

**Scottsdale Ins. Co. v EPC Contr., Inc.**

2023 NY Slip Op 30558(U)

February 23, 2023

Supreme Court, New York County

Docket Number: Index No. 651225/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

-----X

SCOTTSDALE INSURANCE COMPANY,  
Plaintiff,

- v -

EPC CONTRACTING, INC.,  
Defendant.

-----X

EPC CONTRACTING, INC.  
Plaintiff,

-against-

FRANK J. CAPACCIO, JR. COMMERCIAL RISK SERVICES  
INC.  
Defendant.

-----X

INDEX NO. 651225/2022

MOTION DATE 02/21/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595419/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 23, 24

were read on this motion to/for DISMISS.

Third party defendants’ (“Movants”) motion to dismiss the third-party complaint is granted.

**Background**

In this action, plaintiff, an insurance company (“Insurer”), seeks to recover additional amounts it claims defendant (“EPC”) owes pursuant to a policy. Insurer contends that the policy included an initial advance premium, which EPC paid, followed by an audit to determine the final premium. It alleges that EPC failed to pay the amount assessed after the audit.

In the third-party complaint, EPC sues its insurance brokers (“Movants”). EPC alleges that Movants were the ones who communicated directly with Insurer. EPC alleges that Movants reported an inaccurate amount for the estimated payroll and, therefore, Insurer’s audit revealed that additional amounts were due. EPC contends that Movants assured it that the issue would be taken care of, but that this lawsuit followed.

In this motion, Movants seek to dismiss the third-party complaint. They contend that EPC’s attempt to make Movants pay for the additional premium is time-barred. Movants argue that the premium adjustment statement is from October 4, 2016, which is well more than three years from the time this case was commenced. Movants also insist that there is no proximate cause of the damages and that Mr. Capaccio (one of the Movants) told EPC that the premium was to be based upon an audit. Movants also attach a copy of the application (signed by EPC’s president) which Movants claim shows that the payroll was listed at only \$200,000 instead of the \$1.25 million that eventually necessitated at least part of the increased premium.

In opposition, EPC’s president admits that he signed the general liability policy application but claims that Mr. Capaccio did not send him the whole document and he only reviewed the signature pages. EPC argues that Movants failed to deny the allegations in the third-party complaint and reproduces, verbatim, the various allegations that it contends Movants did not address. EPC argues that a six-year statute of limitations applies to a common law indemnification claim and so its claims against Movants are not time-barred.

In reply, Movants contend that the third-party complaint does not mention common law indemnification and instead the allegations suggest a negligence cause of action. They also point out that the opposition does not address the assertion that Movant never made any representations about a fixed premium amount.

## Discussion

As an initial matter, the Court finds that the third-party complaint is time-barred. A review of the third-party complaint reveals that no specific cause of action is cited. Therefore, the Court must consider the allegations and assess what cause of action is alleged. The Court finds that the third-party complaint alleges a negligence cause of action.

“In any common-law negligence case brought pursuant to New York law, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Ferreira v City of Binghamton*, 38 NY3d 298, 308, 173 NYS3d 484 [2022]).

The third-party complaint alleges that Mr. Capaccio misrepresented the payroll amount to the Insurer and that caused EPC to be liable for more money after the audit. That clearly suggests a negligence claim as it alleges that Mr. Capaccio breached his duty to EPC rather than a common law indemnification claim, which relies upon a theory of vicarious liability.

Setting aside which specific cause of action EPC alleges, the Court finds that EPC failed to state a cognizable cause of action against Movants. “Under CPLR 3211(a)(7), pleadings are to be afforded a liberal construction, allegations are taken as true, the plaintiff is afforded every possible favorable inference, and a determination is made only as to whether the facts as alleged fit within any cognizable legal theory” (*CSC Holdings, LLC v Samsung Elecs. Am., Inc.*, 192 AD3d 556, 146 NYS3d 17 [1st Dept 2021]).

EPC admits in the third-party complaint that “In obtaining the Subject Policy, Third-Party Defendant Frank J. Capaccio, Jr. advised Defendant and Third-Party Plaintiff EPC Contracting, Inc. that the amount of the premiums to be paid by Defendant and Third-Party Plaintiff EPC Contracting, Inc. on account of the desired Subject Policy were to be computed

based on three (3) estimated amounts to be subsequently verified by an audit to be performed by Plaintiff: Defendant's payroll; fees paid by Defendant to independent contractors; and Defendant's annual sales" (NYSCEF Doc. No. 3, ¶ 19). In other words, EPC admits that it knew that the ultimate amount of premium it would owe to Insurer was contingent on an audit of the three categories. Therefore, the Court fails to see – and EPC failed to show - how a misrepresentation about a payroll *estimate*, even if Mr. Capaccio is solely responsible for that misstatement, could make Movants liable.

The fact is that the initial amount paid to the Insurer was just that—an initial payment subject to a later audit. The final amount was to be determined after an audit and there are no allegations that Mr. Capaccio did anything with respect to the audit that led Insurer to improperly increase the amount owed by EPC. At best, underreporting the payroll reduced the amount EPC paid initially. But the final premium due, as described by all parties in this action, was not determined until the completion of the audit. That means that, on these papers, EPC would be responsible for the amount claimed by Insurer (assuming, only for purposes of this motion, that the Insurer is able to prove it is entitled to the additional amount) regardless of what Mr. Capaccio did (or did not do) with respect to the initial application. Put another way, Mr. Capaccio's actions as alleged in the third-party complaint (which must be taken as true for the purposes of this motion) did not cause EPC any additional damages according to the complaint. It is alleged that it caused a small up-front payment and a large post-audit bill, but the total premium was still the same. EPC has not shown how it was damaged by paying less up front and more after the audit.

Moreover, EPC's president admitted that he signed the various signature pages in the insurance application that stated the payroll was \$200,000 (NYSCEF Doc. No. 16, exh A). His

explanation that he never received the rest of the application is of no moment as he admits he signed an application that he knew was going to be sent to Insurer and he knew EPC received insurance coverage based on that application. EPC cannot receive the benefit of the application—the insurance coverage—and then claim that he has no responsibility for the contents of the application. “A party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents” (*Cash v Titan Fin. Services, Inc.*, 58 AD3d 785, 788, 873 NYS2d 642 [2d Dept 2009]).

### **Summary**


The Court recognizes EPC’s apparent frustration with Movants. It is upset that Movants purportedly submitted an insurance application to Insurer that contained misstatements. But EPC did not sufficiently explain how Movants would be liable for the post-audit premium, a premium EPC knew was going to be determined at a later date based upon an audit (and not just the application). EPC knew that the advance premium was like a down payment, or a good faith deposit, with the actual bill to be determined after Insurer conducted an audit. This is not a situation in which the broker failed to procure the right type of insurance or any insurance altogether—there is no dispute that EPC obtained the insurance coverage. This lawsuit is simply a dispute about how much more, if any, premium EPC must pay to the Insurer. That amount was not dependent on the initial application.

Simply put, EPC failed to allege what harm it suffered by the alleged error. And even if it could allege harm, its president signed the application. And even if could allege harm and it was not bound by the agreement its president signed, EPC brought the claim too late.

Accordingly, it is hereby

ORDERED that the motion by third-party defendants FRANK J. CAPACCIO, JR. COMMERCIAL RISK SERVICES INC. to dismiss the third-party complaint is granted and the Clerk is directed to enter judgment accordingly in favor of the third-party defendants and against the third-party plaintiff/defendant along with costs and disbursements upon presentation of proper papers therefor.

Conference as to Remaining Parties: April 18, 2023 at 10 a.m. By April 11, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute concerning discovery or 3) letters explaining why no agreement could be reached. Based on these submissions, the Court will assess whether an in-person conference is required. The failure to upload anything by April 6, 2023 will result in an adjournment of the conference.

<p><u>2/23/2023</u> DATE</p>	 <hr/> <p>ARLENE P. BLUTH, J.S.C.</p>	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p>
<p>APPLICATION:</p>	<p><input type="checkbox"/> SETTLE ORDER</p>	<p><input type="checkbox"/> SUBMIT ORDER</p>
<p>CHECK IF APPROPRIATE:</p>	<p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>