SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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HELEN'S KITCHEN, LLC D/B/A SAIGON SOCIAL,

Plaintiff,

- v -

AMERICAN EUROPEAN INSURANCE COMPANY, DAVID J. LOUIE, INC.

Defendant.

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INDEX NO. 650368/2024

MOTION DATE 02/29/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 67 were read on this motion to/for DISMISS.

The instant action arises out of allegations of breach of contract, among other allegations, based on plaintiff being denied insurance coverage for a fire at its premises. Defendants both move to dismiss the complaint, pursuant to CPLR § 3211(a)(1) and (7); this decision will solely address defendant American European Insurance Company ("AEIC"). Plaintiff opposes the motion. For the reasons set forth below, the motion to dismiss is denied.

Background

Plaintiff, a restaurant business named Saigon Social in the lower east side of Manhattan, was insured by carrier AEIC. AEIC provided plaintiff a general business policy, with an initial policy period of March 2020 to March 2021. Plaintiff renewed and fully prepaid all premiums for the policy, and it went into effect from May 26, 2021, to May 26, 2022. On May 2, 2022, a fire caused extensive damage to both the premises and plaintiff's business. Plaintiff timely submitted a claim to AEIC for the loss arising from the fire, however, AEIC denied the claim on the grounds that the policy had been canceled for non-payment of premiums.

Plaintiff's insurance broker, defendant David J. Louie, Inc., obtained additional liquor coverage (the "liquor endorsement") to plaintiff's policy, causing plaintiff to incur an additional premium payment of $275. Plaintiff alleges it was not aware that it owed this additional premium, nor did it have a liquor license and the instruction to its broker was simply to obtain a quote from AEIC. Plaintiff contends that AEIC wrongly canceled both the liquor endorsement and plaintiff's original policy, instead of severing and cancelling just the liquor endorsement. The cancellation of the policy caused plaintiff to be uninsured at the time of the fire.

Standard of Review

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp*., 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.'" *Id*.

"In a motion to dismiss pursuant to CPLR §3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence

"conclusively establishes a defense to the asserted claims as a matter of law." *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

Discussion

Preliminarily, the Court notes that AEIC's motion does not point to any deficiencies in the pleadings, rather its motion relies on the submission of documents and an affidavit to dismiss plaintiff's causes of action asserted against it. In support of its motion, AEIC submits the affidavit of Steven Richart, Senior Property Claims Manager as well as documents purporting to show the communications with plaintiff as well as notice of the policy cancellation and the proof that a check was mailed to plaintiff for the unearned premium.

Richart's affidavit and AEIC's memorandum of law contend that the addition of the liquor endorsement does not create a separate policy rather it remains one single policy, thus cancellation of the entire policy based on nonpayment of the increased premium based on the addition of liquor endorsement was appropriate and valid.

AEIC has failed to establish through documentary evidence that the Liquor Liability endorsement of the policy was not severable, thus failing to establish that the entire policy was legitimately canceled. For the purposes of the instant motion to dismiss, AEIC's reliance on the affidavit of Steven Richart is inappropriate, and contrary to AEIC's assertion, Richart's recitation of factual events does not constitute documentary evidence. AEIC seeks to have this Court make the ultimate determination that there was no intention to be able to sever the policy based on an affidavit which outlines the practices of the company and how it treats endorsements. Again, at the motion to dismiss stage, this is not appropriate.

While it is undisputed that the policy was canceled before the date of plaintiff's loss, the issue is whether the policy should have been canceled in the first instance. Neither the

documents provided by AEIC, nor the case law relied upon establish as a matter of law that such cancellation was appropriate[1]. AEIC concedes in its reply memorandum, that the cases relied upon, *Nationwide Mut. Ins. Co. v Mason*, 37 AD2d 15 [2nd Dept 1971], *Donley v Glens Falls Ins. Co.*, 184 NY 107 [1906], and *Prudential Prop. and Cas. Ins. Co. v Pearce*, 126 Misc 2d 1044 (Sup Ct 1985), affd sub nom. *Matter of Prudential Prop. and Cas. Co.*, 120 AD2d 597 [2d Dept 1986], all stand for the proposition that the intention of the parties is important in determining severability of the policy. Intent of the parties not to sever the general policy and the endorsement is not established by the documentary evidence submitted to the standard required in a motion to dismiss. Accordingly, it is hereby

ADJUDGED that the motion to dismiss is denied.

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11/21/2024
DATE

LYLE E. FRANK, 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**

[1] It is unclear why the movant cites to the New York Vehicle and Traffic Law while in other portions of the memorandum law cites to the New York Insurance Law.