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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Index Number : 401412/2009
COMMISSIONERS STATE INSURANCE
VS.
PRIVATE ONE OF NEW YORK LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 401412/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/30/11

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

- against -

PRIVATE ONE OF NEW YORK, LLC d/b/a NEW YORK AIRPORT SERVICE,

Defendant.

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Index No. 401412/09

ORDER AND DECISION

Mot. Seq.: 001 & 002

EILEEN A. RAKOWER, J.S.C.

Plaintiff, Commissioners of the State Insurance Fund ("SIF"), brings this action to collect the sum of $453,358.95, plus interest from November 30, 2008, and the cost of collection, in the amount of $99,738.97[1], from defendant Private One of New York LLC d/b/a New York Airport Service ("Private"), for unpaid workers compensation premiums. SIF now moves for summary judgment on the complaint pursuant to CPLR 3212. Private opposes the motion. By separate motion, submitted prior to plaintiff's motion, Private moved for summary judgment dismissing the complaint. Plaintiff opposed. Both motions are presently before this Court.

Private is a domestic limited liability company with seventeen employees that operates a privately owned bus fleet. As of February 26, 2007, SIF began providing workers' compensation coverage to Private pursuant to a self-renewing policy. Due to nonpayment of premiums, SIF cancelled the policy on November 30, 2008.

SIF charges an "estimated" premium at the beginning of each annual policy

[1]The claim for collection costs is waived by SIF in the instant motion papers.

term based upon what the anticipated payroll will be for the following year. Defendants pay a deposit, which is broken down into installments, billed by SIF as "provisional bills." At the end of a particular annual policy term, audits are performed, and if the "actual" amount owed is greater than the estimated premium, a bill is generated.

SIF performed an audit of Private's books for the annual policy period from 2/26/2007 to 2/26/2008 and the "short policy[2]" period from 2/26/2008 to 11/30/2008. Following the audit, SIF determined that Private owed the sum on $453,358.95. SIF asserts that the bulk of the charges were for two of Private's "leased employees."

SIF, in support of its motion, submits: the "Affidavit of Merit of Kevin Moskie," SIF employee; a copy of Private's policy; the application for coverage; a "statement of account;"copies of audit reports for the policy periods of 02/26/2007-02/26/2008 and 02/26/2008-11/30/2008; "audit worksheets;"two customer copies of the audit reports, for audits conducted on November 26, 2008 and March 18, 2009, respectively; a policy cancellation notice; and the pleadings.

Private, in opposition to SIF's motion, and in support of its motion for summary judgment submits two contracts; a copy of a document titled "Transportation Industry Workers' Compensation Trust Self Funded Workers' Compensation Program;" and a printout titled "Employer Coverage Search." Private asserts that SIF inflated the premiums due by including "operation personnel," which included the employees of two employee leasing companies. Private claims that it had provided SIF with its contracts with two leasing companies, Contract Transportation, Inc. ("Transportation") and YML LLC ("YML"), an affiliate of Transportation, and that it provided copies of the workers' compensation policies covering the employees who worked for Contract and YML. Private also points to the Workers' Compensation Board website, wherein a search produced confirmation of coverage to Contract and YML employees.

By way of reply, and in opposition to Private's motion, SIF submits the affidavit of Mr. Moskie, wherein he states that SIF was entitled to charge Private premiums for its leased workers pursuant to the New York Workers Compensation and Employers Liability Manual ("Workers' Compensation Manual"). Mr. Moskie points out that, pursuant to Private's policy, it had agreed that all "premium for [the] policy will be

[2]The policy was terminated prior to the expiration of the policy term.

determined by manuals of rules, rates, rating plans and classifications we use."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

The Commissioner of the State Insurance Fund is empowered by §83 of the Workers' Compensation Law to undertake:

> the issuance of policies and their terms and conditions, the fixing of premium rates, the keeping of records, auditing of payrolls, and the billing and collection of premiums therefor . . .

A leasing company, or a Professional Employment Organization ("PEO") [here, Transportation and YML] becomes the employer of record for a "client" [here, Private], adding the client company's employees onto its payroll, and handling a broad range of HR and personnel services, including managing such things as health benefits and worker's compensation insurance. The PEO then leases the employees back to the client. The leasing contracts are generally long term, rather than temporary, and PEOs are governed by Article 31 section 915 et seq. of the Labor Law, and must be licenced by the Department of Labor.[3]

The "Employee Leasing" portion of the Workers Compensation Manual provides that carriers have the option of adopting one of two rules in relation to leased

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[3]http;//onlinelibrary.wiley.com/doi/10.1002/ert.10087/abstract; and see New York State Labor Law § 740 Chapter 31 subsection 916.

employees. The first option, found in Rule 11, Section H(2)(a), requires the "client," [Private], to obtain a standard workers compensation insurance policy to cover both its leased and non-leased workers.

The second option, pursuant to Rule 11, Section I(2)(a), is for the PEO [Transportation and YML], or the "labor contractor," to be issued a separate policy for each of its clients, to cover the client's leased workers. The client is to be named as an additional insured with respect to employees leased from the labor contractor. In this scenario, the first item on the information page must include the name of the labor contractor, and the client must be identified as follows:

> ABC Leasing Company L/C/F for XYZ Machine Shop; (where L/C/F refers to "Labor Contractor For.")

The second option above, in essence, avoids the duplication of coverage by co-employers, which Private claims SIF is attempting to collect here. However, the information page of the Transportation policy, which lists YML as an additional affiliate, does not list Private as an additional insured and does not use the required language pursuant to Rule 11. Indeed, the Transportation workers compensation and employers liability insurance policy does not refer to Private at all (other additional affiliates listed include JAD Transportation Inc., JAD Alliance Inc. and Cityscape Tours Inc.). It names as the insured "Contract Transportation Inc.." Thus, under Section H of the Workers' Compensation Manual, Private was required to have purchased workers' compensation insurance for the employees it leased from Transportation and or YML.

"Plaintiff's documentary evidence consisting of the insurance application, the policy, the audit reports, and the resulting statements were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law." (*The Commissioner of the State Insurance Fund v. Concord Messenger Service, Inc.*, 34 AD3d 355[1st Dept. 2006]). In opposition, Private has failed to raise an issue of fact.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment, Motion Sequence 001, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Private One of New York LLC d/b/a New York Airport Service in the sum of $453,358.95, plus 9% interest from November 30, 2008, and thereafter at the statutory rate, until the judgment is paid; and it is further

ORDERED that defendant Private One of New York LLC's motion for summary judgment, Motion Sequence #002, is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: August 30, 2011

Eileen A. Rakower, J.S.C.