Commissioners of the State Ins. Fund v Metro Group Corp.
2022 NY Slip Op 33919(U)
November 9, 2022
Supreme Court, New York County
Docket Number: Index No. 453950/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART 42**

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

- v -

THE METRO GROUP CORP. and PRESIDIO REALTY HOLDERS, INC.

Defendant.

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INDEX NO. 453950/2021

MOTION DATE 08/31/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

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

In this action to recover unpaid worker's compensation insurance premiums, the plaintiff, Commissioner of the State Insurance Fund, alleges that the defendants, The Metro Group Corp. (Metro) and Presidio Reality Holders, Inc. (Presidio), failed to pay premiums of $422,390.83 for the period of July 1, 2018, to July 1, 2019, the date the policy was canceled, as determined by an audit of the defendant's books and records. The defendants answered with a general denial. No discovery has been conducted. The plaintiff now moves pursuant to CPLR 3212 for summary judgment on the complaint upon theories of breach of contract and account stated. The defendant opposes the motion. The motion is denied.

It is well settled that the proponent of a motion for summary judgment pursuant to CPLR 3212 must establish entitlement to judgment as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish his or her claim or defense sufficiently to warrant a court's directing judgment in the movant's favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., supra; O'Halloran v City of

New York, supra. This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) (quoting Nesbitt v Nimmich, 34 AD2d 958, 959 [2nd Dept. 1970] [internal citations omitted]).

To establish the breach of contract claim, the plaintiff was required to demonstrate (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Second Source Funding, LLC v Yellowstone Capital, LLC, 144 AD3d 445 (1st Dept. 2016); Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). To recover under a theory of account stated, the plaintiff must demonstrate that the defendant "received [and] retained without objection" invoices sent by the plaintiff. Scheichet & Davis, P.C. v Nohavicka, 93 AD3d at 478 (1st Dept. 2012), *quoting* Gamiel v Curtis & Reiss-Curtis, P.C., 60 AD3d 473, 474 (1st Dept. 2009). A cause of action for account stated may be established by demonstrating either partial payment or retention of bills without objection. See Morrison Cohen Singer & Weinstein, LLP v Waters, 13 AD3d 51 (1st Dept. 2004); M&R Constr. Corp. v IDI Constr. Co., 4 AD3d 130 (1st Dept. 2004).

In support of its motion, the plaintiff submits the pleadings, a statement of account in the form of a spreadsheet printed on June 28, 2022 and referable only to defendant Metro, a policy renewal notice for the period July 1, 2017 to July 1, 2018, referable only to defendant Metro, a policy cancellation notice dated June 7, 2019, referable to both defendants, certain audit worksheets, and a final invoice dated April 1, 2020, in the sum of $422,390.83, demanding immediate payment, and addressed only to defendant Metro. The plaintiff also submits an affidavit of Joseph Dennis, an underwriter for the plaintiff, who states that, based upon his review of the plaintiff's books and records, $422,390.83 is currently owing on the defendants' account. Dennis further avers that the original policy was issued to another entity, non-party Cosmopolitan Chemical Co., Inc. (Cosmopolitan) in 1930, and that the defendants were later added to the same policy in 1991 and Cosmopolitan was removed. He represents that the plaintiff was unable to locate the original application or policy and had only information from its computer system, which consisted of partial screenshots that reference Cosmopolitan, Metro, and Presidio, with little other discernible information. The plaintiff's proof fails to establish its entitlement to judgment on either theory in the first instance.

While the original application by Cosmopolitan and the original policy are not submitted, the defendants do not dispute that a policy existed and that they were added as insureds. Moreover, the policy renewal notice submitted would be sufficient to establish the existence of a contract between the parties. However, the plaintiff still fails to establish that the defendants breached that contract or that damages resulted, two requisite elements of any breach of contract claim. That is because the plaintiff fails to attach the audit worksheet for the account of Metro and Presidio and instead attached an audit worksheet of "Pop Displays USA", an entirely different business based in Yonkers. The correct audit worksheets are, of course, necessary to meet the plaintiffs' burden of showing any breach by non-payment of premiums and, if so, the amount determined by the auditor to be owed. Indeed, as explained by Dennis in his affidavit, "the charges for this policy and all policies are based upon the "payroll" figures set forth in the "Auditor Worksheets", which "form the basis for the final charges relative to the period July 1, 2018 to July 1, 2019". Thus, while the "[p]laintiff's business records, [including] the insurance application, audit worksheets and resulting invoices and statement of accounts for a balance due" may be "sufficient to make out a *prima facie* showing of entitlement to judgment as a matter of law" (Comm. of State Ins. Fund v Allou Distribs., 220 AD2d 217, 217 [1st Dept. 1995]), here the plaintiff fails to submit sufficient proof of its claim.

In regard to the account stated cause of action, Dennis alleges in his affidavit that it is the general practice of the plaintiff that all statements of account requiring payment are mailed by first class mail to the insured policyholder. However, the plaintiff has not demonstrated, *prima facie*, that the defendants were sent or received any invoice other than, perhaps, the final invoice for $422,390.83, which was purportedly sent in April 2020, to one defendant. It is well settled that "[a] key element of a *prima facie* account stated claim is evidence that [the plaintiff] delivered one or more invoices for the amount claimed to defendant, so that [the defendant] received them." Morgan, Lewis & Bockius LL v IBuyDigital.com, Inc., 14 Misc 3d 1224(A) (Sup Ct, NY County 2007 [Richter, J.]) [citations omitted]. Thus, "where a plaintiff's evidence fails to establish that the invoices were properly addressed and mailed, there should be no presumption of receipt, and summary judgment on an account stated claim is inappropriate." Id. citing Morrison Cohen Singer and Weinstein, LLP v Brophy, 19 AD3d 161 (1st Dep. 2005).

In opposition, the defendant submits an affidavit of Richard Parker, the CEO of Metro, who disputes the $422,390.83 amount demanded and avers that the absence of the original application and policy and the submission of the wrong audit worksheets requires denial of the

plaintiff's motion. In any event, since the plaintiff failed to meet it burden in the first instance, the court need not consider the sufficiency of the opposing papers.

In the complaint, the plaintiff also seeks, in separate causes of action, statutory interest on any award for unpaid premiums and costs incurred in collecting the premiums. However, since the plaintiff has not established entitlement to any unpaid premiums on this motion, there can be no award for interest or costs. Consequently, all of plaintiff's claims remain for trial.

The parties are encouraged to explore settlement.

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied, and it is further

ORDERED that counsel shall appear for a preliminary conference on January 26, 2023, at 12:00 p.m., to be conducted via Microsoft Teams.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

11/9/2022
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER