

**Zurich Am. Ins. Co. v Il Mulino USA, LLC**

2018 NY Slip Op 32038(U)

August 17, 2018

Supreme Court, New York County

Docket Number: 160408/16

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff

Index No. 160408/16

v

DECISION AND ORDER

IL MULINO USA, LLC, IM LONG ISLAND, LLC,  
IM FRANCHISE, LLC, IM LLC I, IM LLC II, IM  
LLC III, IM LONG ISLAND RESTAURANT GROUP,  
LLC, d/b/a IL MULINO NEW YORK, IM NY AC,  
LLC, d/b/a IL MULINO NEW YORK and TRATTORIA  
IL MULINO, IM NY FLORIDA, LLC, d/b/a IL  
MULINO NEW YORK, IM NY LV, LLC, d/b/a IL  
MULINO NEW YORK, IM PRODUCTS, LLC, GFB  
RESTAURANT CORP., d/b/a IL MULINO NEW YORK,  
and IM NY CHICAGO, LLC, d/b/a IL MULINO NEW YORK

MOT SEQ 001

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action, inter alia, to recover unpaid insurance premiums, the plaintiff, Zurich American Insurance Company (Zurich), moves pursuant to CPLR 3212 for summary judgment on the complaint. The defendants oppose the motion. The motion is granted in part.

II. BACKGROUND

The defendant Il Mulino USA, LLC (IM USA), owns and manages several restaurants at various locations in New York, New Jersey, Pennsylvania, Nevada, Florida, North Dakota, Ohio, Washington, and Wyoming under several trade names, including Il Mulino New

York, and its members include other limited liability companies that also operate under those trade names. It is undisputed that Zurich provided two general comprehensive liability/property protection/business automobile (GCL) insurance policies and one workers' compensation (WC) insurance policy to IM USA, which was the first and primary named insured on each of those policies.

The first GCL policy, which was in effect from October 31, 2013, through October 31, 2014, also named, as additional insureds, all of the other defendants in this action. The terms of this GCL policy recite that Zurich would provide the coverage specified therein to the named and additional named insureds in consideration of the payment of a premium of \$215,362.00 and surcharges for state-specific endorsements in the sum of \$1,710.55, for a total of \$217,072.55. The policy set forth a schedule of twelve monthly premium payments required to be remitted, with the initial payment in the sum of \$17,956.00 plus the surcharges, and continuing with payments of \$17,946.00 for each of the remaining eleven months. It provided, at Section E of the Common Policy Conditions, that the first named insured shown in the declarations page, IM USA, is responsible for the payment of all premiums.

The second GCL policy, effective from October 31, 2014, through October 31, 2015, provided that Zurich would afford the same general comprehensive liability/property protection/business

automobile coverage over that period to IM USA and the other defendants named above, as additional insureds, in consideration for the payment of an annual premium of \$206,147.00, plus \$1,368.59 in state surcharges, for a total obligation of \$207,515.59. It set forth a schedule of twelve monthly premium payments to be remitted, with the initial payment in the sum of \$17,189.00 plus the surcharges, and payments of \$17,178.00 for each of the remaining eleven months. The second GCL policy contains the same recitation that IM USA, as the first named insured, was responsible for the payment of all premiums.

The WC policy, issued to IM USA and all of the other defendants as named insureds, save IM Chicago, LLC, and GBF Restaurant Corp., was effective from October 31, 2014, through October 31, 2015, and indicated that the total premium required to be remitted was \$119,899.00, plus \$5,711.00 in state taxes on the premiums, for a total \$125,620.00. The WC policy includes a twelve-month installment payment schedule, requiring remittance of \$10,692.00 for the first month and \$10,448.00 for each of the remaining eleven months. That policy also sets forth an itemized breakdown of premiums and applicable discounts with respect to each restaurant. General Section, Paragraph A, of the WCL policy recites that the policy is a contract of insurance, and defines the term "you" as "the employer named in Item 1 of the Information Page," which is identified as IM USA. Part V,

Section D of the policy provides that "[y]ou will pay all premium[s] when due."

Zurich alleges that the defendants did not fully pay all of the premiums. Zurich submits copies of the pleadings, a compliance conference order dated July 6, 2017, the subject insurance policies, an affidavit of its attorney, Dennis E. Kadian, and an affidavit from its internal litigation specialist, Bo Gursky. It also relies on a printout showing the dates that payments were received in connection with each of the three subject policies, the amounts received, and the defendants' check numbers referable to each payment.

Gursky, who authenticates the policies, asserts that Zurich provided the coverage set forth therein. He also asserts that, after reviewing Zurich's records, he calculated that, with respect to the 2013-2014 GCL policy, a \$4,590.80 audit credit was applied, which reduced the contractual obligation from \$217,072.55 to \$212,481.75. He states, however, that Zurich received only \$176,589.28 in payments, leaving a balance of \$35,892.47. In connection with the 2014-2015 GCL policy, Gursky avers that a \$26,147.00 cancellation credit reduced the contractual obligation from \$207,515.59 to \$181,368.59, but that Zurich received only \$138,776.00 in payments, leaving a balance of \$42,592.52. Gursky further states that, with respect to the WC policy, after a \$17,671.00 audit credit was applied to reduce

the contractual obligation from \$125,620.00 to \$107,949.00, Zurich received only \$84,187.00 in remittances, leaving a balance of \$23,762.00 on that policy. He thus calculates that of the \$501,799.34 required to be paid in premiums, surcharges, and taxes with respect to the three policies, Zurich received the sum of only \$399,552.28, leaving an outstanding obligation of \$102,247.06.

### III. DISCUSSION

#### A. SUMMARY JUDGMENT STANDARD

The movant on 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 Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form. See Zuckerman v City of New York, 49 NY2d 557 (1980). The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. BREACH OF CONTRACT

"An insurance policy is a contract between the insurer and the insured." Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co., 53 AD3d 140, 144 (1<sup>st</sup> Dept. 2008). To recover for breach of contract, Zurich must show that there was a "formation of a contract between the parties, performance by the plaintiff, the defendant[s'] failure to perform, and resulting damage."

Flomenbaum v New York Univ., 71 AD3d 80, 91 (1<sup>st</sup> Dept. 2009); see Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010).

Zurich fails to show that any defendant other than IM USA was obligated to pay any premiums under any of the policies. Although these other defendants were identified as additional insureds, where, as here, the express terms of an insurance policy impose the payment obligation solely on one named insured, the additional named insureds are not liable under the contract of insurance. See Northern Assurance Co. v Goelet, 69 App Div 108 (1<sup>st</sup> Dept. 1902).

Zurich, however, established its prima facie entitlement to judgment as a matter of law on its first cause of action against IM USA, which is to recover for breach of contract, by submitting Gurksy's affidavit, the policies, the calculation of the audit and cancellation credits, and the printout of checks received. See Commissioners of State Ins. Fund v Beyer Farms, Inc., 15 AD3d 273 (1<sup>st</sup> Dept. 2005); Medical Malpractice Ins. Assoc. v Brooklyn

Hosp., 70 AD2d 552 (1<sup>st</sup> Dept. 1979). In opposition, the defendants submit the affidavit of their chief financial officer, William Minner, who states only that he "believes" that most of IM USA's obligation to Zurich was paid, or that certain payments were "presumably" made through an insurance broker. Minner submits a list of payments made by the defendants to unidentified vendors, and a vaguely worded "reconciliation" sheet, setting forth unexplained credits, that purports to show that IM USA owe only \$25,686.46 to Zurich. Minner's affidavit, however, does not set forth which of those payments were made to Zurich, and none of them matches the monthly premiums required by the policies. Nor does Minner provide a factual explanation as to how much was actually paid to Zurich, or why Zurich's calculations are incorrect. Neither do the defendants submit cancelled checks or drafts, bank statements, or other documentation memorializing full payment to Zurich. Hence, the defendants fail to raise a triable issue of fact, and Zurich is entitled to summary judgment on its first cause of action against IM USA.

C. UNJUST ENRICHMENT

Since Zurich seeks to recover under three express agreements, it is not entitled to recover on its second cause of action, which is for unjust enrichment. See Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382 (1987).

D. ACCOUNT STATED

In support of its third cause of action, which seeks to recover on an account stated, Zurich submits only a three-page Installment Premium Schedule, which simply reiterates the schedules included in the policies themselves. An account stated may be implied by a defendant's retention of bills or invoices without objection or partial payment. See Morrison Cohen Singer and Weinstein, LLP v Waters, 13 AD3d 51 (1<sup>st</sup> Dept. 2004). "In order to establish a viable account stated claim," it was Zurich's burden to "offer evidence that they rendered copies of their invoices" to the defendants. Molinaro v Bedke, 292 AD2d 285, 285 (1<sup>st</sup> Dept. 2002). There must also be proof that a plaintiff regularly presented the subject bills or invoices to the defendants at the defendants' offices. See Roth Law Firm, PLLC v Sands, 82 AD3d 675 (1<sup>st</sup> Dept. 2011). Zurich does not submit proof that it mailed or delivered any bills or invoices whatsoever to IM USA, or to any other defendant. Zurich thus failed to establish the element of "regularity that is critical to establishing an account stated." (id. at 676), or that any "account was presented" (Abbott, Duncan & Wiener v Ragusa, 214 AD2d 412, 412 [1<sup>st</sup> Dept. 1995]) to any particular defendant in the first instance. See Sound Communications, Inc. v Rack & Roll, Inc., 88 AD3d 523 (1<sup>st</sup> Dept 2011); Molinaro v Bedke, supra; Waldman v Englishtown Sportswear, 92 AD2d 833 (1<sup>st</sup> Dept. 1983).

Since Zurich failed to make the necessary prima facie showing in this regard, that branch of its motion which is for summary judgment on the cause of action to recover on an account stated must be denied, regardless of the sufficiency of the defendants' opposition papers. See NY Fuel Distribs., LLC v Eljamal, \_\_\_ AD3d \_\_\_, 2018 NY Slip Op 04555 (2<sup>nd</sup> Dept., Jun. 20, 2018); see generally Winegrad v New York Univ. Med. Ctr., supra; Beach v Touradji Capital Mgt., L.P., 144 AD3d 557 (1<sup>st</sup> Dept. 2016).

#### E. STATUTORY INTEREST

The complaint does not expressly set forth the date or dates on which IM USA breached the subject contracts of insurance. Under the circumstances presented here, the absence of a single reasonable intermediate date for the accrual of damages warrants the conclusion that December 12, 2016, or the date that the action was commenced, is the appropriate date from which interest is to accrue. See CPLR 5001; 23/23 Communications Corp. v General Motors Corp., 257 AD2d 367 (1<sup>st</sup> Dept. 1999); Hanover Data Servs.. v Arcata Natl. Corp., 115 AD2d 403 (1<sup>st</sup> Dept. 1985); Delulio v 320-57 Corp., 99 AD2d 253 (1<sup>st</sup> Dept. 1984).

#### F. SANCTIONS

The court declines to award costs or sanctions against the

defendants, as Zurich fails to show that their defense was frivolous within the meaning of 22 NYCRR part 130.

G. CERTIFICATE OF CONFORMITY

The court notes that Gursky's affidavit was executed and notarized in Illinois, and Kadian's affidavit was executed and notarized in New Jersey, but neither includes the certificate of conformity required by CPLR 2309. The defects do not require the court to disregard the affidavits or deny relief to Zurich, as the defects may be cured by the submission of the proper certificate nunc pro tunc. See Bank of New York v Singh, 139 AD3d 486 (1<sup>st</sup> Dept. 2016).

IV. CONCLUSION


Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that it is awarded summary judgment on the first cause of action against the defendant Il Mulino USA, LLC, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the plaintiff, Zurich American Insurance Company, and against the defendant Il Mulino USA, LLC, on the first cause of action in the sum of \$102,247.06, plus statutory interest from December 12, 2016.

This constitutes the Decision and Order of the court.

Dated: August 17, 2018

ENTER: 

J.S.C.

**HON. NANCY M. BANNON**