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SUPREME TANK, INC., d/b/a AMERICAN TANK SERVICE, Plaintiff v. EVANSTON INSURANCE COMPANY AND INVESTORS UNDERWRITING MANAGERS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO. C-81-06 CIVIL ACTION **DECISION ON MOTIONS FOR SUMMARY JUDGMENT**

Gregory Schwartz, Esq. (Schwartz Kelly, LLC), for plaintiff, Supreme Tank, Inc., d/b/a American Tank Service

Katherine E. Tammaro, Esq. (Tressler, Soderstrom, Maloney & Priess, LLP), for defendants Evanston Insurance Company and Investors Underwriting Managers, Inc.

CONTILLO, J.S.C.

These cross-motions for summary judgment were filed by the plaintiff-insured, Supreme Tank, d/b/a American Tank Service, hereinafter "ATS", and the defendant insurer, Evanston Insurance Company ("Evanston") and Investors Underwriting Managers, Inc. ("IUM"), concerning a 2005 insurance policy and a catastrophic event which occurred during the policy period.

ATS is in the business of installing and removing underground storage tanks. ATS was insured continuously with Evanston from June 30, 2002 until June 30, 2006. ATS was working on a project to remove an underground tank in Bergenfield, New Jersey. Work actually commenced on December 12, 2005, whereupon ATS says it discovered that the tank was not a 2000 gallon tank, as it anticipated, but rather a 5000 gallon tank. ATS says it returned to the job site the following day with equipment appropriate to remove the larger sized tank and, while at the site, an explosion occurred. That explosion killed several people, injured others, and destroyed a 24-unit apartment building.

Third party claims have been asserted against ATS, including three lawsuits filed here in Bergen County. More claims are anticipated.

ATS says that it did not learn until after the explosion, when Evanston advised of its coverage position, that ATS's per occurrence coverage had been reduced from $2,000,000 to $1,000,000 and that Evanston was seeking to impose a $50,000.00 self-insured retention as to each claim asserted against ATS as a result of the explosion. ATS says Evanston never notified ATS that it had modified its coverage to include these – to ATS – unknown changes, and that ATS was not otherwise aware or on notice of these modifications to its coverage.

It is Evanston's position that, under the policy in effect at the time of the explosion, the total per occurrence cap was $1,000,000, that ATS had a $50,000 per

claim self-insured retention, and that ATS's self-insured retention is to be applied on a "per claim" basis, whereby each person or organization that asserts a claim against ATS arising out of the Bergenfield accident triggers a new SIR that ATS must satisfy before Evanston has a duty of defense or indemnification. Evanston argues that these features of the applicable policy are binding and enforceable as against its insured, ATS.

ATS says its 2003 policy with Evanston had a per occurrence limit of $2,000,000, with, at most, a $25,000 per occurrence deductible, which Evanston, without notifying ATS, changed, in the 2004 policy, to a $1,000,000 per occurrence limit, and replaced the $25,000 deductible with a $50,000 self-insurance retention endorsement, which, adding insult to injury, Evanston interprets as being a $50,000 per claim self-insured retention.

These changes were carried over as well in the 2005 renewal policy.

ATS seeks to invoke the court's equitable powers to reform the policy to restore to $2,000,000 the per occurrence limit, and to eliminate the $50,000.00 per claim self-insured retention, and restore to the former $25,000.00 deductible. ATS also seeks to compel Evanston to take over its defense of the claims arising from the accident, and to reimburse ATS its defense costs, minus the deductible.

In support of the requests to reform the policy, ATS asserts that Evanston violated applicable administrative law, and the common law, in failing to notify ATS of these substantial changes to its coverage. Secondly, ATS argues that justice requires that the

policy be reformed to meet ATS' reasonable expectations of coverage. Public policy is also cited by ATS to support its request that the court reform the policy.

ATS cites to numerous perceived ambiguities in the policy – which it characterizes as at best a hopeless muddle – and asks the court to construe the ambiguous policy language against Evanston, eliminating the SIR altogether or at least rejecting Evanston's unreasonable interpretation of it.

If the Court grants ATS' request to nullify the unannounced changes, the Court is further asked to interpret the revived pre-change policy to provide for no deductible, or, at most, a $25,000 per occurrence deductible, and not a $25,000 per claim deductible.

Evanston opposes ATS' summary judgment application, and itself seeks summary judgment against ATS. Evanston contends that it complied with all New Jersey statutory law and administrative regulations in its policy dealings with ATS. It asserts that the policy language is clear and unambiguous, violative of neither the statutory law, administrative regulations, nor public policy of the State of New Jersey. Evanston asks the Court to deny the motion for summary judgment of ATS, and to grant summary judgment in its favor, upholding the plain, unambiguous and lawful 2005 policy, as interpreted by it.

In the event the Court were to void the modifications to the 2003 policy as lacking in adequate notice to the insured, Evanston urges the Court to recognize that the 2003

policy has a $25,000 deductible, per claim, not, as ATS would have it, per occurrence or per event.

Each side maintains that the matter is ripe for adjudication via summary judgment.

The matters at issue are consequential. There are presently approximately 30 claims (generally speaking) arising from the explosion. Whether a $50,000 SIR applies to each claim, or whether the $20,000 deductible applies to each claim, and whether the maximum occurrence coverage is $1M or $2M, matters greatly to the parties.

Oral argument was had on August 1, 2006, at which time the Court reserved decision.

It is undisputed that the policy issued to ATS by Evanston for 2004 differed significantly from the policy in effect in 2003: (1) the per occurrence limitation was reduced from $2 Million to $1 Million (meaning that the total available insurance stemming from a covered loss would be half of what it had been); and (2) ATS' $25,000 deductible was replaced with a $50,000 per claim self-insured retention, which, as interpreted by Evanston, applies to each claim arising out of an occurrence.

ATS asserts that Evanston was required by law to notify ATS of these significant changes in its coverage; that this duty was non-delegable; that it relates to the changes contained in the 2004, which carried over into the 2005 policy (the policy in effect at the time of the explosion); and that Evanston breached this duty, justifying the equitable relief of reformation.

ATS points to N.J.A.C. 11:1-5.2 as a source of the duty owed and breached by Evanston:

> **"11:1-5.2 Notice of cancellation and nonrenewal of fire and casualty coverage**
>
> (a) All fire and casualty policies of insurance, except accident and health policies, shall provide for the issuing company to give:
>
> 1. Thirty days' written notice to the insured of cancellation of any policy;
>
> 2. Thirty days' written notice of cancellation of any policy to any mortgagee mentioned in said policy; and
>
> 3. Thirty days' written notice to the insured of said company's intent not to renew any policy.
>
> (b) Provisions of policies to be effective on or after July 1, 1977, which are issued by any company doing business in New Jersey and provide for less than 30 days' notice of cancellation and nonrenewal shall be null and void, with the following exceptions.
>
> ..."

ATS also relies on the common law for the proposition that so-called "conditional renewals", i.e., renewals with terms and conditions different from the terms and conditions of the expiring policy, must be on notice fairly calling the changes to the

insured's attention. ATS further contends that the duty to notify is owed by the insurer to the insured, and is not delegable to third parties such as brokers or agents.

In its opposition to ATS motion for summary judgment, (and in support of its own cross-motion for summary judgment), Evanston disputes that it owed any duty to provide direct notice to its insured of changes to its commercial insurance renewal policy, and argues that, in any event, that it did in fact notify ATS "and its representatives" of the challenged changes in the renewal policy of 2004, perpetuated in the 2005 renewal policy.

Evanston asserts that non-parties, The Quaker Agency and Sikora Associates, Inc., were agent of ATS for purposes of receiving notices of the changes embedded within the renewal policies, and that notice to Quaker constituted notice to ATS. The Quaker Agency ("Quaker") and Sikora Associates, Inc. ("Sikora") were designated by ATS as "our broker(sic) of record in reference to the 6/30/04 renewal of the referenced policy". Evanston in its papers characterized Sikora as ATS' "retail agent" and Quaker as ATS' "wholesale broker". Evanston relies upon quotes provided by it to Quaker which it says provided ample notice of the reduction of occurrence coverage (from $2,000,000 to $1,000,000) and of the increase and change in the retention type (from deductible to SIR), and points as well to the subsequent insurance binder for the 2004 policy, sent by it to Quaker, who in turn forwarded it to Sikora. Finally, the actual 2004 policy, containing the challenged changes, was sent by Evanston, who in turn sent it on to Sikora.

While disputing any duty under the administrative code (N.J.S.A. 11:1-5.2) to provide direct notice to ATS of the changes embedded in the renewal policy, Evanston points to actual notices of the proposed and implemented changes (in, respectively, the quote, the binder and, ultimately the 2004 policy), as satisfying whatever duty it may have owed ATS to bring changes in the renewal policy to the attention of ATS and its self-designated agents, Quaker and Sikora.

Regarding the renewal of the 2004 policy, which contained the challenged changes from the 2003 policy to the 2005 renewal policy in effect at the time of the catastrophe, Evanston points to similar factors. The 2005 policy contained the exact same terms as the 2004 policy. They point again to the quote for the 2005 renewal policy, which identifies the $1,000,000 per occurrence limit and the $50,000 SIR, which they sent to Quaker, who sent it on to Sikora, who says he would in the normal course have sent a copy of the quote to ATS. Likewise, Evanston sent the binder on to Quaker, which sent it on to Sikora, who says he would have sent it on to ATS. The binder also references the challenged changes perpetuated in 2005. Finally, we have the 2005 policy itself, with the contested provisions, which Evanston provided to Quaker, who forwarded it to Sikora.

Lastly, Evanston points to additional evidence that ATS was specifically aware that the former $25,000 deductible had been changed to a $50,000 per claim Self-Insured Retention endorsement. For the 2005 renewal policy, Quaker requested quotes from

Evanston comparing premiums for $50,000 per claim retention, versus $25,000 per claim retention. The quotes were conveyed to Quaker, then by Quaker to Sikora, whereupon the $50,000 retention quote was adopted. Evanston says Sikora testified at his deposition that he spoke with ATS' principal, Michael Malagiere, regarding the comparison of the premium costs, during the 2005 renewal discussions, and ATS chose the higher retention.

Finally, Evanston points to Malagiere's admissions that he didn't even read the 2004 policy in detail but rather "scanned the Declaration page", a breach, says Evanston, of the insured's duty to examine his insurance policy.

In its cross-motion for summary judgment, Evanston argues that the policy should be applied as written, with a $1,000,000 per occurrence limit, and with a $50,000 per claim self-insurance retention, meaning that the insured is self-insured, and is owed no duty to defend or indemnify, up to $50,000 for each claim. Evanston argues that the policy is free of ambiguity, and that ATS had actual or constructive knowledge of the changes it now seeks with the courts assistance, in hindsight, to modify.

In its supplemental brief ATS argues that Evanston's papers demonstrate that it gave no direct notice to ATS of the changes in the renewal, thus warranting reformation. ATS also disputes that the disclosures provided by Evanston in quotes, binders and policies, were indirect, not targeted or designed to alert ATS, and inadequate to appraise a reasonable person that significant changes have been made to the basic provisions of his policy.

ATS characterizes Quaker, as Evanston's agent, not just ATS' agent, and contends that notice to Quaker is not notice – sufficient or otherwise - to ATS.

ATS invites the court to carefully review Evanston's claim that ATS, through discussions with Sikora, was on actual notice of the $50,000 SIR – as distinct from the prior $25,000 deductible in the 2003 policy. It is clear that Sikora – an experienced insurance agent - like Mr. Malagiere, who is inexperienced in insurance matters – was conflating the concepts of retentions, deductibles, and self-insured retentions. ATS points to Sikora's deposition testimony, as well as the very e-mail Sikora's office sent to Quaker's Mike Walsh, advising that "…American Tank will be staying with their $50,000 deductible…".

Finally, ATS contends that the Court, if it does strike the changes to the 2003 policy should interpret the $25,000 deductible set forth in the 2003 policy as a single deductible, chargeable once as against all claims against it arising from the explosion. Evanston argues that the 2003 policy plainly and unambiguously contained a $25,000 per claim deductible, which should be enforced against ATS in the event the Court finds that adequate notice of the changes to that 2003 policy were not provided.

DECISION OF THE COURT

I. THE POLICY APPLICABLE TO THE DECEMBER 13, 2005 EXPLOSION MUST BE REFORMED TO RESTORE THE 2003 POLICY PROVISIONS

The parties herein have stipulated that the matter is ripe for determination on summary judgment. R. 4:46-2. Brill v. The Guardian Life Insurance Company of America 142 N.J. 520 (1995).

Evanston was ATS's insurer since 2002. Evanston conditionally renewed ATS' insurance policy in 2004. In the renewal policy, ATS's $25,000 deductible was replaced with a $50,000 Self Insured Retention (SIR), and ATS's per occurrence limits were reduced from $2 million to $1 million. These changes carried over to the 2005 policy that was in effect when a devastating explosion occurred in Bergenfield on December 13, 2005. In that explosion, at least three people lost their lives, and the 24-unit apartment complex was destroyed.

Evanston never directly notified its insured ATS that it had made these significant changes to ATS's coverage. Evanston notes that the quotes, and resulting binders, and ultimate policies – 2004 and 2005 – embody the changes. That is true. But nothing in the quotes, binders or policies alert or advise the insured that a change has been made.

The fundamental fiduciary duty of an insurer to its insured is to act scrupulously, fairly and in good faith with its insured in all their dealings. Bowler v. Fidelity & Casualty Co., 53 N.J. 313, 327 (1969). That duty includes the duty to advise an insured

that fundamental modifications have been implemented regarding coverages. The following would have sufficed:

> "Your per occurrence limit has been reduced from $2 Million to $1 Million, and your $25,000 deductible has been changed to a $50,000 per claim self-insured retention".

Not every insured would fully appreciate what changes had been made. But any sentinent adult would know that changes had been made. The insurer's fiduciary duty includes this de minimus duty – which averts much mischief and grievous consequences – of simply altering your insured that the insurer has worked a change in coverage.

Pursuant to N.J.A.C. 11:1-5.2, entitled "Notice of Cancellation and Nonrenewal of Fire and Casualty Coverage"

(a) All fire and casualty polices of insurance, except accident and health policies, shall provide for the issuing company to give:

1. Thirty days' written notice to the insured of cancellation of any policy;

2. Thirty days' written notice of cancellation of any policy to any mortgage mentioned in said policy; and

3. Thirty days' written notice to the insured of said company's intent not to renew any policy.

(b) Provisions of policies to be effective on or after July 1, 1997, which are insured by any company doing business in New Jersey and provide for less than 30 days' notice of cancellation and nonrenewal shall be null and void, with the following exceptions.

The 2004 policy was in effect a conditional renewal of the prior years policy, and the 2005 policy – the one in effect when catastrophe struck – perpetuated the challenged terms.

Conditional renewals – renewals with terms and conditions different from the terms and conditions of the expiring policy - must be on notice fairly calling the changes to the insured's attention. Bauman v. Royal Indemnity Co., 36 N.J. 12, 25-26 (1961). Fairly to provide such simple, forthright notice binds the insurer to the greater coverages provided by the earlier policy. Id. at 23. That the insured did not scrutinize or even read the new policy – as ATS' President Malagiere failed to do in this case - makes no difference. The insured is entitled to assume no unheralded deleterious changes have been made to his prior policy; that he first learns to the contrary after the loss is immaterial. Maryland Casualty Company v. Kramel, 80 So. 2d. 897, 900-901 (La. App. 1955), endorsed in Bauman, 36 N.J. at 24. Whether or not the insured read the initial policy, it can not be changed without specific notice to him of the change. See, Millbrook Tax Fund v. Henry & Associates, 344 N.J. Super. 49, 53 (App. Div. 2001). In Millbrook, Judge Kestin affirmed the insurer's duty to bring reductions in renewal coverage specifically to the insured's attention. Id. at 54. And see, McClellan v. Feit, 376 N.J. Super. 305, 315 – 317 (App. Div. 2005), endorsing a common law duty upon the homeowners' insurer to specifically advise the insured of materially reduced coverage, (but noting the ambiguity in the record on the issue of whether the insurer – Prudential - actually brought the challenged changes to the insured's attention).

Evanston contends that any duty it may have had to advise ATS of the changes were satisfied when it notified ATS' wholesale insurance broker, The Quaker Agency

("Quaker"), of the changes, which in turn notified ATS' retail insurance broker, Sikora Associates, Inc. ("Sikora").

The duty of Evanston to notify ATS of the materially different coverage in the 2004 policy (carrying over to 2005 policy) is not delegable and, in any event, was not effectively delegated in the case at hand.

In Barbara Corp. v. Bob Manelly Ins. Agency, 197 N.J. Super. 339 (App. Div. 1984), app. dism. 102 N.J. 339 (1985), the Appellate Division held that a casualty insurance policy would be deemed automatically renewed if the insurer failed to give the insured notice of the expiration date or advise it that if the stated renewal premium was not timely paid, the policy would not be renewed. This duty of the insurer was determined to be not delegable to brokers or insurance agents: it rests solely upon the insurer. Id. at 346. This principle was upheld in Insignia v. Hegedus, 231 N.J. Super. 562 (App. Div. 1989). Writing for the court, Judge Pressler affirmed the non-delegable notice duty of an insurer to its insured, but refused to impose the automatic renewal rule against an insurer who had apparently failed to provide the notice, where "...the insured did receive proper and timely notice, albeit from the broker if not the insurer, and had made a conscious, voluntary and decision not to renew". 231 N.J. Super. at 567.

In the instant case, Evanston imbedded materially deleterious changes in coverage in its 2004 quote, 2004 binder and 2004 policy, which carried over sotto vocce into its 2005 quote, 2005 binder and 2006 policy, without, in any of those documents – or

otherwise – ever alerting its insured that fundamental changes were afoot. There is no evidence that ATS ever had actual notice that these changes were made. ATS had no such notice. ATS' president denies it, that denial is unrebutted, and is entirely natural and plausible. While ATS's retail insurance agent, Sikora, is relied upon by Evanston as ATS's agent for purposes of receiving notice, the rule of non-delegability precludes such reliance, and, in any event, Evanston never itself gave Sikora notice. Lastly, Sikora himself was obviously confused as to the nature and meaning of the modification from Evanston and Quaker in the 2004 conditional renewal process, as his e-mail, previously quoted, establishes.

Evanston dealt directly only with its own agent, Quaker. That agent was also an agent of ATS, but Quaker was financially reliant upon Evanston to a degree not commensurate with Quaker's financial reliance upon ATS. That is an imperfect conduit of notice and does not provide a basis for relieving Evanston of its duty to specifically alert ATS that changes are embedded in your renewal policy, and here is what they are. Even if the duty was delegable to Quaker, and even if that delegation carried down from Evanston to Quaker to Sikora to ATS, the fact remains that ATS was not made to know the modifications to basic policy provisions implemented by Evanston. The consequences of that fundamental failure to alert the insured must be visited upon the insurer, not the insured: the policy's pre-2004 per occurrence limits of $2 million are restored, the $50,000 SIR is abrogated, and deductible features of the 2003 policy are resurrected.

II. INTERPRETING THE 2003 DEDUCTIBLE

ATS argues that if the pre-2004 coverage is restored, the $25,000 deductible, if it applies at all, is per occurrence, not per claim. Evanston argues that the pre-2004 $25,000 deductible applies per claim not per occurrence. This request for declaratory relief is best vested in the Law Division. A declaration of legal rights is best resolved in the courts of law. Township of Ewing v. Trenton, 137 N.J. Eq. 109, 111 (Ch. Div. 1945). A declaration of what the policy provides regarding the $25,000 deductible (per claim, per occurrence, per event, etc.) is in fact precisely the type of issue cognizable in the Law Division. Government Employees Ins. Co. v. Butler, 128 N.J. Super. 492, 495 (Ch. Div. 1974). "…[T]he construction of a contract and a determination of the rights of the parties thereunder is within the province of a court of law …. hence an action for the declaration of the parties rights under an insurance policy is basically an action for the construction of a contract which has been held to be cognizable before the law courts" (citations omitted) Government Employees Ins. Co., 128 N.J. Super. at 496.

The reformation issue having been decided, issues relating to interpretation and construction of the deductible are hereby transferred to the Law Division, where injury and property claims arising from the explosion are pending, and where those plaintiffs may seek to be heard on the issues surrounding the deductible question.

An Order accompanies this Decision.

ROBERT P. CONTILLO, J.S.C.

FILED

This Order has been prepared and filed by the Court.

SEP 18 2006

ROBERT P. CONTILLO
J.S.C.

SUPREME TANK, INC., d/b/a AMERICAN TANK SERVICE, Plaintiff(s) v. EVANSTON INSURANCE COMPANY and INVESTORS UNDERWRITING MANAGERS, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO. C-81-96 CIVIL ACTION **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

This matter having come before the Court upon the application of Plaintiff Supreme Tank, Inc., d/b/a American Tank Service, by and through its counsel Schwartz Kelly, LLC (Gregory J. Schwartz, Esq. appearing), upon notice to Defendants Evanston Insurance Company ("Evanston") and Investors Underwriting Managers, Inc., ("IUM") by and through its counsel Tressler, Soderstrom, Maloney & Preiss (Katherine E. Tammaro, Esq. appearing) for an Order granting summary judgment in favor of Plaintiff American Tank Services ("ATS"), and the Court having reviewed the moving and opposition papers, as well as defendant's cross-motion for summary judgment and plaintiff's opposition thereto; and having heard the oral argument of the parties on August 1, 2006, and for good cause shown, and for the reasons set forth in the Court's written Decision of this date,

IT IS THIS 18th day of September, 2006

ORDERED as follows:

1. The motion of Defendant Evanston for summary judgment be and hereby is denied.
2. Plaintiff ATS be and hereby is granted partial summary judgment, as follows: the 2005 Evanston insurance policy is reformed to restore the 2003 Evanston policy terms and conditions; the $1 million per occurrence coverage limit is abrogated, null and void; the $2 million per occurrence coverage limit is reinstated; the $50,000 Self Insured Retention is abrogated, null and void.
3. Except to the extent set forth herein Plaintiff ATS's motion for summary judgment is denied without prejudice.
4. The case is hereby transferred to the Law Division for resolution of the remaining issues relating to the interpretation of the 2003 Evanston policy, including issues relating to whether a deductible applies to the explosion event of December 13, 2005, and whether that deductible is per claim, or per occurrence, or otherwise interpreted.
5. A copy of this Order and the Court's written decision of this date are being provided by the Court directly to all counsel.

ROBERT P. CONTILLO, J.S.C.