

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MERCER COUNTY
DOCKET NO. MER- L-1752-01

CIVIL ACTION

RECEIVED AND FILED
JAN 26 2007
SUE BEGANS
DEPUTY CLERK OF SUPERIOR COURT

JAN 26 2007

Sue Begans

SUE BEGANS
DEPUTY CLERK OF SUPERIOR COURT

Karen L. Suter, Commissioner of the :
Department of Banking and :
Insurance of the State of New Jersey :
and her successors as Commissioners :
of the Department of Banking and :
Insurance of the State of New Jersey :
in her Capacity as Liquidator of :
Home State Insurance Company, :

Plaintiffs, :

v. :

Pricewaterhouse Coopers LLP :
f/d/b/a Coopers & Lybrand; and :
Milliman & Robertson, Inc. :

Defendant. :

DECISION ON PLAINTIFF'S
CROSS-MOTION FOR
SUMMARY JUDGMENT

Argued December 1, 2006, decided January 26, 2007.

Before Honorable Paul T. Koenig, Jr., P.J. Civ.

David A. Mazie (Nagel Rice & Mazie), argued for Plaintiff's cross-motion for summary judgment.

William T. Reilly (McCarter & English, LLP), argued in opposition to Plaintiff's cross-motion for summary judgment.

Before the Court is a cross-motion filed by plaintiff, Karen L. Suter, Commissioner of the Department of Banking and Insurance of the State of New Jersey, and her successors as Commissioners of the Department of Banking and Insurance of the

State of New Jersey in her Capacity as Liquidator of Home State Insurance Company, for a motion granting summary judgment to Plaintiff as to two of the three alleged critical errors by defendant Pricewaterhouse Coopers, LLC related to accounting issues as Pricewaterhouse Coopers, LLC failed to recognize that Home State was not properly accounting for 1) ceding commission income or 2) reinsurance profit sharing income in accordance with Statutory Accounting Principles ("SAP"). The plaintiff states that it is the final arbiter of SAP application and should be given deference when determining appropriate standards. The defendant, Pricewaterhouse Coopers, LLC (hereafter "PwC"), argues that the plaintiff's "cross-motion" for summary judgment is procedurally improper and substantively without basis.

Facts

The New Jersey Dept. of Banking and Insurance ("DOBI")'s primary responsibility is to assess the financial health and solvency of the various insurers that conduct business in the State of New Jersey. DOBI requires that every New Jersey insurer file an annual audit of financial statements with DOBI prepared in conformity with Statutory Accounting Principles ("SAP").

Plaintiff states that if there is a question as to how SAP should be interpreted in a particular circumstance for a New Jersey insurer, DOBI is the final arbiter. Defendant PwC disputes the SAP method that plaintiff states was to be applied through the years in question, 1993-1995. Plaintiff asserts that the commissioner of DOBI can permit deviations from SAP and is the only authority for this type of request.

Throughout the course of its existence, Home State purchased substantial amounts of reinsurance to help limit its exposure to large losses. Home State purchased the reinsurance by paying premiums (referred to as “ceding”) to various reinsurers in exchange for those insurers assuming part of Home State’s risk.

According to the terms of the respective reinsurance agreements, the ceding commissions were paid by the reinsurer and earned by Home State as the related premiums were earned by the reinsurers. Defendant PwC disputes plaintiff’s assertion as to the application of SAP and the time in which the ceding commissions earned were to be recognized on financial statements. DOBI alleges that Home State prematurely recognized the ceding commission income and that this greatly inflated Home State’s financial statements. DOBI further alleges that Home State did not properly recognize the appropriate ceding losses.

Plaintiff claims PwC failed to recognize Home State’s accounting error. Defendant PwC disputes plaintiff’s claim and contends that it did not improperly recognize profits and omit losses from ceding. Plaintiff’s expert and defendant PwC’s expert are in dispute as to opinion and application of SAP practices during the audit years, including the accounting and auditing practices in question.

Movant’s Contention

Plaintiff states that two of the three critical errors by PwC relate to accounting issues as PwC failed to recognize that Home State was not properly accounting for 1) ceding commission income or 2) reinsurance profit sharing income in accordance with SAP. Plaintiff states that DOBI should be afforded great deference and that its findings

may only be rebutted by a showing that its determinations were arbitrary, capricious or plainly unreasonable. See in Re Commissioner's Failure, 358 N.J. Super. 135, 149 (App. Div. 2003).

Plaintiff further states that Bryan Fuller, the Senior Reinsurance Manager of the NAIC (National Association of Insurance Commissioners), was contacted and confirmed DOBI's determination that Home State was improperly recognizing profits and losses from ceding in violation of SAP. Plaintiff states that PwC does not dispute that DOBI's interpretation of SAP is authoritative, and further contends that NAIC's position is persuasive. Plaintiff states that since DOBI and NAIC agree that Home State's accounting treatments did not conform with SAP, and the record is void of any proof that PwC has overcome its burden to prove that DOBI's interpretation of SAP is "arbitrary, capricious or plainly unreasonable," this court must defer to DOBI's expertise and find that PwC failed to require Home State to conform with SAP which lead Home State to improperly account for ceding profits and losses.

Plaintiff also argues that PwC cannot use DOBI's failure to discover the ceding commission income issue during the 1994 triennial examination of Home State as a basis to avoid summary judgment. The Honorable Mitchel E. Ostrer, J.S.C. has already ruled in this case that DOBI's pre-liquidation regulatory activities may not be used as the basis of any affirmative defense.

Opposition's Contention

Defendant argues that plaintiff's "cross-motion" for summary judgment is procedurally improper and substantively without basis. Defendant asserts that it is not a

“cross-motion” at all, because it is unrelated to the subject matter of PwC’s summary judgment motion and therefore, violates Rule 1:6-3(b). According to defendant, plaintiff styles its cross-motion to circumvent the summary judgment filing deadline in this case under Rule 4:46-1. Defendant PwC states that based on this alone, the plaintiff’s motion should be dismissed.

Defendant further states that the 2006 correspondence between plaintiff’s expert witness, plaintiff’s own department (DOBI), and NAIC personnel in connection with plaintiff’s expert rebuttal report, has no relationship to any administrative hearing, decision or rule-making exercise that should be accorded any weight by this court. (The correspondence involved answers produced by plaintiff’s rebuttal expert relating to SAP application questions and the proper reference to materials for ceding commissions and profits. It is disputed who answered the questions and omissions pertaining to NAIC reference materials.) Accordingly, defendant states this does not involve rule making or application of administrative law.

Defendant further argues that the only administrative decision relevant to this case is the 1996 Examination Report on Home State’s historical financial condition, which was considered and adopted by the Commissioner pursuant to the regular procedures set forth in the applicable statute at that time.

Defendant also asserts that the issues that plaintiff claims her agency decided are accounting questions, not auditing issues. Defendant contends that it is beyond dispute that a company’s accounting errors, even where established, do not prove that its auditor violated professional standards. Defendant contends that the two accounting issues on which plaintiff seeks summary judgment are also the subject of competing opinions by

the parties' expert witnesses based on the absence of directly applicable accounting guidance and disputed contract interpretation issues. Accordingly, defendant states that summary judgment is improper in those circumstances, and plaintiff cannot make it otherwise by asking her own agency [DOBI] to weigh-in and tip the scales in her favor in this litigation. Defendant states there is no precedent for affording any deference to the self-serving advocacy positions of DOBI. Defendant concludes that plaintiff's assertion to the contrary offends all notions of due process, and plaintiff's professed belief that DOBI is the final arbiter of the issues in this case is grounded by her conduct in bringing and litigating this case.

Summary Judgment Standard

The standard for summary judgment in New Jersey is well settled. To grant a motion to enter summary judgment, the moving party must sustain the burden of showing clearly that there is no genuine issue of material fact in the case, and that he/she/it is entitled to judgment as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73 (1954). R. 4:46-2. A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995).

The key in this analysis is for the motion judge to determine whether there is a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law. Id. at 533. Under R.4:46-2, a motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

Additionally, the State Supreme Court has held that a non-moving party cannot defeat a motion for Summary Judgment “merely by pointing to any fact in dispute.” Id. at 529. Rather, if the moving party makes the requisite *prima facie* showing, it is incumbent upon any opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta v. Wm. H. Wilson, Inc., 72 N.J.Super. 572, 581 (App. Div.), certif. denied, 37 N.J. 229 (1962).

Analysis

Defendant argues that plaintiff’s “cross-motion” for summary judgment is both procedurally improper and substantively without basis. Defendant contends it is not a “cross-motion” at all because it is unrelated to the subject matter of PwC’s summary judgment motion and therefore, violates Rule 1:6-3(b). According to defendant, plaintiff filed the “cross-motion” to circumvent the summary judgment filing deadline in this case under Rule 4:46-1. Defendant PwC states that based on this alone, the plaintiff’s motion should be dismissed.

While the court agrees that the plaintiff’s cross-motion for summary judgment is not subject matter related to the defendant’s motions for summary judgment, in the interests of judicial efficiency, the court will entertain the plaintiff’s motion. There is no doubt that the plaintiff will bring this motion at a later date if not heard now on procedural grounds. Moreover, defendant had ample time to reply, as evidenced by the opposition it filed.

To grant a motion to enter summary judgment, the moving party must sustain the burden of showing clearly that there is no genuine issue of material fact in the case, and that he/she/it is entitled to judgment as a matter of law. Judson at 73. R. 4:46-2. A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill at 523.

The plaintiff in this case seeks summary judgment as to two of the three critical errors by PwC related to accounting issues as it failed to recognize that Home State was not properly accounting for 1) ceding commission income or 2) reinsurance profit sharing income in accordance with SAP. The plaintiff states that it is the final arbiter of SAP application and should be given deference when determining appropriate standards.

The court agrees that DOBI has the authority in the State of New Jersey to define the standards and proper application of SAP. In creating DOBI, the legislature conveyed the administrative duty upon DOBI to regulate and be the final arbiter of SAP. The fact that the defendant has provided expert reports in contradiction to DOBI's assertion of SAP application for ceding commission income and reinsurance profit sharing income is not a material fact because DOBI's interpretation of accounting standards and practices is dispositive unless shown to be arbitrary, capricious, unreasonable or illegal.

In order to overturn DOBI's interpretation and application of SAP, the defendant must show that DOBI's determinations were arbitrary, capricious, or unreasonable. See In Re Commissioner's Failure, 358 N.J. Super. 135, 149 (App. Div. 2003). Indeed, the defendant's expert does not take the position that DOBI's interpretation of SAP is unreasonable. Further, the only other authority for New Jersey SAP interpretation is the NAIC. The plaintiff's have in fact contacted the NAIC which agrees with DOBI's SAP

interpretation as to DOBI's authority on SAP interpretation and application, and deferred to DOBI on this account.

Well established principles require that courts "defer to the expertise of an administrative agency regarding the interpretation and application of its own regulation." In re Tax Credit of Pennrose, 346 N.J. Super. 479, 492 (App. Div. 2002). This principle recognizes that agencies have the specialized expertise to enact and interpret regulations on technical matters and are particularly well equipped to read and evaluate factual and technical issues within their areas of expertise and authority. See Saint Pater's Univ. Hosp. v. Lacy, 185 N.J. 1, 13 (2005). The court's function is "not to substitute [its] judgment for "an agency judgment which "reflects agency expertise." In re Pub. Ser. Elec. & Gas Co., 167 N.J. 377, 384 (2001).

In the Appellate decision of In re Failure by Dept. of Banking, the court stated "we cannot micromanage any administrative agency. How an agency chooses to implement legislation is the agency's primary responsibility, not the court's. We give agencies wide discretion in deciding how best to approach legislatively assigned administrative tasks..." 336 N.J. Super. 253, 262 (App.Div. 2001), certif. denied, 168 N.J. 292 (2001).

A court may only overturn an administrative interpretation if it is "arbitrary, capricious, unreasonable or violated express or implied legislative policies." The party challenging the agency bears the burden of overcoming the presumption that an agency's interpretation is correct. In re Commissioner's Failure, 358 N.J. Super. 135, 149 (App. Div. 2003), citing Med. Soc'y of N.J. v. Div. of Consumer Affairs, 120 N.J. 18, 25 (1990).

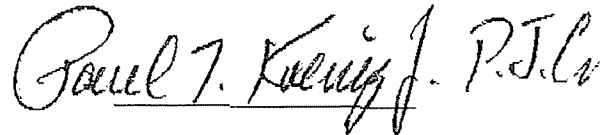
In the present case, it is clear from the record that the defendant PwC does not dispute that DOBI's interpretation of SAP is authoritative. The defendant PwC has also not carried its burden of showing that DOBI's interpretation of SAP was arbitrary, capricious or unreasonable. DOBI has been legislatively charged with regulating and interpreting SAP; therefore, in the absence of any showing that DOBI acted arbitrarily or capriciously, the court must defer to DOBI's interpretation of the defendant PwC's accounting practices related to accounting issues as it failed to recognize that Home State was not properly accounting for 1) ceding commission income or 2) reinsurance profit sharing income in accordance with SAP.

If the moving party makes the requisite *prima facie* showing, it is incumbent upon any opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta at 581. Here, the defendant PwC has not carried its burden of raising a disputed issue of material fact. Specifically, the varying expert witness opinions alone cannot carry this burden as a material issue in dispute. As a matter of law, defendant must prove that DOBI acted arbitrarily, capriciously, unreasonably, or illegally in interpreting SAP and applying its interpretation to defendant's accounting practices. The defendant PwC has not claimed or proved that DOBI's interpretation of SAP standards and application was arbitrary, capricious, unreasonable or illegal and thus, has not carried its burden. The trier of fact should not be left to determine the believability and credibility of the parties' expert witness reports; such testimony is irrelevant as to the application of SAP standards because DOBI is entitled to deference in interpreting SAP standards and its application as a matter of law.

Therefore, defendant's expert testimony that contradicts DOBI's interpretation of SAP standards is not material.

Plaintiff also argues that PwC cannot use DOBI's failure to discover the ceding commission income issue during the 1994 triennial examination of Home State as a basis to avoid summary judgment. The Honorable Mitchel E. Ostrer, J.S.C. has already ruled in this case that DOBI's pre-liquidation regulatory activities may not be used as the basis for any affirmative defense. This court agrees that DOBI's failure to discover or identify the ceding commission income issue has no bearing on DOBI's official interpretation on SAP practices and application.

Accordingly, plaintiff's cross-motion for summary judgment is **GRANTED**.



Paul T. Koenig, Jr., P.J. Civ.

Dated:

