

**Commissioner of the State Ins. Fund v Mega  
Constr. Corp.**

2008 NY Slip Op 32620(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 0400703/2007

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 3c

Index Number : 400703/2007  
COMMSR.OF THE STATE INSURANCE  
vs  
MEGA CONSTRUCTION CORP.  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

is motion to/for Summary judgment

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

PAPERS NUMBERED

1, 2

3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is denied in accordance with the attached memorandum decision

**FILED**

SEP 30 2008

COUNTY CLERK'S OFFICE  
NEW YORK

DORIS LING-COHAN

Dated: 9/29/08

9/29/08

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----X  
COMMISSIONER OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

MEGA CONSTRUCTION CORP.,

Defendant.

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DORIS LING-COHAN, J.:

Index № 400703/07

Motion Seq. No.: 001

**FILED**  
SEP 3 01 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

In this insurance dispute, the plaintiff Commissioner of the State Insurance Fund (SIF) moves pursuant to CPLR 3212, for an order granting summary judgment against defendant Mega Construction Corp. (Mega) in the amount of \$274,556.24, plus interest from April 5, 2006, and the cost of collection, calculated at 22% of the principal amount due, or \$60,402.37, as authorized under section 18 of the State Finance Law.

It is undisputed that, by application dated August 29, 2003, Mega applied to the SIF for a New York Workers' Compensation and Employers' Liability Insurance (Workers' Comp) policy insuring Mega's liability for the payment of benefits to its employees. SIF issued Workers' Comp policy number 13657796 (the Policy) in exchange for which Mega agreed to pay premiums based upon its payroll, as authorized under Workers' Compensation Law. On April 5, 2006, SIF cancelled the self-renewing Policy due to unpaid premiums.

SIF commenced the instant action, by service of a summons and complaint, on or about February 27, 2007, to recover unpaid Workers' Comp premiums, together with interest and the cost of collection, as outlined above. Issue was joined by service of defendant's answer, on or about May 16, 2007. The verified complaint contains, essentially, one cause of action which

sounds in breach of contract. Mega's answer contains a series of boilerplate denials and 20 affirmative defenses.

On or about December 4, 2007, SIF served a notice for discovery and inspection through which it sought discovery of defendant's books, records, documents, and writings pertaining to defendant's payroll for the period of September 2, 2005 to April 5, 2006. On or about May 16, 2007, Mega served a demand for a bill of particulars. On or about February 4, 2008, SIF served the instant motion for summary judgment to recover premiums it claims to be due for the three policy periods during which the Policy was in effect, that being September 2, 2003 - September 2, 2004 (period one); September 2, 2004 - September 2, 2005 (period 2); and September 2, 2005 - April 5, 2006 (period 3). Mega opposes the motion on the ground that discovery is needed to determine the correct amount owed.

SIF explains that, unlike other types of insurance, Workers' Comp premiums are not fixed when the policy is issued, but rather, are flexible and subject to adjustment to reflect certain changes during a given policy period, including the number of insurable employees, their job classifications, and the insured's payroll for that period. Furthermore, because, under Workers' Compensation Law § 92, Workers' Comp insurance premiums are calculated based upon SIF's audits of an insured's books and records, and/or based upon a specific formula for computing estimated premiums for renewal premiums, it is crucial that these materials are made available to SIF so that it can conduct an accurate audit and can make appropriate adjustments to any estimated premium.

Workers' Compensation Law § 92 provides, in relevant part:

(3) [a]t the end of the period an adjustment of the premium shall be made

[\* 4 ]

according to the actual expenditure of wages. If such adjusted premium is more than the premium paid at the beginning of the period, the policyholder shall pay the difference immediately upon notification of the amount due except to the extent that rules promulgated by the commissioners permit such amount to be paid by installments. If such adjusted premium is less than the premium paid in advance, the state insurance fund shall, at the policyholder's option, either refund the difference or credit the amount thereof to the policyholder's account with the state insurance fund.

According to SIF, the balance demanded (\$274,566.24) stems from the audits it conducted for periods 1 and 2, plus an estimate of Mega's payroll for period 3, as it is entitled to do when, as here, the insured fails to produce the books and records for SIF audit.

Specifically, SIF contends that, not only did Mega fail to respond to its notice for discovery and inspection, but prior to commencing this action back on August 22, 2006, SIF auditor John Conry (Conry), attempted to audit Mega's payroll for period 3, but instead, had to compute an estimated premium for this renewal period premium due to Mega's failure to produce several documents necessary for Conry to conduct a complete and accurate audit. As a result, Conry prepared a "Simplified Audit Information Form" in which he noted, under the comment section, "237427 in Payroll was added to audit to bring labor sales ratio to 25%."

In support of the motion, SIF submits its attorney's affirmation together with the sworn affidavit of SIF underwriter Roland Ntim (Ntim), who bases his statements on his review of SIF's books and records in this matter, and upon his knowledge of how these books and records are compiled and maintained by SIF in the normal course of its business. Ntim explains SIF's practice of reviewing an insured's books and records in order to create an audit report for each period, and he offers a general overview of the actions taken with respect to Mega's audits and premiums. He notes, among other things, that on June 9, 2006, June 12, 2006 and June 30, 2006,

SIF made adjustments to the premiums for period 2 following Mega's production of additional materials regarding its sub-contractors. Ntim states that on May 25, 2006, SIF sent Mega an estimated audit bill for period 3, but that when Conry attempted to audit Mega's books and records for that period (on August 22, 2006), he was not able because of Mega's failure to produce "several necessary documents regarding contracts, check books and payroll." He also states that, "based on a change in defendants' experience modification, SIF adjusted the premium for the estimated period by issuing and mailing to defendant an adjustment bill number h795286 dated December 12, 2006," and concludes that, since more than 90 days have passed since the final bill was sent and remains unpaid, there are no material questions of fact and the court should grant SIF's motion.

Central to this dispute is Conry's estimated audit for period 3, because while SIF claims to have followed proper procedure in accessing the amount of premiums due for that period, Mega argues that, contrary to SIF's assertion, it produced all necessary documentation, and that Conry's decision to add \$237,427 to its payroll was arbitrary, rendering SIF's insistence on payment in the amount of \$274,566.24, either improperly calculated, or inadequately explained, or both.

Attached to its opposition papers is the sworn affidavit of Richard P. Wismer, CPA (Wismer), a partner in the certified public accounting firm hired by Mega to assist them in preparing for the SIF audit. According to Wismer, on August 22, 2006, he met with Conry at his (Wismer's) office, at which time he provided Conry with the books and records and other financial documentation that Conry needed in order to conduct Mega's audit. The sum and substance of Wismer's affidavit is that the documents sent to SIF were both comprehensive and

sufficient for SIF to conduct the audit. Moreover, the documents provided were the documents specifically requested by SIF, and that based on his own assessment as a CPA, it is Wismer's contention that the documents do not support the adjustment made to Mega's payroll.

Accordingly, Mega seeks discovery regarding the manner in which the premiums were calculated.

A review of the parties' submissions reveals: copies of discovery requests and responses as well as copies of informal letters between the parties setting forth the materials being requested and the materials being sent; copies of affirmations and affidavits from plaintiff and defendant which offer conflicting recitations as to discovery issues and as to the proper calculation of premiums; and copies of defendant's books and records including numerous pages of construction contracts, ledgers, tax records, insurance documents (separate from Workers' Comp), and other financial materials related to the covered period.

It is well settled that summary judgment is a drastic remedy which "should not be granted where there is any doubt as to the existence of a triable issue" (Moskowitz v Garlock, 23 AD2d 943, 944 [3<sup>rd</sup> Dept 1965]). It is also well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

In seeking summary judgment in its favor, SIF argues that the holding in Commissioners of the State Insurance Fund v Global Distributors, Inc. (NYLJ, Feb. 24, 1992, at 35, col 5 [Sup Ct, NY County, Saxe, J.]), is controlling and puts to rest defendant's objections. However, unlike the fact scenario in Commissioners of the State Insurance Fund v Global Distributors, Inc., this is

not a situation where the insured refused to provide access to the insured's books and records, but rather, the circumstances surrounding Mega's productions of the requested materials is one of the sharply disputed issues.

Furthermore, while SIF provides a generic explanation of how it calculates Workers' Comp premiums, it does not provide sufficient detail and specific (numerically based) data as to its calculation of the premium at the center of this dispute. A further examination of SIF's submissions reveals that the audit at issue and supporting documentation (worksheets) are not sworn to, or authenticated, by the individual, presumably Conry, who actually prepared the audit, and no explanation is provided as to why SIF chose to submit the affidavit of Ntim in its place.

Defendant is entitled to discovery as to the manner in which Mega's premiums were calculated, and to question the individual or individuals who prepared and/or contributed to the preparation of Mega's audit. "It is axiomatic that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant . . ." (Meticecchia v Palmeri, 23 AD3d 894, 895 [3<sup>rd</sup> Dept 2005]).

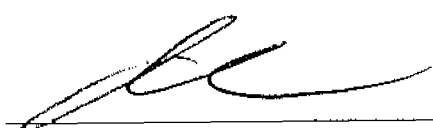
Accordingly, it is

ORDERED that the motion by plaintiff for summary judgment is denied.

Dated:

9/24/08

**FILED**

  
Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\comm of state in re Mega.wpd

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