parties and, even if they had a contract, the Defendants fulfilled their obligations to the Plaintiff. Defendants claim they presented insurance policies for Plaintiff to consider, but were not obligated to do an independent investigation to verify that Plaintiff's representations pertaining to the Property were accurate. In this regard, the Defendants note that the insurance companies themselves performed any necessary inspections of the Property to be insured. In addition, Defendants maintain that, in preparing the insurance documents, they relied on Plaintiff's knowledge and its representation that the building had an operating sprinkler system. Defendants contend that the Plaintiff has not provided any documentary evidence that they (Defendants) knew or were informed that the building lacked an operating sprinkler system. Therefore, Defendants argue that the Plaintiff should now be precluded from offering any such evidence on that issue.

Defendants further argue that Plaintiff has willfully and intentionally failed to respond to requests for evidence of claimed damages, and therefore should be precluded from presenting any such evidence at trial. Defendants contend that Plaintiff failed to provide any such evidence throughout the litigation of this case, and only attempted to introduce an undated, unsigned and unsubstantiated letter stating the repair costs eight

days before the filing deadline of the instant motion. Defendants argue that without evidence of the repairs, the Plaintiff is unable to prove essential elements of its claims. Accordingly, they contend that they should Defendants should be awarded summary judgment.

As to Plaintiff's fraud claim, Defendants argue that it should also be dismissed in that it is duplicative of the breach of contract claim, and otherwise based upon unsubstantiated allegations. In this regard, Defendants contend that the Plaintiff cannot claim misrepresentation where it had the opportunity to conduct its own investigation to verify its policy documents. Further, Defendants note that the Plaintiff fails to identify specific statements that were fraudulently made by Defendants, and fail to point to any evidence establishing that Defendants had notice that the building lacked a sprinkler system.

Summary Judgment

The court will first address that branch of Defendants' motion seeking summary judgment and dismissal of Plaintiff's breach of contract and fraud claims asserted against them. A party seeking summary judgment has the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see also CPLR 3212[b]. The moving party bears the burden of a *prima facie* showing of its entitlement to summary judgment as a matter of law by presenting

evidence in admissible form demonstrating the absence of any material issue of fact. See CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003] Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers. See *Point Holding, LLC v Crittenden*, 119 AD3d 918, 919 [2d Dept 2014] Once movant has made its *prima facie* showing, the burden shifts to the non-moving party to show “facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]). Conflicting inferences and issues of credibility will preclude summary judgment to a party and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment. *Open Door Foods, LLC v Pasta Machs., Inc.*, 136 AD3d 1002, 1004-1005 [2d Dept 2016] and *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]

Turning to Plaintiff’s breach of contract claim, “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] “To set forth a case for negligence or breach of contract against an insurance broker, a Plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy.” *American Bldg. Supply Corp v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012] “A general request for coverage will not satisfy

the requirement of a specific request for a certain type of coverage.” *id.*, quoting *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 158 [2006] “Thus, the duty is defined by the nature of the client's request.” *Verbert v Garcia*, 63 AD3d 1149, 1149 [2d Dept 2009]

“An insured must show that the broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that the broker breached the agreement or that it failed to exercise due care in the transaction.” *Reilly v Progressive Ins. Co.*, 288 AD2d 365, 365-366 [2d Dept 2001] Where an insured makes a request for specific insurance coverage, the fact that the insured failed to read the policy to discern the actual coverage is not a superceding cause precluding liability of the insurance broker as a matter of law. *Gagliardi v Preferred Mut. Ins. Co.*, 102 AD3d 741, 742 [2d Dept 2013]

Here, although Defendants argue that there is no evidence that they knew or were made aware that Plaintiff had no operational sprinkler system when it switched to the LIG insurance policy in 2009, the initial commercial insurance application, signed by Plaintiff and forwarded to Defendants in 2008, contained the language “Sprinkler: None.” When viewed in a light most favorable to the Plaintiff, this entry on the application could create a reasonable inference that the Property did not have an operational sprinkler system, and that the Defendants were aware of that fact.

Contrary to Defendants’ contention, this reasonable inference is not negated by the sworn affidavits by Tommy Tang, an account executive for Defendants, and Annie

Gao, Defendants' President, who swear that Ms. Xu told them that the building had sprinkler coverage, and that Plaintiff's original application in 2008 reflected that fact. These affidavits directly contradict the plain meaning of the entry on Plaintiff's original application, and Plaintiff's testimony wherein she indicates she never had a verbal discussion with Defendants about the sprinkler system, and that Defendants never advised her in 2009 that her premium was going to be lowered upon switching to LIG because of a sprinkler discount. The affidavits proffered by Defendants raise issues of fact as to whether Defendants exercised due care in submitting the application for the LIG policy, which contained the misrepresentation about the sprinkler system, instead of procuring a continuation of Plaintiff's insurance with Harleysville. *Republic Long Is., Inc. v Andrew J. Vanacore, Inc.*, 29 AD3d 665, 666 [2d Dept 2006]

Therefore, "the Defendants failed to establish their *prima facie* entitlement to judgment as a matter of law because they submitted insufficient evidence that they procured the amount of coverage that the Plaintiff engaged them to procure" when they acquired the LIG policy for Plaintiff. *Giamundo v Dunn*, 157 AD3d 867, 868 [2d Dept 2018, see also *Open Door Foods, LLC v Pasta Machs., Inc.*, 136 AD3d 1002, 1004-1005 [2d Dept 2016]¹ Moreover, Plaintiff's failure to read the LIG application, and mistake in signing it, may give rise to her credibility, but does not defeat Plaintiff's claim as a matter

¹ The court notes that this finding is not predicated on the existence of a special relationship between the Plaintiff and the Defendants or any continuing duty of the Defendants to direct Plaintiff to obtain *additional coverage*. Such justified reliance implicating the heightened duty created by such a special relationship was not created here (see *Murphy v Kuhn*, 90 NY2d 266 [1997]).

of law.

Further, this court finds no merit in Defendants' argument for summary judgment based on Plaintiff's failure to produce a separate written contract requiring Defendants to procure insurance on its behalf. Even if the court were to find that the history of applications, quotes, correspondence, and other paperwork exchanged between the parties did not constitute a written contract, the record evidence, as well as Defendants own submissions herein, raise issues of fact as to whether an oral contract or implied agreement existed between the parties, which may also serve as the basis for Plaintiff's breach of contract claim. *Dweck v Friedlander Group, Inc.*, 43 AD3d 854 [2d Dept 2007] Thus, inasmuch as the Defendants have failed to meet their initial burden of demonstrating entitlement to judgment as a matter of law (*see Giuffrida*, 100 NY2d at 81; *see also Zuckerman*, 49 NY2d at 562), the burden of proof never shifted to the Plaintiff (*see CPLR 3212 [b]*). Accordingly, Defendants' motion for summary judgment dismissing Plaintiff's breach of contract claim is denied without regard to the sufficiency of Plaintiff's opposition papers. *Point Holding*, 119 AD3d at 920)

However, given that Plaintiff's fraud claim arises from identical facts, seeks identical damages and only relates to the alleged breach of contract, that branch of Defendants' motion seeking to dismiss Plaintiff's second cause of action for fraud is dismissed as duplicative. *Rose v Different Twist Pretzel, Inc.*, 175 AD3d 597, 599 [2d Dept 2019]

Preclusion

Defendants’ request for an order precluding the Plaintiff from producing any evidence as to its damages is denied. The court may penalize a party who “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed” by issuing an order prohibiting that party from producing designated evidence (CPLR 3126[2]). However, it is well settled that “[a]ctions should be resolved on their merits whenever possible, and the drastic remedy of striking a pleading or the alternative remedy of precluding evidence should not be employed without a clear showing that the failure to comply with court-ordered discovery was willful and contumacious.” *Cap Rents Supply, LLC v Durante*, 167 AD3d 700, 702 [2d Dept 2018] Further, “[r]esolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are matters within the sound discretion of the motion court.” *Morales v Zherka*, 140 AD3d 836, 836-837 [2d Dept 2016]

Here, it is undisputed that the Plaintiff failed to comply with multiple orders to respond to Defendants June 27, 2018 supplemental demands and provide documentation of its damages. However, the court issued a conditional order of preclusion that afforded Plaintiff a final opportunity to provide evidence of its damages by April 10, 2019. *Casas v Romanelli*, 232 AD2d 445, 445 [2d Dept 1996] Given the sequence of events in this case, and that Plaintiff eventually provided discovery within the mandated time period, this court finds that an order precluding Plaintiff from presenting evidence regarding damages at trial is not warranted here, even though Defendants maintain that the

documentation provided is insufficient. *Carr v Melmarkets, Inc.*, 143 AD2d 795, 795 [2d Dept 1988] The Court, at the time of trial, will be in the best position to address evidentiary issues upon application of either party, in light of the totality of the history of the discovery process and based on issues of fairness and prejudice. Accordingly, that branch of Defendants' motion seeking an order precluding Plaintiff from submitting any evidence of its claimed damages is denied at this time.

The court, having considered the Defendants' remaining contentions, finds them without merit.

Accordingly, Defendants' motion is granted, only to the extent that Plaintiff's fraud claim is dismissed as against them, and the remainder of Defendants' motion is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



Carl J. Landicino, J. S. C.