

Burlington Ins. Co. v Tour Cent. Park Inc.

2024 NY Slip Op 31840(U)

May 16, 2024

Supreme Court, New York County

Docket Number: Index No. 655036/19

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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BURLINGTON INSURANCE COMPANY

Plaintiff(s),

-against-

TOUR CENTRAL PARK INC.

Defendant(s).
-----X

**DECISION AND ORDER
AFTER HEARING**

INDEX No.: 655036/19

Present:
Hon. Lynn R. Kotler, J.S.C.

Plaintiff, The Burlington Insurance Company, (Burlington) issued an insurance policy to defendant, Tour Central Park Inc., (CP) that remained in effect between October 20, 2017 and October 20, 2018 and earned a premium in the amount of \$572,412.96. On July 31, 2019, plaintiff commenced the instant action, seeking a judgment in its favor and against defendant in the amount of \$572,412.96, plus interest thereon from October 20, 2018. Defendant filed its answer in or about November 14, 2019. Burlington then moved pursuant to CPLR 3212, on its cause of action for breach of contract, for summary judgment in the amount of \$572,412.96, plus interest thereon from October 20, 2018. By decision dated May 18, 2020, Justice Arthur Engoron granted Burlington summary judgment on the issue of liability only and directed plaintiff to seek an inquest on damages and any necessary fees.

By order dated October 30, 2023, this court conferenced the matter with the parties' respective attorneys on November 28, 2023 and directed the inquest proceed on the issue of damages only and fees, if any, on January 17, 2024.

The hearing was held via Microsoft Teams on January 17, 2024, the transcript of which was filed on March 15, 2024. Lynne Brooke Brickman and Paul Peruzzi testified

on behalf of plaintiff and Mergey Saryyev testified on behalf of the defendant at the hearing. Prior to the inquest the parties stipulated to and marked the following documents, which were admitted into evidence: NYSCEF 9 (plaintiff's 1), NYSCEF 10 (plaintiff's 2) and NYSCEF 11 (plaintiff's 3). The court reserved decision at the conclusion of the inquest.

Based upon the testimony and the evidence introduced at the inquest, the court's decision is as follows.

Lynne Brickman was the auditor engaged by Interstate Premium Auditing to perform the audit on behalf of plaintiff. Ms. Brickman testified that she was given the audit assignment in October or November 2018 and that she scheduled the audit for January 15, 2019 with Melissa Chau, the accountant for CP at defendants' premises at 145 Nassau Street, New York, New York. Ms. Brickman further testified that at the audit she was given the sales ledger and profit and loss statement for the relevant policy term by Ms. Chau. Based on the materials provided by Ms. Chau, Ms. Brickman testified that she determined that the gross sales for bicycle rental during the relevant policy term was \$3,364,540. Ms. Brickman testified that she had an exit interview with Ms. Chau and that Ms. Chau expressed no concerns or issues.

Ms. Brickman prepared and transmitted her report to Interstate Premium Auditing for an internal review and that the report was then transferred to Burlington. On cross-examination, Ms. Brickman testified that while the policy term for the subject insurance policy was October 20, 2017 through October 20, 2018 the audited term was November 1, 2017 through November 1, 2018, a difference of 10 days, and that an audit period is

considered accurate if it is within 15 days of the policy period and that her audit was accurate.

Paul Peruzzi has been employed by Burlington for 7 years starting as premium audit manager and now is the Premium Audit Director, and also was in charge of legal collections from 2017 through 2021. Mr. Peruzzi testified that it's their procedure to receive the audit worksheets, which was done by our audit service, and then passed to our reviewers to review for quality and any potential errors and that there were none here. Mr. Peruzzi further testified about the audit process: that the audit worksheets are assigned to a reviewer who reviews for quality and makes sure they adhere to our guidelines as well as regulatory guidelines and they did here, that Burlington processed the audit endorsement to adjust the policy on the adjustable premium audit basis, that the endorsement was processed and the sales figure from the worksheet is then transferred to the appropriate class code, in this case 10151(bicycle rented to others) and that Burlington's sales exposure was \$3,384,540.

Mr. Peruzzi explained that that figure is times the rate \$169.9661 per thousand and that amounts to \$571,858 in total audit premium with an adjustment of a \$20,241 credit to defendant. The additional premium is \$551,817 not including taxes of \$19,858.21 and stamping fee of \$937.75. Mr. Peruzzi testified that an invoice was sent by plaintiff's broker to the policyholder's insurance broker/retail agent, who then sends the bill to the insured. In this case the amount is \$572,412.96, which is the amount due Burlington. Burlington did not receive any premium on the bill and subsequently made a demand for the full amount to the insured, which has not been paid to date.

Defendant called Mergen Saryyev, who is the owner of CP. Mr. Saryyev testified that his broker procured the policy on behalf of CP to cover his bicycle rental business, that he received the bill from his broker for the additional audit premium, but that it was not explained to him, that the bill was far in excess of what he expected and that the gross sales for his bicycle rental business was \$3,356,000 in 2017 and \$3,703,000 in 2018, but that his net profit in 2017 was \$163,000 and \$100,000 in 2018.

The court reviewed the Plaintiff's Exhibits 1, 2 and 3 entered into evidence. The court finds as follows: Ms. Brickman credibly testified that she performed the audit at CP's premises, that CP's accountant Ms. Chau provided her with the materials to be audited, that Ms. Chau did not have any issue or concern about the audit or materials she provided to Ms. Brickman, and that she prepared the audit which was subsequently sent to Interstate and then to Burlington and that the 10-day difference for an audit is considered accurate. Based on her audit she found gross sales of \$3,364,540. Further, Mr. Peruzzi credibly testified about Burlington's audit procedure, how the additional premium was determined and how the bill was transmitted to the brokers and then ultimately to CP. Mr. Peruzzi testified that plaintiff has not been paid even though payment was demanded by plaintiff. Mr. Saryyev's testimony does not warrant a different result.

Based on the foregoing, the court finds that the premium due plaintiff is \$572,412.96.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff is entitled to recover \$572,412.96 as and for additional

premium due and owing plus interest from October 20, 2018; and it is further hereby
and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been
considered and is expressly denied and this constitutes the Decision and Order and
Judgment of the court.

Dated: New York, New York
May 16, 2024

So Ordered:



Hon. Lynn R. Kotler, J.S.C.