

**Commissioners of the State Ins. Fund v Colonial
Roofing Co., Inc.**

2009 NY Slip Op 32484(U)

October 14, 2009

Supreme Court, New York County

Docket Number: 406072/07

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 406072/2007

STATE INSURANCE FUND

INDEX NO. _____

vs

COLONIAL ROOFING

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered _____, are filed in support of this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided per

attached

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

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/14/09

EMILY JANE GOODMAN *J.S.C.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X

THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

-against-

INDEX NO. 406072/07

COLONIAL ROOFING CO., INC. t/a
COLONIAL GENERAL CONSTRUCTION,

Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff Commissioners of the State Insurance Fund (SIF) moves, pursuant to CPLR 3212, for summary judgment in the amount of \$106,620.87, representing the balance due for the workers' compensation insurance coverage for the period from July 5, 2006 to February 11, 2007, plus interest from February 11, 2007, and ~~\$19,192.72 in collection costs, representing 18% of the sum due,~~ pursuant to State Finance Law § 18 (5), and the costs and disbursements in the action.

Defendant opposes the motion on the basis that it does not owe the amount stated, and because Plaintiff improperly designated most of Defendant's workers as roofers, when they were not working as roofers during the period in question.¹ Defendant submits a chart describing the jobs of those individuals, which include mason worker, sheet metal worker, roof helper, driver, and carpenter. Defendant contends that because the rates for

¹Apparently Defendant's argument is that it does not owe the amount stated solely because the workers were misclassified.

such jobs are significantly less (which they are), the amounts sought are not due. Defendant states that it has brought the problem "to the attention of the New York Compensation Rating Board."

In reply, Plaintiff maintains that the court lacks jurisdiction to determine the defense of misclassification because that must be decided by administrative review. In a supplemental affirmation, Plaintiff states that the failure of Defendant to establish that there is a pending matter before the Rating Board entitles it to summary judgment. Further, Plaintiff points out that Defendant has not taken any action in the last two years to "nudge" the Rating Board. Plaintiff further states in paragraph 7 of the supplemental affirmation that "SIF agrees that if the Rating Board finds that SIF used an incorrect classification in computing the premiums due, SIF will issue the appropriate refund."

Discussion

Insurance rates are based upon rates for specific job classifications set by the Rating Board, an unincorporated association of insurance carriers which includes the State Insurance Fund. Numerous cases hold that challenges to the classification of workers, as distinguished from questions of coverage of workers, require administrative review. See e.g. *Commissioners of State Ins. Fund v Kenneth Yesmont & Assoc.*,

Inc., 226 AD2d 147 (1st Dept 1996); *Commissioners of State Ins. Fund v Fox Run Farms, Inc.*, 195 AD2d 372 (1st Dept 1993); *Commissioners of State Ins. Fund v Mascali-Robke Co.*, 208 Misc 316 [Sup Ct, NY County 1995], *affd* 1 AD2d 945 [1st Dept 1956]).

Pursuant to the procedures established in the New York Workers Compensation and Employers Liability Manual,² an insured may appeal to the Rating Board, by means of a written request, any issue regarding a rule or procedure contained in the manual. A response is mandated within 60 days. If the insured is not satisfied with the response, it may request a conference with members of the Rating Board staff. If, after a conference, the insured is still not satisfied, it may appeal, in writing, to the Underwriting Committee of the Rating Board for a hearing to consider the staff ruling. If the insured is not satisfied with

the ruling of the Underwriting Committee, it may request a
 hearing at the New York Insurance Department. The decision of the Department may then be challenged in an Article 78 proceeding. See New York Workers Compensation and Employers Liability Manual, ¶ M, Appeal Process, at 6; see also *Buffalo Civic Auto Ramps, Inc. v Serio*, 21 AD3d 722 (1st Dept 2005) (change of classification of cashiers from category of clerical "office employees" to category of "automobile parking lot and

²Although it took time for the court to locate the manual online, it is available at www.nycirb.lib.org (to the left of the home page under NY Manuals).

drivers" had to challenged first by appeal to the Rating Board, then by appeal to the Superintendent of Insurance, and only then to the court, by Article 78). The appeal process is also contained in the New York Experience Rating Plan Manual, available on the website previously mentioned (pages R-3 and R-4).

Although Defendant's letter, dated February 22, 2007, complaining that Plaintiff engaged in the "illegal practice" of categorizing workers as roofers, when they were not, was not addressed to the Rating Board as required, the Rating Board sent Plaintiff a letter, dated March 2, 2007. Although it is not clear whether the Rating Board was responding to Defendant's letter, or, rather Defendant's phone calls (which Defendant's letter states he made in October through January, 2007), the Rating Board's letter noted that Defendant's experience rating was reduced from 1.38% to 1.23% and concluded "this is all we can do on our end." Defendant then failed to follow the appeals procedure outlined above, and, did not request a conference with members of the Rating Board staff, which would have entitled Defendant to appeal to the Underwriting Committee of the Rating Board, and then to the Insurance Department. Instead of requesting a conference with Rating Board staff, Defendant sent a letter, dated March 26, 2007, addressed to the "NYS Insurance Fund Legal Department 199 Church Street New York NY 10007"

complaining about the misclassification of workers and seeking "an immediate investigation by the NYS Department of Insurance." Thus, it appears that although Defendant made many attempts to place the issue before the agency, Defendant failed to follow the correct procedures in doing so. Accordingly, no evidence has been presented that an agency appeal is currently pending, and because Defendant did not appeal the issue, in the manner required, it is likely that issue can no longer be challenged. Assuming the unlikely event that the appeal is pending, if the Rating Board classification is reversed, Plaintiff has represented it will issue the appropriate refund. Accordingly, summary judgment is warranted in the amount of \$106,620.87, representing the balance due for the workers' compensation insurance coverage for the period from July 5, 2006 to February 11, 2007, plus interest from February 11, 2007.

Plaintiff also seeks \$19,192.72 in collection costs, representing 18% of the sum due, pursuant to State Finance Law § 18 (5). Defendant has no opposition to the way the amount is calculated, and merely states that no amount is due because summary judgment should not be granted. This court has previously held that the fee should be based on the actual costs of collection (not to exceed 22%), and not merely a flat fee (see e.g., *Commissioners of the State Insurance Fund v B. Manzo & Sons M. Mango & Co., Inc.* (Sup Ct, NY County, October 14, 2005,

Goodman, J., Index No. 401174/04). Plaintiff's attorney contends that a flat rate is permissible because his firm's agreement with Plaintiff is that the "fee will be 15% of the sums collected if the claim is settled before commencement of the action and 18% of the sums collected after the commencement of the action" and that those amounts can be reimbursed under State Finance Law § 18 (5). Plaintiff cites Legislative Memorandum that refers to the practice by private collection agencies of charging state agencies a flat rate of 22% to 35% for services, and the fact that State Finance Law § 18 (5) allows the agencies to recoup those costs, up to 22%. Plaintiff also cites a recent case, *Commissioners v Hallmark Operating, Inc.* (61 AD3d 1212 [3d Dept 2009]), which permitted collection costs "representing 14% of the amount owed, which reflected the amount charged by counsel to prosecute the collection matter." Other than *Commissioners v Hallmark Operating, Inc.*, which does not tie the legal fee to any reasonableness standard, the court knows of no published appellate authority on this issue. In light of this appellate authority, the court grants summary judgment in the amount of \$19,192.72 for collection costs, representing 18% of the sum due, pursuant to State Finance Law § 18 (5).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted in the amount of \$106,620.87, representing the balance

due for the workers' compensation insurance coverage for the period from July 5, 2006 to February 11, 2007, plus interest from February 11, 2007, plus \$19,192.72 in collection costs, and the costs and disbursements in the action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further


ORDERED that in accordance with State Finance Law §18 (10), Plaintiff should consider entering into an agreement with Defendant for an installment payment plan or for temporary deferral of collection, based on Defendant's claim of hardship as well as the fact that Defendant acted in good faith, but was merely confused about the appeals process; and it is further

ORDERED that before executing on the Judgment, Plaintiff should contact Defendant in writing to explain what Defendant needs to do in order for Plaintiff to consider an installment plan or deferral.

This Constitutes the Decision and Order of the Court.

Dated: October 14, 2009

ENTER:



J. S. C.
EMILY JANE GOODMAN

FILED
OCT 26 2009
COUNTY CLERK'S OFFICE
NEW YORK