

**Commissioners of the State Ins. Fund v Caledonia
Carting Servs. Inc.**

2022 NY Slip Op 32683(U)

July 27, 2022

Supreme Court, New York County

Docket Number: Index No. 451059/2021

Judge: Arthur Engoron

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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. ARTHUR ENGORON PART 37

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND, INDEX NO. 451059/2021
Plaintiff, MOTION DATE 07/13/2022
MOTION SEQ. NO. 001

- v -

CALEDONIA CARTING SERVICES INC.,
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 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

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, and for the reasons stated herein, plaintiff's motion is granted.

Background

In November 2016 defendant Caledonia Carting Services Inc. ("Caledonia") requested Workers' Compensation and Employers' Liability Insurance from plaintiff Commissioners of the New York State Insurance Fund ("NYSIF"). NYSCEF Doc. No. 22. In its application Caledonia is described as a company in the "debris removal" business with 17 employees and an annual payroll of "250000." Id.

As shown in an instrument dated December 15, 2016, plaintiff issued to defendant the requested insurance, under policy number 24047250, effective December 2, 2016, through December 2, 2017 ("The Policy"). NYSCEF Doc. No. 23.

"Part Four – Premium" of The Policy explains clearly how NYSIF's premiums are to be calculated, including that: all premiums charged by plaintiff would be determined by "manuals of rules, rates, rating plans and classifications"; the variations of the manual rates would be determined based on appraisals of defendant's business; defendant must notify plaintiff if its employees work classifications differ from the estimated exposure on The Policy; and if defendant does not have payroll records, premiums for each work classification would be calculated using contract prices. NYSCEF Doc. No. 21. Further, defendant agreed to retain all records needed to compute premiums, and that, in order "to determine the final premium" defendant would allow plaintiff to "examine and audit all [defendant's] records that relate to this policy whether these records pertain to the current policy period or to any previous policy period." Id.

According to NYSIF documents, over the course of 2017 and 2018 auditors for plaintiff repeatedly tried to look at defendant's payroll records, visiting its listed place of business and calling the phone numbers provided, to no avail. NYSCEF Doc. Nos. 25 and 26.

After two renewals, The Policy expired on December 2, 2018. NYSCEF Doc. No. 43 ¶ 2.

In an invoice dated July 2, 2019, plaintiff informed defendant of an outstanding balance of \$1,903,915.95. NYSCEF Doc. No. 27.

On April 19, 2021, NYSIF sued Caledonia, asserting breach of contract and account stated causes of action. NYSCEF Doc. No. 1.

On July 7, 2021, Caledonia answered, denying both causes of action, alleging that all "premiums as discussed and agreed to between the parties were paid in full" and that no demands for \$1,903,915.95 were received. NYSCEF Doc. No. 6. Defendant also asserted sixteen affirmative defenses, and a counterclaim alleging breach of contract. *Id.*

On July 13, 2021, NYSIF replied to Caledonia's counterclaim with the affirmative defense that such claims against plaintiff, as a New York State Agency, are only cognizable in the Court of Claims. NYSCEF Doc. No. 7 ¶ 28.

Pursuant to a Preliminary Conference Order dated August 25, 2021, answers to interrogatories were to be served by all parties on or before November 19, 2021. NYSCEF Doc. No. 11.

Despite repeated requests, defendant did not respond to plaintiff's Notice of Discovery. NYSCEF Doc. No. 19 ¶¶ 12-14.

On March 9, 2022, a Discovery Stipulation dated March 4, 2022, was filed with this Court, giving defendant until March 21, 2022, to respond. NYSCEF Doc. No. 16. The same stipulation also provided that all party depositions "shall be conducted on or before May 20, 2022, if necessary." NYSCEF Doc. No. 16.

On April 28, 2022, NYSIF moved for: (1) summary judgment, pursuant to CPLR 3212, against Caledonia in the amount of \$1,903,915.95 plus interest at the rate of nine percent from December 2, 2018; (2) an order striking Caledonia's answer, pursuant to CPLR 3126; and (3) an order dismissing Caledonia's counterclaims, pursuant to CPLR 3211(a)(2). NYSCEF Doc. No. 17.

On July 6, 2022, Caledonia cross-moved to compel plaintiff to produce "auditor Dona Diederich for depositions" as well as all documents that plaintiff used in auditing defendant. NYSCEF Doc. No. 45.

Plaintiff argues that it tried repeatedly to audit defendant's books, before and after the commencement of this action, so as to determine a proper premium and, being unable to do so, is now owed the estimated audit amount, plus statutory interest from the end of the coverage period.

Defendant responds that plaintiff has not made a prima facie case, that summary judgment is premature absent further disclosure, including depositions, and that summary judgment should be denied based the affirmative defenses of laches, accord and satisfaction.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dep't 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”). The moving party’s burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

As a preliminary matter, this Court notes that in making the instant motion for summary judgment, plaintiff failed to annex a *separate*, numbered statement describing undisputed material facts as 22 NYCRR 202.8g(a) requires (“Upon any motion for summary judgment ... there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.”). As plaintiff included such a statement *within* its Memorandum of Law, however, this appears not to prejudice defendant and so this Court, in its discretion and in the interest of justice, waives compliance and trusts counsel will not repeat the oversight. CPLR 2001; 22 NYCRR 202.1(b).

Here, NYSIF has made out a prima facie case of breach of contract by submitting, inter alia, defendant’s insurance application, The Policy, the relevant auditor worksheets and supplementary reports, annual policy information pages explaining the relationship between the premiums charged and NYSIF’s inability to audit Caledonia, a statement of account, and an affidavit of NYSIF Policy Holder Services Department Underwriter Dora Diederich explaining, from her personal knowledge, NYSIF’s business practices for calculating premiums, filling out auditor worksheets, and maintaining statements of account. See Commissioners of the State Ins. Fund v Allou Dist., 220 AD2d 217 (1st Dept 1995).

In response, defendant first argues that “the only issue that this Court should be reviewing is the issue of 2018 billing,” because Caledonia’s premiums for 2016 and 2017 “were submitted and paid.” However, defendant misreads The Policy. Caledonia did pay some of its premiums but repeatedly declined to produce records for NYSIF to audit, and so NYSIF, pursuant to The Policy, is entitled to collect additional premiums based on estimated audits for those years.

Defendant next says summary judgment should be denied based on laches, specifically arguing that plaintiff “decided to wait close to five and a half (5 1/2) years” to bring its claim, which among other things, inappropriately requires Caledonia to produce employment records from a time period beyond what is required by New York State Labor Law.

Defendant misreads New York State Labor Law § 195, however, as that clearly requires that employers “establish, maintain and preserve for not less than six years” payroll records, not three years. Further, the record is clear that plaintiff repeatedly attempted to perform a payroll audit, pursuant to The Policy, within months of each covered year, and so laches does not apply.

Moreover, laches is not an equitable defense not applicable for breach of contract actions.


Defendant also argues that summary judgment should be denied based on a need for further discovery, specifically, the deposition of NYSIF Underwriter Diederich. However, defendant’s counsel fails to proffer any argument as to how such a deposition might support defendant’s case. See MVB Collision, Inc. v Progressive Ins. Co., 129 AD3d 1040, 1041 (2nd Dep’t 2015) (“A party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant.”).

This Court has considered defendant’s other arguments and finds them to be unavailing and/or non-dispositive. Therefore, plaintiff’s motion for summary judgment on its breach of contract cause of action should be granted and this Court need not address its account stated claim.

Finally, as plaintiff is a New York State Agency, defendant’s counterclaim must be dismissed, as such claims, even in response, are only cognizable in the Court of Claims. Commissioners of the State Ins. Fund v Netti Wholesale Beverage Co., Inc., 245 AD2d 48 (1st Dept 1997).

Conclusion

Therefore, defendant Caledonia Carting Services Inc.’s counterclaim is dismissed, and the motion of plaintiff Commissioners of the State Insurance Fund for summary judgment is granted. The Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant in the amount of \$1,903,915.95 plus statutory interest from December 2, 2018, the date the instant policy terminated, plus costs and disbursements.

7/27/2022	
DATE	ARTHUR ENGORON, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input type="checkbox"/> DENIED <input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE