SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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THE BURLINGTON INSURANCE COMPANY

Index No. 153465/2015

Plaintiff, Motion Seq. No.: 001

-against-

FIREQUENCH INC. and FIRETRONICS, INC.

Defendants.

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Hon. Doris Ling-Cohan:

Plaintiff, The Burlington Insurance Company (Burlington), moves for an order, pursuant to CPLR 3212, granting it summary judgment against the named insured defendants, Firequench, Inc.(Firequench) and Firetronics, Inc. (Firetronics), for unpaid premiums on two sequential, one-year, commercial general liability excess insurance policies.

Background

Defendants, both located at the same address, are related corporations that sell, install, and repair fire detection and alarm equipment for office buildings. The apparent distinction between defendants is that Firetronics was created for jobs requiring union labor. Borg Affirmation, Exhibit 3, Description of Operations. Defendants have one executive officer, their president, Desmond Burke (Burke), seemingly their sole owner. *See* Perruzzi Aff, Exhibit 3, Audit Summary, at 2. The first policy issued by Burlington to defendants (Policy #1) was effective May 15, 2012 and expired on May 15, 2013. The second policy (Policy #2) was effective May 15, 2013 and expired on May 15, 2014. The policies' premiums were based on the

insureds' combined "gross sales" during the policy period, calculated at a set composite annual rate, per $1000 of gross sales, of $10.2565 under Policy #1 and $12.8206, under Policy #2. *See id.*, Exhibit 1 at 7; Exhibit 2 at 7. Each policy provided for the payment of an advance premium based on the defendants' combined estimated gross sales for the policy period, and permitted Burlington to, thereafter, audit the defendants' gross sales and adjust the premium to reflect the defendants' actual gross sales. *See* Perruzzi Aff, Exhibit 1 at 48-49; *id.* Exhibit 2 at 48-49; *see also id.* Exhibit 1 at 10, ¶ C; *id.* at 13, items 2, 6; Exhibit 2 at 10, ¶ C; *id.* at 13, items 2, 6.

The estimated advance premium of $40,000.00 for Policy #1, which was paid, was based on estimated gross sales of $3,900,000.00. Policy #2's advance premium was also based on estimated gross sales of $3,900,000.00, but having a higher composite rate, resulted in an advance premium of $50,000.00, which was also paid. After Policy #1's policy period ended, Burlington's auditing company Overland Solutions' (Overland) auditor, Chris Jones (Jones), in September 2013, audited defendants' records (Perruzzi Aff. Exhibit 3, at "1of 5") and determined that defendants' combined gross sales for the policy period totaled $6,861,020.00, resulting in a total premium of $70,370.00 and, thus, the imposition of an additional audited premium of $30,370.00. Overland/Jones' audit summary's General Notes section reveals that defendants used the cash basis accounting method,[1] both defendants' sales journals had been reviewed to

[1] The cash basis accounting method is typically used by small businesses. When using this method, "[r]evenue is reported on the income statement only when cash is received[, and] [e]xpenses are only recorded when cash is paid out." Investopedia.com/ask/answers/09/accrual-accounting.asp, How does Accrual Accounting Differ from Cash Basis Accounting?, Chizoba Morah, updated 4/09/2018. When, on the other hand, one uses the accrual method of accounting, one accounts for revenue at the time it is earned, i.e., when the product or service is provided, usually before funds are received. Under the accrual method, expenses of goods and services are recorded even though no cash has yet been paid out to cover those expenses. *Id.*

verify sales exposures, and that (IRS) forms 1120S had been reviewed for verification. *Id.* at "2 of 5." The General Notes further indicate that there had been "[n]o inter-company sales." *Id.*

The audit contact was listed as John Moreno, CPA (Moreno), defendants' accountant, who signed Overland's Verification of Visit preprinted form, in which Moreno verified Overland/Jones' visit and physical examination of defendants' financial records, and authorized Jones to release a copy of the audit to defendants' insurance agent/broker CRC Insurance Services, Inc. (CRC). *Id.* at "5 of 5." Moreno further verified, in essence, that he took no responsibility for the audit's accuracy, but represented that the records provided to the auditor were true company records, which reflected the actual operations for the period covered by the audit. However, Jones' General Notes recite, "[e]xit interview conducted with John Marino [sic] CPA. Reviewed audit results with him and he agreed." *Id.*, Exhibit 3 at "3 of 5."

In October 2013, Burlington issued, on its partially preprinted form, a Notice-Premium Audit Endorsement Issued, advising that defendants' audit exposure was $6,861,020.00, and that such exposure was based on "S," which that form's key revealed meant "gross sales." The key had numerous coded items, including "gross receipts," but the only code used on Burlington's notice was the one for "gross sales." After applying the composite rate, per $1,000.00, to the audited exposure, and subtracting the previously paid advance premium, the notice advised that an additional $30,370.00 premium was due on November 11, 2013.

Notwithstanding Jones' aforementioned audit summary note, that Moreno had agreed with the audit results, defendants requested a re-audit, and, in April 2014, Overland/Jones re-audited defendants' gross sales for the policy period under Policy #1. That re-audit resulted in a finding of $6,005,011.00 in gross sales, a total audited premium of $61,590.00, and, thus, a

revised additional premium of $21,590.00, which, with taxes and fees, totaled $22,410.42. Jones reiterated in the General Notes section of the re-audit summary that defendants used the cash basis method of accounting, and, as to each defendant, advised that its sales journals had been reviewed to ascertain sales exposures and that forms 1120S had been reviewed for verification. After setting forth that such information was reviewed, first as to Firequench and then as to Firetronics, Jones noted that there had been an adjustment to the verification to change the sales from a cash basis to the accrual basis. *See* n 1 *supra*.

Jones then added to his General Notes that the "[i]nsured has now provided inter-company sales figures." Perruzzi Aff, Exhibit 4. Immediately following his notation of that new circumstance, Jones wrote, "Firetronics inc. [sic] sales [to Firequench] are $382,251.35 and Firequench inc [sic] sales to Firetronics inc [sic] are $991,445.70. [Defendants'] [i]nter-company sales have been included [in gross sales/audit exposure] because the intercompany [sic] sales of Firetronics inc. [sic] seem to be inaccurate where the purchases of Firetronics inc. [sic] from Firequench inc. [sic] are more than the entire gross sales for Firetronics inc. [sic] [in the amount of $425,704, all of which, but $43,453, involved sales to Firequench]." Perruzzi Aff, Exhibit 4, audit summary. Jones' audit summary recites "[e]xit interview was conducted with John Marino [sic] CPA. Reviewed audit results with him and he agreed." *Id.* at 3. Burlington did not include with its re-audit exhibits a Verification of Visit form. Following the re-audit, Burlington, in April 2014, issued a Notice-Premium Audit Endorsement Issued, again using only the code for gross sales, and advising of the relevant figures flowing from the re-audit, that the additional premium, with fees and taxes, totaling $22,410.42, was due on May 30, 2014, and that "this revised Premium Audit Endorsement" supplanted the prior Premium Audit Endorsement of

$30,370.00, which was null and void. *See* Perruzzi Aff, Exhibit 4. Despite due demand, the $22,410.42 was never paid.

Meanwhile, because the results of the September 2013 initial audit, under Policy #1, were not known until after Policy #2 had become effective in mid-May 2013, that audit suggested to Burlington that defendants' estimated annual gross sales figure for Policy #2 had also been significantly underestimated. Therefore, Burlington issued Endorsement #4 on Policy #2, which set forth a revised estimated gross sales figure of $5,000,000.00 and an annual total estimated premium of $64,103.00, requiring payment of an additional premium of $14,103.00 in June 2014, which was never paid. *See* Perruzzi Aff, Exhibit 2 at 70. After Policy #2's term expired, an audit was conducted, in October 2014, to determine defendants' actual gross sales for the policy period. Following that audit, Burlington issued a Notice-Premium Audit Endorsement Issued, which set forth an actual exposure of $6,000,000.00, resulting in a total audited premium of $76,924.00, which required the payment of an additional premium of $12,821.00 in November 2014, which was never paid. *Id.*, Exhibit 5, 10/31/2014 audit endorsement. Between that additional premium and the $14,103.00 previously demanded by Burlington under Endorsement #4, $27,947.12 was owed under Policy #2.

This Action and Motion

In April 2015, Burlington commenced this action against defendants to recover the sums allegedly owed under both policies. The complaint, verified by Burlington's Accounts Receivable and Collection Manager, Joel M. Richardson, Jr., alleges two causes of action, the first relates to Policy #1 and the second relates to Policy #2. Each cause of action sets forth the

policy period[2] and the additional earned premium of, respectively, $22,410.42 and $27,947.12, and alleges that such premium remains unpaid, despite due demand. The complaint demands a judgment against defendants arising from both policies, totaling $50,357.54, together with interest from May 8, 2014 (*see* n 2, *supra*), as well as costs, and disbursements.

In June 2015, defendants served an answer, verified by counsel, denying the complaint's allegations, and asserting seven "affirmative defense[s]." Perruzzi Aff, Exhibit 7, Answer, ¶¶ 9-15. These seven "affirmative defenses," respectively allege that: 1) Burlington is not in privity of contract with one or more of the defendants; 2) Burlington has not set forth a viable basis upon which to obtain relief; 3) Burlington improperly calculated the premium in violation of the policy and insurance industry standards; 4) the invoices issued by Burlington, and paid by defendants, comprise an account stated; 5) Burlington's claims are barred by laches; 6) Burlington failed to properly serve defendants with process; and 7) that Burlington was not authorized to transact business in New York. *Id.*

Burlington now moves for an order granting it summary judgment and directing the Clerk to enter judgment in Burlington's favor against defendants on the complaint's two causes of action. Burlington's motion is supported by the affidavit of Paul Perruzzi (Perruzzi), Burlington's Premium Audit and Accounts Receivable Manager, who advises that he is the custodian of the Burlington business records, which he has appended to his affidavit. These exhibits include copies of both policies, Burlington's relevant premium endorsements for those policies, including those issued after the audits, Burlington's Notices-Premium Audit

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[2] Notwithstanding that Policy #2 states that it was effective May 15, 2013 and expired on May 15, 2014 (*id.*, Exhibit 2 at 3), the complaint alleges that Policy #2 expired on May 8, 2014. The reason for this discrepancy is unclear, and neither side comments on it.

Endorsement Issued, Overland/Jones' documents, including audit summaries and notes for the two audits they conducted on Burlington's behalf for Policy #1, and a post-audit Statement of Account as to Policy #2 on IFG Companies' letterhead.[3] *See* Perruzzi Aff, Exhibits 1-6.

Perruzzi claims that the initial audit relating to Policy #1 was performed "under the supervision of" Moreno. *Id.*, ¶ 10. Based on Perruzzi's explanation of the relevant policy terms, the audits, which were conducted under each policy, the subsequent policy endorsements, the issuance to defendants of Notices-Premium Audit Endorsements Issued, and defendants' failure to pay anything on each of the policies, except for their initial advance policy premium, despite due demand, Perruzzi contends that Burlington is entitled to summary judgment on the complaint's two causes of action, and requests that a judgment be entered against both defendants in the amount of $50,357.54, with interest from May 8, 2014, plus costs and disbursements. Perruzzi further asserts that the answer's general denials are inadequate to oppose summary judgment. In seeking such relief, Burlington relies on case law, which holds that the insurer made a prima facie showing of its entitlement to summary judgment by submitting the subject insurance policy, the audit statement, and the affidavit of a knowledgeable officer or employee, such as the insurer's vice president or its accounts receivable and collection manager, which demonstrated the amount owed, pursuant to the audit, which was performed in compliance with the policy's terms. *Burlington Ins. Co. v Casur Corp.*, 123 AD3d 965, 965 (2d Dept 2014); *Evanston Ins. Co. v Po Wing Hong Food Mkt.*, 21 AD3d 333, 334 (1st Dept 2005); *see also Burlington Ins. Co. v Clearview Maintenance & Servs, Inc.*, 150 AD3d 954, 955 (2d Dept 2017).

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[3] Burlington is part of the insurance group IFG Companies.

Defendants oppose the motion and rely on their attorney Adam Paskoff's (Paskoff) affirmation. Paskoff, while conceding that Moreno provided documentation in connection with the first audit under Policy #1, denies that he supervised that audit. *Id.*, ¶ 5. Paskoff further avers that "[d]efendant [sic] has steadfastly maintained" that "the audit" was improperly conducted because it "factored in 'income' for the coverage period that was no [sic] earned during the coverage year." Paskoff Affirmation, ¶ 2. Specifically, Paskoff contends that Burlington used an improper methodology, which skewed the audit results by including pre-policy period debt that was recouped during the coverage year, which Paskoff maintains did not truly reflect earnings for that year and led to "hire [sic] premiums." *Id.* Paskoff asserts that defendants' concern about Burlington's flawed audit methodology was "extensively discussed" with Burlington, which, in 2015, agreed to conduct a re-audit, which was never conducted, and that both sides "can easily blame the other for the delay." *Id.*, ¶¶ 2-3.

Paskoff also relies on Moreno's August 9, 2014 letter to defendants' insurance broker/agent CRC (Paskoff Affirmation, Exhibit A), regarding "[o]ur mutual client." *See* Perruzzi Exhibits 1, 2, insurance policies at 1; *id.*, Exhibits 3, 4, Notices-Premium Audit Endorsement Issued. In that letter, Moreno advised CRC that, pursuant to defendants' request, he had reviewed the re-audit under Policy #1's Notice-Premium Audit Endorsement Issued, and found an error when he perused the re-audit's worksheet. *Id.* In particular, Moreno informed CRC that the auditor added inter-company sales between the defendants rather than subtracting those sales.[4] Had those sales been subtracted, Moreno urged that the premium due would have

[4] After performing the calculations without the inter-company sales, and looking at Moreno's calculations, it is evident that Moreno is not urging that the auditor erred in adding the inter-company sales to gross sales, and, instead, should have subtracted them from gross sales.

been $7,501.70, plus about $800 in fees and taxes, instead of $21,590.[5] Moreno further advised CRC that he had included a schedule showing his "computation for the premium due." Paskoff Affirmation, Exhibit A, Moreno's letter and computations. Paskoff contends that defendants' concerns about the addition of inter-company sales were never addressed.

