SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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34-06 73, LLC, BUD MEDIA, LLC and
COORS MEDIA, LLC,

Index No. 652422/2011

Plaintiffs,

- against-

DECISION AND ORDER

SENECA INSURANCE COMPANY, INC.,

Defendant.

---------- X

TANYA R. KENNEDY, J.S.C.:

Motion sequences No. 009 and 010 are consolidated for disposition.

This action arises from a fire that occurred on September 8, 2009 in a vacant commercial warehouse at 50-09 27th Street, Long Island City, New York (the Premises).

Defendant Seneca Insurance Company, Inc. (Seneca) issued an insurance policy, number FTZ 1000661 (the Policy) to plaintiffs covering various properties, including the Premises, for the period of April 1, 2009 through April 1, 2010. Non-party Mohammad Malik (Malik) owns the Premises.

In motion sequence no. 009, plaintiffs move to dismiss Seneca's fourth affirmative defense, which asserts noncompliance with the Protective Safeguards Endorsement (the Endorsement) for failing to maintain an "Automatic Sprinkler System" at the time of the fire as required by the Policy. In motion sequence No. 010, Seneca moves for summary judgment, dismissing the complaint, based upon Seneca's fourth affirmative defense.

Seneca retained a company to perform loss control inspections of Malik's various properties, including the Premises, for underwriting purposes (Muller Affidavit, Ex. A). The

Report, dated April 27, 2009, (the Report) set forth four (4) recommendations pertaining to the Premises (Lynn Affirmation, Ex. A).

In an April 30, 2009 letter to Malik, Seneca, advised Malik, in part, that:

> "[t]he attached recommendations result from our recent inspection of the captioned location for underwriting purposes. Please contact your agent/broker or the Company and advise us of your action on these recommendations in the next 30 days. FAILURE TO COMPLY WITH THESE RECOMMENDATIONS BY:_____MAY RESULT IN THE CANCELLATION OF YOUR POLICY"

(*id.*, Ex. B [capitalization in original]).

The deadline for compliance in the above referenced letter was left blank. The recommendations for the Premises were as follows:

> 2009-001: The insured must restore the sidewalks to a flat and even condition.
> 2009-002: The insured must provide full interior access if necessary.
> 2009-003: The insured must contact the broker if the building is occupied.
> 2009-004: Make the insurer aware that the sprinkler system is currently out of service.

(*id.*, Ex. B).

Seneca followed up on some of the recommendations regarding Malik's various properties, as evidenced by emails (Muller Affidavit, Exs. C, D, E). However, none of the emails provide any status as to Malik's compliance with the sprinkler system recommendation for the Premises. It is undisputed that Seneca did not cancel the Policy once it became aware that the sprinkler system was out of service.

Seneca forwarded an April 13, 2011 letter to Malik denying plaintiffs' claim resulting from the fire due to plaintiffs' breach of the Endorsement and breach of the "concealment, misrepresentation or fraud" provision of the Policy (Lynn Affirmation, Ex. C). Plaintiffs then commenced this action for breach of contract.

Plaintiffs served a Notice to Admit (*id.*, Ex. F) and Seneca admitted that it knew the Report indicated that the fire sprinkler system at the Premises was out of service (*id.*, Ex. G). Seneca also admitted that it did not cancel the Policy on such ground (*id.*). Further, Seneca admitted that it "did not cancel the policy within the time period that it had the legal right to cancel a new policy for non-compliance with recommendations, but continued to communicate with plaintiffs' representatives with respect to the recommendations concerning the properties covered by the subject policy" (*id.*). As such, Plaintiffs argue in support of the motion to dismiss that Seneca had the right, pursuant to the terms of the Policy and Insurance Law §3426 to cancel the Policy within the first sixty (60) days and waived its right to enforce the Endorsement.

Seneca argues in opposition that it did not knowingly, voluntarily and intentionally abandon its right to rely on the Endorsement. The deposition testimony of Carol Muller (Muller), a Seneca vice-president in the underwriting department, indicates that Seneca did not cancel the Policy because "[i]t was a nice-size premium. We thought the [recommendations] would get complied with . . . this was a good producer [and] we had a Protective Safeguard Endorsement on the Policy" (*id.*, Ex. H at 101; *see* Muller Affidavit, ¶ 6, Ex. B at 113).

Muller also indicated in her deposition testimony that "we normally try to get the [recommendations] complied with. We don't want to lose a $41,000.00 account" (Lynn Affirmation, Ex. H at 102). Although Muller maintained that Seneca followed up on the recommendations, she acknowledged that there were no written communications regarding the Endorsement (Muller Affidavit, ¶ 8).

Seneca argues in support of its motion for summary judgment that plaintiffs breached the Endorsement by failing to maintain an Automatic Sprinkler System at the time of the fire. Among the exhibits annexed to the motion are the deposition transcript of John A. Gleason, a

retired Battalion Chief with the New York City Fire Department (Exhibit D) and a photograph of the control valves of the sprinkler system in the Premises taken by a New York City Fire Marshal at the fire scene (Deposition Ex. 4).

Chief Gleason testified that he oversaw the firefighting operations at the premises and was required to prepare an incident report (p.10). The report he prepared indicated that due to the magnitude of the fire and the lack of a sprinkler alarm, no automatic sprinkler system was present (pp. 23-24).

According to Chief Gleason, the New York City Fire Marshal photograph of the control valves of the sprinkler system in the Premises at the fire scene which depicts the valves as unchained and closed (Deposition, Ex. 4), was supposed to be chained in the open position (pp.25-30). Chief Gleason also maintained that the sprinkler system would not operate if the control valves were in the off or closed position (pp.27-30).

Plaintiffs argue in opposition that issues of fact exist which preclude the grant of summary judgment. Among the exhibits annexed to the opposition papers are the examination under oath (EUO) transcript of Malik (Ex. D); the EUO transcript of Ezaj Shaheen (Shaheen), the maintenance manager of the Premises (Ex. F); deposition transcripts and affidavit of Khiong Lau (Lau), a former Chief Fire Contractors, Inc. (Chief Fire) employee (Exs. J, K, L) and the deposition transcript of Frank Rivera (Rivera), a Chief Fire Supervisor (Ex. M).

Malik testified that he entered into a contract with Chief Fire in September 2008 to conduct monthly maintenance and inspections on the sprinkler system from October 2008 through September 2009 (pp. 65-66). He also maintained that Chief Fire installed bells on the sprinkler system (pp. 48-49). According to Malik, the sprinkler system was working when he purchased the building and at the time of the fire (pp. 43; 164).

Shaheen testified at his EUO that he visited the premises on May 1, 2009, after he received a call the night before from Malik regarding a leak; that he conducted the necessary repair on May 1, 2009; and tested the system after his repair (pp. 43-46). He also testified that Chief Fire inspected the sprinkler system every month from October 2008 through October 2009 (p.24) and that Chief Fire recorded each inspection on an inspection certificate located on a wall next to the sprinkler system (pp. 31-32).

Lau testified that he was the person responsible for conducting monthly visual inspections of the sprinkler system at the Premises (p. 14). Lau indicated that his February 2009 inspection of the sprinkler system revealed the system was down, which he reported to Chief Fire's owner (pp. 18; 61-63). Lau also testified that he never returned to the Premises after his February 2009 inspection and that he did not know which Chief Fire employee returned to the Premises to inspect the sprinkler system after the date of his inspection up until the time of the fire (pp 74-75).

However, Lau submitted an affidavit a month before his deposition testimony, when he was a Chief Fire employee, indicating that he personally conducted visual inspections of the sprinkler system from October 2008 through September 2009 and that he filled out the inspection card which he always maintained at the Premises to document his activity (¶¶ 9-11). Lau further maintained in his affidavit that Chief Fire did not maintain a copy of the inspection card and that at the request of Chief Fire's owner, he reproduced the inspection card based upon Chief Fire's files and his memory after the card was destroyed in the fire (¶¶13-15).

Rivera testified that he supervised the Chief Fire inspectors (pp. 9-10) and that it was not uncommon in his experience for a sprinkler system to operate when the alarm bell did not ring (p. 25).

MOTION TO DISMISS FOURTH AFFIRMATIVE DEFENSE

CPLR 3211(b) provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." As such, plaintiffs bear the burden of demonstrating that the fourth affirmative defense is without merit as a matter of law (*see Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]).

Insurance Law §3426 states:

> (b) During the first sixty days a covered policy is initially in effect, except for the bases for cancellation set forth in paragraph one, two or three of subsection (c) of this section, no cancellation shall become effective until twenty days after written notice is mailed or delivered to the first-named insured at the mailing address shown in the policy and to such insured's authorized agent or broker.
>
> (c) After a covered policy has been in effect for sixty days unless cancelled pursuant to subsection (b) of this section, or on or after the effective date if such policy is a renewal, no notice of cancellation shall become effective until fifteen days after written notice is mailed or delivered to the first-named insured and to such insured's authorized agent or broker, and such cancellation is based on one or more of the following:
>
> (1) With respect to covered policies:
>
> . . .
>
> (D) after issuance of the policy or after the last renewal date, discovery of an act or omission, or a violation of any policy condition, that substantially and materially increase the hazard insured against, and which occurred subsequent to inception of the current policy period;
>
> . . .

A party may waive its contractual rights "if they are knowingly, voluntarily and intentionally abandoned," which is "established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY 3d 96, 104 [2006] [internal quotation marks and citations omitted]). Further, waiver "should not be lightly presumed and must be based upon a clear

manifestation of intent to relinquish a contractual protection" (*id.* at 104 [internal citations omitted]).

The fact that "a party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligations under the contract do not necessarily constitute a waiver of the innocent party's rights in the future" (*Kamco Supply Corp. v On the Right Track, LLC.*, 149 AD3d 275, 281 [2d Dept 2017] [internal quotation marks and citations omitted]).

Here, the evidence shows that Seneca knew that the Report indicated that the sprinkler system was not in service. Seneca also admitted that it did not terminate the Policy due to economic reasons; its reliance on the Endorsement; and belief that plaintiffs would comply with the recommendations. Although Seneca followed up on the recommendations, Muller acknowledged there were no written communications regarding the Endorsement. As such, factual issue exists which prevent plaintiffs from demonstrating that Seneca knowingly, voluntarily and intentionally abandoned its right to enforce the Endorsement. Therefore, the motion to dismiss is denied.

MOTION FOR SUMMARY JUDGMENT

The proponent of a summary judgment motion must establish its prima facie entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A warranty is "a promise by the insured to do or not to do something that the insurer considers significant to its risk of liability under an insurance contract" (*Triple Diamond Café, Inc. v Those Underwriters at Lloyds of London*, 124 AD3d 763, 765 [2d Dept 2015]). Further, a protective safeguard provision qualifies as a warranty as defined by Insurance Law § 3106 (*see Anghel v Utica Mut. Ins. Co.*, 127 AD3d 897, 899 [2d Dept 2015]).

New York Insurance Law § 3106 provides:

> (a) In this section "warranty" means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish, or the non-existence of a fact which tends to increase, the risk of the occurrence of any loss, damage or injury within the coverage of the contract. The term "occurrence of loss, damage or injury" includes the occurrence of death, disability, injury, or any other contingency insured against, and the term "risk" includes both physical and moral hazards.
>
> (b) A breach of warranty shall not avoid an insurance contract or defeat recovery thereunder unless such breach materially increases the risk of loss, damage or injury within the coverage of the contract. If the insurance contract specified two or more distinct kinds of loss, damage or injury which are within its coverage, a breach of warranty shall not avoid such contract or defeat recovery thereunder with respect to any kind or kinds of loss, damage or injury other than the kind or kinds to which such warranty relates and the risk of which is materially increased by the breach of such warranty.

Insurance Law § 3106 precludes coverage as a matter of law where the insurer establishes a breach of warranty which materially increases the insurer's risk of loss within the coverage of the policy (*see Star City Sportswear v Yasada Fire & Mar. Ins. Co. of Am.*, 1 AD 3d 58 [1st Dept 2003], *affd* 2 NY 3d 789 [2004]; *Triple Diamond Café, Inc. v Those Certain Underwriters at Lloyd's London, supra*).

Seneca cites to *Triple Diamond Café, Inc. v Those Certain Underwriters at Lloyd's London, supra*, in support of its argument that plaintiffs failed to comply with the Endorsement by failing to maintain an Automatic Sprinkler System at the Premises, which voids insurance

coverage as a matter of law. In *Triple Diamond Café*, *supra* at 765, the "special conditions" section of the declaration page stated "[w]arranted . . . burglar alarm[s] will be [f]ully operational throughout the period of the policy." The property in *Triple Café* was consumed by fire and defendant insurer denied coverage after defendant's investigation concluded that the alarm system was not activated at the time of loss.

The Appellate Division, Second Department in *Triple Diamond Café, supra,* affirmed the motion's court grant of summary judgment and determination that plaintiff was not entitled to coverage under the policy as a matter of law since the plaintiff breached the warranty, which materially increased the risk of loss.

Unlike *Triple Diamond Café, supra*, there are conflicting versions as to whether the sprinkler system was functional at the time of the fire. The deposition and EUO transcripts, as well as affidavits raises issues of credibility, which cannot be determined on a motion for summary judgment (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]). Further, the fact that this Court determined that an issue of fact exists as to whether Seneca knowingly, voluntarily and intentionally abandoned its right to enforce the Endorsement also precludes the grant of summary judgment.

Accordingly, it is

ORDERED that plaintiffs' motion (motion sequence No. 009) to dismiss the fourth affirmative defense is denied; and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties are directed to attend a status conference at 60 Centre Street, Room 321, on September 5, 2018 at 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: July 3, 2018

ENTER:

Hon. Tanya R. Kennedy
J. S.C.

TANYA R. KENNEDY
J.S.C.