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Insurance Law—Cooperation with Fire Insurer

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thereto.²⁸ Because the Court has this power it could, under proper circumstances, have awarded some kind of damages in the original action, and, therefore, the Court decided that under the terms of the policy the insurer obligated itself to defend this kind of action. It was held, however, that the plaintiff could not recover the \$350.00 of additional expenses incurred in bringing this action.

This writer feels that, since the insurer had promised to defend suits even if they are "groundless, false or fraudulent," the Court of Appeals was correct in deciding that the defendant was not justified in refusing to defend because damages were not recoverable in the original action. The Court's limiting the plaintiff to the taxable costs of the present action is in accordance with the law of damages on this point.²⁹

Cooperation With Fire Insurer

The standard fire insurance policy for New York contains, among others, the following provisions: that the insured upon request shall submit to examinations under oath and also produce all books of account, bills, invoices and other vouchers;³⁰ that in case of failure to agree as to loss either may select an appraiser;³¹ that the entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact;³² and that no suit or action on the policy shall be sustainable unless all the requirements of the policy have been complied with.³³

In *Happy Hank Auction Co. v. Am. Eagle Fire Ins. Co.*,³⁴ the insured appealed from a judgment³⁵ affirming dismissal of an action for specific performance of the appraisal provision and granting the defendant's motion for summary judgment on its defense of wilful and fraudulent withholding of information. The action was commenced when the parties failed to agree on the loss resulting from a fire in the plaintiff's furniture store—plaintiff claimed total loss of \$129,000 of which \$20,000 was for merchandise missing or unidentifiable after the fire. The insurance company thought these figures were grossly exaggerated. The Company conducted an examination, requested records, and also asked to examine the

28. *Valentine v. Richardt*, 126 N. Y. 272 27 N. E. 255 (1891); *Haber v. Paramount Ice Corp.*, 239 App. Div. 324, 267 N. Y. Supp. 349 (2d Dep't 1933), *aff'd.*, 264 N. Y. 98, 190 N. E. 163 (1934) (by implication); *Queens Plaza Amusements Inc. v. Queens Bridge Realty Corp.*, 265 App. Div. 1057, 39 N. Y. S. 2d 463 (2d Dep't 1943).

29. CLARK, N. Y. LAW OF DAMAGES §145 (1925).

30. N. Y. INSURANCE LAW §168 (6) (Lines 117-123).

31. *Ibid.* (Lines 123-140).

32. *Ibid.* (Lines 1-6).

33. *Ibid.* (Lines 157-161).

34. 1 N. Y. 2d 534, 136 N. E. 2d 842 (1956).

35. *Happy Hank Auction Co. v. Am. Eagle Fire Ins. Co.*, 286 App. Div. 505, 145 N. Y. S. 2d 206 (1st Dep't 1955).

plaintiff's tax returns. The plaintiff failed to produce the records claiming that they had been lost in the fire, and also refused to permit examination of its tax returns. The insured did produce a document which was purported to be the original of an inventory taken a few weeks before the fire. During the examination the plaintiff withdrew its \$20,000 claim for "out-of-sight" damages and demanded an appraisal, but the insurer refused to take part.

Although the Court of Appeals has indicated that a forfeiture may result if the insured refuses to participate in an appraisal demanded by the insurer,³⁶ it is settled in New York that the Court will not force the insurer to join in the appraisal.³⁷ Relying on this, the Court affirmed a dismissal of the plaintiff's first cause of action.

The Court then found that the Appellate Division erred in granting the defendant's motion for summary judgment. A motion for summary judgment dismissing the complaint on affidavits may be made in an action for a sum of money arising on an express contract.³⁸ As pointed out by Judge Cardozo, to award this relief, however, "the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried."³⁹ Thus, summary judgment has been denied where the question depended upon the intent of the parties to a contract⁴⁰ and where an ambiguity in a contract existed.⁴¹ In reaching its decision in the instant case the Court felt that the question of whether or not there was a wilful and fraudulent withholding of information is the kind of question of fact which should be resolved at a trial.

In a case of this nature it is difficult to say that the facts clearly show that the insured has failed to comply with the terms of the policy. It therefore seems to be the better result, that before the insured should forfeit his entire claim—the net effect of granting defendant's motion—he should have the facts determined at a trial.

Conflict of Interest Between Company and Assured

The right to a declaratory judgment depends on there being a present

36. *Matter of Delmar Box Co. (Aetna Ins. Co.)*, 309 N. Y. 60, 65, 127 N. E. 2d 808, 811 (1955).

37. *Matter of Delmar Box Co. (Aetna Ins. Co.)*, *supra*, note 36. The agreement as regards appraisal is distinguished from an agreement to submit to arbitration in *Syracuse Sav. Bank v. Yorkshire Ins. Co.*, 301 N. Y. 403, 94 N. E. 2d 73 (1950).

38. N. Y. R. CIV. PRAC. 113(4).

39. *Curry v. Mackenzie*, 239 N. Y. 267, 146 N. E. 375 (1925).

40. *Piedmont Hotel Co. v. A. E. Nettleton Co.*, 263 N. Y. 25, 188 N. E. 145 (1933).

41. *Utica Carting, Storage & Contracting Co. v. World Fire & Marine Ins. Co.* 277 App. Div. 483, 100 N. Y. S. 2d 941 (4th Dep't 1950).