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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 22
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GIBRALTAR CONTRACTING, INC.

Plaintiff,

- against -

P.F. NORTHEAST BROKERAGE, INC. D/B/A
PF NORTHEAST BROKERAGE, INC.

Defendants.
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Index No. 25127/2018E

DECISION/ ORDER

HON. NORMA RUIZ

Hon. Norma Ruiz, J.S.C.

Plaintiff Gibraltar Contracting Inc. ("Gibraltar") commenced this action against Defendant P.F. Northeast Brokerage Inc. ("PF Northeast") for negligence and breach of contract in connection with their procuring of general liability insurance which Gibraltar claims provided insufficient coverage. Underlying the instant lawsuit was a suit by non-party employee of Gibraltar who was injured in a workplace accident. At issue in the instant case is roughly $344,000 awarded to the injured party in a separate action tried in Westchester Supreme Court.

Plaintiff and defendant had a working relationship for several years prior to the accident which brings rise to this lawsuit. PF Northeast worked to procure various liability insurance for Gibraltar, who primarily works as a subcontractor in and around the New York City area. For many years, Gibraltar performed work which involved scaffolding, which requires certain liability insurance as prescribed by statute. Over the course of time, the nature of Gibraltar's work changed

to a degree that their ownership felt it was no longer necessary to carry scaffolding insurance. As the parties have laid out in great detail in their moving papers, this process of altering their insurance coverage was discussed at great length between Gibraltar and PF Northeast through recalled conversations, some recorded telephone calls, some unrecorded telephone calls, and various email exchanges.

Ultimately, Gibraltar claims it made clear to PF Northeast that while they would not be using traditional scaffolding on any future projects, they believed their employees may occasionally use Baker's scaffolding or pipe scaffolding, which are not traditional outdoor scaffolds but are used to allow a worker to perform work between roughly 6 and 12 feet above the ground. The use of such Baker's or pipe[1] scaffolding resulted in the accident and personal injury precipitating this action. Gibraltar claims it was understood that this sort of work would be covered by the policy procured by defendant. PF Northeast now moves for summary judgment, arguing that there was an explicit height exclusion in the policy issued to plaintiff and as such, there are no issues of fact remaining for a jury. Plaintiff opposes, arguing there are numerous questions of fact remaining concerning the alleged negligence of defendant in issuing the policy containing a height exclusion where defendant knew or should have known that Gibraltar would continue to occasionally engage in the use of Baker's or pipe scaffolding on some jobs.[2]

[1] It was not clear within the papers before the court if the injured party was utilizing a Baker's or pipe scaffolding at the time of the accident, but it appears from this record one of those pieces of equipment was at issue.
[2] Plaintiff in its papers discusses at length the questionable business practices of defendant which, while potentially probative, are not relevant for the purposes of the instant motion.

When deciding a summary judgment motion, the court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

With regard to the instant action, the Court of Appeals has established in no uncertain terms that "to set forth a case for negligence ... against an insurance broker, a plaintiff must establish that a specific request was made to the broker for coverage that was not provided in the policy." (*Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc.*, 19 N.Y.3d 730, 735 [2012]). In *Am. Bldg. Supply Corp.*, the Court of Appeals held that failure to read the underlying insurance policy may speak to comparative negligence, but nevertheless is not an absolute bar to recovery in a negligence action such as this. Based on the entirety of the record before the Court, it appears plaintiff made an affirmative request for limited height coverage based on the scope of the contemplated work. With that being said, however, the parties have relied primarily on the recollections, conversations, and generally conflicting testimony as to what the expectations of the parties were with regard to obtaining appropriate liability insurance coverage. Those conflicts and discrepancies are questions of fact, and a determination of negligence on the part of defendant is the exclusive province of a jury. On this record, summary judgment would not be appropriate. The court has considered the parties remaining arguments and finds them unavailing.

All counsel are directed to contact the court's court attorney - Nathaniel Chiaravalloti - at nchaiaravalloti@nycourts.gov, upon receipt of this decision to set this matter down for a conference consistent with the "Presumptive Alternative Dispute Resolution" systemwide initiative, launched by Chief Judge DiFiore and Chief Administrative Judge Lawrence Marks. Counsel are expected to appear promptly, at the appointed hour, with authority to settle and with access to their adjusters and client. Counsel are expected to refrain from covering other matters in other court rooms at the appointed hour. Such practice will not be tolerated. The Court can not allow one party's tardiness to impede the conference time slot for other litigants. Such inconsideration for the Court's scheduling will also result in sanctions. Per Diem attorneys not authorized to settle will not be permitted to appear. Conference to be held on 2/10/2020 in Room 403 Failure to contact chambers for a time certain to appear before the conference date may result in **sanctions**. Movant is directed to file a notice of entry upon receipt of this order.

This constitutes the decision and order of the court.

Dated: 12/12/19

ENTER,

Norma Ruiz, J.S.C.
HON. NORMA RUIZ