

Arch Specialty Ins. Co. v M.T. Steel Fabricators, Inc.
2020 NY Slip Op 31926(U)
May 12, 2020
Supreme Court, New York County
Docket Number: 654291/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

ARCH SPECIALTY INSURANCE COMPANY,
Plaintiff,

- v -

M.T. STEEL FABRICATORS, INC., STREAMLINE USA,
LLC, and HOUSTON CASUALTY COMPANY

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28,
29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50, 511, 52, 53, 54, 55, 56, 57, 58, 59,
60, 61, 62, 63, 64, 65, 66, 68, 69

were read on this motion to/for DEFAULT JUDGMENT.

DECISION AND ORDER

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3215 for a
default judgment as against defendant M.T. Steel Fabricators, Inc. (MT Steel) seeking a
judgment rescinding a commercial general liability insurance policy issued to defendant MT
Steel based on a material misrepresentation made by MT Steel on its insurance application. MT
Steel does not oppose the motion. The plaintiff's motion is granted inasmuch as the plaintiff has
provided proof of timely service of the summons and complaint upon the defendants, proof of
the facts constituting the claim, and proof of the defendants' defaults (see CPLR 3215[f]; Rivera
v Correction Officer L. Banks, 135 AD3d 621 [1st Dept. 2016]), timely moved for that relief (see
CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen, 128 AD3d 455 [1st Dept. 2015]), and
satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

MT Steel submitted an application for insurance to the plaintiff on or about January 3,
2017. The Application's Commercial General Liability Section discloses two hazards: "Metal
Erection (Decorative/Artistic)," with an exposure of \$27,500.00, and "Metal Work Shop," with an
exposure of \$150,000. The total annual gross sales are stated to be \$350,000.00. The plaintiff
issued a commercial general liability insurance policy to MT Steel for the period January 12,
2017, to January 12, 2018, (Policy No. AGL0033054-01) with a premium of \$21,261.00. The
policy declarations provides a business description for M.T. Steel as "Metal Goods Fabricator,

shop only." The policy also includes an Employer's Liability Exclusion, which states that MT Steel agrees that (1) the statements in the policy's declarations were accurate and complete, (2) those statements are based on representations made by MT Steel to the plaintiff, and (3) the plaintiff issued the policy in reliance on those representations.

However, in its application, MT Steel failed to disclose that it was engaged in structural steel work, and had just received a contract that included significant amounts of structural steel work at a construction project located at 1604 Broadway in Manhattan. During the performance of the construction contract, one of MT Steel's employee's Jose Cruz fell to his death while working. On June 12, 2018, the administrator of Cruz's estate commenced an action captioned Adia Cruz, as Administrator of the Goods, Chattels and Credits which were of Jose Antonio Cruz, and Adia Cruz, Individually v. 1604 Broadway Holder LP., Farmore Realty, Inc., Ryman Hospitality Properties, Inc. and SPK Hosnitality Grouo LLC. a Joint Venture and Streamline USA, LLC (N.Y. Sup. Ct. Bronx Co., Index No. 26800/18). The plaintiff disclaimed coverage in the action and demanded that MT Steel consent to the rescission of the policy based upon its misrepresentations. MT Steel refused, leading to the plaintiff commencing the instant action.

An insurer may rescind an insurance policy, *ab initio*, where it would not have issued an policy absent material misrepresentations made by an insured on its application. See N.Y. Insurance Law § 3105. A misrepresentation can form the basis for rescission even if it was unintentionally made by the insured. See Meagher v Executive Life Ins. Co. of N.Y., 200 AD2d 720 (2nd Dept. 1994). "Failure to disclose is as much a misrepresentation as a false affirmative statement." Vander Veer v Contl. Cas. Co., 34 NY2d 50, 52 (1974). Moreover, an insurer need not show that it would not have issued the insured any policy; an insurer can rescind a policy if it would have charged the insured a higher premium had it known the truth misrepresented on the application. See Arch Specialty Ins Co. v Kam Cheung Constr.. Inc., 104 AD3d 599 (1st Dept. 2013).

In support of its motion, the plaintiff submits, *inter alia*, the affidavit of service for MT Steel and the affidavit of further service required under CPLR 3215(g), demonstrating that the plaintiff satisfied the notice requirements for this motion and timely moved for relief based upon MT Steel's default. The plaintiff further submits MT Steel's policy application, which represented that MT Steel only did decorative metal work, when it actually had contracted to do structural steel work prior to applying for the policy, the policy issued by the plaintiff based upon MT

Steel's misrepresentations, and the plaintiff's denial of coverage following its determination that MT Steel had made material misrepresentations on its policy application. The plaintiff also submits the affidavits of Veronica Kirkham, the senior vice president of contract binding operations for the plaintiff, and John Stelmek, the claims adjuster associated with this action, as well as the underlying policy rating guidelines used in this instance, all of which detail how MT Steel's misrepresentation regarding the scope and type of its work were material as they significantly decreased the premiums that were charged by the plaintiff for the underlying policy such that, had the plaintiff knew of MT Steel's misrepresentations, it would not have entered into the insurance policy.

These submissions demonstrate that the plaintiff would not have issued the policy to MT Steel had it known that MT Steel performed structural steel work, such that the plaintiff is entitled to rescind the policy pursuant to Insurance Law § 3105. Moreover, the plaintiff is also correct that it would be able to disclaim coverage based upon MT Steel's breach of the policy's Representations Condition and the policy's Employer's Liability Exclusion, which states that MT Steel agrees that (1) the statements in the policy's declarations were accurate and complete, (2) those statements are based on representations made by MT Steel to the plaintiff, and (3) the plaintiff issued the policy in reliance on those representations. The policy's declarations describe MT Steel's business as "Metal Goods Fabricator, shop only." As discussed herein, that description is inaccurate given the structural steel work MT Steel contracted to perform and therefore MT Steel also breached the plain language of the Representations Condition, such that the plaintiff would not have to provide coverage beyond the scope of MT Steel's representations. See Citizens Ins. Co. of Am. v. Ill. Union Ins. Co., 105 AD3d 679 (1st Dept. 2013); Moshiko, Inc. Seiger & Smith, Inc., 137 AD2d 170 (1st Dept. 1988).

Although MT Steel did not oppose this motion, the defendants Streamline USA LLC (Streamline) and Houston Casualty Company (Houston) did, arguing that any judgment against the defaulting defendant should await resolution of the action against the answering defendants, as a determination may adversely impact their ability to defend this action. However, contrary to Streamline and Houston's contentions, in declaratory judgment actions where some defendants have appeared but one or more defendants are in default, the plaintiff is entitled to a default judgment against a non-appearing defendant, and that judgment has no effect on, and the action will be severed as against, the appearing defendants. See Colony Ins. Co. v Danica Group, LLC, 115 AD3d 453 (1st Dept. 2014); State Farm Ins. Co. v Frias, 66 AD3d 997 (2nd

Dept. 2009); Tower Ins. Co. of N.Y. v Einhorn, 133 AD3d 841 (2nd Dept. 2015); Am. Motorists Ins. Co. v N. Country Motors, 57 AD2d 158 (3rd Dept. 1977).

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for default judgment pursuant to CPLR 3215 against defendant M.T. Steel Fabricators, Inc. is granted; and it is further,

ADJUDGED and DECLARED that the plaintiff is entitled to rescission of the general liability policy issued to M.T. Steel Fabricators, Inc. (Policy No. AGL0033054-01), and it is further,

ORDERED that the action is severed and continued as against the remaining defendants, Streamline USA LLC and Houston Casualty Company; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon all defendants within 30 days of the date of this order; and it is further;

ORDERED that the parties are to contact chambers on or before July 31, 2020 to schedule a status/settlement conference.

This constitutes the Decision, Order, and Judgment of the court.

5/12/2020

DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

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