SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Plaintiff,

- v -

L. KNIFE & SON, INC., U.B. DISTRIBUTORS,

Defendant.

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INDEX NO. 157164/2013

MOTION SEQ. NO. 008

DECISION AND ORDER

HON. SALIANN SCARPULLA:

In this insurance coverage dispute, plaintiff Great American Insurance Company of New York ("GAIC") moves for leave to file an amended complaint. In a separate motion, defendants L.Knife & Son, Inc. and U.B. Distributors move for summary judgment, pursuant to CPLR § 3212, on their counterclaims. GAIC opposes the motion and cross-moves for summary judgment, pursuant to CPLR § 3212, seeking an order declaring that the insurance policy at issue is void *ab initio* based on a material misrepresentation. The motions and cross-motion are consolidated for disposition.

Background

Defendant L.Knife & Sons, Inc. is the parent corporation of defendant U.B. Distributors (collectively, "L.Knife"). U.B. Distributer is a beer distributor with a warehouse located at 1213-1217 Grand Street, Brooklyn, New York 11211 (the

"Premises"). In 2007 L.Knife sought flood coverage for the Premises through its insurance broker, third-party defendant/plaintiff TGA Cross Insurance, Inc. ("TGA Cross").

To secure excess flood coverage for the Premises, Mary Coates ("Coates") of TGA Cross contacted third-party defendant Swett & Crawford of Georgia, Inc. ("Swett & Crawford") and spoke with Keith Morell ("Morell"). Morell of Swett & Crawford then solicited flood coverage from GAIC.

When applying for flood coverage in 2007, Coates of TGA Cross exchanged information and documents with Morell of Swett & Crawford. The initial application Coates submitted to Morell requested $4,000,000.00 in coverage for the building and $2,500,000.00 in coverage for the contents of the Premises. On this application, the line titled "contents value" was left blank.

During the underwriting process in 2007, GAIC requested Morell obtain additional information specifically regarding L.Knife's flood prevention measures for the Premises. Coates provided information in an email to Morell. Then, Morell relayed the information to GAIC in a separate email on December 6, 2007, adding in that separate email that the value of the contents of the Premises was $3,000,000.00 ("Morell's December 2007 Email"). There are no documents from Morell in which Morell requested Coates or L.Knife provide the value of the Premises' contents. The only documentary evidence demonstrating from where that $3 million value of the contents

originated is Morell's December 2007 Email.[1] The parties dispute from where the $3 million valuation originated – L.Knife attributes it to Swett & Crawford and/or GAIC while GAIC attributes it to TGA Cross and/or L.Knife.

Coates received an insurance quote in 2007 ("2007 Quote") from GAIC through Morell. The 2007 Quote provides that the "Premium is based on $7,000,000 [total insurable value] ($4,500,000 Building and $3,000,000 Contents.)" Coates responded to Morell, asking him to "Kindly bind per GA[IC] [2007] Quote." GAIC subsequently issued L.Knife an excess flood insurance policy for the 12/31/2007 – 12/31/2008 period. GAIC also conducted an inspection of the Premises shortly after issuing the policy. After the inspection GAIC did not make any changes to the policy.

The policy was renewed for an additional four periods. Prior to the last renewal period, *i.e.*, 12/31/2011 – 12/31/2012, Morell sent Coates an insurance renewal quote ("2011 Quote") from GAIC, which stated "Based on total exposed values of $7,000,000 – please confirm that this is still accurate." Coates responded, "Please bind per the attached quote and advise if you need anything further."

On October 29, 2012, the Premises sustained flood damage due to Super Storm Sandy. L.Knife submitted a claim totaling $5,000,000.00 in damage the following day, and GAIC denied coverage for that claim. GAIC explained that its investigation revealed that L.Knife had made a material misrepresentation on its 2007 application for coverage

[1] At their depositions neither Coates nor Morell clearly testified from where the value of the contents as represented originated.

by representing that the total insurable value was $7,000,000.00 when it was in fact higher.

GAIC then commenced this action against L.Knife and previously filed a motion for summary judgment, seeking an order declaring the policy void. That motion was denial, and the denial was affirmed by the Appellate Division, First Department. L.Knife now moves for summary judgment on its counterclaim for payment under the insurance policy, arguing that all factual issues have been resolved in its favor, and that it is entitled to judgment as a matter of law. GAIC opposes L.Knife's motion and cross-moves for summary judgment, again seeking an order declaring the policy void *ab initio.* L.Kinfe also seeks to amend its complaint.

Discussion

The Motion for Leave to Amend

Leave to amend a complaint is freely granted "upon such terms as may be just[.]" CPLR § 3025 (b). "In determining whether to grant a motion to amend [the complaint], the court should consider the merit of the proposed [cause of action] and whether the plaintiff will be prejudiced by the delay in raising it" *Lanpont v Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 209–10 (1st Dep't 1997) (citations omitted).

Here, GAIC argues that the proposed amended complaint separates relief sought into five causes of action. GAIC argues that L.Knife will suffer no prejudice from this amendment because the original complaint and/or prior motions already placed L.Knife on notice of the underlying allegations.

L.Knife argues that GAIC may not "repackage" its complaint at this late of a stage because it will cause L.Knife prejudice now that all discovery is complete. However, L.Knife admits that GAIC's original complaint already alleges the first three proposed causes of action, thereby eliminating L.Knife's prejudice argument with respect to these causes of action. *C.f. Valdes v Marbrose Realty, Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001) (citations omitted) (stating "[p]rejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment[.]").

As to the fourth and fifth proposed causes of action, L.Knife argues that both are without merit. Upon review, I find that the fourth cause of action is sufficient, but the fifth cause of action, seeking an order declaring the insurance policy void based on unilateral mistake, is untenable at this point in the litigation. The Appellate Division, First Department has already held that "[GAIC's] investigation of the property [] could have uncovered the TIV of the property and its contents, which resulted in no underwriting activity[.]" It is well settled that [r]escission will be denied if the mistake arises out of negligence and 'the means of knowledge were easily accessible.' " *Summit Health, Inc. v APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 405 (S.D.N.Y. 2014).

Accordingly, I grant GAIC's request for leave to amend their complaint to the extent it requests to add the first through fourth proposed causes of action, and the motion to amend is otherwise denied. Further, I consider the amended complaint on the cross-motions for summary judgment.

The Cross-Motions for Summary Judgment

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Grob v Kings Realty Assoc.*, 4 A.D.3d 394, 395 (2d Dep't 2004). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Agency

L.Knife argues first that Swett & Crawford is GAIC's agent as a matter of law. GAIC takes the opposite position, claiming that Swett & Crawford is not its agent as a matter of law. "In general, an insurance broker is considered the agent of the insured, not the insurance company . . .. However, a broker will be held to have acted as the insurer's agent where there is some evidence of action on the insurer's part, or facts from which a general authority to represent the insurer may be inferred" *Burlington Ins. Co. v Clearview Maintenance & Services, Inc.*, 150 A.D.3d 954 (2d Dep't 2017); *accord Guardian Life Ins. Co. of Am. v Chem. Bank*, 94 N.Y.2d 418, 422–23 (2000).

Here, L.Knife submits evidence showing that Swett & Crawford collected and paid premiums to GAIC for policies that GAIC issued through Swett & Crawford and that GAIC also paid Swett & Crawford commissions for those same policies. While this conduct demonstrates that Swett & Crawford intended to benefit GAIC, the applicable agreement in 2007, *i.e.*, the Broker Agreement, dated January 20, 2004, provides that

Swett & Crawford "is an independent contractor [with] no authority to quote or issue [GAIC's] policies or to bind or act on behalf of GAIC in any manner." Accordingly, an issue of fact exists as to whether Swett & Crawford acted as GAIC's agent.

The Alleged Material Misrepresentation

The gravamen of GAIC's claims is that Coates of TGA Cross on behalf of L.Knife misrepresented that the value of the contents of the Premises was $3,000,000.00 on the initial insurance application in 2007 and again during the 2011 renewal process. Alternatively, GAIC alleges that L.Knife ratified the same misrepresentation after Coates of TGA Cross reviewed the 2007 and 2011 Quotes. GAIC alleges that had it known the value of the contents was higher, it would have charged a higher premium, which sufficiently constitutes a material misrepresentation to declare the policy void *ab initio*.

"[T]o establish its right to rescind an insurance policy, an insurer must demonstrate that the insured made a material misrepresentation. A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented[.]" *Smith v Guardian Life Ins. Co.*, 116 A.D.3d 1031 (2d Dep't 2014).

The deposition testimony of Coates and Morell, on which both GAIC and L.Knife rely, demonstrates that questions of fact remain as to whether L.Knife misrepresented any facts. Specifically, whether Coates, at any point prior to Morell's December 2007 Email, verbally communicated and represented to Morell the value of the contents.

This issue of fact equally relates to the materiality of the misrepresentation, because Morell's December 2007 Email may be read as showing that he, without any

prompting from GAIC, let alone L.Knife, represented the value of the contents as $3,000,000.00. Moreover, I cannot say as a matter of law that GAIC's underwriting practices as to this policy are clear and substantially uncontradicted, based on GAIC's assertion that, industry wide, the value of contents is used to calculate premiums. *See Botway v Am. Intern. Assur. Co. of New York*, 151 A.D.2d 288, 289 (1st Dep't 1989).

Considering the foregoing material issues of fact, I deny summary judgment on the first cause of action in favor of either L.Knife or GAIC.[2] These fact issues also preclude summary judgment for either party on GAIC's second and third causes of action for declaratory judgment based on ratification. *See supra* pp. 6 –7; *see also* Restatement (Third) Of Agency § 4.03 (2006) ("When an actor is not an agent and does not purport to be one, the agency-law doctrine of ratification is not a basis on which another person may become subject to the legal consequences of the actor's conduct."). Further, for this same reason I deny summary judgment to L.Knife on their counterclaims.

Condition Precedent

GAIC argues in its cross-motion for summary judgment that the 2011 renewal policy was never formed because L.Knife failed to satisfy a condition precedent to form a contract. GAIC bases its argument on the 2011 Quote sent to Morell for Coates, which added "TRIA included. Based on total exposed values of $7,000,000 – please confirm that this is still accurate." GAIC argues that the language, "please confirm that this is still

[2] To the extent that GAIC argues that the 2011 Quote is an independent misrepresentation, that does not eliminate the issue of whether GAIC or Swett & Crawford were primarily responsible for the misrepresentation precluding summary judgment.

accurate", was a condition to forming the 2011 renewal policy, *i.e.*, if Coates never confirmed, then no contract exists.

"In determining whether a particular agreement makes an event a condition courts will interpret doubtful language" to disfavor forfeiture. *Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995). Here, GAIC issued the 2011 renewal policy and collected premiums. Had GAIC intended to make total insurable value a condition precedent to renewing the policy, GAIC should have expressly stated so in the 2011 Quote, but it did not do so. *C.f. Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 691 (1995) (finding that "the parties employed the unmistakable language of condition ('if,' 'unless and until')". Accordingly, I deny GAIC's motion for summary judgment on the fourth cause of action and grant L. Knife summary judgment dismissing this cause of action. *See* CPLR 3212(b).

In accordance with the foregoing, it is

ORDERED that plaintiff Great American Insurance Company's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the first, second, third, and fourth causes of action and to this extent the amended complaint in the form annexed to the moving papers shall be deemed served as of the date of this order; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed fifth cause of action and that cause of action is stricken; and it is further

ORDERED that defendants L.Knife & Son, Inc.'s and U.B. Distributors' motion for summary judgment dismissing the amended complaint is denied, and the motion is also denied as to L.Knife & Son, Inc.'s and U.B. Distributors' first and second counterclaims; and it is further

ORDERED that plaintiff Great American Insurance Company's cross-motion for summary judgment on the first, second, third, and fourth causes of action in the amended complaint is denied, and it is further

ORDERED that, pursuant to CPLR 3212(b) the fourth cause of action is dismissed; and it is further

ORDERED that third-party defendant/plaintiff TGA Cross Insurance, Inc. and third-party defendant Swett & Crawford of Georgia, Inc. shall file its summary judgment motions no later than thirty (30) days from the date of this order.

This constitutes the decision and order of the Court.

10/10/17
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE