

Arch Specialty Ins. Co. v M.T. Steel Fabricators, Inc.,
2021 NY Slip Op 32808(U)
December 15, 2021
Supreme Court, New York County
Docket Number: Index No. 654291/2018
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

-----X

ARCH SPECIALTY INSURANCE COMPANY,

Plaintiff,

- v -

M.T. STEEL FABRICATORS, INC., STREAMLINE USA,
LLC, and HOUSTON CASUALTY COMPANY,

Defendants.

-----X

INDEX NO. 654291/2018

MOTION DATE 10/15/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to/for JUDGMENT - SUMMARY.

In this declaratory judgment action, the plaintiff moves pursuant to CPLR 3212 for summary judgment as against defendants Streamline USA, LLC (Streamline), and Houston Casualty Company (HCC), rescinding a commercial general liability insurance policy issued to defendant M.T. Steel Fabricators, Inc. (MT Steel), based on a material misrepresentation made by MT Steel on its insurance application, and permitting the plaintiff to withdraw from the defense it has been providing Streamline in an underlying action. Streamline and HCC oppose the motion. The motion is granted.

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra.

In support of its motion, the plaintiff submits, inter alia, the affidavit of S. Emy Poulad, the plaintiff's Claims Counsel; the affidavit of Veronica Kirkham, the plaintiff's Senior Vice President, Chief Underwriting Officer, SME Solutions; the ACORD Commercial Insurance Application form

submitted to the plaintiff by MT Steel; the commercial general liability insurance policy issued by the plaintiff to MT Steel; the construction subcontracts between Streamline and MT Steel; the transcript of the deposition of Eric Ortense, Streamline's CEO; photographs of the subject construction site and daily job reports related to such site; and documents filed in the underlying wrongful death action, captioned Adia Cruz, as Administrator of the Good, Chattels and Credits which were of Jose Antonio Cruz, and Adia Cruz, Individually v 1604 Broadway Holder LP, Farmore Realty, Inc., Ryman Hospitality Properties, Inc. and SPK Hospitality Ground LLC, a Joint Venture, and Streamline USA, LLC, currently pending in the Supreme Court, Bronx County, under Index No. 2600/2018 (the underlying action).

The plaintiff's submissions establish that MT Steel submitted an application for insurance to the plaintiff on or about January 3, 2017. In its application, MT Steel described its "Nature of Business" as follows:

"Metal Fabricator in Shop With Installation. Railings, Fences, Stairs, Doors, etc.
70 % Fabrication in Shop & 30% Installation."

The application's Commercial General Liability Section discloses two hazards: "Metal Erection (Decorative/Artistic)," with an exposure of \$27,500, and "Metal Work Shop," with an exposure of \$150,000. MT Steel responded in the negative to Questions 14 and 15 of the Commercial General Liability Section, which ask whether any structural alterations or demolition exposure, respectively, are contemplated. The application also includes a "General Contractors/Developers General Liability Application," which describes MT Steel's operations as "Metal Shop & Installation" and assigns 30% of payroll to the category "Steel (ornamental)" and 70% of payroll to the category "Other," with the descriptor, "Metal." No percentage is assigned to the listed categories "Steel (structural)" or "Wrecking/Demolition."

The plaintiff issued a commercial general liability insurance policy to MT Steel for the period January 12, 2017, to January 12, 2018, (Policy No. AGL0033054-01) with a premium of \$21,261.00. The policy declarations provide a Business Description for MT Steel as "Metal Goods Fabricator, shop only." The policy also includes an Employer's Liability Exclusion, which states that MT Steel agrees that (1) the statements in the policy's declarations are accurate and complete, (2) those statements are based on representations made by MT Steel to the plaintiff, and (3) the plaintiff issued the policy in reliance on those representations. The policy's classification and premium schedule list two classifications and corresponding class codes: Metal Erection – decorative or artistic (class code no. 97650) and Metal Works – shop – decorative or artistic (class code no. 59914).

On September 12, 2016, prior to MT Steel's submission of its insurance application, Streamline, as general contractor, entered into a construction subcontract with MT Steel, as subcontractor, for the performance of steel work on a construction project at a building in the vicinity of Times Square in Manhattan. The subcontract included in the scope of work to be performed the installation of all structural steel for the floors and roof, with certain omissions. Streamline's CEO, Eric Ortense, further testified that part of the steel work contemplated was

the creation of a new bulkhead of steel I-beams on the roof of the building, the addition of metal plates underneath the beams supporting a DJ booth, and the installation of a ten-foot-wide marquee that had to be attached to the building with steel bracing. Streamline's daily job reports documented structural work done on the project by MT Steel, including the installation of gusset plates, columns, beams, bracing, and new steel for the floor and staircase.

On November 3, 2016, Streamline and MT Steel entered into a second subcontract for the performance of certain structural steel demolition work. Specified work included the removal and disposal of Q-decking and steel beams, staircases, and an existing billboard. Ortense testified that pursuant to this subcontract, MT Steel was to remove Q-decking and steel beams supporting such decking from part of the second floor to create a higher ceiling for the first floor of the building. Photographs submitted by the plaintiff show the area where Q-decking and beams had been removed by MT Steel. Streamline's daily job reports document demolition work done by MT Steel at the construction site.

On April 12, 2017, Jose Cruz, an employee of MT Steel, fell to his death at the construction site. According to a Notice of Occurrence filed that date, Cruz was cleaning debris from the edge of the concrete slab on the second floor of the building when he lost his balance and fell to the first floor. On June 12, 2018, the administrator of Cruz's estate commenced the underlying action. The plaintiff is defending Streamline in the underlying action under a reservation of rights pending the outcome of this rescission action.

An insurer is entitled to rescind a policy *ab initio* where it would not have issued a policy, or would have issued a different policy with a higher premium, but for material misrepresentations made by the insured in its application for insurance. See Insurance Law § 3105; Starr Indemnity & Liability Company v Monte Carlo, LLC, 190 AD3d 441 (1st Dept. 2021); Konstantakopoulos v Union Mutual Fire Insurance Company, 194 AD3d 572 (1st Dept. 2021); Arch Specialty Ins. Co. v Kam Cheung Constr., Inc., 104 AD3d 599 (1st Dept. 2013). "Even an innocent misrepresentation is sufficient to void the policy." Starr Indemnity & Liability Company v Monte Carlo, LLC, *supra* at 442 (citations omitted). Moreover, a "[f]ailure to disclose is as much a misrepresentation as a false affirmative statement." Vander Veer v Contl. Cas. Co., 34 NY2d 50, 52 (1974).

The plaintiff's proof establishes, *prima facie*, that MT Steel made material misrepresentations to the plaintiff in its application for insurance when it did not allocate any percentage of its work to structural steel or demolition, affirmatively represented that it only did "decorative and artistic" or "ornamental" steel and metal work, answered "no" to questions about whether it contemplated structural alterations or demolition exposure, and failed to state anywhere in the application that it had contracted to perform a substantial amount of structural steel and demolition work shortly before submitting the application. The subcontracts, daily job reports, and testimony of Ortense submitted by the plaintiff, among other evidence, establish that MT Steel did, in fact, contemplate and actually perform both structural steel and demolition work. The affidavit of the plaintiff's underwriter, Veronica Kirkham, and reference to the plaintiff's underwriting guidelines show that had MT Steel accurately completed the application,

it would have been ineligible for insurance through the plaintiff's Contracting Binding Operations program, which issued the subject policy. Moreover, even if the plaintiff agreed to insure MT Steel, the plaintiff's premium rating guidelines would have obligated the plaintiff to charge MT Steel a dramatically higher premium had it known of MT Steel's contemplated activities.

Streamline and HCC fail to raise a triable issue of fact in their opposition, which is largely limited to challenging the sufficiency of the documentary evidence the plaintiff submits and invoking the equivocal testimony of Streamline's CEO that he was not sure whether some of MT Steel's steel work should be characterized as "structural." As the court has explained, the plaintiff has submitted ample admissible evidence that MT Steel materially misrepresented its contemplated business activities. Moreover, there can be no legitimate dispute that many of the activities contemplated in the subcontracts and actually performed by MT Steel were "structural" insofar as they directly related to the structure of the building and load-bearing parts of the building. The court has considered Streamline and HCC's remaining arguments and finds them similarly without merit.

The plaintiff is therefore entitled to summary judgment rescinding MT Steel's insurance policy *ab initio* and declaring that it has no obligation to defend or indemnify Streamline in the underlying action. Additionally, the plaintiff is entitled to dismissal of Streamline and HCC's counterclaims sounding in breach of contract, declaratory judgment, and contribution, each of which is premised on the enforceability of the subject insurance policy.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted in its entirety; and it is further

ADJUDGED and DECLARED that the general liability policy issued by the plaintiff to M.T. Steel Fabricators, Inc., under Policy No. AGL0033054-01, is rescinded *ab initio* pursuant to Insurance Law § 3105; and it is further

ADJUDGED and DECLARED that the plaintiff has no obligation to defend or indemnify defendant Streamline USA, LLC, pursuant to foregoing general liability policy, in the action captioned Adia Cruz, as Administrator of the Good, Chattels and Credits which were of Jose Antonio Cruz, and Adia Cruz, Individually v 1604 Broadway Holder LP, Farmore Realty, Inc., Ryman Hospitality Properties, Inc. and SPK Hospitality Ground LLC, a Joint Venture, and Streamline USA, LLC, currently pending in the Supreme Court, Bronx County, under Index No. 2600/2018; and it is further

ORDERED that the counterclaims asserted by Streamline USA, LLC, and Houston Casualty Company are dismissed.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/15/2021

DATE

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER