

**Commissioners of the State Ins. Fund v Edgemont
Custom Carpentry, Inc.**

2007 NY Slip Op 31060(U)

April 25, 2007

Supreme Court, New York County

Docket Number: 0402866/2005

Judge: Shirley W. Kornreich

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

PRESENT. **SHIRLEY WERNER KORNREICH**
J.S.C.

PART 54

Index Number : 402866/2005

STATE INSURANCE FUND

vs

EDGEMONT CUSTOM CARPENTRY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for SJ

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4, 5

Cross-Motion: Yes No

FILED
MAY 04 2007
NEW YORK COUNTY CLERK'S OFFICE

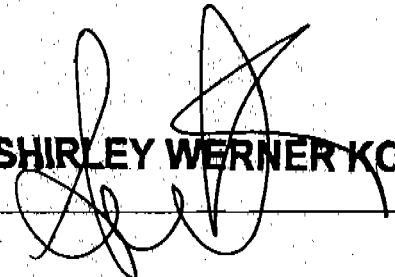
Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 4/25/07

SHIRLEY WERNER KORNREICH
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

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

Index No.: 402866/05

Plaintiff,

**DECISION
and
ORDER**

-against-

EDGEMONT CUSTOM CARPENTRY, INC. and
SUNNINGDALE DEVELOPMENT CO., LLC,

Defendants.

FILED

MAY 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

-----X
KORNREICH, SHIRLEY WERNER, J.:

This is an action brought by The Commissioners of the State Insurance Fund ("SIF") to recover premiums for workers' compensation insurance. Plaintiff now moves to strike defendants' affirmative defenses and for summary judgment on its: 1) "First Cause of Action in the sum of \$110,174.01, representing the balance due for the workers' compensation insurance coverage SIF provided to defendants"; 2) its fourth cause of action for collection costs which it contends is \$24,238.28; and 3) interest on the judgment from January 16, 2005.

In support of its motion, plaintiff has annexed: an affidavit of one of its underwriters Tomy Manimala; defendants' October 1, 2003 application for insurance coverage submitted to plaintiff; the policy issued by plaintiff; audit worksheets of defendants' books and records created by plaintiff for the periods of October 1, 2003 to April 1, 2004 and April 1, 2004 to January 16, 2005; recently printed invoices for the premiums allegedly owed; a partial copy of the complaint;¹ and defendants' verified answer.

I. ***Statement of Facts***

¹ The complaint annexed to the papers, does not include the second and third causes of action.

Mr. Manimala avers that he is familiar with the books and records annexed, which were made and maintained in the course of plaintiff's business. He explains that the policy issued to defendants was self-renewing and was in effect from October 1, 2003 to January 16, 2005. He affirms that the original premium was based on the application information and the subsequent premiums were based upon audits performed by plaintiff of the previous year or the previous years' estimated premium. In addition, he explains that the cost of the insurance is dependent upon the number of employees insured, the hazards related to their jobs and payroll. Mr. Manimala avers that an audit of defendants' books and records was conducted for the first time after commencement of this action and that on August 1, 2006, plaintiff mailed a statement reflecting that defendants owed \$110,174.01 in premiums. The premiums were not paid. Finally, Mr. Manimala avers that plaintiff's attorney is paid 22% of the sums collected.

Defendants' insurance application indicates that they are residential home builders. The insurance policy, Part Four, delineates how premiums are calculated, states that premiums are to be paid when due, provides that the premium on the information page is just an estimate and will be determined at the end of the premium period, requires defendants to keep records of the information needed to compute the premiums and obligates defendants to submit to audits of all of their records in order to determine the final premium. The policy also states that it is automatically renewable. Further, the information page of the policy states that payment in an amount less than the full amount would result in interest at an annual rate of 12% and service charges. Moreover, if a policy is cancelled due to non-payment, the rate paid will be increased by a short-rate cancellation table and procedure.

Defendants' answer asserts two affirmative defense. Defendants contend that plaintiff's "culpable conduct" caused the damages alleged and that plaintiff has failed to perform a correct

[* 4]
audit.

Defendants submit the affidavit of Stephen Piekarski, their president and managing partner, in opposition. He avers that no premiums are due and annexes an October 2006 audit done by defendants. Based upon that document, Mr. Piekarski contends that defendants are owed a \$3,698 credit by plaintiff. He further avers that after the most recent audit of defendants' books by plaintiff, plaintiff's unnamed auditor "remarked to [Mr. Piekarski] that at best [defendants] owe \$7,500." Mr. Piekarski states that plaintiff's second audit for the 2004-2005 period, reduced the net premium owed for the period to \$7,500 and that defendants had paid the account balance. This second audit was annexed to the opposition. The annexed audit, however, does not show a net premium owed of \$7,500, but reflects that premium to be \$53,131.95 and does not indicate that the account balance was paid. Rather, there are unidentified handwritten notations on the audit supporting defendants' claims.

Plaintiff, in reply, argues that defendants' papers are conclusory and unsupported by any evidence. It also argues that the audit statement is unidentified, is unsupported by data and fails to address the October 1, 2003 to April 1, 2004 insurance period.

II. *Conclusions of Law*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). If the movant makes out a prima facie case, the opponent must come forward and "lay bare [his] proofs" of any alleged triable issues of fact. *See In re Dissolution of Rencor Controls, Inc.*, 263 A.D.2d 845, 846 (3d Dept. 1999) *citing Hanson v. Ontario Milk Producers Coop., Inc.*, 58 Misc.2d 138 (Sup.Ct. Oswego County 1968) (Aronson, J.); *Bank of New York v.*

* 5]
Spitzer, 43 A.D.2d 105 (1st Dept. 1973).

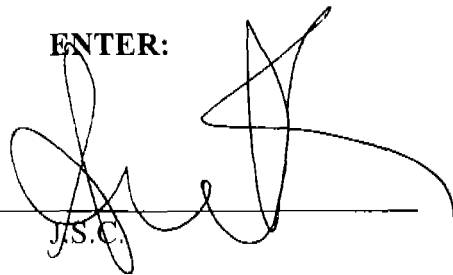
Here, the SIF has demonstrated its prima facie entitlement to judgment, submitting evidence that defendants failed to pay premiums due under their workers' compensation insurance policy. In response, defendants have failed to raise any triable issues of fact. Although Mr. Piekarski makes the conclusory statement that "[defendants'] own audit shows a credit due [to them] of \$3,698," the so-called "audit" does not appear to demonstrate any credit, but rather a balance due. Mr. Piekarski's remaining allegations are similarly conclusory and unsupported by his own exhibits. Nor do defendants' vague affirmative defenses, unsupported by evidence, change this result. *See American Mortgage Banking v. Canestro*, 201 A.D.2d 407, 408 (1st Dept. 1994) (proper to dismiss affirmative defense where defendants' unsubstantiated allegations fail to establish defense). Thus, the SIF is entitled to summary judgment on its first and fourth causes of action. Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendants Edgemont Custom Carpentry, Inc. and Sunningdale Development Co., LLC in the sum of \$110,174.01, with interest at the statutory rate from January 16, 2005 (end of policy) until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs of \$24,238.28 (22% of the sum due plaintiff for attorney's fees, pursuant to State Finance Law § 18[5]) and disbursements as taxed by the Clerk.

Dated: April 25, 2007

FILED
MAY 04 2007
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ENTER:


J.S.C.