[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 402694/2007

COMMISSIONERS

VS

ALLIED RENOVATION CORP.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

FILED
JUL 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion of plaintiff The Commissioners of the State Insurance Fund for an order, pursuant to CPLR §3025(c), granting it leave to serve defendants Allied Renovation Corp., Post Contracting Inc., Oxford Associates Group, Inc., Lancaster Realty Mgt. Corp., Allied Contracting I Corp., WB Contracting Corp. and Northaven Industries Corp. a Second Amended Complaint to reflect the amount claimed to be due to plaintiff after the audit is completed is granted; and it is further

ORDERED that defendants' cross-motion for an order, pursuant to CPLR §3025(c), granting them leave to file a Second Amended Answer on behalf of the Oxford defendants is granted; and it is further

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

Dated: _____

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the branch of plaintif"s motion for an order, pursuant to CPLR §3211(b), striking the second and fourth affirmative defenses in the Answer of Oxford Associates Group, Inc. and Lancaster Realty Mgt. Corp. is granted, and it is further

ORDERED that the branch of plaintiff's motion for an order, pursuant to CPLR §3211(b), striking the third affirmative defenses in the Answer of Oxford Associates Group, Inc. and Lancaster Realty Mgt. Corp. is denied, and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, August 31, 2009 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 7/30/09 ENTER: _____, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

HON. CAROL EDMEAD

[ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

THE COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

ALLIED RENOVATION CORP., POST CONTRACTING INC., OXFORD ASSOCIATES GROUP, INC., LANCASTER REALTY MGT. CORP., ALLIED CONTRACTING I CORP., WB CONTRACTING CORP. and NORTHAVEN INDUSTRIES CORP.,

Defendants.

----------x

Index No. 402694/07

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff The Commissioners of the State Insurance Fund ("plaintiff") seeks to recover premiums due for the workers' compensation insurance coverage (the "Coverage") it provided to defendants Allied Renovation Corp. ("ARC"), Post Contracting Inc. ("Post"), Oxford Associates Group, Inc. ("Oxford"), Lancaster Realty Mgt. Corp. ("Lancaster"), Allied Contracting I Corp. ("Allied Contracting"), WB Contracting Corp., and Northaven Industries Corp. (collectively "defendants").

Plaintiff now moves for an order, pursuant to CPLR §3212, granting it summary judgment against defendants on the second cause of action, compelling defendants to produce records to allow plaintiff to audit their records for storing and retrieving data from June 18, 2004 to January 23, 2007 (the "Periods"); an order, pursuant to CPLR §3025(c), granting plaintiff leave to serve a second amended complaint to reflect the amount claimed to be due to plaintiff after the audit for the Periods is completed; and an order, pursuant to CPLR §3211(b), striking

the second, third and fourth affirmative defenses in the Answer of Oxford and Lancaster (collectively, the" Oxford defendants"), and striking the fourth affirmative defense in the Answer of defendants ARC, Post, Allied Contracting, WB Contracting Corp. and Northaven Industries Corp. (the "Allied defendants")[1].

The Oxford defendants cross move for an order, pursuant to CPLR §3025(c), granting them leave to file a second amended answer.

Background[2]

Plaintiff, relying on the affidavit of Gregg Skalka ("Mr. Skalka"), an underwriter for plaintiff (the "Skalka Aff."), contends that on June 18, 1988, plaintiff issued a workers' compensation insurance policy (the "Policy") to non-party Allied Waterproofing and Renovation Corp. ("AWRC"). On October 8, 1991, ARC was added as an additional insured under the Policy. On October 18, 1995, the Policy was amended to make ARC the insured under the Policy and AWRC an additional insured. Eventually, plaintiff ceased to provide coverage to AWRC. Post was added as an additional insured on April 17, 1998, and the remaining defendants were added as additional insureds during 2000, and are named in the Policy's Information Pages from June 18, 2004 to June 18, 2005 (Exhibit 5), June 18, 2005 to June 18, 2006 (Exhibit 6), and June 18, 2006 to January 23, 2007 (Exhibit 7) (the "Information Pages"). The Policy was self-renewing on an annual basis. The Policy was canceled on January 23, 2007.

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[1]In stipulations dated April 21, 2009 and August 28, 2008, the parties resolved the branches of plaintiff's motion seeking discovery from defendants and seeking to dismiss the Allied defendants' fourth affirmative defense. As a result, those branches of plaintiff's motion are rendered moot. Accordingly, this Court will address only the remaining branch of plaintiff's motion against the Oxford defendants.

[2]Information is taken from plaintiff's motion, which comprises an affidavit from Gregg Skalka ("Mr. Skalka"), an underwriter for plaintiff (the "Skalka Aff.")and a Memorandum of Law ("MOL"), and the Oxford defendants' Verified Amended Answer.

Plaintiff's Amended Complaint contains three causes of action. The first seeks recovery of the premiums due for the Coverage provided for the Periods; the second seeks to compel production of defendants' Records to enable plaintiff to compute, not estimate, the premiums due for the Periods; and the third seeks recovery of plaintiff's collection costs under State Finance Law §8(5).

The Oxford defendants' second and fourth affirmative defenses allege that they are not responsible for the culpable conduct of the other defendants and that plaintiff had full knowledge that the Oxford defendants had no employees during the Periods. Their third affirmative defense alleges that they are not responsible for the culpable conduct of the other defendants, "since they engaged in fraud." Therefore, the Oxford defendants are not responsible to plaintiff for the relief requested, the Oxford defendants argue.

Plaintiff's Motion

First, plaintiff argues that it should be granted to leave to serve a second amended complaint. It is likely that the amount plaintiff seeks on the Policy will be different after the audits of defendants' records than is now sought in the first cause of action, plaintiff argues. Therefore, plaintiff asks that the Court grant it leave to serve a second amended complaint, allowing it to seek recovery of the amount actually determined to be due after the audits.

Second, plaintiff argues that the Court should strike the second, third and fourth affirmative defenses of the Oxford defendants. The Oxford defendants fail to plead any of the circumstances of the co-defendants' alleged fraud, pursuant to CPLR §3016(b), to support the third affirmative defense. As to the second and fourth affirmative defenses, the Oxford defendants do not deny that they were named as additional insureds under the Policy during the

Periods. Thus, both defenses should be stricken because all insureds under the Policy are jointly and severally liable for the Premiums due even if they did not have employees, plaintiff argues.

Defendants' Cross-Motion and Opposition

In support of the Oxford defendants' request for leave to file a Second Amended Answer, attorney Leonard P. Morton ("Mr. Morton") contends that he was recently retained by the Oxford defendants after their former counsel ceased to represent them. The Oxford defendants contend that leave to amend shall be granted freely, "especially where, as here, new counsel has been retained and the granting of such request will not prejudice the other parties" (Opp. ¶ 5). Therefore, the Oxford defendants argue, their request should be granted.

In opposition to plaintiff's motion for to dismiss, the Oxford defendants contend that their affirmative defenses are valid and numerous questions of fact exist. First, the Oxford defendants contend that Policy is invalid as to them, because Vana Apostolopolous ("Ms. Apostolopolous"), the party who entered into the agreement with plaintiff, did not have the authority to do so. Ms. Apostolopolous is the co-owner of the Oxford defendants with George Kyriak ("Mr. Kyriak"), who provides an affidavit in opposition ("Kyriak Aff."). Mr. Kyriak attests that except for the fact that Ms. Apostolopolous is also part owner of the Oxford defendants, there is no working or other relationship between the Oxford defendants and the Allied defendants (Kyriak Aff., ¶ 14).

The Oxford defendants further contend that if and when a party enters into an agreement on behalf of corporate entities, such as the Oxford Defendants, without the authority to do so, the corporations will not be bound by such agreement. Moreover, it is the duty of the contracting parties to ascertain whether the individuals with whom they deal and who purport to act on behalf of a corporation have the authority to do so. When Ms. Apostolopolous, "or, if not her,

some other party," entered into the agreement to provide workers' compensation insurance on behalf of the Oxford defendants, he/she had no right to do so, and the Oxford defendants cannot be held liable for such culpable conduct and this unauthorized act, the Oxford defendants argue. The act of improperly entering into this insurance agreement constituted an act of fraud, the Oxford defendants argue.

The Oxford defendants further contend that they have not had and do not have any employees. Accordingly, neither of the Oxford defendants has needed or would be required under any applicable law to have workers' compensation insurance (Kyriak Aff., ¶¶ 11-13). This fact was, upon information and belief, known to plaintiff at all relevant times, defendants contend. As a result, there was no consideration for any alleged agreement of insurance between the Oxford defendants and plaintiff, and there was no possible way plaintiff could have been called upon to provide coverage for any workmans' compensation claim, the Oxford defendants argue. It is a fundamental principle of contract law that for any agreement to be valid, there must be appropriate consideration from all of the parties to said agreement, the Oxford defendants contend. As plaintiff would and could never have had to provide any coverage, take any action or suffer any other detriment with respect to either of the Oxford defendants, because the Oxford defendants had no employees, such consideration was completely lacking, the Oxford defendants argue.

Finally, the Oxford defendants argue that to the extent that this Court determines that there is an impermissible lack of specificity with respect to any affirmative defense in the Oxford defendants' Answer, the same will be cured if the Oxford defendants' request for leave to amend is granted.

Plaintiff's Reply

Plaintiff contends that the Oxford defendants have failed to set forth proof in evidentiary form that Ms. Apostolopolous was not authorized to name Oxford and Lancaster as insureds under the Policy, or that she was not authorized to continue the coverage under the Policy following May 2005. Plaintiff further contends that Mr. Kyriak never states who had the requisite authority. Ms. Apostolopolous was both a shareholder and an officer in the Oxford defendants and had the actual and apparent authority to name the Oxford defendants as insureds under the Policy, plaintiff contends. In a U-111 Form (the "U-111 Form") dated March 7, 2000 and signed by Ms. Apostolopolous, ARC requested that plaintiff add the Oxford defendants as additional insureds under the Policy. The U-111 Form lists Ms. Apostolopolous as having a 100% share interest in ARC and in the Oxford defendants. The Oxford defendants remained insured under the Policy from May 3, 2000 through January 23, 2007, when the Policy was canceled. The Kyriak Affidavit fails to state that when Ms. Apostolopolous signed the U-111 Form, she was not engaged in the general duties of her office.

Plaintiff argues that Mr. Kyriak never explains what he means when he contends that he and Ms. Apostolopolous co-own the Oxford defendants (Skalka Aff., ¶ 7, citing Kyriak Aff., ¶ 5). Plaintiff further argues that Mr. Kyriak provides no basis for his contention that his approval was required for the Oxford defendants to continue as additional insureds under the Policy (Skalka Aff., ¶ 8). The Oxford defendants were first named as insureds under the Policy in May 2000, "five years before the time Mr. Kyriak claims that [the Oxford defendants] were first named as insureds under the Policy," plaintiff contends. Mr. Kyriak never contends that his approval to add the Oxford defendants as named insureds under the Policy in May 2000 was

required, plaintiff argues. Plaintiff further argues that pursuant to Part Five, Section E of the Policy, all of the insureds had notice that they were insured for each of the Periods.

Plaintiff also contends that the Oxford defendants did not deny liability on the Policy but just claimed the right to offset against this debt the monies owed defendant by the subsidiaries. If the Oxford defendants did not have any employees while they were insureds under the Policy, naming the Oxford defendants as additional insureds under the Policy did not increase the cost of coverage provided to any defendant, plaintiff argues. The cost of coverage under the Policy is based on remuneration paid to an insured's employees and uninsured subcontractors. However, Oxford defendants are jointly and severally liable for the premiums due from all of the other insureds, plaintiff maintains.

Plaintiff also contests the Oxford defendants' argument that since they did not have employees, plaintiff could not be responsible for payment of workers' compensation claims arising out of the Oxford defendants' business. First, insurance is issued prospectively, plaintiff contends. At the time the Oxford defendants were named as insureds, no one could know that they would not have any employees in the future, plaintiff argues. Second, both Mr. Kyriak and Ms. Apostolopolous, as shareholders of the Oxford defendants, were covered by the Policy for any work-related injury claims they may have suffered during the future coverage periods, plaintiff contends.

Finally, plaintiff argues that the Oxford defendants never addressed the deficiencies in their third affirmative defense. Therefore, the third affirmative defense should be stricken.

Analysis

Dismissal of Affirmative Defenses

According to CPLR §3211(b) a "party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." The "standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), *i.e.*, whether there is any legal or factual basis for the assertion of the defense. (*See, Winter v Leigh-Mannell,* 51 AD2d 1012 [1976]). The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Ideal Mutual Ins. Co. v Becker,* 140 AD2d 62, 67 [1st Dept 1988]). "'If there is any doubt to the availability of a defense, it should not be dismissed' [citation omitted]" (*see Nahrebeski v Molnar,* 286 AD2d 891 [4th Dept 2001]).

Further, statements that will not defeat, mitigate or reduce the plaintiff's remedy are insufficient as a defense (*see* NY Jur, Pleading §138; *Walsh v Judge*, 223 AD 423, 425 [1st Dept 1928]). Thus, allegations of a plaintiff's wrongdoing are insufficient as defenses if the alleged wrongdoing is unrelated to the claim made against the defendants; instead the plaintiff's actions must in some way justify the defendant's actions to be properly pleaded as defenses (*TNT Communications Inc. v Management Television Systems, Inc.*, 32 AD2d 55 [1st Dept 1969], *order aff'd*, 26 NY2d 639 [1970] [plaintiff's alleged violation of antitrust laws did not justify defendant's appropriation of trade secrets and hence was not a proper defense]). Finally, if a defendant asserts an affirmative defense, he also must be able to prove it. "General denials in an answer are insufficient to raise triable issues"(*Iandoli v Lange*, 35 AD2d 793, 793, [1st Dept 1970]; (*Cornell Univ. v Dickerson*, 100 Misc 2d 198 [NY Sup 1979] [holding that an ex-student

seeking to avoid repayment of his student loans was not entitled to interpose the affirmative defense of duress where the university terminated him as a student and withheld his degrees because he presented no evidentiary facts regarding this claim, such as when, where, or by whom the duress was inflicted]).

Second Affirmative Defense

The Oxford defendants' second affirmative defense alleging that they are "not responsible for the culpable conduct" of the other defendants lacks merit.

Plaintiff has provided documentary evidence establishing a *prima facie* case that the Oxford defendants are jointly and severally liable for the premiums due on the Policy. The language of the Policy is dispositive. The Policy provides in the General Section A, that it "is a contract of insurance between you (the employer or employers named on the Information Page) and us (the State Insurance Fund)." The Policy also provides in General Section B that "You are an insured if you are an employer named in the Information Page." It is undisputed that the Oxford defendants are listed on the Policy as additional insureds from January 23, 2000 through January 23, 2007 (see the Policy and the Policy's Information Pages). The Policy further provides in Part Four, Section E, titled "Premium":

> You will pay the premium when due. You will pay the premiums even if part or all of the Workers' Compensation Law is not valid. *You are liable jointly and severally with all other insureds, for all premiums allocable for the period of time you are insured.* (*Emphasis added*)

Further, caselaw provides that when there is only one policy and one premium, as is here, all of the named insureds on a policy of insurance are jointly and severally liable for the premiums (*Commissioners of State Ins. Fund v Gem Steel Erectors Inc.*, 237 AD2d 213, 214, 1997 NY Slip Op 02805 [1st Dept 1997], *lv to appeal dismissed* 91 NY2d 866 [1997] ["The documentation

defendants submitted established that all corporate defendants were covered by the policy issued by the State Insurance Fund and that each entity was jointly and severally liable for premium payments, and there has been no showing that, until the commencement of this action, defendants ever objected to that arrangement"]; *Home Indem. Co. v Castel Const., Inc.*, 128 Misc2d 1026 [NY Sup 1985]).

In their opposition, the Oxford defendants attempt to distinguish the instant case from *Home Indem. Co.*, on the ground that the Court found that defendant Castel Construction Corp. ("Castel") had derived "obvious benefits" from being named in the policies (MOL, p. 5; *Home Indem. Co.* at 1028). The Oxford defendants maintain that, unlike Castel, they had derived no benefit from being named as an additional insured on the Policy. However, the Oxford defendants overlook the fact that the Court in *Home Indem.* specifically rejected the exact same argument from Castel, which alleged that it had "derived no benefit from the coverage and therefore should not be liable for premiums on the four insurance policies" (*id.* at 1027). In rejecting Castel's argument, the Court in *Home Indem.* held that the obvious benefits Castel derived from the insurance policies included its "status as an insured party" (*id.*). Similarly, this Court finds that the Oxford defendants' argument that they received no benefit from being named as additional insured on the Policy lacks merit.

Further, the Oxford defendants provide no evidence that it objected to being named as additional insureds before the commencement of this action (*Commissioners of State Ins. Fund v Gem Steel Erectors Inc.* at 214; *Hartford Acc. and Indem. Co. v Coastal Dry Dock and Repair Corp.*, 97 AD2d 724, 726 [1st Dept 1983] ["It is clear that the so-called affirmative defenses and counterclaims are legally insufficient. Not only does the policy by its terms give to the insurer the

right to negotiate and settle claims as it deems appropriate, there is not even any indication let alone factual demonstration that defendant raised any objection to the settlement of any claims or to the calculation of the retrospective premium"]). Finally, the Oxford defendants' argument that there was no consideration for any alleged agreement of insurance between the Oxford defendants and plaintiff, because "there was no possible way plaintiff could have been called upon to provide coverage for any workmans' compensation claim," lacks merit; as does their argument that there was no relationship between the Oxford defendants and the other defendants. The Oxford defendants fail to provide any facts or caselaw to support these arguments. Therefore, plaintiff's request that the Court dismiss the second affirmative defense is granted.

Third Affirmative Defense

The Oxford defendants' third affirmative defense alleges that they are not liable for the premiums due because the remaining defendants engaged in fraud. Plaintiff's argument that the Oxford defendants fail to plead any of the circumstances of the co-defendants' alleged fraud, pursuant to CPLR §3016(b), lacks merit. It is well settled that on a motion to dismiss, the Court searches the record for facts sufficient to constitute a legal defense *(Krantz v Garmise*, 13 AD2d 426, 428-429 [1st Dept 1961], *citing Baxter v McDonnell*, 154 NY 432, 436-437 [1897] ["As 'a bad answer is good enough for a bad complaint,' it is necessary to examine the record to see whether the allegations of the complaint are sufficient to constitute a cause of action"]). Further, pursuant to CPLR § 321, "a trial court may use affidavits in its consideration of a pleading motion to dismiss" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976], *citing Rappaport v International Playtex Corp.*, 43 AD2d 393, 394-395 [3d Dept 1974]; *Epps v Yonkers Raceway*, 21 AD2d 798, 799 [2d Dept 1964]; 4 Weinstein-Korn- Miller, NY Civ Prac,

¶¶ 3211.35, 3211.36). Such affidavits "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello* at 635, *citing Kelly v Bank of Buffalo*, 32 AD2d 875 [4d Dept 1969]; *Raimondi v Fedeli*, 30 AD2d 802 [1st Dept 1968]).

In his affidavit, Mr. Kyriak argues that the Oxford defendants are not liable for premiums due under the Policy because the party who entered the agreement for the Policy, Ms. Apostolopolous, owner of the co-defendants, did not have the authority to do so (Kryriak Aff., ¶¶ 10, 17). In other words, Ms. Apostolopolous, as co-owner of the Oxford defendants committed a fraudulent act against Mr. Kyriak, the other co-owner of the Oxford defendants. Mr. Kyriak attests that sometime prior to May 2005, he joined Ms. Apostolopolous as a co-owner of ARC and Allied Contracting. He further attests that *in or about May of 2005*, Mr. Kyriak and Ms. Apostolopolous agreed to dissolve ARC and Allied Contracting, and that Mr. Kyriak and Ms. Apostolopolous would *remain* co-owners of the Oxford Defendants. Mr. Kyriak states: "As part of my agreement with [Ms. Apostolopolous], it was understood and agreed to by all parties that she would maintain her own workers' compensation insurance policy(ies) for *any of her businesses* that required such insurance" (Kyriak Aff., ¶ 8) (Emphasis added). Rather than proceed as though ARC and Allied Contracting were dissolved, "unbeknownst to me and without my approval, [Ms. Apostolopolous] continued to operate these entities without my knowledge or involvement." (Kyriak Aff., ¶ 9). "Additionally, in procuring workman's compensation insurance in connection with her businesses, [Ms. Apostolopolous], without my knowledge or approval, had . . . the Oxford Defendants improperly named as insureds on the insurance policy or policies on which this action is based," Mr. Kyriak states (Kyriak Aff., ¶ 10). The Oxford defendants maintain that "the act of improperly entering into this insurance agreement . . .

constituted an act of fraud. The date time and place of at least one improper and fraudulent act, to wit, the improper entry into this insurance agreement, is the date, time and place that the insurance policy(ies) were signed" (opp., ¶ 13).

To plead a cause of action for fraud, the following must be alleged: (1) the making of a materially false representation, with the intend to defraud, (2) the reasonable reliance on the representation and (3) damages suffered as a result of that reliance (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307 -308 [1st Dept 1995] ["The elements of fraud are a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages"]). Further, CPLR §3016(b) requires that fraud must be pleaded with sufficient particularity, *i.e.* in sufficient detail to give adequate notice (*Ambassador Factors* at 307-308; *Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). CPLR §3016(b) does not require a plaintiff to prove his allegations. Indeed, the Court of Appeals has specifically noted that this rule "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud' (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]). Further, on a motion to dismiss for failure to state a cause of action, "a plaintiff . . . need only plead that he relied on misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926 [NY Sup 2006]).

Here, the Oxford defendants, via the Kyriak Aff., have supported each of the elements of fraud with factual allegations sufficient to satisfy CPLR 3016 (b). Based on Mr. Kyriak's

affidavit, after May 2005, Ms. Apostolopolous made the material false representation to him that she would maintain workers' compensation insurance for her own companies only, and not for the companies they co-own (*i.e.* the Oxford defendants). Yet, Ms. Apostolopolous deceived him by continuing the Policy for the Oxford defendants, despite her agreement not to do so. Mr. Kyriak alleges that he relied on her misrepresentation, and because of his reliance he has been damaged by being held jointly and severally liable for the premiums due on the Policy. As the Oxford defendants have sufficiently alleged the elements of fraud, plaintiff's motion to strike the third affirmative defense is denied, at this juncture, without prejudice. Further, it cannot be determined at this juncture, that Ms. Apostolopolous, who may have had authority in 2000 to initiate the Policy, maintained authority in 2005 to continue the Policy on behalf of the Oxford defendants. Discovery, i.e., documents and depositions, concerning defendants' statements are necessary in order to determine whether the third affirmative defense has merit. In light of Mr. Kyriak's affidavit, defendants shall be permitted to amend the Third Affidavit Defense to allege the facts attested to by Mr. Kyriak.

Fourth Affirmative Defense

The fourth affirmative defense alleging that the Oxford defendants are not liable on the policy because plaintiff had "full knowledge" that the Oxford defendants had no employees, lacks merit. According to New York Law, an insured can be held liable for workers' insurance premiums regardless of whether it has employees (*Home Indem. Co. v Castel Const., Inc.* at 1028, *citing Great Am. Indem. Co. v Albert Constr. Co.* [reported in J Com, July 17, 1938] ["As early as 1938, the Supreme Court, New York County, found that 'all assureds named in liability policies were held liable for the premium although the evidence indicated that only one of them

employed men'"]). Further, the caselaw that the Oxford defendants cite is not on point. For example, *Employers Mut. Liability Ins. Co. of Wisc. v Bromley et al.* (4 Misc 2d 702, 704 [Sup Ct Monroe Co 1957]) does not stand for the proposition that a company with no employees is not liable for the premiums owed on the company's workers' insurance policy, as the Oxford defendants maintain. The case holds that a self-employed independent contractor is not required to have workers' compensation insurance under the Workmen's Compensation Act; therefore no part of a defendant's payment to its independent contractors should be included in determining the insurer's premiums. As the Oxford defendants fail to allege any facts or caselaw to support its fourth affirmative defense, plaintiff's request that it be stricken is granted.

Leave to Amend

It is well settled that leave to amend a pleading, pursuant to CPLR §3025(b), should be freely granted provided there is no prejudice or surprise to the nonmoving party *(Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.* at 405; *Hynes v Start Elevator, Inc.*, 2 AD3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]).

Here, plaintiff seeks leave to serve a second amended complaint once an audit of defendants' records are complete, so it can claim an actual amount due on the Policy. As the record contains evidence that all of the defendants have agreed to let plaintiff audit their records so that plaintiff can compute the exact amount owed on the Policy (see the stipulations dated April 21, 2009 and August 28, 2008), none of the defendants can claim surprise or prejudice. Accordingly, plaintiff's request for leave to serve a second amended complaint is granted.

The Oxford defendants also seek leave to serve a second amended answer. The Oxford defendants contend that leave to amend shall be granted freely, "especially where, as here, new counsel has been retained and the granting of such request will not prejudice the other parties" (Opp. ¶ 5).[3] The Oxford defendants fail to cite any caselaw for the proposition that the mere addition of a new attorney is meritorious ground for leave to amend. However, the Oxford defendants also seek leave to cure any deficiencies in their third affirmative defense. As none of the defendants can claim surprise or prejudice, and as this Court has granted plaintiff leave to amend to serve a second amended complaint, the Court will grant the Oxford defendants leave to amend their Answer to cure their third affirmative defense and to address any allegations in plaintiff's second amended complaint.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion of plaintiff The Commissioners of the State

[3]In support of the Oxford defendants' request for leave to amend, Mr. Morton explains, by way of background, that all of the defendants in this matter were first represented by Hollander & Strauss, LLP. When questions about the status of the case and the nature of this representation arose, Mr. Kyriak retained separate counsel, Frank & Assoc, P.C., to represent solely the Oxford defendants. After Frank & Assoc, P.C. ceased representing the Oxford defendants, Mr. Kyriak retained Mr. Morton's office.

Insurance Fund for an order, pursuant to CPLR §3025(c), granting it leave to serve defendants Allied Renovation Corp., Post Contracting Inc., Oxford Associates Group, Inc., Lancaster Realty Mgt. Corp., Allied Contracting I Corp., WB Contracting Corp. and Northaven Industries Corp. a Second Amended Complaint to reflect the amount claimed to be due to plaintiff after the audit is completed is granted; and it is further

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ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, August 31, 2009 at 2:15 p.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

FILED
JUL 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 30, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD