STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

v

Case No. 2013-132423-CK
Hon. Wendy Potts

DU-ALL CONTRACTING, INC,

Defendant.
_____/

OPINION AND ORDER RE: BENCH TRIAL

At a session of Court
Held in Pontiac, Michigan
JUL 10 2015

The matter came before the Court on a bench trial submitted on briefs. Defendant Du-All Contracting, Inc. stipulated to Du-All's liability for Plaintiff State Farm Fire and Casualty Company's breach of contract claim. The Court reviewed the parties' respective submissions, and the following are the Court's findings of fact, conclusions of law, and verdict.

State Farm's claim arises from unpaid premiums for five workers compensation policies it issued to Du-All from 2007 to 2011 and two contractor insurance policies for 2009 and 2010. Du-All asserts in its trial brief that it is not contesting the amount State Farm is claiming is owed for the two contractor policies or the amount owed on the 2011 workers compensation policy. Thus, the Court finds that Du-All owes State Farm $482 for the 2009 contractor policy, $2,687.52 for the 2010 contractor policy, and $1,036 for the 2011 workers compensation policy.

The disputed damages involve amounts State Farm claims Du-All owes for workers compensation premiums for the 2008, 2009, and 2010 policy years. Under the terms of those policies, State Farm would calculate the premiums based on job classifications and codes for Du-All's employees and contractors, the amount of remuneration Du-All paid its employees and contractors, and an assigned rate per $100 of remuneration State Farm set for each of the job codes and classifications. By way of example, State Farm asserts that its rate for a painter under Code 5437 was 9.70 per $100 remuneration. If Du-All had an employee who fit that category, Du-All would owe State Farm $9.70 in workers compensation premium for each $100 in remuneration that Du-All paid that employee. The classifications and codes applied to both Du-All's own employees as well as employees of any subcontractor that was not already covered under its own workers compensation policy.

At the start of each policy year, State Farm sent Du-All information about the policy with the estimated annual premium for that policy. However, the full amount of premium owed would be adjusted following State Farm's audit of Du-All's payroll and contractor payment records to determine the proper employee and contractor classifications and codes and the amount Du-All paid each employee or contractor. State Farm conducted audits for each of Du-All's policies issued from 2007 through 2011 and notified Du-All of the additional premium owed. Because Du-All claimed that it could not make the additional premium payments assessed following the 2007 and 2008 audits, State Farm offered a payment plan in August 2010. State Farm claims that Du-All made some of the payments, however, $4,455.76 is still owed for the 2007 and 2008 policy years. State Farm further claims that Du-All owes $10,038 for 2009 and $14,675 for 2010.

Du-All does not dispute State Farm's right to audit its records or increase the premiums beyond the original estimated amounts based on those audits. Du-All further admits that it owes

State Farm some additional amount for the combined 2007-2008 policies, the 2009 policy, and the 2010 policy. However, Du-All asserts that State Farm had an obligation to "accurately and properly" determine the job classifications and codes, and it disputes the classifications and codes State Farm assigned to certain contractors for those policy years and State Farm's calculation of the additional premiums. The Court will address each of these disputed classifications separately.

A. 2007-2008 Policies

Du-All raises two objections to the amount State Farm is claiming for these combined premiums. Du-All's first asserts that State Farm improperly classified payments it made to Martin Dusaj as payments to an uninsured carpentry subcontractor. Du-All claims that its payments to Dusaj were made to purchase specialized tools and equipment, and no additional premiums should have been assessed based on the Dusaj payments. Du-All also asserts that State Farm improperly classified the subcontractor Robert Oberhausen as "labor," when in fact he was an outside salesperson, which would result in a lower payment owed for Oberhausen.

At the outset, the Court agrees with State Farm that Du-All appears to have waived any objection to the premiums owed for the 2007 and 2008 policy when its entered into the payment plan on August 20, 2010. "To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. There must be an existing right and an intention to relinquish it, and there must be both knowledge of the existence of a right and an intention to relinquish it." *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970). In the August 2010 document, Du-All's principal agreed to make the monthly payments and states that "I understand

that I owed a balance of $7,744.00 for the audit premium on the Workers Compensation Policy that was provided during the months of April 2007 to April 2008 and April 2008 to April 2009." Du-All could have, and should have, contested these classifications and the calculation of premium owed before it acknowledged the debt and agreed to pay it. By knowingly and willingly signing the acknowledgment and agreeing to the payment plan, Du-All intentionally relinquished its right to dispute the amount owed.

Even if Du-All had not waived any objection to State Farm's audit results, the Court would still conclude that the objections are without merit. Du-All presents no admissible evidence to support its position that Dusaj was not a contractor or that Oberhausen was a salesperson. Du-All's sole documentation of its claims is an email from Mark Schmidt of Trion Solutions, Inc., who Du-All claims is its "consultant." However, the email is hearsay, MRE 801(c), and Du-All has not asserted that it falls under any hearsay exception that would make it admissible. Du-All presents no affidavit or deposition transcript affirming Schmidt's statements in the email. Thus, the only evidence regarding Dusaj and Oberhausen's classification is the documentation of State Farm's audits, which State Farm claims are admissible as records kept in the normal course of business activity. MRE 803(6). Based on this evidence, the Court finds that State Farm properly classified Dusaj and Oberhausen. Because Du-All presents no other challenge to the amount State Farm claims is owed for the 2007-2008 policy, the Court finds that Du-All owes State Farm $4,455.76 for the 2007 and 2008 adjusted premiums.

B. 2009 Policy

Du-All first asserts that State Farm improperly classified payments to Albert Thomas as work activity and contends that those payments were made to purchase storage pods. Du-All also objects to State Farm's classification of Steve Costello as a laborer, claiming instead that he was

an outside salesperson. However, the only documentation that supports Du-All's claim for either objection is Schmidt's email, which is inadmissible for the reasons stated above. Because the only admissible evidence is State Farm's audit records, the Court finds that Du-All's objections are without merit and Du-All owes State Farm $10,038 for the 2009 adjusted premium.

C. 2010 Policy

Du-All first notes that State Farm incorrectly concluded in its audit that the contractor Active Tree Experts was uninsured. However, there is no dispute on this point and State Farm claims that after Du-All produced the contractor's certificates of insurance, it properly credited the amount owed for Active Tree Experts. Because Du-All concedes that State Farm made the necessary credit, this issue is moot.

Du-All further asserts that the contractor Gochi Unlimited Construction is exempt from premium calculations or assessment because it was a sole proprietor, Kole Gojcaj, who was doing business as Gochi Unlimited and who had no employees. As evidence of this, Du-All presents an "Independent Contractor Worksheet" that Gojcaj appears to have signed in October 2012. As an initial matter, the Court questions whether this document is admissible as it appears to be hearsay and Du-All fails to explain how it would fall under a hearsay exception. Even if the Court were to accept the worksheet as admissible as a business record under MRE 803(6), Du-All fails to explain how a worksheet signed in 2012 supports its position that Gochi Unlimited was a sole proprietor without employees from April 2010 to April 2011. Because Du-All presents no admissible evidence of its claim regarding Gochi Unlimited, the Court rejects the objection to State Farm's classification in the 2010 audit.

Du-All further claims that State Farm improperly classified Progressive Finishes, Inc. as a painter when in fact he is a sole proprietor independent contractor performing sales and

estimating work. In support of this position, Du-All cites an independent contractor worksheet dated March 11, 2014, nearly three years after the July 2011 audit for the 2010 policy year. Assuming that this worksheet is admissible as a business record, it fails to show that Progressive Finishes was a sole proprietor from March 2010 through March 2011. Further, the certificate of insurance Du-All produces for Progressive Finishes states that its workers compensation policy was effective from September 2008 through September 2009. Again, this document does not show that Progressive Finishes had its own workers compensation in 2010 or 2011. Thus, Du-All cannot show it is exempt from paying premiums for Progressive Finishes.

However, Du-All did produce evidence to support its claim that Progressive Finishes performed sales and estimating work and was misclassified. Du-All provided copies of emails sent to and from Nick Gojcaj, Progressive Finishes's principal, in 2010 and 2011 showing that he performed estimating. State Farm criticizes the emails because they appear to show that Gojcaj was a direct employee or agent of Du-All, not a subcontractor. However, State Farm fails to explain why this matters in terms of estimating the premium due. The question presented is whether Gojcaj and his business Progressive Finishes did painting or estimating. Because there is evidence that he performed estimating, and the only evidence to the contrary is State Farm's conclusive audit, the Court finds that Progressive Finishes and Gojcaj should have been classified as estimators. State Farm's audit of the 2010 policy shows that from April 1, 2010 through April 1, 2011, Du-All paid Progressive Finishes $67,700 and assessed a premium of $6,567. However, State Farm concedes that if Progressive Finishes was a salesperson, the rate per $100 of remuneration would be 0.44 and the premium would be $298. Subtracting the correct $298 premium from the $6,567 in premium that State Farm assessed, the Court concludes that

Du-All is entitled to a $6,269 credit. Subtracting this credit from the $14,675 State Farm claims is owed for the 2010 policy, the Court concludes that Du-All actually owes $8,406 for that year.

D. Conclusion

Based on the foregoing findings of fact and conclusions, the Court finds that Du-All owes the following:

Contractor's Policies	2009 year	$482.00
	2010 year	3,099.52
Workers Compensation Policies	2007-2008 years	4,455.76
	2009 year	10,038.00
	2010 year	8,406.00
	2011 year	2,687.52
	Total	$29,168.80

The Court enters judgment for Plaintiff State Farm Fire and Casualty Company and against Defendant Du-All Contracting, Inc. in the amount of $29,168.80 plus statutory interest, statutory attorney fees, and taxable costs.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Dated: JUL 10 2015

Hon. Wendy Potts