

Commissioners of the State Ins. Fund v SSC High Rise Constr. Inc.

2022 NY Slip Op 33447(U)

September 15, 2022

Supreme Court, New York County

Docket Number: Index No. 450630/2020

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 450630/2020

COMMISSIONERS OF THE STATE INSURANCE FUND,

MOTION DATE 03/16/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

SSC HIGH RISE CONSTRUCTION INC., SSC STEEL INC.,
TIMOTHY MAHONEY

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 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, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff, Commissioners of The State Insurance Fund (plaintiff), commenced this action for breach of contract against defendants, SSC High Rise Construction Inc. (SSC) and SSC Steel Inc. (Steel) (collectively, defendants), seeking unpaid premium payments for workers' compensation insurance coverage afforded to defendants from March 17, 2014 to November 24, 2016, in the amount of \$2,372,018.17. Plaintiff now moves pursuant to CPLR 3212 summary judgment on its claims for breach of contract, for interest from November 24, 2016, for dismissal of defendants' affirmative defenses, and for attorneys' fees. The motion is opposed. For the following reasons, plaintiff's motion is granted.

FACTUAL BACKGROUND

In March 2014, SSC applied requesting workers' compensation and employers' liability insurance coverage from plaintiff. The agreement to pay premiums based upon payroll is contained in "Part Four-Premium" of the Policy, which states that premiums charged by plaintiff would be determined by "[m]annuals of rules, rates, rating plans and classifications"; the variations of the manual rates would be determined based on appraisals of defendants' business; and that defendant must notify plaintiff if its employees work classifications differ from the estimated exposure on the policy (NYSCEF doc. no. 57). The policy was self-renewing on an annual basis effective March 17, 2014 until the policy was cancelled on November 24, 2016.

In July 2016, defendants submitted to plaintiff a request for inclusion of additional interest, whereby defendants requested that Steel be included as an additional insured on the

1 The complaint against defendant Timothy Mahoney was dismissed pursuant to the court's May 17, 2021 decision and order granting defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7).

policy. Plaintiff thereafter issued an endorsement to the policy, dated September 16, 2016, stating that effective as of July 30, 2016, coverage under the policy was included for Steel. The endorsement to the policy stated that defendants were “[l]iable jointly and severally with all other insureds, for all the premiums allocable for the period of time you are insured” (NYSCEF doc. no. 60). Plaintiff thereafter performed its end of the bargain by providing the insurance coverage requested up to the date the policy was cancelled.

From 2016 through 2017, plaintiff completed three separate audits of defendants’ books and records in order to compute the sum due by defendants for the provided insurance coverage. The cost of defendants’ workers’ compensation insurance coverage was calculated as follows: for the period from March 21, 2014 to March 21, 2015, \$516,821.07; for the period from March 21, 2015 to March 21, 2016 \$539,587.34; and from the period from March 21, 2016 to November 24, 2016, \$2,929,048.59.

According to plaintiff, the April 21, 2020, statement of account, which shows all the fiscal transactions between plaintiff and defendants, reflected a balance as of February 14, 2020, in the amount of \$2,737,768.59. On or about April 21, 2020, plaintiff mailed to defendants a monthly billing statement, demanding payment of the \$2,372,018.17. According to plaintiff, after the commencement of this action, several adjustments were made to defendants’ policy, as shown on the statement of account, reducing the premium balance due from defendants to the amount of \$2,372,018.17, the amount plaintiff claims is past due. Plaintiff’s records show that defendants have not paid the premiums that resulted from their audited payroll in the amount of \$2,372,018.17.

While defendants were receiving workers compensation from plaintiff, the District Attorney of the County of New York (DANY) commenced an investigation against SSC stemming from the September 21, 2017 death of construction worker working at a construction site wherein SSC was a subcontractor. On March 29, 2018, SSC entered into plea agreement with DANY waiving prosecution, including admitting to failing to pay \$517,000 in wages to fifty-one employees, and to underreporting nearly \$2,000,000 in payroll to evade insurance payments (plea agreement). According to the plea agreement, SSC’s underreporting “[e]nabled SSC to underpay \$325,000 in premium payments to [plaintiff]” (NYSCEF doc. no 81, at ¶4).

As relevant herein, the plea agreement states that SSC agreed to pay \$325,000 in premiums to plaintiff. To this end, the plea agreement states that SCC will make its “[f]irst restitution payment” to the New York State Department of Labor, and then, on the date of sentencing, pay plaintiff the sum of \$325,000 (*id.* at 5[a]-[b]). The plea agreement further states that “[t]his agreement is limited to the District Attorney and cannot bind other government agencies. Likewise, this agreement does not prevent . . . [plaintiff] from seeking any outstanding payments or penalties owed to one or both agencies now or in the future, if any, for time periods outside of those covered by this agreement” (*id.* at ¶9).

DISCUSSION

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter

of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to “show facts sufficient to require a trial of any issue of fact” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding the motion, the court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851, 853 [1985]).

Here, plaintiff makes a prima facie showing that it is entitled to summary judgment on its claim for breach of contract by submitting the affidavit of Nancy Sacks, an underwriter employed by plaintiff, explaining, from her personal knowledge, plaintiff’s business practices for calculating premiums, filling out auditor worksheets, and maintaining statements of account, along with defendants’ application for coverage, including the declaration, information/renewal pages and endorsements, the policy, the relevant auditor worksheets and supplementary reports, annual policy information pages explaining the relationship between the premiums charged based on the information contained in the audit reports, defendants’ current statement of account showing \$2,372,018.17 as the balance due, and the April 21, 2020 monthly billing statement (*see Commissioners of State Ins. Fund v Beyer Farms, Inc.*, 15 AD3d 273, 274 [1st Dept 2005] [“Plaintiff presented un rebutted business records, in the form of the insurance application, the policies and endorsements thereto, the audit reports and resulting invoices, including retrospective accountings, which were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law”]; *Commissioners of the State Ins. Fund v Allou Dist.*, 220 AD2d 217 [1st Dept 1995] [“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 that defendant’s summaries of its payroll”]).

In opposition, defendants contend that plaintiff already received payment for the relevant audit periods under the plea agreement. To this end, defendants argue that plaintiff’s representatives were “[i]ntimately involved in the plea negotiations,” including being physically present for the key negotiations, were “[p]resent in Court when SSC High Rise Construction entered its plea under the Plea Agreement,” and that plaintiff performed audits of SSC’s payroll that were instrumental in the plea negotiations (NYSCEF doc. no. 74, def mem opp at ¶ 13).

Defendants’ arguments fail to raise an issue of fact. While SSC agreed to pay plaintiff \$325,000 in premiums to plaintiff in order to resolve the claims related to under reported payroll from March 12, 2014, and November 24, 2016, the plea agreement was made in the context of a criminal investigation, and importantly, plaintiff was not a party to the agreement. If the Court were to find that the amount agreed upon in the plea agreement resolved plaintiff’s claims, plaintiff would thereby be deprived of an opportunity to litigate its own rights stemming from plaintiff’s audit of defendants’ books and records (*see Farber v Stockton*, 131 Misc 2d 470, 470–471 [App Term 2d & 11th Jud Dists 1986] [“The payment of reparation awarded by a court in a criminal proceeding does not bar a subsequent action against a defendant to recover damages in excess of the reparation awarded”], citing Penal Law § 60.27[6]). Moreover, plaintiff did not

sign a release surrendering or otherwise waive its rights to pursue defendants for the workers' compensation premiums for the audit periods. In fact, the plea agreement specifically indicated that plaintiff is not bound by the terms of the agreement.

Defendants' contention that plaintiff's motion is premature to the extent that further discovery is needed in order to ascertain the effect of the plea agreement as it relates to plaintiff's claims in this action is unavailing. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). Here, no amount of discovery, including whether plaintiff was involved in the calculation of the restitution payable or present at the negotiations under the plea agreement, will change the fact that plaintiff was not a party to the plea agreement with the DANY.

Defendants failed to respond to plaintiff's arguments in favor of dismissing the affirmative defenses. In any event, as plaintiff's motion for summary judgment on the complaint is granted, the branch of plaintiff's motion to dismiss defendants' affirmative defenses is deemed moot. The branch of plaintiff's motion for attorneys' fees is also denied, as plaintiff fails to present any statute, case law, or contractual basis for attorneys' fees.

Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint is granted as to plaintiff's claim for breach of contract only; and it is further

ORDERED that Clerk is hereby directed to enter judgment in favor of plaintiff and against defendants in the amount of \$2,372,018.17 plus statutory interest from November 24, 2016, the date the instant policy terminated, plus costs and disbursements; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



DAKOTA D. RAMSEUR, J.S.C.

9/15/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE