

Lovell Safety Mgt. Co., LLC v Burtis Constr. Co., Inc.
2014 NY Slip Op 32414(U)
September 12, 2014
Sup Ct, NY County
Docket Number: 651597/12
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X
LOVELL SAFETY MANAGEMENT CO., LLC,

Plaintiff,

-against-

BURTIS CONSTRUCTION CO., INC.,

Defendant.
-----X

DECISION AND
ORDER

Index No.
651597/12

HON. ANIL C. SINGH, J.:

Plaintiff moves pursuant to CPLR 3211(b) for an order dismissing the third and the seventh through eighteenth affirmative defenses in defendant's answer. Defendant opposes dismissal of its third, ninth, thirteenth, fifteenth, sixteenth, seventeenth and eighteenth affirmative defenses. Defendant does not oppose dismissal of its seventh, eighth, tenth, eleventh, twelfth, and fourteenth affirmative defenses.

Defendant Burtis Construction Co., Inc., based in Yonkers, New York, is engaged in the rehabilitation of bridges and the construction of pumping stations and landfills. It purchased a workers' compensation and employers' liability policy through the State Insurance Fund ("SIF") and, in 2003, became a member of a safety group consisting of like construction companies. A safety group is a loss-

sensitive insurance program that enables employers in the same industry to pool their insurance premiums with the goal of reducing the cost of workers' compensation insurance. The group manager submits insurance applications and serves as a liaison to SIF for group members. Plaintiff Lovell Safety Management Co., LLC, is safety group manager of defendant's group.

Plaintiff entered into an agreement with defendant in 2003 pursuant to which plaintiff was to "represent ... and service [Burtis] in connection with all matters pertaining [to its Workers' Compensation] policy" (Affidavit of Linda Richardson, exhibit B).

Plaintiff commenced the instant action by filing a summons and complaint on May 9, 2012. The complaint alleges that defendant owes fees to plaintiff for services rendered from April 1, 2008, through December 18, 2011. Plaintiff seeks monetary damages in the amount of \$128,075.06.

Defendant filed an answer, asserting eighteen affirmative defenses and a counterclaim. The counterclaim alleges that plaintiff failed to represent defendant at SIF audits and failed to ensure that defendant's employees were properly classified so defendant would pay the proper amount of workers' compensation insurance premiums. As a result, defendant asserts that it is being sued by SIF in a separate lawsuit for \$692,374.65 for premiums it purportedly owes. Defendant

asserts counterclaims for breach of contract, unjust enrichment, negligence, and breach of fiduciary duty. Defendant seeks damages from plaintiff in the amount of \$1,000,000, as well as attorneys' fees.

Discussion

“On a motion to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law” (534 East 11th Street Housing Development Fund Corp. v. Hendrick, 90 A.D.3d 541, 541-542 [1st Dept., 2011]). “In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed” (id.). “However, once the plaintiff meets its burden of establishing that the affirmative defenses are without merit, the defendant has the burden of rebutting that conclusion through something more than conclusory evidence or hearsay affidavits” (97 N.Y.Jur.2d Summary Judgment, Etc., section 153).

“Motions to dismiss are routinely denied where there are issues of fact requiring trial” (id.). If the defense lacks merit as a matter of law, dismissal is appropriate (Hasbro Bradley Inc. v. Coopers & Lybrand, 128 A.D.2d 218 [1st Dept., 1987]).

The third affirmative defense asserts as follows:

As a result of Lovell's wrongful acts, Burtis has had to hire legal counsel to challenge SIF's wrongful determinations of the premiums it owes for the disputed period.

Plaintiff contends that since the safety group's rules and the affiliation letter do not require that plaintiff pay defendant's attorneys' fees, and because no statute or court rule requires plaintiff to do so, the third affirmative defense should be stricken.

In response, defendant contends it hired plaintiff to act in its best interests and minimize the cost of its Worker's Compensation Insurance, but plaintiff acted in its own self interest and failed to attend audits and to protest SIF's erroneous classifications. Defendant asserts that plaintiff's actions amount to bad faith conduct, which entitle defendant to recoup its legal fees in the SIF action as punitive damages in the instant action.

Generally, a plaintiff may not be awarded attorneys' fees as part of a damages award unless such relief is specifically authorized by statute, rule or contract (Coby Electronics Co., Ltd. v. Toshiba Corp., 108 A.D.3d 419 [1st Dept., 2013]).

Here, defendant has not demonstrated a contractual or statutory basis for an award of attorneys' fees. Further, the Court finds as a matter of law that defendant has not alleged facts sufficiently egregious or outrageous that could justify an award of attorneys' fees as punitive damages. Accordingly, the third affirmative defense

must be stricken.

Next, plaintiff asserts that the seventh through ninth and the eleventh through eighteenth affirmative defenses should be stricken on the grounds that they are set forth in a conclusory manner without any factual underpinning or support.

Defendant exhibits the sworn affidavit of Linda Richardson, who states that she is the president of defendant Burtis Construction Co., Inc. Ms. Richardson's affidavit asserts detailed, specific facts to support the challenged affirmative defenses.

In short, the Court finds that Ms. Richardson's affidavit amply demonstrates there are issues of fact requiring trial.

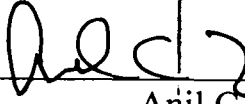
For the above reasons, it is

ORDERED that the motion is granted, and the third, seventh, eighth, tenth, eleventh, twelfth, and fourteenth affirmative defenses of defendant are dismissed; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 320, 80 Centre Street, on October 8, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 9/12/14
New York, New York


Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE