To be Argued by:
HOWARD S. KRONBERG
(Time Requested: 30 Minutes)

APL-2023-00141
New York County Clerk's Index No. 653590/20
Appellate Division– First Department Appellate Case Nos. 2022-00209
and 2022-00438

Court of Appeals
of the
State of New York

REGINA FARAGE,

Plaintiff-Appellant,

– against –

ASSOCIATED INSURANCE MANAGEMENT CORP., LEGION INSURANCE GROUP, COLONIA INSURANCE COMPANY, AXA GLOBAL RISKS US INSURANCE COMPANY, GLOBAL FACILITIES, INC., MORSTAN GENERAL AGENCY, INC., NATIONAL GENERAL INSURANCE COMPANY, NATIONAL GENERAL HOLDINGS CORP. and MARK LAURIA ASSOCIATES, INC.,

Defendants,

– and –

TOWER INSURANCE COMPANY OF NEW YORK, AMTRUST FINANCIAL SERVICES, INC., AMTRUST NORTH AMERICA, CASTLEPOINT INSURANCE COMPANY, TOWER RISK MANAGEMENT CORP., TOWER GROUP, INC., TOWER GROUP COMPANIES and E.G. BOWMAN CO., INC.,

Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT E.G. BOWMAN CO., INC.

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DISCLOSURE STATEMENT

Pursuant to 22 NYCRR §§ 500.1(f), 500.22(b)(5), Respondent E.G. Bowman Co., Inc., a domestic corporation, states that there do not exist any related parent, subsidiary, and/or affiliate corporate business entities.

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PRELIMINARY STATEMENT

A. The Limited Issue Before the Court

As the court can see from the Appellant's Brief, the appeal does not really concern the Insurance Broker Defendants-Respondents. The issue is the application of the 2-Year Suit Clause in the contract of insurance to the facts at hand.

Appellant is correct. If this Court overturns the dismissal so that the Appellant-Insured on the policy can sue on it, then the Lower Court has to go back and decide the Brokers' Motions to Dismiss on the merits, which it did not do....or have to do since Appellant lost any ability or right to make a claim or sue on the policy through no fault of the Brokers.

But Appellant is 100% wrong when it argues that even if this Court affirms the inability of the Insured to make any claim or suit on the policy, again through no fault of the Brokers, a "Failure to Procure" claim on that same policy is viable. It is not. The law in this state has always been clear on a Failure to Procure case: the broker "Stands-in-the-Shoes" of the carrier and its liability is limited to the contract of insurance. Practically applied by the courts it means that, even if a broker was negligent or failed to procure the coverage requested, if the Insured lost the ability to recover on the policy not involving the Broker, (say for an exclusion that was properly part of the policy or late notice), "proximate cause" is negated as a matter of law.

So, only if the Court reverses the First Department's ruling and allows the Insured to sue on the policy, can the claims against the Brokers go forward. Affirmation of the First Department's decision while remanding the case back to the Supreme Court to allow the claims against the Brokers to be litigated when the Insured lost all right to recover under the policy is anathema to long settled and well-reasoned law.

B. The Background of the Facts

This Respondent, E.G. Bowman, Co., Inc. ("Bowman"), is the second and later broker for Ms. Farage who replaced Mark Lauria Associates, Inc.[1] ("MLA"). At the time of the fire, MLA had not been the broker for quite some time. Certainly not for the subject policy. Also, when Bowman became the broker, the subject fire policy had been in effect with the same terms and limits for many, many years.

Bowman and MLA moved for dismissal based on nine (9) separate points, any one of which would have been legally sufficient to support dismissal of the entire action against both. These included Statute of Limitations, Ratification, Waiver, the Duty to Read and that neither broker had any duty to Ms. Farage since the allegations of the Complaint are only directed to Tower that it:

- **i.** Failed to automatically adjust the Building Limit in accordance with the 8% Automatic Increase provision in the policy, and

[1] We represent both Bowman and MLA and submit this as to both their interests.

ii. Failed to increase the Building Limit based upon their actual, physical inspections of the property, as per the policy's terms and conditions, and

iii. Because of "**i**" and "**ii**" Tower failed to adjust and pay the loss at RCV on what would have been a higher Building Limit in effect at the time of the loss, again as per the policy's terms and conditions, and

iv. Because of "**i**", "**ii**" and "**iii**", Tower wrongly applied the policy's Co-Insurance penalty reducing what the Plaintiff could recover. (R. 35-36, 83-87).

As this court can plainly see, Ms. Farage's dispute is with the (1) internal workings of her contract of fire insurance and (2) the failure of her Insurer to abide by the terms of that bi-partite contract.

QUESTIONS PRESENTED

Q. Did the Lower Court err in dismissing the claims against the Broker Defendants based on the dismissal of the claims on the contract of insurance itself because Ms. Farage did not bring suit against her fire insurer within 2 years as required by the explicit terms in the contract of insurance?

A. No. The "Stands-in-the-Shoes" doctrine mandates dismissal against the Brokers where an Insurer would not have given coverage anyway through no fault of the Broker.

COUNTERSTATEMENT OF THE CASE

A. Plaintiff's Purchase of the Property

On or about February 27, 1998, Plaintiff became the owner of a 3-story apartment building located at 95-97 Sherman Ave., Staten Island, New York. (R. 47-48, 87).

B. Insurance with the Assistance of MLA

In 1998, MLA assisted the Plaintiff in obtaining insurance on the subject property. (R. 88).

The property was first insured by Colonia Insurance Company. (R. 51-53). The Building Limit, (RCV), on this policy was $400,000 and Business Income was $50,400. There was also an 80% Co-Insurance provision. (R. 51-53).

In 2000 it was replaced with a policy from Tower. (R. 88).

C. The Tower Policy

The Tower Policy (#: BOP2154821), provided, among other things and in pertinent part ***(a)*** Full Replacement Cost based on the Building Limit, ***(b)*** 8% Automatic Increase on Building Limit and ***(c)*** a Co-Insurance provision (R. 84-90).

The Tower policy automatically renewed each year…year after year… with the Plaintiff getting, direct from Tower, Renewal Certificates. (R. 59-61, 85-90).

The Renewal Certificate was a 2-page document that looked like a Declarations Page that listed the “Building Limit” at RCV and the 8% “Auto Increase-Building Limit”. (R. 59-61).

D. <u>MLA is Replaced by Bowman</u>

In September 2011, Plaintiff replaced MLA with Bowman. (R. 88).

E. <u>The Tower Policy is Renewed to 2015</u>

The Tower policy continued to automatically renew until the fire. (R. 59-61, 85-90).

The Renewal Certificate for the subject Tower policy period, June 21, 2014 to June 21, 2015, shows a Building Limit of $691,737, the 8% Auto Increase-Building Limit and RCV. (R. 59-61).

F. <u>The Loss and Claim on the Tower Policy</u>

On August 4, 2014, the insured property was damaged by fire and its effects resulting in property damage and loss of rental income. (R. 84).

Plaintiff submitted the claim to Tower and it is alleged that Tower failed to properly pay the claim. (R. 84).

G. **Miscellaneous**

By Policy Transmittal letter dated July 26, 2012, Bowman sent the Plaintiff a copy of the Tower policy for the June 21, 2012 to June 21, 2013 effective period to Plaintiff's home[2]. (R. 82).

By letter dated June 3, 2013 Bowman sent the Plaintiff a copy of the Tower Renewal Certificate for the June 21, 2013 to June 21, 2014 effective period to Plaintiff's home[3]. (R. 64-65).

By email dated September 3, 2014, the Plaintiff admits to reviewing the subject policy. (R.66-69).

By email dated September 13, 2014, the Plaintiff admits to having all her "policy declaration pages going back to 2004 and the building limits at that time was $450,000.00 with an auto-increase percentage of 8%". (R. 70-7`).

PROCEDURAL POSTURE

The Court is aware of the procedural posture of the case as recited by the Appellant.

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[2] This is the same home address as one the Tower Renewal Certificates, the Colonia Insurance Company policy and the letters to her that she received from MLA. (R. 69, 79).

[3] This is the same home address as one the Tower Renewal Certificates, the Colonia Insurance Company policy and the letters to her that she received from MLA. (R. 69, 79).

RESPONSIVE ARGUMENT I

A. The Issue

Where, through no fault of the Broker, the Insured would not have coverage anyway for the subject loss or claim, proximate cause is negated. Thus, any Failure to Procure claim against the broker is a nullity and must be dismissed.

Only if the court reverses the First Department holding so that Appellant has a viable claim on the contract of insurance, can she litigate the Failure to Procure claim against the Brokers.

B. The Law

In New York that an insurance broker who fails to procure an insurance policy, or is responsible for the policyholder's lack of coverage, may be required to "Stand in the Shoes of the Insurer." Brian Fay Constr., Inc. v. Morstan General Agency, Inc., 90 A.D.3d 796 (2nd Dept. 2011); Andriaccio v. Borg & Borg, 198 A.D.2d 253 (2nd Dept. 1993); Macon v. Arnlie Realty Co., 207 A.D.2d 268 (1st Dept. 1994); Kinns v. Schulz, 131 A.D.2d 957, 959 (3rd Dept. 1987). See American Motorist Ins. Co. v. Salvatore, 102 A.D.2d 342 (1st Dept. 1984); U.S. Pack Network Corp. v Travelers Prop. Cas., 42 A.D.3d 330 (1st Dept. 2007); see also Bachrow v. Turner Const. Corp., 848 N.Y.S.2d 86 (1st Dept. 2007).

It is merely another way of expressing “Proximate Cause” in the Broker-Insured procurement context. Weissberg v. Royal Ins. Co., 240 A.D.2d 733 (2nd Dept. 1997);

Importantly, the “Stands-in-the-Shoes of the Insurer” doctrine is a limitation on a broker’s liability not a broadening of it. Andriaccio v. Borg & Borg, 198 A.D.2d 253, (2nd Dept. 1993). It means that a broker’s liability is limited to that which the insurer would have sustained. *See*, American Motorist Ins. Co. v. Salvatore, 102 A.D.2d 342 (1st Dept. 1984); Kinns v. Schulz, 131 A.D.2d 957, 959 (3rd Dept. 1987); (The broker's liability is “limited to that which would have been borne by the insurer had the policy been in force.”); Milgrim v. Royal & Sun Alliance Ins. Co., 75 A.D.3d 587 (2nd Dept. 2010); U.S. Pack Network Corp. v. Travelers Prop. Cas., 42 A.D.3d 330 (1st Dept. 2007).

The First Department in U.S. Pack Network Corp. said:

> “[I]t is irrelevant whether defendant broker breached its agreement with plaintiff by obtaining a policy that failed to provide the full coverage plaintiff sought. Although, as plaintiff points out, there may be a distinction between the defenses available in a suit on a policy and those which may be interposed in a suit on an agreement to procure a policy (see Kinns v Schulz, 131 AD2d 957 [1987]), the damages plaintiff claims here as a result of the alleged breach of contract were not caused by the breach of that contract. They would have been suffered in any event, since even had the broker obtained more inclusive coverage, plaintiff itself failed to provide the timely notice necessary to obtain the benefits.”

Id. at 331.

See also Bachrow v. Turner Const. Corp., 848 N.Y.S.2d 86 (1st Dept. 2007), Brian Fay Const., Inc. v. Morstan General Agency, Inc., 90 A.D.3d 796 (2nd Dept. 2011).

In Milgrim v. Royal & Sun Alliance Ins. Co., 75 A.D.3d 587 (2nd Dept. 2010), it was alleged that the broker was negligent in obtaining insurance for the plaintiffs. Since the loss was not covered anyway, through no fault of the broker, the court held that:

> "[I]ts negligence, if any, was not the proximate cause of the plaintiffs' damages (see 730 J & J, LLC v. Fillmore Agency, Inc., 22 A.D.3d 741, 805 N.Y.S.2d 396; Metropolitan Prop. & Cas. Ins. Co. v. Pulido, 271 A.D.2d 57, 61, 710 N.Y.S.2d 375; see also Andriaccio v. Borg & Borg, 198 A.D.2d at 254, 603 N.Y.S.2d 528). * * * Accordingly, the Supreme Court properly granted Fairmont's motion for summary judgment dismissing the complaint insofar as asserted against it and denied the plaintiffs' cross motion for summary judgment on the issue of liability against Fairmont."

CONCLUSION

Through no fault of the Brokers, Ms. Farage does not have coverage because she brought suit too late in violation of a specific contract term: the "2-year suit Clause". That was the finding of the Lower Court and the First Department. As to the Brokers, all the Court did thereafter was apply that dispositive ruling as Law of the Case, which negated proximate cause against the Brokers, properly mandating dismissal against them as well.

For these reasons, if the court affirms the decision of the First Department, then the decision as to the Brokers, should also be upheld. If you reverse, then yes, of course, the Supreme Court has to decide the Broker's original dismissal motions.

DATED: White Plains, New York
January 22, 2024

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.

Type. A proportionally spaced typeface was used, as follows:

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Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 1,986 words.

STATE OF NEW YORK)
)   ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

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at the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on
February 1, 2024

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

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