Additionally, Paskoff asserts, without explanation, that "[p]laintiff's own affidavit" demonstrates that there are issues of fact, which preclude the granting of summary judgment in this action in which no discovery has been exchanged. *Id.*, ¶ 4. In light of the passage of about three years since this action's commencement, Paskoff criticizes Burlington's failures to request a preliminary conference and to conduct discovery, so that "[d]efendants can better determine the legitimacy of its initial audit." *Id.*, ¶ 7. Paskoff also observes that Burlington has not addressed each of defendants' affirmative defenses. Paskoff Affirmation, ¶ 7.

In further opposing Burlington's motion, defendants rely on the affidavit of Firequench's service manager, Mary Lloyd (Lloyd), who claims that Burlington, without providing the audit results, demanded additional premiums of more than $22,000.00 under Policy #1 and an additional premium of almost $28,000.00 under Policy #2. Lloyd maintains that there was a "bait and switch" in connection with the initial policy application because the ultimate demands for premiums were substantially larger than the premium quoted in the initial application. Lloyd

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Instead, Moreno is claiming either that the inter-company sales should never, in the first place, have been added to the gross sales calculations, or that if they were added to gross sales, they should have been subtracted out.

[5] Paskoff mischaracterizes Moreno's contention in his letter as to the amount of the premium claimed due by Burlington on Policy #1, when he asserts that about $50,000.00 was due, when the actual amount claimed was $21,590 plus about $800 in fees and taxes. *See* Paskoff Affirmation, ¶ 6. The approximate sum of $50,000 is the amount claimed by Burlington to be owing on both policies together.

Aff, ¶ 6. As a result of that discrepancy "we" had Moreno look into the issue, and, as set forth in his aforementioned August 9, 2014 letter, he allegedly discovered that the premium should have been only $7,500.00 rather than about $50,000. *Id.*, ¶ 7. Lloyd contends that Burlington never addressed that concern, and further asserts that, "[a]t one point, [p]laintiff agreed to a re-audit," which, as far as Lloyd knows, was never "completed." *Id.*, ¶ 8. In addition, Lloyd notes that her attorney has advised her that no discovery had been conducted to ascertain the methodology of the "initial audit." *Id.*, ¶ 9. Lloyd, therefore, requests that summary judgment be denied.

In reply, Michael Borg (Borg), of Burlington's counsel's office, observes that, despite his execution of a stipulation adjourning this motion, as a courtesy to defendants, so as to extend their time to submit opposing papers (*see* NYSCEF Doc. 25), thus, affording defendants a total of 34 days, and leaving Burlington 9 days to reply (CPLR 2214 [b]), defendants e-filed their opposing papers late (NYSCEF Doc. 26), leaving Burlington fewer than 4 hours to timely file its reply, which it did fewer than 2 ½ hours later. NYSCEF Doc. 30. Consequently, Borg asks that the court not consider defendants' opposing papers.

Substantively, Borg notes that defendants do not dispute any of the policies' terms or that the advance premiums were paid. Borg also claims that defendants have failed to offer any real proof, but, instead merely baldly assert that the audit does not reflect the true gross sales because it included the payment of old debt or inter-company transactions. Borg maintains that, because Burlington has provided copies of the policies and of the "various audits performed" under those policies, as well as Perruzzi's affidavit, Burlington has prima facie established its entitlement to summary judgment. *Id.*, ¶ 4. Moreover, Borg contends that defendants' last-minute claims based on conclusory assertions and a copy of a letter from Moreno fail to establish the defendants' true

earnings or gross sales for the policy years in issue. Borg points to the fact that defendants have not provided their sales ledgers, or tax returns, supporting their claims of gross sales. Borg urges that whether or not the parties agreed to conduct a second re-audit or why it was never conducted is irrelevant because a defendant on a summary judgment motion is required to lay bare its proof to raise a material issue of fact, and defendants have failed to do so. Finally, as for the lack of discovery, Borg asserts that the relevant evidence is in defendants' possession, i.e., their true gross sales, and that defendants have not provided any reason why they need discovery to oppose this motion.

Discussion

The party moving for summary judgment has the burden of prima facie establishing its entitlement to the requested relief, by eliminating all genuine material issues of fact raised by the pleadings (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]), including those raised in any affirmative defenses and counterclaims. *Hoffman v Wyckoff Hgts. Med. Ctr.*, 129 AD3d 526, 526 (1st Dept 2015); *see also Related Companies, L.P. v Tesla Wall Sys.*, 159 AD3d 588, 591 (1st Dept 2018); *Aimatop Rest. v Liberty Mut. Fire. Ins. Co.*, 74 AD2d 516, 517 (1st Dept 1980). However, affirmative defenses that are conclusory and devoid of factual allegations are insufficient to defeat a plaintiff's showing of entitlement to summary judgment. *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619, 619-620 (2d Dept 2008); *Bankers Trust Co. v Fassler*, 49 AD2d 855 (1st Dept 1975). A movant's failure to meet its prima facie burden mandates the denial of the application, irrespective of the opposing papers' adequacy. *Winegrad* at 853. Where the movant makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316,

320 (2009).

A party opposing summary judgment is entitled to discovery when facts which support that party's claims might exist, but cannot then be stated (*Schlichting v Elliquence Realty, LLC*, 116 AD3d 689, 690 [2d Dept 2014]), and this is especially so where "the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." *Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526 (2d Dept 2013). To take advantage of CPLR 3212 (f) to delay or avoid summary judgment, the opposing party must show that it has attempted to discover facts undercutting the movant's proof, the required proof is within the movant's exclusive knowledge, and that the claims in opposition to summary judgment "are supported by something other than mere hope or conjecture." *Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 (1st Dept 2007); *see also Burlington Ins. Co. v Casur Corp.*, 123 AD3d at 965-966; *Progressive Northeastern Ins. Co. v Penn-Star Ins. Co.*, 89 AD3d 547, 548 (1st Dept 2011) (summary judgment not premature where defendant "failed to present any evidentiary basis [for its] suggest[ion] that discovery may lead to relevant evidence" [internal quotation marks and citation omitted]). A party that fails to ascertain the facts because of its own inaction, cannot defeat summary judgment by claiming that discovery is needed. *Meath v Mishrick*, 68 NY2d 992, 994-995 (1986).

Defendants' position, that summary judgment must be denied because the parties have not engaged in discovery due to Burlington's failure to request a preliminary conference, is without merit. If defendants desired discovery during the approximately three years this action has been pending, they could have filed a Request for Judicial Intervention and asked for a preliminary conference, served discovery demands on Burlington, and/or, if necessary, moved to

compel disclosure, but defendants have failed to demonstrate that they took any such measures. Moreover, Paskoff purports to know why the audits were improper, namely, because the auditor allegedly factored in old debt recouped during the policy period, and, during the re-audit under Policy #1, included inter-company sales in gross sales, as noted in Moreno's letter to CRC. Defendants have their financial records, sales journals, tax returns, and forms 1120, and, accordingly, know or should know their gross sales for the applicable policy periods, so as to enable them to oppose summary judgment. Lloyd's claim regarding the need for discovery, based on what defendants' attorney told her, constitutes hearsay. Lloyd's position that Burlington did not provide defendants with "the audit" results (Lloyd Aff, ¶ 5) is undercut by, among other things, Moreno's letter to CRC in which he contended that his examination of the audit worksheet demonstrated that the auditor improperly included inter-company sales in his determination of gross sales.

To the extent that Burlington seeks an order granting it summary judgment against Firetronics on the complaint's first and second causes of action, Burlington's motion is denied because Burlington has failed to meet its prima facie burden of establishing that Firetronics is responsible for paying the policies' premiums. In this regard, the policies provide only that the first named insured, Firequench, was responsible for payment of the premiums and would be the payee for any return premiums paid by Burlington. Perruzzi Aff, Exhibits 1, 2, Policies at 10, Common Policy Conditions, Premiums, § E; *cf. id.*, Premium Audit Condition, Policies at 48. Similarly, only the first named insured was required to maintain the records and information necessary for Burlington's audits and premium computations, and had to permit Burlington to audit those records. *Id.*, § A (5) (e).

Perruzzi's contention, that Moreno supervised the initial audit on Policy #1, is unsubstantiated because Perruzzi does not purport to have any first-hand knowledge of how any of the audits were conducted. Furthermore, Moreno's signed statement in the Verification of Visit form, in connection with the first audit, verifying that no responsibility for the audit's accuracy was implied by him, other than that the records provided are the defendants' true records, which reflect defendants' operations during the policy period, undercuts Perruzzi's assertion. It also defies logic that Burlington or its auditing company would permit defendants' accountant to supervise any audit, which Burlington, pursuant to the policies, had the unilateral right to request and conduct or to decline to conduct, which audits served to help ensure that Burlington received the premiums to which it was entitled from Moreno's clients. *See* Perruzzi Aff, Exhibits 1, 2, Policies at 10, Common Policy Conditions, § C; *id.* at 48, Premium Audit Condition, §§ 5 (d), (e), (f).

As for the requirement that Burlington provide audit statements as part of its prima facie showing, it should be noted that the parties do not define an audit statement, and none of the documents appended to Burlington's moving papers is denominated an audit statement. Neither do the parties advise whether an audit statement is a document that is issued by the insurer or by its auditor. While Burlington's moving papers with respect to the audit and re-audit under Policy #1 are supported by Burlington's Notices-Premium Audit Endorsement Issued, a copy of the policy and its endorsements, as well as various documents from Overland/Jones, including the audit summary and the auditor's notes (Perruzzi Aff, Exhibits 3, 4), Burlington's moving papers as to Policy #2 are unsupported by anything from Overland/Jones, or any other auditor, and the only documents relevant to the audits are: a copy of Policy #2, including Burlington's

Endorsement #4, which increased the estimated advance gross sales and, thus, the amount of the advance premium, and sought payment of the unpaid portion of that advance premium; Burlington's Notice-Premium Audit Endorsement Issued; and the IFG Companies' Statement of Account, which set forth the various estimated advance and earned premiums and the taxes and fees, subtracted that which was paid, and indicated what was owing. *Id.*, Exhibits 2 at 70, 5, 6.

In attempting to demonstrate that Burlington has set forth its prima facie showing of entitlement to summary judgment, Burlington's counsel, Borg, asserts that the motion is supported by Perruzzi's affidavit and copies of the policies and the "various audit's performed" (Borg reply Affirmation, ¶ 4), thereby suggesting that more than a Notice-Premium Audit Endorsement Issued and the IFG Companies' Statement of Account, detailing the premiums paid and owed, are necessary, and that information from the auditor is required. This is buttressed by the Appellate Division, Second Department's decision in *Burlington Ins. Co. v Clearview Maintenance & Servs, Inc.* (150 AD3d at 955), in which the Court found that Burlington made a prima facie showing of entitlement to summary judgment by submitting, among other things, the audit statements. While the Court did not describe the contents of the audit statement, the case was e-filed, including the Exhibits upon which Burlington sought summary judgment before the Supreme Court, Richmond County under index # 150381/2014. Among Burlington's documents in support of its motion in that case were not only the notices of the issuance of the premium audit endorsements, but also the auditor's audit summaries, General Notes, and worksheets. *See Burlington Ins. Co. v Clearview Maintenance & Servs. Inc.*, 2015 WL 13447926 (Sup Ct, Richmond County 2015, *rvd* 150 AD3d at 954), NYSCEF Doc. 12 and 14. When appealing the lower court's decision in that case, Burlington asserted in its supporting brief that it established a

prima facie case because it provided copies of the policy, the affidavit of its accounts receivable and collection manager, and the audits which had been performed. *Id.*, NYSCEF Doc. 38 at 6-8. In any event, the Appellate Division, First Dept, in *Paramount Ins. Co. v Brown* (205 AD2d 464, 465-466 [1st Dept 1994]), held that the IAS court properly found that the defendant had failed to allege facts adequate to withstand the insurer's summary judgment motion seeking additional premiums, and that the court did not err in rejecting defendant's assertion that an audit was improperly conducted where, among other things, the insurer, in support of its motion, presented affidavits, the policies, the audit statement setting forth the premium computations, and the auditor's worksheets, all of which demonstrated that the auditor was entitled to conduct the audit and that the audit was properly conducted.

It is, thus, evident that an insurer must provide more than a premium audit endorsement, which in this case merely shows the insurer's claim as to the defendants' combined gross sales/total exposure, as allegedly determined by the auditor, and the application to that alleged figure of the policy's composite rate per thousand dollars, less the advance premium previously paid, plus any taxes and fees, to arrive at the amount due. Such information fails to prima facie demonstrate that the audit in connection with Policy #2 was properly conducted by the auditor, as stated in *Paramount Ins. Co. v Brown* (205 AD2d at 465-466), and upon what the defendants' alleged combined gross sales/exposure figure set forth in Burlington's Notice-Premium Audit Endorsement Issued (*see* Perruzzi Aff, Exhibit 5) was based. The Statement of Account, issued on IFG Companies' letterhead, does not even set forth the defendants' combined gross sales. Unlike Burlington's showing with respect to the two audits conducted under Policy #1 (*see* Perruzzi Aff, Exhibits 3, 4), Burlington does not, in connection with Policy #2, provide any of

the audit materials, including the auditor's audit summary or General Notes showing the breakdowns of each defendant's gross sales and explaining how the auditor proceeded, even though Perruzzi conceded that an audit had, in fact, been conducted under Policy #2. *See* Perruzzi Aff, ¶ 16. Accordingly, Burlington has not prima facie demonstrated that the audit under Policy #2 was properly conducted, and how the auditor arrived at the combined gross sales/exposure figure. Therefore, although Paskoff has not alleged any specific impropriety as to the audit performed under Policy #2, and Lloyd has asserted nothing of substance, the branch of Burlington's motion, which seeks an order granting it summary judgment against Firequench on the second cause of action is denied. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853.

Turning to the branch of Burlington's motion, which seeks an order granting it summary judgment against Firequench for the amount owed under Policy #1, Burlington has prima facie met its burden of demonstrating its entitlement to summary judgment by providing Perruzzi's affidavit, copies of the policy, and Overland/Jones' notes and audit summaries. In response, neither Paskoff, nor Lloyd, purports to have personal knowledge of their opposing allegations. As for the audit during which Burlington allegedly improperly included the repayment of old debt in the policy period's gross sales, it must be noted that the term "gross sales" has not been defined in either policy (*see also Burlington Ins. Co. v Clearview Maintenance & Servs, Inc.*, 150 AD3d at 955-956), but that term does not appear to include the repayment of old debt because Burlington's Notices-Premium Audit Endorsement Issued's key lists separate codes for gross sales and gross receipts, and the notices in this case only use the code for the former. In addition, that premiums were to be based on sales made during the policy period, without regard to

whether defendants' customers paid them, and, thus, without including payments made on pre-policy period sales, which should have been covered by prior policies, is logical in that the greater the sales the greater the likelihood of mishaps and liability arising, for example, as a result of product defects and installation. Clearly, irrespective of whether defendants' were paid by their customers during the policy period, the risk of liability existed and was the same, which supports that the term gross sales, within Policy #1's intendment, refers to sales made during the policy period even if not paid. Moreover, Jones specifically noted during both audits under Policy #1 that defendants had used the cash basis accounting method, a fact which alerted Jones that such accounting method included the payment of old debt during the policy period and excluded defendants' unpaid sales during the policy period. Jones, therefore, reviewed defendants' sale journals[6] to determine "sales exposures," (Perruzzi Aff, Exhibit 3, auditor's General Notes), and upon the re-audit indicated that an adjustment had been made to the verification to adjust from a cash basis to an accrual basis. Jones' need to adjust to an accrual basis demonstrates that in determining gross sales, under Policy #1, only policy period sales were to be included, irrespective of whether defendants received payment for those sales during the policy period, and that any recoupment during the policy period of old debt had to be excluded.

Defendants do not assert in a straightforward manner why they sought the re-audit under Policy #1 after the initial audit. In addition, Paskoff does not specifically identify which audit

[6] It has been noted that it is difficult to convert from a cash basis method to an accrual method, because cash basis accounting software is "not designed to handle accrual accounting," so that the conversion has to be performed manually, using journal entries, which can be time-consuming and costly. Accountingtools.com/articles/how-to-convert-cash-basis-to-accrual-basis-accounting, February 18, 2018. Further, if a company's records are incomplete or disorganized, conversion may be unreliable. *Id.*

under which policy improperly included the payment of old debt during the policy period, cryptically referring repeatedly to "the audit," in a case where there were three audits. *See e.g.* Paskoff affirmation, ¶¶ 2, 5. As to the alleged improper inclusion of repaid old debt, it is unclear whether Paskoff is complaining about the initial audit, the re-audit under Policy #1, or to both. He appears to be referring to Policy #1's initial audit in that he refers to the audit which found gross earnings of $6,861,000 [sic] (*id.*, ¶ 4) and to "the audit" which Perruzzi claimed was supervised by Moreno (*id.*, ¶ 5), namely the initial audit under Policy #1. *See* Perruzzi Affirmation, ¶ 10; *see also* Paskoff Affirmation, ¶ 7 (in which Paskoff asserts, referring to the "initial audit," that Burlington is seeking a judgment on a contested audit). Nevertheless, defendants have failed to provide copies of their financial documents demonstrating which debt payments were improperly included in gross sales. Even assuming, for argument's sake, that Jones included any repayment of old debt in his calculation of gross sales during Policy #1's initial audit, Burlington, following the re-audit, issued a new Notice-Premium Audit Endorsement Issued, which rendered the original Premium Audit Endorsement "null and void." Perruzzi Aff, Exhibit 4.

Further, here, where Jones was aware of defendants' cash basis method of accounting, reviewed defendants' sale journals to determine the sales exposures, and, during the re-audit of Policy #1, expressed the need to adjust the sales to an accrual method from a cash basis method for verification, and where the re-audit resulted in a decrease in gross sales of more than $850,000.00 and in a reduction of the additional premium by close to a third, the claimed issue of including payment of old debt was seemingly resolved by the re-audit. This conclusion is buttressed by the fact that Moreno, in his letter to his clients' insurance broker/agent, CRC, in

response to defendants' request that Moreno review the propriety of the Notice-Premium Audit Endorsement Issued, more than three months earlier, on the re-audit, did not raise with CRC any issue of the impropriety of the inclusion of old debt repayment in the gross earnings during the policy period. In addition, in recalculating, for CRC's edification, that which Moreno asserted was "the premium due," under Policy #1, following the re-audit, Moreno did not purport to subtract any repaid old debt from gross earnings.

Even if Firequench's assertion about the inclusion of payment of old debt also referred to the re-audit, Firequench has failed to provide Moreno's or another accountant's affidavit or even the affidavit of its president, Burke, or anyone else with knowledge, such as a bookkeeper, on the issue of the allegedly improper inclusion of the payment of old debt in gross sales during the policy period to show that such inclusion occurred during the first audit and continued or commenced during the re-audit under Policy #1. Paskoff does not identify who on defendants' behalf repeatedly raised the issue of the inclusion of old debt payments with Burlington, or with whom on Burlington's behalf this alleged impropriety was discussed. Paskoff further fails to identify not only those at Burlington who allegedly agreed, in 2015, to another re-audit, but also those representatives of defendants to whom such alleged agreement was conveyed. Lloyd's affidavit suffers from similar deficiencies. Even if Paskoff identified those who had these alleged conversations on defendants' behalf, defendants do not provide their affidavits, notwithstanding that they had ample time to do so, where, as here, Burlington granted defendants an extension of time to oppose the motion.

As for Paskoff's claim, based solely on Moreno's letter to CRC, regarding the inclusion of inter-company sales in gross sales during the re-audit, it should be observed that defendants

have provided no evidence of whether or what CRC responded to Moreno's letter, whether CRC passed on Moreno's concerns to Burlington, and, if so, whether anyone at Burlington responded, and of what any such individual's response consisted. Neither did Moreno explain in his letter why inter-company sales should have been excluded from the defendants' gross sales. Furthermore, defendants have failed to even address the reason offered by Jones, in his re-audit's General Notes, for including the inter-company sales in the defendants' gross sales, namely that Jones believed there had been an impropriety involved in the alleged inter-company sales, where defendants and/or Moreno seemingly advised the auditor, during the initial audit, conducted months after Policy #1's conclusion, that there had been no inter-company sales during the policy period, but, seven months after the initial audit and almost a year after the end of the policy period, claimed that there had been sales by each defendant to the other, and provided a sales figure from Firequench to Firetronics, which Jones found to be incredible because it was more than Firetronics' entire gross sales. Defendants present no evidence that Jones' conclusion was incorrect, or explain why they did not present evidence of inter-company sales figures for the original audit, here where Jones noted during the original audit "No Inter-company sales," presumably on being so informed by defendants and/or by Moreno, who, during the initial audit, verified that the records provided to the auditor were the company's true records and reflected its actual operations for the policy period. Perruzzi Aff, Exhibit 3. Defendants have not offered Moreno or any other accountant's affidavit on the propriety of the inclusion in gross sales of inter-company sales, the only impropriety alleged by Moreno in his letter to CRC with respect to the re-audit, or on whether the auditor's rationale for including inter-company sales lacks merit.

As for the seven "affirmative defenses," all are made "[u]pon information and belief," are

wholly conclusory, and none contains any supporting factual allegations. Perruzzi Aff, Exhibit 7, Answer ¶¶ 9-15. Accordingly, they do not avail Firequench on that portion of Burlington's motion which seeks summary judgment against Firequench on the complaint's first cause of action. The court also notes, in passing, as to the lack of proper service "affirmative defense," that the e-filed documents in this action include proof of service on each defendant by service on the Secretary of State of New York, pursuant to the requirements of Business Corporation Law § 306. NYSCEF Docs. 3, 4.

Given the foregoing, the branch of Burlington's motion which seeks an order granting it summary judgment against Firequench on the first cause of action in the amount of $22,410.42, with interest from May 8, 2014, as demanded in the complaint and motion, plus costs and disbursements, is granted to the extent that Burlington is granted summary judgment only against Firequench on the first cause of action in the amount of $22,410.42, plus interest at the rate of nine percent per annum, starting from May 30, 2014, the date by which the premium was to be paid, as per the April 30, 2014 Notice-Premium Audit Endorsement Issued, plus costs, and disbursements stemming from the first cause of action.

In conclusion, it is

ORDERED that the branch of plaintiff The Burlington Insurance Company's motion for an order granting it summary judgment on the complaint's first and second causes of action against defendant Firetronics, Inc. is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking an order granting it summary judgment against defendant Firequench, Inc. on the complaint's first cause of action, is granted and plaintiff is granted judgment against Firequench, Inc. in the amount of $22,410.42, together

with interest payable at the rate of nine percent per annum, from May 30, 2014 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs, and disbursements stemming from the first cause of action to be taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of plaintiff's motion which seeks an order granting it summary judgment on the complaint's second cause of action against defendant Firequench, Inc., is denied; and it is further

ORDERED that by separate order dated January 7, 2019, a preliminary conference order has been issued for the expeditious completion of discovery in this case and the filing of a note of issue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: January 7, 2019

Hon. Doris Ling-Cohan, J.S.C.

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