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

PRESENT: Jane S. Solomon Justice PART 55

State Insurance

-v-

Big Apple

INDEX NO. 400601/07

MOTION DATE 1/5/10

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED
MAR 26 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/24/10

JANE S. SOLOMON J.S.C.

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

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: PART 55

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

Index No.400601/2007

DECISION AND ORDER

-against-

BIG APPLE INTERNATIONAL CONTRACTING CORP.

Defendant.

JANE SOLOMON, J.S.C.:

In this action, plaintiff, The State Insurance Fund (SIF), seeks a judgment against defendant, Big Apple International Contracting Corp. (Big Apple), for unpaid insurance premiums of $97,289.29, plus interest. By a stipulation between the parties, SIF's claim for collection costs was discontinued with prejudice. Pursuant to a Decision and Order dated September 29, 2009, this court granted summary judgment in favor of SIF, and denied Big Apple's cross motion for discovery (the Prior Decision). Pursuant to CPLR 2221 (d), Big Apple seeks leave to reargue the Prior Decision. For the reasons stated herein, Big Apple's motion is denied.

Discussion

CPLR 2221 (d) provides, in relevant part, that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matter of fact not offered on the prior motion." Furthermore, it has been held by

the courts that a motion for leave to reargue is "not designed to offer a party an opportunity to argue a new theory of law not previously advanced by it." *Frisenda v X Large Enterprises Inc.*, 280 AD2d 514, 515 (2d Dept 2001).

In support of its motion, Big Apple alleges that this court "did not sufficiently consider and misapprehended the evidence and arguments" submitted by Big Apple in its opposition to SIF's motion for summary judgment and its cross motion for discovery. Defendant's Brief, at 2. More specifically, Big Apple argues that SIF did not sustain its burden in proving its entitlement to summary judgment. In particular, Big Apple contends that the court had presumed the accuracy of the audit performed by SIF, without requiring SIF to identify the rates used by SIF in its calculation of the unpaid insurance premium owed by Big Apple, or to show that the proper rates were applied "to the amounts claimed to be derived from Big Apple's books and records." *Id.* at 6-7.

Big Apple's argument is unavailing. The following facts, among others, were relevant to the court's determination in the Prior Decision that SIF had established a prima facie case: (1) the documents annexed to the Itwaru Affidavit[1] and the statements made therein, which indicated that such documents are SIF's official business records, including, inter alia, the

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[1] Capitalized terms not otherwise defined herein have the respective meanings ascribed to them in the Prior Decision.

insurance policy at issue, the audit worksheets, invoices and statements of account, which showed all of SIF's transactions with Big Apple since policy inception, including payments made by Big Apple; and (2) the documents annexed to the McInnis Affidavit and the statements made therein, including, inter alia, that the audit worksheets and the resulting reports were generated based upon specific books and records supplied to McInnis by Big Apple, and that it was insincere and misleading for Big Apple to argue that its other books and records might reflect different amounts than those in the worksheets and reports, since those other books and records were never supplied to McInnis in the audit process. The above facts, statements, and documentary evidence were (and are) not disputed by Big Apple. Prior Decision, at 3-7.

On the other hand, Big Apple presented incompetent evidence and uncorroborated allegations when opposing SIF's motion for summary judgment. These included, among others, (1) undated and unsigned tax returns, and with no assertion that such returns were ever provided to SIF for the audits; (2) allegations that Big Apple's requests for re-audits were denied by SIF, but without attaching any documentary evidence in support of such allegations; and (3) assertions that the audit reports improperly classified certain employees and attributed payrolls of Big Apple's affiliates and subcontractors to Big Apple, but without acknowledging the law that employee classification issues require an administrative review and cannot be collaterally raised as a

defense in an insurer's action to recover unpaid insurance premiums, as well as failing to acknowledge that in those instances where such attributions were made, they were made because Big Apple and/or its subcontractors did not provide to SIF any certificate or other evidence of workers' compensation insurance at the time of the audits. Prior Decision, at 4-8.

Based on the above facts and applicable law, this court found that SIF had submitted sufficient evidence to make out a prima facie showing of its entitlement to summary judgment, as a matter of law. Prior Decision, at 8. *See Commissioners of State Insurance Fund v Beyer Farms*, 15 AD3d 273 (1st Dept 2005) (summary judgment granted in favor of SIF because it submitted, inter alia, unrebutted business records, audit reports and resulting invoices); *see also Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986)(when movant for summary judgment has made a prima facie showing, the burden shifts to opponent of motion to produce evidentiary support in admissible form sufficient to rebut such showing to establish the existence of issues of fact).

