At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of October, 2014.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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ROCHDALE INSURANCE COMPANY,

Plaintiff,

- against -

Index No. 507175/13

DYKER INTERIORS CORP.,

Defendant.

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The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5
Affidavit (Affirmation)	
Other Papers Memorandum of Law - Defendant	6

Upon the foregoing papers in this action to recover payment due for audited insurance premiums, as well as for an account stated, plaintiff Rochdale Insurance Company (plaintiff) moves, pursuant to CPLR 3212, for summary judgment.

Facts and Procedural History

Plaintiff, an excess lines insurance carrier, provided workers' compensation insurance coverage to defendant Dyker Interiors Corporation (defendant) for the period of October 4, 2010 through and including October 4, 2011. According to the affidavit of Jeannette

DeBellis, the Accounts Receivable Collections Manager for plaintiff, plaintiff provides "coverages" in the state of New York in accordance with and pursuant to New York State Insurance Law §§ 108 and 110. In support of plaintiff's motion, Ms. DeBellis states that in accordance with the subject policy, defendant's premiums were based upon the nature of employment of defendant's personnel and their earnings. According to Ms. DeBellis, and pursuant to the subject policy, the policy provisions require that defendant provide any and all documents and cooperation necessary for the performance of an audit after the premium period to confirm the computation of the premium due in the event the initial premium was insufficient after the computation.

On or about December 7, 2011, plaintiff performed an audit in connection with this matter. According to Ms. DeBellis - and it is undisputed - the audit (Exh. D) reflects that it was conducted based upon payroll records and documents provided by defendant. In this regard, the audit reveals that an additional premium is due in the amount of $45,482.00, the amount sued upon. Specifically, Ms. DeBellis states, and it appears undisputed, that the initial paid advance premium was based upon a stated payroll of $125,000, as represented by defendant. However, the audit - also based upon defendant's own books and records - reflects an actual payroll of $511,000.00, more than the amount defendant represented it to be, accounting for the alleged additional premium due in the amount of $45,482.00.[1]

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[1]Ms. DeBellis states that pursuant to the terms of her employment, she is one of the custodians of the records for the plaintiff. She further avers that the exhibits which are attached to her affidavit were made in plaintiff's usual business practice; that it was plaintiff's usual business practice to make such records; that the attached records were put into plaintiff's permanent file regarding the within matter on or about the time indicated on the records; that in the event that the attached exhibits were reproduced from electronic records, she has compared the attached exhibits to plaintiff's electronic records and certifies that the attached exhibits are true and accurate copies of the electronic records; that plaintiff's electronic records are stored at plaintiff's central database located at its main office; and that plaintiff has installed anti-tampering methods to assure that the records stored have not been corrupted.

On December 15, 2011, after defendant received notice of the outcome of the audit, Mr. Joseph Rubino, defendant's office manager, opines in his sworn affidavit that defendant sent plaintiff a facsimile entitled "Workers Compensation and GL Notice of Audit Dispute," indicating that defendant's employees had been misclassified. Specifically, defendant advised plaintiff that: "we should have not been insured under Drywall installation." Defendant also sent plaintiff "employee classification information" in response to the audit, entitled "Dyker Interiors, WC Audit, Oct. 2010-Oct. 2011," showing that "not all of the employees so classified were doing drywall work." According to defendant, and as indicated on the employee classification information, employees Eulogio Gonzalez, Rosalino Cabrera and Gregorio Acosto should have been classified as "sales." Further, defendant stated, and the employee classification information indicates, that employee Atlas Juarez should have been classified as a manager; that employees Pedro Fernandez and Blas Ayala should have been classified as supervisors; that employee Chris McNamara should have been classified as a driver; that employees Renee Savino, Lizette Skoczylas and Sivia Arias should have been classified as "clerical;" that employee Victor Lizairve should have been classified as an estimator; that employees Donaldo Diaz Hernandez, Juan Silva, and Armondo Hernandes performed wall covering; and that employees Juma Nahimana, Luis Alguedas, and Raymundo Miramon should have been classified as office cleaners.[2]

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[2]Defendant annexes an affidavit from Mr. Joseph Rubino, defendant's office manger, who confirms that after receiving the results of the premium audit from plaintiff, the above-noted facsimile was sent to plaintiff, and that several calls were made to plaintiff to explain that not all of defendant's employees were engaged in the performance of drywall work. Mr. Rubino also avers that the above-noted copy of the employee classification information was given to plaintiff and that defendant "asked for a re-audit based upon the incorrect classification of the employees, but the re-audit was never performed" (Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, Exh. B).

In further support of plaintiff's motion, Ms. DeBellis states that defendant has never complained about the nature or quality of insurance coverage provided, and that defendant has not provided documentation to evidence a variance from the documents and information provided at the audit. She concludes that defendant has simply refused to pay the outstanding "additional premiums due," and that any dispute raised by defendant is unsupported by any evidence or documentation.

In opposition, defendant asserts that this case involves an insurance policy taken out by defendant from plaintiff; that plaintiff "alleges an unpaid premium on that policy for 2010 totaling $45,482.00;" and that "defendant alleges that the "employee classifications used to calculate that premium [were] incorrect and that the actual amount of the premium should have been much less." Stated otherwise, defendant argues that there is an issue of fact as to the proper amount of premium.

Specifically, defendant asserts that "[a] dispute arose between the parties regarding the classification of employees after [p]laintiff classified employees at a code that differed from the one they should have been classified at." Thus, defendant contends that a material issue of fact exists as to "whether all employees were drywall installer[] workers or whether there were employees who performed different work;" that plaintiff has misclassified its employees; and that defendant "caught this mistake and refused to pay the egregious amount calculated by [p]laintiff." As such, defendant states that although plaintiff argues that it is entitled to classify all the employees as performing drywall, it (defendant) is entitled to determine the type of work its workers were performing. Defendant further argues that "the fact that this issue of classification remains in dispute is enough to defeat [p]laintiff's [m]otion for [s]ummary [j]udgment."

Defendant also notes that discovery has not yet taken place and that the evidence it presented - namely a showing that the audit was disputed - is uncontroverted. As indicated above, defendant states that it did not agree to the amount charged by plaintiff and has requested another audit with the proper classification of its employees.

In reply, plaintiff first asserts that in its opposition papers, defendant acknowledged that it was insured by plaintiff, that an audit of the books and records of the defendant was conducted after the policy period, and that the methodology used by plaintiff was not inaccurate. In addition, plaintiff asserts that defendant does not deny that as a result of the audit, the advanced premium paid was based upon a stated payroll *as represented by defendant of $125,000.00*, and that after the audit, books and records revealed an actual payroll of $511,000.00 (emphasis added). Plaintiff contends that based on these circumstances, it was subjected to a considerable increased risk, which formed the basis for the commencement of this action when payment for the "premiums" [sic] was made and refused.

Plaintiff next argues that defendant only alleges that its employees were misclassified, but "there is no denial that defendant is engaged in 'drywall work.'" In this regard, plaintiff states that defendant has only listed 11 employees whom it alleges are not involved in "'drywall work,' indicating that as [sic] three of those individuals are involved in sales, one is a manager and two are supervisors . One should have been classified as a driver and only three classified as clerical."[3]

However, plaintiff states that an examination of the audit report documents which are annexed to its moving papers reveal that: "two categories were set forth in the audit report

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[3]In fact, plaintiff states that defendant has named 10 employees who were allegedly misclassified, not 11, and defendant has in fact named 17 employees who were allegedly misclassified.

and indeed clerical employees amounted to some eighteen percent of the labor involved, all the rest were indeed classified as 'drywall' or more specifically as provided for in the specific classification of 'wallboard installation - within buildings- & drivers.'" Plaintiff further contends that:

> "Included in the audit documents annexed to plaintiff's moving papers was a complete list of all employees listed by defendant in its own books and records consisting of thirty-nine individuals. Indeed, *apparently*, three of them were strictly clerical office employees and by defendants' [sic] own opposition papers the *vast majority* of the thirty-six other employees were all specifically engaged in the physical labor involved in the drywall installation process" (emphasis added)

As such, plaintiff asserts that "there is no doubt that defendant[,] with the exception of its acknowledged clerical employees[,] was properly classified as engaged in 'wallboard installation-within buildings- & drivers;'" that its "moving papers specifically set[] forth another classification for the clerical office employees" and that defendant was charged "a premium in accordance with that clerical nature of employment."

Plaintiff then goes on to assert that the issue must be determined under Article 23 of the New York Insurance Law. In this regard, plaintiff states that rate classification, interpretation of Article 23, and its many provisions and regulations codified thereunder can be very difficult, but that in this case, the classification applied was appropriate and undisputed. Further, plaintiff states that the methodology for selecting the appropriate classification is best defined by the New York State Insurance Department and its various publications regarding liability insurance, rate calculation and classification, Workers' Compensation Board provisions and the findings of the Compensation Insurance Rating Board. Specifically, plaintiff asserts that "[t]o better understand these circumstances, the [New York State Insurance] Department has issued a pamphlet on-line at

www.web.state.ny.us[4] under the heading 'Understanding Workers' Compensation Insurance,' which incorporates classifications of Workers' Compensation and related policies such as the general liability coverage provided by [p]laintiff to [d]efendant herein." According to plaintiff, the pamphlet provides, among other things, that:

> "'there are more than five hundred classifications of workers, each carrying a different manual rate for determining workers' compensation premiums. A classification code assigned to an employer is based on the actual work being performed, or the classification that most closely represents the type of work being performed, if there is not an exact match. *The manual rate that is assigned to the employer will reflect the most hazardous classification in the business . . .*'" (emphasis added).[5]

Plaintiff states that in the case at bar, "'wallboard installation-within buildings-& drivers' **is** the classification;" that despite defendant's protestations, defendant cannot deny that it is engaged in the activity of 'wallboard installation-within buildings-& drivers;' that in this case, a premium based upon gross payroll, which increases more than four-fold, results in an increased premium, which is set forth in its audit; that the computation of the increase in the premium is fully set forth in the audit documents annexed to its moving papers; and that defendant has failed to raise a question of fact which would preclude granting its motion for summary judgment.

Discussion

"[T]he proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324

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[4]It appears that plaintiff transposed the letters in the web address. The web address is www.wcb.state.ny.us.

[5]It appears that this paragraph is also found in the New York State Workers' Compensation Board Employers' Handbook, on p. 19, under the heading, "Manual Rates." The court was unable to find the last italicized sentence of this paragraph at the web address provided by plaintiff.

[1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*).

Here, plaintiff has failed to make a prima facie showing entitling it to summary judgment. In this regard, in support of its motion, plaintiff asserts through the affidavit of its accounts receivable collections manager, Ms. DeBellis, that the "Final Premium Audit" it performed, based upon defendant's own records, indicates that defendant owes an additional premium of $45,482.00, the amount sued upon. In this regard, Ms. DeBellis states that "[t]he initial paid advance premium was based upon a stated payroll as represented by defendant of $125,000" and that "[t]he audit, based upon defendant's own books and records reflected [an] actual payroll of $511,000, more than said representation, hence the additional premium due of $45,482.00 as set forth." However, the documents from which plaintiff derived the additional premium does not support its claim. In this regard, as a preliminary matter, plaintiff does not identify the location (i.e., the exhibit) of defendant's documents in the record upon which it claims its audit was based. Instead, Ms. DeBellis merely states that:

> "Annexed as Exhibits 'D' is the Report of Audit prepared in connection with this matter. The document reflects that the audit was conducted based upon payroll records and documents provided by Defendant. The computations reflected in the Audit Report is thus, the result of that information and documentation provided by Defendant, leaving nothing more than a mathematical computation resulting in the additional premium due . . ."

Even assuming that the documents annexed to Exhibit D are those which were provided by defendant to plaintiff in order for plaintiff to perform the Final Premium Audit, these documents still do not support the additional premium due which plaintiff seeks. While the

first document indicates that the total payroll amounts to approximately $511,000, the document from which this figure was purportedly derived, namely a listing of all of defendant's 39 employees and their job titles, does not support the new payroll of $511,000, and therefore does not support the additional premium requested by plaintiff. In this regard, plaintiff contends that this list contains 3 clerical employees and 36 drywall installers. However, a review of this list only indicates that three of the employees are clerical workers, that one employee is a driver, and that the remainder of the workers are either an "employee," or "employer." Stated otherwise, the classification of these generically identified "employees" or "employers" cannot be discerned. In fact, the list is largely illegible.

Further, while plaintiff asserts that three of defendant's employees are clerical workers and that the remainder of defendant's employers are drywall installers, plaintiff *itself* is equivocal on this issue. In this regard, Ms. DeBellis states: "*apparently,* three of them [i.e., the employees] were strictly clerical office employees and by defendants' [sic] own opposition papers the *vast majority* of the thirty-six other employees were all specifically engaged in the physical labor involved in the drywall installation process."

It should also be noted that plaintiff asserts that "clerical employees amounted to some eighteen percent of the labor involved, all the rest were indeed classified as 'drywall.'" However, assuming that 3 employees were classified as clerical, and the remaining 36 employees were classified as drywall installers, then clerical employees would amount to 7.7% of the employees and drywall installers would amount to 92.3% of the employees, not 18% and 82% (by mathematical implication), respectively, as plaintiff states.

Finally on this issue, it should also be pointed out that in the Final Premium Audit, while plaintiff notes that the report contains two classifications of employees, the report does not indicate the number of employees in each classification or category.

In sum, in addition to the failure of plaintiff to support its finding for the final payroll amount ($511,000.00), plaintiff's also supplies the court with faulty calculations (the incorrect percentages noted above) and incomplete figures on its report (failing to include the number of employees in each classification). Based upon the foregoing, the court finds that plaintiff has failed to make a prima facie showing entitling it to summary judgment.

In any event, in its opposition, defendant has raised a triable issue of fact. In this regard, defendant has submitted proof, namely the "employee classification information," that 17 of its employees are not engaged in drywall installation. In addition, defendant has demonstrated that it had faxed this information to plaintiff after receiving the results of the Final Premium Audit, and had also advised plaintiff by telephone several times "to explain that not all employees perform drywall work." Mr. Rubino also avers in his sworn affidavit that defendant requested "a re-audit based upon the incorrect classification of . . . [defendant's] employees, but the re-audit was never performed." Thus, even assuming plaintiff made a prima facie showing, defendant has raised a question of fact as to whether the employee classifications used to calculate the purported payroll ($511,000.00) were correct, and thus whether the premium calculated by plaintiff, as reported in the Final Premium Audit by plaintiff, which was based in part upon the payroll of $511,000.00, was correct.

Based upon the foregoing, the motion of plaintiff is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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