

**Commissioner of State Ins. Fund v Precision
Movers, Inc.**

2007 NY Slip Op 31199(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0403924/2005

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Commissioners of SIF

- v -

Precision Movers, Inc

INDEX NO.

403 924/05

MOTION DATE

5/7/07

MOTION SEQ. NO.

02

MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on this motion to/for summary judgment

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

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits

5-8

Replying Affidavits

9-11

FILED

MAY 14 2007

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided as follows:

Defendants Precision Movers, Inc. and Advantage Van Lines, Inc. move for summary judgment dismissing the complaint in this action by the State Insurance Fund ("SIF") to recover workers compensation insurance premiums. SIF cross-moves for summary judgment striking those affirmative defenses based upon defendants' allegation that SIF based its claim for premiums upon an erroneous classification of defendants' employees.

The summons and complaint was filed in November 2005. It alleges breach of contract arising from defendants' failure to pay premiums, account stated, and defendants' refusal to permit SIF to inspect books and records. Defendants did not timely serve an answer, and SIF sought a default judgment in September 2006. The motion was withdrawn on October 6, 2006, apparently after defendants contacted SIF's counsel. SIF then granted defendants' requests to extend their time to serve an answer pending the results of an audit of defendants' records.

Defendants finally served an answer in February 2007, denying liability and asserting four affirmative defenses. In the first affirmative defense, defendants allege that SIF fails

Dated: _____

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

Handwritten signature and initials

to state a cause of action, in part because Advantage Van Lines, Inc. has no employees. SIF offers no proof to rebut defendants' claim that Advantage Van Lines, Inc. has no employees and was improperly sued, so the complaint is dismissed as against that defendant. The second and third affirmative defenses allege that SIF based its claim for premiums on the incorrect classification of alleged employees, vendors, suppliers and subcontractors.

The thrust of defendants' motion is that SIF commenced this action prematurely, after it had determined that premiums were owed, but before it had performed audits and calculated the amount of unpaid premiums to a reasonable certainty. Since this action was commenced, SIF has performed audits of defendants' records and reduced its demand. SIF also has determined that at least one of its post-lawsuit audits was done improperly and needs to be repeated.

SIF contends that it commenced this action when it learned that defendants had breached their insurance contract, and after defendants refused to permit an audit. Defendants deny that they refused to permit an audit prior to the lawsuit, and their contention is supported by a copy of SIF audit results arising from a May 10, 2005 audit (Notice of Cross-motion, Exhibit 4). In any event, there is no dispute that SIF has performed audits in recent months.

Defendants concede that the policy was breached, but that they owe only a small amount. They offer no authority for the proposition that an action for breach of contract should be dismissed where the alleged breach resulted in damages in an amount less than pleaded. However, the motion is granted to the extent that the third cause of action, which seeks judgment directing defendants to produce their books and records for inspection, is dismissed as moot because it already has been permitted to inspect and audit defendants' records.

With respect to the cross-motion, it is granted in part because the court is without jurisdiction to review issues of classification. A challenge to classification must be pursued administratively, and may be challenged in this court only in the context of an Article 78 proceeding. SIF v Fox Run Farms, Inc., 195 AD2d 372 (1st Dept 1993). Accordingly, the second and third affirmative defenses are stricken to the extent that they raise the defense that SIF failed to properly classify defendants' workers. However, the affirmative defenses also raise coverage issues, i.e., that SIF is seeking to recover premiums for workers, vendors, suppliers and subcontractors that are not on defendants' payrolls, and for whom no insurance was provided. Fox Run Farms, Inc., 195 AD2d at 374. Accordingly, it hereby is

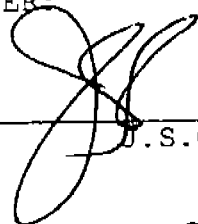
ORDERED that defendants' motion for summary judgment is granted to the extent that the third cause of action is dismissed as moot; and the complaint is severed and dismissed as against defendant Advantage Van Lines, Inc., and the Clerk of the Court is directed to enter judgment accordingly; and it further is

ORDERED that the motion is otherwise denied; and it further is

ORDERED that the cross-motion to strike defendants' affirmative defenses is granted only to the extent that defendants raise SIF's improper classification of employees as affirmative defenses, and otherwise is denied.

Dated: May 10, 2007

ENTER:



J.S.C.
JANE S. SOLOMON

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