

**Commissioners of State Ins. Fund v Northeast
Abatement Corp**

2019 NY Slip Op 32322(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 450280/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED
Justice

PART IAS MOTION 2EFM

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COMMISSIONERS OF STATE INSURANCE FUND,

INDEX NO. 450280/2016

Plaintiff,

MOTION SEQ. NO. 003

- v -

NORTHEAST ABATEMENT CORP,

DECISION AND ORDER

Defendant.
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Commissioners of State Insurance Fund (“the SIF”) moves, pursuant to CPLR 3212, for summary judgment seeking to recover the sum of \$69,229.18 from defendant Northeast Abatement Corp. (“NAC”), which sum allegedly represents the balance of premiums due from the SIF pursuant to the terms of a workers’ compensation insurance policy plus collection costs. The SIF also seeks interest, costs, and disbursements. Defendant opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

In or about February 2013, NAC ordered from the SIF a policy of workers’ compensation insurance for the policy period commencing March 1, 2013 and ending February 10, 2015. Doc. 1 at par. 5; Doc. 43. The total amount of the earned premium owed on the policy was

\$69,229.18, inclusive of 22% collection charges as mandated by the New York State Finance Law.

NAC's policy was canceled in 2015, after it failed to pay its premium. Doc. 42 at par. 4. After NAC failed to pay the premium, despite the SIF's demand for such payment, the SIF commenced the captioned action seeking to recover for monies due and owing and for an account stated. Doc. 1.

The SIF now moves, pursuant to CPLR 3212, for summary judgment seeking to recover the total amount owed by NAC. In support of the motion, the SIF submits, inter alia, the affirmation of its attorney, Eric J. Canals, Esq. (Doc. 41); the affidavit of Brian Simpson, an accounting services manager for the SIF (Doc. 42); NAC's insurance application (Doc. 43); the insurance policy (Doc. 44); the cancellation notice (Doc. 45); audit work sheets (Doc. 46); and invoices and statements of accounts (Doc. 47-48).

In his affirmation in support, counsel for the SIF argues that the said entity is entitled to summary judgment based on the documents submitted in support of its motion. Doc. 41. He further maintains that, although NAC asserts that the premium was miscalculated because its employees were improperly classified by the SIF, a challenge to the classification can only be made by an Article 78 proceeding. Counsel also argues that, even if the classification were improper, NAC would still be required to pay the premium pending resolution of the dispute by the Rating Board.

Simpson argues that NAC is disputing the classification of an employee after an audit of NAC's books and records, and that the sole classifications at issue are code 5473 for asbestos abatement and code 8809 for executive officers. Doc. 42. He maintains that the classifications were properly assigned after an audit of NAC's books and records. Simpson represents that

NAC owes the SIF \$69,229.18, representing \$56,745.23 in premiums on NAC's policy from March 1, 2013 until February 10, 2015, plus \$12,483.95 for collection costs. Doc. 42.

In opposition to the motion, NAC argues that the motion must be denied because the SIF fails to set forth any methodology pursuant to which the SIF assigned classifications. Doc. 56.

As a result of the misclassification, asserts NAC, it was overcharged for its premium.

Specifically, it claims that it owed the SIF \$43,217, paid the SIF \$60,146, and that it is entitled to a credit of \$16,929.

In reply, the SIF argues that NAC failed to raise an issue of fact to defeat the motion. Doc. 67. The SIF reiterates its assertion that the motion must be granted because this dispute involves the classification of employees and not the calculation of premiums or NAC's payroll. The SIF further maintains that the methodology it relied on in determining the correct classification of NAC's employees is irrelevant in this action to recover unpaid premiums since proper classification can only be challenged in an Article 78 proceeding.

LEGAL CONCLUSIONS:

"In an action to recover unpaid workers' compensation premiums, [a showing of entitlement to judgment as a matter of law] typically includes the insurance application, the policy, audit work sheets, resulting invoices and statements of accounts for the balance due." *Comms. of the State Ins. Fund v BSB Constr., Inc.*, 144 AD3d 1236, 1238 (3d Dept 2016) quoting *Legion Ins. Co. v Northeastern Plate Glass Corp.*, 41 AD3d 933, 934 (3d Dept 2007). Plaintiff should also submit affidavits of those with personal knowledge to authenticate its business records concerning defendant's policy and the methodology used in calculating the premiums. *See Legion Ins. Co.*, 41 AD3d at 934.

Here, as noted above, the SIF has submitted an attorney affirmation (Doc. 41); Simpson's affidavit (Doc. 42); NAC's insurance application (Doc. 43); the insurance policy (Doc. 44); the cancellation notice (Doc. 45); audit work sheets (Doc. 46); and invoices and statements of accounts (Doc. 47-48). Simpson authenticates the business records submitted by the SIF and explains that the audit worksheet and final statement of account accurately reflect that NAC owes a premium in the amount of \$56,745.23 plus collection costs in the amount of \$12,483.95, plus interest from February 10, 2015, the date on which the policy was canceled. Doc. 42. Simpson represents that, although NAC was billed for this amount, it failed to pay the same. Thus, the SIF has established its prima facie entitlement to summary judgment in the total amount of \$69,229.18, plus interest from February 10, 2015, and the costs and disbursements in this action. Although NAC maintains that the affidavit of Aiden McCormack raises an issue of fact by demonstrating that NAC is actually entitled to a credit of \$16,929, no such affidavit is annexed to the motion or is filed with NYSCEF, and NAC's attorney advised this Court on July 30, 2019 that the reference to McCormack's affidavit was inadvertent.

In any event, "[i]nsurance rates are based upon rates for specific job classifications set by the Rating Board, an unincorporated association of insurance carriers which includes [the SIF]." *Commissioners of the State Ins. Fund v Colonial Roofing Co., Inc.*, 2009 Slip Op 32484(U) (Sup Ct New York County 2009). As the SIF asserts, "[n]umerous cases hold that challenges to the classification of workers, as distinguished from questions of coverage of workers, require administrative review." *Id.* (citations omitted). Here, since the crux of NAC's argument is that the SIF improperly classified workers, it was incumbent upon that entity to pursue an administrative review, which it did not. Thus, NAC has failed to raise an issue of fact in opposition to the motion.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Commissioners of the State Insurance Fund for summary judgment is granted in the amount of \$56,745.23, representing the premiums owed by defendant Northeast Abatement Corp., plus interest from February 10, 2015, plus collection costs in the amount of \$12,483.95, as well as costs and disbursements to be taxed by the Clerk; and it is further

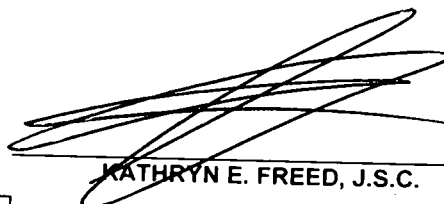
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff Commissioners of the State Insurance Fund is to serve a copy of this order, with notice of entry, upon all parties, as well as on the County Clerk's Office (Room 141B) and the General Clerk's Office (Room 119), within 20 days after this order is entered; and it is further

ORDERED that this constitutes the decision and order of the court.

7/29/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE