

**Commissioners of State Ins. Fund v Maxcon
Gen. Contr. Corp.**

2007 NY Slip Op 30999(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0401788/2001

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART _____

Index Number : 401788/2001
STATE INSURANCE FUND
vs
MAXON GENERAL CONTRACTING
Sequence Number : 002
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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~~

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
MAY 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/24/07

JUDITH J. GISCHE, J.S.C. 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: PART 10

-----x
COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

-against-

MAXCON GENERAL CONTRACTING CORP.,

Defendant.
-----x

Decision/Order

Index No.: 401788/01

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
MAY 0 1 2007
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Pltf's motion w/DFF affirm, VK affid in support 1

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for enforcement of premiums due under workers' compensation coverage policies, and for a collection fee pursuant to §18(5) of the New York State Finance Law. Before the court is plaintiff's motion requesting an order: (1) directing the Clerk of Court to enter a default judgment in favor of plaintiff and against defendant Maxcon General Contracting Corp. ("Maxcon"), pursuant to CPLR 3215, 3126; (2) granting summary judgment in favor of plaintiff and against defendant, pursuant to CPLR 3212. The motion itself is not opposed and is considered by the court on default.

Plaintiffs are the Commissioners of the State Insurance Fund ("SIF"), the New York State agency that provides workers' compensation and disability insurance for its customers, charging premiums and fees for its services.

The instant motion was served on Maxcon on February 16, 2007. Maxcon has not cross moved or otherwise opposed the instant motion. Therefore this motion has been submitted on default. Issue has been joined and since the motion was brought timely after the note of issue was filed, it will be considered on their merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Background

This action is against a corporation, Maxcon, and is based on non-payment of premiums owed to SIF for workers' compensation coverage. The summons and complaint were filed April 3, 2001. Maxcon answered the complaint on September 21, 2001. In September 2006, SIF requested a preliminary conference with the court. Maxcon's then counsel, Kelley Drye & Warren, LLP ("KDW"), moved by Order to Show Cause to be relieved as counsel on November 13, 2006.

By order dated November 13, 2006, Hon. Sherry Klein Heitler directed KDW to be relieved and instructed them to notify defendant to appoint a substitute attorney within thirty days. Defendant was also ordered to appear for a status conference on December 15, 2006. Plaintiff states that defendant's former counsel complied with this order, but that Defendant never appointed substitute counsel and failed to appear for the conference scheduled December 15, 2006. Plaintiff did appear at that conference, and filed the Note of Issue on January 23, 2007.

SIF requests that the court direct the Clerk to enter a default judgment in their favor because Maxcon failed to appear at the December 15, 2007 conference. CPLR 3126, 3215. In the alternative, if the court denies plaintiff's motion for entry of a default judgment, plaintiff argues that it is entitled to summary judgment in its favor. CPLR

[* 4]
3212.

Based on the sworn Affidavit of Valerie Kelly, an Underwriter employed by SIF, upon a copy of the contract and assignment of the subject policy, and statement of account, SIF contends that at the specific request of Maxcon, it provided insurance to Maxcon under insurance policy number 1154 702-3 for an agreed price. After outstanding premiums in the sum of \$91,941.85 (plus interest at 9% per annum from September 11, 2000) were not paid by Maxcon, SIF cancelled its policy agreement with Maxcon (first cause of action). SIF also sent out invoices of the balance due which were returned without objection (second cause of action). Finally, plaintiff alleges that a State Agency, pursuant to State Finance Law § 18(5), is entitled to a collection charge in the sum of \$22,227.21 for defendant's failure to tender payment within 90 days of receiving the bill (third cause of action).

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003).

There are no triable issues of fact relevant to this action. SIC has met its initial burden in that the above claims establish the elements of a *prima facie* cause of action for non-payment of insurance premiums and the ancillary right to statutory collection fees. Maxcon's answer contains general denials which do not establish a basis for judgment in its favor.

Maxcon has also set forth several affirmative defenses. Maxcon contends that the plaintiff has failed to serve the summons in this action as provided by the CPLR. However, pursuant to CPLR 3211(e), Maxcon's time to move for judgment on the ground of improper service of the initiating pleading has expired and the court is unwilling to extend the time to do so. Maxcon's remaining affirmative defenses: (1) that the complaint fails to state a cause of action upon which relief can be granted against Maxcon; (2) that SIF's claims are barred by the doctrines of estoppel, waiver, laches and/or statutory compliance; and (3) that if Maxcon is liable for SIF's damages, SIF failed to mitigate its damages. The court has considered these affirmative defenses and finds them unavailing.

Accordingly, SIC is entitled to summary judgment on its three causes of action. As such, SIF's motion for entry of a default judgment is hereby rendered moot.

Conclusion

In accordance with this decision, it is hereby:

[* 6]
ORDERED that plaintiff's motion for summary judgment is hereby granted; and it is further

ORDERED that plaintiff's motion for entry of a default judgment is dismissed as moot; and it is further


ORDERED that the Clerk shall enter a default judgment in favor of plaintiff Commissioners of the State Insurance Fund, against defendant Maxcon General Contraction Corp., in the amount demanded: in the 1st and 2nd causes of action, totaling Ninety One Thousand Nine Hundred Forty One 85/100 Dollars (\$91,941.85), together with interest at Nine Percent (9%) per annum from September 11, 2000 to the date of entry of this judgment; and in the 3rd cause of action, totaling Twenty Two Thousand Two Hundred Twenty Seven Dollars 21/100 Dollars (\$22,227.21), together with the costs and disbursements of this action.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 20, 2007

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

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NEW YORK
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