

**Seneca Ins. Co., Inc. v Certified Moving & Stor. Co.,
LLC**

2010 NY Slip Op 30140(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 601817/05

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN

PRESENT: _____ J.S.C. _____

PART 11

Index Number : 601817/2005
SENECA INSURANCE COMPANY INC.
VS.
CERTIFIED MOVING & STORAGE CO
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 is determined in accordance with the annexed decision and order.

FILED

JAN 25 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: J. Madden 1/4/2010

J. Madden
HON. JOAN A. MADDEN 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: I.A.S. PART 11

-----X
SENECA INSURANCE COMPANY, INC.,

INDEX NO. 601817/05

Plaintiff,

-against-

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

Defendants.

-----X
JOAN A. MADDEN, J.:

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

From January 2002 through January 2005,¹ Seneca provided commercial property and commercial general liability insurance coverage to both Certified companies. The advance premium for the initial policy was based on the information that Certified supplied in its application for insurance that listed only two classifications of workers-- truckers and warehouse workers. The common policy declarations and the commercial general liability declarations of the policy state, **"IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND**

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

SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.” (Emphasis in the original).

According to the policy, the amount of the premium is computed “in accordance with our [Seneca’s] rules and rates.” 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.

Section IV, paragraph 5(c) of the policy requires Certified to keep records of the information that Seneca needs to compute the premium and it 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 \$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.

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 suspected that there was a problem 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. Based on that audit, Seneca determined that Consolidated owed \$71,502 in premiums for the 2003-2004 policy period.

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

Seneca commenced this action in May, 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 argues that during discovery, Certified produced wage and tax statements for the relevant policy years which revealed that Certified owed \$1,223,670.00 in premiums for the three years covered by the policy, not the \$600,000 originally demanded in the complaint, because it discovered that almost all of the 300 employees on Certified Installation's payroll were classified as "carpenters who installed furniture," not truckers and warehouse workers.

In March, 2008, Seneca moved for partial summary judgment on its first three causes of action for unpaid premium, for dismissal of defendant's affirmative defenses, and to conform the pleadings to the proof. Defendant cross moved for an order granting a continuance to conduct further discovery. In a decision dated June 20, 2008, this Court denied Seneca's motion for summary judgment with leave to renew finding that "extrinsic evidence is necessary to establish Seneca's rules regarding premium computation and its rates on file with the Insurance Department." Defendant's cross motion was granted to permit discovery regarding Seneca's rules and rates, and whether Seneca properly applied those rules and rates when it computed the premium.

Seneca is now moving to renew its motion for partial summary judgment on the first three causes of action. Seneca is also seeking to dismiss defendant's fifth through ninth affirmative defenses, and to conform the pleadings to the proof. Certified opposes the motion and cross moves for summary judgment dismissing the complaint.

In support of its motion for partial summary judgment, 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. In addition, as to its rules and regulations

regarding premium computation and rates, Seneca states that it follows the rules of the New York insurance industry set forth by the Insurance Services Organization (ISO). According to Seneca, under the ISO rules, the final premium rate is determined by selecting the ISO classification which best describes Certified's operations, applying the basic limit rate for that classification, and then adjusting the basic rate by the appropriate increased limits factors and other applicable rate modifications. Seneca asserts that based on Certified's payroll records, job descriptions and audits, and the rules and regulations for determining the premiums due, it appropriately determined that Certified owes \$1,168,876 in premiums.

In seeking dismissal of the fifth through ninth affirmative defenses, Seneca argues that, as to the fifth affirmative defense, discovery in this action revealed that Certified concealed and misrepresented information. Seneca contends that the sixth affirmative defense based on documentary evidence is meritless, since the documentary evidence mandates summary judgment in Seneca's favor, and that the seventh, eighth and ninth affirmative defenses alleging that Seneca failed to properly compute the premium and misrepresented the method of computing the premiums have no basis in fact.

Finally, Seneca asserts that the court should conform the ad damnum clause to the proof, based on the evidence produced in discovery, since the request has merit and defendant will not be prejudiced by the amendment.

In opposition to Seneca's motion for partial summary judgment and in support of its cross motion for summary judgment dismissing the complaint, Certified contends that Seneca's underwriter properly applied the ISO rules when the policy was originally bound. Specifically, Certified argues that under the prevailing industry standard, installation of office furniture is

considered to be part of, and incidental to, the moving operation; and that its moving and installation payrolls are only separated because of union rules, but that the tasks performed by the workers on the installation payroll are part of the moving operation. Certified also asserts that under the ISO rules, the installers should not be separately classified by the insurer for rating purposes, and that drivers and helpers who unload the trucks and assemble the furniture are excluded from coverage under a commercial general liability policy (CGL), since they are covered under the company's auto policy.

