SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM, PART 61

THE PEOPLE OF THE STATE OF NEW YORK,

— against —

LINDA DOPPLER,

Defendant.

Decision and Order on Omnibus Motion

Ind. No. 2352–2018

ABRAHAM L. CLOTT, AJSC:

This Court has reviewed the grand jury minutes. The motion to dismiss or reduce the charges is denied. As explained below, the evidence at the grand jury was legally sufficient to establish a prima facie case for each count of the indictment. The minutes demonstrate that the proceeding was not defective. The prosecutor provided appropriate instructions to the grand jury, which included an instruction about acting in concert and an instruction that admissions made by a defendant were admissible only against the defendant who made the admission. The motion for release of the minutes is denied (CPL 210.30 [3]).

Defendant moves to dismiss count twelve, which charges her with insurance fraud in the third degree (PL 176.20). This count is based upon defendant's submission of a payroll summary spreadsheet on February 1, 2018, to an auditor for the New York State Insurance Fund during an audit to determine the proper premium for a worker's compensation insurance policy issued to defendant's employer CRV Precast Construction, LLC. The cost of the insurance is based upon the gross payroll wages paid for the type of work performed by a worker. CRV employed concrete laborers and ironworkers, and ironworkers cost more to insure than concrete laborers. The spreadsheet covered the period from October 27, 2016, to October 19, 2017, and contained a column that reported no gross payroll wages for ironworkers—a point that defendant concedes (*see* Defense Reply at 2, 6 ["the spreadsheet did not accurately calculate ironworker salaries in the total column"])—even though there was evidence that the company employed ironworkers during that time, including an ironworker who died in a crane accident in November 2016.

A person is guilty of insurance fraud in the third degree when that person "commits a fraudulent insurance act and thereby wrongfully takes, obtains or withholds, or attempts to wrongfully take, obtain or withhold property with a value in excess of three thousand dollars" (PL 176.20). As relevant to this case, "[a] fraudulent insurance act is committed by any person who, knowingly and with

intent to defraud presents . . . to . . . an insurer . . . any written statement as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy . . . that he or she knows to: (a) contain materially false information concerning any fact material thereto; or (b) conceal, for the purpose of misleading, information concerning any fact material thereto (PL 176.05).

Defendant argues that the evidence was insufficient to establish that she had committed a "fraudulent insurance act," because the spreadsheet was submitted during an audit and not as part of an application for insurance or an application for the rating of a commercial insurance policy. According to defendant, "any alleged misstatements were in connection with NYSIF's audit, pursuant to which NYSIF would undertake its own rating of the insurance policy, and not in connection with any application [defendant] submitted" (Defense Reply at 7). This Court disagrees.

This Court construes the statutory definition of "application" in Penal Law 176.05 as including any audit conducted to determine the cost or rating of the insurance policy provided pursuant to the initial application. Defendant's narrow reading of the statute would frustrate the purpose of the statute, which is to ensure that insurance is provided based upon accurate information. As the evidence at the grand jury established, the purpose of the audit was to determine the proper amount of the premium based upon the amount of payroll wages actually paid during the covered period rather than the amount projected or estimated to be paid initial application. The audit is, thus, a continuation of the application process and any information submitted during the audit process constitutes information presented "as part of, or in support of, an application for the issuance of, or the rating of a commercial insurance policy" (PL 176.05 [1]).[1]

Defendant moves to dismiss count thirteen, which charges her with offering a false instrument for filing in the first degree based upon her submission of the payroll spreadsheet that is the subject of count twelve. The crime of offering a false instrument for filing in the first degree occurs when a person "offers or presents" a "written instrument" that contains false information to a public servant "with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, [or] public authority" (PL 175.35 [1]). Defendant contends that the evidence was insufficient to establish that she "ever offered" the spreadsheet "for filing" (Def Aff and Memo at 10) or that she had emailed the spreadsheet to the auditor "with the belief that it would be filed with or become a part of the records of NYSIF" (*id.* at 11).

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[1] The presence on the spreadsheet of other entries that defendant contends show "no effort to hide presence of ironworker wages from NYSIF" (Def Reply Mem at 6) creates a jury question about defendant's intent to defraud to be decided at trial if defendant believes that a trial is in her best interest.

Contrary to defendant's argument, the evidence was sufficient to establish offering a false instrument for filing in the first degree. The prosecutor did not have to prove that defendant supplied the spreadsheet to be "filed," in the formal sense of the word, with the NYSIF, only that she presented the spreadsheet with the knowledge of belief that it would "become a part of the records" of the NYSIF. As noted already, defendant provided the spreadsheet to the NYSIF auditor during an official audit to determine the proper insurance premium to be paid, and the spreadsheet purportedly contained the critical information needed to make that determination. In such a circumstance, the grand jury could have rationally found that defendant supplied the spreadsheet knowing that it would become part of the CRV insurance file at the NYSIF. This was sufficient to satisfy the statute, which only requires proof that defendant presented the spreadsheet knowing that it would "become a part of the records of" the NYSIF (PL 175.35 [1]). Contrary to defendant's arguments (*see* Santillo Aff and Memo at 10-11, ¶ 27), her culpability does turn on the degree to which the spreadsheet would have affected the final determination about the amount of the insurance premium (*see People v Jacob*, 248 AD2d 638, 639 [2d Dept 1998] [statute "does not require that the content of these vouchers be accepted or relied upon by the government. Rather, only the intent to defraud need be proven]).

This Court finds no merit in defendant's argument that counts twelve and thirteen must be dismissed on the ground that NYSIF's conduct during the audit did not give defendant "adequate notice that she was placing herself at risk of a criminal sanction" (*id.* at 11, ¶ 30). Simply put, the NYSIF had no legal duty to notify defendant of the full scope of any potential criminal liability that would flow from providing false information during the audit process. Contrary to defendant's argument, the presence of disclaimers of criminal liability on any document provided to defendant did not serve the limit the scope of her criminal liability for any false information provided to the NYSIF during the course of the audit.

Defendant's motion for dismissal pursuant to CPL 210.40 is denied. The claim as presented on page 12-13, paragraph 34, of the motion is plainly insufficient, on its face, to support a claim for relief under the statute. Defendant is not precluded from renew the application upon papers that properly address each of the facts outlined in the statute (*see* CPL 210.40 [1] [a] – [j]).

The motions for discovery and a bill of particulars are granted to the extent of deeming sufficient the information provided by the prosecutor as part of the "open drawer" discovery and in the voluntary disclosure form and in the prosecutor's answering affirmation. Defendant is granted leave to apply to this Court within fifteen days of the date of this decision for any additional information unreasonably withheld. This Court reminds the prosecutor of the continuing duty to disclose favorable evidence to the defense (*see Brady v Maryland*, 373 US 83 [1963]).