



no duty to provide coverage and/or indemnify defendants or any other insureds under a business policy of insurance, Policy Number BSA-10141, for any losses alleged to have been caused in the fire of April 11, 1996, at 429 Lehigh Avenue, Philadelphia, Pennsylvania. Plaintiffs also assert a claim against defendants for insurance fraud pursuant to 18 Pa. Cons. Stat. Ann. § 4117. Defendants have filed a counterclaim for bad faith pursuant to 42 Pa. Cons. Stat. Ann. § 8371, alleging that plaintiffs have refused to honor their obligations under the terms of the insurance policy in bad faith.

The facts underlying this action are as follows. Plaintiffs issued a business policy of insurance (the "Policy") to "T/A San Juan Meat Market/Zakloul Corporation" with the policy number: BSA-10141. The Policy's effective dates of coverage were November 17, 1995 to November 17, 1996. On April 11, 1996, a fire occurred at the San Juan Meat Market. On this day, Nael Mustafa left the subject building between 6:05 p.m. and 6:10 p.m. At the time he left, he had locked all the doors and armed the building's security alarm system. Mojaswar Mustafa has stated that Nael Mustafa was the only person who had keys to the San Juan Meat Market at the time of the fire.<sup>4</sup>

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citizens of the Country of Lebanon but maintain principle places of residence in Philadelphia, Pennsylvania. At the time of the incident in question herein, Mojaswar Mustafa was a shareholder of Zakloul and Nael Mustafa was the manager of the San Juan Meat Market on behalf of Zakloul.

<sup>4</sup>In their response, defendants state that they leased their store from Kwang Bum Kim and San Ja Kim who were the owners of

At approximately 6:24 p.m., the fire was discovered in the San Juan Meat Market. Lieutenant Harold Young of the Philadelphia Marshall's Office determined that the fire originated in the San Juan Meat Market. Additionally, he noted that the building in question was secured/locked at the time the fire department arrived on the scene and that there was no evidence of forced entry. Lt. Young concluded that the cause of the fire was arson and that there were two points of origin in the rear of the San Juan Meat Market. Because the second floor suffered extensive fire damage, Lt. Young was unable to determine if there was a third point of origin on the second floor. Lt. Young also indicated that there was a door on the second floor through which a person could access the San Juan Meat Market from the adjoining "hoagie shop."

Joseph O'Drain, a cause and origin expert, generally concurred with Lt. Young's conclusions. O'Drain found that the fire was caused by arson and that there were two points of origin in the rear of the San Juan Meat Market. O'Drain also eliminated all accidental causes of the fire. Samples of fire debris, which were taken by O'Drain from the areas of origin, tested positive for kerosene. No other scientific evidence has been produced as to how the fire started or the location of its origin.

At the time of this fire, the San Juan Meat Market was

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429 Lehigh Avenue. The Kims also owned property which adjoined 429 Lehigh Avenue from which they operated a "hoagie shop." Defendants assert that it was possible to access their store from the "hoagie shop." Defendants also suggest that the Kims may have possessed keys to the San Juan Meat Market.

protected by a security system installed and maintained by Victor Security, Inc. A report regarding the alarm activity in the San Juan Meat Market has been produced by Victor Security, Inc. This report indicates that zone 3 was triggered at 6:19 p.m. and that zone 1 was triggered at 6:21 p.m. Zone 3 monitored the "left rear door infra red motion detector," and zone 1 monitored the "silent panic behind counter" button. No other motion detectors located in the building were activated before or after that time. James Valentine, an expert in security systems who conducted an investigation into San Juan Meat Market's security system, concluded that the fire triggered both detection devices.

Subsequent to the fire, Zakloul through Mojaswar Mustafa and Nael Mustafa made a claim of loss under the policy. Following the notice of loss, defendants requested that Zakloul submit certain documents and that the Mustafas submit to examinations under oath. Plaintiffs specifically requested all records that pertain to debt owed by the defendants. Although defendants produced numerous records, plaintiffs maintain that they still need further documents in order to properly evaluate defendants' claims.

On September 21, 1996, Mojaswar and Nael Mustafa submitted to an examination under oath at which they allegedly testified falsely with respect to many issues which are material to plaintiffs' evaluation of defendants' claim. At this examination, Mojaswar Mustafa testified that neither himself nor the Zakloul Corporation had ever been sued. He further testified that Zakloul had no outstanding bills. At this examination, Mojaswar was

presented with Zakloul's "Proof of Loss" form which he testified was correct and then signed for a second time. The Proof of Loss stated that neither Mojaswar Mustafa nor Zakloul had any indebtedness. Nael Mustafa, at his examination under oath, concurred with all answers given by Mojaswar; he specifically testified that all of Zakloul's bills were current.

