

Atlantic Mutual Insurance Co. v Joyce International, Inc.
2005 NY Slip Op 30391(U)
April 19, 2005
Supreme Court, New York County
Docket Number: 601311/02
Judge: Herman Cahn
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: WEDMAN CALIN
Justice

PART 49

0601311/2002

ATLANTIC MUTUAL INS. CO.
VS
JOYCE INTERNATIONAL, INC.

INDEX NO. _____

MOTION DATE 10/29/04

SEQ 1

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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

FILED

APR 21 2005

CLERK OF THE COURT
MOTION COURT
CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH THE COURT'S MEMORANDUM
DECISION IN MOTION SEQUENCE.....

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

Dated: 4/19/05

W. Calin
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
ATLANTIC MUTUAL INSURANCE COMPANY and
CENTENNIAL INSURANCE COMPANY,

Plaintiffs,

-against-

Index No.
601311/02

JOYCE INTERNATIONAL, INC., STREATER, INC.
t/a STREATER STORE FIXTURES, and JOYCE
FURNITURE, INC.,

Defendants.

-----X

CAHN, J.:

Plaintiffs Atlantic Mutual Insurance Company and Centennial Insurance Company (hereinafter, Atlantic Mutual) commenced this action to recover additional retrospective premiums allegedly due on five annual Workers Compensation insurance policies issued to defendant Joyce International, Inc. Atlantic Mutual now seeks to recover on four of these policies.

Atlantic Mutual moves for summary judgment in the amount of \$465,747.00 on its second, third, fourth and fifth causes of action, as well as for an order striking the answers of defendants Joyce and Streater, Inc. t/a Streater Store Fixtures (Streater), and dismissing the six counterclaims asserted by Joyce, insofar as these answers and counterclaims pertain to the four policies at issue, CPLR 3212.

Joyce opposes the motion and cross-moves for an order requiring discovery to proceed, CPLR 3212 (f). Streater cross-moves to dismiss the complaint, insofar as it is asserted against Streater, CPLR 3215 (c).

BACKGROUND

Between 1992 and 1997, Atlantic Mutual issued four annual Workers Compensation and Employers Liability Insurance Policies to Joyce, covering the periods between (1) June 1, 1992 to June 1, 1993 (policy number 400 44 30 95); (2) June 1, 1993 to June 1, 1994 (policy number 400 44 40 04) (3) June 1, 1995 to June 1, 1996 (policy number 400 70 70 22); and (4) June 1, 1996 to June 1, 1997 (policy number 400 70 88 47). Defendant Streater, a subsidiary of Joyce, was listed with Joyce as a Named Insured on each of the policies.

All four policies were "retrospective premium policies," i.e., policies in which the initial estimated annual premium may be adjusted after the end of the policy term, based upon the insured's loss record during the policy period. According to John A. Tillstrand, the vice president of commercial insurance for Atlantic Mutual, retrospective premium workers compensation policies require an insurance carrier to calculate an estimated premium at the commencement of coverage, based on the insured's anticipated total payroll for the coming year and its classifications of employees and uninsured subcontractors (Tillstrand Aff., ¶ 10). This estimated premium becomes the advance, or deposit premium, for coverage under the policy (*id.*). After the termination of the policy, the insurance carrier is required to perform a payroll audit of the insured's records, to

determine the actual payroll for each class of covered employee (id.). The carrier then calculates an earned premium, which becomes the final premium unless, as here, the policy is subject to a retrospective rating plan (id., ¶ 11-12).

When an insured opts for a retrospective rating plan, the final audit premium becomes the "standard" premium, which is then used to establish the upper and lower limits within which the final retrospective premium will fall (id., ¶ 14-15). The insurer's ongoing loss and expense payments are then used to adjust this standard premium, resulting in annual retrospective premium adjustments until all losses have been closed (id., ¶ 16). The retrospective premium adjustments "are computed using a formula which incorporates not only the standard premium, but also the loss experience, and various tax and expense factors" (id., ¶ 17).

According to Tillstrand, the earned premiums for the coverage provided by the four policies at issue were

computed in accordance with the rating plan promulgated and supervised by the New York Compensation Insurance Rating Board (hereinafter "Rating Board"), under the auspices and supervision of the Superintendent of Insurance of the State of New York (hereinafter "Superintendent"). This rating plan, which has been adopted by plaintiffs, outlines the classifications, rates, policy forms, audit rules and requirements, etc., which the plaintiffs were obligated to utilize with regard to the coverage in question

(id., ¶ 8).

Tillstrand asserts that, based on Atlantic Mutual's

calculations, defendants currently owe additional earned retrospective premiums totaling \$465,747.00, for the four policies at issue. Specifically, defendants allegedly owe additional retrospective premiums for the years 2000 and 2001, in the following amounts: (1) \$84,596.00 on policy #400-44-30-95, pursuant to the eighth and ninth retrospective premium adjustments prepared on March 29, 2001 and March 12, 2002 (second cause of action); (2) \$49,348.00 on policy number #400-44-40-04, pursuant to the seventh and eighth retrospective premium adjustments prepared on March 22, 2001 and March 12, 2002 (third cause of action); (3) \$144,136.00 on policy #400-70-70-22, pursuant to the fifth and sixth retrospective premium adjustments prepared on March 30, 2001 and March 12, 2002 (fourth cause of action); and (4) \$218,012.00 on policy #400-70-88-47, pursuant to the fourth and fifth retrospective premium adjustments prepared on March 30, 2001 and February 27, 2002 (fifth cause of action).

Atlantic Mutual now seeks summary judgment for the total amount claimed to be due. It additionally seeks to strike both of the defendants' answers, and to dismiss Joyce's six counterclaims for (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) breach of fiduciary duty; (4) violation of Insurance Law; (5) negligence; and (6) an accounting, insofar as these answers and counterclaims pertain to the four policies at issue on this motion.

Joyce argues that Atlantic Mutual's motion for summary judgment is premature as there has been virtually no discovery with respect either to Atlantic Mutual's causes of action, or Joyce's defenses and counterclaims. Joyce notes that when it served its answer to the amended complaint on July 8, 2002, it also served an amended first set of interrogatories and an amended notice for discovery and inspection. Although Atlantic Mutual served its reply to Joyce's counterclaims on July 24, 2002, it failed to respond to Joyce's interrogatories or requests for discovery until it filed the instant motion. At that time, Joyce notes, Atlantic Mutual served only a brief response to the interrogatories, essentially referencing the exhibits attached to its motion for summary judgment (see Herbert Affirm., Exh. B).

Joyce argues that Atlantic Mutual's motion for summary judgment on its second through fifth causes of action should be denied, as its submissions on the motion are incomplete, and fail to establish its prima facie entitlement to relief. Joyce further argues that because the viability of Atlantic Mutual's claims, and Joyce's defenses and counterclaims, have yet to be established, Joyce's cross motion to require Atlantic Mutual to proceed with discovery should be granted, and the motion to dismiss the affirmative defenses and/or counterclaims should be denied.

Streater cross-moves to dismiss plaintiff's complaint

pursuant to CPLR 3215 (c). Streater notes that Atlantic Mutual served its original complaint on it following the commencement of this action on April 5, 2002, and then served an amended complaint on Streater, at the same address to which it had served the original complaint, on May 8, 2002 (Tillistrand Aff., Exh. 1). Although Streater served an answer to the original complaint on June 28, 2002 (id., Exh. 3), it never served an answer to the amended complaint (Costigan Affirm., ¶ 7). Streater notes that between the filing of the last of the pleadings in early August of 2002, and the filing of the instant summary judgment motion approximately 20 months later, there has been virtually no activity in this case. Streater contends that, because Atlantic Mutual failed to move for a default judgment within a year of Streater's undisputed failure to answer the amended complaint, Atlantic Mutual's claims against Streater should be dismissed, as abandoned.

DISCUSSION

A motion for summary judgment will be granted only where the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has made such a showing, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise triable issues

of fact (see, Zuckerman v City of New York, 49 NY2d 557 [1980]). Issue finding rather than issue determination is the function of the court in deciding a motion for summary judgment.

An insurer establishes a prima facie case of liability for an insurance premium on an audited policy by submitting the policy and endorsements thereto, as well as evidence of the audit and resulting invoices, including the retrospective accountings (see e.g. Commissioners of State Ins. Fund v Beyer Farms, Inc., 15 AD3d 273 [1st Dept 2005] ["unrebutted business records, in the form of the insurance application, the policies and endorsements thereto, the audit reports and resulting invoices, including retrospective accountings" are sufficient to establish prima facie showing]; Commissioners of State Ins. Fund v Country Carting Corp., 265 AD2d 158 [1st Dept 1999]).

In support of the instant summary judgment motion, Atlantic Mutual has submitted the affidavit prepared by Tillstrand; copies of each of the four policies, with the applicable retrospective premium endorsements (Tillstrand Aff., Exhs. 7, 12, 17, and 22); copies of the computations for the 2000 and 2001 retrospective adjustments that Atlantic Mutual alleges are currently due and owing (id., Exhs. 8, 10, 13, 15, 18, 20, 23, and 25); and, copies of the 2000 and 2001 "Policy Loss Analyses" upon which these computations allegedly were based (id., Exhs. 9,

11, 14, 16, 19, 21, 24, and 26).¹ Atlantic Mutual has not submitted documentation or work papers evidencing its audits of Joyce's books and records, the resulting invoices, or evidence that could establish that the calculations of these retrospective premiums were accurate and made in accordance with the appropriate rating plan.² Accordingly, Atlantic Mutual has failed to establish its prima facie entitlement to relief, and that part of the motion that seeks summary judgment on its second, third, fourth and fifth causes of action is denied.³

That part of Atlantic Mutual's motion that seeks dismissal of Joyce's affirmative defenses and/or counterclaims, insofar as they pertain to the four workers compensation policies at issue, is granted to the extent of striking and dismissing all but Joyce's seventh affirmative defense/first counterclaim.

¹The court notes, however, that at least two of the Policy Loss Analysis runs that were submitted by Atlantic Mutual on this motion appear to be incomplete.

²Although Tillstrand states that the retrospective premiums at issue were computed in accordance with the rating plan promulgated by the New York Compensation Insurance Rating Board, which outlines the rates, audit rules and requirements that Atlantic Mutual allegedly followed, Atlantic Mutual has submitted only the table of contents of this rating plan. No detail of the content of the rating plan is otherwise provided.

³Additionally, Atlantic Mutual has failed to submit a statement "of the material facts as to which the moving party contends there is no genuine issue to be tried," as is required by Rule 19-a of the Rules governing the Commercial Division. Failure to submit such a statement constitutes another ground for denial of the motion, as indicated by the language of that Rule.

In its seventh affirmative defense/first counterclaim, Joyce alleges that Atlantic Mutual breached these insurance policies by improperly calculating the retrospective premiums due and by failing to furnish Joyce with information required by the subject policies. Specifically, according to the affidavit of G. Lynn Shostack-Moore, Joyce's former President, well before this suit was filed, Joyce had questioned the accuracy of some of the retrospective premium adjustments at issue and requested Atlantic Mutual to provide supporting documentation. In particular, Joyce alleges that it questioned the apparent inclusion of costs for closed cases that were suddenly reopened, and payments for injuries that might have been sustained by employees after the date on which Joyce had sold the subsidiaries in which those employees had worked. As Atlantic Mutual's submissions on the instant motion do not entirely resolve these issues, dismissal of the seventh affirmative defense/first counterclaim is not warranted at this time.

Joyce's remaining affirmative defenses and/or counterclaims are stricken and dismissed. In its first through sixth affirmative defenses, Joyce asserts that Atlantic Mutual's claims (1) fail to state a cause of action; or are otherwise barred by (2) the applicable statute of limitations; (3) laches; (4) the doctrine of estoppel; (5) the doctrine of waiver; and (6) the

doctrine of unclean hands. As each of these affirmative defenses is asserted with no supporting factual data, and plead mere conclusions of law, they are properly stricken (see Petracca v Petracca, 305 AD2d 566 [2^d Dept 2003]; Robbins v Growney, 229 AD2d 356 [1st Dept 1996]).

Joyce's eighth affirmative defense/second counterclaim alleges that Atlantic Mutual breached the covenant of good faith and fair dealing in administering, defending, and settling claims, which resulted in an increase in the retrospective premiums due. However, New York courts have consistently rejected causes of action/defenses alleging breach of the implied covenant of good faith and fair dealing when asserted in response to a cause of action seeking to recover increased retrospective premiums (see Commissioners of State Ins. Fund v Beyer Farms, Inc., supra; Insurance Co. of Greater N. Y. v Glen Haven Residential Health Care Facility, 253 AD2d 378 [1st Dept 1998]; Commissioners of State Ins. Fund v J.D.G.S. Corp., 253 AD2d 368 [1st Dept 1998]; see also Liberty Mut. Ins. Co., v Thalle Constr. Co., 116 F Supp 2d 495 [SD NY 2000]). Accordingly, this affirmative defense/counterclaim is dismissed.

In Joyce's third affirmative defense/ninth counterclaim, Joyce alleges that Atlantic Mutual breached its fiduciary duty to Joyce in its administration of the subject policies. Under New York law, however, "[n]o special

relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable" (Batas v Prudential Ins. Co. of Am., 281 AD2d 260, 264 [1st Dept 2001]). While a fiduciary relationship may arise as a result of the dealings between an insurer and its insured (see e.g. Hartford Acc. and Indem. Co. v Michigan Mut. Ins. Co., 93 AD2d 337 [1st Dept 1983], affd 61 NY2d 569 [1984] [fiduciary relationship created where insurance company is called on to provide a defense to its insured]), this court can find no relevant authority to support Joyce's contention that the terms of the retrospective premium policies, by adjusting the premium based on the insured's loss record, resulted in a risk sharing with Atlantic Mutual, that gave rise to a fiduciary duty. Accordingly, this cause of action is dismissed. Further, since the equitable relief of an accounting is available only where a fiduciary relationship exists between the parties (see Bettan v Geico Gen. Ins. Co., 296 AD2d 469, 470 [2^d Dept], lv dismissed 99 NY2d 552 [2002], citing Weisman v Awnair Corp. of Am., 3 NY2d 444 [1957]), Joyce's sixth counterclaim is dismissed, as well.

Joyce's tenth affirmative defense/fourth counterclaim is dismissed, as Joyce fails to identify the "applicable" state insurance laws and regulations that Atlantic Mutual allegedly violated. Joyce's eleventh affirmative defense/fifth

counterclaim, which alleges that Atlantic Mutual was negligent in its handling and administering the claims, is dismissed, as New York generally does not recognize an independent tort cause of action for an insurer's alleged failure to perform its contractual obligations under an insurance policy (see New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]; Rocanova v Equitable Life Assur. Socy. of U.S., 83 NY2d 603 [1994]). In any event, to the extent that this particular affirmative defense/counterclaim is based on allegations that Atlantic Mutual was negligent in calculating the retrospective premiums due, and in otherwise failing to comply with the subject insurance policy, it is merely duplicative of Joyce's seventh affirmative defense/first counterclaim for breach of contract.

Joyce's cross motion, for an order directing the parties to proceed with discovery, is granted. However, discovery should be limited to those issues raised by the parties competing contract claims and defenses.

Streater's motion, pursuant to CPLR 3215 (c), to dismiss the complaint asserted against it as abandoned, is granted. The record establishes that there was virtually no activity in this action during the approximately 20 months between the filing of the last of the pleadings, and the filing of the instant motion. It is undisputed that Streater never answered the amended complaint, and that Atlantic Mutual failed to take proceedings to

enter a judgment against Streater within a year of that default. Atlantic Mutual's alleged oversight in failing to notice that Streater's pleadings were directed to the original, rather than the amended, complaint does not excuse its failure to seek a default. The fact that issue had been joined on the original complaint does not compel a different conclusion, as the first amended complaint superseded the original complaint and became the only complaint in this action (see Hummingbird Assoc. v Dix Auto Serv. Inc., 273 AD2d 58 [1st Dept], lv denied 95 NY2d 764 [2000]), citing Halmar Distribs. v. Approved Mfg. Corp., 49 AD2d 841 [1st Dept 1975]).

Accordingly, it is

ORDERED that the motion by plaintiffs Atlantic Mutual Insurance Company and Centennial Insurance Company, for summary judgment is granted to the extent of dismissing all of defendant Joyce International, Inc.'s affirmative defenses and/or counterclaims, except for the seventh affirmative defense/first counterclaim, insofar as these affirmative defenses and counterclaims pertain to the policies at issue on this motion, and the motion is in all other respects denied; and it is further

ORDERED that the motion by defendant Joyce International, Inc., for an order directing the parties to proceed with discovery, is granted to the extent indicated in the decision; and it is further

ORDERED that the motion by defendant Streater, Inc., to dismiss the complaint pursuant to CPLR 3215 (c) is granted.

Dated: April 19, 2005

ENTER:



J.S.C.

FILED
APR 21 2005
NEW YORK
COUNTY CLERK'S OFFICE