

<b>Commissioners of the State Ins. Fund v Sears</b>
2007 NY Slip Op 31925(U)
July 2, 2007
Supreme Court, Albany County
Docket Number: 0014692/0051
Judge: Joseph C. Teresi
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STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY  
COMMISSIONERS OF THE STATE  
INSURANCE FUND,

Plaintiff,

**DECISION and ORDER**  
**INDEX NO. 1469-05**  
**RJI NO. 01-06-085621**

-against-

RICHARD SEARS; RICHARD SEARS d/b/a  
RICHARD SEARS TREE EXPERTS, INC.,

Defendants.

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Supreme Court Albany County All Purposes Term, June 25 2007

**APPEARANCES:**

Gregory J. Allen Esq.  
Attorneys for Plaintiff  
(Robert C. Kinkead, Esq. of Counsel)  
1 Watervliet Avenue Extension  
Albany, New York 12206

Brennan & White LLP  
Attorney for Defendants  
(Daniel J. Stewart, Esq. of Counsel)  
163 Haviland Road  
Queensbury, New York 12804

**TERESI, J.:**

The plaintiff moves for summary judgment pursuant to CPLR 3212 and seeks to recover premiums for workers' compensation and disability insurance provided to the defendant. The defendant opposes the motion and alleges questions of fact exist that preclude summary

judgment.

The plaintiff, the State Insurance Fund is a state agency in the Department of Labor charged with providing workers' compensation and disability insurance to businesses operating in New York State. The State Insurance Fund charges premiums for such coverage. On April 26, 1996, the plaintiff issued a policy of workers' compensation insurance to the defendant Richard Sears Tree Experts Inc. The plaintiff alleges the policy was in effect until it was cancelled on April 15, 2004 for non-payment of the premiums. The plaintiff alleges the amount of the premiums is determined by the defendant's payroll figures. The plaintiff alleges the defendant owes \$53,132.48 for the balance due on the cancelled workers' compensation insurance policy for the period of September 12, 2002 to April 15, 2004.

The defendant's accountant alleges Richard Sears has two businesses: Richard Sears Tree Experts, Inc and Richard Sears Landscaping Corp. The defendant alleges Richard Sears Tree Experts, Inc. is insured by the plaintiff. The defendant alleges Richard Sears Landscaping Corp. is insured by another provider. Defendant's accountant claims that on February 6, 2004 her employee signed a payroll audit which the plaintiff used to calculate the premiums. The accountant also signed a payroll audit on June 23, 2004 The accountant alleges she disputed the payroll figures with plaintiff's representative but was told to sign the audit and her recourse was to appeal the determination. In a letter dated March 16, 2004 to the plaintiff, defendant's accountant protested the additional payroll reported on the audit and requested that the payroll be amended to reflect the true payroll assessment. The accountant alleges the payroll figures contained in the two audits were not correct. The accountant certified that the payroll records she prepared for both companies were accurate. The accountant alleges Richard Sears Tree Experts,

Inc. subcontracted work to Richard Sears Landscaping Corp. and she properly allocated the salaries between the landscaping firm and the tree removal business. The accountant contends the plaintiff incorrectly used the salaries for both companies in the calculation of the premiums.

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v City of New York, *supra*, 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 ( 3<sup>rd</sup> Dept. 2001). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

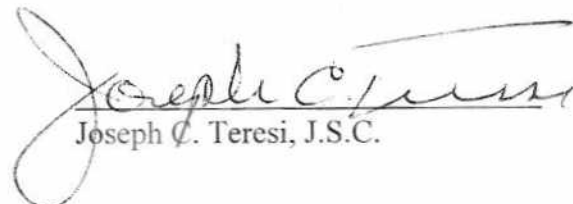
Workers Compensation Law § 95 requires "every employer who is insured by the State Insurance Fund shall keep a true and accurate record on the number of his employees and the

wages paid by him, and shall furnish upon demand a sworn statement of the same.” The record reveals the defendant kept the required employee payroll records. The defendant’s accountant contends she signed the two audits at the insistence of the plaintiff’s employee knowing that the payroll records were incorrect. Subsequently, defendant’s accountant informed the plaintiff in writing that she disputed the audit payroll figures and requested that the payroll figures be corrected. The defendant has raised questions of fact that precludes summary judgment as matter of law. There appears to be an issue of fact as to whether the landscaping wages were included in the calculation of the premiums for the tree removal business. Summary judgment is improper when the affidavit of defendant’s accountant disputes the amounts stated on the invoices for workers’ compensation insurance. See, Legion Ins. Co. v. Northeastern Plate Glass Corporation, \_\_AD3d \_\_ NY Slip Op 04748 (3<sup>rd</sup> Dept. 2007).

All papers, including this Decision and Order are being returned to the attorney for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
July 7, 2007

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion dated April 26, 2007;
2. Affirmation of Robert C. Kinkead, Esq. Dated April 26, 2007 with attached exhibits 1-20;
3. Affidavit of Lawrence Biernacki dated April 25, 2007;
4. Affidavit of Rebecca J. Herrick, CPA dated April 15, 2007 with attached exhibits A-D;
5. Affidavit of Daniel J. Stewart, Esq. dated June 18, 2007 with attached exhibits A-C.