STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SENTRY INSURANCE OF MICHIGAN, INC.,

Plaintiff,

vs

File No. 91-5452-CK
HON. PHILIP E. RODGERS, JR.

JEFFREY G. TAPPERO and ANDREA TAPPERO, husband and wife, AUGUST T. BERNHARD, BARBARA J. MANCINELLI, ALL SEASONS REALTY, a Michigan Corporation, ROBERT M. BAILEY, REPUBLIC BANK NORTH,

Defendants.
/

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DECISION AND ORDER

Plaintiff submits a Renewed Motion for Summary Disposition pursuant to MCR 2.116(C)(10) based upon an exclusion within the liability insurance policy issued by Plaintiff. Plaintiff's motion for summary disposition also relies upon the March 20, 1992 Decision and Order of this Court which found the Defendants Tappero liable for fraudulent misrepresentation and concealment of material facts pertaining to the nature and extent of a fuel oil spill.[1] Plaintiff asserts that intentional acts are not covered under the

[1]Bernhard v Tappero, et al, Antrim Circuit Court File No. 88-4519-CZ, Decision and Order dated March 20, 1992.

terms of the insurance policy and that coverage will not be provided upon a showing of misrepresentation and fraud. Defendants All Seasons Realty and Republic Bank North have timely responded. All Seasons Realty requests that the Court deny the motion, asserting the existence of a factual question as to whether both Mr. and Mrs. Tappero were responsible for the fraud. Republic Bank North maintains that motion is premature and argues that all the factual issues have not been resolved.

The Court has reviewed the motion and the briefs filed by the several parties together with the court file in making its determination on the motion. Pursuant to the applicable standard of review, and for the reasons set forth ahead, Plaintiff's motion is granted.

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

> "A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).
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> The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate.

Rizzo, p 372."

In examining the legal basis of the complaint, and taking Plaintiff's well plead factual allegations as true, the Court is satisfied there is no issue left open upon which reasonable minds could differ. The plain language of the insurance policy issued by Plaintiff states as follows at page 16 regarding the concealment of fraud:

> "We do not provide coverage for you if you have intentionally concealed or misrepresented any material fact or circumstance relating to this insurance."

The rules of construction which pertain to insurance policies were set forth by the Michigan Supreme Court in Fresard v Michigan Millers Mutual Insurance Co, 414 Mich 686, 694 (1982). There the Court wrote as follows:

> "When examining the language of this or any other insurance policy, we are mindful of several other principles of construction so rudimentary as to be axiomatic:
>
> The contract should be viewed as a whole.
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> The intent of the parties should be given effect.
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> An interpretation of the contract which would render it unreasonable should be avoided.
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> Meaning should be given to all terms.
>
> Ambiguities should not be forced.
>
> Conflicts among clauses should be harmonized.
>
> The contract should be viewed from the standpoint of the insured.
>
> The insurer should bear the burden of proving an absence of coverage." Id. p 694.

Recognizing these principles of construction, the issue before the Court is whether or not any factual issues existed with regard to a potential ambiguity in the interpretation of the clauses described above. The issue of ambiguity in the interpretation of insurance contracts was discussed by the Michigan Supreme Court in

Raska v Farm Bureau Insurance Co, 412 Mich 355 (1982). There, the Raska Court wrote as follows:

> "The only pertinent question, therefore, is whether the exclusionary clause in this contract is ambiguous, for if it is not ambiguous we are constrained to enforce it. A contract is said to be ambiguous when its words may be reasonably understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances, and under another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against its drafter and in favor of coverage. Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear." Id. p 362. See also, Allor v Dubay, 317 Mich 281 (1947).

The findings by this Court that the Tapperos fraudulently concealed material facts and made misrepresentations to their realtor and to Mr. Bernard and Ms. Mancinelli regarding the nature and extent of a fuel oil spill are dispositive regarding any duty of Plaintiff Sentry Insurance to defend or indemnify Defendants. No such duty can exist in the face of these findings and a fair reading of the preceding policy language.

Plaintiff's motion is granted on the basis of prior findings of fraud and misrepresentation. The relationship of "intentional acts" to this holding will also be addressed. Clearly, any loss arising out of an intentional act is not covered by the policy. The actual fuel oil spill and leak were not found by the Court to be the product of intentional acts on the part of the Tapperos or any other person. However, the concealment and misrepresentation of the extent of the fuel oil spill were found to be intentional acts on the part of the Tapperos. This Court has held them liable for those acts in the prior litigation.

Finally, the Court cannot agree that the point of law Defendants cite from Morgan v Cincinnati Ins Co, 411 Mich 267 (1981) is applicable to this case at hand. In Morgan, supra, the issue was whether the wrongful conduct of one spouse can be imputed to the other, serving as a bar to the innocent spouse from

recovering the proceeds of a statutory fire insurance policy. The Morgan home, held as tenants by the entireties, was intentionally burned by Mr. Morgan. The Morgans were living separately pending the finalization of their divorce proceedings. The trial court found that Mr. Morgan had committed an act of fraud and other misconduct by intentionally setting the fire of which Mrs. Morgan had no advance knowledge. The insurance company asserted it had no duty to pay on the claim submitted by Mrs. Morgan.

The Morgan court found:

> ". . . whenever the statutory clause limiting the insurer's liability in cause of fraud by the insured is used it will read to bar only the claim of an insured who has committed the fraud and will not be read to bar the claim of any insured under the policy who is innocent of fraud." Emphasis added. Id. 277.

Defendants argue that a factual issue remains as to whether Mr. Tappero was an "innocent insured" who had no knowledge of the extent and severity of the oil spill. Both Tapperos were found to have deliberately and fraudulently concealed the extent of the fuel oil spill. The evidence was clear and convincing. Lewis v Poel, 9 Mich App 131, 139-140; 156 NW2d 41 (1968).[2]

The terms and conditions of the insurance policy when viewed in conjunction with the Tapperos' conduct necessarily excludes them from coverage. The prior finding of intentional concealment and misrepresentation of material facts is dispositive of those issues in this case in accordance with the principles of collateral estoppel.

Plaintiff owes no duty to Defendants to defend or indemnify based upon the prior findings of this Court regarding fraudulent concealment and misrepresentation of material facts concerning the nature and extent of the fuel oil spill. The Defendants Tappero both were responsible and a Judgment was entered against each of

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[2]See, Decision and Order dated March 20, 1992 and discussion at pp 3-4, 11-12, 14-17, 19 and 23. The Court believes its findings were unambiguously stated and that Mr. Tappero had knowledge of an extensive spill, the fact of which be had a duty to disclose. His failure to do so was found to be fraudulent.

them. Plaintiff's renewed motion for summary disposition is granted. MCR 2.116(C)(10). A judgment consistent with this Decision and Order shall be submitted pursuant to the procedure set forth in MCR 2.602 within fourteen days from the date of this order.[3]

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/17/92

[3]Pursuant to this Court's Decision and Order of June 26, 1992, the Defendants Tappero were to have filed proof with the Court that Plaintiff had been reimbursed for those costs found by the Court to have been incurred in obtaining the default. A review of the Court file on this date indicates that no such proof has been filed. Accordingly, it is the additional finding of the Court that the terms and conditions for setting aside the default previously entered have not been met. The default vacated by the Court's May 11, 1992 Order is hereby reinstated.