Compensation Guidance Servs., Inc. v Volunteers of Am.- Greater N.Y., Inc.
2020 NY Slip Op 30363(U)
February 4, 2020
Supreme Court, Kings County
Docket Number: 502933/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of February, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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COMPENSATION GUIDANCE SERVICES, INC.,

Plaintiff,

- against -

Index No. 502933/16

VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC.,

Defendant.

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The following papers e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	44
Opposing Affidavits (Affirmations)	64
Reply Affidavits (Affirmations)	75-76

Upon the foregoing papers, defendant Volunteers of America-Greater New York, Inc. moves, in motion (mot.) sequence (seq.) number three, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Compensation Guidance Services, Inc.

Plaintiff commenced this action to recover sums allegedly owed by defendant for workers compensation insurance consultation services. On March 7, 2013, defendant signed a letter agreement which provides the following:

> "[Plaintiff] will conduct a complete review of your current Rating Modifications, General, and employees Classifications, thereby generating return premiums or credits from your insurance company. In order to accomplish this, we will review your policy audits, classifications, and experience history, looking for errors, missassignments [sic], and improperly included losses and reserves. Once identified, we will amend the policy Classification or Rating Modification from your insurance company. We will also review each policy to ensure that the proper discounts and dividends and other modifiers have been applied. In the event of an error, we will have it corrected and the appropriate refund or credit issued. Our fee is 40% of the actual refunded premiums or credits that you receive as a result of our service. IF THERE IS NO RECOVERY THERE IS NO FEE. You will not be invoiced until you receive a check, credit or reduced premium from your insurance company. Our fee only applies to your Workers Compensation premium for the 2013 policy term and past policies. It does not apply to any credits or refunds in the future."

The terms of the 2013 letter agreement were similar to a 2011 agreement previously executed by plaintiff and defendant. Plaintiff alleges that as a direct result of its services under the 2013 agreement, defendant obtained a $447,405.67 credit to its workers' compensation premiums from its insurer. Plaintiff states that it billed defendant for its alleged services in obtaining those savings, for $178,962.27, or 40% of defendant's total savings. However, defendant has refused to remit payment. In its complaint, plaintiff sets forth causes of action for breach of contract and unjust enrichment.

Plaintiff's claims are grounded in its alleged work with one of defendant's former employees, Nancy Fullerton (Fullerton), to correct defendant's internal payroll computer system with new classifications for defendant's employees. Specifically, plaintiff claims that

he reclassified many employees who had been designated with code 8864 (professional) and changed their classification to 8810 (clerical), which carries a lower premium and reduced the overall amount defendant would have to pay its insurer, New York State Insurance Fund (NYSIF), for defendant's workers' compensation insurance policy.

Several witnesses appeared for examinations before trial (EBTs), including Aaron Silber (Silber) on behalf of plaintiff and employee Leila Kahn (Kahn), employee Robert Krzywicki (Krzywicki) and former employee Fullerton on behalf of defendant. An EBT was also taken of Chung Bun Ching (Chung), an auditor for NYSIF who conducted an audit on December 24, 2014 for the policy terms July 1, 2012 to July 1, 2013 and July 1, 2013 to July 1, 2014.

At the outset, there is no dispute between the parties that the 2013 written agreement signed by defendant is valid and details the circumstances under which plaintiff would be entitled to payment. Thus, the cause of action for unjust enrichment is precluded and dismissed accordingly (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Saunders Ventures, Inc. v Catcove Group, Inc.*, 151 AD3d 991, 995 [2d Dept 2017]).

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 demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact

(*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation (*see Smith v Johnson Prods.*, 95 AD2d 675, 676 [1st Dept 1983]).

"The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*Legum v Russo*, 133 AD3d 638, 639 [2015]; *see All Seasons Fuels, Inc. v Morgan Fuel & Heating Co., Inc.*, 156 AD3d 591, 594 [2017]; *Alliance Natl. Ins. Co. v Absolut Facilities Mgt., LLC*, 140 AD3d 810 [2016]). "'[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see Legum*, 133 AD3d at 639).

