Commissioners of the State Ins. Fund v Design Dev. NYC Inc.
2022 NY Slip Op 30524(U)
February 16, 2022
Supreme Court, New York County
Docket Number: Index No. 450737/2019
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

- v -

DESIGN DEVELOPMENT NYC INC.,BESPOKE MILLWORK NYC LLC,BEST & COMPANY CONSTRUCTION SERVICES, LLC

Defendant.

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INDEX NO. 450737/2019

MOTION DATE 02/14/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

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

The motion by plaintiff for summary judgment is granted as to liability only.

Background

In this action, plaintiff seeks to recover premiums defendants allegedly owe to plaintiff (an entity authorized to issue workers' compensation and disability insurance policies). Plaintiff contends that it provided coverage to defendant Design Development NYC Inc. ("Design") starting in 2012 and that in April 2016, Design requested that defendant Bespoke Millwork NYC LLC ("Bespoke") be added to the policy. Plaintiff argues that Bespoke agreed to be jointly and severally liable for all premiums in consideration of being added to the policy. Next, defendants asked for defendant Best & Company Construction Services, LLC ("Best") to be added to the policy starting in 2017, again with the proviso that this entity be jointly and severally liable for the premiums.

Plaintiff contends that $2,420,166.84 is currently due based on audits of defendants' books through April 1, 2018 (when the policy was purportedly cancelled). It argues it mailed a copy of the bills to defendants and the amount was verified via an audit on October 2, 2018 at defendants' office.

In opposition, defendants argue that the manner in which plaintiff calculated the amount due is not clear. Defendants argue that plaintiff seeks to recover for periods outside the contract terms and insist that the businesses were no longer operating through the entire period identified in the bills. They argue that the doctrine of laches should prevent plaintiff's motion from being granted because plaintiff purportedly delayed in performing audits. Defendants argue that plaintiff did not prove it actually sent the audit statements and therefore plaintiff cannot establish its account stated cause of action.

In reply, plaintiff questions why defendants submitted over 1,000 pages of subcontractor agreements and certificates of insurance without explanation as to how they show an issue of fact. It explains how its underwriter (Ms. Cinelli, who submitted affidavits in connection with this motion) reviewed various certificates to verify if these certificates showed valid insurance for subcontractors during the policy period. Plaintiff admits that this review reduced the amount sought by plaintiff to $2,344,606.01.

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers

(*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Plaintiff's business records, which included the insurance application, audit worksheets and resulting invoices and statement of accounts for a balance due, were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law" (*Commissioners of State Ins. Fund v Allou Distributors, Inc.*, 220 AD2d 217 [1st Dept 1995]).

Here, the Court grants the motion only as to liability. Plaintiff clearly met its prima facie burden by submitting the affidavit of its underwriter who detailed the auditing process and how the bills were generated. Defendants do not directly deny that they owe some amount of unpaid premiums. Rather, they seem to contest the amount due relating to whether certain subcontractors had valid certificates of insurance. Although plaintiff addressed this issue in reply, it reduced the amount it claims is owed. That justifies a trial on damages; the Court cannot ignore that fact that plaintiff reduced the amount it seeks after defendants raised objections in

opposition. It may be that plaintiff is entitled to the amount it now seeks in reply but the Court finds a trial on damages is appropriate under these circumstances.

The Court rejects defendants' other arguments offered in opposition. Laches is not a valid defense. The policies at issue were cancelled in 2018, the audits were performed that same year and this case was brought in 2019. That some of the policy periods were from years prior makes no difference. The fact is that plaintiff conclusively proved that defendants owe some amount of unpaid premiums. Defendants cannot evade their obligations because they subjectively feel it took too long. Plus, plaintiff submitted documents showing how defendants did not promptly turn over certain records as part of the audit process (NYSCEF Doc. No. 56 at 25-27, 35, and Doc. No. 61 at 5).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted on liability only and plaintiff shall file a note of issue for a trial on damages on or before February 25, 2022.

2/16/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE