IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

TJS BROKERAGE & CO., INC.	:	COMMERCE PROGRAM
	:	
	:	DECEMBER TERM 1999
v.	:	
	:	NO. 2755
HARTFORD CASUALTY INSURANCE	:	
COMPANY and PETERMAN COMPANY	:	Control No. 010984

ORDER

AND NOW, this 14th day of August 2001, on consideration of the motion of plaintiff TJS Brokerage & Company for partial summary judgment, and the response of defendant Hartford Casualty Insurance Company, and in accordance with the court's contemporaneously-filed opinion, IT IS HEREBY ORDERED that the motion is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.

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OPINION

BACKGROUND

Plaintiff TJS Brokerage & Co. alleges that Vincent Sicalides, brother of TJS owner and president Tom Sicalides, went on a rampage and destroyed some of TJS's office equipment. TJS submitted property and business income loss claims to its insurer, defendant Hartford Casualty Insurance Company. Hartford paid some of the claims. When Hartford stopped paying, TJS filed a complaint for breach of contract and insurance bad faith. TJS also asked for a preliminary injunction ordering Hartford to pay the claims. As a defense and counterclaim, Hartford alleged that TJS intentionally destroyed its own equipment to cheat Hartford out of the insurance money. After several days of hearings in which Hartford presented very little evidence of fraud, the court preliminarily enjoined Hartford to process the claims in good faith. TJS Brokerage & Co. v. Hartford Cas. Ins. Co., December 1999, No. 2755, op. at 22, 31 (C.P.Phila. Apr. 24, 2000).

TJS now moves for partial summary judgment on its claims and on Hartford's fraud defense and counterclaim. The court denies the motion.

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

The court must grant summary judgment if (1) there is no genuine issue of any a material fact as to a necessary element of the cause of action or defense that could be established by additional discovery or expert report, or (2) after the completion of discovery, a party bearing the burden of proof on an issue has failed to produce evidence of facts essential to the cause of action or defense such that a jury could return a verdict in his favor. Pa.R.C.P. 1035.2. As the moving party, TJS has the burden to prove that there is no genuine issue of material fact. Hagans v. Constitution State Serv. Co., 455 Pa.Super. 231, 687 A.2d 1145, 1156 (1997). Once TJS meets this burden, Hartford must set forth specific facts showing that there is a genuine issue for trial. Id. The court's function is to determine whether there are controverted issues of fact, not whether there is sufficient evidence to prove the particular facts. Id. at 1157.

II. THE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON ANY OF THEIR CLAIMS BECAUSE THERE IS EVIDENCE THAT TOM SICALIDES MISREPRESENTED TO HARTFORD THAT HE DID NOT KNOW WHERE HIS BROTHER WAS.

As a defense to TJS's claims, Hartford alleges that TJS misrepresented and concealed material facts during Hartford's investigation of the claim.[1] The policy contains a false swearing provision:

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[1] Hartford failed to present sufficient evidence of fraud at the preliminary injunction stage of this case. See TJS Brokerage & Co. v. Hartford Cas. Ins. Co., J. A10020/01, memorandum op. at 10 (Pa.Super.Ct. Apr. 25, 2001) ("We have reviewed the evidence Hartford presented to support its argument that Thomas Sicalides and Vincent Sicalides colluded to damage the office equipment and find that theory to be based on the speculation of facts not in the record."). However, this court

CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud by you as it relates to this Coverage Part at any time. It is also void if you or any other insured, at any time, intentionally conceal or misrepresent a material fact concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the covered Property, or
4. A claim under this Coverage Part.

(Exhibit D-5, Commercial Property Conditions, Form, CP 00 90 07 88, p. 1).

To succeed on a claim of insurance fraud, Hartford must prove that (1) TJS made a false statement, (2) TJS made the false statement knowingly or in bad faith, and (3) the subject matter of the statement was material to the insurance transaction. Tudor Ins. Co. v. Township of Stowe, 697 A.2d 1010, 1017 (Pa.Super.Ct. 1997).[2] Hartford must prove these elements by a preponderance of the evidence. Greenberg v. Aetna Ins. Co., 427 Pa. 494, 235 A.2d 582, 584 (1967), explained in Ratay v. Lincoln Nat'l Life Ins. Co., 405 F.2d 286, 289-90 (3d Cir. 1968) (holding that an insurer must by a

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specifically limited its preliminary rejection of Hartford's fraud defense: "[T]he court's finding that the record does not show fraud does not preclude Hartford from urging fraud as a defense at trial." TJS Brokerage & Co. v. Hartford Cas. Ins. Co., December 1999, No. 2755, op. at 43 (C.P.Phila. Apr. 24, 2000).

In its response to the summary judgment motion, Hartford limits its fraud defense to false misrepresentation and concealment by TJS during the investigation. Hartford does not argue in its response that the policy is void because TJS itself destroyed the equipment in order to make a false insurance claim.

[2] Tudor involved an insured's misrepresentations in an insurance application. Tudor, 697 A.2d at 1010. Though no published Pennsylvania appellate decision sets forth the standard for misrepresentation during the insurer's investigation of a claim, the court sees no reason not to extend the three-prong standard to a misrepresentation during the investigation. See Saracco v. Vigilant Ins. Co., 2000 WL 202274 at *2, n.7 (E.D.Pa.) (stating that, though the three-prong test originally applied in cases involving misrepresentations in applications, courts in the Third Circuit have applied the test to concealment or misrepresentation during an insurance company's investigation of a claim), aff'd, 250 F.3d 736 (3rd Cir. 2001).

preponderance of evidence that an insured made a fraudulent claim of loss under a insurance contract). Compare with Tudor Ins. Co., 697 A.2d at 1017 (applying clear and convincing standard to an insurer's claims of fraudulent misrepresentations by the insured in the making of an insurance contract).

A. Evidence that Tom Sicalides Falsely Denied Knowledge of Vincent Sicalides' Whereabouts Is Sufficient to Allow Hartford's Fraud Defense to Go to a Jury.

The first statement on which Hartford bases its fraud defense is Tom Sicalides' September and December 1999 denials of knowledge of his brother's whereabouts.

1. There is evidence that Tom Sicalides made false statements.

The vandalism incident occurred on April 2, 1999. There is evidence that Vincent Sicalides lived in Rowland, Texas with Mary Lou Sicalides from April 1999 until April 2000, when he was arrested for a parole violation. (Ex. D-10, 11 and 12, affidavits of Joseph Carlin, Don Ingle, and Leon Holcomb.) Mary Lou is Vincent and Tom's sister.

Even though Vincent had been living with Tom's sister since the vandalism incident, Tom denied knowing Vincent's whereabouts when Hartford's counsel questioned Tom on September 1, 1999 in an Examination Under Oath:

> Q. What is your brother's full name?
> A. Vincent P. Sicalides.
> * * *
> Q. Where does he currently reside?
> A. I have no idea.
> * * *
> Q. After you met with your brother on the next day, on April 3rd, when he picked up his belongings in the warehouse, have you seen or spoken to him since then?
> A. No.

(Ex. D-6, Tom Sicalides examination, at 104, 112.)

In a December 6, 1999 letter to TJS's counsel, Hartford's counsel again asked for information about Vincent Sicalides' whereabouts since April 1999. (Ex. D-8, Keenan letter to Ellison, 12/6/99, at 5.) In response, TJS's counsel responded that TJS had no such information. (Ex. D-9, Ellison letter to Keenan, 12/14/99, at 4.)

There is evidence that when Tom Sicalides made these denials, he knew that Vincent was at their sister's house in Texas. Tom admitted that he knew that Vincent had stayed with Mary Lou before, in 1997 or 1998. (Ex. D-A, Tom Sicalides dep., at 104.) Tom admitted that he is close to Mary Lou. (Ex. D-A, at 30.)[3] He talks to her once a month or more. (Ex. D-A, at 30.) He gave her $1000 to pay her mortgage at the time Vincent was allegedly staying with her. (Ex. D-14, Tom Sicalides' check to Mary Sicalides, 5/19/99.) Mary Lou may have tried to tell Tom Vincent's whereabouts, but Tom cut her off because talk of Vincent upsets him. (Ex. D-A, at 33.) TJS's toll free phone records show that someone called TJS toll-free number 12 times from Mary Lou's phone between April 23, 1999 and May 19, 1999. (Ex. D-13, Tom Sicalides' April 1999 desk calendar showing Mary Lou's number as (972) 463-8989; Ex. D-15, TJS phone bill, 5/25/99.)

From this evidence, a jury could find that Vincent lived in Texas with Mary Lou in 1999, that Tom knew Vincent was with Mary Lou, and that Tom's denials of that knowledge in September and December 1999 were false.[4] See Evans v. Penn Mut. Life Ins. Co., 322 Pa. 547, 186 A. 133, 140

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[3] In her affidavit, Mary Lou averred that the relationship is not close. (Plaintiff's Supp. Appendix, Ex. 1, Mary Lou Sicalides aff. at ¶ 10.)

[4] In her affidavit, Mary Lou averred that Vincent stayed at her house only intermittently in 1999 and that she did not tell Tom about it. (Plaintiff's Supplementary Appendix, Ex. 1, Mary Lou

(1936) (stating that issue of falsity of an insured's statements to the insurer is generally an issue of fact for the jury).

2. There is evidence that Tom Sicalides denied knowledge of Vincent Sicalides' whereabouts knowingly and in bad faith.

Hartford must show that Tom's allegedly false denials were knowing and in bad faith. Tudor Ins. Co., 697 A.2d at 1017. See also Allegro v. Rural Valley Mut. Fire Ins. Co., 268 Pa. 333, 112 A. 140, 141 (1920) ("[F]alse swearing by the insured, in making proofs of loss, in order to defeat his claim, must be shown by the insurance company to have been done willfully and knowingly and with intent to cheat and defraud the company."). Unless Tom Sicalides had a defect in memory or reasoning, his false denial of knowledge was knowing. Therefore, a jury may infer that Tom denied knowledge of Vincent's whereabouts with an intent to deceive Hartford. Evans v. Penn Mut. Life Ins. Co., 322 Pa. 547, 186 A. 133, 138 (1936) ("It is sufficient to show that [the insured's statements to the insurer] were false in fact and that [the] insured knew they were false when he made them . . . since an answer known by insured to be false when made is presumptively fraudulent."). See also Lobnosky v. New York Underwriters Ins. Co., 145 Pa.Super. 38, 20 A.2d 824, 825 (1941) (stating that whether insured made false statement in proof of loss wilfully with intent to defraud was an issue of fact for the jury); Clingerman v. Everett Cash Mut. Ins. Co., 124 Pa.Super. 89, 188 A. 93, 94 (1936) (same); 13 Couch on Insurance § 197:12 (1999) ("Ordinarily, whether an insured intended to deceive

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Sicalides aff. ¶¶ 5-9.) Her affidavit does not foreclose Tom's having known Vincent's whereabouts. Furthermore, testimonial affidavits of the moving party are not a sufficient basis for summary judgment. Penn Ctr. House, Inc. v. Hoffman, 520 Pa. 171, 553 A.2d 900, 903 (1989); Borough of Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523, 524 (1932);

an insurer is a question of fact.").

3. There is evidence that Vincent Sicalides' whereabouts were material in September.

There seems to be no published Pennsylvania state appellate court case defining materiality in the context of an insured's false statement during the insurer's investigation. A federal court applying Pennsylvania law has held that a false statement is material if it concerns a subject relevant and germane to the insurer's investigation as it was then proceeding or if a reasonable insurance company, in determining its course of action, would attach significance to the fact misrepresented. Saracco v. Vigilant Ins. Co., 2000 WL 202274, at *5 (E.D.Pa.); Hepps v. General Am. Life Ins., 1998 WL 564497, at *3 (E.D.Pa.); Parasco v. Pacific Indem. Co., 920 F.Supp. 647, 654 (E.D.Pa. 1996).[5] Hartford argues, and TJS does not dispute, that the federal court's definition of materiality is the correct one. In the absence of Pennsylvania state court authority on this issue, the court will apply the federal court's definition . See Hutchison v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000) (stating that decisions of federal courts construing Pennsylvania law have persuasive authority, though Pennsylvania state courts are not bound by those decisions).

The alleged vandal, Vincent, was Tom's brother. This familial relationship, alone, may not have been enough to show that Vincent and Tom colluded to cheat the insurance company. But it was enough to make Hartford want to question Vincent. Therefore, when Tom denied knowledge of Vincent's whereabouts in September and December 1999, Vincent's whereabouts were relevant and

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[5] Other states apply a similar definition of materiality. See, e.g., Longobardi v. Chubb Ins. Co. of N.J., 582 A.2d 1257, 1262-63 (N.J. 1990); Meyer v. Home Insurance Co., 106 N.W. 1087, 1089 (Wis. 1906); Tran v. State Farm Fire and Cas. Co., 961 P.2d 358, 363 (Wash. 1998); Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 183 (2d Cir. 1984) (applying New York law).

germane to Hartford's investigation and therefore material.[6] See Saracco, 2000 WL 202274, at *5-6 (holding that insured's concealment of a witness' location was a material misrepresentation). It does not matter whether Hartford ultimately succeeds in proving collusion, for materiality is measured at the time the insured made the representation. See Parasco, 920 F.Supp. at 654.[7]

Tom Sicalides' September and December 1999 denials of knowledge of Vincent Sicalides' whereabouts create an issue of fact as to whether TJS has knowingly made material false statements voiding its coverage. Therefore, the court denies Hartford's motion for partial summary judgment on Hartford's fraud defense. And because the fraud defense, if successful, would void Hartford's obligations under the policy, the court denies TJS's motion for summary judgment on TJS's contract and bad faith claims.

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[6] Through its own investigation, Hartford eventually found Vincent in Texas. It is not clear whether Hartford had already found Vincent's in September or December 1999 when it questioned Tom. The court does not decide whether Tom's alleged misrepresentations were material if Hartford already knew where Vincent was when it questioned Tom.

[7] Applying a similar definition of materiality, the New Jersey Supreme Court wrote that

> Materiality should be judged as of the time when the misrepresentation is made. In hindsight, the significance of an untruth may turn out to be greater or less than expected. Hindsight, however, is irrelevant to the materiality of an insured's misrepresentation to an insurer.

Longobardi v. Chubb Ins. Co. of New Jersey, 582 A.2d 1257, 1262-63 (N.J. 1990).

B. The Court Does Not Now Determine the Effect of Other Allegedly False Statements By TJS.

Hartford argues that TJS made other false statements that voided the policy. Those false statements included Tom Sicalides' testimony at the March 2, 2000 preliminary injunction hearing and TJS's answers to Hartford's interrogatories, in which Tom Sicalides' and TJS again denied knowledge of Vincent's whereabouts. (Ex. D-4, 3/2/00 transcript, at 412; Ex. D-7, TJS's answers to Hartford's first set of interrogatories ¶¶ 79, 81-83.) In addition, counsel for TJS told the court at the preliminary injunction hearing that TJS had replaced the phone switch for $266,280.20. (Ex. D-27, 3/2/00 transcript, at 474-75.) Hartford has since produced evidence that TJS paid only $152,000 to Sprint for the phone switch. (Ex. 24, Patrick Keenan aff. ¶¶ 7, 8.)

There seems to be no published decision by a state or federal Pennsylvania court deciding whether a false swearing provision applies to an insured's statements made after commencement of the action. Applying New Jersey law, a federal appeals court has held that false swearing provision does not apply to an insured's statements during litigation:

> The fraud and false swearing clause is one beneficial to the insurer and it reasonably extends to protect the insurer during the period of settlement or adjustment of the claim. When settlement fails and suit is filed, the parties no longer deal on the non-adversary level required by the fraud and false swearing clause. If the insurer denies liability and compels the insured to bring suit, the rights of the parties are fixed as of that time for it is assumed that the insurer, in good faith, then has sound reasons based upon the terms of the policy for denying the claim of the insured. To permit the insurer to await the testimony at trial to create a further ground for escape from its contractual obligation is inconsistent with the function the trial normally serves. It is at the trial that the insurer must display, not manufacture, its case. Certainly the courts do not condone perjury by an insured, and appropriate criminal action against such a perjurer is always available.

American Paint Serv., Inc. v. Home Ins. Co. of N.Y., 246 F.2d 91, 94 (3d Cir. 1957), citing Republic Fire Ins. Co. v. Weides, 81 U.S. 375, 383 (1872) ("It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the

policies . . . ."). Though a New Jersey trial court has rejected American Paint as an incorrect statement of New Jersey law, Thomas v. New Jersey Ins. Underwriting Ass'n, 649 A.2d 1383, 1384 (N.J. Super. Ct. Law Div. 1994), courts in many jurisdictions have adopted American Paint. See e.g., Ichthys, Inc. v. Guarantee Ins. Co., 57 Cal.Rptr. 734, 737 (Ct.App. 1967); Rego v. Connecticut Ins. Placement Facility, 593 A.2d 491, 497 (Conn. 1991); Dodson Aviation, Inc. v. Rollins, Burdick, Hunter of Kansas, Inc., 807 P.2d 1319, 1326 (Kan.Ct.App. 1991); Home Ins. Co. v. Cohen, 357 S.W.2d 674, 677 (Ky. 1962); Tarzian v. West Bend Mut. Fire Ins. Co., 221 N.E.2d 293, 297 (Ill.App.Ct. 1966); Ocean-Clear, Inc. v. Continental Cas. Co., 462 N.Y.S.2d 251, 252-53 (App.Div. 1983); Vernon v. Aetna Ins. Co., 301 F.2d 86, 90 (5th Cir. 1962) (applying Texas law); Mercantile Trust Co. v. New York Underwriters Ins. Co., 376 F.2d 502, 504 n.2 (7th Cir. 1967) (applying Illinois law). See also 13 Couch on Insurance 3d § 197:3 (1999); F.M. English, Annotation, Applicability of Fraud and False Swearing Clause of a Fire Insurance Policy to Testimony Given at Trial, 64 A.L.R.2d 962 (1959). In a few jurisdictions, however, courts have held that a false swearing provision applies to false statements during litigation. Thomas v. New Jersey Ins. Underwriting Ass'n, 649 A.2d 1383, 1384 (N.J.Super.L.Div. 1994); Follett v. Standard Fire Ins. Co., 92 A. 956 (N.H. 1915); Lomartira v. American Automobile Ins. Co., 371 F.2d 550, 553 (2d Cir. 1967) (applying Connecticut law). But see Rego v. Connecticut Ins. Placement Facility, 593 A.2d 491, 497 (Conn. 1991) (following American Paint and rejecting Lomartira as an incorrect interpretation of Connecticut law).

Because neither side has briefed this issue and because Hartford has presented evidence of pre-litigation false statements that would void the policy and cause all of TJS's claims to fail, the court does not now decide the effect of any false statements that TJS made after filed suit.

III. THE COURT DENIES SUMMARY JUDGMENT ON HARTFORD'S COUNTERCLAIMS.

Hartford asserted counterclaims against TJS for breach of the duty of good faith and fair dealing, common law fraud and statutory insurance fraud. TJS asks for summary judgment on Hartford's counterclaims but has not made any argument in support of that part of its motion. A party moving for summary judgment has the burden of proving that there are no genuine issues of material fact. Hagans v. Constitution State Serv. Co., 455 Pa.Super. 231, 687 A.2d 1145, 1156 (1997). TJS has not met this burden, and the court denies the motion.

CONCLUSION

The court will enter a contemporaneous order denying TJS's motion for partial summary judgment.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: August 14, 2001