[* 1]

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

PRESENT : DONNA M. MILLS PART 58
Justice

COLONY INSURANCE COMPANY,

Plaintiff,

-v-

DANICA GROUP, LLC,

Defendant.

INDEX NO. 116200/10

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion ____.

FILED
MAR 27 2013
NEW YORK
COUNTY CLERK'S OFFICE

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits-Exhibits...	1, 2
Answering Affidavits-Exhibits	3-7
Replying Affidavits	

CROSS-MOTION: ✓ YES ____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 3/21/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

---------- X

COLONY INSURANCE COMPANY,

Plaintiff,

Index No. 116200/2010

- against-

DANICA GROUP, LLC,

Defendant,

-and-

DECISION AND ORDER

ZURICH AMERICAN INSURANCE COMPANY, and
PAV-LAK INDUSTRIES, INC.,

Defendants-Intervenors.

FILED
MAR 27 2013
NEW YORK
COUNTY CLERK'S OFFICE

---------- X

DONNA M. MILLS, J.S.C.:

Plaintiff Colony Insurance Company (Colony) moves for leave to reargue this court's decision and order, entered July 27, 2012 (the order), which held in abeyance Colony's motion for leave to enter a default judgment. Colony also moves to renew its motion for leave to enter a default judgment against its insured, defendant Danica Group, LLC (Danica), declaring that the five policies that Colony issued to Danica for the period 2006 through 2009 are rescinded because of misrepresentations in the applications.

Danica cross-moves for an order (1) pursuant to CPLR 2004 extending its time to answer the complaint; (2) dismissing the

complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7); and (3) dismissing the complaint pursuant to CPLR 1001 for failure to join a necessary party.

Colony states in its moving affidavit that the court denied its motion for a default judgment. This is not accurate. The court held the motion in abeyance pending the intervention of defendant-intervenors, Zurich American Insurance Company (Zurich), and Pav-Lak Industries, Inc. (Pavlak). By holding the motion for a default in abeyance, this court did not overlook or misapprehend the facts or the law or mistakenly arrive at its decision (*see* CPLR 2221 [d] [2]; *see William P. Pahl Equip. Corp. v Kassis,* 182 AD2d 22, 27 [1st Dept 1992]).

The court did not err by allowing the intervenors to file and serve their respective pleadings. The intervenors assert rights as additional insureds under the insurance policies that would be cancelled if Colony were granted leave to file its default judgment, and if Danica's policy were to be rescinded (*see Admiral Ins. Co. v Joy Contracts., Inc.,* 19 NY3d 448, 461 [2012]) (holding that additional insureds lose coverage if the underlying policy is rescinded for misrepresentations in the application).

There is no newly discovered evidence that would support a motion for renewal (*see* CPLR 2221 [e] [2]).

Now that the intervention by Zurich and Pavlak is complete, the motion for leave to file a default judgment is ripe, and the stay granted in the prior decision is lifted. Colony's motion for leave to enter a default judgment will now be considered.

Colony's motion is granted on liability, that is to the extent of deeming the factual allegations of the complaint admitted, but Colony has not demonstrated its entitlement to a judgment declaring the policies rescinded. Rescission is an equitable remedy, not a free-standing cause of action. By virtue of Danica's default, Colony has sustained its cause of action for misrepresentation, but the equitable remedy of rescission requires the court to consider the circumstances in exercising its equitable powers. Such relief is not automatically granted upon default. Factual questions are presented as to the sufficiency of Colony's alleged tender of return of the premiums paid by Danica.

Danica's cross motion is denied. Having defaulted, Danica cannot now move to dismiss the complaint. Danica's only recourse is to move to vacate its default in answering the complaint, but it, along with the intervenors, may be heard at the inquest, or on any summary judgment motion, on the issue of whether rescission should be granted.

The complaint contains five causes of action, each stated as seeking rescission of one of the five insurance

policies involved in this action. The only evidence submitted by Colony on the issue of return of the premiums is the affidavit of Norton M. Geller (Geller), a claims consultant for Colony, stating that on December 6, 2010, Colony advised Danica of its intention to rescind the policies, and tendered the premiums to Danica "through counsel." Geller states: "[t]o my knowledge, Danica has not accepted the offer to return the premiums for the Policies" (Geller aff., ¶ 11). Geller states further, "[o]nce the Policies are rescinded, Colony will again tender the premiums paid for the policies back to Danica" (*id.*, ¶ 12). There is no evidence that a check for the premiums paid was ever issued or tendered.

Geller states that Colony first became aware of the alleged misrepresentations in the middle of 2010. It has retained the premiums since that time.

At the inquest, the parties may submit evidence relating to the issue of whether the policies should be rescinded, or whether Colony is estopped by virtue of its retention of the premiums. Under New York law, in the words of Judge Cardozo, "the keeping of the premiums with knowledge of a then existing breach of the conditions ... [gives] rise to a waiver or, more properly an estoppel" (*Bible v John Hancock Mut. Life Ins. Co.*, 256 NY 458, 462-463 [1931]).

Alternatively, at the inquest, the issue of resissory damages may be considered. As JUSTICE BRANSTEN stated,

> "[r]escissory damages, while not often used in New York, are far from an unknown form of relief. Rescissory damages are an established remedy where rescission, the voiding of a contract, may not be a valid form of relief. As the Delaware chancery court stated in 2003: 'Rescissory damages are designed to be the economic equivalent of rescission in a circumstance in which rescission is warranted, but not practicable. A solid body of case law so holds [citations omitted]'"

(*Syncora Guarantee Inc. v Countrywide Home Loans, Inc.*, 36 Misc 3d 328, 343 [Sup Ct, NY County 2012]).

The counterclaims of the defendant-intervenors assert substantial factual allegations to support a finding of waiver or estoppel on the part of Colony. These counterclaims do not, however, relieve Danica of the consequences of its default.

The parties may conduct limited discovery on the issues to be considered at the inquest. Upon completion of discovery, any party may move for summary judgment.

Accordingly, it is

ORDERED that the motion of plaintiff Colony Insurance Company for leave to reargue and renew, and for leave to enter a default judgment, is granted, only to the extent of deeming the factual allegations of the complaint admitted, and setting the matter down for an inquest upon completion of discovery, and otherwise denied; and it is further

ORDERED that the cross motion of defendant Danica Group LLC, to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), and for failure to name a necessary party pursuant to CPLR 1001, or, alternatively, for an extention of time in which to answer the complaint pursuant to CPLR 2004, is denied as untimely.

Dated: 3/21/13

E N T E R:

J. S. C.