The URB Insider

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URB FORMS NEWS

Forms Recently Approved

- FL-55 Ed. 9/18 – Replacement Cost Provision – Coverage C-Personal Property
- FL-375 Ed. 9/18 – Siding And Roofing Matching

Forms Projects In Progress

- Updated LS Form Series
- ML and LS Unmanned Aircraft Limited Liability Coverage Endorsements
- ML Home Business
- ML Home Sharing
- LS Customer Goods Legal Liability
- LS Sale and Disposal Operations Legal Liability
- Agribusiness Pursuits

Forms Projects In Development

- Agritainment Program
- Personal Liability On A Commercial Policy
- FL Extender Endorsements

We will keep you posted as these projects progress. ♦

COURT IMMEDIATELY DISMISSES SUIT

Editor's Note: In the case of *Calhoun v Midrox Ins. Co.*, 2018 NY Slip Op 07024 [165 AD3d 1450] plaintiffs who were insured by defendant, Midrox Insurance Company, presented a claim for structural damage to their barn caused by a tractor and hay baler that broke through the floor. Defendant moved to dismiss and offered the policy as evidence that there was not a covered peril. Supreme Court disagreed with defendant insurer due to a documentary issue. Defendant insurer appealed. Because the plaintiffs had failed to establish a loss within the specified perils of the policy, Supreme Court, Appellate Division, Third Department dismissed the case. Below is the decision of the Supreme Court, Appellate Division, Third Department.

In January 2017, plaintiffs commenced this action alleging that defendant breached the terms of their insurance policy by denying them coverage for structural damage caused to their barn when their tractor and hay baler, operated by plaintiff Taylor Calhoun, "broke through the barn floor." Defendant moved, pre-answer, to dismiss the complaint based upon documentary evidence—namely, the insurance policy issued to plaintiffs (*see* CPLR 3211 [a] [1]). Supreme Court denied the motion, finding that the insurance policy offered by defendant was of disputed authenticity. This appeal by defendant ensued.

A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint as barred by documentary evidence may be properly granted only if "the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 106 [2018]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity'" (*Matter of Koegel*, 160 AD3d 11, 20-21 [2018], *lv dismissed* 32 NY3d 948 [2018], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2010]; *see Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2017]). The defendant bears the burden of proving that the proffered documentary evidence conclusively refutes the plaintiff's factual allegations (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d at 105-106; *Datena v JP Morgan Chase Bank*, 73 AD3d 683, 684 [2010], *lv denied* 17 NY3d 704 [2011]).

Initially, we disagree with Supreme Court's conclusion that a factual dispute exists regarding the authenticity of the proffered documentary evidence. The insurance policy submitted by defendant in support of its motion was sufficiently authenticated by the sworn affidavit of defendant's president, who stated that, based upon his review of defendant's files, defendant's proffer was a "full and complete copy" of the insurance policy issued to plaintiffs (*see Hefter v Elderserve Health, Inc.*, 134 AD3d 673, 675 [2015]; *see generally Muhlhahn v Goldman*, 93 AD3d 418, 418-419 [2012]).[FN*1] The alternate version of the insurance policy submitted by plaintiffs did not raise a genuine question of fact as to the authenticity of defendant's

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proffer. It is unmistakably clear from the face of their submission that plaintiffs did not offer the full and complete insurance policy, instead submitting only the 2016-2017 policy declarations and endorsements to the underlying insurance policy. Such conclusion, which can be readily made from an examination of plaintiffs' submission, is further supported by the sworn statement of defendant's president that plaintiffs offered only the 2016-2017 policy renewal documents. Moreover, the document submitted by plaintiffs entitled "Farmowners Policy Declarations" served as further authentication of defendant's proffer, as it stated that plaintiffs' insurance coverage was subject to 33 specifically listed forms and endorsements, all of which were included in defendant's proffer, but not in plaintiffs' proffer. In short, plaintiffs did not raise a genuine question of fact regarding the authenticity of the insurance policy submitted by defendant (*see Hefter v Elderserve Health, Inc.*, 134 AD3d at 675; *Born to Build LLC v 1141 Realty LLC*, 105 AD3d 425, 426 [2013]). As such, Supreme Court should have proceeded to the question of whether defendant had an irrefutable defense based upon the insurance policy it provided.

Upon our examination of the insurance policy, we find that the terms of the policy conclusively refute plaintiffs' claim that defendant is obligated to cover the structural damage caused to their barn by Calhoun's operation of their tractor and hay baler. By its unambiguous terms, the policy insured plaintiffs only against direct physical loss caused to the barn by 11 specifically delineated perils. Accepting the allegations in plaintiffs' complaint as true and affording them the benefit of every possible favorable inference (*see Kolchins v Evolution Mkts., Inc.*, 31 NY3d at 105-106; *Vestal v Pontillo*, 158 AD3d 1036, 1038 [2018]), the alleged cause of the structural damage here—the tractor and hay baler "br[ea]k[ing] through the barn floor"—does not fall under one of the covered perils. The section of the policy cited by plaintiffs as providing coverage is inapplicable, as that section applies solely to liability insurance coverage arising out of third-party claims made against plaintiffs. Accordingly, as the insurance policy conclusively disposes of plaintiffs' claim, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) should have been granted and the complaint dismissed (*see Kilmer v Miller*, 96 AD3d 1133, 1135-1136 [2012], *lv dismissed* 19 NY3d 1042 [2012]; *Nisari v Ramjohn*, 85 AD3d 987, 990 [2011]).

Footnotes

Footnote*: Although the insurance policy initially submitted by defendant was missing two pages, defendant provided the missing pages along with an attorney affirmation stating that the pages were provided to counsel by defendant, but "were inadvertently omitted in the course of reproduction," and requesting that the "purely clerical error" be overlooked. In the absence of any demonstrated prejudice to a substantial right of plaintiffs, Supreme Court should have overlooked defendant's administrative error (*see* CPLR 2001; *Medina v City of New York*, 134 AD3d 433, 433 [2015]), rather than using the missing pages as support for its conclusion that the insurance policy submitted by defendant was of disputed authenticity.

Click here to read the case in its entirety. ♦

SETTLEMENT AGREEMENT HELD ENFORCEABLE

Editor's Note: In the case of *Anghel v Utica Mut. Ins. Co.*, 2018 NY Slip Op 06073 [164 AD3d 1294] after a complicated procedural history, the parties apparently entered into a stipulation of settlement on September 15, 2015, that was filed with the County Clerk on September 29, 2015. Plaintiff did not issue a release and defendant moved to compel its production. In response, plaintiff moved to vacate the settlement. Supreme Court granted defendant's motion and the plaintiff appealed. The Supreme Court, Appellate Division, Second Department found the plaintiff was bound by the stipulation of settlement signed by her former attorney, who had apparent authority at the time. The decision of the Supreme Court, Appellate Division, Second Department is below.

In an action to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Thomas Feinman, J.), entered February 11, 2016. The order granted the defendant's motion to enforce a stipulation of settlement dated September 15, 2015, and to compel the plaintiff to execute a release, and denied the plaintiff's cross motion to vacate the stipulation of settlement.

Ordered that the order is affirmed, with costs.

On or about January 31, 2010, there was a flood in premises owned by the plaintiff and insured by the defendant, which resulted from a water pipe that froze and burst. The defendant denied coverage, and the plaintiff commenced this action alleging breach of contract. The plaintiff moved for summary judgment on the issue of liability, and the Supreme Court denied the motion. After a jury trial, a judgment was entered in favor of the defendant and against the plaintiff dismissing the complaint. The plaintiff appealed, and this Court reversed the judgment, granted the plaintiff's motion for summary judgment on the issue of liability, and remitted the matter to the Supreme Court, Nassau County, for a trial on the issue of damages (*see Anghel v Utica Mut. Ins. Co.*, 127 AD3d 897 [2015]).

Thereafter, the plaintiff and the defendant purportedly entered into a stipulation of settlement dated September 15, 2015, which was filed with the County Clerk on September 29, 2015. The defendant moved to enforce the stipulation of settlement and to compel the plaintiff to execute a release, and the plaintiff cross-moved to vacate the stipulation of settlement. The Supreme Court granted the defendant's motion and denied the plaintiff's cross motion. The plaintiff appeals.

"An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him [or her] or his [or her] attorney or reduced to the form of an order and entered" (CPLR 2104). A stipulation of settlement signed by an attorney may bind his or her client even if it exceeds the attorney's actual authority if the attorney had apparent authority to act on his or her client's behalf (*see Hallock v State of New York*, 64 NY2d 224 [1984]; *Wil Can [USA] Group, Inc. v Shen Zhang*, 73 AD3d 1166, 1167 [2010]; *Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819, 819 [2007]). Here, the plaintiff is bound by the stipulation of settlement signed by her former attorney, as the record supports the finding that even if the attorney lacked actual authority to enter into

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the stipulation of settlement on the plaintiff's behalf, he had apparent authority to do so (*see* CPLR 2104; *Hallock v State of New York*, 64 NY2d 224 [1984]; *Martello v Martello*, 145 AD3d 1000 [2016]; *Pak Chong Mar v New York Infirmary-Beekman Downtown Hosp.*, 161 AD2d 373 [1990]). Accordingly, we agree with the Supreme Court's determination to grant that branch of the defendant's motion which was to enforce the stipulation of settlement and to deny the plaintiff's cross motion to vacate the stipulation of settlement.

In the order appealed from, the Supreme Court directed that, should the plaintiff seek payment made under the stipulation of settlement, she must forward an executed release to the defendant within 30 days of service of the order with notice of entry. The plaintiff argues in one sentence of her appellate brief that as to that issue, "there was no basis for the lower court to compel plaintiff to release defendant." We construe this argument as asserting that the exchange of a general release was not addressed and otherwise not included within the language of the stipulation of settlement. However, CPLR 5003-a (a) provides that any settling defendant "shall pay all sums due to any settling plaintiff within twenty-one days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation [of discontinuance] executed on behalf of the settling plaintiff" (*accord Cunha v Shapiro*, 42 AD3d 95, 101 [2007]). We find no error in the court directing the plaintiff's compliance with this statute.

Click here to read the case in its entirety. ♦

TOM WHITE OF COMMUNITY MUTUAL ANNOUNCES RETIREMENT

Thomas A. White, President of Community Mutual Insurance Company ("Community Mutual"), will be retiring from his position effective December 31, 2018.

On October 1, 2003, Tom joined Community Mutual as Executive Vice President. He was chosen as President of Community Mutual by it's Board of Directors in March of 2005, after the retirement of Robert Carpenter. With his oversight, Community Mutual affiliated with Union Mutual of Vermont in 2013. Subsequently, with his oversight, the company has grown its Direct Written Premium 85% and it's Surplus nearly 230%.

During the past 40 years of Tom's career, he has had many accomplishments. He began his career on February 1, 1979 at Eastern Mutual as a Field Representative. When Tom left employment at Eastern in 2003, he was Executive Vice President-Claims, Secretary and Director. Tom also served as Chairman of the New York Insurance Association ("NYIA") in 2002-2003 and was honored with their Distinguished Service Award in 2014.

Tom attributes his success and knowledge of the insurance industry to the key relationships he has developed with fellow employees, agents, colleagues, attorneys, independent adjusters, service bureaus and others he has worked with throughout his career.

In addition to his career, Tom is an active and engaged member of the East Greenbush (New York) Fire Company. Tom is a life member there, having served 43 years. He also served as a Town of East Greenbush fire investigator and volunteered for 20 years as a Rensselaer County Fire Investigator. He was honored by the Rensselaer County Legislature by Proclamation for assisting another local township in the investigation of a total loss house explosion.

After his retirement, Tom looks forward to spending more time with his partner, Colleen, his four children and six grandchildren.

Congratulations and best wishes to Tom from URB on your retirement! ♦

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As a not for profit insurance rate service organization, Underwriters Rating Board has a history of over 80 years of continuous service to the insurance industry. Our aim is to be recognized as a pro-active, market driven supplier of a broad array of individualized services to insurers. The long term personal and professional relationship between URB and its member companies is its greatest asset.

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