

**Federal Ins. Co. v Outsource Group, LLC**

2008 NY Slip Op 30211(U)

January 18, 2008

Supreme Court, New York County

Docket Number: 0601921/2006

Judge: Joan Madden

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: JOAN A. MADDEN  
*Justice*

PART 11

FEDERAL INSURANCE  
COMPANY,

- v -

THE OUTSOURCE GROUP, LLC

INDEX NO. 601921/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

	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 *and cross-motion are determined in accordance with the annexed decision and order.*

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 18, 2008

J.S.C.  
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X

FEDERAL INSURANCE CO.,

Plaintiff,

-against-

THE OUTSOURCE GROUP, LLC,

Defendant.

-----X

JOAN A. MADDEN, J.:

Index No.  
601921/06

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Federal Insurance Company (Federal) commenced this action to recover insurance deductibles that defendant The Outsource Group, LLC (Outsource) allegedly owes under its Workers Compensation and Employers Liability Policy.

Plaintiff Federal now moves, pursuant to CPLR 3212, for summary judgment against Outsource in the amount of \$347,175.12, together with interest, costs and disbursements in this action. Defendant Outsource cross-moves for leave to amend its answer to assert, as a sixth affirmative defense, payment of sums claimed.

**BACKGROUND**

The following facts are not in dispute.

Defendant Outsource is a professional employment organization that contracts to supply and manage its customers' human resource, employee benefits, and payroll administration needs. Among the services that Outsource offers to its customers is workers compensation insurance for the customers' employees.

Effective October 26, 2001, Outsource was covered under a multi-state Workers Compensation and Employers Liability Policy,

policy number 7170-57-42 (the Policy), which was issued by Federal through the Chubb Group of Insurance Companies (Chubb). The Policy provided workers compensation coverage for the period between October 26, 2001 and October 26, 2002. The coverage was subject to a large deductible of \$250,000.00 per claim or occurrence, up to a total aggregate deductible of \$1,500,000.00 for the policy year. Under the terms of the Policy, the deductible was applicable both to loss payments and claims expenses.

Federal alleges that numerous claims for losses were reported under the Policy, which Federal has since handled and paid. Federal alleges that, on June 9, 2003, it billed Outsource for \$89,844.89 in deductibles that had been incurred on the Policy from its inception through May 28, 2003. Federal alleges that no part of this amount has been paid. Federal further alleges that, between June 2003 and April 2006, it continued to incur claims expenses and make loss payments on the Policy that were subject to the deductible; that it regularly issued invoices to Outsource for these amounts; and that, to date, none of these amounts has been paid. By April 12, 2006, the date of the final invoice on which Federal currently is suing, the outstanding deductibles allegedly due and owing from Outsource totaled \$358,426.12.

Federal commenced the instant action on June 1, 2006,

seeking damages in the total amount of \$347,195.12, representing the \$358,426.12 in deductibles then due and owing from Outsource, less a \$11,251.00 credit due to defendant as a result of its overpayment of the policy premium. Issue was joined on September 11, 2006, when Outsource served its answer to the complaint, asserting, as affirmative defenses, that plaintiff's claims were barred by (1) the terms of the parties' insurance policy, (2) waiver, (3) estoppel, (4) the equitable doctrine of unclean hands, and (5) laches. Outsource served a set of interrogatories and document demands on Federal that same day.

On April 13, 2007, Federal filed the instant motion for summary judgment on the complaint. In support of the motion, Federal has submitted an affidavit from Roopa Gandhi, its Assistant Vice president, with (1) a copy of the Policy issued to Outsource (see Gandhi Aff., Exh. 1); (2) a copy of Federal's Claim Review from inception through May 2003 (id., Exh. 2); and (3) a copy of each of the bills that Federal thereafter periodically issued to Outsource between June 9, 2003 and April 12, 2006 (id., Exhs. 3-15). The May 2003 Claim Review lists, as of that period, the name of each claimant, his or her corresponding occurrence number, the date of loss for each claim, the State in which the loss occurred, as well as a summary of the amounts paid on each claim during that period. Additionally, each of the bills subsequently issued by Federal, as the claims

expenses continued to accrue, provides a summary of the deductibles due and owing for that period, as well as a listing of all the period's billable loss activity, identifying each claimant, occurrence number, loss date, and the amounts paid on each listed claim.

Outsource initially opposed Federal's summary judgment motion on the ground that Federal's submissions were not sufficiently authenticated or particularized to support its claim for the amounts sought, and cross-moved to dismiss the complaint unless Federal responded to Outsource's outstanding interrogatories and document demands within 30 days. Outsource also argued that summary judgment in Federal's favor was not warranted because Outsource was entitled to a total of \$179,827.00 in additional set-offs and/or credits, beyond the \$11,251.00 credited by Federal, as a result of further payments made with respect to its Policy premiums. In support of this latter contention, Outsource has submitted an affidavit from Kevin Grauman, the Chief Executive Officer of Outsource.

In the affidavit, Grauman, after acknowledging that "the calculation of the gross unpaid insurance deductibles set forth in the Gandhi affidavit appears to be accurate" (Grauman Aff., ¶ 3), asserts that Outsource is entitled to two additional offsets and credits against the unpaid insurance deductibles, totaling \$179,827.00, which Federal has refused to acknowledge. First,

Grauman asserts that Outsource is entitled to an additional credit of \$90,827.00, as Outsource has documentation confirming that it made premium payments totaling \$468,219.00, and not merely the \$377,392.00 that Chubb has acknowledged and credited. In support of this assertion, Grauman proffers a copy of an "internal worksheet," purporting to show the dates, check numbers, and amounts of five premium payments allegedly totaling \$468,219.00 (id., Exh A). Second, Grauman asserts that Outsource should be credited with an additional \$89,000.00, representing the amount that Chubb had received from defendant's insurance broker in settlement of a dispute between Chubb and the broker over the proper allocation of the premiums that were paid by Outsource.<sup>1</sup>

In response to Outsource's objections regarding its documentation, Federal has submitted a reply affidavit from Gandhi, asserting that all of the exhibits attached to the summary judgment motion, excluding the pleadings, were copies of business records kept in the normal course of business, and that it was Federal's business practice to bill for deductibles only after the amounts incurred by plaintiff had been paid.

---

<sup>1</sup>In his affidavit, Grauman also asserts his belief that Outsource is entitled to a third adjustment "to compensate it for the bad faith refusal of Chubb to resolve the unpaid insurance deductible issue ... [n]otwithstanding the clear offsets addressed above" (id., ¶ 6). Defendant apparently has abandoned this contention, as it makes no further mention of this adjustment in any of its other submissions on this motion.

Additionally, Gandhi avers that the \$11,251.00 that it credited to Outsource due to the overpayment of premiums, was the full amount of any overpayment received by Federal.

By interim order dated June 28, 2007, this court granted Outsource's cross motion for discovery solely to the extent of ordering Federal to provide, within three weeks, the statement of claim and proof of payment as to each claim giving rise to the underlying deductible. Federal's motion for summary judgment was held in abeyance pending these supplemental submissions.

Plaintiff has now submitted a supplemental affidavit from Gandhi, attaching (1) a copy of an "Alert Check Report," i.e., a computerized check register (Gandhi Supplemental Affidavit, Exh. 17), and (2) a copy of the claim notification or loss notice for each occurrence on which it paid worker's compensation benefits under the Policy. The Alert Check Report itemizes every check that was issued and paid in connection with each occurrence, and lists the occurrence number, check number, issue date, named payee, type of transaction, and amount paid for every check. Federal's claims notices identify each claimant by name and address, and provide the loss date, type of injury, loss location, and certain other employee identification information, for every claimant. In the supplemental affidavit, Gandhi avers that the attached record of claims and claims payments was maintained in the regular course of its business. Gandhi also

avers that all of the checks listed in the Alert Check Report have been paid by plaintiff, pursuant to the terms of the Policy.

