

**American Empire Surplus Lines Ins. Co. v Liberty  
Water & Sewer LLC**

2021 NY Slip Op 30272(U)

January 27, 2021

Supreme Court, New York County

Docket Number: 158468/2019

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

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**INDEX NO. 158468/2019**

AMERICAN EMPIRE SURPLUS LINES INSURANCE  
COMPANY

**MOTION DATE Sept. 10, 2020**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

LIBERTY WATER AND SEWER LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

The following read on plaintiff’s motion for summary judgment, CPLR 3212; and defendant’s cross-motion for an order directing plaintiff “to appoint a separate and distinct auditing firm to conduct the policy audit.”

Plaintiff commenced the instant action by filing a Summons and Complaint on August 30, 2019. Plaintiff filed an amended complaint on September 27, 2019. Defendant interposed an answer on October 31, 2019. A request for judicial intervention was filed on November 13, 2019.

As described in plaintiff’s amended complaint, American Empire Surplus Lines Insurance Company (“American Empire Surplus”) issued a Commercial General Liability Insurance Policy to Liberty Water and Sewer, LLC (“Liberty Water and Sewer”) bearing policy no. 17CG0216952 for the policy period of November 12, 2017 to November 12, 2018 with an advance premium of \$284,000. A second Commercial General Liability Insurance Policy, bearing policy no.

PL2644644, was issued from November 12, 2018 to November 12, 2019, with an advance premium of \$333,700 which was cancelled effective June 14, 2019.

The premiums charged for the American Empire Surplus Policies were computed as a percentage of Liberty Water and Sewer's gross receipts during the policy period and said advance premiums were subject to adjustment if an audit revealed that the gross receipts exceeded the initial estimate of same. The Commercial General Liability states in pertinent part, "[p]remium shown in this coverage part as advance premium is a deposit only. We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward."

The complaint states, "American Empire Surplus and its auditor have attempted on numerous occasions to schedule and conduct an audit of Liberty [Water and Sewer]'s business records. Liberty [Water and Sewer], however, has been uncooperative with American Empire [Surplus] and its auditor and, as such, no audit has been performed." Plaintiff seeks to recover for i) Liberty Water and Sewer's failure to submit to an audit seeking damages to be determined at trial; and further seeks ii) specific performance of the policy; iii) a seeking a declaratory judgment that American Empire Surplus has no obligation to defend and/or indemnify Liberty Water and Sewer due to a violation of the policy; and iv) a declaration from the Court that American Empire Surplus has no obligation to defend and/or indemnify Liberty Water and Sewer due to a breach of good faith and fair dealing.

Pursuant to CPLR § 3212 (b) "the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate

as a matter of law the absence of a material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

In support of its motion, American Empire Surplus submits the 2017 policy, 2018 policy, a July 10, 2019 demand letter, and an affidavit from Randy Myers, a Divisional Assistant Vice President for American Empire Surplus.

Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On summary judgment, “facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr Corp*, 18 NY3d 499, 503 [2012]).

Liberty Water and Sewer affirmation in opposition states, “defendant has repeatedly asserted that it did not refuse to comply with the audit but that it refused to complete the audit for good cause with the particular auditing firm presented by Plaintiff.” Defendant’s opposition and cross-motion submits the affidavit of Alexander Figliolia Jr., President of Liberty Water and Sewer. The affidavit states in relevant part, “I submit this affidavit ... requesting that Plaintiff be directed to utilize a different auditing company to complete the audit. Liberty Water and Sewer has maintained a Commercial General Liability Policy with American Empire since November 2011. Ms. Zimmerman’s (auditor) attitude with my staff during her attempts to conduct the audit was nasty, curt and condescending.”

Plaintiff’s reply argues “Liberty’s opposition papers do not dispute that the American Empire [Surplus] policies are subject to audit. Liberty [Water and Sewer] has been provided with full discovery, nothing else is needed by American Empire [Surplus].” Plaintiff further argues that “American Empire offered to have another individual auditor at the auditing firm conduct the

audits, but Liberty’s [Water and Sewer] response is that ‘[a]ssigning another auditor ... would not solve the issue as Ms. Zimmerman [the original auditor] would still be the supervising auditor and this firm condoned her behavior.’”

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]).

Here, both parties acknowledge plaintiff is entitled to conduct an audit and defendant acknowledges that same was not completed based on conflicts with the original auditor assigned. Thus, it is clear plaintiff is entitled to have said audit completed.

ORDERED that the branch of plaintiff’s motion is GRANTED to the extent that defendants shall submit to a premium audit of both the 2017 policy and the 2018 policy within ninety (90) days of service of a copy of this Order, together with Notice of Entry; and it is further

ORDERED that if defendant fails to submit to a premium audit with ninety (90) days, plaintiff may move for a Declaratory Judgment that American Empire Surplus Lines Insurance Company has no obligation to defend and/or indemnify Liberty Water and Sewer due to a violation of the policy; and it is further

ORDERED that defendant’s cross-motion seeking an order directing plaintiff to appoint a separate and distinct auditing firm is DENIED in its entirety.

1/27/2021  
DATE

  
LAURENCE L. LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE