IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JACOB B. SCHORR, III, and **ZINNIES ENTERPRISES, INC.,**	)	
Plaintiff,	)	
v.	)	No. **00-3106 D/V**
SECURITY INDEMNITY INSURANCE COMPANY, RELIANCE INSURANCE COMPANY and **TATE INSURANCE AGENCY,**	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant, Security Indemnity Insurance Company ("SIIC"), filed a motion for summary judgment regarding Plaintiffs', Jacob B. Schorr, III ("Schorr") and Zinnies Enterprises, Incorporated ("Zinnies"), claims under the Tennessee Consumer Protection Act ("TPCA"), Tenn. Code Ann. § 47-18-104. The Court has jurisdiction pursuant to 28 U.S.C. § 1332. For the following reasons, the Court grants Defendant's motion for summary judgment.

I. Background Facts

Schorr resides in Tennessee and is the sole stockholder and president of Zinnies Enterprise, Inc. Zinnies is a Tennessee corporation with its "principal office and business" in Memphis,

Tennessee. Zinnies owns and operates restaurants.

SIIC is a foreign corporation with its principal place of business in New Jersey. Reliance Insurance Company ("RIC") is a foreign corporation with its principal place of business in Pennsylvania. Tate Insurance Agency ("Tate") has its principal place of business in Memphis, Tennessee. SIIC, RIC, and Tate are all in the business of selling insurance.

It is alleged that in March 1997, Schorr applied for insurance from Tate, which was allegedly underwritten by SIIC.[1] The application covered the following four restaurant or tavern locations in Memphis: 346 North Main Street, 348 North Main Street, 356 North Main Street, and 112 Jackson Avenue. The policy allegedly obligated Defendants to compensate Zinnies in the event of covered fire losses and related losses to personal and real property and losses suffered as a result of the interruption of business. Plaintiffs allegedly paid all premiums before October 5, 1998.

On October 5, 1998, a fire damaged Plaintiffs' restaurant at 346 and 348 North Main Street "The North End." Tenco Services, an adjuster and Defendants' alleged agent, inspected the damage and interviewed Schorr at length. On January 26, 1999, Plaintiff submitted two claims for "building loss" to 346 and 348 North Main for the amounts of $122,171.11 and $26,653, respectively. On February 1, 1999, Plaintiffs filed a claim for the loss of the combined contents of both buildings in the amount of $139,956.33.

After further consulting with Tenco Services, Schorr resubmitted reduced claims with the understanding that they would be promptly paid, and that additional money would be paid if the

[1] The application was attached to Defendant's Memorandum in Support of its Motion for Summary Judgment as Exhibit 1. The application is titled "Restaurant Application" and the letterhead on the application belongs to Tennessee Underwriters, Inc. at 140 Fourth Avenue South in Franklin, Tennessee. Schorr lists March 10, 1997 as the effective date and Greg Tate is listed as the salesperson. The restaurant application did not include a policy number.

actual losses to Schorr later proved to be higher. Plaintiffs reduced their building loss claims for 346 and 348 North Main to $98,171.17 and $16,991, respectively. Plaintiffs also reduced their claim for the combined contents to $109,728. On February 23, 1999, Plaintiffs submitted a claim for business interruption loss in the amount of $342,571.95, which exceeded the limit of the policy and was reduced to $200,000.

On January 13, 2000, SIIC paid Plaintiffs' $98,171.17 building loss claim for 346 North Main Street to the mortgage holder. On July 21, 2000, SIIC paid Plaintiffs' $16,991 business loss claim for 348 North Main Street to the mortgage holder. Allegedly, Defendants, however, have not paid the claim for the loss of the combined contents and the business interruption claim.

Plaintiffs brought an action in state court against Defendants alleging (1) a breach of the insurance contract; (2) a breach of the implied covenant of good faith and fair dealing; and (3) a violation of the TCPA, Tenn. Code Ann. § 47-18-104. Plaintiffs also alleged that SIIC and RIC refused, in bad faith, to pay Plaintiff's claims, thereby violating Tenn. Code Ann. § 56-7-105.

The case was removed to federal court. On April 2, 2001, Tate filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. On April 5, 2001, SIIC and RIC filed a motion to dismiss Plaintiff's TCPA claim, asserting that Plaintiff failed to comply with specific pleading requirements. SIIC and RIC also moved to dismiss all extracontractual claims, arguing that the bad faith statute precludes such claims. SIIC and RIC also move for partial summary judgment of Plaintiffs' bad faith claim, asserting that Plaintiffs failed to comply with the statutory requirements before filing suit. In their response, Plaintiffs agreed to dismiss the bad faith penalty claim and all extra-contractual damages. On June 5, 2001, the Court entered an agreed order dismissing Tate as a party.

On June 12, 2001, the Court denied Defendants' motion to dismiss Plaintiffs' TPCA claim. The Court granted Defendants' motion to dismiss claim for breach of contract and breach of the implied covenant of good faith and fair dealing. The Court granted Defendants' partial summary judgment motion as to Plaintiffs' bad faith claim under Tenn. Code Ann. § 56-7-105. Currently, only Plaintiffs' claim under the TCPA remains.

Defendants filed a motion for summary judgment on July 17, 2001. According to Local Rule 7.2(a)(2), Plaintiffs were required to submit their response within thirty days after service of the motion. Plaintiffs failed to respond timely, therefore, the Court decides the motion in the absence of Plaintiffs' response.

II. Legal Standards

A. Summary Judgment

Summary judgment is proper "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." Fed. R. Civ. P. 56(c). In other words, summary judgment is appropriately granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The party moving for summary judgment may satisfy its initial burden of proving the absence of a genuine issue of material fact by showing that there is a lack of evidence to support the nonmoving party's case. Id. at 325. This in turn may be accomplished by submitting affirmative

evidence negating an essential element of the nonmoving party's claim, or by attacking the opponent's evidence to show why it does not support a judgment for the nonmoving party. 10A Charles A. Wright et al., Federal Practice and Procedure § 2727, at 35 (2d ed. Supp. 1996).

Facts must be presented to the court for evaluation. Kalamazoo River Study Group v. Rockwell Int'l Corp., 171 F.3d 1065, 1068 (6th Cir. 1999). The court may consider any material that would be admissible or usable at trial. 10A Charles A. Wright et al., Federal Practice and Procedure § 2721, at 40 (2d ed. 1983). Although hearsay evidence may not be considered on a motion for summary judgment, Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 927 (6th Cir. 1999), evidentiary materials presented to avoid summary judgment otherwise need not be in a form that would be admissible at trial. Celotex, 477 U.S. at 324; Thaddeus-X v. Blatter, 175 F.3d 378, 400 (6th Cir. 1999).

In evaluating a motion for summary judgment, all the evidence and facts must be viewed in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Walbourn v. Erie County Care Facility, 150 F.3d 584, 588 (6th Cir. 1998). Justifiable inferences based on facts are also to be drawn in favor of the non-movant. Kalamazoo River, 171 F.3d at 1068.

Once a properly supported motion for summary judgment has been made, the "adverse party may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue for trial exists if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some

metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

B. Tenn. Code Ann. § 56-7-103

According to Tenn. Code Ann. § 56-7-103,[2] an insurer may avoid coverage if it can prove (1) that the insured made misrepresentations in his insurance application; and (2) that the insured made misrepresentations with the intent to deceive the insurer *or* that the false answers materially increased the risk of loss. See Womack v. Blue Cross and Blue Shield of Tenn., 593 S.W.2d 294, 295 (Tenn. 1980)(emphasis added); Tennessee Farmers Mut. Ins. Co. v. Westmoreland, No. E2000-02693-COA-R3-CV, 2001 WL 579047, at *3 (Tenn. Ct. App. May 30, 2001). Whether the insured provided false information and whether the insured acted with an intent to deceive are questions for the factfinder, but whether a misrepresentation materially increased the risk of loss is a question for the court. Womack, 593 S.W.2d at 295; see also Webb v. Insurance Co. of North America, 581 F.Supp. 244, 246 (W.D. Tenn. 1984).

A misrepresentation that "increases the risk of loss" is any representation in an application for insurance which naturally and reasonably influences the judgment of the insurer in making the contract. Clingan v. Vulcan Life Ins. Co., 694 S.W.2d 327, 330 (Tenn. Ct. App. 1985); State Farm General Ins. Co. v. Wood, 1 S.W.3d 658, 661, 662 (Tenn. Ct. App. 1999). To determine whether there has been a material misrepresentation, a court need not find that a policy would not have been issued had the facts been known. Clingan, 694 S.W.2d at 330. The court must find only that the misrepresentation "'was sufficient to deny the insurer information which it sought to discover and which it must have deemed necessary to an honest appraisal of insurability.'" Clingan, 694 S.W.2d

[2] Section 56-7-103 is identical to its precursor, section 56-1103.

at 330-31 (quoting Johnson v. State Farm Life Ins. Co., 633 S.W.2d 484, 488 (Tenn. Ct. App. 1981)). The burden is on the insurer to establish a misrepresentation defense. J.H. Hamlin v. Allstate Ins. Co., No. 03A01-9211-CV-00406, 1993 WL 191988, at *4 (Tenn. Ct. App. June 8, 1993) (citing McDaniel v. Physicians Mut. Ins. Co., 621 S.W.2d 391, 393 (Tenn. 1981)).

III. Analysis

A. Misrepresentation

In the instant case, although it is unclear from the record whether Schorr personally completed the application, (Def.'s S.J. Memo. Ex. 2 at 147-48), the application ultimately bears his signature. Case law imposes upon an insured the duty to read the application and to verify its accuracy. Montgomery v. Reserve Life Ins. Co.,585 S.W.2d 620, 622 (Tenn. Ct. App. 1979). "'To permit a party, when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.'" Hardin v. Combined Ins. Co. of America, 528 S.W.2d 31, 37 (Tenn. Ct. App. 1975) (quoting 17 C.J.S. Contracts § 137, at 489-90). Therefore, the Court finds Schorr responsible for the representations made in the insurance application.

In the instant case, Defendants contend that Schorr made a number of misrepresentations in the insurance application. Specifically, Defendants argue that Schorr falsely maintained that he and/or Zinnies Enterprises, Inc. were never subject to any litigation or tax liens and that Royal Insurance Company ("Royal") was Plaintiffs' insurance carrier when Schorr signed the application. Plaintiffs did not file a response to these contentions.

An examination of the record indicates that Schorr, at the time of the application, had been involved in a number of litigations. In 1992 or 1993, a patron's leg was broken when an employee tried to break up a fight. Schorr testified that this patron sued him and was awarded either $2,300 or $2,100 following a jury trial. (Def. Memo. Ex. 2 at 161-62). In addition, a woman allegedly fell off a patio chair at the North End in the early nineties and sued Plaintiffs.[3] Schorr also indicated that he was involved in lawsuits relating to a carriage company, (Def.'s S.J. Memo. Ex. 2 at 163), which is relevant because the application asks whether the "*owner* or corporation" was ever involved in any lawsuits. (Def.'s S.J. Memo. Ex. 1).

There is also evidence that Schorr falsely reported that he and/or Zinnies were never involved in tax liens. During his testimony, Schorr stated that he "believed" that the IRS placed a lien on his property an estimated three times. (Def.'s S.J. Memo. Ex. 2 at 198, 199). Schorr also testified that the IRS seized the North End's checking account. (Def.'s S.J. Memo. Ex. 2 at 199-200). Schorr's testimony regarding tax liens and lawsuits prove that he made misrepresentations on the insurance application.[4]

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[3] The lawsuit was dismissed.

[4] The Court finds, however, that not all of Defendants' assertions in their memorandum supporting their motion for summary judgment are beyond challenge. Although Defendant asserts that there were additional "slip-and-fall" lawsuits, the Court can not conclusively determine that these two incidents resulted in litigation. Also, though Defendants allege that Schorr also testified that he has been sued regarding debt collection for debts incurred from transacting the North End's business, (Def.'s S.J. Memo. 7), Schorr testified that he owed money, but never mentioned litigation. (Def.'s S.J. Memo. Ex. 2 at 126, 127).

Defendants maintain that Schorr omitted two mortgages from the application. Although Schorr testified that he owed the 348 Corporation roughly forty-two thousand dollars on a note that was later assigned to Bruce Ralston, (Def.'s S.J. Memo. Ex. 2 at 67-68), Schorr did not testify that his creditors were given an interest in the property. The Court refuses to presume that Schorr's debt was a mortgage on the property. Defendants also speaks of monies owed to "Mrs. Johnson" but there is no mention of Mrs. Johnson in the transcript.

B. Misrepresentation Increased the Risk of Loss

To void the insurance policy, the Court must find that the misrepresentations materially increased the risk of loss. The Court need not find that the insurer would not have issued the policy because of the misrepresentation. Clingan v. Vulcan Life Ins. Co., 694 S.W.2d 327, 330 (Tenn. Ct. App. 1985). Rather, the Court must only determine that the misrepresentation "naturally and reasonably influence[d] the judgment of the insurer in making the contract." Id.; State Farm General Ins. Co. v. Wood, 1 S.W.3d 658, 661, 662 (Tenn. Ct. App. 1999). In Wood, while completing an insurance application, the insured plaintiff failed to disclose a prior loss due to fire. When the plaintiff's home was later destroyed by fire, the insurance company refused to pay and the court declared the policy void from its inception. Supporting the defendant's contention that the misrepresentation increased the risk of loss, an underwriter testified that a homeowner with a history of fire loss is more likely to suffer additional fire losses in the future. Wood, 1 S.W.2d at 662.

Similarly, in Clingan, the court did not permit a plaintiff to recover the medical costs related to a back surgery, because the plaintiff failed to disclose past lower back pain and leg pain in her

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Schorr also indicated that he was sued by an employee for wages "a year ago" but the Court cannot determine whether the lawsuit was filed before or after the fire because the transcript is not dated. (Def.'s S.J. Memo. Ex. 2 at 166, 167).

Finally, Defendants also argue that, at the time Schorr signed the application, he misrepresented Royal as his current insurance carrier. Defendants assert that Schorr's testimony is evidence that Royal had canceled Plaintiffs' coverage before he signed Defendants' application. Nevertheless, according to Schorr's testimony, Royal paid Plaintiffs $19,005.90 for lightning damage on June 17, 1997. (Def.'s S.J. Memo. Ex. 2 at 157). Therefore, the Court cannot conclusively determine when Royal ceased to be Plaintiffs' insurance carrier before Schorr signed Defendants' application.

Despite the above-mentioned deficiencies in Defendant's memorandum supporting its motion for summary judgment, at least two lawsuits and at least one tax lien were not disclosed in the insurance application. These failures to disclose constitute misrepresentations.

insurance application. Clingan, 694 S.W.2d at 331. An underwriter testified that had he known of the plaintiff's medical history at the time she applied for coverage, the underwriter would have placed an exclusion rider in the policy excluding coverage for any type of problem to the lower back or lumbar section of her spinal column. Id. at 330.

"It does not matter that the misrepresentation was unrelated to the cause of loss where there is testimony that the defendant would not have written the policy if it had known of the insured's prior losses." Bagwell v. Canal Ins. Co., 663 F.2d 710 (6th Cir. 1981); Seaton v. Nat'l Grange Mutual Ins. Co., 732 S.W.2d 288 (Tenn Ct. App. 1987); Milligan, 497 S.W.2d at 738-79. In Seaton v. Nat'l Grange Mutual Ins. Co., 732 S.W.2d 288 (Tenn. Ct. App. 1987), the plaintiff sought to recover the value of his stolen automobile from his insurance company. Nevertheless, in his insurance application, the plaintiff failed to mention any previous accidents or violations, whereas the record established that plaintiff had been involved in two accidents and two speeding tickets. Seaton, 732 S.W.2d at 288. The plaintiff argued that his driving history bore no relation to the risk of theft, but an underwriter stated that had the plaintiff fully disclosed his history of accidents and violations, the policy would not have been issued. Seaton, 732 S.W.2d at 289. The court agreed with the defendants and voided the policy.

Additionally, in Holmes v. Sphere Drake Ins. Co., No. 02A01-9112-CH-00301, 1992 WL 245522 (Tenn. Ct. App. Sept. 30, 1992), the court found that the misrepresentations regarding arrests for drug possession and second degree murder could stop a plaintiff from recovering insurance monies for an automobile theft. Holmes, 1992 WL 245522, at *1. The court found that even though his convictions were not traffic-related, this information "would 'naturally and reasonably influence the judgment' of the defendants when issuing the policy." Id. at *3.

In the instant case, Defendants submitted an affidavit of Lisa Fellows ("Fellows"), an underwriter for SIIC. In her affidavit, Fellows states that Schorr failed to disclose past lawsuits, tax liens, and two mortgages on the property, and these omissions prevented SIIC from "conducting a thorough investigation" and "accurately appraising" Schorr's risk of loss. (Fellows Affidavit at 4,5,6). Fellows further concluded, "If I or [SIIC] had known the truth about Plaintiff's misrepresentations on his Application for Insurance, [SIIC] would not have issued an insurance policy to the Plaintiff." (Fellows Affidavit at 7). Plaintiff failed to offer evidence to contradict Fellows's conclusion.

At a motion for summary judgment, the non-moving party must present evidence demonstrating that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). In the instant case, Defendants proffered an affidavit establishing that there were misrepresentations and but for the misrepresentations, Defendants would not have issued its insurance policy. Plaintiffs have failed to respond or to contradict Defendants' evidence. Therefore, the Court grants Defendant's motion for summary judgment and declares the policy void *ab initio*.

IV. Conclusion

For the foregoing reasons, Defendant's motion for summary judgment is granted, and Plaintiffs complaint is dismissed.

IT IS SO ORDERED this _____ day of _____ 2001.

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BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE