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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IA Part 14

BURLINGTON INSURANCE COMPANY x

- against -

CENTRAL LINE CONSTRUCTION INC.

x

Index Number 13799 2010

Motion Date January 25, 2011

Motion Cal. Number 5

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by plaintiff for summary judgment in its favor and against defendant.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover payment due for audited insurance premiums and an account stated regarding plaintiff's issuance of a general liability insurance policy covering defendant's business for the period of time from August 25, 2008, through and including August 25, 2009.

Prior to the subject coverage period, defendant applied for general liability insurance through its agent, Cosmos Insurance Brokerage, Inc. (Cosmos), for the period of August 25, 2008 through August 25, 2009, in connection with its construction business.

Plaintiff issued to defendant a policy of general liability insurance effective August 25, 2008, with an auditable annual policy premium or deposit premium of $45,000, based on projected annual sales of $500,000. An auditable insurance policy is a policy in which the initial estimated annual premium may be adjusted after the end of the policy term based upon the gross receipts of the insured. The deposit premium is a specified percentage of defendant's estimated gross receipts. The policy provides that if the earned premium exceeds the deposit premium, defendant is obligated to pay plaintiff the difference, that is, the adjustment. If the deposit premium exceeds the earned premium, plaintiff will refund defendant the difference. The insurance policy also contains a provision that after termination of the policy, the insurance carrier is to perform an audit of the records of the insured to determine the final premium.

After the policy period, plaintiff conducted an audit of defendant's gross sales in accordance with the insurance policy. Based on defendant's response and information provided, plaintiff determined that, for the period of August 25, 2008 through August 25, 2009, additional premiums were due. Specifically, plaintiff determined that, in accordance with the premium statement, entitled "Notice – Premium Audit Endorsement Issued" (Notice), defendant owed an additional premium of $71,929.25 for the subject period. The premium due date in the Notice is November 7, 2009. Plaintiff commenced this action after defendant failed to pay same despite due demand therefor, and plaintiff now moves for summary judgment.

On a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.) The evidence presented by the opponents of summary judgment must be accepted as true and given the benefit of every reasonable inference. (*See Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518 [2006].)

In general, an insurer has the burden of proof as to the amount of a premium due and unpaid. (*See Royal Ins. Co. of Am. v Mercy Hosp.*, 204 AD2d 219 [1994].) Upon the insurer's satisfaction of that burden, the burden shifts to the insured to set up a viable defense to payment. (*See Family Coatings v Michigan Mut. Ins. Co.,* 170 AD2d 816 [1991].)

In this case, plaintiff has met its initial burden of demonstrating its entitlement to summary judgment as a matter of law on its cause of action to recover unpaid insurance

premiums. Plaintiff has submitted ample evidence in admissible form, including the policy sued upon, the affidavit of its accounts receivable manager, the audit report, and the detailed premium statement, to demonstrate that defendant owes the sum representing the outstanding balance for the premium of the policy in the amount of $71,929.25 plus interest, and that it duly demanded this outstanding balance from defendant. (*See Commissioners of the State Ins. Fund v Concord Messenger Serv., Inc.*, 34 AD3d 355 [2006]; *see also Evanston Ins. Co. v Po Wing Hong Food Mkt., Inc.*, 21 AD3d 333 [2005]; *Family Coatings, Inc. v Michigan Mutual Ins. Co.*, *supra*.) Plaintiff established that defendant was fully and fairly informed as to the basis on which the final premium was to be computed, and the audit was conducted in compliance with the terms of the subject policy. Moreover, plaintiff demonstrated that the audit was conducted with the participation of the defendant's Certified Public Accountant (CPA), and based upon sales ledgers and documents provided by defendant and its CPA.

Plaintiff also made a prima facie showing of entitlement to summary judgment on its cause of action for an account stated.

"An account stated has long been defined as an 'account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance.' . . . The receipt and retention of an account, without objection, within a reasonable amount of time, coupled with an agreement to make partial payment, gives rise to an account stated entitling the moving party to summary judgment in its favor." (*Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355-356 [2001].)

Plaintiff presented competent evidence demonstrating that an account was rendered showing a balance and that defendant, the receiving party, failed within a reasonable time to dispute the account. (*See Castle Oil Corp. v Bokhari*, 52 AD3d 762 [2008]; *see also Morrison Cohen Singer & Weinstein, LLP v Ackerman*, *supra; Sullivan v REJ Corp.*, 255 AD2d 308 [1998].)

Since plaintiff met its initial burden, the burden now shifts to defendant to raise a triable issue of fact to preclude the issuance of summary judgment on plaintiff's causes of action to recover payment due for audited insurance premiums and an account stated.

Defendant has failed to meet this burden. Defendant initially argues that broker, Cosmos, did not act on its behalf with regard to the insurance fee at issue. Unless there is evidence showing otherwise, a broker is generally considered an agent for the insured. (*See Temple Constr. Corp. v Sirius Am. Ins. Co.*, 40 AD3d 1109 [2007].) An insured is bound by its broker's actions in obtaining a policy on its behalf. (*See Evanston Ins. Co. v Po Wing Hong Food Mkt., Inc.*, *supra*.) Defendant does not produce any evidence to counter the

showing that the broker, Cosmos, was its agent. Since defendant fails to raise a factual question regarding Cosmos' status, it is bound by Cosmos' actions in obtaining the policy on its behalf.

To the extent that defendant claims that no representative from defendant signed a "Contractor's Application" with Cosmos to obtain coverage with plaintiff, same is unavailing, as the application relied upon by plaintiff is for a different coverage period. In any event, defendant does not deny that its own CPA agreed with the audit nor that it enjoyed the benefits of coverage during the policy period.

Defendant next disputes the terms of the policy contending that plaintiff was paid a flat rate premium of $45,000 for the policy it provided, and that there is a triable issue as to whether any additional fees are due.

A document which is complete, clear and unambiguous on its face is an integrated agreement as a matter of law and must be construed according to its terms. (*See Greenfield v Philles Records*, 98 NY2d 562 [2002]; *see also Westport Ins. Co. v Altertec Energy Conservation, LLC*, ___ AD3d ___, 2011 NY Slip Op 2652 [2d Dept 2011]; *MGM Emerald Enters., Inc.*, 69 AD3d 674 [2010].) Unless a contract contains an ambiguity that needs to be clarified, the parol evidence rule excludes evidence from outside the four corners of a written instrument to contradict or vary the terms therein. (*See R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29 [2002]; *see also* W.W.W. *Assoc. v Giancontieri*, 77 NY2d 157 [1990]; *Royal Sun Alliance Ins. Co. v Travelers Ins. Co.*, 15 AD3d 563 [2005].) A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. (*See Matter of Matco-Norca, Inc.*, 22 AD3d 495 [2005]; *see also Tikotzky v City of New York*, 286 AD2d 493 [2001]; *Tantleff v Truscelli*, 110 AD2d 240 [1985].) The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties. (*See Matter of Matco-Norca, Inc.*, *supra*.)

In this case, the subject policy is clear and unambiguous. Thus, defendant is bound by its terms, which, among other things, provide that the subject policy premium is auditable and that the $45,000 is a deposit premium.

Finally, defendant contends that additional discovery is necessary. This contention is no more than a mere hope that disclosure will reveal something helpful to defeat the motion, and insufficient to forestall summary judgment. (*See Commissioners of the State Ins. Fund v Concord Messenger Serv., Inc.*, *supra*; *see also Fulton v Allstate Ins. Co.*, 14 AD3d 380 [2005]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [1987].)

Accordingly, plaintiff's motion for summary judgment is granted. Plaintiff is awarded, and the Clerk of the Court is directed to enter, judgment in favor of plaintiff and against defendant in the sum of $71,929.25 plus interest to be calculated from November 7, 2009,[1] together with costs and disbursements of this action to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs.

Dated: May 23, 2011

J.S.C.

[1] Although plaintiff seeks interest from August 25, 2009, the end date of the policy, plaintiff only is entitled to interest from November 7, 2009, the date of breach of the policy, pursuant to CPLR 5001.