

**Atlantic Mut. Ins. Co. v California Fruits Mkts., Inc.**

2007 NY Slip Op 32383(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0603112/2005

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART \_\_\_\_\_

Index Number : 603112/2005

ATLANTIC MUTUAL INSURANCE CO

vs

CALIFORNIA FRUIT MARKETS INC

Sequence Number : 002

SUMMARY JUDGMENT

NO. \_\_\_\_\_

NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

AUG 0 1 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 7/26/07

**JUDITH J. GISCHE, J.S.C.** *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: PART 10**

-----X  
Atlantic Mutual Insurance Company,

Plaintiff

-against-

California Fruits Markets, Incorporated  
d/b/a CFM Food Distributors,

Defendant.

**DECISION/ORDER**

Index No.: 603112/05

Seq. No.: 002

Present:

Hon. Judith J. Gische  
J.S.C

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltff n/m (§3212) w/NEH affid, exhs .....	1
Def opp w/JL affid, exhs .....	2
MAG reply affirm, exh .....	3

*Upon the foregoing papers the court's decision is as follows:*

**GISCHE, J.**

This is an action to recover damages for breach of contract. The court has before it plaintiff's motion for summary judgment which defendant opposes. Though issue has been joined, the note of issue has not been filed, therefore this motion is timely and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

As the proponent of this summary judgment motion, plaintiff has the burden of making a prima facie showing of entitlement to judgment in its favor as a matter of law,

tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to defendant who must then demonstrate the existence of a triable issue of fact to defeat the motion. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

### **Background**

Plaintiff is an insurance provider. It provided defendant with worker's compensation insurance for the year 2002 - 2003 and for 2003 - 2004. It is undisputed that defendant received the benefit of such coverage. It is also unrefuted that plaintiff billed defendant for certain premiums that defendant has not paid. The sole dispute presented by this motion is whether plaintiff has proved the premiums that defendant owes or, as defendant claims, a further audit, or further proof of the premiums owed is necessary before plaintiff is entitled to entry of judgment.

In the complaint plaintiff alleges that defendant has total unpaid premiums of \$35,960 for the 2002/2003 and 2003/2004 policies. After this action was commenced, and it brought a prior motion for summary judgment, plaintiff withdrew the motion voluntarily and conducted an audit. Following the audit, it reduced its claimed damages to \$23,461.88, based upon its findings. This is broken down as \$8,758 for the 2002/2003 year and \$14,815 for the 2003/2004 year.

In support of its motion, plaintiff offers the sworn affidavit of Ms. Mahon, its vice

president, copies of each policy, and copies of the audits it did for each year. It has also provided the auditor's worksheets or raw figures used to calculate the 2002/2003 premiums. According to Ms. Mahon, the premiums were computed using standard rates approved by the New York Compensation Board.

Defendant opposes the motion on the basis that the figures are different than those alleged in the complaint and in the prior motion for summary judgment. Thus, it is defendant's contention the revised premiums (damages sought) could also be wrong, noting the more than \$12,000 difference between what plaintiff had sought and now seeks. This, according to plaintiff's principal, Mr. Levos, is reason alone to deny plaintiff summary judgment.

Defendant also demands a new "physical" audit of the business because one was done for the 2002/2003 policy. Mr. Levos contends that the terms of the policy requires such an audit. For this argument defendant relies upon the following language set forth in Part 5 ("Premium"), section E ("Final Premium") of the policy:

"The premium shown on the Information Page . . . is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy."

### **Discussion**

In an action to recover unpaid workers' compensation premiums the typical *prima facie* case requires that the plaintiff provide the insurance application, the policy, the audit work sheets, resulting invoices and statements of accounts for the balance due.

Commissioners of State Ins. Fund v. Beyer Farms, Inc., 15 A.D.3d 273 (1<sup>st</sup> Dept. 2005);  
Legion Ins. Co. v. Northeastern Plate Glass Corp., \_\_\_ A.D. 3d \_\_\_ (3<sup>rd</sup> Dept 2007), 2007  
N.Y. Slip Op. 04748. These have been provided, along with the affidavit of a person  
with personal knowledge of the facts. Therefore, plaintiff has met its burden of  
establishing its prima facie case.

Defendant's arguments in opposition consist entirely of innuendo. It has failed to  
raise any factual dispute that would require a trial of this case. The fact that plaintiff has  
decreased the amount being sought as damages is of no moment. The revision is  
based upon more recent information and an audit. Though defendant implies this is  
due to some finagling by plaintiff, this is nothing more than rhetoric.

Defendant's further argument, that plaintiff must conduct another audit or do a  
physical audit adds a condition to the payment of premiums not present in the policy  
itself. In any event, plaintiff did an audit of defendant's business already, after this  
action was commenced, and defendant has provided no compelling argument why yet  
another one is necessary. None of the audit statements plaintiff has provided have  
been challenged by defendant in any meaningful way.

Since plaintiff has proved its prima facie case, and there are no factual disputes  
for trial, plaintiff is entitled to summary judgment in the sum of \$23,461.88, with interest,  
the costs and disbursements of this action. This sum consists of the 2002/2003 unpaid  
premiums of \$8,758 - for policy 400-52-77-01 in effect from 3/1/2002 - 3/1/2003 and  
unpaid premiums of \$14,815 for policy 400-53-1077 in effect from 3/1/2003 - 3/1/2004.  
The clerk shall enter judgment in that amount (\$23,461.88) in favor of plaintiff, against

[ 6 ]  
the defendant.

**Conclusion**

It is hereby

Ordered that plaintiff's motion for summary judgment is granted; and it is further


Ordered that the clerk shall enter judgment in favor of plaintiff Atlantic Mutual Insurance Company against defendant California Fruit Markets Incorporate d/b/a CFM Food Distributors in the sum of Twenty Three Thousand Four Hundred Sixty One and 88/100 dollars (\$23,461.88), plus interest from March 1, 2004, along with the costs and disbursements of this action; and it is further

Ordered that any relief not expressly addressed herein has nonetheless been considered and is hereby denied; and it further

Ordered that this shall constitute the decision and order of the court.

Dated: New York, New York  
July 27, 2007

So Ordered:

  
Hon. Judith J. Gische, J.S.C.

**FILED**  
AUG 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE