

**Lufthansa Cargo, A.G. v New York Marine and Gen.
Ins. Co.**

2006 NY Slip Op 30678(U)

July 25, 2006

Sup Ct, New York

Docket Number: 100827/06

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **SHIRLEY WERNER KORNREICH**
J.S.C.
.Justice

PART 54

Index Number : 100827/2006

LUFTHANSA CARGO, AG

vs

N.Y. MARINE & GENERAL INS.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 5/18/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 4 this motion to/for dismiss

Notice of Motion Order to Show Cause — Affidavits — Exhibits ..

Answering Affidavits Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1, 2	_____
3	_____
4	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

FILED
JUL 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/25/06

SHIRLEY WERNER KORNREICH
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LUFTHANSA CARGO, A.G.,

Plaintiff,

- against -

NEW YORK MARINE AND GENERAL INSURANCE
COMPANY,

Defendant.
-----X

KORNREICH, SHIRLEY WERNER, J.:

FILED
JUL 31 2006
NEW YORK
COUNTY CLERK'S OFFICE

Index No.: 100827/06

**DECISION
and
ORDER**

In this declaratory judgment action arising out of a prior personal injury suit, plaintiff Lufthansa Cargo, AG (“Lufthansa”) seeks a declaration that defendant New York Marine and General Insurance Company (“NYMAGIC”) is obligated to indemnify and defend Lufthansa based on a commercial insurance policy (the “policy”) between NYMAGIC and Century Express Inc./Century Motor Leasing Inc. (“Century”), naming Lufthansa as additional insured. Lufthansa also seeks attorneys’ fees it has incurred defending itself in a personal injury suit (the “underlying action”) initiated by Daniel Dwyer (“Dwyer”), an employee of Century. NYMAGIC now moves to dismiss based on documentary evidence, pursuant to CPLR 3211(a)(1). Lufthansa opposes the motion and cross-moves for summary judgment.

Facts

The parties do not dispute the material facts. Lufthansa contracted with Century for trucking services. Dwyer was involved in a single-vehicle accident while working for Century on August 29, 2003. Dwyer initiated the underlying action against Lufthansa in federal court, alleging that Lufthansa’s negligence in loading the vehicle he was driving

caused his injuries. At the time of the accident, NYMAGIC covered Century under the policy for the period from June 19, 2003 to June 19, 2004. Lufthansa was named as an additional insured on the policy.

NYMAGIC alleges that the policy was procured through material misrepresentation. Jerry Mazzella (“Mazzella”), an insurance agent for I. Arthur Yanoff & Co., Ltd (“Yanoff”), was responsible for underwriting the policy. Mazzella avers in his affidavit that NYMAGIC’s underwriting guidelines did not allow NYMAGIC to cover Century, since one of Century’s employees (namely, Dwyer) had a conviction within the previous five years for driving while intoxicated. Mazzella further alleges that Century, through its insurance broker the Bruce Cohen Agency (“Cohen”), assured him that NYMAGIC could insure Century because Dwyer “will not be driving” for Century. For purposes of this motion, Lufthansa does not dispute that Century procured its insurance coverage from NYMAGIC through a material misrepresentation of the facts.

Based on these facts, NYMAGIC now contends that the policy is void *ab initio* and moves for dismissal, arguing that NYMAGIC has no obligation to indemnify and defend Lufthansa since no coverage ever existed. Lufthansa denies that the policy is void as to them, cross-moving for summary judgment.

Conclusions of Law

A. Defendant’s Motion to Dismiss

In order to prevail on a motion to dismiss based on documentary evidence, the moving party (here, NYMAGIC) must present documentary evidence that utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002). Even assuming, *arguendo*, that the facsimile communications defendant submitted here constitute

documentary evidence, defendant has at most demonstrated that Century made material misrepresentations in procuring the insurance policy. This is not challenged by plaintiff, and it certainly does not refute any factual allegations made by plaintiff in the complaint. Also, for reasons detailed below, this evidence of misrepresentation also does not relieve defendant of any obligations to plaintiff as a matter of law. Accordingly, defendant has not met its burden and the motion to dismiss must be denied.

B. Plaintiff's Cross-Motion for Summary Judgment

In order to prevail on a motion for summary judgment, the moving party (here, Lufthansa) must establish a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once such a showing is made, the non-moving party has the burden of providing admissible evidentiary proof establishing the existence of a material factual issue requiring a trial. *Id.*, at 560. The evidence submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the non-moving party. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562.

Under New York law, an insurer undertakes a separate and distinct obligation to each party named on the insurance policy and must treat each individual insured "as if he had a separate policy of his own." *Greaves v. Public Service Mutual Ins. Co.*, 5 N.Y.2d 120, 124 (1959). This treatment applies even in cases where the policy is void *ab initio* due to the primary insured procuring the policy by misrepresentation. *BMW Financial Services v. Hassan*, 273 A.D.2d 428, 429 (2d Dept. 2000) (Although lessee of BMW vehicle obtained insurance naming BMW as additional insured through material

misrepresentation, voiding policy *ab initio*, BMW still had insurable interest in vehicle and was entitled to recover under policy terms for loss).

This case is analogous to *BMW*. Century acquired insurance, naming Lufthansa as additional insured, from NYMAGIC through misrepresentation. Although the policy is clearly void as to Century as a result, *BMW* establishes that NYMAGIC still owes a separate and distinct obligation to Lufthansa, as if Lufthansa held a separate policy of its own. Since NYMAGIC cannot cite any valid law to the contrary and has not raised any factual issues warranting trial, Lufthansa is entitled to a declaration that NYMAGIC is obligated to indemnify and defend Lufthansa. Lufthansa is also entitled to attorneys' fees incurred as a result of the underlying action. Accordingly, it is

ORDERED that defendant's motion to dismiss is denied; it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted as against defendant NEW YORK MARINE AND GENERAL INSURANCE COMPANY, with costs and disbursements to plaintiff as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; it is further

ORDERED and ADJUDGED and DECLARED that plaintiff is entitled to the full benefits of the insurance contract; it is further

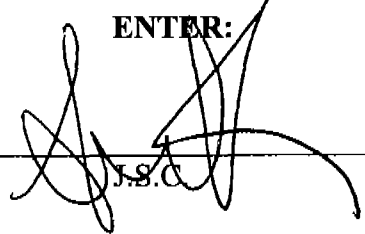
ORDERED and ADJUDGED and DECLARED that defendant's failure to defend, indemnify, and hold Lufthansa Cargo AG harmless in the underlying action is a breach of the insurance contract.

ORDERED that the issue of reasonable attorneys' fees is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all parties of the date of the hearing.

Date: July 25, 2006

ENTER:

J.S.C.

FILED
JUL 31 2006
NEW YORK
COUNTY CLERK'S OFFICE