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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

W. PARK ASSOCIATES, INC. and
WEST PARK BUILDERS, INC.,
Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

INDEX NO.: 16444/2009
MOTION DATE: 3/14/11
MOTION SEQUENCE: 01

-against-

EVEREST NATIONAL INSURANCE COMPANY,
and INTER-RECO, INC.

Defendants.

The following papers read on this motion:

Notice of Defendant Everest's Motion for Summary Judgment, Affirmation, and Exhibits 1
Defendant's Memorandum of Law in Support of its Motion 2
Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion 3
Plaintiffs' Affirmation in Opposition to Defendant's Motion and Exhibits 4
Defendant's Reply Affirmation in Further Support of its Motion 5
Defendant's Reply Memorandum of Law 6

PRELIMINARY STATEMENT

Defendant Everest National Insurance Company moves this court to grant it summary judgment dismissing all claims against it on the ground that plaintiffs claims are barred by the filed rate doctrine or fail to state any cause of action.

BACKGROUND

Plaintiffs assert a cause of action for breach of contract, alleging that Everest improperly calculated the premiums for the insurance coverage it provided to the plaintiffs, under its own approved rate calculations. Plaintiffs assert a second cause of action for unjust enrichment, alleging that defendants accepted plaintiffs' non-gratuitous premium payments in excess of the rates that should have been assessed. Plaintiffs assert a third cause of action under General Business Law § 349 and for injunctive relief, alleging that defendants engaged in unlawful and deceptive business practices by charging premiums for any independent contractors who did not provide certificates of insurance or hold-harmless agreements, even though defendants never intended to provide any coverage to such independent contractors.

Defendants Everest and Inter-Reco, agent for Everest, underwrote a general commercial liability("GCL") insurance policy to plaintiffs, who are residential home builders. At the outset of the policy period, plaintiffs paid a premium of $28,541, which Everest denominates an "Advance Premium" pending an audit after the policy ends. The initial premium of $28,541 was calculated under rating rules submitted to the Insurance Department, which adopted the Commercial Lines Manual ("ISO manual") created by an industry group, the Insurance Services Offices, Inc ("ISO"). One of the risks included in this calculation contemplated that Everest's risk exposure was $400,000 for any work by plaintiffs' subcontractors. Another risk included in the calculation contemplated a risk exposure of $138,000 for the work of plaintiffs' own employees. Both of these amounts for risk exposure were based on what the plaintiffs were expected to pay for subcontractors' labor and payrolls for its own employees.

The audit at the end of the policy determined that the risk exposure for plaintiffs' own employees had been overestimated, but that the risk exposure for subcontractors' work had been underestimated. The initial calculation had assumed that all subcontractors were adequately insured and had signed hold-harmless and indemnity agreements with the plaintiffs. Defendants determine whether a subcontractor is adequately insured by requesting a "Certificate of Insurance" as evidence of insurance. Because plaintiffs did not have a "Certificate of Insurance" on file for one of the electrical subcontractors, defendants re-calculated the risk exposure for this subcontractors' work based on the total amount paid to this subcontractor, according to industry

practice rather than according the procedures approved by the Insurance Department. Defendants determined that based on these calculations, the total premium should be $34, 305, which exceeds the estimated "Advance Premium" of $28, 541. Plaintiffs dispute defendants calculation of the total premium according to industry practice rather than the rating rules approved by the Insurance Department, and plaintiffs also allege that defendants unlawfully charged premiums for coverage that their policies plainly did not provide. Plaintiffs further seek to bring a class action on behalf of all those similarly situated, claiming that the unlawful practice of defendants is a common in the industry for GCL policies issued to construction contractors.

PROCEDURAL POSTURE

Defendant Everest brings this motion under CPLR § 3212 for summary judgment. Summary judgment terminates a case before a trial, and it is therefore a drastic remedy that will not be granted if there is any doubt with regard to a genuine issue of material fact, since it is normally the jury's function to determine the facts. (*Sillman v. Twentieth Century-Fox Film Cor.*, 3 NY2d 395 [1957]). When summary judgment is determined on the proof, it is equivalent to a directed verdict: if contrary inferences can reasonably be drawn from the evidence, then genuine issues of material fact preclude summary judgment. (*Gerard v. Inglese*, 11 AD2d 381 [2d Dep't 1960].

It is not the court's function to weigh the credibility of contradictory proof on a motion for summary judgment. (*Ferrante v. American Lung Assoc.*, 90 NY2d 623 [1997]). Thus the evidence will be considered in the light most favorable to the opposing party. (*Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). However, where a party is otherwise entitled to a judgment as a matter of law, an opposing party may not simply manufacture a feigned issue of fact to defeat summary judgment. A material issue of fact "must be genuine, bona fide and substantial to require a trial." (*Leumi financial Corp. v. Richter*, 24 AD2d 855 [1st Dep't 1965] quoting *Richard v. Credit Suisse*, 242 NY 346 [1926]).

If a party has presented a prima facie case of entitlement to summary judgment, because no triable issues of material fact exist, the opposing party is obligated to come forward and bare his proof by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the court to

believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Summary judgment is therefore generally appropriate when any dispute involves only issues of law (*see, e.g., Surrey Strathmore Corp. v. Dollar Sav. Bank of New York*, 36 N.Y.2d 173 [1975], *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385 [1974]), when the record objectively establishes that a party cannot support its allegations or has completely established them (*see, e.g., Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986], *Ferluckaj v. Goldman Sacks & Co.*, 12 NY3d 316 [2009]), or when any unresolved fact issue is immaterial or is manufactured from patently incredible evidence (*see, e.g., Bank of New York v. 125-127 Allen Street Assoc.*, 59 AD3d 220 [1st Dep't 2009]).

DISCUSSION

Filed rate doctrine

Defendant Everest contends that plaintiffs' claims for breach of contract regarding Everest's premiums involve only the construction and reasonableness of rates for insurance, and that plaintiffs' claims are thus barred by the "filed rate doctrine." The filed rate doctrine originates from the fact that an administrative agency regulating insurance generally has exclusive jurisdiction to set the reasonableness of regulated insurance rates, and courts do not have authority to change those rates. (*See U.S. v. Western Pacific Railroad*, 352 U.S. 59 [1956], *N.Y.S. Elec. & Gas Corp. v. N.Y. Ind. Sus. Oper. Inc.*, 108 F.Sup.23 [NDNY 2001]). Where the reasonableness or interpretation of particular rates for insurance is not at issue, but only the application of approved rate methods, a court has jurisdiction to determine whether insurance rates have been unlawfully assessed, since the usual concerns of non-justiciability, price discrimination, and an agency's exclusive jurisdiction, are not at issue. (*Good v. American Pioneer Title Ins.*, 12 AD3d 401 [2d Dept. 2004]; Schlesinger Aff., Ex. B, *Good v. American Pioneer Title Ins.*, No. 010335/2002 [Nassau Cty. Sup. Ct. April 25, 2003] [Warshawsky, J.] *aff'd* 12 A.D.3d 401 [2d Dept. 2004]; *id.*, Ex. A, *Winward Builders, LLC v. Delos Ins. Gr.*, No. 015214/2009 [Nassau Cty. Sup. Ct. Feb. 9, 2010] [Driscoll, J.]).

Plaintiffs contend that the premium calculation's inclusion of an exposure risk related to its uninsured subcontractors constitutes unlawful charging of a premium for noncoverage.

However, the submissions to the Department of Insurance included both, an endorsement stating an exclusion of coverage for any subcontractors which do not present a valid Certificate of Insurance, and a premium calculation method which differentiates the exposure risk when a subcontractor is uninsured. (Howell Aff., Exs. C & E). Thus, the Department of Insurance approved as reasonable, a premium calculation for an exposure risk from uninsured subcontractors, despite the referenced exclusion for such uninsured subcontractors.[1] This premium calculation, as a rating rule filed with and approved by the Department of Insurance, is therefore unassailable by judicial action . On the other hand, the court cannot determine as a matter of law that the Insurance Department approved a rating rule that permitted Everest to determine the premium "base" for uninsured subcontractors by the total remuneration paid to the subcontractors, rather than the payroll total. In fact, defendants admit that the rating rule approved by the Insurance Department required them to use "payroll." (Howell Aff. ¶ 12, Ex. F). However, defendants contend that industry practice permits them to use total monies paid to a subcontractor, in place of the "payroll" rating rule specifically approved by the Insurance Department. (Howell Aff., Ex. H). "Payroll" is a commonly understood English word, and the definition approved by the Insurance Department fits with plain English usage. (Howell Aff., Ex. G). Therefore, this court can apply the basic rating rule approved by the Department of Insurance, to determine whether plaintiffs were assessed an incorrect rate, either because it contravenes the rating rules approved by the Department of Insurance for use of payrolls, or the rating rule applied is otherwise unlawful and it is not per se reasonable because the rating rule was not "filed" with the Insurance Department.

Breach of Contract

A cause of action for breach of contract will lie if there is an agreement between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant, and damages resulting from the breach. (*Furia v. Furia*, 116 AD2d 694 [2d Dept. 1986]). In this case, the policy agreement entered between the plaintiff and defendant included provisions

[1] This court does not speculate on why the Insurance Department may approve a higher premium base for uninsured subcontractors despite the exclusion of coverage for such subcontractors. Plaintiffs suggested during oral argument that a general contractor, rather than an uninsured subcontractor, may be more likely to be sued for an accident caused by such uninsured subcontractor.

regarding calculation of premiums "based on rates and rules in effect at the time the policy was issued." (Howell Aff., Ex. D at EVIR000043). Plaintiffs contend, in essence, that the rates and rules in effect are those which have been filed and approved by the Insurance Department pursuant to article 23 of the Insurance Law, since the Insurance Law requires the filing of any rating rules. A violation of these rating rules or "rates and rules in effect" would be a breach of the policy agreement. Defendants do not otherwise contest the plaintiffs paid the initial premium, offered consideration, and have or will be damaged by defendants' alleged overcharging of premiums. A cause of action for breach of contract has been adequately stated. Any arguments regarding contractual privity with Inter-Reco are not resolved by any of the submissions on these motions.

Unjust Enrichment

At this stage, the defendants contest that the policy agreement binds Inter-Reco, such that Inter-Reco would not be liable in breach of contract for any violations of the policy agreement. Because the defendants contest that an express, written contract governs the dispute between Inter-Reco and plaintiffs, the plaintiffs may continue to allege unjust enrichment as an alternative grounds for recovery from any non-gratuitous payments received by Inter-Reco, which have unjustly enriched Inter-Reco, because it is not entitled to such payments. (*See Auguston v. Spry*, 282 AD2d 489, 491 [2d Dept. 2001]). However, to the extent that plaintiffs' cause of action for unjust enrichment seeks restitution of any premiums charged for uninsured subcontractors, because the policy does excludes coverage for such uninsured subcontractors, such a claim is precluded under filed rate doctrine. As discussed previously, the rating method for a higher premium based assessed due to uninsured subcontractors was filed and approved by the Insurance Department, as were the policy forms which excluded coverage for uninsured subcontractors.

Gen. Bus. L. § 349

Defendants contend that plaintiffs cannot make out a claim under GBL § 349 because they are businesses, and as businesses they cannot be part of the class of "consumers" which the legislature intend to be protect in GBL § 349. The case law regarding "consumer oriented harm" does not hinge on any material differences between personal and commercial consumers. The

distinction is one without a difference, and it would take courts in the direction of distinguishing between acts of consumption that involve leisure, business, or personal consumption. The focus of "consumer oriented harm" is rather to distinguish generally deceptive or misleading business practices that affect consumers generally, from those acts of misrepresentation or deception in private business transactions. (*See City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616 [2009], *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 [1999]).

Causes of action for fraudulent conduct or deceptive business practices are also subject to the filed rate doctrine, if they involve allegations regarding the charge of a rate that was approved by a regulatory agency. (*See Wegoland Ltd. v. Nynex Corp.*, 27 F3d 17 [2d Cir. 1994]). In this case, plaintiffs' allegations under Gen. Bus. L. § 349 regard only defendants' practice of charging a higher premium to construction contractors whose subcontractors did not present adequate Certificates of Insurance. As discussed above, this practice was approved generally as a rating rule by the Insurance Department. Although plaintiffs also allege that defendants failed to follow their own approved rating rule, which required the use of payroll records, the plaintiffs do not claim that the practice of *not* using payroll records, was itself a deceptive business practice that misled consumers. Because the rating method of charging a higher premium base for uninsured subcontractors was filed with the Insurance Department, there can be no cause of action for defendants' alleged deceptive business practice of charging rates under such approved rating methods. Plaintiffs' cause of action under Gen. Bus. L. § 349 is dismissed.

Defendants motion for summary judgment is granted in part in accordance with this decisions. This constitutes the Decision and Order of the court.

DATED:
April 20, 2011

J.S.C.