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INSURANCE LAW BLOG

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New York Court Discusses Evidentiary Standards for Policy Rescission Based on Material Misrepresentation

BY:

On July 27, 2020, in the case of *Mt. Hawley Ins. Co. v. AKI Renovations Group, Inc*., (Sup. Ct. NY Co. 2020), Index No. 159421/2017 (unpublished), the trial court issued an Order granting summary judgment permitting rescission of a CGL policy based upon material misrepresentations in a policy application. The insured submitted an application in which it failed to disclose its demolition operations despite specific questions seeking this information. Mt. Hawley issued a primary and excess policy for the period of December 29, 2016 to December 29, 2017 (collectively, the policy).

Subsequently, the insured sought coverage for a claim in which it was alleged that the insured was acting as a general contractor for demolition of a three-story building when the plaintiff was injured. The insurer advised the defendants that it was rescinding the policy *ab initio*, and also returned defendants' premium in its entirety. The insurer asserted that it would not have issued the policy had defendants disclosed their demolition operations, then filed the coverage action seeking a judicial declaration ratifying its rescission of the policy.

In granting the insurer's motion for summary judgment the court reiterated the applicable standard under New York Insurance Law § 3105 (a) and case law precedent, that an insurer will be entitled to rescind a policy *ab initio*, where it can show that it issued the policy in reliance on a knowing and material misrepresentation by the applicant. The court examined the application submitted. The court also considered the affidavit of the insurer's underwriter, who stated that the insurer would not have insured risks associated with defendants' undisclosed demolition work, particularly where the building exceeded two stories in height. This was corroborated by underwriting guidelines. The court found that the affidavits, underwriting guidelines and other submissions by the insurer demonstrated prima facie that the insurance application contained material misrepresentations as a matter of law.

The burden then shifted to defendants to establish the existence of a triable issue of fact, which they failed to do. In this regard, defendants submitted only an attorney's affirmation that the project did not involve demolition of the building in question, but merely gutting of the building's interior. The court found that this affirmation was insufficient to create an issue of fact because it did not establish a foundation for counsel's knowledge regarding any of the facts asserted, including what was shown in the attached photographs, which were unauthenticated in any event.

The case is notable for its detailed discussion of the kinds of evidence a New York court will consider in deciding a rescission claim, and the insufficiency of an unsubstantiated attorney's affirmation to refute such evidence.

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