SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

SHERRY MEYERS,

Plaintiff(s),

ORIGINAL RETURN DATE: 07/31/00
SUBMISSION DATE: 09/19/00
INDEX No.: 748/96

-against-

GO-PRO CONTRACTING INC. and
NORTH SEA INSURANCE COMPANY,

MOTION SEQUENCE #10,11

Defendant(s).

The following papers read on this motion:

Notice of Motion	1
Cross-Motion	2
Answering Papers	4
Reply	5
Plaintiff's Brief	3

Motion by defendant North Sea Insurance Company for an order pursuant to CPLR 3212 awarding summary judgment is denied, as the movant has failed to establish the defense of rescission as a matter of law. Cross-motion by plaintiff Sherry Meyers for summary judgment is also denied, as questions of fact concerning North Sea's alleged waiver of the rescission defense preclude an award of judgment as a matter of law.

Plaintiff Sherry Myers hired defendant Go-Pro Contracting, Inc. (hereinafter Go-Pro) to install a roof on her home. During the work, which required the use of a propane torch, Meyers' home was damaged by fire. Plaintiff thereafter commenced this action against Go-Pro and North Sea Insurance Company (hereinafter North Sea), the insurer of Go-Pro, to recover damages. Plaintiff brought suit against Go-Pro for negligence and breach of contract, and against North Sea for a declaration that North Sea is obligated to indemnify Go-Pro for any judgment against it. Go-Pro, apparently a defunct corporation, has not appeared in this action, and plaintiff has taken a default judgment.

In this action North Sea avers that it would not have provided insurance coverage to Go-Pro, if Go-Pro had not falsely listed its business as general carpentry. Once North Sea became aware that Go-Pro's principal business was roofing, it sought rescission of

the policy and North Sea commenced a separate declaratory judgment action against Go-Pro. In that action, North Sea secured judgment after a hearing and upon Go-Pro's default.

In this action, by order dated August 18, 1998 [Lockman, J.], North Sea was granted leave to amend its answer to raise the defense of rescission premised upon the alleged material misrepresentation regarding the nature of Go-Pro's work. In so holding this court specifically found that such amendment would not cause prejudice to plaintiff by preventing her from litigating the rescission defense on the merits. In short, the default judgment in North Sea's action against Go-Pro would have no collateral estoppel effect against plaintiff Meyers in this action. As a consequence of the newly raised defense, plaintiff's cross-motion for summary judgment was denied (Short Form Order dated August 18, 1998).

The Appellate Division affirmed by order dated November 15, 1999, stating:

> Given the lack of prejudice or surprise to the plaintiff, the Supreme Court did not improvidently exercise its discretion in granting that branch of the motion of North Sea which was for leave to amend its answer to seek the rescission of an underlying insurance contract ... plaintiff's ... contentions, which concern the merits of the proposed amendment, and whether North Sea waived and/or is estopped from asserting a defense of rescission, raise questions of fact for trial.

(Meyers v. Go-Pro Contr., 266 AD2d 362, 362-363).

Defendant North Sea (hereafter defendant) now seeks summary judgment, both on the merits and based upon collateral estoppel. With respect to estoppel, North Sea argues that the default judgment declaring the policy with Go-Pro null and void is binding upon plaintiff as a creditor of Go-Pro. North-Sea relies upon **D'Arata v. New York Central Mutual Fire Insurance Company** (76 NY2d 659), which held that an injured party who brings a direct action against a carrier pursuant to Insurance Law § 3420 (b) (1) does so as a "subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured" **(D'Arata v. New York Cent. Mut. Fire Ins. Co., supra** at p 665).

This court previously rejected this argument on the grounds that estoppel is not applicable to a default judgment (**see American Motorists Ins. Co. v. North Country Motors**, 57 AD2d 158, 160 ["a person concerned with the issue of insurance coverage cannot be deprived of an opportunity to be heard on that point by the default of another, and the doctrine of collateral estoppel ... cannot be

used to effectuate such an end"]). Indeed, the grant of leave to amend explicitly noted plaintiff's right to contest the defense on the merits, and defendant is bound by the doctrine of law of the case, "an articulation of sound policy that, when an issue is once determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" **(Martin v. City of Cohoes**, 37 NY2d 162, 165).

North Sea also seeks summary judgment on the merits. However, North Sea has provided only deposition testimony to support its claim that it would not have undertaken the risk had Go-Pro revealed that it was primarily a roofer. Such testimony is insufficient to support an award of summary judgment. "An insurer is entitled to rescind an insurance policy if it establishes that the misrepresentations in the application for insurance were material to the risk to be insured * * * The materiality of an applicant's misrepresentation is ordinarily a factual question" **(Carpinone v. Mutual of Omaha Ins. Co.,** 265 AD2d 752, 754). In order to establish the materiality of a misrepresentation as a matter of law, an insurer is "required to present documentation concerning its underwriting practices such as its underwriting manuals, rules or bulletins which pertain to insuring similar risks", and "conclusory statements by an insurance company employee, which are not supported by documentary evidence, are insufficient to establish that plaintiff's misrepresentations were material as a matter of law" (**Carpinone v. Mutual of Omaha Ins. Co.,** 265 AD2d 752, 754-755, **supra**). As North Sea has failed to submit the pertinent " underwriting manuals, rules or bulletins", the motion for summary judgment is denied.

Plaintiff also seeks summary judgment. Plaintiff argues that there was no material misrepresentation, and that North Sea waived the rescission defense as a matter of law. Plaintiff too here raises arguments previously rejected by this court and the Appellate Division. As noted above, the Appellate Division stated in affirming the order granting leave to amend that plaintiff's contentions that North Sea "waived and/or is estopped from asserting a defense of rescission, raise questions of fact for trial" **(Meyers v. Go-Pro Contr.,** 266 AD2d 362, 363, **supra**). And, "under the doctrine of law of the case, the respective parties are bound by [the] prior decision in this matter" **(see, Atlantic Mut. Ins. Co. v. Greater N. Y. Mut. Ins. Co.,** 271 AD2d 278, 280).

Notwithstanding the foregoing, as the parties have not provided the court with the record of the arguments raised on appeal, and the court is unable to determine upon the present record whether plaintiff previously submitted all the facts offered on this cross-motion. Accordingly, the cross-motion is also addressed on the merits.

Plaintiff argues that North Sea, as a result of its own procedures, knew that Go-Pro was more that a carpentry contractor, and that, as a home improvement contractor, Go-Pro performed roofing work. North Sea counters that any roofing work "incidental" to Go-Pro's carpentry, such as roofing associated with dormer work, was excluded under the policy and that North Sea could not attempt to rescind until it was on notice of sufficient facts to indicate that Go-Pro was primarily a roofer and not a carpenter.

The following facts are uncontested. On July 22, 1993 North Sea issued a commercial lines policy to Go-Pro Contracting for the period July 22, 1993 through July 22, 1994. Go-Pro represented its business as carpentry, and the policy excluded coverage for roofing work. The policy was renewed the following year, notwithstanding that by this time, based upon an inspection conducted by Lorix Inspection Service, Inc., North Sea was on notice that Go-Pro performed some roofing services.

In December of 1994 the broker who secured Go-Pro's policy notified North Sea that a fire had started while Go-Pro was installing a roof upon plaintiff's premises. Upon receipt of the notice, Richard Nelson, claims manager for North Sea, retained the services of Steele Associates to investigate and adjust the claim. Steele advised that the damage was caused by roofing work and that a reservation of rights letter should issue. On January 12, 1995 Nelson issued a reservation of rights letter based in part on the designated roofing work exclusion in the policy. In January of 1995, Steele submitted a supplemental report which contained an admission by a principal of Go-Pro, Stephen Tacktill, that 50% of Go-Pro's work consisted of roofing. In February of 1995 North Sea sent a disclaimer letter based upon, inter-alia, the "designated work" exclusion. Steele submitted an additional report in February of 1995 which included the broker's statement as well as photographs of Go-Pro's place of business with window signs identifying the company as "Go-Pro Roofing." North Sea then issued a cancellation notice to Go-Pro, effective March 17, 1995. The reason offered for the cancellation was "Insured may act as a roofing contractor." North Sea retained all premiums for the period up to March 17, 1995.

In June of 1995 North Sea sought to collect increased premiums from Go-Pro for the period through March 17, 1995. North Sea commenced suit and took a default judgment for the increased premiums on January 22, 1996. In March of 1996, one month after plaintiff initiated this declaratory judgment action, North Sea directed counsel to discontinue the collection action and to vacate the default judgment for additional premiums. North Sea commenced the separate action for rescission in May of 1996.

An explanation of the facts outlined above was offered on behalf of defendant by Richard Nelson at deposition. The following testimony appears at page 56:

> A. There came a point in time when I reviewed all of the investigative reports that had been submitted to North Sea Insurance, and I reviewed a background investigation report that had been submitted to North Sea Insurance, and I came to the conclusion that in my opinion G0-Pro Contracting was a roofer, pure and simple, and they did not do anything else other than roofing.
>
> On January 11, 1995, apparently the principal of Go-Pro Contracting, 21 days after this loss, formed a new corporation, High Point Contracting. In the construction business they generally fold one corporation and go on to a new one.
>
> There was a Consumer Affairs report which indicated that there were five complaints all dealing with roofing. I could speculate that perhaps that may have been hurting their marketing by going to new clients who would call the Consumer Affairs Division and find out that there were all these complaints and maybe they would not get the job.
>
> There is something called IBR in the insurance industry which is claims incurred but not reported. You are required to account statistically for claims that could be out there but have not been reported to you yet.
>
> After taking everything into consideration, I requested that [attorneys] Gladstein and Isaac proceed with a recission action, and that's what I did.
>
> Q. Why?
>
> A. Because I felt that the insured had committed a fraud upon North Sea Insurance by holding themselves out to be a carpenter when in fact they were a roofer, and I was concerned about the IBR that could be out there, not knowing if there were any claims that were going to walk in the door.
>
> I felt the most responsible course of action for North Sea Insurance to do would be to bring a recission action.

