Premium Assignment Corp. v Utopia Home Care, Inc.
2010 NY Slip Op 31495(U)
June 14, 2010
Supreme Court, Suffolk County
Docket Number: 07-32229
Judge: Jeffrey Arlen Spinner

[* 1]

PUBLISH

SHORT FORM ORDER

INDEX No. 07-32229

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-6-10
ADJ. DATE 4-21-10
Mot. Seq. # 003 - MotD
004 - XMotD

PREMIUM ASSIGNMENT CORPORATION, Plaintiff, - against - UTOPIA HOME CARE, INC., Defendant.	STEVEN G. LEGUM, ESQ. Attorney for Plaintiff 170 Old Country Road Mineola, New York 11501 AHERN & AHERN Attorney for Defendant/Third-Party Plaintiff Utopia Home Care, Inc. One Main Street Kings Park, New York 11754
UTOPIA HOME CARE, INC., Third-Party Plaintiff, - against - CRUM & FORSTER, Third-Party Defendant.	CARROLL, McNULTY & KULL, L.L.C. Attorney for Third-Party Defendant / Counterclaimant United States Fire Insurance Company sued incorrectly herein as Crum & Forster 570 Lexington Avenue, 10th Floor New York, New York 10022

Upon the following papers numbered 1 to 82 read on this motion for summary judgment and cross motion to strike answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 40; Notice of Cross Motion and supporting papers 43 - 72; Answering Affidavits and supporting papers 73 - 78; Replying Affidavits and supporting papers 79-82; Other memorandum of law 41 - 42; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (# 003) by the third-party defendant, Crum & Forster, Inc., pursuant to CPLR 3212 for summary judgment dismissing the third-party plaintiff's complaint and awarding it summary judgment on its counterclaims, is granted to the extent that summary judgment in its favor is granted as to said counterclaims as set forth herein, and is otherwise denied; and it is further

ORDERED that this cross motion (# 004) by the third-party plaintiff, Utopia Home Care, Inc., pursuant to CPLR 3126 for an order striking the answer of the third-party defendant, seeking to compel disclosure, and for sanctions for noncompliance with court ordered discovery is granted to the extent that

all parties shall complete discovery pursuant to the preliminary conference order dated March 11, 2009, and all party depositions are to be completed, within forty five days of the service of this order with notice of entry; and is otherwise denied.

This is an action to recover for the payment of money due as a refund of premium for a workers' compensation policy issued by the third-party defendant United States Fire Insurance Company, sued herein as Crum & Forster (US Fire), to the third-party plaintiff Utopia Home Care, Inc. (Utopia).[1] The claim involves the second of two such policies issued to Utopia, which was effective December 31, 2006 to December 31, 2007 under policy number 406-680270-3 (2007 Policy). The 2007 Policy was a renewal of a policy effective December 31, 2005 to December 31, 2006 under policy number 406-680149-7 (2006 Policy).

Coverage under the 2007 policy ended after 51 days, on February 21, 2007, and it is undisputed that Utopia is entitled to a refund of the unearned premium. On September 21, 2007, US Fire provided such a refund by delivering a check in the amount of $238,900 to the plaintiff Premium Assignment Corporation, which sum was credited to Utopia's account. However, Utopia claims that it is due a refund of $347,817.11. US Fire claims that its refund of premium for the 2007 Policy is correct, and it has asserted a counterclaim against Utopia seeking to recover for unpaid premiums pursuant to the 2006 Policy, and unpaid deductible invoices pursuant to the 2006 and 2007 Policies.

A review of the US Fire policies reveals that, pursuant to the Deductible Endorsements therein, US Fire agreed to advance deductible payments on behalf of Utopia and Utopia agreed to reimburse US Fire for those payments. In addition, the premiums under said policies were set, in final form, through annual audits of Utopia's outstanding claims, its payroll records and the classification of its employees. Depending on the audit results, Utopia might be required to pay additional monies, or it might be entitled to a refund for an overpayment of its premium.

After the business relationship between the parties ended, US Fire hired an independent auditing firm to conduct an annual audit of Utopia's records under the 2006 Policy. On March 21, 2007, US Fire completed the audit, and issued an invoice to Utopia for $88,025.00, which Utopia disputed. Thereafter, US Fire and its independent auditor requested documentation and information in order to conduct a second audit, which information was not immediately forthcoming from Utopia. On November 21, 2007, the revised audit was completed and allegedly revealed that the 2006 Policy premium was actually $108,013.00, due to a rate reclassification based on the duties of certain Utopia employees. Utopia again disputed the accuracy of the revised audit claiming that the reclassifications made by the auditor were in error.

US Fire continued to pay for workers' compensation claims covered during the pendency of the 2006 and 2007 Policies, and it transmitted invoices to Utopia reflecting the deductibles

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[1] Summary Judgment in favor of the plaintiff Premium Assignment Corporation against Utopia was granted on January 20, 2009 (*Premium Assignment Corporation v Utopia Home Care, Inc.*, 58 AD3d 709, 871 NYS2d 724 [2009]).

reimbursement owed to it. The record reveals invoices with dates ranging from January 3, 2008 to January 28, 2009.

US Fire now moves for summary judgment 1) dismissing the complaint on the grounds that there are no disputed material issues of fact and, 2) finding Utopia liable for the payment of premiums and deductibles as a matter of law pursuant to its counterclaims. Utopia opposes US Fire's motion for summary judgment and contends that said motion is premature in light of outstanding discovery and that there is a dispute between the parties concerning the reclassification of Utopia employees.

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 eliminate any material issue of fact (*see*, ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). In an action to recover unpaid workers' compensation premiums, such a showing typically includes the insurance application, the policy, audit work sheets, resulting invoices and statements of account (*see,* ***Legion Ins. Co. v Northeastern Plate Glass***, 41 AD3d 933, 873 NYS2d 430 [2007]; ***Commissioners of the State Ins. Fund v Concord Messenger Service***, 34 AD3d 355, 826 NYS2d 187 [2006]; ***Commissioners of the State Ins. Fund v Beyer Farms***, 15 AD3d 273, 792 NYS2d 380 [2005]; ***Commissioners of the State Ins. Fund v Country Carting***, 265 AD2d 158, 696 NYS2d 129 [1999]). In addition, the plaintiff should submit affidavits of those with personal knowledge to authenticate the plaintiff's business records concerning the defendant's policy and the methodology used in calculating the associated premiums (*see,* ***Legion Ins. Co. v Northeastern Plate Glass***, *supra*; ***Commissioners of the State Ins. Fund v Albany Capitaland Enterprises***, 18 AD3d 934, 794 NYS2d 505 [2005]).

Here, US Fire failed to submit an audit report or audit sheets, or an affidavit to explain the methodology used in calculating the premium it charged for the short period during which the 2007 Policy was in effect. Because the premium charged directly affects the amount of the refund due to Utopia, there is a material issue of fact requiring a trial of Utopia's action against US Fire. Under these circumstances, US Fire has failed to make a prima facie showing of its entitlement to summary judgment (*see,* ***Legion Ins. Co. v Northeastern Plate Glass***, *supra*).

Accordingly, that branch of US Fire's motion for summary judgment seeking to dismiss the complaint is denied.

US Fire has established its prima facie entitlement to summary judgment regarding its counterclaims seeking the unpaid premiums due under the 2006 Policy, and the unpaid deductible invoices under the 2006 and 2007 Policies. It was therefore incumbent upon Utopia to produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, *supra*; ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*.) In opposition to the request for the 2006 Policy premium, Utopia reasserts its position that the classification of certain of its employees to a higher premium rate was in error. However, Utopia has not submitted any evidence regarding this

critical issue. In opposition to the request for reimbursement of the deductibles advanced by US Fire, Utopia alleges that US Fire has improperly handled the underlying workers' compensation claims thereby increasing the amount of deductible payments due as reimbursement. However, Utopia has not submitted any evidence regarding this issue. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore***, *supra*). In addition, a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence, and Utopia failed to make the requisite evidentiary showing (*see,* ***Panasuk v Viola Park Realty, LLC,*** 41 AD3d 804, 839 NYS2d 520 [2007]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion (*see,* ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 846 NYS2d 309 [2007]). Finally, Utopia does not dispute that it is liable for the payment of deductibles advanced by US Fire pursuant to the Deductible Endorsements in the relevant policies and the Deductible Program Agreement signed by its vice president. However, US Fire has failed to include as exhibits all of the invoices which it alleges are due and owing pursuant to its agreements with Utopia. Accordingly, US Fire's motion is granted to the extent that it is awarded summary judgment on the issue of liability relative to its counterclaims. The amount of damages owed to US Fire by Utopia for deductibles shall be determined at the trial of this action. The entry of judgment on that portion of US Fire's counterclaim that involves the premium of $108,013.00 due under the 2006 Policy shall be held in abeyance pending the determination of the remaining causes of action (CPLR 3212[e][(2]).

Utopia has cross-moved to strike US Fire's third-party answer, to compel discovery in this matter based on the alleged failure of US Fire to produce a witness for deposition or to respond to its demands for discovery, and for sanctions against the counsel for US Fire. The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Further, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). Here, Utopia has not submitted the required affirmation of good faith. It appears, instead, that the counsel for Utopia relies upon a single letter, dated November 18, 2009, sent by Utopia's counsel to the counsel for US Fire stating that US Fire's failure to comply with a previous Preliminary Conference Order "shall result in a motion for striking your pleadings" as a purported affirmation of good faith effort. It remains the fact that said letter is deficient under the Uniform Rules (*see*, ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2007]; ***Cestaro v Chin***, 20 AD3d 500, 799 NYS2d 143 [2005]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2000]).

Actions should be resolved on their merits wherever possible (*see*, ***Traina v Taglienti***, 6 AD3d 524, 774 NYS2d 391 [2004]; ***Bach v City of New York***, 304 AD2d 686, 757 NYS2d 759 [2003]), and the drastic remedy of striking a pleading should not be employed absent a clear showing that the failure to comply with discovery demands was willful, contumacious, or in bad faith (*see*, ***Mendez v City of New York***, 7 AD3d 766, 778 NYS2d 501 [2004]; ***Traina v Taglienti***, *supra*; ***Bach v City of New York***, *supra*; ***Byrne v City of New York***, 301 AD2d 489, 490, 753 NYS2d 132 [2003]). The record reveals that the parties have spent a good deal of time attempting to reach a settlement in this matter and that Utopia

has consented on at least one occasion to the adjournment of depositions in this matter. Here, there has been no showing of willful and contumacious conduct on the part of US Fire or any repeated failure, over an extended period of time, to comply with discovery orders, and there appear to be adequate excuses for the delays in responding to the discovery demands herein.

However, pursuant to the preliminary conference order dated March 11, 2009, all party depositions were scheduled for June 17, 2009 and June 18, 2009. In addition, the parties signed a stipulation dated October 7, 2009, scheduling depositions on or before December 7, 2009. Depositions have not been conducted to date. Although counsel for US Fire sets forth in her affirmation that Utopia has been supplied with US Fire's file in this matter, it is clear that responses to Utopia's discovery demands pursuant to the preliminary conference order have not been served.

Accordingly, Utopia's cross motion is granted to the extent that all parties shall complete discovery pursuant to the preliminary conference order dated March 11, 2009, and all party depositions are to be completed, within forty five days of the service of this order with notice of entry.

The court has considered that portion of Utopia's motion seeking sanctions against the counsel for US Fire pursuant to 22 NYCRR 130-1.1 for the failure to comply with court-ordered discovery and finds it to be without merit.

Dated: JUN 14 2010

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION