SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE **PART** 60M

Justice

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ZURICH AMERICAN INSURANCE COMPANY

Plaintiff,

- v -

AIR TECH LAB, INC.,

Defendant.

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INDEX NO. 652054/2020

MOTION DATE 07/16/2021, 09/23/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 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, 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, 69, 70, 71, 72, 73, 74, 75, 76, 77

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for STRIKE CASE FROM CALENDAR.

Upon the foregoing documents, it is

In this action to recover unpaid deductibles, plaintiff Zurich American Insurance Company (Zurich) moves, pursuant to CPLR 3212, for summary judgment against defendant Air Tech Lab, Inc. (ATL).

BACKGROUND

Zurich issued workers compensation insurance policy no. 00230817-00, effective from December 31, 2015 to December 31, 2016 (the 2016 Policy), and workers compensation insurance policy no. 00230817-01, effective from December 31, 2016 to December 31, 2017 (the 2017 Policy) (together, the Policies) to ATL (NY St Cts Elec Filing [NYSCEF] Doc No. 59, Carla Flammini [Flammini] affirmation, Ex BB, ¶¶ 6-7). The Policies provided coverage for ATL's

obligations under the Workers' Compensation Law for an employee's bodily injury by accident occurring during the policy period and for an employee's bodily injury by disease caused or aggravated by the conditions of employment, with Zurich agreeing to pay any benefits required under the law (NYSCEF Doc No. 32, Flammini affirmation, Ex A at 11; NYSCEF Doc No. 34, Flammini affirmation, Ex C at 9). Zurich had "the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits" (*id.*). Zurich agreed to pay the costs associated with defending a claim, proceeding or suit, including reasonable expenses, litigation costs and interest on any judgment (*id.*). Zurich also retained the right to "recover our payments from anyone liable for the injury," and ATL agreed to "do everything necessary to protect those rights for us and to help enforce them" (NYSCEF Doc No. 32 at 12; NYSCEF Doc No. 34 at 10).

The Policies contained an identical New York-Large Deductible Endorsement form U-WC-259-B NY (11/95) (NYSCEF Doc No. 32 at 33; NYSCEF Doc No. 34 at 32). The endorsement provides that:

> "This deductible endorsement applies between you and us. It does not affect or alter the rights of others under the policy. You will reimburse us for the deductible amounts that we pay on your behalf. This endorsement will remain in effect on renewals of this policy unless specifically not made a part of such or replaced by a similar endorsement"

(NYSCEF Doc No. 32 at 33). Under Section A, ATL agreed to reimburse plaintiff for:

> "**a.** Each Accident / each Claim, up to the deductible amount shown in the Schedule above, for the total of:
> **(1)** All benefits required of you by the Workers Compensation Law (including benefits payable under Other States Insurance or under any endorsement) and any Federal Act; plus
> **(2)** All sums you must pay as damages under Employers Liability Insurance and any Federal Act; plus
> **b.** All 'allocated loss adjustment expense' as respects any 'claim' or suit:

> **(1)** As a part of the total of 1. Above when you have elected Option 1, 'ALAE is reimbursed and included in the deductible amount' in the Schedule above; or
> **(2)** In addition to and not limited by the deductible amount when you have elected Option 2. 'ALAE is reimbursed and in addition to the deductible amount', in the Schedule above.
> **c.** All assessments we incur related to the deductible amount"

(*id.*). A "claim" is "a written demand you receive for: **a.** Benefits required of you by a Workers Compensation law; or **b.** Damages covered by this policy" (*id.* at 34). An "allocated loss adjustment expense" or "ALAE" is a:

> "claim adjustment expense directly allocated by us to a particular 'claim'. Such expense shall include, but shall not be limited to: attorney's fees; independent adjusters fees; court and alternative dispute resolution costs; medical examinations; expert medical or other testimony; autopsies; witnesses and summonses; copies of documents; arbitration fees; surveillance; appeal bond costs and appeal filing fees; pre and post judgement interest; and medical cost containment expenses"

(*id.*). The schedule in the endorsement lists a $100,000 deductible for each accident for Workers Compensation Bodily Injury By Accident and a $100,000 deductible for each claim for Workers Compensation Bodily Injury By Disease (*id.* at 33). ATL also selected Option 1, under which "ALAE is reimbursed and included in Deductible Amount," on the endorsements in both Policies (*id.* at 33; NYSCEF Doc No. 34 at 32).

In connection with the 2016 Policy, the parties executed a Paid Deductible Agreement (the 2016 Agreement) effective December 31, 2015. The 2016 Agreement outlined the structure for a deductible program whereby Zurich handled and paid claims and billed ATL for claim payments within the deductible amounts, plus expenses (NYSCEF Doc No. 33, Flammini affirmation, Ex B at 7). The parties agreed Zurich would "hold a Loss Fund … so that We do not use Our funds to pay your obligations within the Deductible Amount(s)" (*id.*). The agreement defines "Deductible Amount(s)" as "the amount You are obligated to reimburse Us for each occurrence, accident or

claim under the Policy(ies)," and "Loss Fund" as "a non-interest bearing account where Your funds are held by us to provide for the payment of Your obligations within the Deductible Amount(s) under the Policy(ies) prior to Your reimbursing us" (*id.* at 8). ATL agreed to pay Zurich $15,000 to establish the Loss Fund (*id.* at 4).

The 2016 Agreement describes the Deductible Amount as follows:

> "1. The first $100,000 under Workers' Compensation ('WC') coverage arising out of each accident involving one or more employees.
> 2. The first $100,000 under WC coverage arising out of occupational disease payable to each affected employee.
> 3. With respect to above, the amount of ALAE that You are obligated to pay Us will be determined as follows:
>
> ALAE is included within the Deductible Amount(s) under the Policy(ies) and is reimbursed to Us by You up to the Deductible Amount. We pay the ALAE excess of the Deductible Amount"

(*id.* at 1). The agreement set the "Aggregate Deductible," defined as "the greatest amount You are obligated to reimburse Us under the Deductible Policy(ies)," at $400,000 (*id.* at 3 and 8).

Because the program involved a risk financing arrangement, ATL agreed to furnish Zurich with a letter of credit as collateral, and Zurich reserved the right to draw on the collateral in the event ATL failed to pay any amount due under the agreement (*id.* at 10). ATL established an irrevocable letter of credit with J.P. Morgan Chase Bank, N.A. (J.P. Morgan) for $240,000 with Zurich named as the beneficiary (NYSCEF Doc No. 31, Flammini affirmation, ¶ 13).

The 2016 Agreement states that Zurich shall bill ATL monthly for "1. Paid Losses within the Deductible Amount(s) plus applicable Paid ALAE paid during the month, 2. less Recoveries within the Deductible Amount(s) credited during the month, 3. times the LCF" (NYSCEF Doc No. 33 at 3). Payments were due within 20 days from the date of each bill (*id.* at 9).

In connection with the 2017 Policy, the parties executed a second Paid Deductible Agreement effective December 31, 2016 (the 2017 Agreement) with terms similar to those in the 2016 Agreement (together, the Agreements) (NYSCEF Doc No. 35, Flammini affirmation, Ex D).

ATL submitted multiple claims for coverage under the Policies but has not paid Zurich deductibles totaling $539,567.84 despite due demand (NYSCEF Doc No. 59, ¶¶ 11-13).

Zurich commenced this action on May 27, 2020 by filing a summons and complaint pleading three causes of action for (1) breach of contract; (2) unjust enrichment; and (3) an account stated. It seeks $606,541.76, inclusive of $66,973.92 in accrued interest as of April 15, 2020 (*id.*, ¶¶ 14-15). ATL interposed an answer with 28 affirmative defenses[1] (NYSCEF Doc No. 15, Dennis E. Kadian [Kadian] affirmation, Ex A).

Zurich now moves for summary judgment. The motion is supported by the pleadings; an affirmation from Thomas Hodgskin (Hodgskin), a Workers Compensation Team Manager; an affirmation from Flammini, a Legal Collections Specialist; the Policies; claim notes; decisions issued from the State of New York Workers' Compensation Board (the WCB); 22 invoices; and, two statements of account, among other exhibits. ATL opposes the motion and relies, in part, on an affidavit from its president.

DISCUSSION

A party moving for summary judgment under CPLR 3212 "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), including the absence of any material facts on the affirmative defenses raised in the pleadings (*see Hoffman v Wyckoff Hgts. Med. Ctr.*, 129 AD3d 526, 526 [1st Dept 2015]). The

[1] The twenty-fourth affirmative defense does not contain plead a defense.

"facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met its prima facie burden, the burden shifts to the non-moving party to furnished evidentiary in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

At the outset, the argument that Hodgskin and Flammini failed to lay a proper foundation for the admission of Zurich's business records is not supported. CPLR 4518 (a) provides an exception to the hearsay rule and reads in part, that:

> "Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter."

Hodgskin and Flammini state they have personal knowledge of the facts and based their statements on their review of the documents maintained in the ordinary course of Zurich's business. These statements are sufficient to authenticate the documents (*see Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept 2017], *lv denied* 29 NY3d 919 [2017] [admitting a ledger maintained in the ordinary course of business where the plaintiff's witness authenticated the document]).

A. The First Cause of Action

To prevail on a cause of action for breach of contract, the plaintiff must demonstrate the existence of a contract, the plaintiff's performance, the defendant's breach and damages (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]). It is well

settled that "[a]n insurance policy is a contract between the insurer and the insured" (*Bovis Lend Lease LMB., Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]).

Hodgskin states that his responsibilities include supervising claims adjusters, providing oversight on claims files and examining, investigating and resolving claims, among other tasks (NYSCEF Doc No. 19, Hodgskin aff, ¶ 3). Based upon his review of the documents maintained in Zurich's ordinary course of business, he states the 11 claims ATL submitted triggered coverage under the Policies (*id.*, ¶¶ 5 and 7). Four claimants brought two separate claims each for physical injuries and for hearing loss caused by ATL's machinery (*id.*, ¶¶ 14-15, 16-17, 16-20 and 22-23). Hodgskin states that for each claim, Zurich contacted ATL regarding the allegations made by the injured employee, conducted a complete liability and defense analysis and retained defense counsel (*id.*, ¶ 11). Each claim "was handled properly and in accordance with both ZAIC's procedures and reasonable claim handling standards" (*id.*, ¶¶ 14-24). The WCB decisions or Zurich's internal claim notes show that each claimant suffered a compensable, work-related injury and received benefits (*id.*; NYSCEF Doc Nos. 20-30, Hodgskin affirmation, Exs A-K). Zurich's appeal of the WCB decision on claim no. 2440288227 was unsuccessful and an appeal of the WCB decision on claim no. 2440291038 is pending (NYSCEF Doc No. 19, ¶¶ 15-16).

Flammini states that she is responsible for collecting debts owed by policyholders to Zurich (NYSCEF Doc No. 31, Flammini affirmation, ¶ 3). Annexed to her affirmation are 22 invoices, with the first invoice dated March 31, 2018 and the last dated January 17, 2020, addressed to ATL (NYSCEF Doc Nos. 36-57, Flammini affirmation, Exs E-Z). Zurich issued a statement of account dated April 15, 2020 to ATL stating that $539,567.84 was due (NYSCEF Doc No. 58, Flammini affirmation, Ex AA at 1). Flammini adds that, due to ATL's default on the Policies and the Agreements, Zurich issued a sight draft to J.P. Morgan for $240,000 on the letter of credit on July

21, 2020; J.P. Morgan paid Zurich the full amount three days later (*id.*, ¶¶ 51-53). A second statement of account dated September 10, 2020 shows a balance due of $371,298.20 (NYSCEF Doc No. 60, Flammini affirmation, Ex CC at 1).

Zurich has established the existence of valid written contracts, i.e. the Policies and the Agreements, Zurich's performance thereunder in defending and paying on the claims submitted by ATL and ATL's failure to satisfy its contractual obligation of paying a $100,000 deductible per claim, which has caused Zurich to suffer damages.

However, Zurich has "failed 'to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses'" (*Hoffman*, 129 AD3d at 526, quoting *Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 517 [1st Dept 1980]). As relevant here, ATL pleads as an eighth affirmative defense that "[p]laintiff breached is [sic] obligations under the policies and pursuant to law by intentionally and/or negligently failing to do a proper investigation of each and every underlying workers' compensation claim" (NYSCEF Doc No. 15, ¶ 26). As a twenty-sixth affirmative defense, ATL alleges "[p]laintiff breached its contractual and fiduciary duties to defendant by failing to raise all defenses and cross-claims in the underlying workers' compensation claims and by failing to vigorously defend the interests of its insured in said underlying claims" (*id.*, ¶ 43).

Hodgskin's averments that each claim "was handled properly and in accordance with both ZAIC's procedures and reasonable claim handling standards" (NYSCEF Doc No. 19, ¶¶ 14-24) are entirely conclusory and not supported by specific facts (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005] [stating that "[a] conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden"]). Hodgskin does not reference any provision of Zurich's claims handling

procedures, set forth the general standard for reasonable claim handling, or detail how Zurich's actions conformed to those procedures or standards (*see Litwin v Tri-State Consumer Ins. Co.*, 166 AD3d 563, 564 [1st Dept 2018] [denying summary judgment to the defendant insurer where its adjuster's affidavit was too conclusory to establish that it had complied the terms of the policy]). He offers no factual basis to support his allegation that the claims were properly handled (*see Matter of New York City Asbestos Litig.*, 123 AD3d 498, 499 [1st Dept 2014] [denying summary judgment where an affidavit from the defendant's representative lacked a specific factual basis]).

Zurich also submits that ATL cannot meet its burden of demonstrating that Zurich breached the policies because ATL is precluded from introducing expert reports and testimony.[2] However, this argument merely points to a gap in ATL's proof, which is insufficient to meet Zurich's initial prima facie burden on summary judgment (*see Healy v BOP One N. End LLC*, ___ AD3d ___, 2022 NY Slip Op 01388, *1 [1st Dept 2022] [denying summary judgment where the defendant pointed to gaps in the plaintiffs' proof]). Accordingly, the motion insofar as it seeks summary judgment on the first cause of action is denied.

B. The Second Cause of Action

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993] [internal quotation marks and citation omitted]). An account stated "exists where a party to a contract receives bills or invoices and does not protest within a reasonable time" (*Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011] [internal quotation marks

[2] A June 7, 2021 court order directed ATL to disclose its expert witnesses on or before June 21, 2021 or else it would be precluded from introducing an expert (NYSCEF Doc No. 18, Kadian affirmation, Ex D). ATL has not responded to the June 7, 2021 court order and submits that the issues do not require expert testimony (NYSCEF Doc No. 71, ATL mem of law at 4).

and citation omitted]), or where party retains invoices without objection and promises to make payment or partially pays them (*see Anderson Kill, P.C. v Board of Mgrs. of Honto 88 Condominium*, 192 AD3d 551, 551 [1st Dept 2021]; *LePatner Project Solutions LLC v 320 W. 115 St.*, 192 AD3d 507, 508 [1st Dept 2021]).

Here, Zurich has failed to demonstrate that the invoices and statements of account were sent to and received by ATL (*see Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 161-162 [1st Dept 2005] [reasoning that the "[p]laintiff's evidence did not, however, establish that any of the invoices were properly addressed and mailed, so plaintiff should not have been afforded the presumption of receipt"]; *Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 581 [2d Dept 2002] [denying summary judgment on an account stated claim where "[t]here is no proof as to when this bill was first sent to, or received by, the defendant"]). Flammini's affidavit is entirely silent as to method and manner by which the invoices and statements of account were sent to ATL and states only that Zurich issued them. Thus, the motion insofar as it seeks summary judgment on the second cause of action is denied.

C. The Third Cause of Action

Zurich has not expressly moved for summary judgment on the unjust enrichment claim as it states only that it "reserves the right to rely" on this cause of action if the contract claim fails (NYSCEF Doc No. 13, Zurich mem of law at 23 n 3). Assuming Zurich is moving for relief, the motion is denied as a cause of action for unjust enrichment is duplicative where a valid written agreement governing the dispute exists (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Accordingly, it is

ORDERED that the motion brought by plaintiff Zurich American Insurance Company for summary judgment (motion sequence no. 001) is denied; and it is further

ORDERED that Motion 2 is denied without prejudice for the reasons stated on the record of 4/1/2022; and it is further

ORDERED that there shall be no further motion practice whatsoever without prior conference with the judge on this case who can be reached at macrane@nycourts.gov; and it is further

ORDERED that the parties are to appear for a conference on April 11, 2022 at ten am to discuss the need for further discovery and/or set a trial date.

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4/1/2022
DATE

MELISSA CRANE, J.S.C.

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