

**Commissioners of the State Ins. Fund v Pinnacle
Restoration Ltd.**

2015 NY Slip Op 31420(U)

July 27, 2015

Supreme Court, New York County

Docket Number: 452320/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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COMMISSIONERS OF THE STATE INSURANCE
FUND,

Index No. 452320/2014

Plaintiff,

-against-

DECISION/ORDER

PINNACLE RESTORATION LTD. and EDWARD
J. ERHARD III,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover the sum of \$209,467.90 in insurance premiums alleged to be due from defendants for workers compensation insurance. Plaintiff now moves for an order granting it summary judgment. As set forth below, plaintiff's motion is granted.

The relevant facts are as follows. Plaintiff is an entity organized and existing pursuant to the laws of the State of New York. It is an agency of the State of New York and was created and authorized pursuant to the Workers' Compensation Law to issue workers' compensation and disability insurance policies. Defendant Pinnacle Restoration LTD. ("Pinnacle") is a construction company that often acts as a general contractor for a job and hires sub-contractors for various parts of the work. Defendant Edward J. Erhard III ("Erhard") is the owner of

Pinnacle.

At some point in 2008, plaintiff entered into an agreement with Pinnacle wherein the plaintiff issued and maintained workers' compensation insurance coverage on behalf Pinnacle. Pinnacle was charged an estimated premium at the outset of the annual policy term based upon what the anticipated payroll would be for the next year. Each installment was billed by plaintiff in what is referred to as a "provisional bill." After the conclusion of the particular annual policy term, audits were performed wherein the actual payroll was determined and Pinnacle was billed or credited accordingly. Additionally, in accordance with the New York Compensation Insurance Rating Board (the "Rating Board"), Pinnacle was also charged ancillary charges which included charges for uninsured subcontractors, expense constants and assessment charges.

Pinnacle's policy was cancelled on April 25, 2013 because of nonpayment of premium by Pinnacle. The sum of \$209,467.90 is allegedly currently due and owing. According to plaintiff, this sum is based upon an actual audit of Pinnacle's books and records for the policy periods of December 22, 2008 to April 25, 2013. Included in this total is charges associated with at least two subcontractors working with Pinnacle that did not have proper insurance coverage for the applicable time period. Specifically, when plaintiff performed an audit on Pinnacle, it advised Pinnacle that it owed money based upon the fact that the subcontractors Branka Rocanin d/b/a Phoenix Solutions Company ("Phoenix") and Xuncas Restoration ("Xuncas") did not have New York workers' compensation coverage.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is

any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

In the present case, plaintiff has made a prima facie showing of its entitlement to summary judgment as a matter of law. Plaintiff has met its initial burden of making a prima facie showing by presenting the court with its business records, which include the insurance application, audit worksheets and resulting invoices and statements of accounts. These documents clearly establish plaintiff’s right to the outstanding premiums from defendants.

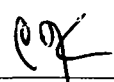
In opposition, defendants have failed to produce evidentiary proof to raise a material issue of fact. Defendants contend that the alleged outstanding premiums are inaccurate as they had provided plaintiff with a certificate of insurance for both Phoenix and Xunacas and, as such, charges should not have been made for these subcontractors’ failure to have proper workers’ compensation insurance. In support of this contention, defendants have presented the court with the certificate of insurance for Phoenix that they originally presented to plaintiff and the affidavit of Erhard who attests that “all the Certificates of Insurance provided by Xuncas showed that there was workers compensation insurance in effect.” However, contrary to defendants’ assertion, this certificate and Erhard’s statement are insufficient to raise an issue of fact as, notwithstanding the alleged valid certificates, it is undisputed that neither Phoenix nor Xuncas actually had appropriate insurance coverage. Thus, the certificates are immaterial. Simply put, presenting invalid certificates to plaintiff is not sufficient to avoid either of these subcontractors

being included in the premium calculations as a search of the insurance records revealed that neither subcontractor actually had the appropriate insurance coverage. Indeed, State Insurance Fund's "Notice to Contractors," which was provided to defendants, specifically states "The State Insurance Fund reserves the right to verify any certificate of insurance by confirming coverage through the appropriate rating authority. A portion of the contract price for each uninsured subcontractor will be included as payroll for premium charges." Thus, plaintiff is entitled to summary judgment.

Additionally, to the extent defendants contend that summary judgment should be denied pursuant to CPLR § 3212(f) because discovery remains outstanding, such argument is unavailing. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1st Dept 2008). Here, defendants fail to provide any evidentiary basis indicating that discovery may lead to relevant evidence necessary to support their defense in this action.

Accordingly, based on the foregoing, plaintiff's motion is granted. The Clerk is directed to enter judgment in favor of plaintiff and against defendants, jointly and severally, in the amount of \$209,467.90, with interest thereon from April 25, 2013, at the rate of nine percent per annum, together with costs and disbursements. This constitutes the decision and order of the court.

Dated: 7/27/15

Enter: 

J.S.C.
CYNTHIA S. KERN
J.S.C.