

**Commissioners of the State Ins. Fund v Shear
Constr., LLC**

2023 NY Slip Op 32268(U)

July 7, 2023

Supreme Court, New York County

Docket Number: Index No. 453696/2021

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH **PART** **14**

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND

Plaintiff,

- v -

SCHEAR CONSTRUCTION, LLC,

Defendant.

-----X

INDEX NO. 453696/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**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, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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

Plaintiff’s motion for summary judgment is granted.

Background

Plaintiff contends that defendant obtained a Worker’s Compensation insurance policy from plaintiff that began on April 7, 2018. The policy was renewed annually until it was cancelled on March 31, 2021. Plaintiff explains that after the policy was cancelled, it reached out to defendant in order to schedule an appointment to complete an audit. An audit is utilized to calculate the premiums owed by the insured based on relevant records, such as payroll documents. Plaintiff insists that defendant never responded and so it calculated the premium by estimating the amount for the final two policy periods. Plaintiff asserts that \$1,567,404.03 is due.

In opposition, defendant claims that this motion is premature as the parties have not completed discovery. It complains that the amount requested by plaintiff is only an estimate.

Defendant opines that the future exchange of discovery would alter plaintiff’s calculations. It

insists that there are issues of fact relating to the accuracy of plaintiff's estimation and whether plaintiff properly considered a replacement Worker's Compensation Policy obtained by defendant.

Defendant's CFO claims that he uploaded documents to plaintiff's portal and that plaintiff did not properly consider this information when calculating the premium. He also claims that defendant obtained alternative coverage and that it notified plaintiff on November 5, 2020 that it was cancelling its policy with plaintiff.

In reply, plaintiff argues that to the extent defendant points to payroll records, defendant failed to include these records in its opposition. Plaintiff insists it made many attempts to complete the audits of defendant's business records, including payroll reports, a general ledger and tax returns. It points out that its auditor detailed the efforts to set up an appointment with defendant but that defendant never followed up.

Plaintiff explains that even after this lawsuit was commenced, it attempted to complete the audits but, once again, defendant failed to provide the necessary records and that defendant failed to provide records in response to a discovery demand in May 2022. It argues that although defendant claims its payroll is less than what plaintiff calculated, defendant cannot make such an argument without providing documentation to back that assertion up. With respect to the cancellation issue, plaintiff claims that defendant produced no proof about when and how it notified plaintiff about the requested cancellation.

Discussion

The Court grants the motion. The record before this Court demonstrates that plaintiff requested records on numerous occasions, even after this lawsuit was commenced, in order to

calculate the premiums owed by defendant. And defendant failed to raise an issue of fact that it ever complied with any of these requests. Instead, defendant claims that it uploaded certain documents to plaintiff's portal but did not include those documents in opposition to this motion. Defendant cannot have it both ways. It cannot claim that plaintiff's calculations (which are admittedly an estimate) are inaccurate and then ignore plaintiff's many, many requests for the records necessary to make such a calculation. Under such circumstances, plaintiff is entitled to rely upon an estimate.


The fact is that plaintiff, in its moving papers, included significant details describing how it calculated the premium owed by defendant based upon the documents it possessed. Plaintiff readily admits that the amount is an estimate because defendant did not provide the records needed to calculate an exact amount. Plaintiff specifically warned defendant in a letter dated April 9, 2021 that if defendant failed to upload the necessary documents, then it would use an estimated payroll (NYSCEF Doc. No. 23). That is exactly what happened.

The Court also finds that defendant failed to raise an issue of fact that it cancelled the policy in November 2020. It did not attach any proof in its opposition to show that it notified plaintiff in accordance with the insurance policy (NYSCEF Doc. No. 17 at 25).

Defendant also failed to demonstrate that outstanding discovery is a reason to deny the instant motion. The entire case is, at least according to plaintiff, about defendant's failure to produce requested records. And plaintiff observes that defendant has not responded to discovery demands from May 2022 and did not produce sufficient documents in opposition to this motion. Defendant did not adequately explain what discovery it needs that it does not already possess.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant the amount of \$1,567,404.03 plus statutory interest from March 31, 2021 along with costs and disbursements upon presentation of proper papers therefor.

<u>7/7/2023</u> DATE			 _____ ARLENE P. BLUTH, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE