Seneca Ins. Co. v Cimran Co., Inc.

2012 NY Slip Op 33166(U)

June 18, 2012

Sup Ct, NY County

Docket Number: 601087/10

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Charles Edward Ramos PART 53
Justice

Index Number : 601087/2010
SENECA INSURANCE COMPANY, INC.
vs.
CIRMAN CO. INC.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

_____ is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/18/12

_____, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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SENECA INSURANCE COMPANY,

Index No. 601087/10

Plaintiff,

-against-

CIMRAN CO., INC., and DARSHAN S. BAGGA A/K/A D.S. BAGGA,

Defendants.

----------x

Charles Edward Ramos, J.S.C.:

In this action for declaratory judgment, defendants Cimran Co., Inc. (Cimran) and Darshan S. Bagga a/k/a D.S. Bagga (together, defendants) move for summary judgment dismissing the complaint on the ground of waiver and/or estoppel.

Plaintiff Seneca Insurance Company, Inc. (Seneca) cross-moves for summary judgment and seeks a declaration that a Seneca insurance policy issued to defendants is void ab initio and that it has no duty to defend or indemnify defendants in an underlying action.

Background

Cimran, a domestic corporation located in Old Brookville, New York, submitted a written application to obtain liability insurance from Seneca, a domestic insurance company, on January 18, 2007. Defendant Darshan S. Bagga is Cimran's principal and owner.

Defendants sought insurance coverage for a one-story building located in Flushing, Queens, that Cimran owns (the

Premises).

The application for insurance coverage contained the following questions and answers by Cimran: Question 12: "Any structural alterations contemplated?" "No." Question 13: "Any demolition exposure contemplated?" "No."

Based on defendants' representations in the application for insurance, Seneca issued to defendants Policy No. ESR 0004764 (policy) for commercial general liability coverage for the period February 5, 2007 through February 5, 2008. The policy was subsequently renewed annually to February 5, 2011.

On February 9, 2010, Cimran was served with a summons and complaint in a personal injury action entitled *Villarreyna v Bagga, Singh Contracting Company of New York, LLC, Cimran Co. Inc., et al.*, Supreme Court, Bronx County, Index No. 300832/2010 (Underlying Action). The Underlying Action arose from an accident that occurred on a construction site at the Premises, on October 12, 2009.

Defendants provided notice of the Underlying Action to Seneca in February 2010. Seneca acknowledged the claim, retained defense counsel for defendants in connection with the Underlying Action, but reserved its rights to disclaim coverage. Thereafter, Seneca commenced an investigation regarding the nature of the claim.

During the course of its investigation, Seneca purportedly

learned that during the insurance application process, defendants sought to erect several additional floors to the existing structure located on the Premises as early as 2006, which was in direct contravention to their representations contained in their application that they were not contemplating structural alterations. Seneca represents that it has a strict policy against writing insurance policies for construction work.

Following its investigation, Seneca issued a notice of cancellation of the policy to defendants, which was to become effective on April 1, 2010. Subsequent to the issuance of the notice of cancellation, Seneca commenced this action seeking a declaration that the policy be declared void ab initio from its inception on the basis of material misrepresentations contained in the application for insurance.

Defendants interpose a counterclaim seeking dismissal of the complaint and a declaration that Seneca is obligated to defend and indemnify them in the Underlying Action. Defendants also seek an award of attorney's fees.

Discussion

Defendants move for summary judgment dismissing Seneca's complaint on the basis of estoppel and/or waiver.[1] Alternatively, defendants seek a declaration that Seneca provide

[1] For the extensive reasons stated on the record, defendants' motion for summary judgment is denied in its entirety (12/14/11 Tr 7-15).

defense coverage to defendants in the Underlying Action.

Seneca cross-moves for summary judgment and seeks a declaration that the policy is void ab initio on the basis of defendants' material misrepresentations contained in their insurance application. According to Seneca, the undisputed factual record demonstrates that defendants were contemplating structural alterations to the Premises as early as 2006.

For an insurer to be entitled to rescind a policy ab initio, it must show that the applicant made a material misrepresentation in its application (*Kiss Constr. NY, Inc. v Rutgers Cas. Ins.*, 61 AD3d 412 [1st Dept 2009]).

A fact is material so as to avoid ab initio an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only issued it at a higher premium (*Interested Underwriters at Lloyd's v H.D.I. III Assoc..*, 213 AD2d 246, 247 [1st Dept 1995]; *see also* Insurance Law § 3501 [b]). Ordinarily, the question of materiality of a misrepresentation is a question of fact for the jury (*Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214, 216-17 [1st Dept 1976], *affirmed* 42 NY2d 928 [1977]). However, where evidence concerning the materiality is clear and substantially uncontradicted, the matter is one of law for the court to determine. The major question is whether the insurer has been induced to accept an application which it might have otherwise

refused.

The record shows that defendants were contemplating structural alterations to the Premises, possibly as early as 2006 (*see* Exhibits annexed to the Mok Deposition). Seneca submits a retainer agreement dated October 6, 2006 setting forth the terms under which Cimran was to engage Paul Mok, a licensed engineer, in order to "prepare plans and applications for the addition of a second and third floor (...) to the existing one story commercial building" at the Premises for the sum of $58,350 (*Id.*). Defendants submitted the application for insurance on January 18, 2007.

In December 2007, Mok prepared architectural plans for the addition and submitted them to the Department of Buildings, which was approved on February 14, 2008 (*Id.*). In July 2009, Cimran entered into an agreement with Singh Contracting Company of NY, LLC, a construction company owned and operated by defendant Bagga, to build the addition (Exhibit E, annexed to the Milner Aff.).

Seneca also proffers the affidavit of the vice president of its New York office, who testifies as to Seneca's underwriting practices (*see East 115th Street Realty Corp. v Focus & Struga Bldg. Developers*, 27 Misc 3d 1206[A] [Sup Ct, NY County 2010], *affirmed* 85 AD3d 511 [2011]). He states that Seneca "does not write policies of liability insurance for renovation,

construction and/or demolition risk for general contractors," and that before writing a policy of insurance, all underwriters must confirm that no construction or demolition is or will be taking place at the subject premises (McCarthy Aff., Exhibit G, annexed to Seneca's Cross-Motion).

The defendants seek to raise material issues of fact concerning whether they were contemplating structural alterations at the time that they submitted the insurance application in January 2007 by submitting Bagga's deposition testimony wherein he denies contemplating structural alterations at that time (Bagga Dep Tr 17-23) and states that he only consulted with Mok in 2006 in connection with the possibility of selling the Premises and enhancing the value of the building by obtaining air rights. Nonetheless, the fact remains that even if the Court were to credit defendants' representation that the decision to build the addition to the Premises was not made until March 2008, the defendants renewed the policy in February 2009 and declined to inform Seneca at that time, which could void the policy as of the renewal date. However, Seneca provides neither the 2009 renewal application that Cimran's insurance broker submitted on defendants' behalf, nor the broker's deposition testimony (12/14/11 Tr 10:11-22).

Therefore, Seneca's motion for summary judgment is denied on this record, without prejudice, due to the existence of triable

issues with respect to whether defendants were contemplating a structural alteration to the Premises when they submitted the insurance application in January 2007 or at the time of renewal.

Alternatively, Seneca argues that even if the policy were valid at the time the accident at issue in the Underlying Action occurred, no duty to defend exists because the construction site identified is not part of the insured Premises, which is designated as a "one-story building." Seneca submits the bill of particulars in the Underlying Action which alleges upon "information and belief" that the plaintiff fell from the steel framing on the "fourth floor" of a construction site located at the Premises (Exhibit N, annexed to the Renner Aff.).

It is well-settled that an insurer's duty to defend arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim (*Worth Constr. Co. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008]). Nonetheless, an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]).

Here, the policy provides coverage for "bodily injury" "arising out of ... [t]he ownership, maintenance or use of the premises shown in the Schedule and operations necessary or

incidental to those premises" (Exhibit K, annexed to the Renner Aff.). The Premises identified in the schedule is designated as a "one-story building."

Although the bill of particulars in the Underlying Action identifies the premises where the accident occurred as the "fourth floor" and the premises designated in the policy is a "one-story building," it is alleged upon information and belief only (*compare Richner Communications, Inc. v Tower Ins. Co. of New York*, 72 AD3d 670 [2d Dept 2010]). Moreover, the complaint in the Underlying Action describes the premises where the accident occurred as "the entire property" (Exhibit N, annexed to the Renner Aff.). Because the allegations of the complaint potentially give rise to a covered claim, the Underlying Action may be within policy coverage. Therefore, the alternate basis for Seneca's cross-motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendants' motion is denied; and it is further

ORDERED that plaintiff Seneca Insurance Company, Inc.'s cross-motion for summary judgment is denied without prejudice and may be renewed upon submission of the policy renewal.

Dated: June 18, 2012

ENTER:

CHARLES E. RAMOS