

Protective Ins. Co. v Jay EI Inc.

2022 NY Slip Op 30034(U)

January 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 524672/2019

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 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 3rd day of January, 2022.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

PROTECTIVE INSURANCE COMPANY d/b/a
PROTECTIVE RE,

Plaintiff,

- against -

DECISION AND ORDER
Index No. 524672/2019

JAY EL INC.,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

23-29

Opposing Affidavits (Affirmations) _____

33-40

Reply Affidavits (Affirmations) _____

46

Upon the foregoing papers in this action to recover unpaid insurance premiums, plaintiff Protective Insurance Company d/b/a Protective RE (“Protective”) moves, in motion sequence 01, for an order, pursuant to CPLR 3212, granting it summary judgment and entering a judgment against defendant Jay El Inc. (“Jay El”) in the sum of \$99,315.00, plus interest, costs and disbursements.

Background

On November 9, 2019, Protective commenced this action by filing a summons and an unverified complaint alleging that defendant Jay El was insured by workers' compensation policy No. IW029986 issued by Protective with a term from April 11, 2014 through April 11, 201[7] (WC Policy), and that a \$99,315.00 premium for the WC Policy remains unpaid. Specifically, the complaint alleges "Plaintiff has duly performed all the terms and conditions of the policy(s) on its part to be performed" and "[i]n accordance with its terms the total premium accrued as set forth above and after credit for all payments and credits the total due remains unpaid after due demand" (complaint at ¶¶ 4-5). Although the complaint does not specifically identify the cause of action asserted, Protective seemingly asserts a cause of action for an account stated. On January 30, 2020, Jay El answered the complaint, denied the allegations in paragraphs 4 and 5 of the complaint and asserted affirmative defenses, including lack of privity and that the amount sued for is not the amount due.

Protective's Summary Judgment Motion

Protective now moves for summary judgment and seeks entry of a judgment against Jay in the amount of the \$99,315.00 premium with interest from April 13, 2018. Protective submits an affidavit from its employee, Sara Huber (Huber), who attests that on or about May 13, 2013, Protective issued policies of insurance naming defendant as an insured, including the WC Policy. Protective submits a May 3, 2013 correspondence addressed to Justin Elliott (Elliott) of Jay El enclosing proof of coverage for Jay El in the "Protective

Insurance Company independent contractor insurance program . . .” as a “Primary Additional Insured” and an “Additional Insured” under the WC Policy issued to “Certain Independent Contractors Under Lease to FedEx Ground Package System, Inc. DBA Home Delivery.”

Regarding the premiums for the WC Policy and the invoices for those premiums, Huber asserts that:

“Plaintiff issued a workers compensation insurance policy which provided insurance coverage for Defendant commencing April 11, 2014 through April 11, 2017. The premiums due for the insurance coverage for the workers compensation policy are determined by estimates of number of employees, and remuneration paid among other items. These estimates are supplied by the insured, and are subject to an audit to determine if the estimate numbers provided are accurate for the period of time for the coverage.

“On or about April 13, 2018, Plaintiff completed an audit of the time period between April 11, 2014 and April 11, 2017 to determine the accuracy of the premiums charged for workers compensation insurance coverage to Defendant. Pursuant to the audit, there was monies owed for premiums for the policies for each year. For the policy period from April 11, 2014 through April 11, 2015, the sum owed was \$22,116.00. For the policy period of April 11, 2015 through April 11, 2016, the sum owed was \$35,744.00. For the policy period of April 11, 2016 through April 11, 2017, the sum owed was \$43,076.00.

“An invoice was delivered to Defendant for each year period where monies were due as a result of the audit information. Copies of these invoices are annexed hereto as Exhibit ‘C’. The invoices were not returned to Plaintiff as undeliverable, nor was any written objection to the invoices received by Plaintiff” (emphasis added).

The three audit premium invoices collectively annexed as Exhibit C to Huber's affidavit are all dated April 13, 2018 and are all addressed to Jay El at 342 Schenck Avenue in Brooklyn, NY. The cover letters for the audit premium invoices advise that:

"We have completed the Premium Audit for the captioned Workers' Compensation policy and the Audit Invoice is enclosed. The payroll information provided to us as part of the audit process was used to determine the appropriate workers' compensation premium for the policy period. If the premium paid during the policy period was less than the audited premium, additional premium is due to Protective. . .