Notwithstanding the above, Big Apples argues once more that it has not had a chance to conduct or complete discovery, and that "summary judgment should have been denied since it was premature." Defendant's Brief, at 2. In sum, Big Apple argues that, had it been afforded an opportunity to conduct discovery, it could show that the audits were not properly done. *Id.* at 4.

As indicated in the Prior Decision, Big Apple's allegation is without merit, because the correspondence between the parties reflects otherwise. In fact, the letters from SIF to Big Apple's counsel (from September to October 2007), copies of which were attached to its moving papers, showed that SIF had urged Big Apple to promptly proceed with deposition of witnesses so as to move this action forward, and that SIF had given to Big Apple the names of witnesses and the available dates for deposition taking. However, Big Apple unilaterally decided to depose the witnesses only in connection with SIF's separate action against Big Apple Roofing and Construction Corp. (an affiliate of Big Apple), and made no attempt to depose these witnesses again in connection with the instant action until SIF filed its summary judgment motion. Prior Decision, at 11-12. These facts were (and are) undisputed.

Nevertheless, Big Apple contends that denial of Big Apple's prior cross motion for discovery established "an unworkable and impractical standard requiring a singular deposition of [SIF witnesses] for multiple defendants in unrelated actions." Defendant's Brief, at 4. But Big Apple fails to explain why it could not have deposed these witnesses in more than 16 months after the last time it attempted to do so, and then only after SIF sought summary judgment. More importantly, nowhere in the Prior Decision is it indicated that Big Apple was required to complete (or should have completed)

witness depositions in a "singular deposition" for "multiple defendants in unrelated actions."

Also in the Prior Decision, the court stated that the argument that Big Apple should be given more time to discover facts is unpersuasive, because its "own voluntary inaction is the cause of the lack of knowledge." *Selznick v Ordan Corp.*, 202 AD2d 268, 269 (1st Dept 1994); *Moxon v Barbour*, 106 AD2d 558, 559 (2d Dept 1984). Prior Decision, at 12-13. Instead of arguing why these cases are inapplicable, Big Apple argues that these cases apply to plaintiffs who failed to conduct discovery to advance their claims, but "in the instant matter Big Apple is the defendant and did not commence the action." Defendant's Brief, at 3. This argument does not address the law that a party's failure to conduct discovery is equal to its "own voluntary inaction [being] the cause of [its] lack of knowledge."

Despite the foregoing, Big Apple also alleges that since SIF "did not seek and the Court had not yet entered a preliminary conference order to schedule the completion of discovery ... it did not appear that [SIF] ever intended to prosecute the [instant] action." Defendant's Brief, at 4. This argument is equally baseless, because it was not raised in Big Apple's prior cross motion for discovery, and is not supported by the facts. *Rubinstein v Goldman*, 225 AD2d 328, 328 (1st Dept 1996)(motion to reargue does not provide "'an opportunity to advance arguments

different from those tendered on the original application' [citation omitted]").

Furthermore, Big Apple's claim that discovery is needed to show that SIF improperly conducted the audits is "no more than a 'mere hope' that disclosure will reveal something helpful to its cause, [which is] insufficient to forestall summary judgment." *Commissioners of State Insurance Fund v Concord Messenger Service, Inc.*, 34 AD3d 355, 356 (1st Dept 2006). Finally, Big Apple's claim that the court had presumed the accuracy of the audits performed by SIF (without requiring SIF to identify the rates it used in calculating the unpaid premium) is no more than an attempt to argue that the rates applied by SIF should have been lower. The same argument was rejected by the Appellate Division in *Concord Messenger Service*. *Id.* 34 AD3d at 355 (affirmed trial court's ruling in favor of SIF because documentary evidence established its entitlement to summary judgment as a matter of law, and "[d]efendant's claim that plaintiff incorrectly calculated the premiums at the rate for employees, rather than the lower rate for independent contractors, is conjectural, and rebutted by an express statement in an audit report plaintiff submitted"). Here, Big Apple's claim that discovery is necessary to obtain information to help its opposition to SIF's audit calculations and the applied rates is conjectural, and is rebutted by an express statement in the

Itwaru Affidavit that "SIF calculates the premium by multiplying the applicable rates by the actual payroll attributable to each classification." Itwaru Affidavit, at 9.

For all of the foregoing reasons, Big Apple has failed to demonstrate that this court has overlooked or misapprehended the facts or law in determining SIF's motion for summary judgment, or in considering Big Apple's opposition to that motion and its cross motion for discovery, as reflected in the Prior Decision. Accordingly, it is

ORDERED that defendant Big Apple International Contracting Corp.'s motion (motion sequence number 003) for leave to reargue is denied in all respects.

Dated: March 24, 2010

ENTER:

J.S.C.
JANE S. SOLOMON