In opposition, Outsource contends that the Federal's supplemental submissions are still insufficient to establish Federal's entitlement to summary judgment, because Federal has not supplied cancelled checks or other proof of payment beyond these self-generated documents. Outsource additionally notes that it had expected Federal, in responding to this court's interim order, to provide it with the actual statement of claim made by each claimant, and not just the claims notices that Federal had entered into its records. Outsource contends that Federal's claims notices are deficient, as they lack all of the information that would enable Outsource to verify that each claimant actually was awarded workers compensation benefits and had been paid. Outsource contends that the Alert Check Report is deficient, because more than one occurrence code relates to more than one claimant, and vice versa. Outsource also contends that there is no way to correlate each occurrence code to the corresponding statement of claim.

In addition to these objections, Outsource also has submitted a new cross-motion, seeking leave to amend its answer to assert a further affirmative defense alleging payment of sums claimed.

Federal has opposed Outsource's new motion, on the ground

that Outsource failed to submit an affidavit of merit, or any other evidentiary proof to support the proposed amendment. In reply, Outsource has submitted a second affidavit from Grauman ostensibly in support of the cross motion, but, in which, Grauman argues that Outsource should be granted leave to amend its answer to assert a proposed counterclaim for additional set-offs and/or credits totaling \$179,827.00. In support of this "revised" motion, Grauman has proffered copies of two letters which, he asserts, confirms that Outsource overpaid its Policy premium by an additional \$90,827.00 (Grauman Aff. in Support of the Motion to Amend, Exhs. B and C). In the affidavit, Grauman also asserts that he received personal confirmation, from certain unnamed individuals at Federal, that Federal did received an additional \$89,000.00 of defendant's Policy premium from defendant's broker.

#### DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law," by tendering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 852 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish that material issues of fact exist which require a

trial, or to tender an acceptable excuse for its failure to do so (CPLR 3212[b]; Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]; Zuckerman, at 562). To defeat the motion, the opposing party is "required to present a material issue of evidentiary fact comprised of more than just mere speculation or conjecture" (Cillo v Resjefal Corp., 16 AD3d 339, 340 [1<sup>st</sup> Dept 2005]; citing Castro v New York Univ., 5 AD3d 135, 136 [1<sup>st</sup> Dept 2004] ["affidavits devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary relief "]; see also Shaw v Time-Life Records, 38 NY2d 201, 207 [1975] ["[m]otions for summary judgment may not be defeated merely by surmise, conjecture or suspicion"]).

Plaintiff Federal has establish its prima facie entitlement to summary judgement through the affidavits of Gandhi, and its submission of Federal's authenticated business records in the form of (1) the Policy; (2) the May 2003 Claim Review; (3) the periodic bills for deductibles due; (4) the claims notices for each occurrence; and (4) the Alert Check Report. All together, the documentation and affidavits establish that, through March 2006, Federal incurred and paid claims expenses subject to the policy deductible in the total amount of \$358,426.12, no part of which Outsource has paid, and that, after subtracting a credit for the overpayment of premiums in the amount of \$11,251,00, the

amount of \$347,175.00 remains due and owing from defendant.

Defendant's first affirmative defense, asserting that plaintiff's claims are barred by the terms of the parties' insurance policy, is insufficient to defeat plaintiff's summary judgment motion, as defendant has failed to allege or identify any such term. Defendant's second, third, fourth, and fifth affirmative defenses, asserting that this action is barred by waiver, estoppel, the equitable doctrine of unclean hands, and laches, are also insufficient to defeat plaintiff's summary judgment motion, as these defenses, alleged without any supporting factual allegations, are wholly conclusory.

Outsource objects that Federal's submissions are insufficient, but has failed to particularize any specific deficiencies or irregularities with respect to the documentation, and in particular, with the itemized check register evidencing Federal's payment of claims. While Outsource suggests that there is some overlap and/or duplication with respect to the occurrence codes and individual claimants, it has identified no specific instance of such possible overlap or duplication and, after reviewing all of plaintiff's documentation, this court can find none. Further, this court finds that plaintiff's documentation, when viewed in its entirety, provides more than adequate information with which to correlate each occurrence number with each claimant, and thus with each of the claims notices provided

by Federal.

Federal's claims notices, by providing the identity, address, date of loss, loss location, and injury of each claimant, are more than sufficient to have enabled independent verification of each claim. The Alert Check Report, which plaintiff has authenticated as a business record, adequately itemizes Federal's payment of claims with respect to each occurrence. Absent some indication of irregularity or deficiency in this documentation, which defendant has not shown, it is not necessary for plaintiff to produce a copy of each of the more than 750 checks listed therein.

Nor has Outsource come forth with evidence sufficient to raise a triable issue of fact with respect to the amount of the deductibles that Federal alleges to be due and owing. Grauman seemingly acknowledges as much, in his first affidavit, when he indicates that the calculation of gross unpaid deductibles under the policy appeared to be accurate, and asserts that "[this] dispute concerns offsets and credits against the unpaid insurance deductibles, as opposed to the calculation of those deductibles" (Grauman Aff., ¶ 3). Only in the second affidavit, offered ostensibly in support of Outsource's second cross motion, does Grauman belatedly assert that Outsource had not received all of invoices from plaintiff prior to the commencement of this action, only invoices totaling \$319,782.78, and suggest that "the absence

of invoices for the 'missing' \$27,392.34 certainly raises a question as to whether these amounts are legitimate" (Grauman Aff. in Support, ¶ 3).

Even if it would be appropriate for this court to consider defendant's new argument, offered for the first time in a reply affidavit on a different motion, Grauman's conjecture that the amounts sought in the absent invoices may not be legitimate, fails to raise a triable issue of fact in this regard. This court notes that all of the invoices upon which Federal is seeking damages, including the allegedly absent invoices, were included in the original documentation that Federal submitted in support of its summary judgment motion. Defendant has not indicated why it failed to raise any objection to these invoices, which it presumably had examined, in its initial response to Federal's summary judgment motion. Nor does defendant identify any specific problems or discrepancies with these particular invoices, which it now has had an ample opportunity to examine. In any event, as the amounts billed in those invoices appear to be fully supported by the itemized payments listed in the Alert Check Report, plaintiff's mere contention that these amounts should be considered questionable is, by itself, insufficient to raise a triable issue of fact in this regard.

As noted above, the real dispute in this case involves defendant's claimed entitlement to additional credits and/or set-

offs totaling \$179,827.00 (\$90,827.00, representing defendant's alleged overpayment of its premiums, plus \$89,000.00, representing its broker's payment of further premiums to Federal).

This court finds that Outsource has failed to raise an issue of fact with respect to its alleged entitlement to an additional credit for overpayment of premiums in the amount of \$90,827.00. Defendant has produced no proof, in evidentiary form, that it actually paid premiums totaling \$468,219.00, and thus is entitled to this credit. Nor are defendant's submissions sufficient to raise even an arguable issue of fact in this regard.

The self-described "internal worksheet," which defendant has submitted in opposition to plaintiff's motion, is not authenticated as a business record, and defendant has given no indication when, or by whom, the worksheet was produced. The worksheet appears to have been prepared and/or printed, originally, on or about July 9, 2002, before all of the purported premium payments identified therein had been made, and defendant has not identified when, or by whom, the subsequent handwritten additions of check numbers and dates, entered with respect to the final two payments, were made. The worksheet is deficient, in any event, as it not only fails to identify the named payee on any of the purported checks, but it cannot be viewed as an accurate indication of the amount of each payment, as the sum of

the five purported payments listed on the worksheet does not total \$468,219.00,<sup>2</sup> and thus does not correspond to the amount that defendant alleges that it paid via these five "payments."

The only other documentation proffered by Outsource to "confirm" its payment of premiums totaling \$468,219.00, are the two letters submitted by Grauman in support of the cross motion for leave to amend. The first letter, written by defendant's insurance broker on October 31, 2001, shortly after the policy was procured, was written well before the full premium was to be paid. While the letter indicates that the premium for the policy had been calculated at \$468,219.00, it neither indicates, nor confirms, that defendant actually made such payment. Further, the second letter, written by plaintiff's counsel on November 3, 2005, indicates that the premium subsequently was re-computed by Chubb, at the request of Grauman, resulting in the \$11,251.00 credit (Grauman Aff. in Support of Cross Motion, Exh. C). Nothing in that letter suggests that Outsource actually made premium payments beyond the \$377,392.00 acknowledged by plaintiff in the letter. Absent any authenticated proof which might show actual payment of the premiums, such as copies of the checks, defendant fails to raise a triable issue of fact in this regard.

---

<sup>2</sup>Specifically, when all of the checks and payments listed on the worksheet are added together, the sum actually totals \$477,113.00, which is more than Outsource is contending it actually paid via these very checks. Defendant fails to note, much less account for, this obvious discrepancy.

Nor has defendant submitted any evidence that might establish its legal entitlement to a credit or off-set in the amount of \$89,000.00, the amount that defendant's broker allegedly paid Federal in settlement of their dispute over the allocation of plaintiff's premium. Admittedly, Outsource was not a party to the dispute between Federal and the broker regarding the proper allocation of the paid premium. Nor does Grauman contend that this amount represents an additional overpayment of the total premium that it was contractually obligated to pay. Thus, even assuming that Federal received an additional \$89,000 of defendant's paid premium from defendant's broker, defendant has not identified any legal theory requiring this amount to be credited to Outsource to reduce its outstanding deductibles.

Defendant's cross motion for leave to amend its answer to assert an additional affirmative defense of payment is denied. While motions for leave to amend pleadings should be liberally granted in the absence of prejudice or surprise (CPLR 3025 [b]; Masterwear Corp. v Bernard, 3 AD3d 305 [1st Dept 2004]), leave to amend will not be granted "upon the mere request of a party without a proper basis" (Morgan v Prospect Park Assoc. Holdings, L.P., 251 AD2d 306, 306 [2<sup>d</sup> Dept 1998]). Rather, a motion for leave to amend a pleading must still be supported by an affidavit of merit or an offer of evidence similar to that supporting a summary judgment motion (Schulte Roth & Zabel, LLP v Kassover, 28

AD3d 404 [1<sup>st</sup> Dept 2006]; Helene-Harrisson Corp. v Moneyline Networks, Inc., 6 AD3d 151 [1<sup>st</sup> Dept 2004]; Non-Linear Trading Co., Inc. v Braddis Associates, Inc., 243 AD2d 107 [1<sup>st</sup> Dept 1998]).

In its cross motion to amend, defendant sought leave only to amend its answer to propose, as an additional affirmative defense, payment of sums claimed. However, defendant failed to include an affidavit of merit or any evidentiary proof that might support such amendment; nor did the proposed pleadings contain any factual allegations which might support the proposed affirmative defense. In its reply papers, defendant does not directly address the deficiencies of the original motion, but instead, argues that it should be granted leave to amend its answer to assert a counterclaim seeking credits or set-offs totaling \$179,827.00, and submits an affidavit from Grauman in support.

As an initial matter, this court notes that defendant never requested leave from this court to revise its motion for leave to amend its answer to assert the proposed counterclaim, and such motion is not properly before this court. Further, insofar as defendant is attempting to remedy the deficiencies in its original motion by submitting an affidavit for the first time in its reply, the submission is improper (Schulte Roth & Zabel, LLP, at 405).

In any event, even if this court could properly consider defendant's "revised" cross motion for leave to amend, the motion would be denied. Our courts consistently have held that, in order to conserve judicial resources, an examination of the underlying merits of a proposed cause of action is warranted (Non-Linear Trading Co., Inc., at 116). As this court already has determined that defendant's evidentiary submissions fail to raise an arguable issue of fact with regard to its entitlement to these additional credits and set-offs, leave to amend would be denied on the ground that the proposed counterclaim lacks merit (Polizzi v Profaci, 5 AD3d 456, 458 [2<sup>d</sup> Dept 2004]).

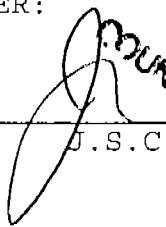
Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and the Clerk directed to enter judgment in favor of plaintiff Federal Insurance Co. and against defendant The Outsource Group, LLC, in the amount of \$347,175.12, together with interest from December 1, 2004, as computed by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant's cross motion is denied.

DATED: January 18, 2008

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JAN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE