

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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FRANCIS J. BIFULCO and  
CHARLENE BIFULCO,

99-CV-0119E(M)

Plaintiffs,

MEMORANDUM

-vs-

GREAT NORTHERN INSURANCE COMPANY,

and

ORDER

Defendant.

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Plaintiffs commenced this breach of contract action January 15, 1999 in the New York State Supreme Court, Erie County, alleging that defendant Great Northern Insurance Company (“Great Northern”) wrongfully refused to pay a claim under their homeowners insurance policy for damage to their house located at 28 Ashland Avenue, Buffalo, N.Y. (“the house”) caused by a fire on January 19, 1997. Defendant removed this action to this Court February 19, 1999 pursuant to 28 U.S.C. §1446. This Court has jurisdiction over this case pursuant to 28 U.S.C. §1332(a)(1) because plaintiffs are citizens of New York,

defendant is a citizen of Minnesota and the amount in controversy exceeds \$75,000. Defendant filed a motion for summary judgment April 10, 2000 seeking to dismiss the complaint on the basis that it could rescind the insurance policy because plaintiffs had made material misrepresentations in the application therefor. Such is presently before this Court for disposition.

Rule 56(c) of the Federal Rules of Civil Procedure (“FRCvP”) states that 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 and that the moving party is entitled to a judgment as a matter of law.” A fact that “might affect the outcome of the suit under the governing law” is material and a fact is genuine if it “is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-248 (1986). The party moving for summary judgment must demonstrate to the court the “lack

of a genuine, triable issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The opposing party “must set forth specific facts showing that there is a genuine issue for trial.” FRCvP 56(e). When deciding a motion for summary judgment, the court must view the facts in the “light most favorable to the opposing party.” *Adickes v. H.S. Kress & Co.*, 398 U.S.144 (1970). The following facts are construed in the light most favorable to plaintiffs, as the party opposing summary judgment.<sup>1</sup>

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<sup>1</sup>Plaintiffs’ attorney, Thomas J. Eoannou, Esq., had filed a FRCvP 56(f) affidavit August 11, 2000 requesting permission to file an affidavit by Charlene Bifulco in opposition to defendant’s motion for summary judgment by August 15, 2000. During oral argument on defendant’s motion for summary judgment August 18, 2001, — such affidavit never having been obtained — this Court granted plaintiffs’ permission to file such affidavit if — and only if — Charlene Bifulco submitted to a deposition by defendant. On September 29, 2000 plaintiffs forwarded a copy of Charlene Bifulco’s affidavit — which was dated August 22, 2000 — to this Court, requesting that such be considered in determining defendant’s motion for summary judgment. Defendant wrote this Court October 4, 2000 objecting to such affidavit on the basis that it contradicted her earlier sworn testimony and that she had never appeared for her noticed deposition. The undersigned wrote to the parties October 5, 2000 stating that such affidavit would not be considered unless she submitted to a deposition. On December 5, 2000 defendant’s attorney Roy A. Mura, Esq. wrote to this Court stating that Charlene Bifulco had again failed to attend her deposition scheduled for December 6, 2000. Accordingly, such affidavit — which has never been filed with this Court in any event — will not be considered by this Court in deciding defendant’s motion for summary

(continued...)

Francis Bifulco purchased the house July 1, 1990 and such was insured by Security Mutual Insurance Company (“Security Mutual”) from July 2, 1990 through July 2, 1993. During this time, he submitted four claims to Security Mutual and was indemnified for one. On May 20, 1993 Security Mutual notified Francis that it would not be renewing his homeowners insurance policy due to “loss frequency.”<sup>2</sup> On June 17, 1993 Francis Bifulco<sup>3</sup> applied for insurance from Unigard Insurance Company (“Unigard”) stating that he had had no losses within the prior three years and Unigard issued to him a homeowners insurance policy valid from July 2, 1993 through July 2, 1996. During the period the house was covered by the Unigard policy, plaintiffs submitted five claims to Unigard and were indemnified for all of them. Unigard notified

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<sup>1</sup>(...continued)  
judgment.

<sup>2</sup>Thomas N. Brace, Security Mutual Claims Manager, affidavit and attached exhibits.