* * *

"The audit balance was determined using information provided by your business. Any additional information you wish to be considered as part of the audit must be provided within 60 days of the date of this letter. If no such information is provided, the business agrees that the balance is final and no revisions will be made."

Protective's April 13, 2018 audit premium invoices contain premium calculations for each of the three policy periods.

Huber explains that after "two inquiries" from an unidentified individual on behalf of Jay El, Protective processed a credit and adjusted the audit for the WC Policy for the period 2016- 2017 to \$41,455.00, and "[t]he total sum due and owing to Plaintiff was \$99,315.00." Huber's affidavit collectively annexes as Exhibit D two 2019 emails from Protective's counsel, Christine Hickey ("Hickey"), to Elliott, Jay El's principal, regarding the audit premium. In the June 18, 2019 email, Hickey advises Elliott:

"You never reported to your agent Marsh that you had clerical employees. Had you done so, there would have been necessary endorsements. You also failed to complete the audit form

when it was sent to you by our client. That would have required you to list every employee and their job duties. Had you completed the required form at the time of audit, and had you listed clerical employees, that would have been an exception that would have required additional information to determine if applicable. Again, you failed to do so. The audit required notification of any disputes or discrepancies within 60 days of the audit letter. You failed to timely dispute or note any discrepancies. You are bound by the contract and the audit . . .”

Notably, although Hickey’s email to Elliott appears to be responsive, Huber’s affidavit does not annex any related emails from Elliott.

Jay El’s Opposition

Jay El in opposition, submits an affidavit from Elliott, its sole owner, shareholder and officer who attests that Jay El “was and is contracted with Federal Express” to “make deliveries to designated locations” and that “[p]art of the contract requires that I maintain Workers Compensation insurance . . .” Elliott alleges that he “placed the insurance [with Protective] and paid the required premium.” Elliott confirms that in 2014 he provided documentation to Overland Solutions (“Overland”), which “needed to review my records on behalf of Protective . . .” According to Elliott, “I was told that my premium would have to increase based on the documentation that I provided, and I paid that extra money for the two following years.” Elliott avers that Overland requested documents again in 2016 and “I continued to cooperate and provide information.”

Elliott claims that “Protective made a mistake in their billing to me by not properly reading or understanding the financial documents that I was providing” because “they assumed that all of my employees were drivers and helpers[,]” which are billed for

workers' compensation at a higher rate than managers and those doing clerical work. Elliott attests that by the year 2016 Jay El had 15 employees, of whom there were four trucks, three drivers, nine helpers, a manager, a clerk, and himself. Elliott also claims that Protective billed him according to his salary but used the incorrect salary.

Importantly, Elliott asserts that he contacted the plaintiff when he received the invoices annexed to the moving papers. Elliot further asserts that he made many inquiries and tried to communicate with Protective and Ms. Hickey, and that those inquiries were mostly ignored. Annexed to Elliott's affidavit as Exhibit C is a chain of emails between Elliott and Hickey regarding the April 13, 2018 audit premium invoices, including Hickey's June 18, 2019 email to Elliott. The email chain includes a series of April 3, 2019 emails between Elliott and Hickey, including an email sent at 11:36 a.m. by which Hickey sent Elliott the audit premium invoices and requested that he "[p]lease respond with [his] proposal for payment." At 11:44 a.m., Elliott sent a responsive email to Hickey asserting that "[t]he audits were not completed thoroughly. I have reached out . . . unsuccessfully to Protective, you, and your office to dispute these charges." At 12:34 p.m., Hickey sent a responsive email to Elliott advising him to "[r]espond with specifics, on how the audits are incorrect. A general statement or leaving messages will not suffice . . ." By a May 2, 2019 email, Hickey advised Elliott that "[w]e have heard nothing from you and we are recommending suit . . ." Notably, Elliott's May 3, 2019 responsive email advises Hickey that:

"I've reached out numerous times to your office and left multiple voicemails. I have also reached [out] to Protective

Insurance and left messages with the billing department. You are not the company that initiated this audit and *Protective is unresponsive to the audit disputes as is your office*. They used 941s which clearly do not give any depth to the roles of any individual included in the company and its payroll. I was asked to provide these documents to begin the audit process. I was told that someone would follow up to complete the process which has yet to happen. The outstanding amounts are thus inaccurate. I was also notified that I was in compliance with the years in question because I had to pay a penalty those years. I was notified of this from accounting department over at Protective. *I reached out frequently for over a year and have just . . . been sent amounts to pay which is not the way this process should be conducted*" (emphasis added).

This email correspondence from Elliott directly rebuts Huber's affidavit testimony that Jay El failed to object to the audit premium invoices.

Defense counsel submits an affirmation in which he asserts that Elliott's affidavit raises questions of fact that warrant denial of Protective's summary judgment motion.

Defense counsel also asserts that:

"it would appear that the plaintiff misapprehended the job titles and financial circumstances of the defendant, and its employees. That misapprehension results in an improper calculation of Workers Compensation premiums, and thus the claim cannot be upheld for the amount requested."

Protective's Reply

Protective, in reply, submits an attorney affirmation asserting that "[d]efendant has admitted to contracting with Plaintiff, receiving the insurance policy as alleged, and failing to pay the sums demanded for the premiums due on the policy." Protective's counsel asserts that the allegations of defendant in opposition to the prima facie showing of plaintiff are conclusory, unsupported by evidence, and insufficient to create a triable issue of fact.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). “The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Ayers v City of Mount Vernon*, 176 AD3d 766, 769 [2019]).

Protective seeks summary judgment and a judgment awarding it the unpaid premiums reflected in its audit premium invoices. While Protective does not specifically identify the nature of its claim in either the complaint or its summary judgment motion, Protective seemingly seeks a judgment for an account stated based on the April 13, 2018 audit premium invoices that it sent to Jay El. “An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due” and “[t]he agreement may be express or . . . implied from the retention of an account rendered for an unreasonable period of time

without objection and from the surrounding circumstances” (*Fleetwood Agency, Inc. v Verde Electric Corp.*, 85 AD3d 850, 851 [2d Dept 2011] quoting *Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 (1993])). “Evidence of an oral objection to an account rendered is sufficient on a motion for summary judgment to rebut any inference of an implied agreement to pay the stated amount” (*1000 Northern of New York Co. v Great Neck Medical Associates*, 7 AD3d 592, 593 [2d Dept 2004] citing *Sandvoss v Dunkelberger*, 112 AD2d 278, 279 [2d Dept 1985]).

Here, Huber attests that Protective issued the WC Policy to Jay El, provided Jay El with insurance coverage and delivered the April 13, 2018 audit premium invoices to Jay El. Huber further alleges that the invoices were not returned to plaintiff as undeliverable, nor was any *written* objection to the invoices received by plaintiff. Protective has met its prima facie burden of establishing its entitlement to summary judgment for an account stated.

However, in opposition, Jay El raised a triable issue of fact as to whether it retained the April 13, 2018 audit premium invoices for an unreasonable period of time without objection. While Elliott, Jay El’s principal, admits that he received the April 13, 2018 audit premium invoices from Protective, he also avers that he contacted the plaintiff upon receipt of the invoices and made multiple inquiries which he claims were ignored. Elliott’s affidavit testimony regarding his objections to the audit premium invoices is bolstered by his May 3, 2019 email to Hickey, Protective’s lawyer (*see* NYSCEF Doc No. 37), in which Elliott asserted that “I’ve reached out numerous times to your office and left multiple

voicemails[.]” “Protective is unresponsive to the audit disputes as is your office” and “I reached out frequently *for over a year . . .*” regarding the audit premium invoices (emphasis added). Significantly, Huber admits in her affidavit that the audit premium invoices were adjusted after Protective received two inquiries from someone on behalf of Jay El. In addition, Huber attests that Protective received no written objections to the invoices, without addressing Elliott’s oral objections. Elliott’s affidavit testimony, the email correspondence between Hickey and Elliott combined with Huber’s testimony regarding inquiries received by Protective raise triable issues of fact as to whether Jay El retained the April 13, 2018 audit premium invoices for an unreasonable amount of time without disputing the amount due to Protective (*see Fleetwood Agency, Inc.*, 85 AD3d at 851 [holding that “the affidavit of the defendant’s president raised triable issues of fact as to whether the defendant had disputed the amount due to the plaintiff for the plaintiff’s services . . .”]). Accordingly, it is hereby

ORDERED that Protective’s summary judgment motion (motion sequence 001) is hereby denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT

2022 JAN -5 AM 9:42
 KINGS COUNTY CLERK
 FILED