SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**
Justice

PART 57

M & G Auto Repairs Inc.

INDEX NO. 105704-01

MOTION DATE

- v -

MOTION SEQ. NO. 02

Travelers Prop Cas Co

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notice of Cross-Motion	2A
Answering Affidavits — Exhibits	2
Replying Affidavits	3, 4
Memos of law	5, 6

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted and the cross-motion is denied as per the accompanying decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/22/03

[signature], J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

M & G AUTO REPAIR, INC.,
Plaintiff(s),

Index No.: 105704/01

against

DECISION/ORDER

TRAVELERS PROPERTY CASUALTY CO., et al.,
Defendant(s),

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff M & G Auto Repair, Inc. seeks a declaratory judgment that defendants are obligated to pay its insurance claim pursuant to a policy issued by defendant Travelers Property Casualty Co., a member of Traveler's Group a/k/a Travelers Indemnity Company ("Travelers"). Travelers moves for summary judgment dismissing the complaint on the grounds that the policy did not cover the property at issue. Plaintiff cross-moves for summary judgment as to liability, claiming that the property was covered by the policy.

It is not disputed that in August 1998, Travelers issued a policy to plaintiff providing insurance for a premises located at 5069 Broadway, New York, New York. The complaint alleges that plaintiff purchased the insurance policy issued by Travelers through defendant Wilson Seda ("Seda"), an agent for Travelers.[1] The complaint also alleges that in June 1999, plaintiff entered into a lease for another premises located at 292 Sherman Avenue, New York, New York, and that this additional property was added to the existing policy by defendant Seda.[2]

---

[1]Defendant Seda has not appeared in this action.

[2]In his affidavit in opposition to the motion, Alejandro Beato, an officer of plaintiff, attests that a prior affidavit in which he stated that he entered into the lease in June 1999 "was erroneous as the lease clearly states that it was August 1, 1999." (Beato Aff., ¶ 6.) Defendant does not dispute that the lease was signed on August 1, 1999.

The Sherman Avenue property was damaged in a fire on September 5, 1999. Plaintiff made a claim for benefits under the policy, which was denied, and the instant lawsuit was commenced.

In support of its motion, defendant Travelers contends that Seda was not an employee or agent of Travelers and had no authority to add an additional property to the policy. In support of this contention, defendant submits deposition testimony and an affidavit of Jeffrey Musumeci, the president of KLM Brokerage, the insurance agent listed on the policy issued by Travelers to plaintiff. Mr. Musumeci attests that he is the sole agent for KLM Brokerage and that "[a]t no time was Seda ever an agent or an employee of the KLM brokerage firm." (Musumeci Aff., ¶ 5.) He also testified at his deposition that "I have no idea who Wilson Seda is. I have never met him. I have never spoken to him." (Musumeci Dep., at 14-15.) Defendant thus asserts that the Sherman Avenue property was never added to the existing policy. Defendant also argues that the Sherman Avenue property was not otherwise covered by the original policy.

On the instant motion, plaintiff submits no evidence to refute defendant's claim that Seda was not an employee or agent of Travelers. In opposition to the motion, plaintiff apparently concedes that it cannot show that Seda was an authorized agent of Travelers and asserts only that "Travelers denies that Wilson Seda was an employee of theirs or an agent of theirs and Mr. Seda has not been able to be found." (Aff. Of Richard Creditor, Esq., ¶ 4.)

Plaintiff argues, rather, that the Sherman Avenue property was covered under a provision of the original policy that extended coverage to "newly acquired" property. (See Policy, Section A.7; Ex. 11 to defendant's moving papers.)

Section A.7(b)(1)(b) of the policy provides, in pertinent part, that insurance under the policy will be extended to "[b]uildings you acquire at locations, other than the described

premises, intended for: i. Use similar to that of the building described in the Declarations." Section 7(b)(3)(b) provides that "Insurance under this Extension for each newly acquired or constructed property will end when any of the following first occurs: * * * 30 days expire after you acquire or begin to construct the property." (Id. at 7.)

Plaintiff does not contest that it signed the lease for the subject premises on August 1, 1999, but claims that it did not acquire the property until August 16, 1999, when it took physical possession of the property. Plaintiff thus argues that the coverage extension was in effect on September 5, 1999, when the fire damage occurred. Defendant contends that plaintiff acquired the property on August 1, 1999, when the lease commenced, and thus was not in effect on September 5, 1999.

In his affidavit in opposition to defendant's motion and in support of plaintiff's cross-motion, Mr. Beato attests that "the landlord, Mr. Rodriguez, did not give me possession of the property until August 16, 1999. The reason for this was that Mr. Rodriguez has a lot of his personal property on the premises and he needed time to remove them." (Beato Aff. In Opp., ¶ 3.) Mr. Beato further attests that "[o]n August 16, 1999, I met Mr. Rodriguez at the premises and at that time he gave me the keys and returned to me one-half month's rent in cash." (Id., ¶ 4.) The landlord submits a sworn statement in which he attests simply that Mr. Beato signed the lease on August 1, 1999 and "took possession of [t]he property on August 16th 1999 to start cleaning the premises." (Letter dated Nov. 12, 2002, annexed to Beato Aff. In Opp.)

Defendant argues that these affidavits are "inadmissible and cannot be used to defeat summary dismissal of the complaint" (Urbano Aff. In Reply, ¶ 11) because they contradict the allegations of the complaint, affidavits submitted on a prior motion, and the terms of the lease.

However, to the extent that the affidavits clearly contradict the complaint and the prior affidavits, they do so only as to the date that the lease was signed. Plaintiff now attests that he was wrong when he stated that the lease was signed in June 1999, and defendant does not dispute that the lease was signed on August 1, 1999. In fact, defendant, relying on the written lease, argues that plaintiff acquired the premises when the lease was signed on August 1, 1999. (Urbano Aff in Support, ¶ 25.)

Defendant also argues that plaintiff, by claiming that it did not acquire the property until August 16, 1999, impermissibly moves on a different theory than is asserted in the complaint. Defendant further argues that plaintiff fails in any event to raise a triable issue of fact as to the date that plaintiff acquired the property. Defendant contends that by the terms of the lease, plaintiff acquired the property on August 1, 1999.

"While the general rule is that a party may not obtain summary judgment on an unpleaded cause of action, it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice. As with a trial, the court may deem the pleadings amended to conform to the proof." (Weinstock v Handler, 254 AD2d 165, 166 [1st Dept 2002][citations omitted]; Torrioni v Unisul, Inc., 214 AD2d 314, 315 [1st Dept 1995].)

In this case, however, the affidavits submitted by plaintiff do not support its claim that it did not acquire the Sherman Avenue property on August 1, 1999. "[L]eases have been historically recognized as a present transfer of an estate in real property." (Holy Properties Ltd. v Kenneth Cole Prods., Inc., 87 NY2d 130, 133 [[1995]. See Becar v Flues, 64 NY 518 [1876].) That is, "as soon as the lease is made and delivered to a tenant, he acquires legal right to

possession and he may or may not occupy the demised premises, as he pleases." (Fishel v Baronelli, Ltd., 119 Misc2d 625, 626 [Civ Ct, New York County 1983]. See 1 Dolan, Rasch's Landlord and Tenant–Summary Proceedings § 8:1 [4th Ed.].)

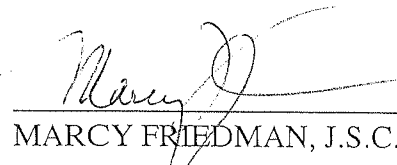
Further, Real Property Law § 223-a provides that "[i]n the absence of an express provision to the contrary, there shall be implied in every lease of real property a condition that the lessor will deliver possession at the beginning of the term. In the event of breach of such implied condition the lessee shall have the right to rescind the lease and to recover the consideration paid." Plaintiff does not claim that there was "an express provision to the contrary." Nor do the affidavits of plaintiff and its landlord demonstrate that plaintiff did not acquire legal possession of the premises at the time of the execution of the lease. Plaintiff submits no authority to support its position that legal possession does not constitute acquisition of the property for purposes of the subject insurance policy. Thus, in the absence of evidence demonstrating that plaintiff did not acquire legal possession of the Sherman Avenue premises at the time the lease was signed, plaintiff's argument that the policy's "coverage extension" was in effect on September 5, 1999 must fail.

Accordingly, defendant's motion is granted and plaintiff's cross-motion is denied to the extent that it is

ORDERED that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
September 22, 2003



MARCY FRIEDMAN, J.S.C.