

**Commissioners of State Ins. Fund v Crossroad Serv.
Group Inc.**

2014 NY Slip Op 30431(U)

February 7, 2014

Sup Ct, New York County

Docket Number: 402531/2011

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 44

COMMISSIONERS OF STATE INSURANCE FUND

INDEX NO. 402531/2011

-v-

MOTION DATE _____

CROSSROAD SERVICES GROUP INC.

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that ~~this motion is~~:

The court denies plaintiff's motion for summary judgment, pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

FILED
FEB 25 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/7/14

Lucy Billings, J.S.C.

LUCY BILLINGS

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

-----x
COMMISSIONERS OF STATE INSURANCE FUND, Index No. 402531/2011

Plaintiff

- against -

CROSSROAD SERVICES GROUP INC.,

Defendant
-----x

FILED
DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiff moves for summary judgment on account stated and breach of contract claims for Workers' Compensation Insurance premiums of \$36,426.28, plus \$4,168.91 in collection charges permitted by New York State Finance Law § 18, for an insurance policy period of February 6, 2007, to November 10, 2008.

C.P.L.R. § 3212(b). For the reasons explained below, the court denies plaintiff's motion.

No affidavit on personal knowledge to support plaintiff's account stated claim attests that its statements of account were transmitted to defendant by the witness or according to a regular business procedure: an essential element of an account stated claim. Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005); Bartning v. Bartning, 16 A.D.3d 249, 250 (1st Dep't 2005). See, e.g., Hermitage Ins. Co. v. Zaidman, 107 A.D.3d 579, 580 (1st Dep't 2013); State Farm Mut. Auto. Ins. Co. v. KanKam, 3 A.D.3d 418, 419 (1st Dep't 2004);

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8112-24 18th Ave. Realty Corp. v. Aetna Cas. & Sur. Co., 240 A.D.2d 287, 288 (1st Dep't 1997). Defendant's president Raymond Carazo, on the other hand, specifically attests to its regular business procedures for receipt and logging of its incoming mail and for responding to invoices. Brito v. Allstate Ins. Co., 102 A.D.3d 477, 478 (1st Dep't 2013). Based on his personal knowledge, defendant never received the statements of account or invoices upon which plaintiff seeks to collect. Although defendant admits payments of billed premiums, which may establish receipt of the corresponding bills, LePatner & Assoc., LLP v. Horowitz, 81 A.D.3d 472 (1st Dep't 2011); Kramer Levin Naftalis & Frankel LLP v. Canal Jean Co., Inc., 73 A.D.3d 604, 605 (1st Dep't 2010), the payments were not for the amounts plaintiff seeks to collect. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Reid & Priest v. Realty Asset Group, 250 A.D.2d 580 (1st Dep't 1998); Citibank (S.D.), N.A. v. Brown-Serulovic, 97 A.D.3d 522, 523 (2d Dep't 2012).

Plaintiff's underwriter attests to plaintiff's audit of defendant's records to ascertain the premiums owed and to the absence of defendant's protest to the audit, but fails to demonstrate personal knowledge of the audit and defendant's communications to the auditor. Defendant's president Carazo, on the other hand, specifically identifies another person as the auditor, to whom he expressed his protests to plaintiff's assessment of premiums based on its count of defendant's

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employees that defendant disputed. See RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619); Herrick, Feinstein LLP v. Stamm, 297 A.D.2d 477, 478 (1st Dep't 2002). Carazo describes the additional compensation paid by defendant for services to it, on which plaintiff assessed the additional premiums, as compensation to two entities that were independent contractors and performed work for defendant outside New York, in California and Florida.

New York Workers' Compensation Law § 10(1) requires every employer to "secure compensation to his employees" for injuries or death arising from their employment. Plaintiff fails to establish either that the two entities defendant identifies were not the employees plaintiff counted to assess the additional premiums or that these entities were "employees" requiring Workers' Compensation insurance under Workers' Compensation Law § 10(1). Plaintiff suggests that, if defendant hired independent contractors rather than employees, then the independent contractors were required to carry their own Workers' Compensation insurance, or otherwise defendant was required to secure the insurance for their employees, who would be counted as defendant's employees for purposes of assessing defendant's premiums. Plaintiff cites no authority for this proposition, but even if such a requirement applies, plaintiff fails to carry its burden to show that any independent contractors hired by defendant did not carry Workers' Compensation insurance or even that such a reason was why plaintiff attributed additional

employees to defendant.

Finally, plaintiff fails to establish that the additional employees it attributed to defendant were employed in New York. For Workers' Compensation Law § 10(1) to apply, the employment must have "sufficient and significant contacts" with New York "to support a reasonable conclusion that the employment was to some extent sited in this state." Deraway v. Bulk Storage, Inc., 51 A.D.3d 1313, 1314 (3d Dep't 2008). See Edick v. Transcontinental Refrigerated Lines, Inc., 300 A.D.2d 848, 849 (3d Dep't 2002). Here, the employer conducts business in New York, but no evidence indicates the employees in question performed any of their assignments in New York or ever were even present in New York. See Deraway v. Bulk Storage, Inc., 51 A.D.3d at 1314. No evidence indicates whether defendant travelled to California or Florida to recruit and hire the independent contractors or employees in question or hired them in New York. Id.; Sanchez v. Clestra Cleanroom, Inc., 11 A.D.3d 781, 782-83 (3d Dep't 2004). Nor does any evidence indicate whether defendant gave instructions or exercised supervision governing the work and to what extent from New York, which would bear on the questions of both the site of the employment and whether the work actually was performed by employees or by independent contractors. Sanchez v. Clestra Cleanroom, Inc., 11 A.D.3d at 783.

Thus plaintiff fails to establish an undisputed amount owed by defendant under the insurance policy for purposes of either plaintiff's account stated claim or its breach of contract claim.

In fact, plaintiff's underwriter does not even attest that the policy she presents is the policy issued to defendant or that the policy application she presents is defendant's application, to establish an insurance contract with defendant that it breached. US Bank N.A. v. Lieberman, 98 A.D.3d 422, 423 (1st Dep't 2012); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Colbourn v. ISS Intl. Serv. Sys., 304 A.D.2d 369, 370 (1st Dep't 2003); American Motorists Ins. Co. v. Greater N.Y. Mut. Ins. Co., 255 A.D.2d 190, 191 (1st Dep't 1998). See Yonkers Ave. Dodge, Inc. v. BZ Results, LLC, 95 A.D.3d 774 (1st Dep't 2012); 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Bell Atl. Yellow Pages Co. v. Padded Wagon, 292 A.D.2d 317, 318 (1st Dep't 2002). For all the reasons explained above, the court denies plaintiff's motion for summary judgment. C.P.L.R. § 3212(b).

DATED: February 7, 2014

FILED

Lucy Billings

FEB 25 2014

LUCY BILLINGS, J.S.C.

NEW YORK
COUNTY CLERKS OFFICE

LUCY BILLINGS
J.S.C.