SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND

Plaintiff,

- v -

NEW WORLD INTERIOR CLEANOUT SERVICES INC.,

Defendant.

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INDEX NO. 451938/2018

MOTION DATE 05/11/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77

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

Plaintiff, Commissioners of The State Insurance Fund (plaintiff), commenced this action for breach of contract and account stated against defendant, New World Interior Cleanout Services, Inc. (defendant), seeking unpaid premium payments for workers' compensation insurance coverage afforded to defendants from March 17, 2014 to November 24, 2016, in the amount of $1,439,801.16. Plaintiff now moves pursuant to CPLR 3212 summary judgment on the amended complaint, for interest from October 8, 2017 and for dismissal of defendant's counterclaims. The motion is opposed. For the following reasons, plaintiff's motion is granted.

In March 2014, defendant applied for workers' compensation and employers' liability insurance coverage from plaintiff. The agreement to pay premiums for the subject insurance is based upon payroll and contained in "Part Four-Premium" of the Policy, which states that premiums charged by plaintiff would be determined by "[m]anuals of rules, rates, rating plans and classifications"; the variations of the manual rates would be determined based on appraisals of defendant's business; and that defendant must notify plaintiff if its employees work classifications differ from the estimated exposure on the policy (NYSCEF doc. no. 57). The

policy was self-renewing on an annual basis effective October 8, 2013 until the policy was cancelled on November 8, 2017.

Plaintiff thereafter performed audits of defendant's books and records, including an August 28, 2020 audit, for the policy periods of October 8, 2013 to October 8, 2017. According to plaintiff, the audit revealed that defendant owes plaintiff the sum of $1,439,801.16 for premiums due for insurance coverage during the applicable policy periods. Plaintiff thereafter commenced this action seeking damages for breach of contract and account stated in the amount of $425,658.00. On January 28, 2022, the court granted plaintiff's unopposed motion to amend the damages under the first cause of action for breach of contract to $1,439,801.16.

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding the motion, the court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851, 853 [1985]).

Here, plaintiff makes a prima facie showing that it is entitled to summary judgment on its claim for breach of contract by submitting the affidavit of Elena Serri (Serri), an underwriter

employed by plaintiff. According to Serri, as part of her role as an underwriter, she is "[f]ully familiar with the facts and circumstances of this action, based upon the records kept in the normal course of business" by plaintiff, and that plaintiff keeps the records she relies on in the normal course of business (NYSCEF doc. no. 54 at ¶ 1). Serri explains, from her personal knowledge, plaintiff's business practices for calculating premiums, filling out auditor worksheets, and maintaining statements of account, along with defendants' application for coverage, including the declaration, information/renewal pages and endorsements, the policy, the relevant auditor worksheets and supplementary reports, including the August 24, 2020 audit, annual policy information pages explaining the relationship between the premiums charged based on the information contained in the audit reports, and defendant's current statement of account showing $1,439,801.16 as the balance due for policy periods of October 8, 2013 to October 8, 2017 (*see Commissioners of State Ins. Fund v Beyer Farms, Inc.*, 15 AD3d 273, 274 [1st Dept 2005] ["Plaintiff presented unrebutted business records, in the form of the insurance application, the policies and endorsements thereto, the audit reports and resulting invoices, including retrospective accountings, which were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law"]; *Commissioners of the State Ins. Fund v Allou Dist.*, 220 AD2d 217 [1st Dept 1995] ["Plaintiff's business records, which included the insurance application, audit worksheets and resulting invoices and statement of accounts for a balance due, were sufficient to make out a prima facie showing of entitlement to judgment as a matter of law that defendant's summaries of its payroll"]).

In opposition, defendants fail to raise an issue of fact. Defendants argue that the affidavit of plaintiff's underwriter is without personal knowledge, and thus without probative value.

Defendant further argues that underwriter's affidavit is conclusory in that it makes conclusory assertions concerning facts in documents that are not referenced in the documents submitted. As discussed above, plaintiff's underwriter succinctly described the documents used in the calculation of premiums due by defendant.

Further, the affidavit of defendant's bookkeeper, Maurizio Bordone (Bordone), is conclusory and fails to raise an issue of fact. Bordone states that plaintiff failed to "properly account for multiple errors concerning overtime" and that plaintiff's submissions fail to address "ancillary costs," but the affidavit does not address how those purported discrepancies would have changed plaintiff's calculation of the premium due.

Defendant's contention that plaintiff's motion is premature to the extent that further discovery is needed is unavailing. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). Here, defendant does not "provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party" (*Mogul v Baptiste*, 161 AD3d 847, 848 [2d Dept 2018]).

Plaintiff also moves to for summary dismissal of defendant's counterclaims, however, plaintiff does not specify which counterclaims it seeks to dismiss. In any event, the counterclaims were already dismissed pursuant to the October 31, 2019 decision and order by another justice of this court (NYSCEF doc. no. 68). Even if the not all of the counterclaims were

dismissed by the prior order, defendant's counterclaims must be dismissed, as claims seeking monetary damages are only cognizable in the Court of Claims (*see Commrs. of the State Ins. Fund v Trio Asbestos Removal Corp.*, 9 AD3d 343, 345 [2d Dept 2004] ["A counterclaim against the State Insurance Fund is only cognizable in the Court of Claims"]; *Commrs. of the State Ins. Fund v Netti Wholesale Beverage Co.*, 245 AD2d 48, 48 [1st Dept 1997] ["Defendant's counterclaim is cognizable only in the Court of Claims … even where it is presented as a setoff to plaintiff's claim in Supreme Court"]).

Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment on the complaint is granted as to plaintiff's claim for breach of contract and the dismissal of defendant's counterclaims only; and it is further

ORDERED that Clerk is hereby directed to enter judgment in favor of plaintiff and against defendant in the amount of $1,439,801.16 plus statutory interest from October 8, 2017, the date the instant policy terminated, plus costs and disbursements; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendant, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

10/7/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE