STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

COMMISSIONERS OF STATE INSURANCE FUND,

Plaintiff, DECISION AND ORDER

v. Index #2003/10412

CRUZ CONSTRUCTION OF ROCHESTER, et al,

Defendant.

Plaintiff, Commissioners of the State Insurance Fund, have moved pursuant to CPLR §3212 for an order granting it summary judgment against defendants on the grounds that there are no triable issues of fact, and there is no defense to the cause of action asserted in the complaint herein. Plaintiff commenced this action in 2003, seeking summary judgment in lieu of complaint. Plaintiff's motion was ultimately granted as to Cruz Construction and denied as to the remainder of the defendants by the court (Stander, J.) by order dated April 23, 2004. Summary judgment in lieu of complaint relief was granted as to Cruz Construction based upon a letter agreement presented to the court dated August 30, 2001. The court (Stander, J.) denied relief as to the remaining defendants, stating that Plaintiff failed to establish the amounts owed by the additional entities under the U-111 form. See April 23, 2004 Decision and Order, transcript at 2. Plaintiff now seeks summary judgment against the remaining

defendants, arguing that all defendants are liable for the premiums due relative to Workers' Compensation Insurance policy 1043 656-6 issued by Plaintiff. Plaintiff's claims of unpaid premiums due make up the subject matter of this litigation.

On May 22, 1993 Cruz Construction filed with Plaintiff an application for a workers' compensation insurance policy. The aforementioned insurance policy was thereafter issued. The policy was by its terms self-renewing on an annual basis, but was ultimately cancelled for non-payment of premiums on January 16, 2001. The other defendants were added to the policy at various times via U-111 forms signed by Al Spaziano. U-111 forms are used to add additional entities to a policy. Above the signature line on this form is the following legend:

> In consideration of the inclusion of the additional entity named above under the coverage of the Policy, we the undersigned jointly and severally do hereby assume full liability and responsibility for any and all premiums that may become due THE STATE INSURANCE FUND for coverage extended to either or both the entity now covered and the additional entity covered by the Policy from its inception to cancellation date.

A separate U-111 form was executed for each additional entity added to the policy. Based upon this form and legend, plaintiff contends that defendants are jointly and severally liable for the debt of Cruz Construction. In opposition to the motion, defendants have represented that this action cannot be maintained

against defendants Westview Commons Apartments, Inc. and Jordache Development, Inc. because both have filed for bankruptcy protection.

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted); see also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v

Johnson, 147 A.D.2d 312, 317 (2nd Dept' 1989) (citations omitted).

Plaintiff has established through the submission of the U-111 forms that the remaining defendants[1] pledged joint and several liability for the share of the premium owed both by it and Cruz Construction. The difficulty arises, however, in harmonizing the U-111 forms with the August 20, 2001 letter agreement upon which summary judgment in lieu of complaint was granted to plaintiff previously. While plaintiff expends considerable effort in the submitted affidavits to explain the premium amounts due, the August 30, 2001 letter agreement, entered into after the U-111 forms, definitely states that the balance due is $103,103.08. On the previous motion, plaintiff represented to the court that certain payments were made on the letter agreement, bringing the balance due down to $97,892.28. Defendants contend that each "additional interest" can only be held liable for any insurance premiums assessed for coverage extended both to it and to Cruz Construction and consequently conclude that judgment cannot be rendered against them assessing liability as to premiums due other "additional interests."

The principles of contract interpretation are well-settled and oft-stated:

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[1] Excepting, of course, those afforded bankruptcy protection and Cruz Constrcution, the entity against whom judgment was entered on the summary judgment in lieu of complaint motion.

> Clear and unambiguous terms should be understood in their plain, ordinary, popular and non-technical meaning. Where the language is plain and unambiguous, extrinsic circumstances should not be considered to determine the intention of the parties.

Lopez v. Fernandito's Antique, Ltd., 305 A.D.2d 218, 219 (1st Dept. 2003). See also Computer Assoc. International, Inc. v. U.S. Balloon Manuf. Co., Inc., 10 A.D.3d 699 (2nd Dept. 2004); Crossmar, Inc. v. Portfolioscope, Inc., 307 A.D.2d 843 (1st Dept. 2003). The above-stated legend from the U-111 forms clearly states: "we the undersigned jointly and severally do hereby assume full liability and responsibility for any and all premiums that may become due THE STATE INSURANCE FUND for coverage extended to either or both the entity now covered and the additional entity covered by the Policy from its inception to cancellation date." As such, each of the remaining defendants is jointly and severally liable for the amount due to plaintiff for the premiums under the August 30, 2001 letter agreement, taking into account the amount plaintiff has admitted was paid lowering the balance due to $97,892.28. Mr. Tuckey's affidavit submitted on this motion requests the same amount. Summary judgment as requested by plaintiff is, therefore, granted.

Defendants attempt to defeat this motion by stating that the court (Stander, J.), in deciding the previous motion for summary judgment in lieu of complaint, denied the motion as to the remaining defendants on the basis that the August 30, 2001,

letter agreement did not provide a breakdown of the premiums to be assessed to the defendants to the court. However, defendants' argument misses the point of the court's previous ruling. As that motion came before the court in the posture of a CPLR §3213 motion, which the court specifically noted in the transcript attached to the order, the court determined that it could not grant summary judgment as to the remaining defendants because the amounts owed by those defendants was not set forth in the U-111 forms. See Ljungberg v. Marino, 239 A.D.2d 952 (4th Dept. 1997)(stating that "resort to CPLR 3213 was inappropriate" where "'proof beyond the written instrument is necessary to substantiate the underlying obligation'"), *citing* Mesaba Serv. & Supply Co. v. R. Freedman & Son, Inc., 111 A.D.2d 985 (3d Dept. 1985). On this motion, plaintiff established prima facie entitlement to judgment under CPLR 3212, by reference to the U-111 forms less the payments it admitted were made. Defendants, on the other hand, fail to raise an issue of fact concerning this and have failed to lay bare any proof to the contrary, especially in view of the contractual language quoted above.

CONCLUSION

Plaintiff'S motion is granted.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December ___, 2005
Rochester, New York