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

PRESENT: HON. CAROL EDMEAD PART 35

*Justice*

Comm

- v -

County Erectors

INDEX NO. 402306/00

MOTION DATE 1/12/07

MOTION SEQ. NO. 002

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



Based on the above, it is hereby

ORDERED that the motion by SIF for summary judgment against Defendant for the sum of $408,859.97 representing the balance due for the workers' compensation insurance coverage SIF provided to Defendant, interest from January 14, 1999, and costs and disbursements of this action, is granted, and it is further

ORDERED that the Clerk shall enter judgment in the sum of $408,859.97 plus interest from January 14, 1999, and costs and disbursements of this action upon a submission of the appropriate bill of costs, to be calculated by the Clerk; and it is further

ORDERED that SIF serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: 3/22/07

HON. CAROL EDMEAD J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION [* 1]

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

COUNTY ERECTORS INC.,

Defendant.

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Index No. 402306-2000

Sequence 002
DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Plaintiff, Commissioners of the State Insurance Fund ("SIF"), commenced this action against County Erectors, Inc. ("Defendant"), to recover premiums allegedly past due under a Workers' Compensation and Employer's Liability Insurance Policy provided to Defendant, as well as interest and costs of this action. SIF now moves for renewal of its motion for summary judgment pursuant to CPLR 2221 on the ground that Defendant's bankruptcy case has been dismissed. SIF requests that its motion for summary judgment be granted and that the court enter a judgment in favor of SIF against Defendant for the sum of $408,859.97 with interest from January 14, 1999, plus the costs and disbursements of this action.

Defendant opposes the motion on the ground that it is premature in that it does not contain the requisite proof upon which summary judgment may be granted and additional discovery is needed.

For the reasons set forth below, SIF's motion is granted in its entirety.

## FACTUAL BACKGROUND

Defendant filed an application for Worker's Compensation and Employer's Liability Insurance with the State Insurance Fund to take effect on June 14, 1995. Based on that application, SIF issued Defendant a policy of insurance known as Policy No. 1159019-7 (the "Policy"). SIF cancelled the Policy effective January 14, 1999 due to Defendant's failure to pay the required premiums. Upon cancellation and based upon actual audits of Defendant's books and records, SIF determined that Defendant owed a sum of $408,859.97. SIF subsequently brought the instant action to recover the unpaid premiums.

SIF originally moved for summary judgment on February 5, 2004, but the motion was withdrawn, with leave to renew due to Defendant's filing for bankruptcy protection on March 18, 2004. Defendant's bankruptcy petition was subsequently dismissed on August 11, 2006.

*Plaintiffs' Contentions*

SIF contends that there is no defense to the cause of action set forth in the complaint. Pursuant to Part Four of the Policy, Defendant agreed to pay premiums based upon its payroll. Upon Defendant's default, SIF cancelled the Policy. SIF further contends that its affidavits and documentary evidence support its contentions.

Accordingly, summary judgment should be entered in favor of SIF, against Defendant, for the sum of $408,859.97 with interest from January 14, 1999, plus the cost and disbursements of this action.

*Defendant's Opposition*

Defendant contends that SIF's motion is premature at this time for several reasons. Firstly, as a threshold matter, SIF's motion is defective because it does not contain the requisite

proof upon which summary judgment can be granted. Specifically, SIF failed to submit as an exhibit the actual policy issued to Defendant and instead submitted a Specimen Policy of Insurance (the "Specimen"). Defendant further contends that SIF does not aver that it compared a copy of the Policy to the Specimen or that they are exact copies, although it does maintain that the basic terms are identical. Defendant notes that it has been held that SIF's failure to provide the actual policy is contrary to the best evidence rule and fatal to SIF's claim for unpaid premiums.

Defendant also contends that additional discovery is needed in furtherance of Defendant's affirmative defenses[1] and to determine the premium upon which SIF's action relies. Specifically, there has been minimal exchange of documents and the only deposition conducted has been that of Suresh Modi, SIF's senior underwriter. Defendant further contends that pursuant to Mr. Modi's deposition testimony, he could not address the specifics of Defendant's premiums or what information SIF's auditor relied upon when reviewing Defendant's payroll. As such, Defendant would need to depose the auditor and any other persons who may have had responsibility in determining the premiums.

Additionally, Defendant contends that the computerized bills submitted in support of SIF's motion contain a confusing series of entries and are comprised of calculations made from provisional bills, estimated bills, rebills, and audited bills. Defendant also notes that Mr. Modi had difficulty trying to explain them during the course of his deposition.

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[1] In its answer to the complaint, Defendant asserted three affirmative defenses: (1) payment of premiums so there is nothing now due or owed to SIF; (2) misclassification of employees; and (3) misclassification of independent contractors as employees. The second and third affirmative defenses both conclude that, as a result, SIF charged Defendant the incorrect premiums.

*Plaintiffs' Reply*

In reply, SIF asserts that Defendant's argument for additional discovery is misplaced. Firstly, Defendant was aware of SIF's stayed motion and had approximately three months, from the date its bankruptcy petition was dismissed to the date that SIF moved to renew its motion, in which to seek additional discovery.

Secondly, Defendant deposed SIF's underwriter, Mr. Modi, on November 27, 2001, approximately two years and three months prior to SIF's original motion for summary judgment. Despite SIF's inquiry by way of letter on February 25, 2004 as to whether Defendant would need additional discovery, Defendant did not request any further depositions.

As to Defendant's argument that SIF has failed to satisfy the best evidence rule, SIF does not have the original policy because it was sent to Defendant. Additionally, a copy of the endorsements were provided to Defendant on November 29, 2001 in response to Defendant's Notice for Discovery and Inspection.

With regard to Defendant's affirmative defenses, SIF contends that Defendant's arguments are also misplaced. Defendant must present admissible evidence demonstrating that all payments have been made timely and in full. In the instant case, Defendant fails to do so.

As to Defendant's second affirmative defense, SIF contends that the court lacks subject matter jurisdiction over the issue of alleged misclassification, because only the Compensation Insurance Rating Board, an administrative body, can review classifications. Such a review is limited to twelve months from the expiration of the period for which the review is requested. Since the Policy was cancelled effective January 14, 1999, Defendant's opportunity to request a review expired on January 14, 2000.

Defendant's third affirmative defense, alleging misclassification of independent contractors as employees of the defendant, also lacks merit. During SIF's audits for 1998 to 1999, Defendant failed to provide SIF's auditor with certificates of insurance, or copies of contracts or invoices, to clarify the status of the alleged subcontractors. Notably, Defendant also failed to provide this information in support of its opposition to SIF's motion.

**DISCUSSION**

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212[b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Here, SIF presents, through the affidavit of its underwriter Flaureen Rahman, its business records including Defendant's application for New York Workers' Compensation and

Employers' Liability Insurance, a Specimen Policy of Insurance,[2] invoices, audit worksheets, and the statement of account indicating the balance allegedly due. In her affidavit, Ms. Rahman states that she reviewed the invoices and the statement of account. Based upon that review, the amount due is $408,859.97 from January 14, 1999. Business records, such as the ones mentioned, are sufficient to make out a *prima facie* showing of entitlement to judgment as a matter of law (*see Commissioners of State Ins. Fund v. Beyer Farms, Inc.*, 15 AD3d 273, 274, 792 NYS2d 380 [1st Dept 2005]; *Commissioners of State Ins. Fund v. County* 265 AD2d 158, 158, 696 N.Y.S.2d 129, 130 [1st Dept 1999]; *Commissioners of State Ins. Fund v. Allou Distribs.*, 220 AD2d 217, 217, 632 NYS2d 5, 6 [1st Dept 1995]).

Given that SIF, as the proponent of the motion, made a *prima facie* showing of entitlement to summary judgment, the burden shifts to Defendant to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for its failure to do so (*see Vermette v. Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman,* 49 NY2d at 560, 562; *Forrest v. Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Here, Defendant's submissions in opposition to the motion, which primarily challenge SIF's evidence and methodology for determining the premiums, as well as calling for additional discovery, are insufficient to raise triable issues of fact. Defendant's aforementioned arguments in opposition will be taken in turn.

The best evidence rule requires that when the terms of a writing are to be proved, the original document must be produced unless the proponent can show that is unavailable for

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[2] It is uncontested that the Specimen is a preprinted form that is identical to the Policy and that the original of said policy was sent to the Defendant.

reasons other than his own fault (*see Schozer v. William Penn Life Ins. Co. of New York*, 84 NY2d 639, 643, 620 NYS2d 797, 799 [1994]; Barker and Alexander, 5 N.Y.Prac., Evidence in New York State and Federal Courts § 10:1 [2006]).

An important question to be answered when considering whether the best evidence rule applies is whether the content of the writing sought to be admitted is for its substantive value (Barker and Alexander, 5 N.Y.Prac., Evidence in New York State and Federal Courts § 10:1 [2006]). Thus, where the mere existence of a document is to be proven, the best evidence rule is inapplicable (*Id.*; *see also U.S. v. Sliker*, 751 F.2d 477, 483-84 [2d Cir. 1984] [holding that oral testimony about an insurance policy was properly admitted to prove the existence of insurance, in contrast to proving the terms of the policy]).

The issue before the court is neither the Policy issuance nor its terms, as such matters are uncontested; rather, at issue is the amount allegedly owed by Defendant. That said, SIF's failure to submit the original is not fatal to its motion for summary judgment.

Additionally, several courts have not required the original agreement as part of SIF's *prima facie* case (*see Commissioners of State Ins. Fund v. Allou Distribs.*, 220 AD2d 217, 217, 632 NYS2d 5, 6 [1st Dept 1995] [insurance application, audit worksheets and invoices, statement of accounts for balance due are sufficient to make insurer's *prima facie* case]; *Family Coatings, Inc. v. Michigan Mutual Ins. Co.*, 170 AD2d 816, 817, 566 NYS2d 106 [3d Dept 1991]; *Liberty Mutual Ins. Co. v. Thalle Construction Co., Inc.*, 116 F.Supp.2d 495, 499 [S.D.N.Y. 2000]).

Nonetheless, even if it could be said that the Policy is necessary for SIF to make a *prima facie* case, either because the Policy itself is a necessary document or because its contents are at issue, a long-recognized exception would apply. Secondary evidence of an unproduced original

may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence (*see Schozer*, 84 NY2d at 644, 620 NYS2d at 799). The original is deemed unavailable when it is in the possession of the proponent's adversary (Barker and Alexander, 5 N.Y.Prac., Evidence in New York State and Federal Courts § 10:8 [2006]). In that instance, "all the proponent need do is notify the adversary of his intention to rely on the evidence" (*Id.*). Notice can be implied from the pleadings (*Id.*; *A.F.L. Falck, S.P.A. v. E.A. Karay Co.*, 722 F.Supp. 12 [SDNY 1989]; *see also* The Advisory Committee's Note to Federal Rule 1004[3]).

All competent secondary evidence is admissible provided that its admission does not offend any exclusionary rule (*see Schozer*, 84 NY2d at 645, 620 NYS2d at 800). The burden is on the proponent of the secondary evidence to establish, to the court's satisfaction, that it is reliable and reflects the contents of the original (*Id.*).

As to the first of the two-prong test established by *Schozer*, SIF has met its burden in that it sufficiently explained that the Policy is unavailable, because it was sent to Defendant upon issuance. With regard to the second prong, SIF has established by affidavit that the Specimen is a standard preprinted form that reflects the contents of the Policy word-for-word. Further, SIF submitted as exhibits a copy of the Specimen and a copy of the endorsements in its possession. Furthermore, Defendant has acknowledged the existence of the Policy and has not denied any of its terms either in its papers or by introduction of the original as an exhibit.

Defendant's reliance on *Commissioners of the State Ins. Fund v. Elias Kassas*, (5 Misc 3d 1012[A], 798 NYS2d 708; 2004 WL 2532296, *1 [NY Civil Ct 2004]) for the proposition that SIF's failure to provide the actual policy is fatal is misplaced.

In *Kassas*, SIF sought to recover $2,958.21 in unpaid premiums due pursuant to a worker's compensation insurance contract. When SIF moved for summary judgment in its breach of contract claim, it relied on the "collection manager's mere recitation of the [insurance contract's] document's terms." The court concluded that without the document itself, the collection manager's statements "is rank hearsay, is contrary to the best evidence rule, and relegates SIF to its account stated claim" (*Id.* at *1).

However, here SIF's motion does not rest solely upon a statement of its underwriter, but upon the Specimen and the undisputed terms therein.

With regard to Defendant's claimed need for further discovery the court finds Defendant's argument lacking. Pursuant to CPLR § 3212[f], if "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had" (CPLR § 3212[f]; *see Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). "It is axiomatic that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant" (*Metichecchia v. Palmeri*, 23 AD3d 894, 895, 803 NYS2d 813, 814 [3d Dept 2005]; *see Groves v. Land's End Housing Co.*, Inc., 80 NY2d 978, [1992] [summary judgment motion is properly denied as premature where nonmovant asserts in its affidavits that it needs more discovery time to depose witnesses and discovery timetables set forth in preliminary conference order have not yet expired]; *Schneider v. 17 Battery Place North Associates II*, 289 AD2d 164, 735 NYS2d 509 [1st Dept 2001]).

Conversely, where the nonmoving party has had ample opportunity to conduct relevant

discovery it should not be allowed to claim that facts cannot be stated due to its own voluntary inaction (*see Commissioners of State Ins. Fund v. Country Carting Corp.*, 265 AD2d 158, 696 NYS2d 129, 130 [1st Dept 1999] [defendants' need for disclosure of assumptions and methodologies supporting the fund's evidence did not preclude judgment given defendants' prolonged inactivity prior to plaintiff's motion]; 6B Carmondy-Wait 2d § 39:79 [2006] ["Summary judgment ... may not be defeated on the ground that more discovery is needed, where the side advancing such an argument has failed to ascertain the facts due to its own inaction"]).

Nor is SII's motion for summary judgment premature due to lack of discovery. First, Defendant has failed to avail itself of two lengthy time intervals during which discovery could have been conducted (*see Meath v. Mishrick*, 68 NY2d 992, 994, 510 N.Y.S.2d 560, 561 [1986] ["Summary judgment may not be defeated on the ground that more discovery is needed, where, as here, the side advancing such an argument has failed to ascertain the facts due to its own inaction."]; *Guarino v. Mohawk Containers Co., Inc.*, 59 NY2d 753, 754, 463 NYS2d 433, 434 [1983] ["Inasmuch as plaintiff had deposed one of defendant's officers and in the 17 months available had not indicated a desire for further disclosure, that he now asserts that he had not completed discovery does not interdict the grant of summary judgment"]; *Rodriguez v. 1414-1422 Ogden Avenue Realty Corp.*, 304 AD2d 400, 401, 758 NYS2d 43, 44 [1st Dept 2003] [Landlord's failure to seek discovery during the eight years that the action had been pending provided no basis to forestall summary judgment.]; *National Union Fire Ins. Co. Of Pittsburgh, Pa. v. Marangi*, 214 AD2d 469, 470, 625 NYS2d 535, 536 [1st Dept 1995] [Defendant's claimed need for further disclosure was not a reason to forestall summary judgment where she failed to take advantage of the opportunity to conduct an examination before trial despite plaintiff's

availability.]). Second, Defendant's argument that it recently changed counsel does not excuse the fact that no action was taken during the nearly two years and three month period between Mr. Modi's deposition and SIF's original motion for summary judgment (*see Ingalsbe v. Chicago Ins. Co.*, 287 AD2d 939, 940, 731 NYS2d 782, 784 [3d Dept 2001] [summary judgment is not premature where the nonmoving party has offered no excuse for its failure to conduct discovery during the appropriate time period]; *In re Estate of Dietrich*, 271 AD2d 894, 895, 706 NYS2d 763, 764-65 [3d Dept 2000]).

As to the first of Defendant's affirmative defenses, Defendant, in response to SIF's *prima facie* showing, has failed to come forward with evidence sufficient to raise a triable issue as to whether it had satisfied its obligation to pay the subject premiums (*see Commissioners of State Ins. Fund v. DiPietro*, 289 AD2d 46, 734 NYS2d 432 [1st Dept 2001], citing *Commissioners of State Ins. Fund v. Allou Distribs.*, 220 AD2d 217, 632 NYS2d 5 [1st Dept 1995]). Defendant has not produced any evidence of payment by means of cancelled checks, payment records, or any other form (*see Illumalights Manufacturing, Inc. v. Neo-Ray Products, Incorporated*, 124 AD2d 644, 644, 507 NYS2d 899, 900 [2d Dept 1986]).

Defendant's second and third affirmative defenses of improper classification of employees and independent contractors are also insufficient to defeat summary judgment. Defendant does not deny that it owes SIF money. Furthermore, "[t]he question of improper classification of payroll is not one which the court may consider collaterally, by way of defense or otherwise, in an action by an insurance carrier to recover workmen's compensation insurance premiums" (*Commissioners of State Ins. Fund v. Mascali-Robki Co.*, 208 Misc 316, 320, 145 NYS2d 374, 378 [NY Sup Ct 1955], *affd* 1 AD2d 945, 151 NYS2d 608 [1st Dept 1956]; *see also*

*Commissioners of State Ins. Fund v. Kenneth Yesmount & Associates, Inc.*, 226 AD2d 147, 640 NYS2d 86 [1st Dept 1996] [stating that questions of classifications require administrative review]).

The defense raised by Defendant relates solely to the classification and is not akin to the question of coverage, which may be properly determined by a court (*see Commissioners of State Ins. Fund. v. Fox Run Farms, Inc.*, 195 AD2d 372, 374, 600 NYS2d 239, 241 [1st Dept 1993]). The court in this proceeding lacks jurisdiction to hear the merits of whether classifications are proper. Such administrative review shall be done before the Compensation Insurance Rating Board (*see Commissioners of State Ins. Fund v. Mascali-Robki*, 208 Misc 316, 145 NYS2d 374 [NY Sup Ct 1955], *affd* 1 AD2d 945, 151 NYS2d 608 [1st Dept 1956]). Furthermore, recovery in an action by SIF for premiums need not await a determination by the Compensation Insurance Rating Board of an objection by the "insured that classifications in which its employees were placed were improper" (*Commissioners of State Ins. Fund v. Sealand Marine & Maintenance Corp.*, 13 Misc 2d 745, 178 NYS2d 257 [NY Sup Ct 1958]; *see also Liberty Mut. Ins. Co. v. John Gailer, Inc.*, 1997 WL 328074, *2 [SDNY 1997] [summary judgment granted in favor of insurance company seeking collection of outstanding insurance premiums for workmans' compensation policies, despite a possibility of incorrect classifications]; *Medical Malpractice Ins. Ass'n v. Neuman*, 64 AD2d 559, 560, 406 NYS2d 832, 833 [1st Dept 1978] [suit where medical malpractice insurer was entitled to premiums calculated according to rates established by the superintendent of insurance, despite a possibility that rates may be reduced in the future as a result of administrative proceedings by superintendent of insurance]).

Lastly, Defendant contends that the invoices are difficult to decipher and that Mr. Modi's

deposition supports this conclusion. The court disagrees. Although some of the invoices may appear difficult to decipher, a careful reading leads to the conclusion that SIF is seeking the correct amount. In any event, Defendant failed to demonstrate that the alleged amount due is incorrect. As to the allegation regarding Mr. Modi's deposition, Defendant has provided the court with several fragmented selections from the transcript, which even when taken out of context cannot be said to support its contentions.

**CONCLUSION**

Defendant, in response to SIF's *prima facie* showing, has failed to come forward with evidence sufficient to raise a triable issue of fact. For the foregoing reasons SIF's motion for summary judgment is granted in its entirety.

Based on the above, it is hereby

ORDERED that the motion by SIF for summary judgment against Defendant for the sum of $408,859.97 representing the balance due for the workers' compensation insurance coverage SIF provided to Defendant, interest from January 14, 1999, and costs and disbursements of this action, is granted, and it is further

ORDERED that the Clerk shall enter judgment in the sum of $408,859.97 plus interest from January 14, 1999, and costs and disbursements of this action upon a submission of the appropriate bill of costs, to be calculated by the Clerk; and it is further

ORDERED that SIF serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: March 22, 2007

Hon. Carol Robinson Edmead, J.S.C.