

**Commissioners of State Ins. Fund v Tropical Auto  
Inc.**

2018 NY Slip Op 30889(U)

May 8, 2018

Supreme Court, New York County

Docket Number: 450602/2017

Judge: Robert D. Kalish

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

**PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM**

*Justice*

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**INDEX NO. 450602/2017**

COMMISSIONERS OF STATE INSURANCE FUND,

**MOTION DATE 5/8/2017**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

TROPICAL AUTO INC.,

Defendant.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

JUDGMENT - SUMMARY

Motion by Plaintiff Commissioners of State Insurance Fund for summary judgment, pursuant to CPLR 3212, is denied for the reasons stated herein.

**BACKGROUND**

Plaintiff Commissioners of State Insurance Fund (“NYSIF”) brings the instant action to recover \$27,102.91, allegedly representing \$22,215.50 in earned insurance premiums plus \$4,887.41 in collection charges, pursuant to a Workers’ Compensation insurance policy (no. 13868245) issued by NYSIF to Defendant Tropical Auto Inc. (“Tropical”) for the policy period from May 12, 2014 to June 15, 2016. (Aff. in Supp. ¶¶7-8, Ex. A [Complaint] ¶¶ 5-7; Ex. C [Statement of Account].)

In Tropical’s answer, Tropical admits that it “had a policy” with NYSIF, but it denies the amounts alleged to be owed. (Aff. in Supp., Ex. B [Answer].)

On the instant motion for summary judgment, NYSIF submits an affidavit from its employee named Alvin Hass who states that his “duties include determining the amount of earned premium due and owing on insurance policies issued, by the Plaintiff.” (Aff. in Supp. ¶ 1.) Mr. Hass states that, pursuant to a Statement of Account (attached as Exhibit C to his affidavit), NYSIF is owed a premium of \$22,215.50 plus collection charges of \$4,887.41, for a total of \$27,102.91. Mr. Hass further states, that if one examines the Statement of Account, “[o]n the left side of the printout demonstrating how the balance was arrived at are the dates that account statements were sent to line Defendant In this case, account statements were sent to the Defendant for several months. No objection to the account statements was received.” (Aff. in Supp., ¶ 9.) As such, Mr. Hass argues that the Court should award NYSIF summary judgment in the amount of \$27,102.91.

In opposition, Tropical argues – through its counsel – that NYSIF has failed to submit sufficient evidentiary proof to be entitled to an award of summary judgment on a breach of contract cause of action or for an account stated cause of action. In particular, Tropical argues that NYSIF has failed to submit a copy of any contract or agreement between the parties and that NYSIF has failed to submit “any invoices or account statements it claims were sent to Defendant in support of its motion for summary judgment on an account stated cause of action.” (Affirm. in Opp. ¶¶ 10-12.) Tropical further argues that the only document that NYSIF submits is “a document labeled ‘Statement of Account’” but that none of the “purported monthly statements are annexed to Plaintiff’s motion, even though they purport to have a ‘Bill Number’ and may even be hyperlinked.” (Id. ¶ 15.) Tropical further states that there is no evidence that “any supposed monthly statement was ever sent to Defendant.” (Id.)

In addition, Tropical submits an affidavit from its president Carl Dunbar who states that around September 2016 his office received information relating to an audit performed by the New York State Insurance Fund (NYSIF) regarding amounts due for premiums in connection with the Workers’ Compensation policy covering Tropical. (Dunbar Aff. ¶ 2.) Mr. Dunbar states that Tropical disputed the amount due for the premiums and that he and Tropical’s accountant Stan Charles “had numerous discussions with the auditor regarding issues with respect to the amount of premiums due in connection with the workers compensation policies.” (Id. ¶¶ 3-4.) Mr. Dunbar states that, “[i]n May 2017, NYSIF agreed to conduct an additional audit for the period May 12, 2015 through May 12, 2016 as well as other outstanding audit periods to determine the proper amount of premiums due from Tropical Auto.” (Id. ¶ 5.) Mr. Dunbar states, pursuant to a letter attached to Tropical’s opposition papers as Exhibit A, an audit appointment was scheduled May 4, 2017, during which NYSIF’s auditor would review Tropical’s books and “calculate the correct premium.” (Dunbar Aff. ¶ 5; Ex. A [Audit Scheduling Letter].) Mr. Dunbar states that “We have never received any response or statement of results from the May 4, 2017 additional audit which was undertaken at our request (and the request of our accountant) when we objected to the findings of the NYSIF from 2016.”

Mr. Dunbar adds: “It has always been our intention to pay the proper and appropriate premium due for the workers compensation policy. However, we have continued to object to the incorrect premium calculations assessed by NYSIF.” (Id. ¶ 15.)

In sum and substance, Tropical states that Mr. Dunbar’s sworn affidavit and the Audit Scheduling Letter stand in stark contradiction to Mr. Hass’s sworn statement that NYSIF monthly account statement to Tropical and received no objection. Accordingly, Tropical states that there are material questions of fact precluding summary judgment.

NYSIF submits an affirmation in reply which states incorrectly that “[t]he only opposition submitted by the Defendant is an attorney’s affirmation” and that there is “no affidavit from the Defendant[.]” (Affirm. in Reply. ¶ 3, 11.) The affirmation does not address the affidavit from Tropical’s president or the audit scheduling letter.

## DISCUSSION

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form.” (*Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980] [internal quotation marks and citation omitted].) “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Id.) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (See *Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

An insurer can establish prima facie entitlement to summary judgment by submitting an affidavit of a knowledgeable employee “that competently establishes the issuance of the policy ... and a computation of the earned premium by means of an audit of the insured’s books and records conducted at the termination of the policy.” (*Family Coatings, Inc. v Michigan Mut. Ins. Co.*, 170 AD2d 816, 817 [3d Dept 1991].) Once the insured meets its prima facie burden, the burden shifts to the insured to “come forward with evidence in support of its defense that it did not request or receive the benefit of the insurance coverage.” (Id.)

Here, Tropical admits that there was a policy between itself and NYSIF, however, it specifically challenges the amount owed and contends that it has never received the results of a May 4, 2017 audit of its books that was intended to “calculate the correct premium.” (Affirm. in Opp., Ex. A [Audit Scheduling Letter].) In addition, Tropical points out that NYSIF has failed to attach the underlying and supporting documentation that verify the amounts listed in the Statement of Account attached as Exhibit C. As such, there is a material question of fact concerning the computation of the premium owed to NYSIF by Tropical because, as Tropical points out, Tropical has never been told the result of the May 4, 2017 audit that was intended to compute the premium, and there is no evidence in the record whatsoever to establish that the amount claimed to be owed is based on the aforesaid May 4, 2017 audit of Tropical’s books.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Plaintiff Commissioner of State Insurance Fund for summary judgment, pursuant to CPLR 3212, is DENIED; and it is further

ORDERED that counsel for the parties are to appear for a preliminary conference on Tuesday, July 24, 2018 at 9:30 AM in Part 29 at 71 Thomas Street, Room 104.

The foregoing constitutes the decision and order of this Court.

5/8/2018  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

*Robert D. Kalish*  
HONORABLE ROBERT D. KALISH, J.S.C.  
J.S.C.