Nelson also testified that he believed that Go-Pro's roofing work "was close to 90% or better" and stated that he doubted that it "ever did anything other than roofing ...".

Plaintiff argues that North Sea waived its right to rescind "by waiting more than 16 months after [it] knew of the basis for rescinding the policy before seeking to rescind and by retaining the premium, seeking to recover additional premiums and engaging in other conduct that affirmed the continued validity of the policy for the period in question".

Waiver ordinarily presents a question of fact and is defined as an "intentional relinquishment of a known right with full knowledge of the facts upon which the existence of the right depends" **(Amrep Corp. v. American Home Assur. Co.**, 81 AD2d 325, 329). The same principles apply to waiver in the context of insurance fraud , when it is argued "that the insurer had knowledge of the facts and took no action" **(Amrep Corp. v. American Home Assur. Co., supra**). It is only in the "exceptional case" delay may be deemed unreasonable as a matter of law (**Hartford Ins. Co. v. County of Nassau**, 46 NY2d 1028, 1030). Normally it is a question of fact "which depends on all the circumstances, especially the length of and the reason for the delay" (**Hartford Ins. Co. v. County of Nassau, supra**). And, while it is true that "a lengthy and/or unexplained delay" can be unreasonable as a matter of law, and the failure to conduct a "diligent investigation" may result in a relatively short time period being deemed so (**Travelers Ins. Co. v. Monpere**, 1996 U.S. Dist. Lexis 19638, 1997 WL 9792 [W.Dist., New York]) here plaintiff has not established that defendant failed to conduct a diligent investigation once it had grounds to suspect a material misrepresentation, and the deposition testimony of Richard Nelson provides an explanation for the delay.

In **Travelers,** relied upon by plaintiff, the court explicitly stated the delay was unreasonable as a matter of law "*because* Travelers failed to conduct a diligent investigation during the period of its admitted two-and-a-half year delay" (**Travelers Ins. Co. v. Monpere, supra** [emphasis supplied]). Indeed, under the appropriate circumstances, even a three year delay in seeking rescission has been held not "so excessive as to warrant the imposition of laches and/or ratification" **(Schlanger v. Flaton**, 218 AD2d 597, 603, **lv app den** 87 NY2d 812).

Here it cannot be said as a matter of law that North Sea failed to conduct a diligent investigation, or at what point in time North Sea became fully aware of the true facts triggering its obligation to rescind. Thus the alleged sixteen-month delay cannot be deemed unreasonable as a matter of law.

Plaintiff also claims that defendant should be estopped because it chose to pursue additional premiums at a time when it was aware that 50% of Go-Pro's work consisted of roofing. Plaintiff relies upon the "well settled" rule "that the continued acceptance of premiums by the carrier after learning of facts which allow for rescission of the policy, constitutes a waiver of, or more properly an estoppel against, the right to rescind" **(Scalia v. Equitable Life Assur. Socy. of U.S.**, 251 AD2d 315; see also, **Belesi v. Connecticut Mut. Life Ins. Co.**, 272 AD2d 353, 354).

A question of fact is presented in this regard as well. Defendant, although it determined to seek a retroactive additional premium, did not actually "accept" premiums, and later determined to abandon pursuit of the additional premiums.

Moreover, as noted, it cannot be said as a matter of law at what precise point in time defendant had "sufficient" knowledge of the fraud to trigger its duty to seek rescission and cease pursuit of additional premiums. Even had North Sea continued to accept premiums after having sufficient knowledge to rescind, waiver is not established as a matter of law, for even under such circumstances the following factors must be considered, "whether the insurer had served notice of its election to rescind the policy at the time it accepted the premium; whether the insurer's receipt of the premium was inadvertent or intentional; whether retention of the premium was permanent or temporary; and whether the premium was returned within a reasonable time after the payment came to the attention of responsible officials of the insurer * * * " (**Sielski , D.D.S., P.C. v. Commercial Ins. Co. of Newark, N. J.**, 199 AD2d 974, 975, **lv app dsmd** 83 NY2d 953). Accordingly, plaintiff has not established that defendant's acts or knowledge require judgment as a matter of law, and with respect to resolution of issues such as the requirements for diligent investigation, sufficient knowledge to appreciate fraud, and a reasonable time to act, such issues can be determined as a matter of law only in the "exceptional" case (**Hartford Ins. Co. v. County of Nassau**, 46 NY2d 1028, 1030, **supra**).

The motion and cross-motion are denied.

This decision constitutes the order of the court.

Dated: 11-28-00

THOMAS P. PHELAN

J.S.C.