On March 27, 1997, counsel for defendants forwarded correspondence to plaintiffs, enclosing documents that speak to debt owed by Zakloul to a supplier, Scrivner/Fleming Foods.<sup>5</sup> On April 16, 1997, Nettie Brannan, as corporate designee of Scrivner/Fleming Foods, provided deposition testimony. Brannan testified that Scrivner/Fleming Foods had a business relationship with Zakloul whereby it would sell Zakloul products for the San Juan Meat Market. In 1993, the San Juan Meat Market account had become delinquent for an amount in excess of \$77,000.

On November 15, 1993, Scrivner/Fleming Foods sued Zakloul and Mojaswar Mustafa, individually, in an attempt to recover this debt.<sup>6</sup> As a result of this suit Mojaswar Mustafa and Zakloul executed three documents: (1) a judgment note for the amount of

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<sup>5</sup>Fleming Foods purchased Scrivner of Pennsylvania in July 1994. The debt referenced in plaintiffs' motion arose from a transaction between defendants and Scrivner and was transferred with the ownership change. The Court will collectively refer to these entities as Scrivner/Fleming Foods for the purposes of this memorandum.

<sup>6</sup>The case was captioned Scrivner of Pennsylvania, Inc. v. Zakloul Corporation, t/a San Juan Meat Market and Mojaswar Mustafa, No. 2148 November Term 1993, Philadelphia Court of Common Pleas.

\$50,406.57; (2) a security agreement whereby all of Zakloul's inventory and proceeds therefrom became collateral against the judgment note; and (3) a settlement agreement and release which reflected that Zakloul was indebted to Scrivner/Fleming Foods in the amount of \$50,406.57, and which required a payment of \$1,000.00 per month by Zakloul. The \$1000.00 payments were not made during the months of January and March 1996, a few months prior to the fire. Nael Mustafa, on several different occasions, offered Brannan various reasons on why Zakloul was not making these payments. Specifically, on April 22, 1996, Brannan testified that Nael Mustafa informed her that a fire occurred at the San Juan Meat Market for which they had no insurance.

In addition to this litigation and debt, Kwang Bum Kim and Sun Ja Kim filed a Complaint for Confession of Judgment for Money under Pa. R. Civ. P. 2951.<sup>7</sup> In their complaint, the Kims allege that Mojaswar Mustafa failed to pay minimum monthly rents and prior arrearage in the total amount of \$10,300.00. In the complaint, the Kims also sought additional damages in the approximate amount of \$125,000. These additional damages arose from other conduct by Mojaswar Mustafa alleged to have caused injury to the Kims. The disposition of this matter is not clear from the record before this Court.

Plaintiffs were also provided with an accounting of

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<sup>7</sup>This action is captioned Kwang Bum Kim and Sun Ja Kim v. Mojaswar Mustafa, No. 1316 August 1996 Term, Philadelphia Court of Common Pleas.

business personalty destroyed as a result of the fire. The Proof of Loss specifically states that Zakloul claimed a business personal property loss in excess of \$394,480.00. The records of defendants' accountant reflect that all the property owned by Zakloul had an acquisition cost of only \$90,532.00, including \$12,900.00 which is not the subject of defendants' claim. Plaintiffs maintain that these documents indicate that defendants misrepresented the value of the replacement costs of the business personalty destroyed.

Plaintiffs presently move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs argue that they are entitled to a declaration that they have no duty to provide coverage and/or indemnify defendants or any other insureds under the Policy for any losses alleged to have been caused in the fire of April 11, 1996. Plaintiffs argue that they do not owe a duty to provide coverage because defendants have committed arson, defendants have made material misrepresentations, and defendants have failed to comply with condition precedents in the Policy. Plaintiffs further argue that they are entitled to judgment on the insurance fraud count and defendants' bad faith counterclaim.

Defendants rejoin that there exists genuine issues of material fact, and as such, summary judgment is inappropriate. Additionally, defendants request to withdraw their bad faith claim without prejudice to them being permitted to reassert this claim at a more appropriate time in the future.

## II. Standard of Review

A trial court may enter summary judgment if, after review of all evidentiary material in the record, there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. Long v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983); Bank of America Nat'l Trust and Savings Ass'n v. Hotel Rittenhouse Assoc., 595 F. Supp. 800, 802 (E.D. Pa. 1984). Where no reasonable resolution of the conflicting evidence and inferences therefrom, when viewed in a light most favorable to the non-moving party, could result in a judgment for the non-moving party, the moving party is entitled to summary judgment. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 883 (3d Cir.), cert. denied, 454 U.S. 893 (1981); Vines v. Howard, 676 F. Supp. 608, 610 (E.D. Pa. 1987).

The party moving for summary judgment has the burden of proving that there are no genuine issues as to any material fact, and that he is entitled to judgment as a matter of law. Hollinger v. Wagner Mining Equip. Co., 667 F.2d 402, 450 (3d Cir. 1981); Cousins v. Yeager, 394 F. Supp. 595, 598 (E.D. Pa. 1975). The burden then shifts to the non-moving party to present opposing evidentiary material beyond the allegations in the complaint showing a disputed issue of material fact. Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 96 (3d Cir. 1982); Goodway Mktg., Inc. v. Faulkner Advertising, Inc., 545 F. Supp. 263, 265, 267-68 (E.D. Pa. 1982). The non-moving party must present sufficient evidence for a jury to return a verdict favoring that party. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505 (1986).

### III. Discussion

As an initial matter, this Court notes that the laws of the Commonwealth of Pennsylvania will govern this action. This case is before this Court pursuant to its diversity of citizenship jurisdiction. 28 U.S.C. § 1332(a). A district court in a diversity action shall apply the choice of law rules of the forum state in determining which state's law will be applied to the substantive issues before it. Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941). Since Pennsylvania is the forum state, its choice of law rules control. Pennsylvania conflicts principles dictate that an insurance contract is guided by the law of the state in which it is delivered. Travelers Indem. Co. v. Fantozzi ex rel. Fantozzi, 825 F. Supp. 80, 84 (E.D. Pa. 1993). In this case, the contract was delivered in Pennsylvania to a named insured who was a Pennsylvania resident. Thus, Pennsylvania law shall govern this case.

Viewing the evidence in a light most favorable to the defendants, the Court finds that genuine issues of material fact exist as to whether defendants committed arson. Although there is no dispute that the fire in the San Juan Meat Market was caused intentionally, there is a factual dispute as to who started this fire. The circumstantial evidence points to the Mustafas, and Nael in particular. To begin, there is evidence that the business was doing poorly; indeed, the business was failing to pay its bills and

rent. Additionally, the store was insured and would be covered for any losses caused by an accidental fire. Thus, a plausible motive has been established for arson.

The circumstantial evidence on the night of the fire indicates that Nael Mustafa had the opportunity to commit arson. Nael left the store on April 11, 1996 between 6:05 and 6:10 p.m. At 6:24 p.m., the fire was discovered in the San Juan Meat Market. Mojaswar Mustafa testified that Nael was the only person with the keys to the store, and fire department officials' indicated that there was no forced entry into the store. The fire investigators also note that there were at least two points of origin of the fire, strongly indicating that this fire was intentionally set. Based on this evidence, it is fair to say that a jury would not be remiss in concluding that Nael started this fire.

However, no direct evidence has been produced that the Mustafas, personally or through agents, started the fire in the San Juan Meat Market. Additionally, some evidence indicates that the Kims, owners of the building in which the San Juan Meat Market was located, had access to the San Juan Meat Market through the second floor. Defendants also aver that the Kims had requested to be listed as additional insureds under a property damage insurance policy that defendants would be required to maintain. Based on this evidence, defendants claim that it may have been the Kims who started the fire.<sup>8</sup>

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<sup>8</sup>Defendants also argue that former employees may have had keys to the San Juan Meat Market, and thus the opportunity to

Although plaintiffs have set forth a persuasive argument that defendants were responsible for arson, plaintiffs have not conclusively established that defendants caused the fire, nor eliminated the possibility that others may have started the fire. Viewing these facts in a light most favorable to defendants, the Court cannot conclude that there exists no genuine issues of material fact.

Plaintiffs further maintain that the policy should be void because defendants have made numerous material misrepresentations during the course of plaintiffs' investigation. The Policy provides:

**Concealment, fraud.** This entire policy shall be void, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in the case of any fraud or false swearing by the insured relating thereto.

Under Pennsylvania law an insurance policy is void for misrepresentation when the insurer establishes three elements: (1) that the misrepresentation was false; (2) that the insured knew that the misrepresentation was false when made or made it in bad faith; and (3) that the representation was material to risk being insured. New York Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991) (citations omitted). Viewing the evidence in a light most favorable to defendants, the Court finds that there exists no genuine issues of material fact as to whether the policy should be

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have started the fire.

void because of material misrepresentations made by defendants.

The following misrepresentations were made during the course of the insurers' investigation. First, Mojaswar Mustafa testified under oath that he and Zakloul had never been sued. This was a clear misrepresentation. As stated above, Mojaswar was personally named in two lawsuits that were directly related to his business. In one of these lawsuits, Zakloul was sued. Thus, no dispute exists as to whether Mojaswar Mustafa uttered misrepresentations with respect to whether he or Zakloul had ever been sued. Instead, the only question that exists is whether Mojaswar Mustafa knew that he was uttering such misrepresentations.

Mojaswar Mustafa argues that he did not know he was misrepresenting his prior litigation history because he did not understand the questions posed at his examination. Defendant maintains that he did not understand the questions because he does not speak English well and the questions were being asked through an interpreter. Mojaswar Mustafa further argues that they he did not understand what was meant by the phrase, "have you ever been sued," because he possesses a much different understanding as to what a lawsuit is because he was raised under Islamic Law, a religious law, which is much different then the common law.

The Court first rejects the argument that Mojaswar Mustafa did not understand the questions because they were being asked through an interpreter. There simply is no evidence of record that would indicate that Mojaswar Mustafa could not understand the questions being asked by the interpreter.

Nevertheless, Mojaswar has raised a question of fact as to whether he understood the question as to whether he had been previously sued. The Court finds that Mojaswar may have had difficulty in understanding what was exactly being asked of him due to his poor English and his experience under Islamic Law. Thus, the Court finds that a genuine issue of material fact exists as to whether Mojaswar Mustafa misrepresented his prior litigation history.

Nonetheless, the Court does find that Mojaswar Mustafa made wilful misrepresentations with respect to debt owed by Zakloul. On behalf of Zakloul, Mojaswar Mustafa signed a Proof of Loss which indicated that Zakloul had no indebtedness. At his examination, he was presented with this same Proof of Loss which he read, testified was correct, and then signed for a second time. By presenting this Proof of Loss form to the insurers, it is evident that Zakloul and Mojaswar wilfully misrepresented Zakloul's indebtedness. Contrary to Mojaswar Mustafa's representations, Zakloul was indebted to Scrivner/Fleming Foods. In settlement of a suit brought by Scrivner/Fleming Foods, Mojaswar, as president of Zakloul, signed a judgment note in favor of Scrivner/Fleming Foods. He also executed a security agreement and "settlement agreement and release" wherein Zakloul promised to make monthly payments in the amount of \$1,000.00, which they failed to make in January and March of 1996. Thus, the Court finds that Zakloul and Mojaswar wilfully misrepresented Zakloul's indebtedness.

Mojaswar Mustafa also wilfully misrepresented his indebtedness to his landlords. As mentioned above, Mojaswar

Mustafa was in arrears under the terms of the lease agreement he entered into with the Kims. At their examinations, both Nael and Mojaswar Mustafa failed to mention this indebtedness. Additionally, the Proof of Loss document stated that Mojaswar had no personal indebtedness. As the record demonstrates, Mojaswar Mustafa wilfully misrepresented the existence of this debt owed to his landlords.

The defendants also wilfully misrepresented the value of the business personalty lost in the fire. Defendants, as part of their Proof of Loss, submitted a "List of Equipment Destroyed in Fire" which totaled \$394,480.00. Despite this claim, the records of defendants' accountant indicate that all the property owed by Zakloul had an acquisition cost of only \$90,532.00, including \$12,900 which is not the subject of defendants' claim. This form thus manifestly misrepresents the value of defendants' business personalty loss.

In response, defendants argue that they should not be held responsible for these misrepresentations because they are not attorneys or accountants. In essence, defendants argue that their misrepresentation with respect to the value of the personal property was not wilful because they could not be expected to know how to properly value the property.

The Court must perforce reject this argument. Defendants candidly admit that they did not know how to value their property. Despite this knowledge, defendants, instead of hiring a professional, decided to place arbitrary, over-inflated prices on

their business personalty. The fact that defendants did not actually know the true value of their business personalty loss does not make their submission any less of a misrepresentation. Thus, the Court finds that defendants misrepresented the value of the personal property lost in the fire.

Although defendants have made a number of misrepresentations, these misrepresentations will not act to void the Policy unless they were material. Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 655 (E.D. Pa. 1996). The question of materiality is generally considered one of fact and law, but if the facts misrepresented are so evidently important that "reasonable minds cannot differ on the question of materiality," then the question becomes one of law that the court can decide at the summary judgment stage. Id. (citing Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 771 (3d Cir. 1976)). "In the context of an insurer's post-loss investigation, 'the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding.'" Id. (quoting Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 183 (2d Cir. 1984)).

In this case, there is no question that the false statements "concern a subject relevant and germane" to plaintiffs' investigation. Considering the circumstances of the fire underlying this matter (that the fire was incendiary in nature), it was relevant for the insurers to inquire into the defendants' financial situation at the time of and before the fire. Plaintiffs

could establish a motive for committing arson if they could prove that defendants were in poor financial condition at and/or before the time of the fire. As such, any indebtedness of defendants would be highly germane and relevant to the plaintiffs' investigation. Therefore, the Court concludes that defendants' misrepresentations were material as a matter of law.

Because defendant wilfully misrepresented facts that were material to the insurance policy in question, the Court finds that the Policy in question is void pursuant to the Policy's "Concealment, fraud" provision. As such, the Court declares that plaintiffs have no duty to provide coverage and/or indemnify defendants or any other insureds under the Policy for any losses alleged to have been caused in the fire of April 11, 1996.

Plaintiffs also seek judgment on its claim that defendant committed insurance fraud. Under Pennsylvania law, a person commits insurance fraud when he "[k]nowingly and with the intent to defraud an insurer or self-insured, presents or causes to be presented to any insurer or self-insured any statement forming a part of, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim." 18 Pa. Cons. Stat. Ann. § 4117(a)(2). Although defendants surely submitted false statements to plaintiffs with respect to their claim, I find that a genuine issue of material fact exists as to whether defendants submitted such false statements with the intent to defraud.

The existence of a party's intent to defraud generally

presents a factual question for a jury. United States v. Thomas, 610 F.2d 1166 (3d Cir. 1979). Although defendants submitted certain false statements with respect to their claim, there remains a genuine issue of material fact as to whether defendants submitted such statements with the intent to defraud. Thus, the Court denies plaintiffs' motion for summary judgment with respect to its insurance fraud claim.

Finally, plaintiffs move for summary judgment on defendants' counterclaim for bad faith denial of insurance coverage pursuant to 42 Pa. Cons. Stat. Ann. § 8371. Defendants rejoin that they will voluntarily withdraw this counterclaim without prejudice to them filing such a claim at a more appropriate time. Since the Policy is void due to defendants' material misrepresentations, defendants cannot, as a matter of law, assert a claim based on plaintiffs' bad faith denial of insurance coverage. In addition, the Court concludes that, as a matter of law, plaintiffs have not acted in bad faith by investigating the legitimacy of defendants' claim. The Court thus grants summary judgment in favor of plaintiffs on Count II of defendants' counterclaim for bad faith.

#### IV. Conclusion

Accordingly, for the foregoing reasons, plaintiffs' motion for summary judgment is granted in part and denied in part. The Court declares that plaintiffs have no duty to provide coverage and/or indemnify defendants or any other insureds under the Policy for any losses alleged to have been caused in the fire of April 11, 1996. Thus, judgment is entered in favor of plaintiffs and against

defendants on Count I of plaintiffs' complaint. Summary judgment is denied with respect to Count II of plaintiffs' complaint. Finally, the Court grants summary judgment in favor of plaintiffs and against defendants on defendants' counterclaim for bad faith.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SPHERE DRAKE INSURANCE CO.,	:	CIVIL ACTION
et al.	:	
	:	
v.	:	
	:	
ZAKLOUL CORPORATION t/a	:	
SAN JUAN MEAT MARKET, et al.	:	NO. 96-8123

**O R D E R**

AND NOW, this        day of June, 1997, upon consideration of plaintiffs' Motion for Summary Judgment, and defendants' response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part;
2. JUDGMENT is ENTERED IN FAVOR of plaintiffs and AGAINST defendants on Count I of plaintiffs' complaint and on Count II of defendants' Counterclaim; and
3. Plaintiffs have no duty to provide coverage and/or indemnify defendants or any other insureds under a business policy of insurance, Policy Number BSA-10141, for any losses alleged to have been caused in the fire of April 11, 1996, at 429 Lehigh Avenue, Philadelphia, Pennsylvania.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.