Summary judgment is a drastic remedy that should not be granted where any doubt is raised as to the existence of a triable issue of fact (*Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; *Tronlone v. Lac d'Amiante du Quebec, LTEE*, 297 AD2d 528, 528-529 [1st Dept 2002], *aff'd* 99 NY2d 647 [2003]). When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). In determining whether there are any triable issues of fact, the court should draw all favorable inferences in favor of the party opposing the summary judgment (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008]).

In this case, questions of fact exist which preclude summary judgment. Seneca's chief financial officer, Marc Wolin, and its New York branch manager in charge of underwriting, Kevin McCarthy, both aver that Seneca is a member of the ISO and that it follows the ISO's standard rules and rates with respect to the calculation of premiums. According to the ISO protocol, the final premium rate is determined by first selecting the ISO classification that best describes Certified's operation. To that end, Section 28 provides:

A. For Classification Assignment purposes

1. If a risk consists of a single operation, or a number of separate operations which normally prevail in the business described by a single manual classification, that single classification which most accurately describes the entire enterprise should be applied.

Certified's expert Robert Kirkwood, the principal of an insurance agency that specializes in transportation insurance, avers that Seneca calculated its initial deposit premium based on the correct application of ISO Section 28(A) because the installation payroll is omitted from the calculation of premium even though Seneca knew, from Certified's insurance application, that Certified's operations included installations. It is Kirkwood's position that in considering ISO Section 28(A), the underwriter must consider what prevails in the moving business in general and that, in the moving business, it is customary for the mover to move furniture into a client's location and then set it up. He claims that the risk that Seneca underwrote for Certified consisted of a single moving and storage operation and that Seneca's initial underwriter properly determined that the installation payroll should not be separately classified. In addition, Kirkwood states that under the correct application of the ISO rules, Certified's entire moving payroll, including the installation payroll, should be excluded from the calculation of the CGL premium because the moving and unloading exposure is insured under Certified's liability policy.

On the other hand, Seneca states that, in response to its interrogatory request, Certified identified the employees on its installation payroll as carpenters who installed modular furniture. Seneca states that this job description corresponds to the ISO classification "furniture or fixtures installation in offices or stores - portable, metal and wood." According to Seneca, the installers'

payroll should have been separately classified and rated on a payroll basis (ISO Section 28[A][2] and Section 28[B][1]).

Based on the foregoing, neither Seneca nor Certified has presented sufficient evidence in admissible form to demonstrate entitlement to judgment as a matter of law. In particular, neither party has established how moving, unloading and installation are generally classified in the moving and storage industry under the ISO rules. Seneca has also failed to establish its prima facie case that Certified owes more than one million dollars in premiums, since there is no evidence that its separate classification of the installers comports with ISO rules as applied to the moving industry. The conclusory statements of its chief financial officer and New York branch manager in charge of underwriting are insufficient, standing alone, to establish that movers and installers should be separately rated (*See, e.g. Curanovic v Central Mutual Fire Ins. Co.*, 307 AD2d 435, 437-438 [3rd Dept 2003][conclusory statements by insurance company employees, unsupported by documentary evidence such as underwriting practices pertaining to similar risks, are insufficient to establish materiality]).

On the other hand, Certified's expert's affidavit concerning industry-wide knowledge is also insufficient to support summary judgment in its favor, because Kirkwood states his conclusions "unencumbered by any trace of facts or data" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533-534, n 2 [1991]; *see also Jones v City of New York*, 32 AD3d 706, 707 [1st Dept 2006][holding that an expert's affidavit on industry practice must provide support "in the form of published industry or professional standard or in the form of evidence that such a practice has been generally accepted in the relevant industry"]).

Thus, since neither party has submitted admissible evidence establishing how installers are generally classified in the moving and storage industry which is the initial step in the process of computing the proper premium rate, summary judgment is not warranted. For same reason, the balance of plaintiff's motion is denied.

Accordingly, it is

ORDERED that plaintiff, Seneca Insurance Company, Inc.'s motion for partial summary judgment and other relief is denied in its entirety; and it is further

ORDERED that defendants Certified Moving & Storage Co., LLC and Certified Installation Services, LLC's cross motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for March 18, 2010 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: January 14, 2010

ENTER:

J.S.C.

FILED

JAN 25 2010

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