

**Commissioners of the State Ins. Fund v Harry's
Nurses Registry, Inc.**

2011 NY Slip Op 32191(U)

July 8, 2011

Sup Ct, NY County

Docket Number: 406555/07

Judge: Milton A. Tingling

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

PRESENT. MILTON A. TRINGALI

PART 44

Index Number : 406555/2007

STATE INSURANCE FUND

VS.

HARRY'S NURSES REGISTRY

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 *is decided in accordance with the annexed decision.*

FILED

AUG 03 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 7/8/11 _____ mat _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : JAS PART 44

----- X

COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

INDEX NO.
406555/07

-against-

HARRY'S NURSES REGISTRY, INC.,

Defendant.

FILED

AUG 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

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MILTON TINGLING, J.:

Plaintiff moves pursuant to CPLR 3212 for summary judgment against defendant in the amount of \$122,729.01 plus interest from June 19, 2007 at the rate of 9% per year, collection costs and attorney fees pursuant to State Finance Law § 18 in the amount of \$27,000.38, together with costs and disbursements.

Plaintiff State Insurance Fund issued and maintained a workers' compensation insurance policy covering defendants' employees commencing February 7, 2006. According to its terms, the policy was to be renewed annually. On its second term, defendant cancelled the policy, effective June 19, 2007. The premiums due on the policy were calculated based on the remuneration defendant paid to its employees, as adjusted to include ancillary charges. The total payroll would be multiplied by a constant determined by the New York Compensation Insurance Rating Board, an unincorporated association of insurance carriers. At the beginning of each policy term, defendant would be charged an estimated premium. At the end of each term, an audit would be performed to determine defendant's actual payroll and either a credit or a bill would be issued.

The first problem arose when plaintiff based its estimated premium on defendant's representation that it had 11 employees collectively earning \$301,280 for the year (see plaintiff's exhibit B, p 4), but when plaintiff conducted a mid-term audit to ascertain the adequacy of the estimated premium, it discovered that despite representations to the contrary (see *id.*, p 7), defendant in fact employed numerous "independent contractors" who were paid an aggregate of \$2,457,483 from February 7 to June 30, 2006. After a complex process of audits, recalculations and document amendments, plaintiff determined that the final balance due under the policy was \$122,729.01. Despite plaintiff's demands, defendant paid no part of that balance.

In this action, plaintiff seeks to collect the unpaid premiums, together with interest thereon at the rate of 9% from the date of the policy's cancellation, and collection and legal fees in the amount of \$27,000.38.

In opposition, defendant contends that plaintiff charged such exorbitant rates for its policy despite negotiated rate reductions, that defendant was forced to cancel plaintiff's policy and replace it with a policy issued by AIG (for nearly half the price), which took effect on May 25, 2007. Despite the AIG policy plaintiff would not let defendant cancel its duplicative coverage until nearly a month after the date requested, and then imposed an early cancellation penalty. Defendant argues that such penalty cannot be enforced because it is vastly disproportionate to plaintiff's exposure. Defendant seeks a recalculation of the premiums which would exclude the penalty and include defendant's payroll only until May 25, 2010, when defendant switched its coverage to AIG.

Plaintiff counters that the early cancellation penalty is not an unconscionable liquidated damages provision, but rather a "short rate premium," a "time-honored 'customary' or

'standard' clause" which allows an insurer to collect the premiums it would have charged for a short-term contract instead of the presumably lower premiums it actually charged expecting the contract to be for a longer term.

The court finds that plaintiff may charge a short-rate premium for the partial term of the February 7, 2007 to February 6, 2008 contract year so as to make the premiums payable by defendant equivalent to the premiums plaintiff would have charged had the policy been originally issued for the abbreviated term (see *Commissioner of State Insurance Fund v. Kassas*, 5 Misc 3d 1012(A) [Civ Ct, NY Co, Billings, J, 2004]; short-term penalty applies only to the partial last year, it cannot be imposed on prior full years of policy).

The applicable clause in the parties' policy provides as follows:

If you cancel for any reason other than that you are no longer required by law to have insurance, final premium will be more than pro rata, it will be based on the time this policy was in force, and increased by our short rate cancellation table and procedure. Final premium will not be less than the minimum premium

(¶ IV[F](2), at plaintiff's exhibit A). This provision was subsequently amended by plaintiff as follows:

"If you request cancellation for any other reason other than you are no longer required by law to have insurance or if your policy is cancelled for non-payment of premium, final premium will be more than pro rata: it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.

(see various revised information pages at plaintiff's exhibit D). Such clauses are permitted by law (see *Gately-Haire Co., Inc. v. Niagara Fire Insurance Co. of City of New York*, 221 NY 162, 170-172 [1917]; *Great American Indemnity Co. v. Greenberg Bros. Iron & Steel Corporation*, 170 Misc 489 [Mun Ct, NY Co, 1939]; *McKenna v Firemen's Insurance Co.*, 30 Misc 727 [Sup Ct, NY Co, 1900]; see also 5 Couch on Ins § 79:21; 45 CJS Insurance § 810).

Nonetheless, there are two main issues which preclude the award of summary judgment to plaintiff: the cancellation date of the policy and the collection costs being charged by plaintiff.

