

Indian Harbor Ins. Co. v SP&K Constr.
2017 NY Slip Op 04427
Decided on June 7, 2017
Appellate Division, Second Department
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Decided on June 7, 2017 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department

CHERYL E. CHAMBERS, J.P.

SHERI S. ROMAN

ROBERT J. MILLER

FRANCESCA E. CONNOLLY, JJ.

2015-04871

(Index No. 21437/12)

[*1]Indian Harbor Insurance Company, appellant,

v

SP & K Construction, et al., respondents. (and another title)

Kaufman Dolowich & Voluck, LLP, Woodbury, NY (Eric B. Stern of counsel), for appellant.

Tsyngauz & Associates, P.C., New York, NY (Yevgeny Tsyngauz of counsel), for respondents.

DECISION & ORDER

In an action for a judgment declaring that an insurance policy issued by the plaintiff to the defendants is void and that the plaintiff is entitled to rescission of the policy, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), dated March 23, 2015, as denied its motion for summary judgment on the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

To establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when securing the policy ([see *Caldara v Utica Mut. Ins. Co.*, 130 AD3d 665](#), 665; [Interboro Ins. Co. v Fatmir](#), 89 AD3d 993, 994). A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented ([see *Interboro Ins. Co. v Fatmir*](#), 89 AD3d at 994). "To establish materiality as a matter of law, the insurer must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins, or rules pertaining to similar risks, that show that it would not have issued the same policy if the correct information had been disclosed in the application" ([Schirmer v Penkert](#), 41 AD3d 688, 690-691).

Here, the Supreme Court properly denied the plaintiff's motion for summary judgment on the complaint. The plaintiff failed to establish its prima facie entitlement to judgment as a matter of law on the issue of the materiality of the alleged misrepresentations ([see *Alvarez v Prospect Hosp.*](#), 68 NY2d 320; [Zuckerman v City of New York](#), 49 NY2d 557; [Schirmer v Penkert](#), 41 AD3d at 691; [Parmar v Hermitage Ins. Co.](#), 21 AD3d 538, 540). Since the plaintiff failed to meet its prima facie burden, its motion for summary judgment was properly denied, regardless of the sufficiency of the defendants' papers in opposition ([see *Winegrad v New York Univ. Med. Ctr.*](#), 64 NY2d 851, 853).

CHAMBERS, J.P., ROMAN, MILLER and CONNOLLY, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

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