

**Atlantic Cas. Ins. Co. v Eastern Fruit &  
Vegetables, Inc.**

2019 NY Slip Op 32183(U)

July 2, 2019

Supreme Court, Kings County

Docket Number: 510798/2018

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>nd</sup> day of July 2019.

PRESENT:

HON. CARL J. LANDICINO,  
Justice

----- X

ATLANTIC CASUALTY INSURANCE COMPANY,

Plaintiff,

- against -

EASTERN FRUIT AND VEGETABLES, INC.,

Defendants.

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FILED  
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Index No. 510798/2018

DECISION AND ORDER

Motion Seq. #1 and #2

The following papers numbered 1 to 8 read herein:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_  
Supplemental Affirmation \_\_\_\_\_

Papers Numbered

1-3    4-6  
5-6    7  
7  
8

Plaintiff, Atlantic Casualty Insurance Company (Atlantic), in this action for an account stated and breach of contract, moves, pursuant to CPLR 3212, for an order striking the answer of defendant Eastern Fruit and Vegetables, Inc. (Eastern), dismissing all counterclaims and granting it summary judgment. Eastern cross-moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and Business Corporations Law (BCL) § 1312 (a).<sup>1</sup>

<sup>1</sup> While Eastern also sought a stay, pursuant to CPLR 8502 and 8503, that branch of the cross motion has been rendered moot because Atlantic has posted \$500.00 as security for costs.

### *Background*

On May 24, 2018, Atlantic, a North Carolina corporation engaged in the insurance business, commenced this action against Eastern by filing a summons and a complaint alleging that it “is duly authorized to issue policies of insurance in the State of New York” (complaint at ¶ 1). The complaint further alleges that Atlantic, which “provided certain commercial general liability insurance coverage” to Eastern, is entitled to recover \$93,141.09 for the unpaid principal balances due on two insurance policies: (1) \$69,903.09 under policy L146001424-1, and (2) \$23,238.00 under policy L146001424-2 (*id.* at ¶ 3). The complaint asserts three causes of action. Breach of the insurance policies, unjust enrichment and an account stated.

On or about June 29, 2018, Eastern interposed an answer in which it denied the material allegations in the complaint and asserted affirmative defenses, including: (1) Atlantic is unlicensed to issue insurance policies in New York and fails to allege licensing authority in another jurisdiction (second affirmative defense), and (2) Atlantic’s incapacity to commence and maintain this action (sixth affirmative defense). Eastern also asserted a counterclaim alleging that it “request[s] reasonable attorney[’]s fees in defending this action.”

Atlantic now moves for summary judgment seeking the sum of \$93,141.04 that is allegedly due and owing on the two insurance policies that it issued to Eastern. In support of its motion, Atlantic submits the affidavit of Suzanne Parrish, its premium audit manager,

who explains that, pursuant to the terms of the insurance policies, premium audits were conducted revealing an increase in policy exposure, which resulted in increased premiums. According to Parrish, Eastern failed to pay the increased premiums, and consequently, policy L146001424-2 was cancelled. Notably, while Atlantic seeks to collect premiums based on the insurance policies, Atlantic fails to annex copies of those insurance policies to its moving papers.

Eastern opposes Atlantic's summary judgment motion and cross-moves to dismiss the complaint. Eastern submits the affidavit of Asif Jhangir (Jhangir), its president, who attests that Eastern had a general liability insurance policy with Atlantic for six years and that Eastern paid an annual premium of approximately \$7,000. However, in July 2017, Atlantic notified Jhangir that Eastern's policy was audited and its premiums would be increased. Eastern denies knowledge of Atlantic's rights under the insurance policy to conduct an audit and increase premiums, and asserts that Atlantic failed to specifically plead the terms of the policy or attach a copy of the policy to its complaint. Eastern further contends that Atlantic cannot prevail on its summary judgment motion because it failed to submit a copy of the insurance policy for the court's consideration.

Eastern, in support of its cross motion to dismiss, argues that Atlantic lacks capacity to maintain this action because:

“[a]fter a thorough search of both the New York State Department of State Corporation Filing database, and public records maintained by the New York State Department of Financial Services, plaintiff is neither registered to do business in the State of New York nor licensed to write

insurance policies in the State of New York.”

Eastern thus contends that Atlantic, a foreign corporation that does business in New York and “makes no allegations regarding its corporate status,” lacks capacity to commence and maintain this action, pursuant to BCL § 1312 (a).

Atlantic, in opposition to the cross motion, argues that it “was ‘not doing business’ in New York, and therefore [is] not subject to . . . Business Corporation Law § 1312.”

