

Seneca Ins. Co., Inc. v ESF Trading, Inc.

2022 NY Slip Op 34137(U)

December 2, 2022

Supreme Court, New York County

Docket Number: Index No. 656626/2022

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

SENECA INSURANCE COMPANY, INC.

Plaintiff,

- v -

ESF TRADING, INC.,

Defendant.

-----X

INDEX NO. 656626/2022

MOTION DATE 12/01/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 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, 34, 35, 36, 37

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

Plaintiff’s motion for summary judgment is granted and the cross-motion by defendant is denied.

Background

Plaintiff issued a commercial general liability policy to defendant that remained in effect from September 8, 2020 through September 8, 2021. The policy provided coverage for both defendant’s building and for the business itself. Plaintiff alleges that the policy charged a flat fee for the property portion but the commercial general liability portion was based upon defendant’s gross sales during the policy period. Plaintiff explains that the policy was written with an estimated amount of exposure and was subject to a subsequent audit to determine the actual exposure and, consequently, the actual amount owed to plaintiff. It argues that audit revealed an additional premium of \$21,845.00, an amount that defendant has refused to pay. Plaintiff now moves for summary judgment and attaches the audit documentation to justify the amount it seeks from defendant.

Defendant cross-moves for summary judgment on the ground that plaintiff is not currently licensed by the state Department of Insurance and so it cannot bring the instant lawsuit. It also claims that plaintiff is not authorized to transact business in New York. Defendant also contends that it earned far less in profit because of the COVID-19 pandemic and that plaintiff should not be permitted “to profit off the plight [of] all small business owners.”

In reply, plaintiff points to a certificate of good standing issued by the State of New York Insurance Department, which plaintiff attached to its moving papers (NYSCEF Doc. No. 13). It also attaches a certificate of good standing that it obtained on November 21, 2022 reflecting that it has been authorized to transact insurance since 1978 (NYSCEF Doc. No. 33).

Discussion

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942

NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants plaintiff's motion and denies the cross-motion by defendant. As an initial matter, plaintiff established that it has standing to bring this case by submitting a certificate of good standing as well as an insurance license (NYSCEF Doc. No. 14).

With respect to the merits, defendant failed to raise an issue of fact. Defendant did not substantively dispute the audit documents submitted by plaintiff nor did it include anything from the defendant itself except for a two-line affidavit in which its Vice-President simply states that whatever defendant's attorney says is true.

To the extent that defendant claims that public policy should somehow compel the Court to deny the motion, that argument is wholly without merit. Defendant did not cite a single case for the proposition that the pandemic is a basis for this Court to arbitrarily rip up a contract (the insurance policy) that defendant entered into with plaintiff. The terms of the insurance policy were clear and simply because defendant does not want to pay what is owed is not a basis to ignore the contract. Defendant failed to sufficiently point to an issue of fact upon which this Court could deny plaintiff's motion and did not meet its burden for its cross-motion for summary judgment to dismiss this case.

Defendant also makes a bizarre argument that an exclusion contained in the policy for loss due to a virus or bacteria (*see* NYSCEF Doc. No. 10 at 50) somehow means that plaintiff is not permitted to recover based on defendant's gross sales. Of course, this exclusion means that *plaintiff* "will not pay for loss or damage caused by or resulting from any virus, bacterium or

other microorganism that induces or is capable of inducing physical distress, illness or disease” (*id.*). Defendant’s attempt to create a reciprocal obligation on plaintiff from this provision is unavailing. Defendant appears to claim that because plaintiff would not cover any of defendant’s losses from the pandemic, plaintiff should not be able to seek premiums that are based on defendant’s sales during by the pandemic. That is completely illogical and has no basis in law. The Court declines to create an additional contractual provision and then impose it on plaintiff.

The Court also severs and dismisses defendant’s counterclaim which contends that plaintiff commenced this action without standing. As stated above, that argument is without merit.

Summary

The Court recognizes that defendant is clearly frustrated with the subject insurance policy it procured. The commercial general liability portion required that the premiums would be calculated initially by an estimate and then adjusted by an audit of defendant’s gross sales. Defendant does not substantively contest the audit. That defendant’s *profits* from those gross sales may have decreased due to the pandemic is unfortunate but not a reason to ignore a valid and unambiguous contract that defendant signed; the premium was not calculated by profit, it was calculated by gross sales. There is no dispute that defendant got the benefit of the insurance protection it sought from plaintiff during the time period at issue. It must now pay what it owes.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted and the Clerk is directed to enter judgment in the amount of \$21,845.00 plus statutory interest from September 8,

2021 along with costs and disbursements upon presentation of proper papers therefor; and it is further

ORDERED that defendant's cross-motion is denied.



12/2/2022

DATE

ARLENE P. BLUTH, J.S.C.

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