

**Commissioners of the State Ins. Fund v Cactus Holdings, Inc.**

2017 NY Slip Op 31578(U)

July 25, 2017

Supreme Court, New York County

Docket Number: 451497/2014

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 59

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COMMISSIONERS OF THE STATE INSURANCE  
FUND,

Plaintiff,

Index No. 451497/2014

- against -

CACTUS HOLDINGS, INC., WESTERN BEEF  
RETAIL, INC. formerly known as WESTERN  
BEEF, INC., WESTERN BEEF BBQ TO GO, INC.,  
WESTERN BEEF MARINERS HARBOR, LLC, ANT  
HOLDING CORP., 125 MINEOLA AVENUE, INC.,  
MCPJF, INC., AWESOME TRANSPORTATION, INC.,  
FOODNATION, INC., G and P WAREHOUSE, INC.,  
and WESTERN BEEF PROPERTIES, INC,

DECISION AND ORDER

Defendants.

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**DEBRA A. JAMES, J.S.C.:**

In this action for money damages for unpaid workers  
compensation premiums allegedly owed on policy number 21104294  
(the State Insurance Fund Policy), which automatically renewed  
for the policy years 2010 through 2013 (the Policy Years),  
plaintiff the State Insurance Fund (SIF) moves for summary  
judgment, seeking \$3,096,985, plus interest, and the cost of  
collection, pursuant to State Finance Law § 18(5).

SIF also moves to dismiss defendants' Cactus Holdings, Inc.,  
et al's (Cactus) counterclaims for breach of contract, breach of  
the implied covenant of good faith and fair dealing, and tortious  
misconduct, as well as Cactus's affirmative defenses. SIF  
asserts that Cactus has failed to exhaust its administrative  
remedies through the procedures of the New York Compensation

Rating Board (the Rating Board), which allow for review by the Superintendent of Insurance, and ultimately by a CPLR Article 78 proceeding (see Insurance Law 2319 [b]; Matter of Colortone Camera, Inc v New York State Compensation Ins. Rating Board, 102 AD3d 962 [2d Dept 2013]).

#### CONCLUSION

The motion of plaintiff SIF for summary judgment on its first and second causes of action, awarding \$3,096,985 against defendant Cactus Holdings, Inc., and dismissing Cactus's counterclaims, shall be granted.

#### Background

SIF is an agency of New York State that is authorized by law to provide worker's compensation insurance to employers in New York State, and charge a premium therefor. Cactus is a holding company for the defendant entities, which operate 31 retail food stores in New York, that are covered under the SIF Policy. Cactus also employs people in Florida.

The Rating Board, which is not a party to this action, collects payroll data from all employers throughout the State of New York and determines premiums for each job classification pursuant to Workers' Compensation Law § 89<sup>1</sup> (Commissioners of

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<sup>1</sup> Workers' Compensation Law § 89, captioned, "Rates for workers' compensation," provides in subdivision (1), as pertinent: "[e]mployments and employees in the state fund shall be divided into such groups and classes as shall be equitable based upon differences of industry or hazard for the purpose of

State Ins. Fund v. Mascali-Robke Co., 208 Misc 316, 318 [Sup Ct, NY County 1955), affd 1 AD2d 945 [1<sup>st</sup> Dept 1956]).

The role and function of the Rating Board is described in Matter of the Petition of the New York State Insurance Fund - Workers' Compensation Fund for Redetermination of a Deficiency or for Refund of Franchise Tax on Insurance Corporations under Article 33 of the Tax Law for the Years 1999 and 2000 (2007 WL 892508 at 2-3 [Div. of Tax Appeals 2007]), as being a nonprofit, unincorporated association of insurance carriers, including SIF, that is charged with collecting employment-related data and developing workers' compensation classifications and rates. The Rating Board Manual<sup>2</sup> (the Manual) contains the so-called "manual

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establishing premium rates for workers' compensation insurance, and for such purpose a system of merit rating may be employed which shall take account of the peculiar hazard of each individual risk. Such premiums in the state fund shall be fixed at the lowest possible rates consistent with the maintenance of a solvent fund and of reasonable reserves and surplus.

<sup>2</sup> The regulations applicable to SIF provide, as pertinent: "[t]he rates for workers' compensation and employer's liability, disability benefits, volunteer ambulance and volunteer firefighters' benefit insurance shall be fixed as low as possible consistent with the maintenance of a solvent fund and reasonable reserves and surplus. For such purpose the rate manual and rating plans and classifications established and promulgated by the Compensation Insurance Rating Board and approved by the Superintendent of Insurance pursuant to, and under the authority of the Insurance Law, are hereby adopted insofar as they are consistent with article 6 of the Workers' Compensation Law. Such rate manual and rating plans as applied to the standard risks insured with the State Fund may be modified to permit the application of such initial discount in rates and to permit other reductions in net costs of insurance as, in the judgment of the commissioners, or under their direction, seem to be appropriate

rates" used by SIF, and contains procedures by which an aggrieved policyholder may seek review of those rates.

This action involves a dispute over the employment data used to calculate a component of rate-making called the "experience modification factor" (the Modification Factor), which measures

"the employer's own loss experience or its individual risk if the insurance is over \$5,000.00. The experience modification factor or rate compares a company with others in its classification and is a means of allocating premiums among employers within a classification according to their relative contribution to a class cost. This experience rating is applied to all policies with an annual premium of at least \$5,000.00"

(id. at 3).

Since Cactus has employees in Florida as well as in New York, the Rating Board utilized the National Council of Compensation Insurers (NCCI), a nationwide rate-making body, to analyze the payroll data of Cactus, and calculate the Modification Factor for Cactus. This Modification Factor is a function that the Rating Board would perform if Cactus's employees were all based in New York State.

Payroll data, including remuneration, number of employees,

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consistent with the financial status of the State Fund; and similarly, for nonstandard risks, such rate manual and rating plans may be modified to permit the application of increased rates as may reflect the peculiar hazards of each individual risk. The term standard risk shall refer to a risk whose indicated accident and moral hazards approximate the normal hazards of the risk's governing classification" (12 NYCRR 450.2).

and which of the rating association's classifications they fit into are self-reported by the employer to both SIF and, in this case, NCCI and the Rating Board, all of which are entitled to audit that payroll data.

SIF audited Cactus for the Policy Years, and found no discrepancies. In 2012, Cactus voluntarily informed SIF that Cactus had discovered that it had under-reported its payroll for the Policy Years, both by improper classification of employees, and by listing workers as independent contractors who were actually employees.

The SIF policy provides in Part 4, captioned "Premium," subdivision (c), captioned "Classifications:"

"[t]he information page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy. You must notify us promptly of any change in the nature of the work performed by your employees so that we can assign proper classifications".

According to the affidavit of Robert Isacsen (Isacsen), an insurance consultant retained by Cactus, SIF then conducted supplemental audits for the Policy Years using the newly reported payroll data, and determined that Cactus owed an additional \$4.2 million in premium.

Isacsen states that the new information required adjustment

of the Experience Modifier:

"to reflect newly revised payroll figures for the 2011 and 2012 years. Consequently, [SIF] re-filed the 2011 and 2012 payroll information with the [Rating Board] and NCCI and agreed to lower the request for additional premiums to \$3,096,985.89, which is the amount currently being sought . . ."

In 2014, Cactus again voluntarily informed SIF that it had under-reported payroll, this time for the policy years 2006 through 2009 (the Prior Policy Years), for which SIF was not Cactus's insurer. Cactus argued that SIF should further reduced the premium for the Policy Years because the Experience Modifier would be lower if it reflected the correct payroll and used the correct mechanics of the supplemental audit for the Prior Policy Years.

According to the expert affidavit of Christopher B. Byrnes, SIF should have reduced its premium demand for the Policy Years by a further \$1,640,221 to reflect the effect of the revised payroll data for the Prior Policy years on the Modification Factor that should have been applied to the Policy Years. Byrnes used NCCI to make this informal calculation. There is no dispute in this action about the actual premium calculations of either SIF's version or Cactus's. The only dispute is about whether the revised payroll data for the Prior Policy years should be used by SIF to revise the Experience Modifier for the Policy Years.

SIF declined to further reduce the premium for the Policy Years or to refer the matter to the Rating Board, as it did

previously. SIF takes the position that only the Rating Board or NCCI, if NCCI is designated by the Rating Board, can determine the proper Modification Factor. After SIF declined to amend its premium demand on the basis of the payroll under-reporting in the Prior Policy Years, Cactus retained the services of Leahy & Co. (Leahy), which determined that the correct amount owed to SIF for the Policy years, using an Experience Modifier revised to reflect the revised 2008-2010 payroll data, was \$1,456,764.15. In 2014, Cactus made a voluntary payment of \$165,556 to SIF.

Isacsen further states that, after Cactus had advised SIF that it was inclined not to renew for the 2013 policy year, SIF offered a 20% discount on the premium if Cactus renewed. Isacsen contends that it was an act of bad faith by SIF not to have offered the 20% renewal at inception or on the prior renewal. Isacsen contends that questions of fact are presented as to whether SIF used inaccurate data in arriving at its calculations, and whether it was a breach of the implied covenant of good faith and fair dealing not to offer that discount.

#### DISCUSSION

SIF brings this action seeking the past due premium as calculated using the revised Modification Factor provided by NCCI and the Rating Board. SIF has met its initial burden of demonstrating its entitlement to judgment as a matter of law by presenting the affidavits of Lily Chien and Ken Cho, which annex

sufficient evidence to demonstrate its entitlement to judgment as a matter of law, shifting the burden to Cactus to present sufficient evidence to demonstrate the existence of a question of fact (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 325 [1986]).

Submission of the policy, the audit reports, and the resulting statements is sufficient to state a prima facie case (see Commissioners of State Ins. Fund v Concord Messenger Serv. Inc., 34 AD3d 355, 355 [1st Dept 2006]; Commissioners of State Ins. Fund v Beyer Farms. Inc., 15 AD3d 273, 274 [1st Dept 2005]).

In opposition, Cactus argues that the premium being sought here is based on inaccurate data, and that SIF should reduce the premium by applying a revised Modification Factor, to reflect the revised payroll data and using the correct audit mechanics of the supplemental audit to calculate the premium for the Prior Policy Years. Cactus contends that it is not required to exhaust administrative remedies before the Rating Board because any application to the Rating Board would be untimely and therefore futile (see Lehigh Portland Cement Co. v New York State Dep't of Env'tl. Conservation, 87 NY2d 136 [1995]).

The Rating Board Manual provides, under the general heading "Administrative Rules and Procedures," in section F, captioned "Incorrect Underwriting," at subdivision (3), captioned "changes":

"[n]o request to change a classification(s) for a risk on the grounds that the risk has been improperly classified shall be considered by the Rating Board unless the request is filed directly with the Rating Board, by the insured, its representative or by the carrier during the policy term with respect to which the request is made or within twelve (12) months after the expiration thereof".

There can be no dispute that in 2014 any application to the Rating Board to change the classifications for the Prior Policy Years would have required a review of policies that expired more than 12 months before the application.

The Manual provides for an appeal of an adverse determination by the Rating Board, with the further right of appeal to the Superintendent of Insurance, and ultimately to this court in a CPLR Article 78 proceeding (see Insurance Law 2319 [b]; Di Pietro v State Ins. Fund, 206 AD2d 211, 213 [4<sup>th</sup> Dept 1994]). Di Pietro involved a premium differential, which is an adjustment of premium based on underwriting criteria. The regulations governing SIF provide an administrative procedure within SIF to appeal a premium differential, but there are no SIF regulations that specifically provide an appeal procedure for the calculation of an Experience Modifier.

It is unnecessary for this court to determine either whether Cactus must exhaust administrative remedies before asserting these counterclaims or whether the exhaustion requirement is excused on the ground of futility, because an aggrieved SIF policyholder may not assert the issue of improper classification

of payroll "by way of defense or otherwise, in an action by an insurance carrier to recover workmen's compensation insurance premiums" (Commissioners of State Ins. Fund v. Mascali-Robke Co., 208 Misc at 320). The basis for Cactus's contention that the Experience Modifier is too high is improper classification of employees in the Prior Policy Years.

If Cactus

"felt aggrieved by the classifications assigned to its payrolls, it had its remedy of applying directly to the Board for a revision thereof by filing a complaint within the time limitation set forth in the manual. This it did not do"

(id.).

Cactus is required to pay its premium regardless of the pendency of any proceeding before the Rating Board. If it prevails, then SIF is required to refund any overpayment (see Commissioners of State Ins. Fund v Sealand Marine & Maintenance Corp., 13 Misc2d 745 [Sup Ct, NY County 1958]; see also Commissioners of State Ins. Fund v Regenstreif, 27 Misc2d 1049, 1050 [App Term, 1<sup>st</sup> Dept 1960]).

Cactus "cannot stay the motion for summary judgment by initiating a proceeding before the Board or awaiting a determination from the Rating Board [citation omitted]" (Commissioners of the State Insurance Fund v DFL Carpentry, Inc., 2015 WL 3866738 \*2 (Sup Ct, NY County 2015)).

A further reason that it is unnecessary to address the

exhaustion requirement is that only the Court of Claims has jurisdiction to entertain Cactus's counterclaim for money damages (see Commissioners of State Ins. Fund v Trio Asbestos Removal Corp., 9 AD3d 343, 345 [2d Dept 2004]; Commissioners of State Ins. Fund v J.D.G.S. Corp., 253 AD2d 368, 369 [1<sup>st</sup> Dept 1998]).

Similarly, Cactus's argument that a factual issue is presented as to whether SIF failed to act in good faith by not offering it a 20% discount on prior renewals, is only cognizable in the Court of Claims. Cactus has failed to meet its burden of presenting sufficient evidence to demonstrate the existence of a question of fact, triable in this court.

ORDER

Accordingly, it is

ORDERED that the motion of plaintiff Commissioners of the State Insurance Fund for summary judgment on its first and second causes of action, awarding \$3,096,985 against defendant Cactus Holdings, Inc., and dismissing Cactus's counterclaims, is granted, plus interest, costs and disbursements, as taxed by the Clerk of the Court, upon presentment of an appropriate bill of costs; and it is further

ORDERED that the action is severed; the counterclaims are dismissed, without prejudice, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: July 25, 2017

E N T E R:

~~Debra A. James~~  
**DEBRA A. JAMES** J. S. C.