

**Commissioner of the State Ins. Fund v
Whitehead**

2007 NY Slip Op 30313(U)

March 20, 2007

Supreme Court, Suffolk County

Docket Number: 0018787

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT-STATE OF NEW YORK
TRIAL TERM PART XXI-SUFFOLK COUNTY**

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

**COMMISSIONER OF THE STATE
INSURANCE FUND.**

Plaintiff,

- against -

**GEORGE WHITEHEAD d/b/a WHITEHEAD
HOUSE PAINTING & HOME IMPROVEMENT,**

Defendant

Index No.: 2003-18787

Calendar No. 2006-00206-OT

DECISION AFTER TRIAL

The Plaintiff commenced this action to recover the sum of \$ 10,403.28 as and for earned premiums due upon worker's compensation insurance coverage provided to the Defendant. Both parties had been represented by counsel but the Defendant's attorney was relieved prior to the time of trial. The matter was referred to the undersigned for a bench trial on 16 March 2007 at which time the Defendant moved for a change of venue to the County of Nassau, which was denied as untimely pursuant to CPLR 511(a). It should be noted that the Defendant had previously made a similar (and unsuccessful) application to Mr. Justice Baisley in the Calendar Control Part. Trial was commenced on 16 March 2007 and concluded on 19 March 2007. Inasmuch as the Defendant was proceeding *pro se*, the Court elected to allow him a great deal of latitude, understanding that he was not trained in the law and hence might well be at a disadvantage in view of Plaintiff's representation by very capable counsel.

The Plaintiff sued to recover the total sum of \$ 10,403.28. The amount sought consisted of earned premiums due of \$ 8,527.28 for the period encompassing September 30, 2000 through June 5, 2002 together with a 22% collection fee which, counsel asserted, was imposed under the express authority of State Finance Law § 18.

The Plaintiff produced two witnesses on its behalf. The first witness was Donna Diederich, the Underwriter who was responsible for the Defendant's account while the second, George Varughese, was the Senior Auditor to whom the Defendant's account was assigned. Both of these witnesses testified credibly. A number of exhibits were introduced into evidence, received pursuant to CPLR 4518. The Defendant offered sworn testimony on his behalf and the Court likewise found him to be credible and worthy of belief.

Trial testimony disclosed that on September 28, 1993, the Defendant applied to Plaintiff for a policy of worker's compensation insurance. Thereafter a policy of insurance was issued for his benefit. The policy cycled through several cancellations and reinstatements, with only one cancellation being germane to the controversy herein. The policy periods at issue are those from September 30, 2000 through September 30, 2001 and from September 30, 2001 through June 5, 2002, when the policy was cancelled for non-payment.

According to the Plaintiff's witnesses, an estimated premium is billed at the policy inception (which may be paid in monthly installments, as was done here) and upon expiration, an audit is conducted for the policy period to determine what the precise premium due for the policy period. This is done even where the policy is renewed as the rates are determined according to the actual business or profession and the actual payroll maintained. For the purposes of worker's compensation coverage, the term "payroll" includes W-2 employees and 1099 independent contractors as well as cash laborers and temporary help. The amount of payroll is determined through an examination of the insured's payroll records, tax returns, checkbooks and other relevant business records. Where an actual audit cannot be conducted, a "desk audit" is put into place where the payroll is estimated predicated upon information obtained in previous audits.

In the present matter, it was uncontroverted that on May 28, 2002, Mr. Varughese met with the Defendant and conducted an actual audit for the period of September 30, 2000 through September 30, 2001. Based upon that examination, the payroll was found to be \$ 25,564.00 which was the amount reported by the Defendant on IRS Form 1040, Schedule C, Line 47b for the tax year 2000. This was memorialized in an Audit Information Form that was signed both by Mr. Varughese and the Defendant and received into evidence as Plaintiff's Exhibit 4. The policy was thereafter cancelled on June 5, 2002 which triggered another audit. Mr. Varughese testified that he was unable to conduct another audit owing to his inability to obtain access to the Defendant and his records. On September 14, 2002, he prepared a Desk Audit wherein he estimated the payroll to be \$ 17,700.00. He testified that inasmuch as he was prevented from performing an actual audit, he utilized the prior period's payroll amount and pro-rated that figure from the inception to the cancellation. The Desk Audit was received into evidence as Plaintiff's Exhibit 6. The total principal balance claimed by Plaintiff is \$ 8,527.28.

Prior to the close of its case, counsel requested a brief recess which was granted by the Court. Following the recess, counsel recalled Donna Diederich who testified that during the recess, the Defendant had produced a copy of his tax return for 2001 and that if the payroll was as stated therein, the Defendant would be entitled to a credit on the amount claimed of up to \$ 3,000.00.

The Defendant thereafter offered sworn testimony which, though eminently believable, did not controvert the evidence offered by the Plaintiff. He did allow that he has not worked for the preceding three years, that he is losing his eyesight and that he subsists on disability payments of \$ 500.00 per month, \$ 84.00 of which is paid to the IRS.

In a matter such as this one, it is the province and indeed the obligation of the trial court to assess and determine matters of credibility, *Morgan v. McCaffrey*, 14 AD 3d 670 (2nd Dept. 2005), *Matter of Liccione v. Michael A.*, 65 NY 2d 826 (1985). Here, in this civil matter, the burden is upon the Plaintiff to plead and prove its direct case by a fair preponderance of the credible, relevant and material evidence, *Prince-Richardson On Evidence*, § 3-210, *Torem v. Central Ave Rest*, 133 AD 2d 25. This Court is of the opinion that the Plaintiff has proven its right to the relief sought by a fair preponderance of the evidence adduced, at least insofar as recovery of premiums is concerned.

Turning to the amount of recovery of principal, the Plaintiff initially demanded \$ 8,527.28 but upon a review of the record, it is apparent that the Plaintiff has voluntarily conceded a credit in favor of the Defendant of up to \$ 3,000.00. In light of all of the evidence adduced, the Plaintiff is entitled to recover the principal sum of \$ 5,527.28 with interest thereon from June 5, 2002 at the statutory rate of 9% per annum as codified in CPLR 5004.

As to the “collection fee” imposed pursuant to State Finance Law § 18, the Court finds that statute, specifically § 18(5), contains express language that is clearly discretionary, which reads, in pertinent part that “...the debtor...may be assessed an additional collection fee...not to exceed twenty two percent of the outstanding debt” [emphasis added]. Therefore, it is within the Court’s discretion as to whether or not to allow recovery of the same by the Plaintiff. Under the circumstances presented, the Court declines to impose the collection fee upon the Defendant.

At this juncture, the Court wishes to express to Ronald S. Snyder, Esq. (Plaintiff’s counsel) the Court’s appreciation of his zealous advocacy as well as his unfettered candor with the Court. In this Court’s opinion, Mr. Snyder has clearly and capably demonstrated his adherence to the Code of Professional Responsibility, codified in 22 NYCRR § 1200, et. seq. . The Court also appreciates his professional indulgence and unfailing courtesy in this matter where the Defendant has appeared *pro se*.

This Court, while sympathetic to the plight of the Defendant as he has placed the same on the record, must nonetheless render its ultimate decision, based upon the law and the facts, in favor of the Plaintiff.

It is, therefore

ORDERED that the Plaintiff recover judgment of the Defendant in the principal amount of \$ 5,527.28 together with interest thereon at the statutory rate of 9% per annum as computed from June 5, 2002, together with a Bill of Costs; and it is further

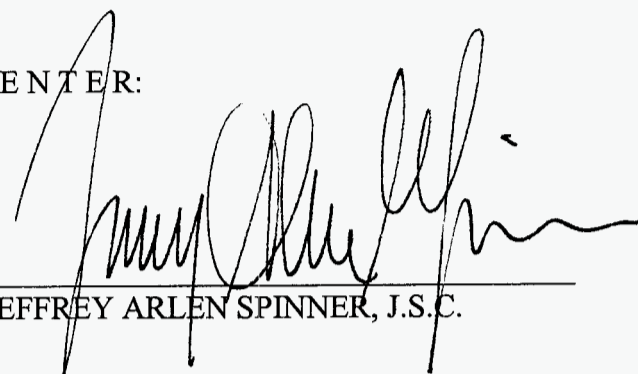
ORDERED that Plaintiff's counsel shall serve a copy of this Decision with Notice of Entry upon the Defendant within twenty one days following entry by the County Clerk; and it is further

ORDERED that Plaintiff's counsel shall submit a Judgment on fifteen days' notice to the Defendant.

This shall constitute the decision and order of this Court.

Dated: 20 March 2007
Riverhead, New York

ENTER:



JEFFREY ARLEN SPINNER, J.S.C.

To:

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FINAL DISPOSITION

NON-FINAL DISPOSITION

SCAN

DO NOT SCAN