With respect to the cancellation date, plaintiff argues that it cancelled the policy in accordance with its terms:

You may cancel this policy if you secure benefits for your employees in another manner that complies with the Workers' Compensation Law. You must mail or deliver written notice to us which specifies the date you propose cancellation to take effect. Notwithstanding the date you specify, cancellation will not take effect until thirty days after the date you mail or deliver notice to us and ten days after we file notice in the office of the Chair of the Workers' Compensation Board.

(¶ V[D](1), at plaintiff's exhibit A). Even if this court were to find that clause enforceable as plaintiff interprets it, it could not determine the proper date of cancellation as a matter of law, since glaring by its omission from plaintiff's submission is defendant's notice of cancellation to plaintiff. Not only is the actual notice and proof of its transmission not provided to the court, but plaintiff does not allege either in its complaint or affidavits, on what date the notice was provided and on what date plaintiff filed the notice of cancellation with the Board. The only document provided (buried in plaintiff's exhibit D) is plaintiff's notice dated May 30, 2007, addressed to no one, advising that at defendant's request it has cancelled the policy effective June 19, 2007.

"Basic summary judgment principles have long held that it is the movant's burden to present evidence demonstrating his or her prima facie entitlement to judgment as a matter of law... Even where there is no opposition to a motion for summary judgment, the court is not relieved of its obligation to ensure that the movant has demonstrated his or her entitlement to the relief requested" (*Zecca v Riccardelli*, 293 AD2d 31, 33-34 [2d Dept 2002], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980] and *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Plaintiff has not done so.

Furthermore, the court is not persuaded by plaintiff's interpretation of the applicable statute, Workers' Compensation Law § 54, which provides that

... When cancellation is due to any reason other than non-payment of premiums such cancellation shall not be effective until at least thirty days after a notice of cancellation of such contract, on a date specified in such notice, shall be filed in the office of the chair and also served on the employer; provided, however, in either case, that **if the employer has secured insurance with another insurance carrier which becomes effective prior to the expiration of the time stated in such notice, the cancellation shall be effective as of the date of such other coverage....**

(WCL § 54, emphasis added). The Practice Commentary makes it clear that the 30-day waiting period was enacted solely for the benefit of the employer. The "provision is intended to protect employers from being subjected to personal and even criminal liability from an unexpected lapse in coverage without being given a proper opportunity to protect themselves by obtaining other coverage.... The old policy should then end when the new valid policy and coverage went into effect. There is no need for duplicate coverage" (Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 54 [2006 Main Vol]). "If the employer obtains other coverage prior to the end of the 30-day period, the policy is deemed cancelled as to the date of the new coverage" (*Id.*). In short, "[t]he statute requires first a written notice with a definite cancellation date, and the saving clause as to the effect of other insurance applies only to the period after the notice has been given and before the cancellation date fixed therein has been reached" (*Horn v. Malchoff*, 276 App Div 683, 685 [3d Dept 1950], lv den 99 NYS2d 753 [3d Dept 1950]). Thus, if defendant gave plaintiff notice of cancellation before May 25, 2007, plaintiff should have cancelled the policy as of that date - when defendant's replacement policy became effective.

Finally, plaintiff's failure of proof also dooms its motion for summary judgment with respect to collection costs, which plaintiff seeks to recover pursuant to State Finance Law § 18.

Plaintiff's complaint alleges that plaintiff's collection cost in this action is "22% of the principal amount sought ..., or \$27,000.38" (¶ 10, at plaintiff's exhibit J). No calculation of actual expenditures and costs of collection has been submitted – or indeed performed – other than that percentage. This is inconsistent with the statutory requirement. State Fin L § 18(5) allows plaintiff to assess employers who fail to make payment within 90 days of the first invoice "an additional collection fee charge to cover the cost of processing, handling and collecting such debt, not to exceed twenty-two percent of the outstanding debt.... The assessed collection fee charge may not exceed the agency's estimated costs of processing, handling and collecting such debt." Since plaintiff has not even attempted to estimate its costs, it cannot prove that 22% of the principal does not exceed such estimate. Counsel's glib statement that if plaintiff prevails herein his office alone would be paid more than \$27,000 (Florio supporting affirmation, ¶ 30) does not constitute an estimate. In this context, the court notes that it appears to be plaintiff's custom to charge 22% of whatever amount is due, no matter what relation such percentage bears to the actual costs. Another Justice of this court has decried such practice by plaintiff and found it precludes summary judgment in plaintiff's favor (see *Commissioners of State Insurance Fund v Brooklyn Barber Beauty Equipment Co., Inc.*, 191 Misc 2d 1, 12-14 [Civ Ct, NY Co, Billings, J, 2001], app dism 2 Misc 3d 14 [App Term, 1st Dept 2003]; *Commissioner of SIF v. Kassas, supra*, 5 Misc 3d 1012(A) at *5). This court sees no reason to disagree.

Accordingly, plaintiff's motion for summary judgment is denied in its entirety. Upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

FILED

This decision constitutes the order of the court.

AUG 03 2011

DATED: July 8, 2011

NEW YORK
COUNTY CLERK'S OFFICE

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J.S.C.
MILTON A. TROTTEN