

Essex Ins. Co. v Nowak
2013 NY Slip Op 32886(U)
November 4, 2013
Sup Ct, Wayne County
Docket Number: 75474/2013
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF WAYNE

ESSEX INSURANCE COMPANY
Plaintiff,
-vs-
MATTHEW NOWAK,
Defendant

DECISION
Index No. 75474

2013

Soffer, Rech & Borg, LLP
Michael A. Borg, Esq., of Counsel
Attorneys for Plaintiff

Matthew Nowak, Pro Se
Defendant

The Plaintiff ("Essex") has filed a motion for summary judgment against the Defendant ("Nowak") pursuant to CPLR §3212, striking the Defendant's Answer and granting a money judgment in the amount of \$11,779.23. The Defendant has previously served a pro se Answer in the nature of a general denial. The Plaintiff submitted its motion on papers; however, the Defendant appeared before the Court on the return date without counsel , and submitted a written response to the motion, which was notarized on the day of the appearance. The Defendant subsequently submitted exhibits in support of his response. The response and the exhibits were forwarded to counsel for the Plaintiff, who has now submitted

a Reply Affirmation, a Supplemental Reply Affirmation, and a Memorandum of Law. The Plaintiff's motion has been deemed submitted on all papers as outlined above.

The action arises from the issuance of Commercial Liability Policy #3DC3081-O by Essex to Nowak, which provided commercial general liability coverage for Nowak's artisan contracting business from July 23, 2009 to July 23, 2010. The Policy provided coverage for three classifications of Nowak's business; the main classification was listed as "carpentry - construction - residential property not exceeding 3 stories in height", and the other related classifications pertained to exterior painting and excavating. The amount of the premium was initially based on a rate of \$25.50 per \$1,000.00 of the Defendant's gross receipts, which applied to the main classification and included the other two classifications. The Defendant's estimate of his gross sales was \$200,000.00, resulting in an advance premium of \$5,100.00, which Nowak paid.

However, the Policy provided for an audit at the end of the policy term in order to determine the actual Exposure. Therefore, on or about August 10, 2010, a physical audit was performed to determine the Defendant's actual gross sales for the policy period. The Audit Statement,

submitted as an Exhibit, indicates an Exposure of \$939,882.00. When multiplied by a revised rate of \$17.50 per \$1,000.00, the calculations resulted in an actual earned premium of \$16,448.00. After crediting the original \$5,100.00 payment and adding other expenses, the net total due is \$11,779.23, none of which has been paid.

In response, the Defendant maintains that his insurance agent advised him that Essex has agreed to insure only the three components of his business which he physically performs - framing, painting and excavating. The other aspects of his new home construction business are performed by subcontractors, each of whom maintain their own insurance policies. Nowak insists that it was never his understanding that the Essex coverage would apply to his entire construction business. The \$200,000.00 estimate he provided to Essex represented his gross payout for the three components listed on page 2 of the Policy which is labeled "Supplemental Declaration".

However, page 2 of the Policy is intended to be utilized as the basis for calculation of the premium. Specifically, the \$5,100.00 payment previously made by the Defendant is identified as "Total Advance Premium." Page 1 of the Policy clearly states that the business which is

the subject of the Policy is “Artisan Contractor”; there are no exceptions or limitations to the broad coverage provided. Also, Paragraph 5 of Section IV on page 17 of the Policy clearly states the advance premium is a “deposit premium only”, and will be subject to an audit at the end of the coverage period, at which time the “earned premium” will be due.

It is unfortunate that the Defendant misconstrued the nature and scope of the coverage provided by the Policy. However, the Supplemental Declaration page is intended to set forth the method of computation of the premium. The Policy itself was obviously issued to provide coverage for the Defendant’s business in its entirety.

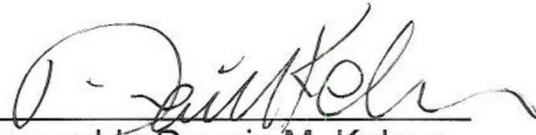
In support of its motion, Essex has submitted the subject insurance policy, the audit statement and an affidavit from the Collection Manager, thereby establishing the existence of a prima facie case. (See, Evanston Insurance Company v PoWing Hong Food Market, 21 AD3d 333 (1st Dept, 2005)). Therefore, the burden of proof has shifted to Nowak, requiring him to demonstrate the existence of material triable issues of fact. The Defendant has failed to meet this burden.

Therefore, the Plaintiff’s motion for summary judgment is granted, the Answer of the Defendant is stricken and the Plaintiff is entitled to enter a

judgment against the Defendant in the amount of \$11,779.23, together with interest, costs and disbursements.

Counsel for the Plaintiff is hereby directed to submit an Order for signature in accordance with this Decision.

Dated: November 4, 2013
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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WAYNE COUNTY
SUPREME AND COUNTY COURT