UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAMMEBY'S MANAGEMENT COMPANY, LLC; 1-10 BUSH TERMINAL OWNER LP, as successor in interest to 1-10 INDUSTRY ASSOCIATES, LLC; 19-20 BUSH TERMINAL OWNER LP, as successor in interest to 19-20 INDUSTRY CITY ASSOCIATES, LLC, Plaintiffs, -v- AFFILIATED FM INSURANCE COMPANY; ALLIANT INSURANCE SERVICES, INC., Defendants.	9/16/14 13-cv-2814 (JSR) FINDINGS OF FACT AND CONCLUSIONS OF LAW

JED S. RAKOFF, U.S.D.J.

This case arises from an insurance coverage dispute in the aftermath of Superstorm Sandy and involves the following parties: (1) plaintiffs Cammeby's Management Co., 1-10 Bush Terminal Owner, LP (as successor in interest to 1-10 Industry Associates, LLC), and 19-20 Bush Terminal Owner, LP (as successor in interest to 19-20 Industry City Associates, LLC) (collectively, "Cammeby's"); (2) defendant Affiliated FM Insurance Co. ("Affiliated"); and (3) defendant Alliant Insurance Services, Inc. ("Alliant").

Cammeby's alleges that Affiliated breached an insurance contract by failing to cover $30 million in losses caused by Superstorm Sandy to certain insured properties, and only covering $10 million in losses instead. Affiliated disputes that the

coverage amount, referred to here as the "Coverage Sublimit," was in fact $30 million and also asserts a counterclaim for reformation of General Change Endorsement No. 3 to the insurance policy ("Endorsement No. 3") to reflect a $10 million Coverage Sublimit, rather than the $30 million figure there stated. In the event that the Coverage Sublimit is found to be only $10 million, Cammeby's asserts a negligence claim against its broker Alliant, alleging that Alliant's negligence caused the reduction in coverage. Alliant, in turn, asserts that Cammeby's ratified any actions Alliant took that were allegedly negligent.

Following pre-trial practice, the case proceeded to an eight-day jury trial, at which the parties presented live and deposition testimony from fourteen witnesses and introduced approximately 130 exhibits. For reasons explained below, the jury's verdict was partly advisory and partly binding. Specifically, the jury found, as an advisory verdict, that, due to a mutual mistake, the Coverage Sublimit was wrongly stated as $30 million in Endorsement No. 3 but was actually $10 million, so that Affiliated did not breach the insurance contract. But the jury also found, in its capacity as the ultimate finder of fact, that Alliant's negligence caused the reduction of the Coverage Sublimit to $10 million and that Alliant had not proved its affirmative defense of ratification.

The fact that the verdict was partly advisory reflected the fact that during trial the Court determined that Cammeby's had proved, as a matter of law, the elements of their breach of contract claim on which they bore the burden of proof, indeed, this was uncontested. *See* Trial Transcript ("TT"), at 1404, 1915. After further narrowing of the claims and defenses, *see, e.g.*, TT at 1369 (regarding Affiliated's equitable estoppel defense); TT at 1388-89 (regarding Affiliated's ratification defense); TT at 1764 (regarding Alliant's comparative fault defense), all that remained as to Cammeby's claim against Affiliated was Affiliated's affirmative defense of mutual mistake and its counterclaim for reformation.

The parties agreed that the counterclaim was for the Court to decide, but disagreed as to whether the defense of mutual mistake was for the Court, or the jury, to decide, and as to whether Affiliated had to prove that defense by a preponderance of the evidence or by clear and convincing evidence.

After receiving briefing and hearing argument from the parties, the Court concluded that, under applicable New York law, the mutual mistake defense was an equitable defense that is left for the Court to decide and that, to prevail on that defense, Affiliated must prove it by clear and convincing evidence. TT at 1633-34. The Court relied primarily on the decision of the New York Court of Appeals in *George Backer Management Corp. v. Acme*

Quilting Co., 46 N.Y.2d 211 (N.Y. 1978). In that case, the Court of Appeals discussed the defense of reformation and made clear that the remedies for mutual mistake were equitable in nature and that no remedies existed at law for such mistakes. *See* 46 N.Y.2d at 219 (citing 5 Holdsworth, *History of English Law* 292-93, 327-28). The Court of Appeals also determined that to reform a contract on the basis of mutual mistake, "evidence of a very high order is required." *Id.* (internal quotation marks omitted).

This Court, when applying New York law in a case brought under diversity jurisdiction, is bound by the decisions of the New York Court of Appeals as to the standard of proof. *See, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). Furthermore, since there are no contested issues related to the breach-of-contract claim, which is clearly a legal claim, the only unresolved issues are equitable ones, which do not require a jury under the Seventh Amendment. *See, e.g.*, *Smith v. Baer*, 237 F.2d 79, 86-87 (2d Cir. 1956) ("An action to reform a written instrument in accordance with the intent of the parties was exclusively equitable, and hence a claim for reformation under the Federal Rules is triable to the court." (quoting Moore's Federal Practice, ¶ 38.22 (1st ed.))).

Nevertheless, since these determinations were only made mid-trial (because no party had raised the issue prior to trial), the Court decided to take an advisory verdict from the jury on this

issue pursuant to Rule 39 of the Federal Rules of Civil Procedure. This was particularly appropriate because the jury would have to consider the plaintiffs' negligence claim against Alliant in the event that a mutual mistake entitled Affiliated to reformation. As noted, the jury found that Affiliated had proved by clear and convincing evidence that a mutual mistake was made as to the amount of coverage in Endorsement No. 3., and that Affiliated was not liable to Cammeby's for breach of contract. *See* TT at 1913; Court Ex. 1 at 12-13. But the jury further found, in the non-advisory part of its verdict, that Alliant's negligence was the cause of the mistake and that Alliant was, therefore, in effect, liable to Cammeby's for $20 million plus interest.[1]

Following the jury's verdict, the Court requested, and then received, supplemental submissions on various open issues. *See* TT at 1914-19. Now, after carefully considering the evidence introduced at trial as well as the parties' supplemental submissions, the Court makes the following findings of fact and conclusions of law, which also reflect the Court's determinations as to the witnesses' respective demeanor and credibility:

First, the Court first finds that Affiliated has proved by clear and convincing evidence that its intent in issuing Endorsement No. 3 was simply to correct errors in the listed

[1] With the consent of all parties, it was left to the Court to

addresses of several covered locations, and not to increase the Coverage Sublimit to $30 million. The Court credits fully the testimony of Affiliated's Barbara Milia, who testified that she included a $30 million Coverage Sublimit in Endorsement No. 3 as a result of her mistake in copying and pasting from the original S1 policy form instead of General Change Endorsement No. 1 ("Endorsement No. 1"). *See* TT at 1157, 1159-61. The Court finds her account fully credible not only because of her demeanor and the plausibility of her testimony, but also because the S1 policy, and not Endorsement No. 1, contained all the information she needed to modify the covered properties' addresses as a result of a request from Cammeby's to fix an incorrect address. *See* TT at 1160-61; *see also* TT at 1155-57.

Second, the Court finds plaintiffs' alternate accounts of the purpose of Endorsement No. 3 entirely unconvincing, not least because it is undisputed that Affiliated believed that the Coverage Sublimit was reduced to $10 million in Endorsement No. 1. *See* TT at 1652. The implausibility of plaintiffs' account as to the relevance of Endorsement No. 3, at least from Affiliated's perspective, becomes even clearer in light of Affiliated's decision not to charge any additional premium or purchase any reinsurance for this alleged Coverage Sublimit increase. *See* TT at 1057-58, 1164. Therefore, Affiliated has demonstrated by clear

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determine damages.

and convincing evidence that its scrivener made an error as to the Coverage Sublimit in Endorsement No. 3.

Third, however, a unilateral scrivener's error, standing alone, does not establish a mutual mistake. Affiliated must also prove by clear and convincing evidence that the final, written agreement between the parties reflected the objectively manifested intent of *neither* party to the agreement. *See Harris v. Uhlendorf*, 24 N.Y.2d 463, 467 (N.Y. 1969); *U.S. Bank Nat'l Assoc. v. Lieberman*, 98 A.D.3d 422, 424 (N.Y. App. Div. 2012). In the determination of whether a mutual mistake occurred, "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties." *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574 (N.Y. 1986) (internal quotation marks and alterations omitted).

Therefore, the crucial question is whether Cammeby's, through the acts of its authorized agents, sufficiently manifested its intent to Affiliated that it intended to maintain only a $10 million Coverage Sublimit. In particular, the Court will look to the actions taken and representations made by Cammeby's employees and agents, provided that such conduct occurred within the scope of those employees' or agents' actual or apparent authority.

Fourth, under applicable New York law, an insurance broker is generally considered to be an agent of the insured for

purposes of securing coverage. *See* N.Y. Ins. Law § 2101(c) (McKinney 2013); *see also, e.g.*, *Bohlinger v. Zanger*, 306 N.Y. 228, 240 (N.Y. 1954); *Evvtex Co. v. Hartley Cooper Assocs. Ltd.*, 911 F. Supp. 732, 738 (S.D.N.Y. 1996). Furthermore, a third party can bind a principal for the conduct of its agent if that agent had authority. *See Herbert Constr. Co. v. Cont'l Ins. Co.*, 931 F.2d 989, 993-94 (2d Cir. 1991). The third party must establish both that "the principal was responsible for the appearance of authority in the agent to conduct the transaction in question," and that "the third party reasonably relied on the representations of the agent." *Id.* (internal quotation marks omitted) (citing *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 473 (N.Y. 1973); *Hallock v. State*, 64 N.Y.2d 224, 231 (N.Y. 1984)). Additionally, where a broker acts generally as an agent of the insured for purposes of procuring coverage, the agent is vested with apparent authority based on the insured's conduct, which gives the broker the power to bind the insured as to a third party in similar contexts. *See, e.g.*, *Globe & Rutgers Fire Ins. Co. v. Warner Sugar Refining Co.*, 187 A.D. 492, 494-95 (N.Y. App. Div. 1919).

Fifth, Affiliated has shown by clear and convincing evidence that Alliant acted with apparent authority both when it represented to Affiliated that the purpose of Endorsement No. 3 was simply to fix incorrect addresses and when it earlier helped

to create — and did not correct — Affiliated's belief that Cammeby's had requested a reduction in the Coverage Sublimit. The Court reaches this conclusion for several reasons.

To begin with, Cammeby's conduct created a reasonable belief in Affiliated that Alliant had authority to act on Cammeby's behalf in obtaining and modifying coverage under the various Affiliated insurance policies. Multiple witnesses testified that Affiliated only issues and modifies policies through its insured's brokers, and not directly through its insureds. *See* TT at 1050, 1151. There was also no dispute that Cammeby's selected Alliant as its broker in securing and modifying the Affiliated insurance policies. *See, e.g.*, TT at 112, 118-19, 130-31, 217. Furthermore, the Court heard undisputed testimony that Alliant represented Cammeby's in multiple insurance decisions involving Affiliated, *see, e.g.*, TT at 125, 132, 405, 429-32, 452-53, 457-61; Joint Ex. 35; Plaintiffs' Ex. ("Pl. Ex.") 7; Pl. Ex. 11; Joint Ex. 3 at AFM0003208-09, so Affiliated knew that, as a general matter, Alliant was Cammeby's broker for purposes of obtaining Cammeby's insurance coverage relating to the properties relevant here. Given these facts, the Court finds that Affiliated reasonably believed that Alliant was acting with authority at all relevant times for purposes of the disputes in this case because Cammeby's cloaked Alliant with the appearance of authority and never communicated to Affiliated that it had revoked Alliant's

authority. *See Herbert Constr. Co. v. Cont'l Ins. Co.*, 931 F.2d 989, 993-94 (2d Cir. 1991); *Parlato v. Equitable Life Assurance Soc'y of the U.S.*, 299 A.D.2d 108, 115 (N.Y. App. Div. 2002).

Acting in that capacity, Alliant represented to Affiliated that the sole purpose of Endorsement No. 3 was to correct an address at Cammeby's request. This purpose is corroborated by former Alliant employee Deena Popovici's deposition testimony received in evidence. *See* TT at 892-95. Moreover, Deepa Cook, a senior vice president at Alliant, credibly testified that Cammeby's never asked to reinstate a $30 million Coverage Sublimit after the issuance of Endorsement No. 1. *See* TT at 606; *see also* TT at 383. Emails sent by Alliant shortly after the issuance of Endorsement No. 3 also clearly indicate that the purpose of the Endorsement was simply to correct errors in the addresses of covered properties. *See, e.g.*, Alliant Ex. 92 at MSG001367.

Furthermore, Alliant, through its communications to and actions involving Affiliated, manifested Cammeby's apparent intent to obtain only a $10 million Coverage Sublimit in the period leading up to the issuance of Endorsement No. 1.[2] On July

[2] The parties agree that there was no direct communication between Cammeby's and Affiliated regarding the amount of the Coverage Sublimit. *See* TT at 264-65; *see also* Defendant Affiliated FM Insurance Company's Post-Trial Brief Per the Court's August 7, 2014 Request, Aug. 25, 2014, at 3, 5; Plaintiffs Post-Trial Brief Submission ("Pl. Post-Trial Br."),

26, 2011, Stephen Gerber, Cammeby's outside insurance consultant, sent an email to Alliant's Matthew Turetsky that inquired, "If requested, will Affiliated cancel the $20MM of additional flood coverage at the Brooklyn locations back to inception?" Joint Ex. 14; *see also* TT at 1656.[3] Deepa Cook testified that, after a series of interactions between Alliant and Affiliated, as well as between Affiliated and its reinsurer, Cook, on August 4, 2011, directed Affiliated employee Kate Bishoff to reduce the Coverage Sublimit to $10 million effective July 26, 2011. *See* TT at 499-500, 516-17, 521-22, 572-73. Furthermore, another Affiliated employee, Sabrina Hough, testified that Cook called and asked her

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Aug. 25, 2014, at 2, 4.

[3] Alliant's Matthew Turetsky testified at trial that at a meeting on July 27, 2011, Eli Schron, a Cammeby's vice president copied on the July 26 email, instructed him to cancel the $20 million of excess flood coverage. TT at 1221-22. However, the Court does not find this testimony credible for multiple reasons. First, later interactions between Cammeby's and Alliant would appear illogical if Schron granted authority for the coverage reduction on July 27. *See, e.g.*, Joint Ex. 39 at ALL2434. Second, Eli Schron credibly testified that this conversation never took place. *See* TT at 1700-01. Third, and most importantly, there are serious inconsistencies between Turetsky's current version of events and those that he presented at multiple earlier depositions. *See, e.g.*, TT at 1213-22, 1293-1317. (It should also be noted that, in any event, this portion of Turetsky's testimony is relevant to only the question of whether Alliant had actual authority, and not whether it had apparent authority. After all, Affiliated had no knowledge at any relevant time period as to whether such communications took place.)

when Affiliated would be able to issue Endorsement No. 1. *See* TT at 1053-55, 1073-74.[4]

Any uncertainty as to whether Ms. Cook called Ms. Bishoff and Ms. Hough about the coverage reduction is substantially resolved in light of the subsequent communications from Affiliated to Alliant and from Alliant to Cammeby's, communications in which Alliant effectively confirmed that Cammeby's had agreed to reduce the Coverage Sublimit. On August 10, 2011, Affiliated issued and sent to Alliant Endorsement No. 1, which detailed the July 26, 2011 effective date, $10 million Coverage Sublimit, and $121,795 return premium. *See* Joint Ex. 31 at CAM000002; TT at 1055-56, 1150-51. That same day, Affiliated also sent Alliant an invoice for the $121,795 return premium credit for the coverage reduction. *See* Affiliated Ex. 5; TT at 1151-52. Alliant not only did not object to this coverage reduction, but actually sent both an invoice reflecting the premium credit and an unofficial binder that indicated changes

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[4] In their post-trial submission, plaintiffs argue that Affiliated had some obligation to verify that Alliant had actual authority to reduce the Coverage Sublimit. *See* Pl. Post-Trial Br. at 12-14 (citing, *e.g.*, *S & S Textiles Int'l v. Steve Weave, Inc.*, No. 00-cv-8391, 2002 WL 1837999, at *7 (S.D.N.Y. Aug. 12, 2002); *Herbert Constr. Co. v. Cont'l Ins. Co.*, 931 F.2d 989, 995-96 (2d Cir. 1991)). However, nothing was particularly novel or extraordinary about the coverage reduction in light of the other transactions that the parties had previously completed. *See, e.g.*, Joint Ex. 35; Pl. Ex. 12 at CAM004169; Pl. Ex. 7; Pl. Ex. 8 at CAM004528; Pl. Ex. 14 at MSG000004, MSG000006; TT at 132-36, 266-67. Therefore, Affiliated reasonably relied on Alliant's representations apparently made on Cammeby's behalf.

that Affiliated had made to the Coverage Sublimit. *See* Alliant Ex. 14 at ALL3240; Alliant Ex. 111 at ALL0032A, 32B, 32L; TT at 567-68, 573-74, 576-78. Then, on September 26, 2011, Alliant's Leslie Leaser sent a letter to Cammeby's Sumita Ragbir enclosing the Affiliated policy and Endorsement Nos. 1, 2, and 3. *See* Joint Ex. 31 at CAM000001-05; TT at 1538-39, 1654. In that letter, Leaser explained that "Endorsement #1 . . . cancels the excess flood coverage effective July 26, 2011." Joint Ex. 31 at CAM000001. She similarly attempted to send Endorsement Nos. 1, 2, and 3 to Stephen Gerber by email on September 27, 2011, but failed to attach Endorsement No. 1 correctly. *See* Alliant Ex. 92 at MSG001367; TT at 1521-22. Taken collectively, these exchanges confirm, by clear and convincing evidence, that Alliant manifested to Affiliated Cammeby's intent to be bound to a $10 million Coverage Sublimit.

Sixth, for the foregoing reasons, the Court finds, as the jury did in its advisory verdict, that Affiliated has proved by clear and convincing evidence that Endorsement No. 3, which is a valid contract and which evidences the parties' agreement, contains a mutual mistake as to the amount of the coverage for the properties at issue in this case, and that the actual Coverage Sublimit is $10 million.

Seventh, it follows from the above that Affiliated is entitled to the equitable remedy of reformation. As the New York Court of Appeals has decided:

> Reformation is not designed for the purpose of remaking the contract agreed upon but, rather, solely for the purpose of stating correctly a mutual mistake shared by both parties to the contract; in other words, it provides an equitable remedy for use when it clearly and convincingly appears that the contract, as written, does not embody the true agreement as mutually intended.

Ross v. Food Specialties, Inc., 6 N.Y.2d 336, 341 (N.Y. 1959); *see also George Backer Mgmt. Co. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 (N.Y. 1978). Here, Affiliated has proved the existence of a mutual mistake by clear and convincing evidence, and there are no equitable reasons for denying Affiliated the relief of reformation as to its obligations under its insurance contract with Cammeby's.

Accordingly, the Court hereby grants Affiliated's counterclaim for reformation of Endorsement No. 3. It follows that plaintiffs' breach-of-contact claim must be dismissed. Entry of final judgment, however, is also affected by the jury's non-advisory, binding verdict that the mutual mistake was the result of Alliant's negligence. While it follows that Alliant is liable to Cammeby's for $20 million plus interest, the parties have not yet been heard on the calculation of interest.[5]

[5] The Court construes Alliant's post-trial letter of August 25, 2014 as a motion for a verdict in its favor notwithstanding the

Accordingly, counsel for the parties (including counsel for Affiliated, in case they have any relevant information to offer) are hereby directed to call Chambers by no later than September 22, 2014 to discuss this issue.

SO ORDERED.

Dated: New York, New York
September 15, 2014

JED S. RAKOFF, U.S.D.J.

jury's verdict, and hereby denies the motion.