Atlantic also submits a supplemental affidavit from Parrish attesting that:

“Plaintiff is an Excess and Surplus lines insurance company and [its] appointed general agents issue policies on [its] behalf.”

“Plaintiff was incorporated in the State of North Carolina in October of 1983. Plaintiff has been eligible to transact surplus lines business in New York since October 24, 2002 . . .”

“The Excess Line Association of New York lists Atlantic Casualty Insurance Company as a Foreign Insurer in the state of NY as shown in the report annexed hereto . . .”

Essentially, Atlantic seemingly argues that as a member of the Excess Line Association of New York (ELANY)<sup>2</sup> it is statutorily authorized to transact surplus lines business in New York through an excess line broker, and thus, it has capacity to maintain this action.

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<sup>2</sup> ELANY is “a legislatively created advisory association under the supervision of the Department of Financial Services (DFS) . . .” and “was created . . . pursuant to Insurance Law § 2130 (a), in order to facilitate compliance with the many filing and record keeping requirements for excess line brokers . . .” (*Excess Line Assn. of N.Y. (ELANY) v Waldorf & Assoc.*, 30 NY3d 119, 121-122 [2017]).

*Discussion*

(1)

*Eastern's Cross Motion to Dismiss*

“Business corporations . . . are creatures of statute and, as such, require statutory authority to sue and be sued” (*Cnty. Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). BCL § 1312 (a) provides, in relevant part:

“[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state *unless and until such corporation has been authorized to do business in this state* and it has paid to the state all fees and taxes imposed under the tax law or any related statute . . .” (emphasis added).

Atlantic, an excess and surplus lines insurance company incorporated in North Carolina, contends that it has been “eligible” to transact surplus lines business in New York through “appointed agents” since 2002, as a listed member of ELANY. However, as the Court of Appeals noted, “[e]xcess line insurance policies are issued by foreign insurers *not authorized to do business in this state*” and “ELANY was created as an ‘advisory’ association, pursuant to Insurance Law § 2130 (a), in order to facilitate compliance with the many filing and record keeping requirements for excess line brokers” (*Excess Line Assn. of N.Y. (ELANY) v. Waldorf & Assocs.*, 30 NY3d at 121-122 [emphasis added]). Importantly, Insurance Law § 2130, by which ELANY was created, does not reference BCL § 1312 (a) or specifically grant ELANY members the authority to maintain an action in the State of New York.

Based on the plain language of BCL § 1312 (a), Atlantic's capacity to maintain this action apparently turns on whether or not Atlantic actually "does business" in New York. This presents a question of fact that precludes dismissal at this juncture. Consequently, Eastern's cross motion to dismiss the complaint, pursuant to BCL § 1312 (a), is denied.

(2)

*Atlantic's Summary Judgment Motion*

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of *prima facie* showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see CPLR 3212 [b]; Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Here, Atlantic failed to establish a *prima facie* case, and is not entitled to summary judgment awarding it unpaid premiums under the terms of the insurance policy, because it failed to annex a copy of the applicable insurance policy to its motion papers.

However, that branch of Atlantic's summary judgment motion seeking to dismiss Eastern's counterclaim seeking an award of attorney's fees is granted. "Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be

recovered unless supported by statute, court rule or written agreement of the parties” (Flemming v Barnwell Nursing Home & Health Facilities, Inc., 15 NY3d 375, 379 [2010]; see also Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989] [holding that “(u)nder the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule”]; Rosenthal v Rosenthal, 151 AD3d 773, 774 [2017] [same]).

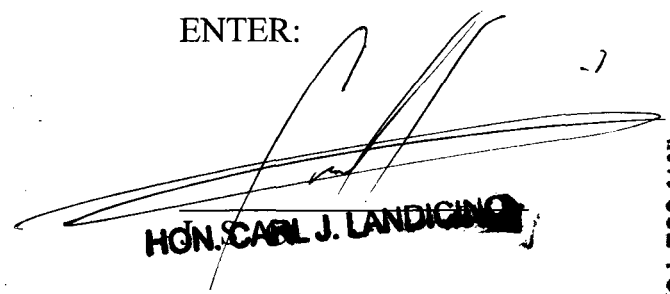
Accordingly, it is hereby

**ORDERED**, that the branch of Atlantic’s summary judgment motion seeking to dismiss Eastern’s counterclaim is granted, the counterclaim is hereby dismissed, and Atlantic’s summary judgment motion is otherwise denied; and it is further

**ORDERED** that defendant’s cross motion to dismiss the complaint is denied.

This constitutes the decision and order of the court.

ENTER:



HON. CARL J. LANDICINO

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