Leading Ins. Group Ins. Co., Ltd. v New City Sliquors, Inc.
2020 NY Slip Op 34401(U)
September 3, 2020
Supreme Court, Kings County
Docket Number: 11958/2014
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

LEADING INSURANCE GROUP INSURANCE CO., LTD.,

Plaintiff,

against

NEW CITY SLIQUORS, INC.,

Defendant.

Index Number 11958/2014
Seq#004 & 005

DECISION/ORDER

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

	Papers Numbered
Notice of Motion and Affidavits Annexed	1, 2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3, 4
Replying Affidavits	5, 6
Exhibits	
Other	

Upon review of the foregoing documents, plaintiff's motion for summary judgment (Mot. Seq. 004) and defendant's motion for summary judgment and to amend its answer (Mot. Seq. 005), are decided as follows:

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Factual Background

Plaintiff commenced this action for judgment declaring that the insurance policy it issued to defendant was rescinded and void. There appears to be no dispute that plaintiff has certain criteria for the insurance it issues. There is also no dispute that, when applying for a policy, such as the subject policy, prospective insureds, such as defendant, complete an application that seeks information based on these criteria. Plaintiff uses this information to determine whether or not it will issue the insurance policy. It is further undisputed that defendant was a tenant, and not the owner, of the premises from which it did business.

Defendant operates a liquor store on the first floor of commercial space located at 2102 Astoria Boulevard, Queens, New York. In September 2012, defendant applied for insurance with plaintiff. The application, titled "Commercial Insurance Proposal-Businessowners", was

submitted through plaintiff's website. In this application, defendant represented that the type of construction of the its building was "joisted masonry". Subsequently, defendant submitted an Acord Insurance Application, in which defendant represented that the construction type of its building was "brick". Thereafter, plaintiff sent defendant a written insurance quote. On one page of that document, it states, under "Subject to Bind", "Letter of Management Experience - MIN 2 years". In apparent response to that document, Mei Rong Wang, defendant's president, stated by letter, dated September 28, 2018, that she "had retail experience at [her] relatives['] liquor store for the past five years as a manager." Plaintiff then issued an insurance policy to defendant, which was effective from October 1, 2012, to October 1, 2013.

As a result of Superstorm Sandy in October 2012, the awning of defendant's store was damaged. Defendant submitted a claim under its policy with plaintiff. In November 2012, plaintiff investigated the loss, through William Steele of Long Island Adjustment Corp. ("LIAC"). As part of this investigation, Mr. Steele visited the premises. Plaintiff ultimately determined that the loss was covered and paid benefits to defendant. Thereafter, the policy was renewed for a one-year period beginning on October 1, 2013.

In or around July 2014, plaintiff's underwriting department began the process of reviewing its policy with defendant for renewal. As part of this process, plaintiff prepared a property report, which includes information about the building, such as construction type. Plaintiff reviewed a report called a Building Underwriting Report, which stated that defendant's building was of frame construction, and not joisted masonry or brick. On or about July 28, 2014, plaintiff sent defendant a notice of nonrenewal (the "Nonrenewal Notice"). The Nonrenewal Notice stated that, "[d]ue to our recent changes in our underwriting guidelines, we are no longer

entertaining buildings of frame construction, or risks in frame buildings . . . ."

In August, plaintiff reviewed a further inspection of the building a month later and confirmed that the building was frame construction. Accordingly, plaintiff advised defendant that it considered the policy rescinded and issued a Notice of Rescission of Insurance Contract and Reservation of Rights (the "Rescission Notice") to defendant.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

To be afforded the right to rescind an insurance policy, an insurer must demonstrate that the policyholder made a material misrepresentation (*Piller v Otsego Mut. Fire Ins. Co.*, 164 AD3d 534, 535 [2d Dept 2018]). Under Insurance Law § 3105, a misrepresented fact is material if knowledge of that fact would have led the insurer to refuse issuance of the policy (*Zilkha v Mut. Life Ins. Co. of New York*, 287 AD2d 713, 714 [2d Dept 2001]). Whether a fact is material is generally a question of fact to be determined by the jury (*Parmar v Hermitage Ins. Co.*, 21 AD3d 538, 540 [2d Dept 2005]). That said, "[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, that show that it would not have issued the same policy if the correct information had been disclosed in the application" (*Interboro Ins. Co. v Fatmir*, 89 AD3d 993, 994 [2d Dept 2011], quoting *Schirmer v Penkert*, 41 AD3d 688, 690-691

[2d Dept 2007]).

Plaintiff argues that, had defendant disclosed the actual construction type of its building, plaintiff would never have issued the insurance policy. In support of its motion, plaintiff submits Section 11 of its written underwriting policies, titled "Ineligible Operations or Risk Characteristics", as well as the deposition and affidavit testimony of John Seing, an underwriter for Leading Insurance Services, Inc., the United States manager of plaintiff, all of which state that plaintiff does not provide insurance to those whose buildings have frame construction. Mr. Seing also explains in his affidavit that, had defendant disclosed the construction type of its building during the application, plaintiff's computer system would have automatically rejected the application as ineligible.

Defendant does not dispute that it provided incorrect information about the building construction type, only that the information was not material. Defendant argues that the construction type of its building is not material because it was not a subject of the insurance policy. Defendant refers to the Acord application, which states in the "Subject of Insurance" box "Contents of 21-01 Astoria Blvd., Astoria Queens". In addition, Mr. Seing acknowledged at his deposition that plaintiff insured the contents of defendant's store, and not the building itself. Defendant also references the insurance policy itself, which states that it is a "Businessowners" policy, although the type or scope of coverage is not self-evident from this word, which defendant does not define.

Plaintiff seemingly ignores this argument and refers to the Section 11 guidelines, Mr. Seing's testimony, and its computer system, all of which appear to reject insurance for companies whose building is frame construction. Plaintiff argues, citing *Bleecker St. Health & Beauty Aids*

v Granite State Ins. Co. (38 AD3d 231 [1st Dept 2007]), that the information was material because its computer system would have automatically rejected the application had defendant accurately disclosed the construction type. However, *Bleecker* does not support this position. The court held that it was the testimony of its underwriter, more than the processes of its computer system, that established that the information was material (*id.* at 232).

Defendant argues that Mr. Seing does not have personal knowledge of plaintiff's underwriting practices for New York insurance policies at the time plaintiff issued the subject policy because he was not issuing such policies on behalf of plaintiff at that time. Plaintiff contends, by referring generally to Mr. Seing's deposition testimony, that he had personal knowledge of plaintiff's underwriting policies. To the extent that Mr. Seing's experience in issuing New York policies for plaintiff postdates the issuance of the subject policy, this affects the weight of his testimony. The assessment of such weight is the best resolved by the jury (*see, e.g.*, *Gordon v Tishman Const. Corp.*, 264 AD2d 499, 502 [2d Dept 1999]).

Defendant also argues that plaintiff has not established that the written underwriting policies plaintiff submits apply in this case. As defendant explains, Section 11 of the guidelines, upon which plaintiff relies, is undated, and does not appear to be a part of other underwriting guidelines, titled "Underwriting Guidelines for BOP ["Businessowners" Policy]" that, according to their date, were in effect when the subject policy was issued. Plaintiff does not respond directly to the possible disparity between Section 11 and the BOP guidelines. Rather, plaintiff refers to Mr. Seing's deposition testimony, in which he recognized Section 11 as the underwriting guidelines in effect at the relevant time. Further clouding this issue is the Nonrenewal Notice plaintiff sent, which states that the guidelines upon which plaintiff relies

were updated "recently", where the policy was issued in October 2012 and the Nonrenewal Notice was sent in July 2012. Again, this will be an issue for the jury to resolve.

Separately, plaintiff argues that the misstatement about Ms. Wang's management experience was also material. In support, plaintiff provides the insurance quote that it sent to defendant. This document states, under "Subject to Bind", among other things "Letter of Management Experience - MIN 2 years". However, plaintiff does not reference an underwriting guideline or other written policy that established it would not have issued the insurance had Ms. Wang has the requisite experience.

Defendant argues that plaintiff waived the right to rescind the policy because it sent a "notice of nonrenewal" rather than a "notice of rescission" once it became aware of the alleged misrepresentations in July 2014. However, a notice of nonrenewal does not preclude later rescission of the policy (*Continental Cas. Co. v Marshall Granger & Co., LLP*, 6 F Supp 3d 380, 400 [SDNY 2014], *affd sub nom. Cont. Cas. Co. v Boughton*, 695 Fed Appx 596 [2d Cir 2017]). Defendant relies on the court's decision in *GuideOne Specialty Mut. Ins. Co. v Congregation Adas Yereim* (593 F Supp 2d 471 [EDNY 2009]) in support of its argument. As the Second Circuit regognized in *Boughton*, *Guideone* was based on a misapplication of precedent (*Boughton*, 695 Fed Appx at 599, n 1).

Defendant also argues that plaintiff waived its right to rescind because it accepted premiums after having become aware the defendant's purported misrepresentation. If plaintiff was aware of the purported misrepresentation, and accepted premiums in spite of it, then plaintiff cannot rescind the policy (*Belesi v Connecticut Mut. Life Ins. Co.*, 272 AD2d 353, 354 [2d Dept 2000]). Defendant argues that plaintiff became aware of the construction type of the building in

October 2012, when it inspected the building following Superstorm Sandy. In support, defendant references the photographs of the building taken for inspection. Defendant argues that the photographs of the outside of the building establish that the building was frame construction.

Plaintiff contends that it did not know the truth of defendant's misrepresentations prior to its recision of the policy. When plaintiff inspected the awning damage following Superstorm Sandy, William Steele, who inspected the awning for plaintiff following the storm, testified at his deposition that he is sometimes able to determine the construction type of the building by looking at the outside of the building, but not all of the time. Mr. Steele also testified that he did not go inside the building as part of the awning inspection, nor was there any need to do so. Accordingly, there are issues of fact as to whether, and to what extent, plaintiff had notice of the construction type of defendant's building at this time.

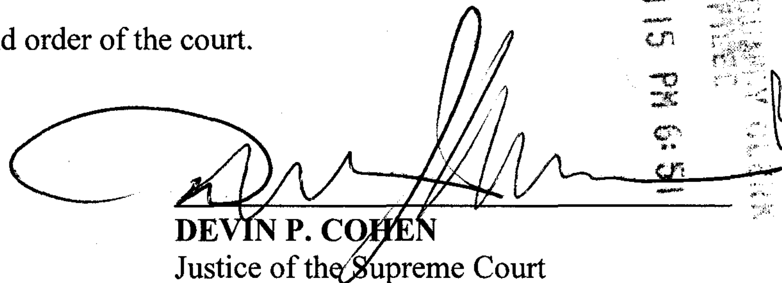
Separately, defendant moves for summary judgment on the basis that plaintiff waived any right to rescind the policy, and to amend its answer to include a defense of waiver. Defendant bases its motion only on one theory of waiver – that plaintiff waived rescission when it sent the Renewal Notice first. However, as explained above, sending a notice of nonrenewal does not waive a subsequent rescission (*Continental Cas. Co. v Marshall Granger & Co., LLP*, 6 F Supp 3d 380, 400 [SDNY 2014], *affd sub nom. Cont. Cas. Co. v Boughton*, 695 Fed Appx 596 [2d Cir 2017]). Because there is no basis for waiver under these circumstances, there is no reason to amend defendant's answer.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment (Mot. Seq. 004) is denied, and defendant's motion for summary judgment and to amend its answer (Mot. Seq. 005)

is also denied. Finally, defendant's motion (Mot. Seq. 006) to restore its motion (Mot. Seq. 005) is denied as moot. Although the action appears to have been marked off and subsequently restored by another Justice of the court, there is no indiction in the Court's records that the then pending motions were ever formally "marked off". Accordingly, I have considered both substantive motions here on their merits.

This constitutes the decision and order of the court.



September 3, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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