[*1] **Norguard Insurance Co. against Apex Design & Construction Corp.**

700422/2011

SUPREME COURT OF NEW YORK, QUEENS COUNTY

2011 NY Slip Op 52259U*; *2011 N.Y. Misc. LEXIS 6075

December 19, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

COUNSEL: [**1] For Plaintiff: Brandon L. Sipple, Esq., of Staff Counsel of Guard Insurance Group, New York, New York.

For Defendants: Joseph D. Nohavicka, Esq., Mavromihalis, Pardalis & Nohavicka, Astoria, New York.

JUDGES: Charles J. Markey, J.

OPINION BY: Charles J. Markey

OPINION

Charles J. Markey, J.

[*2] NorGuard Insurance Company ("NorGuard"), the plaintiff in this action is an insurance carrier suing for the collection of alleged earned premium due. Defendant Apex Design and Construction Corp. ("Apex"), counterclaims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO," codified in *18 U.S.C. §§ 1961-1968*) and for fraudulent billing practices. Plaintiff moves to dismiss the counterclaims based upon documentary evidence and for failure to state a cause of action. Defendant opposes the motion and cross moves to amend the answer to assert the affirmative defense of lack of in personam jurisdiction and to dismiss the underlying action, pursuant to *CPLR 3211(a)(8)*. Plaintiff NorGuard opposes the cross-motion.

The Facts

Plaintiff NorGuard is a corporation licensed by the New York Insurance Department to sell insurance in the State of New York. Plaintiff and defendant entered into a written contract wherein plaintiff [**2] agreed to provide defendant with workers' compensation and employer's liability insurance in consideration for the payment of premium.

In New York, premium for workers' compensation insurance is calculated by multiplying remuneration paid by an insured-employer by a rate, or series of rates, set by the New York Compensation Insurance Rating Board (the "Board"). Since a company cannot know how much an insured will pay in remuneration in the future, at the beginning of a policy period, the premium for the period is estimated based on information supplied to the insurer, by the insured, on their application for insurance. At the end of the policy period, the actual premium for the policy is calculated by performing an audit wherein actual remuneration figures are ascertained.

Here, the procedure for auditing policies and calculating actual premium is set forth in Part Five of the insurance policy. At audit, the actual remuneration figures are multiplied by the applicable classification code rates to determine actual premium. The estimated premium paid by the insured employer at the beginning of and throughout the policy does not constitute the actual cost of the insurance coverage they [**3] have purchased. Instead, it is the actual premium, ascertained at audit, that constitutes the true price for the coverage.

Under Part 5(C) of the policy, a premium is charged based on remuneration paid to officers and employees, as well as other persons performing work that could make plaintiff-NorGuard liable under the policy. Based on this policy provision, plaintiff [*3] charges a premium based on remuneration paid to both employees, as well as subcontractors who have not secured their own workers' compensation coverage based on the risk that the

uninsured subcontractors could make plaintiff NorGuard liable under the policy.

NorGuard provided workers' compensation and employer's liability insurance to defendant from March 15, 2010 to March 15, 2011. As per plaintiff's usual practice, estimated premium for this policy was charged based on the information supplied by defendant on its insurance application. The insurance submitted by defendant indicated that its total remuneration was $25,000 and that it did not use subcontractors. Using the information provided by defendant on its application for insurance, plaintiff estimated the premium for the policy term to be $3,630. At the end of [**4] the policy term, however, the audit revealed that defendant actually had $159,349 in chargeable remuneration, a sizable variance from the estimate presented on defendant's application. The audit also revealed that, contrary to what was set forth in their application, the defendant utilized the services of subcontractors and that remuneration paid to uninsured subcontractors exceeded the remuneration paid to employees.

The ratio of remuneration paid to subcontractors to remuneration paid to employees far exceeded what is permissible under plaintiff's underwriting guidelines. Plaintiff submits that had it known the actual ratio, it would not have written the policy. However, plaintiff relied on the representations made in defendant's application for insurance, which indicated that it did not use subcontractors. Plaintiff NorGuard also relied on the representations made in defendant's application for insurance in setting overall estimated premium.

Based on the actual remuneration paid to defendant, as revealed by the audit, a premium balance of $16,625 resulted, which defendant has refused to pay. NorGuard filed suit to collect that amount on July 26, 2011. On August 4, 2011, Apex answered [**5] the complaint and asserted counterclaims against plaintiff alleging RICO violations, misrepresentation and fraud. Plaintiff now moves to dismiss defendant's counterclaims.

Plaintiff's Motion

Plaintiff NorGuard moves to dismiss the counterclaims, pursuant to *CPLR 3211(a)(1)*, as barred by documentary evidence and *CPLR 3211(a)(7)* for failure to state a cause of action.

As a preliminary matter, the Court notes that plaintiff makes the same arguments and submits the same proof with respect to both *CPLR sections 3211(a)(1)* and [*4] *3211(a)(7)*.

Generally, on a motion to dismiss made pursuant to *CPLR section 3211(a)(7)*, the pleading is to be afforded a liberal construction. The Court must accept the allegations of the counterclaims as true and provide the defendant the benefit of every possible favorable inference (*see, AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582, 591, 842 N.E.2d 471, 808 N.Y.S.2d 573 [2005]*). In determining a motion to dismiss, a court's role is ordinarily limited to determining whether the counterclaim states a legally cognizable claim (*Frank v DaimlerChrysler Corp., 292 AD2d 118, 741 N.Y.S.2d 9 [1st Dept.]*, *lv. to appeal denied*, *99 N.Y.2d 502, 782 N.E.2d 567, 752 N.Y.S.2d 589 [2002]*). Thus, "[w]hether a plaintiff can ultimately [**6] establish its allegations, is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]*).

Further, in order to prevail on a *CPLR 3211(a)(1)* motion, namely, "a defense . . . founded on documentary evidence,", the moving party must show that the documentary evidence conclusively refutes defendant's allegations (*see, AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., 5 NY3d at 590--591, supra*; *Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]*). Where documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted (*Ullmann v Norma Kamali, Inc., 207 AD2d 691, 692, 616 N.Y.S.2d 583 [1st Dept. 1994]*).

The first counterclaim asserted by defendant is that plaintiff violated *18 USCA section 1962(c)*, namely, that plaintiff engaged in racketeering in an effort to defraud defendant. To properly state a RICO claim for damages under *section 1962(c)*, a plaintiff must allege: (1) a violation of the RICO statute; (2) an injury to business or property; and (3) causation of the harm or injury by the RICO violation (s*ee, De Falco v Bernas, 244 F.3d 286, 305 [2d Cir.]*, [**7] *cert. denied sub nom. Dirie v De Falco, 534 U.S. 891, 122 S. Ct. 207, 151 L. Ed. 2d 147 [2001]*).

Section 1962(c) makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity (*18 U.S.C. § 1962[c]*). To allege a violation of *section 1962(c)*, "a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity" *(Cofacredit, S.A. v Windsor Plumbing Supply Co., Inc., 187 F.3d 229, 242 [2d Cir.1999])*. The requirements of *section 1962(c)* must be sufficiently alleged as to each defendant (*see, De Falco, 244 F.3d at 306, supra*).

In considering civil RICO claims, a court must be mindful of the devastating effect such claims may have on defendants *(see, Katzman v Victoria's Secret Catalogue, 167* [*5] *F.R.D. 649, 655 [SDNY]* ("Civil RICO is an unusually potent weapon-the litigation equivalent of a thermonuclear device.") (quotation marks and citation omitted), *reargument denied*, *939 F Supp 274 [SDNY 1996]*, *judgment aff'd*, *113 F.3d 1229 [2nd Cir. 1997]*.

" [**8] Because the mere assertion of a RICO claim . . . . has an almost inevitable stigmatizing effect on those named as defendants, . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.'" *Allen v New World Coffee, Inc., 2001 U.S. Dist. LEXIS 3269 at *8, 2001 WL 293683, slip op. at 3 [SDNY 2001]*, *quoting Schmidt v Fleet Bank, 16 F. Supp. 2d 340, 346 [SDNY 1998]* [quotation marks omitted]). "[C]ourts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb." *Schmidt, 16 F. Supp. 2d at 346* (quotation marks omitted).

In the present action, defendant Apex alleges that plaintiff NorGuard violated the RICO statute by perpetuating a scheme "to submit earned premium' bills to defendant and others similarly situated in the New York area and others." Defendant Apex generally alleges that the premium audit conducted at the end of the policy, and actual premium balance charged to defendant, were fraudulent. Defendant Apex repeatedly alleges that plaintiff NorGuard made "false representations" about earned premiums being due for insurance coverage provided to defendant. The record does not support [**9] this contention.

The undisputed record indicates that NorGuard - - and any other workers' compensation insurance carrier - - can only *estimate* premium at the beginning of the policy period. The ability is restricted to an estimate because a premium is based on actual remuneration, which cannot be ascertained until the end of a policy period. In estimating a premium for the policy period, the only reference a carrier has is the insured's insurance application. Here, defendant represented to plaintiff that it had $25,000 in total projected remuneration for the policy term spread across three classifications. Based upon this representation, plaintiff estimated premium for defendant for the policy term.

The record does not support the claim that plaintiff NorGuard represented to defendant Apex that such estimated premium was the actual cost of their insurance policy. In fact, Part 5(E) of the standard Workers' Compensation policy used by plaintiff states, as follows:

> E.Final Premium
>
> The premium shown on the Information page, [*6] schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper [**10] classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium paid to us, you must pay the balance . . .

The policy terms are clear that defendant's actual premium would be calculated based on defendant's actual remuneration figures ascertained at audit. The record does not support defendant's claim that plaintiff's premium audit procedure constitutes some sort of "fraudulent scheme" amounting to a pattern of racketeering activity.

Defendant also alleges in its counterclaims that "plaintiff reclassified workers and claimed entitlement to premiums earned for possible coverage of individuals associated with the construction project who, although either covered under their own insurance, or not required to have Workers' Compensation coverage." The insurance policy however, clearly states that the "proper classifications" for an insured's workers will be applied at audit. Accordingly, it is the audit classifications that represent the correct exposure, not the initial classification.

Furthermore, the "individuals associated with the construction project" referenced by defendant clearly refer to subcontractors utilized [**11] by defendant. It is noted that defendant stated in its insurance application that it did not use subcontractors on its work. Notwithstanding this representation, plaintiff put defendant on notice by way of an "Important Alert" in the policy declaration pages that, to the extent defendant utilized subcontractors during the policy period, premium would be charged for any such subcontractors not carrying their own workers' compensation insurance pursuant to Part 5(c)(2) of the policy.

Finally, defendant has no standing under RICO, absent a showing that it has been injured in its business or property by the conduct constituting the violation (*see, Sedima, S.P.R.L. v Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 [1985]*). This injury must be proximately caused by the predicate acts of the RICO violation (*De Falco v Bernas, 244 F.3d at 305* [internal citations omitted]). Here, since defendant has not paid the premium it alleges were wrongfully charged, and has alleged no other injury to its business or property by the

conduct constituting the violation, defendant may not assert a counterclaim under RICO.

The second counterclaim asserts that plaintiff violated *18 U.S.C. section 1962(d)*, by conspiring to participate [**12] in a commercial enterprise or an enterprise affecting [*7] commerce through a pattern of specific racketeering activity. To plead a RICO conspiracy under *18 U.S.C. section 1962 (d)*, a plaintiff must allege "the existence of an agreement to violate RICO's substantive provisions" (*Cofacredit, S.A. v Windsor Plumbing Supply Co., 187 F.3d 229 [2d Cir. 1999]*). A conspiracy claim under RICO cannot be established when, as here, the substantive legal claim is without merit (*see, Ochoa v Housing Auth., 47 Fed Appx. 484, 487 [9th Cir. 2002]*; *Discon, Inc. v Nynex Corp., 93 F.3d 1055 [2d Cir. 1996]*, *judgment vacated on other grounds*, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 [1998])*.

The third counterclaim asserts that plaintiff engaged in misrepresentation by "conspir[ing] together for the purpose of fraudulently misleading defendant." "To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation, and that the plaintiff suffered damages as a result of its reliance on the defendant's [**13] misrepresentation." (*P .T. Bank Central Asia v ABN AMRO Bank, N.V., 301 AD2d 373, 376, 754 N.Y.S.2d 245 [1st Dept. 2003])*.

The gravamen of defendant's counterclaim here is that plaintiff falsely assessed its premium upon approving its insurance application. However, the record reveals that the actual premium on a workers' compensation policy is always assessed at the end of the policy period, and that the initial "estimate" is just that, an estimate based upon information provided by the insured. The insurance policy clearly stated that the actual premium would be assessed at the end of the policy period following an audit at which defendant's actual remuneration to employees and subcontractors would be determined. Defendant fails to state any facts that would suggest either that this information was falsely communicated to it in order to defraud or mislead it, or that it did anything (or refrained from doing anything) in reliance on false information. Thus, this cause of action fails for want of essential elements.

The fourth and final counterclaim asserted is common law fraud. "To sustain a cause of action alleging fraud, a party must show a misrepresentation or a material omission of fact which was [**14] false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Cayuga Partners, LLC v 150 Grand, LLC, 305 AD2d 527, 527--28, 759 N.Y.S.2d 347 [2003])*. *CPLR 3016(b)* requires, in addition, that when a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail."

Here, defendant's bare allegations of fraud, without any allegations of the details [*8] constituting the wrong, are insufficient to sustain a counterclaim for fraud (*see, Michaelson v Scaduto, 205 AD2d 507, 508, 612 N.Y.S.2d 659 [2nd Dept. 1994])*. No viable fraud claim is stated, moreover, where the only fraud charged is that the contracting party did not intend to meet its contractual obligation (*see, Blackman v Genova, 250 AD2d 561, 562, 671 N.Y.S.2d 982 [2nd Dept. 1998]*; *Non--Linear Trading Co. v Braddis Assocs. Inc., 243 AD2d 107, 118, 675 N.Y.S.2d 5 [1st Dept. 1998]*; *Hadari v Leshchinsky, 242 AD2d 557, 558, 662 N.Y.S.2d 85 [2nd Dept. 1997])*. Thus, defendant's fourth counterclaim for fraud must be dismissed (*see*, *CPLR 3016[b]*, *3211[a][7]*; *3212[b]*; *Blackman v Genova, 250 AD2d at 562, supra*; *Hadari v Leshchinsky, 242 AD2d at 558, supra* [**15]).

Without addressing the merits of the motion to dismiss, defendant objects to the affidavit of Wayne Vidzicki submitted in support of the motion to dismiss the counterclaims, on the ground that plaintiff did not submit a certificate of conformity along with the affidavit. The affidavit was signed in Pennsylvania before a Pennsylvania notary public. As such, defendant alleges that the affidavit is "not competent evidence" and violates *CPLR 2309(c)* and *Real Property Law section 299-a(1)*. Since a party's failure to comply with the provisions of *CPLR 2309 (c)* can easily be corrected *nunc pro tunc* and does not prejudice "a substantial right of a party", it is not a fatal defect, but rather a mere defect in form (*Moccia v Carrier Car Rental, Inc., 40 AD3d 504, 837 N.Y.S.2d 67 [1st Dept. 2003]*; *see, Smith v Allstate Ins. Co., 38 AD3d 522, 832 N.Y.S.2d 587 [2nd Dept. 2007])*.

Plaintiff's omission of a certificate of conformity does not preclude the affidavit from consideration by the court. Courts are not rigid about the certificate of conformity requirement, and as long as the oath is duly given, authentication of the oath-giver's authority can be secured later, and given *nunc pro tunc* effect if necessary (Siegel, Practice [**16] Commentary, McKinney's Cons. Laws of NY, CPLR 2309:3). Here, defendants' attorney has submitted a certificate of conformity complying with the oath formalities of *CPLR 2309(c)* (*cf., B.B.Y. Diamonds Corp. v Five Star Designs, 6 AD3d 263, 775 N.Y.S.2d 34 [1st Dept. 2004])*.

Accordingly, the plaintiff's motion to dismiss the four counterclaims is granted.

Defendant's Cross-Motion to Amend the Answer

Defendant's cross-motion to amend its answer to assert lack of personal jurisdiction on the ground that it was not properly served with process, is denied. In support of its motion, defendant merely asserts that Joseph Nohavicka, the corporation's attorney, "is not now or was any time in the past, affiliated in any way with APEX in any capacity other than legal counsel. Neither was [counsel] designated as an agent authorized to accept service of process on behalf of APEX." [*9]

Defendant does not set forth the specifics of the service of process actually effectuated. Defendant merely claims that the individual who received the process, who is defendant's attorney, Mr. Nohavicka, is not the "project manager" of defendant company and was not authorized to receive service on behalf of defendant. However, on defendant's [**17] Secretary of State filing, Mr. Nohavicka's law firm, Mavromihalis, Pardalis & Nohavicka, is listed as "the entity to which [Department of State] will mail process if accepted on behalf of the entity."

Under New York law, a corporation is free to chose its own agent without regard to title or position and may appoint an agent without observing the formalities necessary to designate an agent pursuant to *CPLR 318* (*Fashion Page, Ltd., v Zurich Ins. Co., 50 NY2d 265, 406 N.E.2d 747, 428 N.Y.S.2d 890 [1980])*. The statute should be liberally construed (*CPLR 104*).

The purpose of *CPLR 311(a)(1)* is to give the corporation notice of the commencement of the suit (*see generally, Tauza v Susquehanna Coal Co., 220 NY 259, 115 N.E. 915 [1917]*; *Barrett v. AT & T, 138 NY 491, 34 N.E. 289 [1893]*; *Katims v DaimlerChrysler Corp., 9 Misc 3d 503, 508, 802 N.Y.S.2d 312 [Dist Ct. Suffolk County 2005])*. Delivery of the summons to the officials or employees designated by the Legislature fulfills the statutory aim since their "positions are such as to lead to a just presumption that notice to them will be notice to the . . . corporation" (*Tauza v Susquehanna Coal Co., 220 NY 259, 115 N.E. 915, supra*). The presumption is unnecessary when the summons is served on a person the corporation itself has selected [**18] to accept service on its behalf. The corporation is free to choose its own agent for receipt of process without regard to title or position.

A corporation may appoint an agent to accept service without observing the formalities necessary to "designate" an agent pursuant to *CPLR 318*. Designation is merely a type of appointment which might, under certain circumstances, offer special benefits to the corporation or principal.

A corporation may assign the task of accepting process and may establish procedures for insuring that the papers are directed to those ultimately responsible for defending its interests. A process server may, of course, always serve the corporate personnel specifically identified in the statute. The corporation however cannot escape the consequences of establishing alternative procedures that it prefers. In such a case, the process server cannot be expected to know the corporation's internal practices. Reliance may be based on the actions or designations of corporate employees to identify the proper person to accept service.

In such circumstances, if service is made in a manner that, objectively viewed, is calculated to give the corporation fair notice, the service should [**19] be sustained *(Fashion Page, Ltd. v Zurich Ins. Co., 50 NY2d 265, 406 N.E.2d 747, 428 N.Y.S.2d 890 [1980])*. Here, defendant and Mr. Nohavicka's law firm share an office location and also have an owner in common. Defendant named Mr. Nohavicka's law firm as the entity to which process should be mailed if served at the Department of State. In [*10] evaluating whether service is to be sustained, the circumstances of the particular case must be weighed. Where, as here, a process server acts reasonably in light of all circumstances and "if service is made in a manner which objectively viewed is calculated to give the corporation fair notice, the service should be sustained." (*Id. at 273*; *see, e.g., Allegiant Partners, Inc. v Manor east of Massapequa, LLC, 19 Misc 3d 1117[A], 862 N.Y.S.2d 812, 2008 NY Slip Op 50752[U], 2008 WL 961116 [Sup Ct Nassau County 2008]*).

Conclusion

The plaintiff's motion to dismiss the counterclaims is granted

The defendant's cross-motion to amend the answer to assert lack of in personam jurisdiction and to dismiss the complaint is denied.

The foregoing constitutes the decision, opinion, and order of the Court.

Dated: Long Island City, New York

December 19, 2011