In support of its motion for summary judgment, defendant refers to the specific language in the 2013 agreement which limits plaintiff's recovery to 40% of the actual refunded premiums or credits that defendant receives ***as a result of*** plaintiff's service and argues that the savings realized from the 2014 audit was not the result of any of work or services by plaintiff. Defendant thus maintains that it does not owe plaintiff any fee. With its motion, defendant submits the affirmation of its attorney referencing portions of the EBT testimony of Silber, Kahn, Chung, Fullerton and Kryzwicki, along with the EBT transcripts and other documentation.

At his EBT, Silber testified that for the subject time period, his point of contact with defendant was Fullerton (defendant's summary judgment motion, exhibit C, Silber tr at 95-96) and that he corresponded with Fullerton regarding classification of payroll for workers' compensation purposes. Silber stated that as a result of these communications, he concluded that program directors, clerks, and front desk staff were improperly classified in code 8864 (the code for "professional" services), instead of code 8810 (a "clerical" designation which carries with it a lower premium) (*id.* at 96, 103). When plaintiff was asked how he knew the credit defendant received following the audit was the result of his analysis or work, he responded:

> "Because the - - once again, as we mentioned before we calculate how much payroll we feel should be in one the [sic] few different codes in all of the different codes there are. We look at the past, what the client has had done prior to doing our service for them, and then we know how much we had done correct and we see the State Insurance Fund has taken the correct numbers and applied them into the different codes" (*id.* at 86-87).

Fullerton, defendant's former director of benefits and compensation, testified that she had corresponded with plaintiff via e-mail concerning updating defendant's computer system to include new workers' compensation classification codes for each employee and advised him that the system would be updated (defendant's summary judgment motion, exhibit F, Fullerton tr at 34). However, Fullerton testified that she had no personal recollection of actually making those changes (*id.*). Fullerton explained that the changes would not have been made because doing so would require time defendant "didn't have" (*id.* at 35).

Kahn, defendant's director of risk management and safety, responsible for placing and managing the claims of the workers' compensation program (defendant's summary judgment, motion, exhibit D, Kahn tr at 12) appeared at the audit along with Krzywicki. Kahn testified that she did not personally provide any documents to NYSIF for consideration in the audit and does not know nor has ever spoken with Silber (*id.* at 13-14).

Chung, the NYSIF auditor who performed the subject workers' compensation audit for the policy periods of July1, 2012 to July 1, 2013 and July 1, 2013 to July 1, 2014, testified that the salary information, classification codes, and payroll in the NYSIF system prior to the audit were estimates or projections, and that he determined during the course of the audit which employees fall into each classification (8864 or 8810) (defendant's summary judgment motion, exhibit E, Chung tr at 141). Chung also testified that any information NYSIF had with regard to classification codes given by a policy holder would have no bearing on his ultimate determination of the proper codes during his audit (*id.* at 49-50). Chung testified that in making determinations as to the correct workers' compensation classification codes for each employee, he used mostly information about the particular programs in which each employee was involved (*id.* at 26). Chung did not recall defendant providing him with documentation that contained workers' compensation classifications codes for its employees - and if they did, he was unaware of it:

> "Q: To clarify, it's your recollection that those worksheets, and no other document that Volunteers of America gave you, contained classification codes?
>
> "A: I don't remember.

"Q: Okay.

"A: If they do, I didn't know it" (*id.* at 34-35).

Chung testified that even if he was provided with documentation containing suggested designations of defendant's various employees as "professional" or "clerical," such broad designations alone would not have been enough for him to make any sort of determination without additional information (*id.* at 143-144, 146-149).

Chung testified that any shift in number of employees/amount of payroll designated in the 8864 category versus the 8810 category was his decision (*id.* at 63-64), and that he was able to make most of these determinations by reviewing a 50,000 line spreadsheet which provided information concerning the particular program in which each employee was involved (*id.* at 67-69).

Krzywicki, a consultant for defendant who appeared at the audit, testified that he was "pretty much" the only person working with Chung and had no reason to believe that any other individual provided Chung with documentation (defendant's summary judgment motion, exhibit G, Krzywicki tr at 11). Krzywicki testified that he was not aware of plaintiff or Silber until defendant's chief financial officer asked him to inquire about plaintiff's bill for the alleged services in dispute (*id.* at 12) and that he was not aware that Fullerton had been working with plaintiff (*id.* at 15). Krzywicki stated that he maintained a record of all the documents he provided to Chung (*id.* at 10). When Krzywicki was shown e-mail correspondence between plaintiff and Fullerton and a portion of a spreadsheet containing job titles and workers compensation codes (which may have been compiled through the efforts

of plaintiff), he testified that it looked to be a report that was pulled from "ADP payroll" (*id.* at 25) and confirmed that this document was not given to NYSIF for the audit:

> "Q: Is there any reason to think that this document was not given to the auditors, to NYSIF for the audit?
>
> "A: Yes, because I gave, to my knowledge all the documents that the NYSIF auditor used to complete those audits and this schedule is not in my schedule, was not given by me to that auditor" (*id.* at 26-27).

Krzywicki stated that defendant did not provide Chung with any documents from payroll (Fullerton's department) which had correct/updated workers' compensation classification codes: "I know we weren't able to pull them, a report for him, so he instead validated the job descriptions and did a determination of which Workers' Comp. codes they should be in. He also validated and compared that with the general ledger report." (*id.* at 36-37). Krzywicki testified that Chung went through 50,000 employees listed in a spreadsheet and determined the appropriate workers' compensation code for each one based on the job titles and descriptions provided by defendant (Kyzywicki EBT at 37).

Krzywicki also testified that Fullerton never updated the codes in the computer system:

> "We were not able to pull them into a report and the whole history with those codes was that Nancy Fullerton was supposed to be working on updating them and for every year that she was there and I worked with her on every subsequent Workers' Comp. audit that was a bone of contention that those codes were wrong and they never been updated. That is what I know about the codes that they were supposedly had wrong, not updated, and Nancy never had time to do it. It was a very time consuming project and that was always her reason for saying they are not updated" (*id.* at 24).

Krzywicki also confirmed that any codes in defendant's computer system were still wrong following the subject audit: "I know from the audit subsequent to 2012/2013, 2013/2014 that there were still the issue with the Workers' Comp. codes being wrong in the system and that was brought up at every single Workers' Comp. audit" (*id.* at 35).

The court finds that the submitted testimony, particularly the testimony of Chung and Krzywicki, establishes prima facie that the credits or savings defendant received following the 2014 audit did not result from plaintiff's services. The testimony demonstrates that the determination of the workers compensation codes (and resultant credits of premiums) were done independently by Chung based on information regarding job titles and descriptions rather than documentation produced through the efforts of plaintiff containing reclassified codes. Consequently, defendant has established prima facie that it did not breach the 2013 agreement by refusing to pay plaintiff for the alleged services rendered. The burden thus shifts to plaintiff to raise an issue of fact.

In opposition to defendant's summary judgment motion, plaintiff submits the affirmation of his counsel who refers to the EBT testimony of defendants' witnesses and argues that it is contradictory and indicative of a "cover up." Plaintiff argues that certain information had to be provided to Chung that would allow for him to make a proper determination whether to code an employee as an 8810 or an 8864 employee, that defendant had the means to provide Chung with the information that would help him reclassify employees as 8810 employees, that Chung needed that information to help make a

determination and that several million dollars in payroll was reallocated from 8864 employees to 8810 employees, allowing for a much lower premium. Plaintiff 's counsel contends that the foregoing was "all in line with what plaintiff was hired to do."

However, there is no proof submitted by plaintiff to demonstrate that documentation containing codes determined by plaintiff was provided to Chung or used by Chung in his determination, nor is there any proof submitted that the information necessary for Chung to make the determination with respect to proper codes was compiled by plaintiff. Significantly, plaintiff does not refer to any of the specific contents of the file provided by Krzywicki to Chung (which Kryzwicki averred was the only information provided to Chung) that represented the fruits of plaintiff's labor.[1] There is no dispute that plaintiff was not present at the audit, and plaintiff does not allege it directly provided any documents to Chung. There is also no proof to support plaintiff's allegation that, prior to discovery, Krzywicki deleted any potion of the file that he testified was the sole package of documentation and information provided to Chung for the 2014 audit. Put simply, any contention that Chung considered documentation or information produced through the efforts of plaintiff is based on speculation. Accordingly, it is

[1]In a reply affidavit, Krzywicki avers that the electronic folders provided to plaintiff in discovery are the entirety of documents provided to NYSIF for the audit, at which only himself, Kahn and Chung were present.

ORDERED that defendant's summary judgment motion, mot. seq. number three, is granted, and the complaint is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

Justice Lawrence Knipel

KINGS COUNTY CLERK
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