SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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

Plaintiff,

- v -

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

Defendant.

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INDEX NO. 155954/2014

MOTION DATE 12/07/2020

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

TCE INSURANCE SERVICES, INC.

Plaintiff,

-against-

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

Defendant.

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Third-Party
Index No. 595256/2015

The following e-filed documents, listed by NYSCEF document number (Motion 010) 361, 362, 363, 364, 365, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, the motion is decided as follows:

This action arises from Defendant, Seneca Specialty 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"). Plaintiffs commenced the instant action against Seneca and TCE Insurance Services, Inc. ("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). Seneca filed its answer to the amended complaint on October 31, 2014, including cross-claims against TCE for apportionment, contribution, and indemnification and asserting a counterclaim against plaintiffs for a judgment declaring the Policy as void ab initio and that no coverage exists under the Policy. TCE filed its answer to the amended complaint on October 27, 2014, which included crossclaims against Seneca for apportionment, contribution, and indemnification. TCE also commenced a third-party action on May 11, 2014 against GLN Worldwide, Ltd. ("GLN") for contribution and indemnification. GLN also asserted a counterclaim against TCE for contribution and indemnification. GLN moved for summary judgment, dismissing the amended third-party complaint and cross-claims as asserted against it (motion sequence 006). TCE and Seneca also moved for summary judgment dismissing the amended complaint and cross-claims and/or counterclaims insofar as asserted against them (motion sequence 007 and 008, respectively).

In an Order dated April 3, 2020, this Court granted 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, granted Defendant TCE Insurance Services, Inc.'s motion for summary judgment to dismiss the amended complaint and cross-claims insofar as asserted against it. And denied Defendant Seneca Specialty Insurance Company's motion for summary judgment in its entirety.

Plaintiff now moves to reargue the portion of this Court's Order which granted summary judgment to TCE dismissing the amended complaint and cross-claims asserted against it. A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an

opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey,* 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc*., 112 AD2d 410 [2d Dept 1985]). A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court" (see, *Pryor v. Commonwealth Land Title Ins. Co*., 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari,* 16 AD3d 664 [2d Dept 2005]).

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. 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. 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"). Schwartz then forwarded the application to Seneca's underwriter, Tony Steffa ("Steffa"). 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"). 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. Seneca retained a company to inspect the Premises and prepare an inspection report to verify the information plaintiffs submitted in the insurance application was "accurate, true and acceptable."

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 . . ." The Inspection Report included photographs of the Premises depicting piles of debris and waste housed inside the transfer station. 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." The fire occurred at the Premises four days later, necessitating its demolition.

Seneca received notice of the fire on October 23, 2013. Following an investigation, Seneca issued a letter on May 14, 2014, disclaiming coverage ("disclaimer letter"). 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. 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.

In support of its original motion, TCE argued that it was not the proximate cause of plaintiffs' injuries since Seneca wrongfully denied coverage and rescinded the Policy. TCE also argued 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 argued 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.

In opposition, plaintiffs argued 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. Seneca also opposed 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 and that that TCE had actual knowledge that plaintiffs' operations breached the warranty when it procured the Policy and 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. GLN also submitted opposition papers arguing that 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.

In granting TCE's motion, finding that TCE neither breached any contract nor duty of care the Court reasoned as follows: Maggio testified no fire code violations existed in September 2013. 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." 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. Further, Gino testified that Testa advised him that no fire code violations existed. This evidence established that the information as to whether uncorrected fire code violations existed was consistent with plaintiffs' representations and the information they provided to Gino. The evidence further established that plaintiffs provided TCE with the information which TCE forwarded to

GLN, and that GLN provided Seneca with such information. Seneca also argued in opposition that it properly denied coverage because plaintiffs breached the warranty against conducting recycling operations at the Premises. The Court noted that the application for insurance described the operations as a "transfer station" and failed to ask whether recycling occurred there and that Steffa asked Schwartz in his September 12, 2013 email whether plaintiffs conducted recycling at the Premises and Schwartz responded no such activity occurred at the location. 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" 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. Alicks testified the term included sorting of materials and that the Premises was improperly classified as a "transfer station. Steffa testified the Premises was properly classified as a "transfer station" and that it was not a recycling center. Steffa further testified the term "recycling" included the breaking down of materials, which Maggio and Testa both testified did not occur at the Premises. Maggio and Testa's testimony, as well as Maggio's affidavit, established that plaintiffs sorted recyclable materials from construction debris and transported same to third-parties by truck and rail. For these reasons, the Court found that the term "recycling" is ambiguous and that therefore Seneca failed to raise a triable issue of fact to TCE's prima facie showing.

In support of plaintiff's motion to reargue, plaintiffs argue that while plaintiffs "wholly agree with TCE's position that the facts of this matter clearly establish that no misrepresentation took place herein and that Seneca's denial of this loss is improper" plaintiffs dispute TCE's stance that it should be entitled to summary judgment no matter the outcome of the Seneca motion. Specifically, plaintiffs argue that "It is undisputed in this matter that Mario Gino of TCE and Vincent Maggio (plaintiff) had a long history as insurance broker and client. Mario was fully familiar with Vincent's businesses and what business was operated out of the properties. It is undisputed that Mario was asked to procure a policy of insurance for plaintiffs' newly acquired property at 80 Emjay Boulevard, Brentwood, New York ("80 Emjay"). It is undisputed that Mario visited the premises in connection with this application for insurance and honestly and truthfully answered all questions posed. However, if there is a determination by jury or otherwise that there was a material misrepresentation in the application, then it is respectfully submitted that questions of fact exist surrounding whether or not such was the result of the negligence of TCE under these facts." Plaintiff also highlight that they asserted an additional claim against TCE for their failure to properly obtain insurance for plaintiffs' equipment and machinery in the premises valued at $974,888.00.

TCE's opposition highlights that plaintiff's original opposition to the summary judgment motions argues only that "should Seneca's motion be granted in any respect, which is not conceded, then plaintiffs will clearly have a claim against TCE for Mr. Gino's negligence in procuring a policy that was found void ab initio. " Plaintiff's original opposition papers, which were not submitted in opposition to TCE's motion, but in opposition to Seneca's motion, failed to raise any opposition to TCE's entitlement to judgment as a matter of law. As such, the Court found that in moving for summary judgment, TCE addressed each and every ground upon which Seneca relied

in rescinding coverage and established that no "misrepresentations" were made by TCE so as to support Seneca's rescission or the Plaintiffs claims against it.

Plaintiff's contention that they asserted an additional claim against TCE for their failure to properly obtain insurance for plaintiffs' equipment and machinery in the premises valued at $974,888.00 is also without merit as TCE established in their motion for summary judgment that they did, in fact, obtain such coverage both under the Seneca policy and a Catlin Insurance Company policy.

Plaintiff's motion seeking leave to reargue this Court's prior grant of summary judgment to TCE Insurance Services, Inc. is DENIED in its entirety.

1/12/2021
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE