SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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THE BURLINGTON INSURANCE COMPANY,

Plaintiff(s),

- against - INDEX NO: 300202/2014

PCF STATE RESTORATION, INC. and PROVOST 3615 LLC a/k/a 3915 PROVOST, LLC, DECISION/ORDER

Defendant(s).

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HON. DOUGLAS E. MCKEON

Plaintiff's motion for summary judgment on its complaint and dismissing defendants' counterclaims is granted in part and denied in part.

Plaintiff served as defendants' liability insurer for a period of time, issuing defendants three commercial general liability policies that were effective between October 2010 and September 2013. Each policy required defendants to pay a premium based on defendants' gross sales during the policy period. The estimated gross sales (i.e., estimated exposure) were multiplied by a particular rate, which yielded an advance premium that defendants were required to pay. At the conclusion of the respective policy term, an audit was performed to determine the actual amount of defendants' gross sales (i.e., actual exposure) during the policy period. The actual esposure would be multiplied by the

particular rate, yielding the actual premium that defendants were required to pay. The advance premium was compared to the actual premium. If the advance premium exceeded the actual premium, defendants were entitled to a refund of the difference; if the actual premium exceeded the advance premium, defendants owed the difference.

On January 14, 2014, plaintiff commenced this breach of contract action seeking to recover damages for defendants' alleged failure to pay certain premiums. Under the first cause of action, plaintiff alleged that defendants owe plaintiff $59,546.94 under the policy that was effective from 2011 to 2012 ("the 2011-2012 policy"). On its second cause of action, plaintiff alleged that defendants owe plaintiff $59,737.91 under the policy that was effective from 2012 to 2013 ("the 2012-2013 policy"). Defendants interposed an answer including a number of affirmative defenses and two counterclaims. The counterclaims alleged that, under the policy that was effective from 2010 to 2011 ("the 2010-2011 policy"), defendants paid to plaintiff a sum that exceeded the actual premium due on that policy, and that defendants were therefore owed a refund or other suitable damages.

Plaintiff seeks summary judgment on its complaint and dismissing defendants' counterclaims. In support of the motion, plaintiff submitted, among other things, the affidavit of its accounts receivable and collections manager. He averred, based on his review of plaintiff's business records, that plaintiff issued

the 2011-2012 policy to defendants at their request; that the policy contained a $300,000 estimated exposure, which yielded an advance premium of $50,000;[1] that, following an audit, defendants' actual exposure for the policy period was determined to be $644,201, which yielded an actual premium of $107,367; and that, adding to the actual premium certain taxes and fees then subtracting the advance premium paid by defendants, defendants owed $59,546.94.

The affiant also averred that plaintiff issued the 2012-2013 policy to defendants at their request; that the policy contained a $300,000 estimated exposure, which yielded an advance premium of $67,500;[2] that the estimated exposure was amended to reflect the actual exposure under the 2011-2012 policy, $644,201, which led to an increase of the advance premium for the 2012-2013 policy of $144,945; that defendants had paid the $67,500 advance premium, but owed the difference between the revised advance premium of $144,945 and the initial advance premium of $67,500 (i.e., $77,445); that defendants failed to pay the additional advance premium owed on the 2012-2013 policy, so the policy was cancelled approximately two months before the expiration of the policy period; and that the cancellation resulted in a pro rata return of $20,650 of the advance premium, leaving the amount of $59,737.91

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[1] The rate applied to the estimated exposure under the 2011-2012 policy was $166.6667 per $1,000 of gross sales.

[2] The rate applied to the estimated exposure under the 2012-2013 policy was $225 per $1,000 of gross sales.

owed under the 2012-2013 policy.

The total principal amount due, according to the affiant's calculations, is $119,284.85.[3]

With respect to defendants' counterclaims related to the 2010-2011 policy, the affiant attested that plaintiff paid a refund on that policy to RPS/Yanoff Companies, the producer of the policy, and that RPS, in turn, issued a check to Coverage by Design Corp., defendants' insurance broker.

Accompanying the affidavit of plaintiff's accounts receivable and collections manager are copies of the 2011-2012 and 2012-2013 policies; business records relating to the audits performed on those policies; and documents reflecting the refund paid on the 2010-2011 policy. Notably, the copies of the policies are not signed by anyone purporting to act on behalf of defendants. Rather, the policies are signed only by officers of plaintiff.

In opposition to the motion, defendants argue that they never agreed to the increases in rates reflected in the 2011-2012 and 2012-2013 policies, and insinuate that plaintiff and defendants' insurance broker "may have been working in cahoots to overcharge" defendants. Thus, defendants assert that a triable issue of fact exists regarding whether they agreed to pay the rates reflected in the

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[3] The complaint alleges damages in the principal sum of $119,334.85. But the amounts sought under each of the respective causes of action ($59,546.94 and $59,737.91) total $119,284.85, the sum of the amounts reported by plaintiff's affiant.

2011-2012 and 2012-2013 polices. Alternatively, defendants contend that summary judgment should be denied as premature (see CPLR 3212[f]).

Defendants submit the affidavit of Nowowiejski, defendant PCF State Restoration's principal and a member of defendant Provost 3915 LLC. Nowowiejski avers that he secured insurance coverage with plaintiff through defendants' insurance broker. He states that defendants were not notified that they were entitled to a refund under the 2010-2011 policy until the summer of 2013, and that they never received any such refund. With respect to the 2011-2012 policy, Nowowiejski states that defendants never agreed or otherwise consented to the increase in the rate that occurred between the 2010-2011 and 2011-2012 policies.[4] He states too that defendants had no notice of the increase until June 2013 when they received a collection letter from plaintiff. Concerning the 2012-2013 policy, Nowowiejski avers that defendants never agreed or otherwise consented to the increase in rate that occurred between the prior year's policy and the 2012-2013 policy.[5]

With regard to the refund under the 2010-2011 policy (which is the subject of defendants' counterclaim), Nowowiekski states that defendants should be permitted to undertake discovery to ascertain the relationship between plaintiff,

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[4] The rate in the 2010-2011 policy was $75.75 per $1,000 of gross sales; the rate in the 2011-2012 policy was $166.6667 per $1,000 of such sales.

[5] The rate in the 2012-2013 policy was $225 per $1,000 of gross sales.

RPS and Coverage by Design, because the nature of that relationship might reveal what happened to the alleged refund.

In reply, plaintiff provides evidence that defendants expressly agreed to the rates in the 2011-2012 and 2012-2013 policies. That evidence suggests that defendants' alleged vice president knew of and expressly agreed to the year-to-year increases reflected in those policies. Plaintiff highlights that any negligence or other tortious conduct by defendants' insurance broker, Coverage by Design, is a matter between defendants and the broker, and does not serve as a defense to this action. With respect to defendants' argument that summary judgment should be denied under CPLR 3212(f), plaintiff asserts that nothing that could be revealed in discovery would provide defendants with evidence sufficient to raise a triable issue of fact on plaintiff's causes of action or defendants' counterclaims.

Viewing the evidence in the light most favorable to defendants and affording them the benefit of every reasonable inference (see Negri v Stop and Shop, Inc., 65 NY2d 625 [1985]), plaintiff failed to make a *prima facie* showing of entitlement to judgment as a matter of law on the complaint. As noted above, the copies of the 2011-2012 and 2012-2013 policies submitted in support of plaintiff's motion are not signed by anyone purporting to act on behalf of defendants; the policies are signed only by the secretary and president of plaintiff (see generally Cendant Car Rental Group v Liberty Mutual Insurance Co., 48 AD3d 397 [2d Dept 2008]). There is nothing in plaintiff's remaining initial submissions

suggesting that defendants (directly or through their insurance broker) assented to the rate increases that occurred in the 2011-2012 and the 2012-2013 policies.

That defendants do not deny that the policies were ordered, issued and in effect for their respective periods is immaterial. Defendants knew they had insurance coverage and were obligated to pay for it. What they did not know and did not consent to, according to them, was the rate increases in each of the last two policies.

Plaintiff's reliance on new evidence in its reply to demonstrate that defendants consented to the rate increases is inappropriate and amounts to an effect to remedy a basic deficiency in its *prima facie* showing (see Lazar v Nico Industries, Inc., 128 AD2d 408 [1st Dept. 1987]; see also Ritt v Lenox Hill Hospital, 182 AD2d 560 [1st Dept. 1992]).

Because plaintiff failed to make a *prima facie* showing of entitlement to judgment as a matter of law on its claims, that aspect of the motion seeking summary judgment on the complaint must be denied regardless of the sufficiency of defendants' opposing papers (see Winegrad New York University Medical Ctr., 64 NY2d 851 [1985]; see also Vega v Restani Construction Corp., 18 NY3d 499 [2012]).

Regarding that aspect of the motion seeking summary judgment dismissing the counterclaims, plaintiff made a *prima facie* showing that the refund owed on the 2010-2011 policy was paid to defendants' insurance broker, Coverage by

Design. In opposition, defendants, who acknowledge that Coverage by Design was their broker, failed to raise a triable issue of fact. The insurance broker was defendants' agent (see Bohlinger v Zanger, 306 NY 228 [1954]) and the payment of the refund by plaintiff to the broker satisfied plaintiff's obligation. What, if anything, the broker did with the refund is a matter between defendants and the broker. Defendants' request for denial of this aspect of the motion to allow for discovery is unavailing (see CPLR 3212[f]; Moukarzel v Montefiore Medical Center, 235 AD2d 239 [1st Dept. 1997]).

Accordingly, it is hereby ordered that the aspect of plaintiff's motion seeking summary judgment dismissing the counterclaims is granted; and it is further,

ORDERED that the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: 4/11/17

Douglas E. McKeon, J.S.C.