

**Commissioners of the State Ins. Fund v BDM
Solutions LLC**

2020 NY Slip Op 33552(U)

October 26, 2020

Supreme Court, New York County

Docket Number: 451847/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

- v -

BDM SOLUTIONS LLC,

Defendant.

-----X

INDEX NO. 451847/2018

MOTION DATE 02/25/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31

were read on this motion to/for JUDGMENT - SUMMARY

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiff for summary judgment is denied; and it is further

ORDERED that counsel shall submit a proposed preliminary conference order or competing proposed preliminary conference order(s) to 59nyef@nycourts.gov and NYSCEF on or before November 30, 2020.

DECISION

Plaintiff, Commissioners of the State Insurance Fund (SIF), moves, pursuant to CPLR 3212, for summary judgment in the amount of \$86,816.61, representing the alleged balance due from defendant, BDM Solutions LLC (BDM), for workers' compensation insurance coverage premiums (Policy Number 23478209).

There is no dispute that SIF issued a policy to BDM for workers' compensation insurance. The policy's coverage, with renewals, spanned from November 13, 2014 to November 23, 2017, when the policy was cancelled. SIF billed BDM \$86,816.61, as the balance for premiums for coverage, through a billing statement mailed to BDM on or near June 13, 2018.

The causes of action of Plaintiff's complaint are for breach of contract and account stated.

The essence of the parties' dispute is SIF's calculation of BDM workers' compensation insurance premium. BDM contends that SIF had agreed on classifications of certain BDM workers on an audit, but then changed those classifications, erroneously classifying some workers in a carpentry classification and charging BDM a higher premium. BDM's answer to the complaint alleges that SIF acted in bad faith in changing audit findings after the audit, billing BDM in excess of those findings, and knowingly changing the result of the audit to increase the charges (NYSCEF Doc. No. 6).

Generally, "evidence consisting of the insurance application, the policy, the audit reports and the resulting statements [are] sufficient to make out a prima facie showing of entitlement to judgment as a matter of law" (Commissioners of State Ins. Fund v Concord Messenger Serv., Inc., 34 AD3d 355 [1st Dept 2006]). However, it "is well settled that [t]he

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 Univ. Med. Ctr., 64 NY2d 851, 853)" (Finkelstein v Cornell Univ. Med. Coll., 269 AD2d 114, 117 [1st Dept 2000] [quotation marks omitted]). Equally well settled is that "[r]egardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993], quoting Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [quotation marks omitted]).

To meet its moving burden on this motion, and to demonstrate the admissibility of its documents, SIF submits the affidavit of Arif Malik (NYSCEF Doc. No. 8), who avers that SIF's auditors maintain a log of audits of SIF's assureds, such as BDM, and create "Auditor Worksheets" (auditor worksheets) contemporaneously in time, or shortly after an audit is completed, which are then used by SIF to determine premium payments due (NYSCEF Doc. No. 8, ¶ 21). Malik further avers that auditor worksheets, submitted here by SIF in moving, form the basis for SIF's final charges concerning the period from November 13, 2016 to November 13, 2017, and that the worksheets for that period were prepared based upon an actual audit

conducted at BDM's accountant's office on February 28, 2018 (NYSCEF Doc. No. 8, ¶¶ 26-27).

An examination of those audit worksheets reveals a supplemental report which states that a partial audit was performed in December 2017. This report also appears to directly address the issue of SIF's assignment of worker classification categories for BDM's workers (NYSCEF Doc. No 16 at 22 of 22). As to report's contents, on summary judgment, the meaning of SIF's assertions therein, and any inferences drawn from them, must be viewed in favor of BDM, the non-moving party (Matter of Eighth Jud. Dist. Asbestos Litig., 33 NY3d 488, 496 [2019]). When viewed in that manner, the report does not eliminate fact issues about the parties' dispute or show that the audit upon which SIF relies is consistent with the bill, as the report appears to be an internal SIF query concerning whether the auditor's classification of certain workers is correct. Furthermore, SIF's submissions contain no affidavit from the auditor, or another knowledgeable party, explaining the meaning of the supplemental report, or otherwise addressing its contents. SIF also does not address why BDM was credited for \$47,637.66, concerning workers, in February 2018, but then billed for a different classification at a higher amount (see NYSCEF Doc. No. 25 at 14 of 17).

Thus, on this record, SIF has not met its burden to demonstrate that the premiums were correctly calculated and owed, which is at the heart of this dispute (see e.g., Seneca Insurance Co. Inc. v Certified Moving & Stor. Co, LLC, 82 AD3d 677, 687 [1st Dept 2011] [prima facie case not met where evidence submitted did not sufficiently address classification issue which was at the heart of the parties' dispute]; Atlantic Mutual. Ins. Co. v Joyce Intern., Inc., 2005 NY Slip Op 30391[U] [Sup Ct, NY County 2005], affd as mod 31 AD3d 352, 352 [1st Dept 2006] [insurer failed to submit evidence to establish that the calculations of retrospective premiums were accurate and made in accordance with the appropriate rating plan]). As to the account stated claim, such a claim "cannot be made the instrument to create liability when none exists" (see Gurney, Becker & Bourne, Inc. v Benderson Development Co., Inc., 47 NY2d 995, 996 [1979]).

In summary, a movant's failure to make its prima facie showing results in the denial of the motion, regardless of the sufficiency of the opposing papers (Corprew v City of New York, 106 AD3d 524, 525 [1st Dept 2013]; TrizecHahn, Inc. v Timbil Chiller Maintenance Corp., 92 AD3d 409, 410 [1st Dept 2012] [where movant failed to demonstrate "the absence of triable issues of fact" denial warranted "regardless of the sufficiency

of the opposing papers"). Consequently, the motion must be denied.

In reply, SIF argues that questions of classification are not within this court's jurisdiction but require administrative review by the New York Compensation Insurance Rating Board. As a general rule, "a rate classification may not be contested in court" (Commissioners of State Ins. Fund v Fox Run Farms, Inc., 195 AD2d 372, 375 [1st Dept 1993]). However, no determination as to whether or not any classification rate is actually correct, or not, has been made in the instant case. This court has determined only that SIF's submissions are not sufficient to meet its moving burden to, with admissible evidence, eliminate all material issues of fact concerning its calculation and determination of the premiums that it claims that it is owed, in order to demonstrate its entitlement to judgment. Moreover, absent from the motion record is an actual determination, or dismissal, by the Rating Board, in response to the December 17, 2018 appeal letter concerning the classification issue sent by BDM to the Rating Board.

10/26/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: