

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

	x	Index
COMMISSIONERS OF STATE INSURANCE FUND,		Number <u>22053</u> 2003
Plaintiff,		Motion
-against-		Date <u>January 25,</u> 2006
S M TRANSPORTATION LTD.,		Motion
Defendant.		Cal. Number <u>8</u>
	x	

The following papers numbered 1 to 4 read on this motion by defendant S M Transportation, Ltd. for what the court deems to be summary judgment dismissing the complaint against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1
Answering Affidavits - Exhibits .....	2
Reply Affidavits .....	3
Other (Memorandum of Law).....	4

Upon the foregoing papers it is ordered that the motion is denied. (See the accompanying memorandum.)

Dated:

\_\_\_\_\_  
J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 2

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COMMISSIONERS OF STATE INSURANCE FUND,	x	INDEX NO. 22053/03
Plaintiff,		BY: WEISS, J.
S M TRANSPORTATION LTD.,		DATED:
Defendant.		

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Defendant S M Transportation Ltd. has brought what the court deems to be a motion for summary judgment dismissing the complaint against it.

Plaintiff State Insurance Fund ("SIF") issued yearly Workers' Compensation policies to the defendant from October 1, 1994 to October 1, 1998. The policies contained a clause permitting the plaintiff to conduct audits to calculate additional premiums due during the policy periods and within three years after the end of the policy periods. On December 18, 1998, the plaintiff conducted audits for the policy periods October 1, 1994 to October 1, 1995, October 1, 1995 to October 1, 1996, October 1, 1996 to October 1, 1997, and October 1, 1997 to October 1, 1998. The plaintiff sent the defendant a bill dated March 1, 1999 demanding the payment of additional earned premiums totaling \$36,134.95. While the parties agree that the defendant paid all of

its estimated premiums, the plaintiff claims that the defendant owes additional sums based on the audit. The plaintiff began this action on September 17, 2003 by the filing of a summons and a complaint, seeking to recover \$37,310.74. The defendant contends that the claims for sums owed for the policy periods October 1, 1994 to October 1, 1995 and October 1, 1995 to October 1, 1996 are time-barred.

A compensation carrier calculates the premium owed on a policy based on several factors, and employers required to provide coverage under the Workers' Compensation Law must keep accurate payroll records upon which the premium is based. (See, Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, § 131.) Workers' Compensation Law § 131, "Payroll Records," provides in relevant part: "(1) Every employer subject to the provisions of this chapter shall keep a true and accurate record of the number of his employees and the wages paid by him for a period of four years after each entry therein, which records shall be open to inspection at any time, and as often as may be necessary to verify the same by investigators of the board, by the authorized auditors, accountants or inspectors of the carrier with whom the employer is insured\*\*\*." (Emphasis added.) (See, American Mut. Liability Ins. Co. v Velletri Const. Corp., 282 App Div 867.) Thus, in the case at bar, plaintiff SIF had a contractual right to conduct an audit of the defendant within three years after the end of the policy period,

and plaintiff SIF also had a statutory right to conduct an audit of the defendant within four years after the end of the policy period. The end of the earliest policy period at issue occurred on October 1, 1995, and plaintiff SIF timely conducted its audit within four years of that date on December 18, 1998.

The parties agree that CPLR 213, a six-year Statute of Limitation, applies in this case. (See, Micha v Merchants Mut. Ins. Co., 94 AD2d 835.) The audit conducted by plaintiff SIF on December 18, 1998 and the bill sent to the defendant pursuant to the audit on March 1, 1999 became subject to a new limitation period. (See, Commissioners of State Ins. Fund v Trio Asbestos Removal Corp., 9 AD3d 343.) In Trio, an action to recover unpaid premiums due on a Workers' Compensation policy, the Appellate Division, Second Department, stated: "Each final audit statement of the actual premium due\*\*\*is subject to a new limitations period for any balance due above the amount of the estimated premium." (Commissioners of State Ins. Fund v Trio Asbestos Removal Corp., supra, 345.) The Statute of Limitations did not begin to run at the end of each policy period, but rather began to run at a point after contemplated adjustments to the premium were made pursuant to the audit. (See, Commissioners of State Ins. Fund v Photocircuits Corp., 2 Misc 3d 300, revd on other grounds 20 AD3d 173.) CPLR 213 began to run when the plaintiff's cause of action accrued (see,

CPLR § 203[a]; Vigilant Ins. Co. of America v Housing Auth. of the City of El Paso, Texas, 87 NY2d 36; Ely-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399), and the plaintiff's cause of action accrued when the defendant breached the terms of its policies by failing to pay premiums demanded after the audit. (See, Ely-Cruikshank Co., Inc. v Bank of Montreal, *supra*; R.V.R. Realty, LLC v Tenants Alliance, 305 AD2d 289.) The breach occurred after May 1, 1999, the date of the bill sent by the plaintiff to the defendant pursuant to the audit. This action, commenced on September 17, 2003, is timely.

Accordingly, the motion is denied.

Short form order signed herewith.

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J.S.C.