

Commissioners of the State Ins. Fund v North Valley Contr. Co., Inc.
2007 NY Slip Op 31265(U)
May 16, 2007
Supreme Court, New York County
Docket Number: 0400490/1999
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JOAN A. MADDEN

Index Number : 400490/1999
COMMISSIONERS
VS.
NORTHERN VALLEY CONTRACTING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

J.S.C.

PART 11

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is determined in accordance with the annexed decision and order.*

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

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 16, 2007

[Signature]
HON. JOAN A. MADDEN *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: IAS PART 11

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

Plaintiff,

Index No. 400490/99

-against-

NORTH VALLEY CONTRACTING CO., INC.,

Defendant.

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this action seeking recovery of Worker's Compensation Insurance premiums, plaintiff Commissioners of the State Insurance Fund (State Insurance Fund) moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor against defendant North Valley Contracting Co., Inc. (North Valley) on the ground that no genuine triable issues of fact exist. North Valley opposes the motion, and cross-moves for an order, pursuant to CPLR 3126, prohibiting State Insurance Fund from introducing evidence at the trial of this action of the audit reports of Seymour Winitz, or, in the alternative, resolving any and all disputes concerning these audit reports in North Valley's favor. For the reasons set forth herein, State Insurance Fund's motion is granted and North Valley's cross motion is denied.

BACKGROUND

State Insurance Fund, a New York State agency, authorized to issue Worker's Compensation policies, seeks to recover billed and unpaid premiums, plus interest, on a Worker's Compensation and Employer's Liability Insurance policy (number 1066518-0) issued to North Valley. On or about January 27, 1997, State Insurance Fund sent a notice of

cancellation to North Valley, notifying it that the policy would be canceled, effective February 20, 1997, for default in payment of premiums, and the policy was thereafter canceled.

DISCUSSION

Workers' compensation premiums are based on payroll and the risk classification of each occupation. An audit of a company's books is performed to determine the risk associated with each employee's position and to establish the payroll amount attributable to each risk classification. The payroll figure is then multiplied by a percentage corresponding to the risk associated with the particular position and the figures totaled to arrive at the premium charge.

(Commissioners of State Ins. Fund v Fox Run Farms, Inc., 195 AD2d 372, 373 [1st Dept 1993]).

State Insurance Fund contends that \$448,957.69 is due and owing based on actual audits. Annexed to the motion are copies of, among other things: (a) bills, all of which State Insurance Fund alleges were mailed to North Valley, each containing an explanation of how said premiums were determined; (b) statements of account showing payments received from North Valley and credited to its account; (c) audit worksheets prepared by State Insurance Fund's auditors based on the audits of North Valley's books and records. According to State Insurance Fund, the audits are all certified by North Valley. State Insurance Fund submits that the above-mentioned documents are official records of State Insurance Fund, a New York State Agency, and are records kept in the ordinary course of its business.

North Valley counters that: (a) the audits conducted by State Insurance Fund were erroneous, and the documents submitted by State Insurance Fund do not constitute "business records" and, as such, are an insufficient predicate for summary judgment; (b) State Insurance Fund erroneously computed the premium rates based on misclassifications; (c) State Insurance Fund did not give North Valley credit for subcontractors that had certificates of insurance; and

(d) State Insurance Fund charged North Valley improper differentials not authorized by the New York Compensation Rating Board. North Valley further maintains that it is necessary to depose Mr. Winitz, who performed the audits of North Valley's books and records in 1997 on behalf of State Insurance Fund (but who is no longer employed by it).

Business records are sufficient to make a prima facie showing of entitlement to summary judgment (Commissioners of the State Ins. Fund v Country Carting Corp., 265 AD2d 158 [1st Dept 1999] ["plaintiff's unrebutted business records, which included the insurance application, audit worksheets and resulting invoices and statements of account for a balance due, were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law"]; see also Commissioners of the State Ins. Fund v Concord Messenger Service, Inc., 34 AD3d 355 [1st Dept 2006]; Commissioners of the State Ins. Fund v Beyer Farms, Inc., 15 AD3d 273 [1st Dept 2005]; Commissioners of the State Ins. Fund v DiPietro, 289 AD2d 46 [1st Dept 2001]; Commissioners of the State Ins. Fund v Allou Distributors, Inc., 220 AD2d 217 [1st Dept 1995]). The audits were admitted correct by North Valley when a representative of defendant certified that the information on the audit worksheets was correct. The court therefore rejects North Valley's claim that the audits do not constitute business records.

North Valley's next argument, based on State Insurance Fund's alleged improper classification, may not be raised as a defense herein. The issue of rate classification requires administrative review, and may not be "consider[ed] collaterally, by defense or otherwise, in an action by an insurance carrier to recover Worker's Compensation insurance premiums" (see Commissioners of the State Ins. Fund v Pennsylvania Tower Painting Co., Inc., Sup Ct, Nassau County, December 22, 2005, LaMarca, J., Index No. 12463/04; citing Commissioners of State

Ins. Fund v Mascali-Robke Co., 208 Misc 316, 320 [Sup Ct NY County 1955], affd 1 AD2d 945 [1st Dept 1956]; see also Commissioners of State Ins. Fund v Fox Run Farms, Inc., 195 AD2d 372 [1st Dept 1993]).

So too, any challenges to the differential rates, should have been made to the Rating Board, and may not be asserted as a defense to payment herein. The means for challenging a State Fund Differential is by means of a protest, pursuant to 12 NYCRR 452, and thereafter, if dissatisfied, Article 78 judicial review. Likewise, challenges to the Experience Modification Factor used in determining premiums, must be made in a timely matter to the Rating Board, also pursuant to 12 NYCRR 452. North Valley did not challenge either the differential or the Experience Modification Factor in the manner prescribed, and is therefore barred from raising these challenges now.

Although the question of whether North Valley was improperly charged premiums for subcontractors is considered a proper question for the court (see Commissioners of State Ins. Fund v Kenneth Yesmont & Assocs., Inc., 226 AD2d 147 [1st Dept 1996]), North Valley has not provided any Worker's Compensation certificates or other evidence to show that it may have been incorrectly billed for any such subcontractors. Thus, this ground is of no avail to North Valley.

State Insurance Fund has produced evidence in the form of business records supporting the premiums charged and sought herein. North Valley has not produced any evidence to contradict this proof. Its claimed need for discovery, including the deposition of auditor Winitz, "is no more than a 'mere hope' that disclosure will reveal something helpful to its cause, [and] is insufficient to forestall summary judgment" (Commissioners of the State Ins. Fund

[* 6]
v Concord Messenger Service, Inc., supra, 34 AD3d at 356, citing Fulton v Allstate Ins. Co., 14 AD3d 380, 381 [1st Dept 2005]; see also Commissioners of the State Ins. Fund v Country Carting Corp., supra, 265 AD2d 158).

North Valley's opposing arguments are conclusory and without any evidentiary support. Since North Valley has failed to raise any triable issues or refute State Insurance Fund's entitlement to summary judgment in any respect (Zuckerman v City of New York, 49 NY2d 557 [1980]), State Insurance Fund is entitled to judgment (see Commissioners of the State Ins. Fund v Country Carting Corp., supra, 265 AD2d 158). Furthermore, North Valley has not established its entitlement to any of the relief requested in its notice of cross motion.

Accordingly, it is

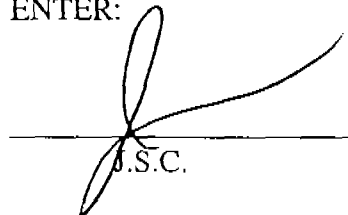
ORDERED that the motion of plaintiff Commissioners of the State Insurance Fund for summary judgment is granted and the Clerk is directed to enter judgment in favor plaintiff Commissioners of the State Insurance Fund and against defendant North Valley Contracting Co., Inc, in the amount of \$ 448,957.69, together with interest from February 20, 1997 as computed by the Clerk, and costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant North Valley Contracting Co.'s cross-motion is denied.

DATED: May 16, 2007

FILED
MAY 22 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


J.S.C.