<sup>3</sup>Charlene Duszynski commenced cohabitation with Francis Bifulco in October 1993 and they were married January 5, 1995. On May 30, 1995 Francis Bifulco transferred the house into both of their names.

plaintiffs May 10, 1996 that it would not be renewing their homeowners insurance policy which was scheduled to expire July 2, 1996 due to “loss activity.”<sup>4</sup> In May 1996 Charlene Bifulco telephoned the Walsh Duffield Companies (“Walsh Duffield”) and spoke to an account executive, Marcia Lipinski, regarding the purchase of a homeowners insurance policy. Lipinski filled out a Walsh Duffield Insurance Quote Request Form based on the information Charlene Bifulco had provided to her. Lipinski Aff. ¶4 and Ex. A. Based on this information, Lipinski recommended that Charlene Bifulco consider purchasing a policy from one of the Chubb Group of Insurance Companies (“Chubb”).<sup>5</sup> Lipinski Aff. ¶10. Walsh Duffield eventually sold plaintiffs a Great Northern “Masterpiece”

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<sup>4</sup>Affidavit of Douglas W. Furman, Unigard Claim Line Manager, and attached exhibits.

<sup>5</sup>Walsh Duffield is an independent insurance agency, which obtains insurance policies for customers from various insurance companies including Chubb. Lipinski Aff. ¶¶1, 10. Chubb is comprised of four separate insurance companies — viz., (1) Chubb Indemnity Insurance Company, (2) Vigilant Insurance Company, (3) Pacific Indemnity Insurance Company and (4) Great Northern. Great Northern is the most preferred of the four Chubb insurance companies and only the best insurance risks are placed with it. Paul M. Morrissette Aff. ¶4.

homeowners insurance policy, effective from July 2, 1996 through July 2, 1997.

On January 19, 1997 the house suffered the instant damage and plaintiffs requested indemnification for such from Great Northern pursuant to their homeowners insurance policy.<sup>6</sup> Albin C. Dec, a special investigator with Chubb conducted an investigation into the fire claim on behalf of Great Northern. As a result of this investigation, which included an examination under oath of plaintiffs January 29, 1997, Great Northern became aware of their previous insurance claims.<sup>7</sup> Defendant now seeks rescission of the homeowners insurance policy *ab*

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<sup>6</sup>This was Francis Bifulco's third house fire. He had been indemnified for \$62,626.07 by Michigan Mutual Insurance Company for a fire at 25 Wellington Road, Buffalo, N.Y. on February 27, 1984 and for \$54,553.80 by Aetna Casualty and Surety for a fire at 40 Niagara Falls Boulevard, Tonawanda, N.Y. on March 10, 1985. Dec. Aff. Ex. A. at 4-7 (January 29, 1997 examination under oath of Francis and Charlene Bifulco); Rebecca Lund, Travelers Property Casualty Property Unit Manager, affidavit and attached exhibit.

<sup>7</sup>In addition to the above fires and the losses under the Security Mutual and Unigard insurance policies, Francis Bifulco had been indemnified for \$10,159.13 by Cigna Insurance Companies for the collapse of a water bed at 230 Wallace Avenue, Buffalo, N.Y. and Charlene Bifulco had been indemnified for a burglary at one of her businesses and vandalism at another. Dec. Aff. Ex. A. at 3-4 (January 29, 1997 examination under oath of Francis and Charlene Bifulco).

*initio*, on the basis that plaintiffs had made material misrepresentations in applying for such in regard to their prior losses and the non-renewal of their Unigard policy and summary judgment dismissing their complaint on such basis.

Whether an insurer is entitled to rescind an insurance contract based upon misrepresentations made by the insured in applying for such is governed by section 3105 of the New York Insurance Law.<sup>8</sup> “It is well established that in order for an insurer to establish its right to rescind an insurance policy, it must establish that there were misrepresentations in the application, and that the misrepresentations were material to the risk

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<sup>8</sup> “(a) A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.

“(b) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.

“(c) In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible.”

it was being asked to insure.” *Kulikowski v. Roslyn Savings Bank*, 503 N.Y.S.2d 863, 864 (App. Div. 2d Dep’t 1986).

“Whether an applicant’s misrepresentations are material is typically an issue of fact; however, where the evidence concerning materiality is clear and substantially uncontradicted, it is for the court to decide as a matter of law, especially when the misrepresentation substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise have not taken.” *Kroski v. Long Island Savings Bank FSB*, 689 N.Y.S.2d 92 (App. Div. 1st Dep’t 1999).<sup>9</sup>

“[E]ven innocent misrepresentations, if material, are sufficient to allow an insurer to defeat recovery under the insurance contract.” *Kulikowski*, at 864. To determine if a misrepresentation is material as a matter of law, the court generally relies upon the insurer’s underwriting manual and an affidavit from its underwriter. *Feldman v. Friedman*, 661 N.Y.S.2d 9 (App. Div. 1st Dep’t 1997). As stated by the New York Court

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<sup>9</sup>Internal quotation marks and citation omitted.

of Appeals, when an insurance company poses certain questions to a prospective insured, in

“effect the company states to the applicant that the answers to those questions are intended to guide the company in deciding whether to accept or reject the application. By posing the question the insurer has indicated that it wanted to know the facts and that it intended and expected the applicant to speak the truth so that it might acquire information concerning them. Any misrepresentation which defeats or seriously interferes with the exercise of such a right cannot be truly said to be an immaterial one.

“\*\*\* [W]here an applicant for insurance has notice that before the insurance company will act upon the application, it demands that specified information shall be furnished for the purpose of enabling it to determine whether the risk should be accepted, any untrue representation, however innocent, which either by affirmation of an untruth or suppression of the truth, substantially thwarts the purpose for which the information is demanded and induces action which the insurance company might otherwise not have taken, is material as a matter of law. The question in such case is not whether the insurance company might perhaps have decided to issue the policy even if it had been apprised of the truth, the question is whether the failure to state the truth where there was duty to speak prevented the insurance company

from exercising its choice of whether to accept or reject the application upon a disclosure of all the facts which might reasonably affect its choice.” *Geer v. Union Mut. Life Ins. Co.*, 273 N.Y. 261, 265-266 (1937).

However, questions on insurance applications must be strictly construed against the insurance company when it seeks to avoid liability by citing the answers thereto as misrepresentations. *Vella v. Equitable Life Assur. Soc. of U.S.*, 887 F.2d 388, 391-392 (2d Cir. 1989). “The questions must be so plain and intelligible that any applicant can readily comprehend them. If any ambiguity exists, the construction will obtain most favorable to the insured.” *Id.* at 392.<sup>10</sup> Furthermore, an “applicant for insurance is [generally] under no duty to volunteer information where no question plainly and directly requires it to be furnished.” *Id.* at 393. However, the “duty to disclose information is not limited to information requested in an insurance application where non-disclosure would be tantamount to fraudulent concealment,” but for the “non-disclosure to

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<sup>10</sup>Citation and quotation marks omitted.

rise to the level of fraudulent concealment, it must have been done in bad faith with intent to mislead the insurer.” *Home Ins. Co. of IL(NH) v. Spectrum Info. Tech.*, 930 F. Supp. 825, 840 (E.D.N.Y. 1996).<sup>11</sup> Based on the above, the issue to be decided by this Court is whether plaintiffs misrepresented their prior insurance losses and the non-renewal of their Unigard policy and, if so, whether such misrepresentations are material.

Paul M. Morrissette, the Zone Underwriting Center Manager for Chubb, has submitted an affidavit stating that at the time plaintiffs’ homeowners insurance policy was issued he was Chubb’s Personal Lines Manager for Central and Western New York and that under the underwriting guidelines in place at that time the policy would not have been issued to plaintiffs had their prior claims and the fact that Unigard was not renewing their policy been disclosed. Morrissette Aff. ¶¶1-2, 10, 20. Under the Upstate New York “Masterpiece” Manual Binding Guidelines, insurance agents are not supposed to bind coverage on

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<sup>11</sup>Internal citations and quotation marks omitted.

individuals with either “a loss history suggesting a pattern of frequent or severe losses” or those “whose insurance has been cancelled, refused, or discontinued by another insurance company” without specific authorization from the underwriter. *Morrisette Aff. Ex. B.* Furthermore, under the Chubb Homeowners Writing Company Guidelines, a Great Northern insurance policy may not be issued to anyone who has had any losses in the preceding three years. *Morrisette Aff. Ex. C.* *Morrisette* states that to determine if a customer is eligible for a Chubb insurance policy the insurance agent completes an electronic application and as part of such is required to “ask the client about his or her prior insurance loss history.” *Morrisette Aff. ¶9.* Defendant states that the reason that no question regarding loss history appears on the plaintiff’s electronic application is that “Chubb’s customer service representative bypassed (and removed) that screen when account executive Marcia Lipinski stated that, according to her client, there were no prior losses. For this reason, no ‘loss screen’ appears together with the

other computer screens that comprised the Bifulcos' electronic homeowners insurance application." *Morrisette Aff.* ¶16 and Ex. D (Bifulcos' electronic application). Lipinski states that Charlene Bifulco informed her that the Unigard policy was going to be renewed and that she had specifically asked Charlene Bifulco if "she had experienced any prior property insurance losses" to which Charlene Bifulco responded that "there were no prior insurance losses." *Lipinski Aff.* ¶¶6, 9.

Plaintiffs, however, submitted a Statement of Material Facts ("Response") wherein Charlene Bifulco states that, when she contacted Walsh Duffield, the Bifulcos were not aware that the Unigard policy would not be renewed and that she does not remember being asked about any prior losses. *Pls.' Statement of Material Facts* ¶¶3-5; *Mura August 1, 2000 Aff. Ex. E* at 102-103, 114-115, 127-128 (C. Bifulco EUO).<sup>12</sup>

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<sup>12</sup>It appears that plaintiffs may have been aware that their Unigard policy would not be renewed prior to contacting Walsh Duffield. *See Dec Aff. Ex. A.* at 19-20.

"Q: Were you ever in arrears prior to the fire?

"A: There might have been a little problem with the mortgage because we're having a . . . whose? Unigard? [Husband asks to wife — whose the last insurance on  
(continued...)]

As the parties opposing summary judgment, all ambiguities must be resolved in favor of plaintiffs. Furthermore and lending support to plaintiffs' contentions, the Walsh Duffield Insurance Quote Request Form completed by Lipinski neither inquires as to either the renewal *vel non* of the prospective customer's current insurance or any prior insurance losses — Lipinski Aff. Ex. A — nor is anything mentioned in the Great Northern insurance policy itself about representations made by plaintiffs regarding either the renewal of their Unigard policy or prior insurance losses. Morrissette Aff. Ex. A. Defendant states that it “would not have issued the homeowners policy to plaintiffs had it known that

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<sup>12</sup>(...continued)

the house? Wife — Unigard. Oh. Do you want me to explain this? Husband — well, either or. They cancelled us, okay?]

“Q: And for any particular reason?

“A: Yes. Because of the claim.

“Q: Loss history?

“A: Yes okay they cancelled us so this Chubb, she went out and got Chubb and it worked at the same time as the cancellation. So they charged me \$1,700. because they got their own insurance. So I have been arguing with them right now that I have coverage and it never lapsed so there was a time in there when we were a little a month behind and we tried to get this straightened out because I wasn't going to send them \$1,700. because I don't owe \$1,700. but it is all current right now.” Dec Aff. Ex. A. at 19-20

plaintiffs had prior insurance losses and that Unigard had refused to renew their homeowners insurance effective July 2, 1996.” Mem of Law in Supp. of Def.’s Mot. for Summ. J. at 15. However defendant also states that “following the loss \*\*\* the policy was renewed.” *Id.* at 10.<sup>13</sup> There is a genuine issue of material fact as to whether plaintiffs were asked about the renewal of their Unigard policy or prior insurance losses and even whether defendant would have still issued them a policy knowing of such, therefore summary judgment will be denied.

Accordingly, it is hereby *ORDERED* that defendant’s motion for summary judgment is denied.

DATED: Buffalo, N.Y.

June 27, 2001

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S.U.S.D.J.

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<sup>13</sup>This statement, although overlooked by plaintiff, calls into doubt defendant’s assertion that it would not have issued plaintiffs the insurance policy at issue due to their prior losses and cancelled policies.