

Commissioners of the State Ins. Fund v Roadway Moving & Stor. Inc.
2018 NY Slip Op 33014(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 450321/16
Judge: David Benjamin Cohen
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SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58-----X
COMMISSIONERS OF THE STATE
INSURANCE FUND

Plaintiff,

-against-

Index No.

ROADWAY MOVING & STORAGE INC.,

450321/16

Defendant.

-----X
DAVID COHEN, J. :

Plaintiff Commissioners of the State Insurance Fund moves for summary judgment.

Plaintiff is suing defendant Roadway Moving & Storage Inc. to recover premiums due on a workers' compensation insurance policy. Defendant procured the policy, No. 21784830, from plaintiff from 2010 to 2014 to cover its employees, consisting of clerical, sales, executive and furniture moving personnel. The total number of said employees averaged between 20 to 30 individuals. Defendant retained the services of another entity, CG Services LLC (CG), to provide some labor and delivery services. The complaint alleges that defendant, which chose not to renew its policy after 2014, owes plaintiff \$131,859.02, having failed to make payment. The complaint consists of two causes of action for breach of contract and account stated.

Plaintiff moves for summary judgment, claiming that there is no material issue of fact. Plaintiff provides a copy of the policy issued to defendant as well as the insurance application, audit worksheets estimating the amount owed, and a statement of account. Plaintiff contends that these documents are sufficient proof that plaintiff has made out a *prima facie* entitlement to summary judgment. Plaintiff has included an affidavit from an employee, Robin John, who serves as an insurance underwriter. Plaintiff claims that John has knowledge of the facts and

circumstances involving the money owed by defendant based upon the aforesaid documents.

While the complaint alleges that plaintiff is owed \$131,859.02, plaintiff seeks \$127,218.85 here.

Plaintiff also seeks interest on the money at 9% per annum from September 15, 2014, the date that defendant cancelled its policy.

Defendant opposes the motion on several grounds. First, defendant argues that the motion is premature until discovery has been completed. Defendant contends that plaintiff has failed to properly account for GC as an insured subcontractor in its auditing. According to defendant, until plaintiff accounts for the payrolls of insured subcontractors, a determination of the actual audited premiums cannot be made. Defendant states that the audit worksheets from plaintiff clearly show that GC 's expenses, erroneously charged to defendant, were part of the audit, and that these charges were not properly adjusted.

Second, defendant contends that plaintiff failed to meet its burden of making a prima facie showing for summary judgment. Defendant claims that the evidence consists of an affidavit from somebody who has no knowledge of the facts of this case, and unsworn, unsigned audit reports, which are not proper business records. Defendant argues that the information submitted is not sufficient proof to establish summary judgment.

Third, defendant argues that the summary judgment motion must be denied because plaintiff failed to join a necessary party to this action, GC. Defendant contends that GC is a necessary party to the breach of contract claim, since GC was hired by defendant as a subcontractor, may or may not have reviewed the pertinent data at issue, and may or may not have paid the premiums at issue. According to defendant, it is settled that GC had its own policy with plaintiff. Defendant asserts that, in the absence of an inquiry into GC's audit records,

plaintiff would be potentially collecting premiums twice: first from GC, then from defendant. In addition, without the joinder of GC, defendant argues that the possibility exists of another action, by it or against it, based upon a claimed breach of contract.

In a reply affirmation, plaintiff argues that the evidence it submitted was sufficient for a summary judgment motion, and that it was defendant's obligation to show an issue of fact. Plaintiff states that although defendant asserted that it and GC had a leasing agreement, defendant failed to provide any evidence that its contract with GC was one involving a contractor/subcontractor relationship. Moreover, plaintiff claims that defendant never provided any evidence indicating that GC would be responsible for paying the premiums for workers' compensation coverage of its own employees. Thus, plaintiff argues that it assumed that defendant was responsible for paying premiums for GC's employees.

Plaintiff argues that there is no need for further discovery because defendant has not shown the existence of evidence exclusively within the knowledge or possession of plaintiff. Plaintiff avers that GC's payroll records are not in its possession, and that defendant has a duty to keep such records for its employees, both leased and non-leased. Moreover, plaintiff argues that defendant has failed to show how additional discovery from GC would alter the outcome of this case.

Plaintiff argues that the audit worksheets are admissible as evidence because they were made in the regular course of business, and that its underwriter is sufficiently qualified to offer the records into evidence. Plaintiff disputes the need to join GC as a party, since, it contends, the outcome would not have any effect on GC's policy with defendant. In addition, plaintiff argues that GC is not a party to the subject contract.

A party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has established a *prima facie* entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in an evidentiary form establishing the existence of triable issues of fact precluding judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In its opposition papers, defendant does not dispute plaintiff's claim, that defendant owes money to plaintiff, but does dispute the amount of the debt. Defendant argues that the inclusion of calculations involving GC's payroll as part of its outstanding premiums is improper. Defendant contends that GC is a subcontractor with a separate policy that it secured from plaintiff. Defendant claims that it should not be held accountable for GC's premiums. Plaintiff argues that GC has a lease with defendant and that the leased employees are subject to two treatments: (1) defendant, as plaintiff's client, obtains a policy for its non-leased and leased employees. GC, a labor contractor, would have to either obtain a policy for its non-leased employees and get an endorsement on defendant's policy naming GC as an additional insured, to exclude the leased employees, or maintain coverage under its policy for both its leased and non-leased employees, or (2) GC obtains a separate policy for defendant's leased employees by obtaining a policy identifying defendant on the Information Page of the policy as follows: "ABC Co. L/C/F (Labor Contractor For) XYZ Co." Defendant would maintain a policy for its non-leased employees and get an endorsement on that policy excluding the leased employees.

Plaintiff contends that defendant failed to provide proof that GC would be responsible for the coverage of the leased employees. Plaintiff also contends that defendant failed to provide

proof that GC was a subcontractor of defendant.

Defendant submitted evidence that GC has a separate policy with plaintiff, No. 21152915.

There is an affidavit from Raz Spair, president of defendant corporation, asserting that he spoke to GC's representatives about the matter of including GC premiums in the audits involving defendant, and that he was informed that the matter would be resolved. Defendant did not submit any copies of contracts that it had with GC, indicating the nature of their relationship or the manner in which the insurance would be provided.

The court finds that plaintiff is entitled to summary judgment on the issue of liability.

Defendant does not deny liability for failure to pay premiums to plaintiff. The amount of damages is the disputed matter, and this court holds that an inquest shall be held to determine what the appropriate amount of damages is owed to plaintiff. Defendant has submitted sufficient evidence to raise an issue of fact as to whether the auditing of defendant's policy was intermingled with that of GC.

The court does not find that GC is a necessary party in this action. GC would not be inequitably affected by a judgment here, and complete relief between the parties could be realized in GC's absence.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted with regard to liability; and it is further

ORDERED that an immediate trial of the issue of damages shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of

this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calender for such trial.

Dated: 11-26-2018

ENTER:



J.S.C.

HON. DAVID B. COHEN
J.S.C.