SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 159421/2017

MOTION SEQ. NO. 003

MT. HAWLEY INSURANCE COMPANY,

Plaintiff,

- v -

AKI RENOVATIONS GROUP INC., AKI RENOVATION INC., AKI DEVELOPMENT GROUP INC.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124

were read on this motion for SUMMARY JUDGMENT.

Kenney Shelton Liptak Nowak LLP, Buffalo, NY (Timothy E. Delahunt and Matthew C. Ronan of counsel), and *Delahunt Law PLLC*, Buffalo, NY (Timothy E. Delahunt of counsel), for plaintiff.
Gleason & Koatz, LLP, New York, NY (John P. Gleason of counsel), for defendants.

Gerald Lebovits, J.:

In this insurance-coverage action, plaintiff is seeking a declaration that (i) a commercial general-liability policy that plaintiff issued to defendants is rescinded under Insurance Law § 3105 for material misrepresentations; and (ii) plaintiff has no obligation to defend or indemnify defendants in a personal-injury action brought against defendants in Supreme Court, Queens County. Defendants counter-claimed for breach of contract and for a declaration that plaintiff is obligated to defend them in that personal-injury action.

Plaintiff now moves for summary judgment in its favor on its declaratory-judgment claims, and for summary judgment dismissing defendants' counterclaims. The motion is granted.

BACKGROUND

On November 21, 2016, defendants, through their wholesale insurance broker, CRC Insurance Services (broker), submitted an application with plaintiff for a CGL policy (verified complaint at ¶ 9; NYSCEF Doc. No. 2). Defendants' application for commercial insurance included a standard "acord" application form dated December 22, 2016, as well as a supplemental application form (acord and supplemental applications; NYSCEF Doc. Nos. 97 & 98).

The application included specific, yes-or-no questions regarding the nature of defendants' business as general contractors and whether defendants contemplated liability exposure due to demolition work.

The answers given by defendants failed to disclose their demolition operations. Plaintiff then issued defendants a primary policy and also an excess policy for the period of December 29, 2016 to December 29, 2017 (collectively, the policy). Plaintiff claims that after issuing the policy, it learned for the first time that defendants had been engaged, and were acting as, a general contractor for demolition of a building over two stories in height from grade, and that defendants had subcontracted out the performance of the demolition work (verified complaint at ¶ 14; NYSCEF Doc. No. 2). Plaintiff concluded that defendants had materially misrepresented the nature of their business. As a result, plaintiff cancelled defendants' CGL policy on July 3, 2017, and the excess policy on July 13, 2017, under Insurance Law § 3105 (*id.*). Plaintiff argues that it would not have issued the policy had defendants disclosed their demolition operations.

Plaintiff claims that on or about July 31, 2017, it was notified of a negligence action captioned *Ayala v 30-11 12th JV LLC et al.* (Sup. Ct. Queens County, Index No. 708376/2017) (*Ayala*). Plaintiff further claims that defendants were the general contractors for the project in the *Ayala* lawsuit; and that Ayala's complaint alleges he was working at the construction site, and was injured by falling bricks and/or debris from the collapse of a building being demolished (*id*. at ¶¶ 14-17). Plaintiff claims that defendants applied for, and received a work permit as the general contractor for the full demolition of the three-story building involved in the *Ayala* lawsuit, and that defendants retained Sunny Builders NY Corp. as a subcontractor to perform the demolition work involved in the *Ayala* action (*id*. at ¶¶ 20-21).

On August 28, 2017, plaintiff advised defendants that it was rescinding the policy *ab initio*, and also returned defendants' premium in its entirety (rescission letter; NYSCEF Doc. No. 104). Based upon the current claim against defendants in the *Ayala* action, plaintiff commenced the instant lawsuit seeking a judicial declaration ratifying its rescission of the policy. Defendants counterclaimed for (i) a judgment declaring that plaintiff is obligated to defend defendants in the *Ayala* lawsuit; (ii) damages for bad-faith breach of contract (verified answer; NYSCEF Doc. No. 6).

Plaintiff now moves under CPLR 3212 for summary judgment in its favor on its claims for declaratory relief, and to dismiss defendants' counterclaims.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the movant has demonstrated its prima facie entitlement to judgment, the party opposing the motion must 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 [1980]).

For an insurer to be entitled to rescind a policy *ab initio*, the insurer must show that it issued the policy in reliance on a knowing and material misrepresentation by the applicant (*see 128 Hester LLC v New York Mar. Gen. Ins. Co.*, 126 AD3d 447 [1st Dept 2015]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412 [1st Dept 2009]). "A misrepresentation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof" (Insurance Law § 3105 [a]). "No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such a contract" (*Id.* § 3105 [b]). Although the materiality of a misrepresentation ordinarily is a jury question, the issue may be decided as a matter of law of law when the evidence concerning materiality is clear and substantially uncontradicted (*see Process Plants Corp. v Beneficial Natl. Life Ins. Co.*, 53 AD2d 214 [1st Dept 1976]), *affd* 42 NY2d 928 [1977]).

Here, plaintiff asserts that defendant made the following material misrepresentations: (i) that defendants are a remodel-and-repair contractor; (ii) that defendants' operations consist of general contracting for interior renovations; (iii) that other than interior-only work, defendants do not perform any work over two stories in height from grade; (iv) that defendants do not perform any demolition work other than remodeling; and (v) that defendants neither perform nor subcontract exterior/building demolition work (verified complaint at ¶ 23; NYSCEF Doc. No. 2).

To support these assertions at summary judgment, plaintiff offers the affidavit of its underwriter, Arthur Tavani. Tavani states that as an underwriter for plaintiff, his primary responsibility is to receive and review applications for commercial liability insurance (Tavani aff at 1, ¶ 2). Tavani claims that he determines if an applicant reflects a risk that plaintiff is willing to insure, and if so, he determines the premium for the issuance of the policy. In the instant matter, Tavani alleges that plaintiff received defendants' application from the broker on November 21, 2016. Tavani reviewed the application which included a standard acord form describing the nature of defendants business as a "GC" (general contractor) "[d]oing Renovation, Remodel & Repair" (*id*. at 3, ¶ 7). Defendants also submitted a supplemental application form.

Tavani stated that the accord contained the following question:

Q: "Any demolition exposure contemplated?"
A: "No."

The supplemental application also contained the following questions:

Q: "Does the applicant do any work over two (2) stories in height from grade (other than interior only)?"
A: "No."
Q: "What percentage of its construction work consists of demolition (whether direct or subcontracted).
Q: "Will you be doing any demolition work other than remodeling."
A: "No."

In his affidavit, Tavani, averred that plaintiff would not have insured risks associated with defendants' undisclosed demolition work, particularly where the building exceeded two stories in height. Plaintiff corroborates Tavani's statements by providing excerpts from its guidelines, including evidence of a standard exclusion that would preclude recovery for bodily injury arising from demolition work in buildings exceeding two stories. Plaintiff also provides an underwriting worksheet that treats defendants as a general contractor for interior renovation.

Tavani states that the underwriting guidelines dictate that the application requirements were met, and therefore the policy was issued by plaintiff in reliance on the documents submitted by defendants. Tavani further states that plaintiff does not generally offer CGL policies to demolition contractors, and that if defendants had disclosed their demolition operations he would not have issued a quotation to defendants and plaintiff would not have issued the policy.

Plaintiff also offers the affidavit of its claim director, Deborah Lewis. Lewis states that her investigations revealed that at the time of the accident in the *Ayala* action, defendants had been acting as the general contractor for the demolition of a three-story building (Lewis affirmation at p 2, ¶ 4; NYSCEF Doc. No. 105). Lewis concluded that based upon building and work permits for the *Ayala* project, coverage is not available to defendants. Likewise, Lewis' review of the policy's Designated Ongoing Operations Exclusion (which excludes coverage for projects involving exterior work above one story) led her to determine that there was no coverage for defendants in connection with the *Ayala* action. Furthermore, Lewis claims that defendants never entered into a written contract with its subcontractor Sunny Builders for the *Ayala* project, and also did not obtain a certificate of insurance from Sunny prior to Sunny beginning work. Therefore, Lewis concluded that there is no coverage based on defendants' failure to comply with the conditions of its policy coverage endorsements (*id*. at 2, 4, ¶¶ 12-13).

This court concludes that the affidavits of Tavani and Lewis, the excerpts from plaintiff's underwriting guidelines, and the underwriting worksheet in this case demonstrate prima facie that defendants' insurance application contained material misrepresentations as a matter of law (*Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.,* 38 AD3d 231 [1st Dept 2007]). The burden now shifts to defendants to establish the existence of a triable issue of fact.

Defendants rely primarily on an attorney affirmation. Counsel contends in the affirmation that photographs of the *Ayala* project show that the project did not involve demolition of the building in question, but merely gutting of the building's interior (attorney affirmation, NYSCEF Doc. No. 118 at 3, ¶ 12). Counsel states that the photographs of the 12th Street Project show that work was to the interior only and that the exterior of the building is largely two stories from grade (*id*. at ¶ 15) (photographs, NYSCEF Doc. No. 121). And counsel claims that another company, Demoworks Expediting, Inc., was responsible for demolition on the project, rather than defendants. To support this claim, counsel refers to a demolition registration that assertedly lists Demoworks Expediting, Inc. as the demolition company (registration for demolition, NYSCEF Doc. No. 120).

This court concludes that the materials submitted by defendants do not create a material issue of fact. Counsel's affirmation does not establish his basis for knowledge of what the

photographs assertedly depict—or even that the photographs are authentic. The photographs themselves do not indicate when they were taken, or by whom. With respect to the demolition registration, counsel does not indicate the basis for his knowledge that this registration shows that Demoworks, rather than defendants, were responsible for demolition on the project. The registration form itself appears to indicate on its face that Demoworks was responsible *for filing the form*, not for performing the demolition itself. And defendants have not provided any other evidence (whether in the form of affidavits or otherwise) that might support the statement of counsel that Demoworks performed the demolition work at issue.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment in its favor is granted; and it is further

ORDERED that plaintiff's motion for an order dismissing defendants' counterclaims is granted without opposition; and it is further

ADJUDGED AND DECLARED that under Insurance Law § 3105 plaintiff is entitled to rescind *ab initio* the primary commercial general liability policy and excess policy that plaintiff issued to defendants; and it is further

ADJUDGED AND DECLARED that plaintiff has no obligation to defend or indemnify defendants in the *Ayala* action pending in Supreme Court, Queens County, under the Index No. 708376/2017.

HON. GERALD LEBOVITS
J.S.C.

7/27/2020
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE