

**Commissioners of the State Ins. Fund v IJZ Assoc.,
Inc.**

2010 NY Slip Op 32984(U)

October 21, 2010

Supreme Court, New York County

Docket Number: 402545/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Index Number : 402545/2008
COMMSR.OF THE STATE INSURANCE

INDEX NO. 402545/08

vs
IJZ ASSOCIATES INC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGEMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
OCT 25 2010
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 10/20/10

[Signature]
HON. EILEEN A. RAKOWER ^{c.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

- against -

IJZ ASSOCIATES, INC.,

Defendant.

-----X
EILEEN A. RAKOWER, J.S.C.

Index No.
402545/08
**ORDER AND
DECISION**
Mot. Seq.: 001

FILED

OCT 25 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff, Commissioners of the State Insurance Fund ("SIF"), brings this action to collect monies, in the amount of \$164,823.49, plus interest from May 26, 2008, from defendant IJZ Associates, Inc. ("IJZ"), for unpaid workers compensation premiums, interest and the costs of collection. SIF now moves for summary judgment pursuant to CPLR 3212. IJZ opposes.

IJZ applied for, and was afforded "New York Workers' Compensation and Employer' Liability Insurance" from SIF on, or about, May 19, 2005. On or about May 26, 2008 the policy was cancelled due to non-payment of premiums.

SIF, in support of its motion, submits: the policy; several other informational SIF documents; the application for coverage; a "statement of account;" copies of audit reports, for the policy periods of 05/19/2005-05/19/2006; 05/19/2006-05/19/2007; 05/19/2007-05/19/2008; 05/19/2008-05/19/2009; an "Account Data" printout; the summons and complaint; IJZ' answer; an affidavit of service and affidavit of additional mailing of the summons and complaint. SIF asserts that, based on the audit of its books for the policy periods listed above, including the reversal of charges on estimated or provisional bills and taking into account all payments made by

defendant, there is due and owing the sum of \$164,823.49.

IJZ, in opposition, submits: the affidavit of Henry Sudol, President of IJZ Associates; a Notice to Take Deposition Upon Oral Examination; and several Certificates of Liability Insurance and Certificates of Workers' Compensation Insurance. IJZ asserts that summary judgment should not be granted because there are facts in dispute "including whether or not the audit was performed properly, whether the amounts included in the audit are correct, and whether Defendant provided proof of insurance for subcontractors." IJZ claims that the motion is premature because it served a notice for deposition of the auditor on March 19, 2009, but that the auditor was never produced by SIF. IJZ asserts that it needs to depose the auditor in order to assess the accuracy of the audits.

In reply, SIF submits the affidavit of Jack Kapsack, a premium auditor employed by SIF. Mr. Kapsack avers that he has reviewed all of the records used for the subject audits, which were provided to him by Vinny Esposito, IJZ' accountant. Among the records reviewed were the "Payroll Book, General Ledger, Contracts or Subcontracts, and Tax Returns of IJZ." SIF points out that it is disingenuous for IJZ to assert that the payroll calculations set forth in the audit reports were incorrect because those numbers were obtained from IJZ' own records. Further, the formula used by SIF to calculate the premiums due was taken from the policy itself and 'promulgated by the New York State Insurance Rating Board.' Finally, Mr. Kapsack asserts that he originally charged for several subcontractors because IJZ had not submitted certificates of insurance for them at the time of the audit. Subsequently, IJZ provided such certificates and Mr. Kapsack avers that those charges were then deleted. Mr. Kapsack asserts that the charges were not deleted for JV Contracting Corporation ("JV"), because a certificate of insurance was not provided for that subcontractor. Although IJZ submits a certificate of insurance for JV here, Mr. Kapsack asserts that the certificate is "not valid," claiming that SIF has no record of having provided JV with insurance during the period claimed on the certificate. Rather, Mr. Kapsack asserts, SIF's records indicate that insurance was afforded for a different time period, but was cancelled due to non-payment of premiums.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party

opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The Commissioner of the State Insurance Fund is empowered by §83 of the Workers' Compensation Law to undertake:

the issuance of policies and their terms and conditions, the fixing of premium rates, the keeping of records, auditing of payrolls, and the billing and collection of premiums therefor . . .

“Plaintiff’s documentary evidence consisting of the insurance application, the policy, the audit reports, and the resulting statements were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law.” (*The Commissioner of the State Insurance Fund v. Concord Messenger Service, Inc.*, 34 AD3d 355, [1st Dept. 2006]). In light of such evidence, IJZ has not shown how a deposition of the auditor, who’s report is based on IJZ’ own records, would serve to uncover “facts essential to justify opposition,” that are not already at its disposal. (*see*; CPLR 3212[f]).

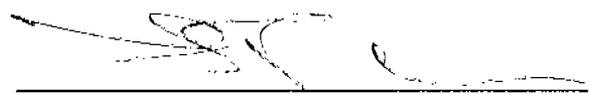
It is undisputed that independent contractors are not employees covered by the Workers’ Compensation Law. (*see*; *Commissioners of the State Insurance Fund v. Fox Run Farms, Inc.*, 195 AD2d 372 [1st Dept. 1993]). To that end, IJZ submits a Certificate of Liability Insurance for JV, which purports to provide, among other things, workers’ compensation and employers’ liability coverage to JV for the period of 07/20/2007 to 07/20/2008. However, a certificate of insurance is “merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure.” (*Horn Maintenance Corp. v. Aetna Cas. & Sur. Co.*, 225 AD2d 443 [1st Dept. 1993]).

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$164,823.49, together with interest at the rate of 9% per annum from the date of May 26, 2008 until the date of the decision of this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: October 21, 2010



Eileen A. Rakover, J.S.C.

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