

Commissioners of the State Ins. Fund v Ramer

2011 NY Slip Op 31743(U)

June 27, 2011

Sup Ct, NY County

Docket Number: 401313/09

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Commissioners of the State Ins. Fund

INDEX NO. 401313/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Mark Ramee + Michael Saperstein
d/b/a 361-363 Assoc., et al

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/27/11

[Signature]
HON. EILEEN A. RAKOWER

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 -

Index No.
401313/09
**ORDER AND
DECISION**
Mot. Seq.: 001

MARK RAMER & MICHAEL R. SAPERSTEIN
d/b/a 361-363 ASSOCIATES,
MARK RAMER & MICHAEL R. SAPERSTEIN,
as General Partners and including Limited Partners
d/b/a 19 East 7th Group LP,
MARK RAMER & MICHAEL SAPERSTEIN, as
General Partners and including all Limited Partners
d/b/a 319 EAST 92 GROUP LP,
MARK RAMER & MICHAEL SAPERSTEIN, as
General Partners and including all Limited Partners
d/b/a 303 WEST 11TH GROUP LP,
MARK RAMER & MICHAEL R. SAPERSTEIN,
d/b/a 339-19 ASSOCIATES, 32 SPRING ST. GROUP
LLC, 337 GROUP, LLC and 280-10 GROUP, LLC,

Defendants.

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

FILED

JUN 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, Commissioners of the State Insurance Fund ("SIF"), brings this action to collect the sum of \$161,776.75¹, plus interest from October 10, 2008, from

¹Plaintiff represents that, prior to the commencement of the action, the sum owed, based on the actual audit of the defendants' books and records, was calculated to be \$174,804.03. That

defendants for unpaid workers compensation premiums. SIF now moves for summary judgment on the complaint pursuant to CPLR 3212, and to dismiss defendants' affirmative defenses pursuant to CPLR 3211(b). Defendants oppose.

Defendants own and manage real estate in New York City. Defendants subcontracted with Z&K Renovation Corp. ("Z&K") to perform carpentry work. Defendant Mark Ramer & Michael R. Saperstein d/b/a 361-363 Associates, applied for, and received "New York Workers' Compensation and Employers' Liability Insurance" from SIF on, or about, March 19, 2005². Thereafter, On or about October 20, 2008, the policy was cancelled due to non-payment of premiums.

SIF charges defendants an "estimated" premium at the beginning of each annual policy term based upon what the anticipated payroll will be for the following year. Defendants pay a deposit, which is broken down into installments, billed by SIF as "provisional bills." At the end of a particular annual policy term, audits are performed, and if the "actual" amount owed is greater the estimated premium, a bill is generated.

SIF, in support of its motion, submits: the policy; the application for coverage; several documents titled "Request for Inclusion of Additional Interest," a "statement of account;" copies of audit reports, for the policy periods of 03/19/2005-01/01/2006; 01/01/2006-01/01/2007; 01/01/2007-01/01/2008; 01/01/2008-10/20/2008; an "audit statement;" an "estimated audit statement;" several "audit worksheets;" an invoice, dated November 2, 2009; the pleadings; and "plaintiff's notice of discovery and inspection." After conducting an audit of defendants' books and records for the policy periods listed above on July 3, 2008, SIF asserts that defendants owe \$161,776.75, following adjustments for payments received.

amount was reduced to the current amount after several adjustments were made. SIF represents that it is not seeking collection costs here, even though SIF is seeking such costs in the complaint.

²In March and April of 2005, Ramer & Saperstein applied for insurance coverage under the policy to include the following named defendants: Mark Ramer & Michael R. Saperstein as General Partners and including Limited Partner d/b/a 19 East 7th Group LP, Mark Ramer & Michael R. Saperstein, as General Partners and including all Limited Partners d/b/a 319 East 92 Group, LP, Mark Ramer & Michael R. Saperstein, as General Partners and including all Limited Partners d/b/a 303 West 11th Group LP, Mark Ramer & Michael R. Saperstein, d/b/a 339-19 Associates, 32 Spring St. Group LLC, 337 Group, LLC and 280-10 Group LLC.

Defendants, in opposition, submit several estimates and/or “contracts” with Z&K Renovation Corp. (“Z&K”); several documents titled “Simplified Audit Information Form; the affidavit of Adam Gottlieb, Certified Public Accountant for defendants; the affidavit of Krystian Grum, President of Z&K; the affidavit of Michael R. Saperstein, and a document titled New York Rulings and Interpretations.

Defendants argue that summary judgment should not be granted because there are facts in dispute. Specifically, defendants assert that, during the relevant policy periods, SIF directly provided workers’ compensation coverage to Z&K and its employees. Thus, defendants claim, SIF double charged them for workers’ compensation insurance premiums for Grum and Kszton, who were “officers and employees” of J&K.

Further, defendants argue that SIF misclassified a worker named Rosalyn Rodriguez. Ms. Rodriguez was given the classification codes 5474 for “PAINTING/DECORATING” and 9028 for “BUILDING OPER DWELLING NOC ETC-U.” Defendants argue that Ms. Rodriguez should have been given codes for non-manual work, and that Ms. Rodriguez was a “part-time consultant, not a full time employee.”

Defendants concede that, normally, mis-classification is an issue for the New York State Compensation Insurance Review Board (“Review Board”), and that the Review Board has a series of administrative remedies in place in order to address the issue of classification. However, defendants point out that it is the Review Board’s policy to not hear classification complaints more the twelve months after a policy period has ended. SIF did not conduct its audit until July 3, 2008, which was more than twelve months after the end of the 03/19/2005-01/01/2006 and 01/01/2006-01/01/2007 policy periods. Thus, defendants argue, this is an instance where administrative review would be futile, and it is proper for the Court to address the issue in the first instance.

Defendants seek a re-audit which excludes Grum and Kszton, and which takes into account the re-classification of Ms. Rodriguez. Defendants add that discovery was never conducted in the instant matter.

In reply, SIF submits the policy covering Z&K, email correspondence between SIF and “The Flanders Group,” which SIF alleges is defendants’ agent; copies of SIF

Audit Scheduler and Estimated Audit Worksheets; a printout of an “audit search;” and a letter from Mr. Saperstein to SIF, dated August 7, 2008.

As to Grum and Kszton, SIF points to the Z&K’s policy endorsement which states, in relevant portion:

This policy does not cover claims or suits that arise from bodily injury suffered by the sole executive officer and only stockholder of the insured corporation, or two executive officers who together are the only officers and stockholders of the insured corporation. When such corporation has other employees who are required to be covered by the law, and the corporation has elected to exclude from coverage the officer(s) described in the schedule, the premium basis for the policy does not include the remuneration of the excluded executive officer or officers. You will reimburse us for any payment we must make because of bodily injury to such person(s).

SIF asserts that the policy endorsement is proof that Grum and Kszton were not covered under Z&K’s policy, and defendants have failed to submit proof of independent coverage for those workers.

As to the re-classification issue, SIF argues that defendants delayed the audits by failing to make their books and records available, thereby causing such audits to occur more than a year after two of the policy periods ended. SIF submits a printout of its “Audit Scheduler,” which shows that three appointments were scheduled for the policy period of 3/19/2005-01/01/2006 on 04/12/2006, 05/01/2006 and 08/29/2006. There is a note on that printout which states: “unproductive contact called in sick left card-no response sent letter f[sic] second appt 8-29 claim they ha [sic] received lett[sic].” SIF also claims that defendants failed to permit access to its records for the 01/01/2006-01/01/2007 policy period. SIF asserts that it is disingenuous for defendants to delay the audits, and then claim it is futile to seek redress from the administrative agency because of the lapse of time.

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 SIF’s “Notice to Contractors,” it states, in relevant part:

Uninsured Subcontractors

Section 56 of the Workers’ Compensation Law makes you responsible (or your Workers’ Compensation insurance carrier if you are insured) for payment of benefits to an injured employee of an uninsured subcontractor. *Because of this liability, you will be charged premium for any uninsured subcontractor who works for you.* You can save this money by obtaining original certificates of Workers’ Compensation insurance . . . from your subcontractors before they start the job. Just give the certificates to our auditor at the time of your premium audit and the auditor will not charge premium for these subcontractors. (emphasis added).

In an email correspondence on August 19, 2008, Riyadh Sawh, of The Flanders Group, requests that charges for Grum and Kszton's payrolls be removed from the audits. Carol Benson, underwriter for SIF, responds:

The policy does not cover the officers. They are excluded. On all the audits, the checks were paid to the officers directly and not the company, We can not remove charges.

SIF submits documentary evidence here establishing that the audits were correct as to Grum and Kszton, and defendants fail to raise an issue of fact regarding those premiums. Defendants do not dispute that Grum and Kszton are the "only" officers and shareholders of J&K, thereby excluding them from coverage under J&K's policy. Nor do defendants submit proof that Grum and Kszton had obtained independent Workers' Compensation Insurance.

Unlike questions of coverage, a challenge to the classification of workers requires administrative review. (*Commissioners of the State Ins. Fund v. Kenneth Yesmont & Assocs., Inc.*, 226 AD2d 147[1st Dept. 1996]). "CPLR 7801(1) "embodies the long-standing administrative law doctrine that a petitioner must exhaust his administrative remedies prior to seeking judicial relief." (*Community School Board Nine v. Crew*, 224 AD2d 8[1st Dept. 1996]).

However, there are exceptions to the exhaustion doctrine where either "pursuit of the administrative remedy reasonably appears to be futile [or] where irreparable harm may occur in the absence of prompt judicial intervention . . ." (*Id.* at 13). Section I, Page D-2 of the New York Workers Compensation and Employees Liability Insurance Manual states:

The Rating Board will *not* consider a change in classification(s) for a risk that may have been improperly classified when the inquiry is received at the Rating Board later than twelve months *after* the expiration date of the policy term in question.

It is undisputed that the July 3, 2008 audit was conducted more than twelve months after two of the policy periods ended. SIF's audit scheduler does show that several appointments were cancelled, at least one of which was cancelled by defendants due to sickness for the policy period of 3/19/2005-01/01/2006. However,

SIF's submissions do not establish, as a matter of law, that it was defendants' conduct which caused the audit to be delayed until July 2008, more than two years after the 3/19/2005-01/01/2006 policy period ended.

"In view of the undisputed chronology . . . there was no meaningful opportunity, under NYCIRB's rules and procedures, for [defendants] to challenge [the classifications] used in the audit, especially with respect to the first two terms of the Policy . . ." (*Commissioners of the State Insurance Fund v. HR Healthcare Staffing Remedies LLC*, 25 Misc.3d 1216(A)[Sup. Court NY County 2009]).

Issues regarding the classification of Ms. Rodriguez remain unresolved, and are properly before this Court. 3212(f) precludes summary judgment at this time.

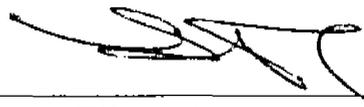
Wherefore it is hereby

ORDERED that the motion is denied as premature; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on Tuesday August 16, 2011 at 9:30 a.m. in Room 308 at 80 Centre Street.

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

Dated: June 27, 2011



Eileen A. Rakower, J.S.C.

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