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New York Law Journal

CORPORATE INSURANCE LAW

Southern District Refuses to Grant Summary Judgment Due to Lack of Documentary Evidence Demonstrating That Insured's Misrepresentations Were Material

By Howard B. Epstein and Theodore A. Keyes

November 20, 2024

In New York, insurers are generally entitled to rescind an insurance policy issued in reliance on a policyholder's material misrepresentations. This provides insurers with an important tool to avoid paying out claims where the policy was issued based on false information in the application. In order to rescind a policy based on misrepresentations in the application, the insurer must demonstrate that the false information was material such that the insurer would not have issued the policy if it had known the misrepresented facts.

In general, materiality is a question for the jury – unless the evidence is clear and substantially uncontradicted. In Travelers Casualty Insurance Company of America vs. BJB Construction Corporation, the Southern District of New York recently held that, in order to demonstrate materiality as a matter of law in the context of a summary judgment motion, an insurer must submit documentary evidence in support of its position.

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The Application

Travelers Casualty Insurance Company of America (Travelers) issued (and subsequently renewed) general liability and property policies to BJB Construction Corporation (BJB) after BJB's completion of an application for coverage.

The Travelers application form referenced a two-page list of ineligible operations, including "(1) 'elevator or escalator inspections, installations, servicing or repair,' (2) 'drywall and plastering, '(3) 'debris removal,' (4) 'general contractors,' and (5) 'metal erection — any type other than purely decorative.'" Travelers Cas. Ins. Co. of Am. v. BJB Constr. Corp., No.

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22-cv-5496 (NSR), 2024 WL 3952729, at *2-3 (S.D.N.Y. Aug. 27, 2024).

The application did not expressly state that risks on the ineligible operations list would not be insured. In its application, BJB represented that it did not conduct any of the ineligible operations. BJB's application also classified BJB as "a contractor for 'driveways, sidewalks, or parking areas.'" Id. at *3.

The BJB Claim

During the policy period, BJB entered into a contract to install an elevator system for the Town of Mount Kisco pursuant to which BJB would act as general contractor for the project.

BJB's project manager was injured during the installation and filed a notice of claim against the Town of Mount Kisco, alleging that the injuries were caused by the town's actions. The town sent a letter to Travelers seeking coverage as an additional insured under the Travelers policies. During the course of investigating the claim, Travelers became aware that the project was an elevator installation, which it alleged was an ineligible operation under the issued policies. After this discovery, Travelers issued a notice of rescission to BJB.

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Despite its representations in the application, BJB had previously acted as a general contractor for other elevator installations, and had performed other activities that were included on the ineligible operations lists, including "debris removal, drywall and plastering, and service and repair operations." Id. at *3. In addition, despite classifying BJB as a "contractor for 'driveways, sidewalks, or parking areas,'" in the application, BJB's president later admitted that the company's work was not limited to these activities.

Travelers filed suit against BJB seeking, among other things, a declaration that the policies issued to BJB are "rescinded and void ab initio," and that Travelers has "no further obligation to any purported additional insured" under the policies. Complaint at 28-29, Travelers, No. 22-cv-5496 (NSR),2024 WL 3952729. Travelers filed a motion for summary judgment. In its Aug. 27, 2024 opinion, the Southern District of New York denied the motion, finding that Travelers could not establish at this stage of the litigation that BJB's misrepresentations in the application were material.

The Legal Standard

Insurers are entitled to rescind an insurance policy "if it was issued in reliance on material

misrepresentations." Id. at *7. The burden of proof rests on the insurer to demonstrate (i) that the insured made a misrepresentation and (ii) that such misrepresentation was material. If the insurer is able to meet this burden of proof, the policies are deemed void ab initio, meaning that the contract is considered to have never had any legally binding effect.

In its ruling, the court first addressed whether BJB had made a misrepresentation. Under New York law, a "misrepresentation" is defined as a "false 'statement as to past or present fact, made to the insurer by ... the applicant for insurance ... at or before the making of the insurance contract as an inducement to the making thereof.'" Id.

As BJB admitted that it had performed work on the ineligible operations list despite representing to the contrary in its application, the court determined that the application contained "false affirmative statements," and thus that BJB had made misrepresentations in the application. Id. at *9. The court rejected BJB's arguments that the application and the ineligible operations list were ambiguous and confusing.

Next, the court examined whether Travelers had met its burden to prove that BJB's misrepresentations were material. A misrepresentation is considered to be material if "the insurer would not have issued the policy had it known the facts misrepresented." Id. at *12. The court explained that, to establish materiality as a matter of law, an insurer must submit documentary evidence of its underwriting practices that demonstrate that it would have refused to issue the policy had it received accurate information.

The court clarified that such documentation should include "underwriting manuals, bulletins, or rules pertaining to similar risks." Id. at *13. The court also highlighted that "[c]onclusory statements by insurance company employees, unsupported by documentary evidence" are not sufficient to prove materiality. Id.

In support of its motion, Travelers had submitted (i) BJB's application, (ii) the ineligible operations list, and (iii) a declaration by one of its underwriters stating that Travelers would not have issued the policy had it known about the misrepresentations. The court held that this evidence was insufficient to prove materiality as a matter of law because Travelers did not submit "underwriting guidelines, policies, or rules." Id. at *14.

According to the court, Travelers' application "merely asks whether the applicant meets the eligibility requirements and references the ineligible operations list," and the ineligible operations list, in turn "simply states 'risks associated with the following operations should not be written as Contractors Pac accounts.'" Id. In the court's view, this was not sufficient to show "the underwriter's decision making process for granting a policy." Id.

The court distinguished the case before it from similar cases in which the insurer was found to have met its burden to demonstrate materiality by highlighting that, in each of those cases, the insurer submitted its underwriting guidelines in support of its position.

Consistency with Precedent

The court's decision appears to be consistent with similar cases decided under New York law. For example, in Gemini Insurance Company v. Integrity Contracting, Inc., No. 17-CV- 1151 (AJN), 2019 WL 1099705 (S.D.N.Y. March 8, 2019), the Southern District determined that an insurer had not met its burden of proof where the insurer relied heavily on an underwriter's

affidavit stating that, had the insurer been aware of certain operations that the insured was conducting at the insured premises, it would not have issued the policy.

While the insurer also presented a portion of its underwriting guidelines to support its claims, the court found that the excerpt was insufficient to demonstrate that the insurer would not have issued the policy had it been provided with true information.

In contrast, in Union Mutual Fire Insurance. v. OHR Makif LLC, the Southern District held that the insurer had met its burden of demonstrating materiality. In that case, the application form expressly stated that if there were certain "unacceptable risks present," the insurer "would automatically be entitled to the 'issuance of a Notice of Cancellation for [u]nderwriting reasons' as an exercise of its right of recission." Union Mut. Fire Ins. Co. v. OHR Makif LLC, No. 22-CV-2025 (JPO), 2023 WL 5576877, at *3 (S.D.N.Y. Aug. 29, 2023).

The insurers in Union also submitted "detailed and unambiguous [u]nderwriting [g]uidelines," which defined an "unacceptable risk" to include "yes" responses to certain preliminary questions, including the questions that were the subject of the misrepresentations. Furthermore, the insurance policies were issued via a platform that would not allow a potential insured to continue with the underwriting process had the potential insured answered "yes" to such questions.

In John Hancock Life Insurance Company. v. Perchikov, 553 F. Supp. 2d 229 (E.D.N.Y. 2008), the insurer demonstrated through its underwriting policy and underwriters' testimony that it would not have issued a life insurance policy on the insured had it known that she had not disclosed the existence of her other life insurance policies, as she would have been required under the underwriting policies then in place to verify her income to proceed with the underwriting process, and the insured would not have been able to do so given that she misrepresented her income on the application.

Looking Forward

Although the Travelers application clearly indicated that certain activities constituted ineligible operations, the court determined that the language stating that such ineligible operations should not be insured under a specific type of account was not explicit enough to meet Travelers' burden at this stage of the litigation. In order to prevail on summary judgment, the court indicated that Travelers would have had to provide evidence through underwriting guidelines, bulletins, or rules to definitively prove that it would not have issued a policy had it been aware of BJB's ineligible operations.

As the court did hold that BJB made false representations, the issue of whether the misrepresentations were material such that Travelers would not have issued the policy if BJB had been truthful in the application is a question of fact to be decided by the jury. In that context, at trial, Travelers will not be required to rely on documentary evidence.

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