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

PRESENT: Hon Joan B. Miller PART 11

Index Number : 601817/2005

SENECA INSURANCE COMPANY INC.

vs

CERTIFIED MOVING & STORAGE CO

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2-21-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Partial Summary Judgmt + other relief.

	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 is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: June 20, 2008

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: I.A.S. PART 11

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SENECA INSURANCE COMPANY, INC.,

Plaintiff,

-against-

Index No. 601817/05

CERTIFIED MOVING & STORAGE CO., LLC and CERTIFIED INSTALLATION SERVICES, LLC,

DECISION AND ORDER

Defendants.

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MADDEN, JOAN, J:

In this breach of contract action, plaintiff, Seneca Insurance Company, Inc., ("Seneca") moves pursuant to CPLR Sections 3025(c), 3212 and 3211(b): (1) to conform the pleadings to the proof; (2) for partial summary judgment on the first, second and third causes of action in the complaint and (3) for an order dismissing defendant, Certified Moving & Storage Co., LLC's and defendant Certified Installation Services, LLC's, (collectively, "Certified" or "defendant") affirmative defenses. Defendant cross moves pursuant to CPLR 3212(f) for an order granting it a continuance to conduct further discovery.

From January 2002 through January 2005[1], Seneca agreed to provide commercial property and commercial general liability insurance coverage to both of the Certified companies. The advance premium for the initial policy was based on the information that Certified supplied in its application for insurance. (Wolin Aff., Ex. C) The common policy declarations and the commercial general liability declarations of the policy state, "**IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS**

[1] January 2002-January 2003, Initial Policy Period; January 2003-January 2004, First Renewal; January 2004-January 2005, Second Renewal.

POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY." (Emphasis in the original)(Wolin Aff., Ex. B) Seneca states that the premium is based on the payroll for each category of the insured's employees and that it sets the rate applicable to each category of employees annually and files these rates with the New York State Insurance Department in accordance with Sections 2303-2304 of the Insurance Law.

According to policy, the amount of the premium is computed "in accordance with our [Seneca's] rules and rates." (Wolin Aff., Ex. A, Section IV, para 5[a]) An endorsement to the policy, titled "New York Changes--Premium Audit" states:

> (b) Premium Audit
>
> Premium shown in this coverage part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. An audit to determine the final premium due or to be refunded will be completed within 180 days after the expiration date of the policy.
>
> * * *
>
> Audit premiums are due and payable on notice to the first Named Insured.

(Wolin Aff., Ex. A)

Section IV, paragraph 5(c) gives Seneca the right to review the insured's records for each policy period in order to verify the information upon which the premium is computed.

In March 2003, pursuant to the terms of the policy, Seneca requested a physical audit of defendant's books and records to verify the accuracy of the payroll information for the January 2002-January 2003 premium. Based on that audit, Seneca determined that Certified owed it $2,354.00 in premiums for the 2002-2003 policy year. Seneca states that, despite due demand,

Certified failed to pay the additional premium that it allegedly owed. (Beatus Aff, Ex. 1, hereinafter Complaint, paras. 10 and 11)

In January 2004, Seneca requested a physical audit of defendant's books and records to verify the payroll information upon which the 2003-2004 premium was based. Seneca alleges that it first discovered that something was amiss as a result of the April, 2004 audit when defendant provided the auditor with three sets of payroll records for Certified Moving but allegedly refused provide any payroll records for Certified Installation. (Wolin Aff, Ex. I, p.2) Based on that audit, Seneca determined that Consolidated owed $71,502 in premium for the 2003-2004 policy period. (Complaint, para 13)

Seneca alleges that after the April, 2004 audit, Certified refused to produce any payroll records for the co-insured Certified Installation, but instead, in July, 2004, Certified's insurance broker sent Seneca a single sheet of paper entitled "Certified Payroll" that revealed that the Certified's employees had earned a payroll in a far greater amount than Certified had previously disclosed. However, according to Seneca, Certified continued to stonewall Seneca's efforts to conduct a proper audit of both of the insureds. (Complaint, para. 15)

Thereafter, Seneca refused Certified's request for a further policy renewal because, based on its prior audits, Seneca determined that Certified owed more that $600,000 in premium for 2002-2005.

Collectively, the first three causes of action in the complaint allege that defendant breached the insurance contract for the policy years January 2002 through January 2005 by failing to pay premiums due in the amount of approximately $600,000.

Defendant answered and asserted nine affirmative defenses: (1) failure to state a cause of

action; (2) waiver and release; (3) failure to allege fraud in sufficient detail; (4) statute of limitations; (5) defendants did not conceal or misrepresent information; (6) documentary evidence; (7) failure to correctly compute the premium due; (8) misrepresentation of the method of computing premiums and (9) failure to notify the defendants of the method of computing premiums.

Seneca now claims that during discovery, Certified produced wage and tax statements for the relevant policy years which reveal that, Certified owes $1,223,670.00 in premium for the three years covered by the policy, not the $600,000 originally demanded in the complaint.

CONTENTIONS

In support of that branch of the motion seeking partial summary judgment on the first three causes of action in the complaint, Seneca contends that it has established its prima facie case by submitting the insurance application and contract, the audit reports and invoices and a retrospective accounting and that defendant has failed to come forward with evidence, in admissible form, to rebut its prima facie case that $1,223,670 in premium is due and owing.

In support of that branch of the motion that seeks dismissal of the affirmative defenses, Seneca argues that it has alleged all of the elements necessary for the breach of contract claims and that it has alleged fraud with sufficient particularity; that it has neither waived nor released its claims against Certified; that the action is governed by the six year statute of limitations for breach of contract and thus this action, which was commenced in May, 2005 is timely; that the documentary evidence does not bar this action but rather establishes that Seneca is entitled to judgment as a matter of law and that the "failure to compute" affirmative defenses have no basis in fact.

In opposition to that branch of the motion for partial summary judgment and in support of the cross motion for a continuance, defendant argues that further discovery is needed because Seneca is relying on evidence that is extrinsic to the contract which it has failed to submit in support of its request for summary judgment, i.e., Seneca's "rules and rates" referred to in Section IV, paragraph 5(a) of the insurance contract are not incorporated by reference into the contract and Seneca has not otherwise produced those rules and rates in discovery or submitted those rules and rates to the court. Similarly, defendant contends that although Seneca states that its rates are filed with the Insurance Department, has failed to produce proof of such filing in discovery or in support of this motion. Defendant also contends that there are issues of fact concerning the oral understanding between the parties about what classifications and payroll information would be used in the calculation of the premiums and that depositions are necessary to resolve these issues.

DISCUSSION

A. Summary Judgment

The well established law of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give meaning and effect to all its provisions. Words and phrases are given their plain meaning . . . . Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. *On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.*

(*American Express Bank Ltd. V. Uniroyal, Inc.*, 164 A.D.2d 275, 277 [1st Dept 1990], *lv denied*

77 N.Y.2d 807 [1991] [internal citations omitted] [emphasis added]); *South Rd. Assocs. V. IBM Corp.*, 4 N.Y.3d 272 [2005]; *see also, NFL Enterprises, LLC v. Comcast Cable Communications, LLC*, 51 A.D.3d 52 [1st Dept 2008])

In *Atlantic Mutual Insurance Co. v. Joyce Intern, Inc.*, 31 A.D.3d 352 (1st Dept 2006), plaintiff insurer sued to recover insurance premiums allegedly due from defendants under four workers' compensation retrospective premium insurance policies. There the court denied summary judgment on plaintiff's breach of contract causes of action, "since plaintiffs failed to support their motion with the documentation, invoices and other evidence necessary to establish that retrospective premiums had been accurately computed." (*Commissioners of the State Ins. Fund v. Kuck*, 2004 WL 2222276 [N.Y. City Civ. Ct.]["Plaintiff must demonstrate its entitlement for the amount it is seeking by providing evidence as to how it arrived at the figure."]) In addition, the *Joyce Intern* court found that defendant's cross motion for discovery was properly granted, "insofar as it sought evidence bearing upon the accuracy of the disputed premium." (*See also, Roman Catholic Church of the Good Shepherd v. Tempco Sys.*, 202 A.D.2d 257 [1st Dept 1994])

In the case before the court, extrinsic evidence is necessary to establish Seneca's "rules" regarding premium computation and its rates that are on file with the Insurance Department[2].

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[2] Section 2314 of the New York Insurance Law provides that, "[n]o insurer shall . . . charge or demand or receive a rate or premium which departs from the rates, rating, plans, classifications, schedules, rules and standards in effect on behalf of the insurer . . . ." The filed rates have the force of law and an agreement varying those rates would be invalid. See, *Public Service Mutual Insurance Co. v. Rosebon Realty Corp.*, 39 Misc.2d 663, 664 [N.Y. City Civ. Ct. 1963]; *In the Matter of Empire Blue Cross Blue Shield Customer Litigation*, 164 Misc.2d 350, 355-356 [Sup. Ct. N.Y. County 1994])

This information is not included, or incorporated into, the four corners of the contract and it has not been produced in support of this motion. Accordingly, in this case, as in *Joyce Intern*, limited discovery is necessary to determine Seneca's rules and filed rates regarding premium computation and whether Seneca properly applied those rules and rates when it computed the premium allegedly owed by Certified.

However, Certified's demand for discovery concerning an alleged oral understanding between the parties about how the premium would be computed is denied. The policy contains a merger clause which states:

> This policy contains all the agreements between you [Certified] and us [Seneca] concerning the insurance afforded. The first Named Insured shown in the declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made part of this policy.

(Wolin Reply Aff., Ex Q, at Q-1)

It is well settled that where a written contract contains a merger clause, the parties prior oral agreements, if any, are superseded by the merger clause in the parties' written agreement. (*Berger v. Roosevelt Inv. Group Inc.*, 28 A.D. 3d 345, 346 [1st Dept 2006]; *Payne v. Enable Software*, 229 A.D.2d 880, 882 [3rd Dept 1996]; *Goodyear Pub. Co., Inc. v. Mundell*, 75 A.D.2d 556, 557 [1st Dept 1980]); *Investors Insurance Co. Of America v. Eastway Construction*, 120 A.D.2d 336 [1st Dept 1986][summary judgement for the full amount of the premiums due on a policy of insurance is appropriate and defendants may not offer testimony about an oral agreement to vary the terms of the policy.]) Here, any alleged oral agreement was superseded by the merger clause, and cannot be used to vary the terms of the written contract.

B. Affirmative Defenses

That branch of the motion that seeks to dismiss Certified's affirmative defenses is granted to the extent of dismissing the first affirmative defense for failure to state a claim upon which relief can be granted because plaintiff has properly stated all elements of a breach of contract claim. In addition, the second affirmative defense claiming waiver and release is dismissed as there is no evidence that plaintiff knowingly waived or released its right to collect any premium due and defendant's reliance on an alleged oral agreement in support of this affirmative defense is without merit. The third affirmative defense is dismissed because plaintiff has alleged all elements of the fraud claim with sufficient particularity to put defendant on notice regarding the fraud alleged (*See, Pludeman v. Northern leasing Systems, Inc.*, 40 A.D.3d 366 [1st Dept. 2007]). In addition, the fourth affirmative defense is without merit as plaintiff timely commenced this action within the six year statute of limitations.

That branch of the motion that seeks to dismiss the fifth, sixth, seventh and eighth and ninth affirmative defenses is held in abeyance pending completion of the limited discovery regarding Seneca's rules and rates because the merit of those affirmative defenses is dependent on the rules and rates regarding the computation of premium.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking partial summary judgment on the first, second and third causes of action is denied with leave to renew following limited discovery regarding Seneca's rules and filed rates concerning premium computation; and it is further

ORDERED that the branch of plaintiff's motion that seeks to conform the pleadings to

the proof is denied with leave to renew following the limited discovery described above; and it is further

ORDERED that the branch of plaintiff's motion that seeks to dismiss defendant's affirmative defenses is granted to the extent of dismissing the first, second, third and fourth affirmative defenses and the first, second, third and fourth affirmative defenses are dismissed; and it is further

ORDERED that the branch of the motion that seeks to dismiss the fifth, sixth, seventh, eighth and ninth causes of action is denied with leave to renew following the limited discovery described above; and it is further

ORDERED that defendant's cross motion for a continuance is granted to the extent of permitting limited discovery regarding Seneca's rules and filed rates regarding the computation of the premium under the subject insurance policies and the motion is otherwise denied.

DATED: June 24, 2008

J.S.C.