

**Commissioners of the State Ins. Fund v North Am.
Precast Servs., Inc.**

2017 NY Slip Op 30269(U)

February 8, 2017

Supreme Court, New York County

Docket Number: 452781/2014

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

Index No.
159598/14

-against-

NORTH AMERICAN PRECAST SERVICES, INC.,

**DECISION
and ORDER**
Mot. Seq. 001

Defendants,

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Commissioners of the State Insurance Fund (“Plaintiff”), commenced this action against North American Precast Services Inc., (“Defendant”), to recover premiums allegedly past due under a Workers’ Compensation and Employment Liability Insurance Policy provided to Defendant, as well as interest and costs of this action. Plaintiff now moves for Summary Judgment pursuant to CPLR § 3212 on the ground that there is no triable issue of fact with respect to Defendant’s obligation to pay the premiums. Plaintiff requests that its motion for summary judgment be granted and that the court enter a judgment in favor of Plaintiff against Defendant for the sum of \$525,909.28 with interest from June 22, 2014 plus the costs and disbursements of this action.

In support of its motion for summary judgment, Plaintiff submits: the attorney affirmation of Michael Totaro, dated August 19, 2016; the affidavit of Jett Geiger (“Geiger”), an underwriter for Plaintiff, dated August 11, 2016; the policy of insurance issued from Plaintiff to Defendant #22401327, Plaintiff’s Verified

Complaint; Plaintiff's statement of account with balance due and resulting invoices among other things.

In opposition, Defendant submits: the attorney affirmation of Diana Plue, dated September 27, 2016; the affidavit of Chris Floro ("Floro"), the former President of Defendant; a letter sent from Angella Dawes of the New York State Insurance Fund notifying Defendant of an appointment date to review Defendant's records with handwritten notes on it among other things.

On October 15, 2012 Defendant submitted an insurance application to Plaintiff. Plaintiff was then issued Workers Compensation Insurance Policy #22401327 on October 19, 2012. Defendant failed to pay certain premiums and on June 22, 2014, Plaintiff cancelled the policy. Based on an estimated audit of Defendant's books and records for the policy periods of October 19, 2012 to June 22, 2014, Defendant owes \$525,909.28 as premiums for insurance coverage provided by Plaintiff.

Geiger avers that the auditor worksheets dated April 17, 2014 "that form the basis for the final charges relative to the period October 19, 2012 to October 19, 2013" (Geiger Aff. ¶ 22) provide in pertinent part that "Defendant did not provide all the records needed to complete the audit." (Exhibit D). In addition, the auditor worksheets state "Due to unsuccessful efforts to complete a satisfactory audit, this bill is based in whole or in part on estimate payrolls. The premium can be adjusted when a *complete* set of business records is made available. You may arrange an audit appointment by calling premium audit . . ." (*Id.*)(*emphasis added*).

Geiger avers that "the Defendant was mailed a letter requesting an audit be conducted. (Geiger Aff. ¶ 25). The letter was dated July 11, 2014. (Exhibit G). "If the policyholder does not respond to the letter, the premium for the cancelled period will be estimated by our computer system." (Geiger Aff. ¶ 25).

On July 30, 2014, "Defendant was requested again to schedule an audit so accurate payroll could be acquired." (*Id.* at ¶ 26). Geiger avers that "there is no indication that an audit was ever rescheduled." (*Id.* at ¶ 27).

On August 19, 2014, Defendant was invoiced the final balance due under the policy in the amount of \$525,909.28. (Exhibit H). Defendant has not payed that

sum. Plaintiff further argues that Defendant is obligated to pay interest from the date of June 22, 2014 at the rate of nine percent per annum pursuant to State Finance Law § 18.

In opposition, Defendant contends that handwritten notes on its letter sent from Angella Dawes show that Defendant emailed the requested 2013 payroll documents on March 7, 2014, the Cash Disbursement Records on March 7, 2015, and a Corporate Income Tax Return. Therefore, Defendant did provide the requested documents for an audit of the 2012 to 2013 insurance year but the audit was never completed.

Specifically, the affidavit of Floro avers “On January 27, 2014, [Defendant] received a letter from the [Plaintiff] with a list of records [Defendant] needed to produce so an audit could be done to determine the proper premium for the policy year of October 19, 2012 to October 19, 2013.” (Floro Aff. ¶ 8). “[Defendant] produced to NYSIF the contracts that were requested on April 2, 2014, emailed the requested 2013 payroll documents on March 7, 2014 and the Cash Disbursement Records on March 7, 2014 and emailed the 1120 Corporate Income Tax Return for 2013.” (Id. at ¶ 9). Floro avers that “[Defendant] did provide requested documents for an audit of the 2012 to 2013 insurance year. Yet the audit was not completed.”

Floro avers that in connection with this lawsuit and “[i]n response to Plaintiff’s demand to produce documents, [Defendant] produced payroll records for October 19, 2012 to June 22, 2014, Cash Book for October 19, 2012 to June 22, 2014, general ledger for the period October 19, 2012 to June 22, 2014, Cash receipts and disbursements for the period October 19, 2012 to June 22, 2014, any certificates of insurance in their possession, State Unemployment Insurance Reports for the period October 19, 2012 to June 22, 2012, NYS 45 and 941 for the year 2013 and part 2012. (Floro Aff. ¶ 13).

Finally, Plaintiff later demanded the “2012 4th quarter NYS 45 and 941, 2014 941 and NYS 45, 2013 and 2014 Tax Returns 1120, 1099’s and contracts for the audit period.” (Floro Aff. ¶ 14). Floro avers that “Defendant is no longer an active corporation and thus the employees that handled the accounting are no longer at [Defendant]. Therefore, it has been difficult to find and obtain these documents.” (Floro Aff. ¶ 15). But Defendant was “able to find the 1120 tax returns for 2013 and 2014, 4th quarter 2012 NYS 45s and 941 and contracts for the

audit period. These documents have been sent this day to opposing counsel . . . but due to their confidential nature will not be attached as an exhibit and e-filed.” (Floro Aff. ¶ 16). Thus Floro avers that Defendant “has provided 2012, 2013 and 2014 payroll records, cash disbursements, ledgers, cancelled checks and unemployment insurance reports, 2013 and 2014 corporate tax return 1120’s, NYS 45’s and 941 for 2012 and 2013 and contracts.” (Floro Aff. ¶ 17).

In reply, Plaintiff contends that on March 4, 2015, it filed a Notice of Discovery and Inspection seeking the payroll documents for the period of October 19, 2012 to June 22, 2014. Defendant did not respond and Plaintiff thereafter filed a Request for Judicial Intervention on May 12, 2015. A Preliminary Conference was held and gave Defendant until September 2015, to provide the payroll documents. Defendant did not provide them. A Compliance Conference was held giving Defendant until March 2016 to provide the payroll documents. Defendant did not provide the documents. At the April 2016 Compliance Conference, the Court gave Defendant an additional 30 days to provide the discovery documents. Defendant still did not provide any payroll documents and Plaintiff filed this instant action.

Plaintiff notes that according to the Defendant, the 1099’s which show payments made to independent contractors, the NYS-45’s, which show payroll for the purposes of Unemployment Insurance, and the 941’s which show payroll for the purpose of Social Security benefits, were not provided to Plaintiff and without a full set of records, the audit cannot be completed.

To obtain summary judgement, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgement in its favor (CPLR § 3212[b]). This standard requires the movant to make a *prima facie* showing of entitlement to judgement as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Silverman v. Perlbiner*, 307 A.D.2d 230, 762 N.Y.S.2d 386 [1st Dept 2003]; *Thomas v. Holzberg*, 300 A.D.2d 10, 11, 751 N.Y.S.2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie*

entitlement to summary judgement through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v. Rovello*, 262 A.D.2d 172, 692 N.Y.S.2d 67 [1st Dept 1999]).

Should the movant make a *prima facie* showing of entitlement to summary judgement, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (*see Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714, 717 [1986]; *Zuckerman*, 49 N.Y.2d at 560, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546, 765 N.Y.S.2d 326 [1st Dept 2003]). The non-moving party must set forth evidentiary proof in admissible form in support of its claim that material triable issues of fact exist. (*Zuckerman, supra* at 562).

The Commissioner of the State Insurance Fund is empowered by §83 of the Workers' Compensation Law to undertake “the issuance of policies and their terms and conditions, the fixing of premium rates, the keeping of records, auditing of payrolls, and the billing and collection of premiums therefor”

“Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him, and shall furnish, upon demand, a sworn statement of the same.” (*see McKinney's Cons. Law of N.Y.*, Book 64, Workers Compensation Law § 95).

Where there is no basis for finding that the defendant failed to maintain proper records or refused to provide plaintiff with access to the appropriate records, the State Insurance Fund is not entitled to recover estimated workers compensation insurance premiums (*see Commissioners of the State Ins. Fund v. D & M Leasing, Inc.*, 259 A.D.2d 271, 686 N.Y.S.2d 32 [1st Dept.1999]).

Here, Plaintiff presents an affidavit of its underwriter Brian Simpson, business records including Defendant's application for New York Workers' Compensation and Employers' Liability insurance, Workers Compensation Insurance Policy #22401327, invoices and audit worksheets. Plaintiff has established *prima facie* entitlement to summary judgment. (*see Commissioners of the State Insurance Fund v. Concord Messenger Service, Inc.*, 34 A.D.3d 355, 355-56 [1st Dept. 2006]) (“Plaintiff's documentary evidence consisting of the insurance application, the policy, the audit reports and the resulting statements were

sufficient to make out a prima facie showing of entitlement to judgment as a matter of law.”)

Because the Plaintiff made a *prima facie* showing of entitlement to summary judgement, the burden now shifts to Defendant to show a triable issue of fact. Defendant by its own admission shows that it has failed to turn over the 1099's and 2014 941 and NYS 45 requested by Defendant. (Floro Aff ¶ 16). Consequently, Defendant fails to raise a triable issue of fact because Defendant has not provided a complete set of business records that would even merit a premium adjustment.

Although Defendant notes that it has been difficult to find these payment and payroll documents because Defendant is no longer an active corporation, Workers Compensation Law § 95 states that every employer who is insured in the state insurance fund shall keep a true and accurate record of . . . the number of his employees and the wages paid by him. Thus Defendant's inactivity as a corporation is not a defense.

In addition, where there is a basis for finding that defendant fails to maintain proper records or refuses to provide Plaintiff with access to the appropriate records, the Plaintiff is entitled to recover estimated workers compensation insurance premiums. Here the Defendant notes that it has difficulty finding its own documents and has failed to provide to Plaintiff the 1099's and 2014 941 and NYS 45 needed for an accurate audit. Consequently, such a basis exists here that entitles Plaintiff to recover the estimated workers compensation insurance premiums.

For the foregoing reasons, Plaintiff's motion for summary judgement is granted.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for summary judgment against Defendant for the sum of \$525,909.28 representing the balance due for the workers' compensation insurance coverage Plaintiff provided to Defendant, interest from June 22, 2014, and costs and disbursements of this action, is granted, and it is further

ORDERED that the Clerk shall enter judgment in the sum of \$525,909.28 plus interest from June 22, 2014, and costs and disbursements of this action upon a submission of the appropriate bill of costs, to be calculated by the Clerk; and it is further

ORDERED that Plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

DATED: ^{Feb 8} ~~January~~ _____, 2017


EILEEN A. RAKOWER, J.S.C.