

**One Beacon Ins. Co. v Kings Plaza
Diner Inc.**

2007 NY Slip Op 32162(U)

July 22, 2007

Supreme Court, New York County

Docket Number: 0115450/2006

Judge: Barbara Kapnick

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

PRESENT: ESTERITA R. KAPROK
J.S.C.
Justice

PART 12

Index Number : 115450/2006
ONE BEACON INSURANCE
vs
KINGS PLAZA DINER
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 115450/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers _____ this motion to/for _____

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

PAPERS NUMBERED

FILED

JUL 19 2007

Cross-Motion: Yes No

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**

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

Dated: 7/13/07


ESTERITA R. KAPROK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
ONE BEACON INSURANCE COMPANY,

Plaintiff,

-against-

KINGS PLAZA DINER INC.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 115450/06
Motion Sequence No. 001

FILED
JUL 19 2007
NEW YORK
COUNTY CLERKS OFFICE

In this action, plaintiff One Beacon Insurance Company seeks to recover unpaid premiums in the sum of \$40,072.00, together with interest from June 23, 2005, and costs and disbursements, for an insurance policy issued by plaintiff to the defendant Kings Plaza Diner Inc. for the policy period commencing June 23, 2004 and ending June 23, 2005, based on an amount due and owing (first cause of action) and on an account stated (second cause of action).

Plaintiff now moves for summary judgment against the defendant on the grounds that there is no defense to this action.

Defendant opposes the motion on the ground that the plaintiff is a foreign corporation which is doing business in New York without the requisite authority. See, BCL § 1312 which provides, in relevant part, that

- (a) A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such

corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation.

However, pursuant to BCL § 103, said provision does not apply "to a foreign corporation of any type or kind heretofore or hereafter formed which (1) has as its purpose or among its purposes a purpose for which a corporation may be formed only under the insurance law, ..., and (2) is ... an authorized insurer as defined in the insurance law. ..."

There is no dispute that plaintiff is an insurance corporation authorized by the New York State Department of Insurance to sell insurance in the State. Therefore, this Court finds that BCL § 1312 does not preclude plaintiff from maintaining this action.

Defendant alternatively argues solely through an attorney's affirmation that the audit provisions in the policy relating to premiums are too vague, indefinite and ambiguous to be enforceable, or at least create a material question of fact as to the calculation and determination of the premiums the plaintiff seeks to recover herein.¹

¹ Specifically, defendant argues that the provisions fail to specify the precise basis for determining and calculating the premium and do not offer any example of how the premium is calculated.

However, it is well settled that "[f]actual allegations contained in an attorney's affirmation are of no probative value on a motion for summary judgment (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 ... [1980])." *Santamaria v. 1125 Park Avenue Corp.*, 238 A.D.2d 259, 260 (1st Dep't 1997).

In the instant case, defendant has not submitted any affidavit from a person with knowledge denying that the premiums sought by plaintiff are owed and/or denying plaintiff's claim that account statements in the amount of \$40,072.00, copies of which are annexed to the moving papers, were delivered to and accepted by defendant without objection (see, *Rothstein & Hoffman Electric Service, Inc. v. Gong Park Realty Corp.*, 37 A.D.3d 206 [1st Dep't 2007], lv. to app. denied, 8 N.Y.3d 812 [2007]).


Thus, defendant has failed to present sufficient evidence to rebut plaintiff's prima facie showing of its entitlement to summary judgment. See, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Figueroa v. Flatbush Women's Services, Inc.*, 222 A.D.2d 398 (2nd Dep't 1995).

Accordingly, based on the papers submitted and the oral argument held on the record on April 25, 2007, plaintiff's motion for summary judgment is granted.

The Clerk may enter judgment in favor of plaintiff One Beacon Insurance Company and against defendant Kings Plaza Diner Inc. in the sum of \$40,072.00, together with interest to be calculated by the Clerk from June 23, 2005, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Date: July 13, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE