

**American Empire Surplus Lines Ins. Co. v A.A.D.
Constr. Corp.**

2022 NY Slip Op 30835(U)

March 10, 2022

Supreme Court, New York County

Docket Number: Index No. 650513/2019

Judge: Arlene Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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INDEX NO. 650513/2019

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,

MOTION DATE 03/04/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

A.A.D. CONSTRUCTION CORP.,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95

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

Plaintiff's motion for summary judgment on the relief sought in its amended complaint is granted. The cross-motion by defendant ("AAD") to dismiss the amended complaint and for an inquest to award it legal fees is denied.

Background

Plaintiff brings this case for a declaratory judgment that AAD is required to submit to a premium audit and re-audits pursuant to the terms of three insurance policies issued by plaintiff to AAD for 2016, 2017 and 2018. Plaintiff insists it wants to determine whether additional premium is due. It argues that under the Common Policy Conditions of the subject policies, plaintiff is entitled to inspect AAD's books and records at any time during the policy period and up to three years after.

Plaintiff explains that it (and its auditor) attempted to contact AAD to do these audits but AAD has refused to cooperate with these requests. Plaintiff argues that AAD should be compelled to follow the terms of the policies.

In opposition and in support of its cross-motion to dismiss, AAD argues that the motion should be denied because plaintiff failed to upload a statement of material facts as required under the Uniform Rules. It also argues that plaintiff did not submit any evidence from someone with personal knowledge and that the instant motion is premature as discovery is still ongoing.

AAD argues that there are material questions of fact regarding whether plaintiff wrongfully canceled the 2018 policy, whether the premium audits were requested in a timely manner, whether the audits were conducted, whether accurate information was provided by AAD for the audits and if the audits were conducted on numerous occasions. AAD insists that the case should be dismissed because the documents submitted by plaintiff show that a premium audit was already done for each of the three policies at issue and plaintiff simply never ordered a re-audit within the three-year contractual time period.

In reply, plaintiff acknowledges that it forgot to do a statement of material facts and that it did not include a certificate of conformity with its affidavit. It also clarifies that it is seeking essentially only “partial” summary judgment on its second cause of action for declaratory relief and that its third and fourth causes of action are moot. Plaintiff emphasizes it is seeking a judgment that AAD has to submit to a completion of a premium audit and re-audit of its business records.

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]).

The Court grants plaintiff’s motion. As an initial matter, the Court can consider the notarized affidavit of Mr. Myers despite plaintiff’s failure to include a certificate of conformity. “[T]he absence of a certificate of conformity is a mere irregularity, and not a fatal defect” (*Wager Estate of Cordaro v Rao*, 178 AD3d 434, 435, 113 NYS3d 63 [1st Dept 2019] [internal quotations and citations omitted]). The Court questions, however, why plaintiff did not simply include a certificate of conformity in reply instead of asserting it would do so if the Court wanted. And while plaintiff belatedly filed a statement of material facts, the Court finds that this error can be overlooked too. AAD is clearly aware of what this case is about.

In any event, this notarized affidavit establishes plaintiff's prima facie burden. The policies at issue all provide that plaintiff "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" (*e.g.*, NYSCEF Doc. No. 59 at 3 [2016 policy]). And Mr. Myers asserts that plaintiff has been trying to conduct re-audits for the 2016 and 2017 policies and an audit for the 2018 policy.

Plaintiff alleges that AAD entered into multiple construction contracts, both prior to and during the period in which plaintiff provided Commercial General Liability coverage; those contracts were for amounts significantly higher than those disclosed to plaintiff. That is why plaintiff wants to do the audits; it believes that there is additional premium owed.

The affidavit of Mr. Amaxas (NYSCEF Doc. No. 76) in opposition does not raise a material issue of fact. He acknowledges that the policy allows for an examination of AAD's books and records but argues they were audited and paid the premiums for 2016 and 2017 and that it submitted to an audit for 2018. He claims that policies do not provide for unlimited audits and that plaintiff should have drafted a different policy if it wanted that ability.

The Court disagrees with defendant's interpretation of these policies. That position makes no practical sense; it encourages the insured to withhold information about lucrative contracts (what plaintiff says happened here) and then play "gotcha" by arguing the insurance company already had its chance to perform the single audit under the policy. The Court declines to read the policy to set up a system by which AAD can avoid paying what it owes by concealing information; clearly, that was not the intention of the subject provision. The fact is that plaintiff has a good faith reason to do the re-audits; it thinks AAD did not pay what it is owed based on contracts that were not disclosed to plaintiff. That AAD does not want to do that because

plaintiff did an audit with allegedly incomplete information is not a sufficient reason to deny the motion.

And a plain reading of the provision, particularly the part that permits plaintiff to do an audit up to three years after the policy period, necessarily includes a re-audit. The purpose of the audits are to set and adjust the premium based on the business conducted by the insured, here AAD. Obviously, the premium would be different if AAD did five million in business or five hundred million. The only way to determine the entirety of the business for whole premium year is to wait for the year to be over, then look back. Therefore, by defendant's reasoning, if only one audit was allowed, that audit would have to be well after the policy period was over. In essence, defendant argues that plaintiff must provide coverage on credit, only to determine the premium years later.

This Court does not buy defendant's interpretation of the contract. Of course, plaintiff has a right to set a premium and then adjust it based on audits and re-audits. It makes no business sense for plaintiff to not seek a premium at all for a policy for multiple years after it provided the coverage. And, of course, plaintiff did not see it that way either, as plaintiff sought these re-audits within the required timeline (3 years). This case was commenced in 2019, within three years of when the earliest (2016) policy's coverage ended. The 2016 policy expired on January 9, 2017.

The Court finds that there is no need for further discovery. It is undisputed that plaintiff has a right, as a matter of law, to seek audits for 2016, 2017 and 2018 to determine whether AAD owes any additional premium. This Court finds that plaintiff had the right to conduct re-audits as well.

Summary

The Court observes that plaintiff's reply is confusing as to what exactly it wants from the instant motion with respect to its other claims. Because plaintiff says the third and fourth causes of action are moot and because it asserts that it wants a judgment (and, typically, there can only be one judgment per case), the Court finds that with this decision the instant case is disposed. The only potential remaining cause of action is the first claim for breach of contract which appears to be pled in the alternative. Plus, it is not clear plaintiff wants to continue to pursue this cause of action beyond the declaratory relief (the second cause of action).

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted to the extent that it is DECLARED that defendant A.A.D. Construction Corp. shall submit to a re-audit of its business records pursuant to the terms and conditions of the American Empire 2016 and 2017 policies so that plaintiff may determine whether an additional premium is due and owing under the same and defendant A.A.D. Construction Corp. shall submit to an audit (and re-audit, as appropriate) of its business records pursuant to the terms and conditions of plaintiff's 2018 policy; and it is further

ORDERED that the County Clerk is directed to enter judgment accordingly without costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that the cross-motion by defendant to dismiss is denied.

3/10/2022 DATE [Signature] ARLENE BLUTH, J.S.C.

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