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## Feigned Issue of Fact Rejected in Policy Rescission Action

The Appellate Division, First Department, recently considered a request by an insurer to declare a commercial general liability policy void *ab initio* based upon misrepresentations in the application. *Kiss Construction NY, Inc. vs. Rutgers Casualty Insurance Company, et al.*, 61 A.D.3d 412 (1st Dep't. 2009).

Plaintiff stated in its application for coverage that its business was "PAINTING - 100% - 100% INTERIOR". The policy described plaintiff's business as a painting contractor, including "PAINTING INTERIOR BUILDINGS - NO TANKS." The plaintiff acknowledged that by accepting the policy, it agreed that the statements in the policy declarations were accurate and that Rutgers was issuing the liability policy in reliance on those statements.

In 2004, a claim was submitted as a result of injuries occurring during the construction of a three-family building in which plaintiff was the general contractor involving excavation and paving. Rutgers disclaimed coverage based upon material misrepresentations in the application. Plaintiff brought a declaratory judgment action to declare that Rutgers was obligated to defend and indemnify it in the underlying liability action.

Rutgers moved for summary judgment, declaring its policy void *ab initio*, based on the alleged material misrepresentations in the application. The lower court denied Rutgers' motion, and granted the plaintiff's motion for partial summary judgment declaring that Rutgers was obligated to defend the underlying action until the question of rescission was decided.

On appeal, the Appellate Division, First Department, held that while the materiality of a misrepresentation is generally a factual issue, where the evidence is clear and substantially uncontradicted, it is a question of law for the Court. The Court noted that Rutgers submitted the affidavits of two vice presidents who each stated under oath that the company does not write policies for construction work or for general contractors. "This argument was also supported by the Company's underwriting guidelines, by copies of e-mails declining coverage to similarly situated applicants, and by copies of disclaimer letters sent to similarly situated insureds making similar claims\*\*\*. This satisfied Rutgers' burden of demonstrating the materiality of the misrepresentation\*\*\*."

In support of its motion, Rutgers also submitted deposition testimony from one of the plaintiff's managers, the father of the plaintiff's principal, that plaintiff had been performing such construction work since 2002.

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“The subsequent affidavits of plaintiff’s principal and this manager, to the effect that the father was never employed by plaintiff and that he had no knowledge of any such construction work during 2002, were insufficient to defeat Rutgers’ motion for summary judgment, as those self-serving affidavits created no more than a feigned issued [sic] of fact tailored to avoid the consequences of the earlier contrary testimony\*\*\*. The latter affidavits asserting that the father was not employed by plaintiff are also belied by a prior affidavit submitted by him in this action, on plaintiff’s behalf, in which he averred that he was indeed one of plaintiff’s managers.”

The Court declared the policy void *ab initio* and directed Rutgers to refund the plaintiff’s premium payments.

This case demonstrates the nature of the proof required in order to succeed on a motion to declare a policy void *ab initio*. It is also instructive in the frequently encountered situation where an insured attempts to create a question of fact by submitting testimony clearly tailored to avoid the grant of summary judgment. The Court will disregard such “feigned” issues of fact under appropriate circumstances. ■

## Employee Liability Exclusion Not Against Public Policy

In *Utica First Insurance Company vs. Santagata*, Appellate Division, First Department, October 20, 2009, the Court affirmed an order of the lower court declaring that the plaintiff had no obligation to defend or indemnify its insureds in an underlying liability action in connection with a construction accident.

The plaintiff’s liability policy included an employee exclusion excluding coverage in cases of bodily injury to an employee of the insured or an employee of a contractor hired by the insured occurring during the course of employment.

The insured attempted to circumvent the policy exclusion by arguing that such a limitation violated the public policy of the State of New York. The Appellate Court rejected the argument. “[W]hen statutes and Insurance Department regulations are silent, [courts] are reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy\*\*\*. There is no statutory requirement for commercial liability coverage which would prohibit insurers from limiting their contractual liability in the manner done so here\*\*\*.”

This decision highlights the fact that an employee exclusion in a personal injury liability policy does not violate the public policy of the State of New York. ■

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