Commissioner of the State Ins. Fund v DFL Carpentry, Inc.
2015 NY Slip Op 31076(U)
May 20, 2015
Supreme Court, New York County
Docket Number: 452808/08
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

DFL CARPENTRY, INC.,

Defendant.

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DECISION AND ORDER

Index No. 452808/08

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on its claims against defendant for unpaid workers' compensation insurance premiums. Defendant opposes the motion.

The material facts are as follows.

Plaintiff is the State Insurance Fund ("SIF"), suing through its commissioners. As an agency of the state of New York, SIF provides workers' compensation insurance and disability coverage, for a premium, to its policyholders. Defendant is DFL Carpentry, Inc. ("DFL Carpentry"), a company doing business in New York.

On April 14, 2004, defendant submitted an application for Workers' Compensation and Employers' Liability Insurance. Michael Stack, the president

of DFL Carpentry, signed the application form, which described defendant's business as "interior carpentry" and listed the type of work as "cabinet installation" under code #5429 (Motion, exhibit A).

At some point prior to 2007, SIF conducted an audit of defendant's coverage.

Defendant cancelled the insurance coverage on December 13, 2007.

By letter dated February 29, 2008, SIF notified defendant that SIF had referred to its legal department a claim against defendant in the sum of $150,122.00 for premiums due under the cancelled policy.

On July 2, 2008, defendant's accountant sent an email to SIF stating in pertinent part:

> We are the accountants and payroll processors for DFL Carpentry, Inc., Policy #1384 257-0. We have all the records necessary for a re-audit of this client showing the correct classifications of their employees. They were originally a carpentry company, hence the name, but now only do drywall work. The audit is to be done at our offices....

Jacob H. Weintraub, an attorney in SIF's Legal Department, sent an email to defendant dated August 18, 2008, stating as follows:

> After audit, the current balance due is $117,207.64. Please advise me as to whether DFL Carpentry Inc., will pay this balance. If so, please advise me as to whether DFL Carpentry Inc., needs a short payment plan.

> It is my understanding that DFL Carpentry, Inc., may be disputing the classification of some or all of its employees. If you believe there is an issue regarding employee classifications, such issue must be raised before the New York Compensation Insurance Rating Board ("Rating Board"). The Rating Board's address is 200 East 42nd Street, New York, New York 10017.
>
> In addition, should this matter go to litigation, the Court will not have jurisdiction over classification issues as this is a Rating Board function. Commissioner State Insurance Fund. v. Mascali-Robke Co., 208 Misc.316, 320; 145 N.Y.S.2d 374 (Sup.Ct., N.Y.Co. 1955) aff'd. 1 A.D.2d 945, 151 N.Y.S. 608 (1st Dept. 1956).

It is undisputed that defendant failed to contact the New York Compensation Insurance Rating Board, despite the above notification.

Plaintiff commenced the instant action by filing a summons and verified complaint on September 3, 2008, alleging that defendant defaulted in paying its premiums. The complaint seeks damages, prejudgment interest, reasonable attorneys' fees, together with costs and disbursements.

Defendant retained Sean F. McCaffrey, Esq., to defend the lawsuit. Mr. McCaffrey filed a verified answer asserting nine affirmative defenses. The answer is verified by counsel, not the defendant.

Mr. McCaffrey sent a letter dated February 6, 2009, to SIF's counsel, stating as follows:

> Enclosed please find the verified answer for my client, DFL Carpentry. I apologize for its tardy arrival. Please be advised that my

client is alleging that the audit mischaracterized the category/description of the work performed by my client as "carpentry" when in reality they are more accurately characterized as "drywall".

It is respectfully alleged that this mischaracterization is based upon the assumption inherent in the title of my clients corporation. The reason for the late arrival of this material is based partially upon my collection and organization of documents necessary to establish this position. I expect to have this material available for your review within the next several days. Therefore I request that following your receipt and review of same we schedule a conference for us to discuss this issue. Thank you for your continued courtesies and I look forward to speaking with you soon.

Janice Pargh, SIF's counsel, sent a letter to Mr. McCaffrey dated February 20, 2009, stating as follows:

I have received the Verified Answer and Combined demands. In your cover letter you state that NYSIF has mischaracterized your client's classification, which should be drywall, not carpentry. Please note that questions regarding classification must be raised before the New York Compensation Insurance Rating Board.

> Public policy and an expressed legislative intent require that the rate and classification fixed by the [Rating] Board, a body invested by law with administrative and quasi-judicial powers, be deemed binding upon insurer and insured unless revised within the time limitation and in accordance with the relevant rules and procedure set forth in the [Rating] Board's manual. *Commissioner State Insurance Fund v. Mascali-Robke Co.*, 208 Misc. 316, 320; 145 N.Y.S.2d 374 (Sup. Ct., N.Y. Co. 1955) *aff'd.* 1 A.D.2d 945, 151 N.Y.S.2d 608 (1st Dept. 1956).

Further,

> Regardless of the merits of [defendant's] defenses, the question of improper classification of payroll is not one which the court may consider collaterally, by way of defense or otherwise, in an action by insurance carrier to recover workmens's' compensation insurance premiums. *Id.*

> Moreover, defendant cannot stay the motion for summary judgment by initiating a proceeding before the Board or awaiting a determination from the Rating Board (the "Rating Board)." *Commissioners of the State Insurance Fund v. Sealand Marien and Maintenance Corp.*, 13 Misc.2d 745; 178 N.Y.S.2d 257 (Sup. Ct. N.Y. Co. 1958).

Despite receiving the above notification, the defendant again failed to contact the New York State Insurance Rating Board.

During discovery, defendant narrowed its defenses to that of laches and improper classification of its employees by plaintiff.

SIF sent defendant a final bill dated July 8, 2009, stating that the balance owed by defendant was the sum of $117,207.64.

Subsequently, Edwin Rivera, an attorney in SIF's legal department, sent a letter to Mr. McCaffrey dated August 3, 2009, stating as follows:

> This correspondence is in reference to your letter dated 6 February 2009 addressed to Ms. Janice Pargh. Please be advised that Ms. Pargh is no longer with this office and that I have inherited this file.
>
> In your letter you stated that your client alleges a mischaracterization of the work you performed in the audit resulting in a higher premium. You also indicated that you were collecting the documents necessary to establish this position, which you would provide for review.

A review of the file indicates non-receipt of this material. Please contact the undersigned at your earliest convenience so that this and any other related matters may be addressed.

On September 9, 2011, SIF filed a motion for summary judgment. By order dated November 2, 2011, Justice Melvin Schweitzer awarded summary judgment in favor of SIF on default.

On June 26, 2013, DFL Carpentry moved by order to show cause to vacate the default judgment. At this point, defendant was no longer represented by Sean McCaffrey, Esq. By order dated September 30, 2013, Justice Schweitzer vacated the default judgment, finding that defendant had a reasonable excuse for the default in that its counsel at the time was arrested on charges of forgery and incarcerated.

Plaintiff's motion for summary judgment is now pending before the Court.

Discussion

The standards for summary judgment are well settled. "The 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 eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.)

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1st Dept., 1989]). The court's role is "issue-finding, rather than issue-determination" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

Documentary evidence consisting of the insurance application, the policy, the audit reports, and the resulting statements is sufficient to make out a prima facie showing of entitlement to judgment as a matter of law in an action to recover unpaid workers' compensation premiums (Commissioners of State Ins. Fund v. Concord Messenger Service, Inc., 34 A.D.3d 355, 355 [1st Dept., 2006]).

Here, we find that plaintiff's unrebutted business records, in the form of the insurance application, the policies, the audit reports and resulting invoices are

sufficient to make out a prima facie case of entitlement to judgment as a matter of law (Commissioners of State Ins. Fund v. Beyer Farms, Inc., 15 A.D.3d 273, 274 [1st Dept., 2005]).

Defendant contends that there is an issue of fact whether plaintiff improperly classified defendant as being in carpentry, and not drywall construction.

Michael Stack, the president of defendant DFL Carpentry, has submitted a sworn affidavit in opposition to the motion for summary judgment. He notes that in the application form for insurance, defendant described itself as being engaged in the business of interior carpentry. However, he states that defendant "now and has always been a drywall company" and has "limited the scope of its work to drywall work." Mr. Stack asserts that defendant never intended to indicate that it was engaged in anything other than drywall work. Mr. Stack asserts that in March 2008 he personally sent a letter to SIF contesting the classification of defendant as a carpentry company.

Mr. Stack contends that it is not defendant's fault that it failed to exhaust its administrative remedies by seeking administrative review of the misclassification before the New York Compensation Insurance Rating Board. Rather, defendant's attorney Sean McCaffrey is to blame for mishandling the case.

According to Mr. Stack, defendant's attorney – without defendant's knowledge – filed a verified answer, which was verified by counsel, that failed to contain any affirmative defenses or counterclaims relating to the misclassification; failed to inform him of the proper administrative channels which could have been followed in order to contest the classification; was arrested during the pendency of the instant litigation, charged with forgery, and subsequently incarcerated; failed to submit opposition to SIF's motion for summary judgment; never communicated with defendant regarding the status of this action; and never responded to defendant's communications.

Defendant cites no caselaw holding that law office failure or ineffective assistance of counsel excuses a defendant's failure to follow the procedure requiring misclassification issues to be reviewed not by the Court, but by the New York State Compensation Insurance Rating Board.

"The question of improper classification of payroll is not one which the court may consider collaterally, by way of defense or otherwise, in an action by an insurance carrier to recover workmen's compensation insurance premiums" (Commissioners of State Insurance Fund v. Mascali-Robke Co., Inc., 208 Misc. 316 [Sup. Ct., N.Y. Co., 1955], aff'd Commissioners of State Insurance Fund v. Mascali Robke Co., Inc., 1 A.D.2d 945 [1st Dept., 1955]). An insured's failure to

exhaust administrative remedies renders its misclassification argument inappropriate for judicial review (Commissioners of State Ins. Fund v. Ramer, 100 A.D.3d 507, 508 [1st Dept., 2012]). Accordingly, this Court does not have jurisdiction to determine the issue of classification (Commissioners of State Ins. Fund v. Yesmont & Assoc., 226 A.D.2d 147 [1st Dept., 1996]).

For the above reasons, the Court finds that defendant has failed to raise a genuine issue of material fact or otherwise rebutted plaintiff's prima facie case.

Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $117,207.64, together with interest at the statutory rate from December 13, 2007, until the date of decision on this motion, as calculated by the Clerk, together with reasonable attorneys' fees in the amount of $21,097.38 pursuant to State Finance Law section 18, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the court.

Date: May 20, 2015
New York, New York

Anil C. Singh