

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

ROMAN GUTMAN, : CIVIL ACTION
individually and t/a :
R&J INSURANCE AGENCY : NO. 97-5694
 :
v. :
 :
TICO INSURANCE COMPANY :

MEMORANDUM AND ORDER

YOHN, J.

June , 1998

Plaintiff Roman Gutman, an independent insurance agent, alleges that his agency contract was terminated by defendant TICO Insurance Company (“TICO”) because plaintiff is a member of the “Russian-Jewish” race. Plaintiff seeks redress for racial discrimination under 42 U.S.C. § 1981, and brings additional claims under Pennsylvania law. For the reasons set forth below, defendant’s motion for summary judgment will be granted in part and denied in part.

STANDARD OF REVIEW

Rule 56 provides that summary judgment should be granted where “the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party seeking summary judgment may meet its burden with a showing “that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The court must draw all reasonable inferences in the nonmovant’s favor, and “the evidence of the nonmovant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Nevertheless, the nonmovant must

do more than rest upon mere allegations, general denials, or vague statements, *Trap Rock Indus., Inc. v. Local 825*, 982 F.2d 884 (3d Cir. 1992), and instead “must present affirmative evidence to defeat a properly supported motion for summary judgment,” *Anderson*, 477 U.S. at 257. No genuine issue for trial exists “where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

BACKGROUND

The following account is drawn from plaintiff’s evidence and undisputed facts, or where disputed, construes the evidence in plaintiff’s favor.

Plaintiff Roman Gutman is an independent insurance agent in Philadelphia. He is an American citizen of Russian national origin, and describes himself as belonging to the “Russian-Jewish” race. Approximately 99% of his insurance clients are of Russian ancestry and ethnic heritage. Plaintiff entered an agreement in 1995 to sell insurance underwritten by defendant TICO, as TICO’s authorized agent. TICO was in the business of “nonstandard automobile insurance,” insuring drivers with higher than average risk.

On July 8, 1996, plaintiff received a telephone call from Wilbur L. Martin IV, defendant’s Senior Product Manager and Vice President. This call was also heard by plaintiff’s wife on a speakerphone. (R. Gutman Dep. at 53-55.) Martin referred to one of plaintiff’s clients, who had filed a complaint with state regulators, as a “damn Russian.” (*Id.* at 55-56, 75.) Martin referred to having “problems with Russians,” and made remarks about Russian immigrants’ involvement in “crime rings” for insurance fraud. (*id.* at 58-60; *cf.* Martin Dep. at 32-33.) Martin, who had never met plaintiff, asked plaintiff whether he is Russian. (J. Gutman Dep. at 22.) Because

plaintiff is an American citizen, he told Martin that he is not Russian. (R. Gutman Dep. at 6, 58.) Martin then confronted plaintiff about his performance as an agent, discussing his loss ratio. (*Id.* at 60.) A loss ratio is the ratio of claims incurred to earned premiums; that is, if an insurer pays out two dollars in claims for every dollar it receives in premiums, there is a 200% loss ratio. Martin incorrectly accused plaintiff of having a 2,500% loss ratio. (*Id.*)

Additional phone conversations followed, and in a letter dated September 11, 1996, Martin gave plaintiff written notice of his immediate termination as a TICO agent. (Pl.'s Compl. Ex. C.) Defendant advised plaintiff that it was "non-renewing all policies and canceling all policies bound less than 60 days ago due to agency binding outside marketing authority." (*Id.*) Plaintiff's clients received individual notices of cancellation or refusal to renew, which explained TICO's action with the sentence: "Agent exceeded his binding authority to market the TICO program." (Pl.'s Compl. Ex. E.)

DISCUSSION

1. Section 1981

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, provides in relevant part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The coverage of the statute "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b). These rights are protected against discrimination by both private and state actors. *Id.* § 1981(c).

A successful § 1981 claimant is required to prove intentional racial discrimination, which

is accomplished under the burden-shifting framework of *McDonnell Douglas* and *Burdine*. *Stewart v. Rutgers, The State University*, 120 F.3d 426, 432 (3d Cir. 1997) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186, 109 S.Ct. 2363, 2377-78 (1989)); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94 (1981). If a prima facie case is established, the burden of production shifts to the defendant “to proffer a legitimate, nondiscriminatory reason” for the termination. *Geraci v. Moody-Tottrup, Int’l, Inc.*, 82 F.3d 578, 580 (3d Cir. 1996). If the defendant does so, “the presumption of discrimination arising from the prima facie case drops away,” *id.*, and plaintiff then bears the burden of proof that the proffered non-discriminatory reasons are false and merely a pretext for its true discriminatory intent. *Frederick v. Southeastern Pennsylvania Transp. Auth.*, 892 F.Supp. 122, 125 (E.D. Pa. 1995) (citing *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 2747-48 (1993)).

Applying the *McDonnell Douglas* formula to the present context, Gutman establishes a prima facie case under 42 U.S.C. § 1981 if he proves that: (1) he is in a protected class; (2) he was qualified for the agency contract, and (3) the contract was terminated “under conditions that give rise to an inference of unlawful discrimination.” *Geraci*, 82 F.3d at 580 (quoting *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093). The second element is not at issue in this case, as defendant does not contend that plaintiff lacked the qualifications to enter into an agency contract. (Def.’s Mot. Summ. J. Ex. B.)

Section 1981’s prohibition of purposeful racial discrimination “includes discrimination solely because of ancestry or ethnic characteristics.” *St. Francis College v. Al-Khazraji*, 481 U.S.

604, 613, 107 S.Ct. 2022, 2028 (1987). For purposes of protection under § 1981, people of Jewish heritage are considered a distinct race. *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990); accord *United States v. Brown*, 49 F.3d 1162, 1166 (6th Cir. 1995) (protecting Jewish citizens under § 1982 because they were considered a race when Civil Rights Act was passed). Similarly, immigrant groups representing a distinct ancestry, such as Chinese, Germans, and Russians, were intended by Congress to be within the coverage of the statute. See *St. Francis*, 481 U.S. at 612-13, 107 S.Ct. at 2027-28. “Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.” *Id.* at 613, 107 S.Ct. at 2028. Plaintiff’s self-description as “a Jew of Russian ancestry” (Pl.’s Mem. Opp. Summ. J. at 1) is not contested, and I conclude that plaintiff is a member of a protected class.

However, an additional and “often overlooked” element of the prima facie case of discrimination is that the adverse action took place “under conditions that give rise to an inference of unlawful discrimination.” *Geraci*, 82 F.3d at 580 (quoting *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093). “[T]reating a person differently because of his race . . . implies consciousness of race, and a purpose to use race as a decision-making tool.” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854-55 n.15 (1977). Where a defendant denies any awareness that the plaintiff was a member of the protected class, this element is critical and weighs heavily in the case. *Geraci*, 82 F.3d at 580-81 (finding no pregnancy discrimination where defendant was unaware of plaintiff’s pregnancy).

Defendant asserts that “there is no evidence that TICO was even aware that Plaintiff was Russian Jewish,” pointing out that plaintiff’s name and the name of his insurance agency “cannot

reasonably be said to indicate the alleged race of Plaintiff.” (Def.’s Mot. Summ. J. at 13.) Mr. Martin’s first personal contact with plaintiff was a telephone conversation in or around July 1996. (Martin Dep. at 25, 29-30.) A portion of this conversation revolved around Russian immigrants (Martin Dep. at 32-33), who were allegedly disparaged by Martin. (R. Gutman Dep. at 55-60.) Martin asked plaintiff whether he was himself Russian, which plaintiff chose to deny because he is an American citizen. (J. Gutman Dep. at 22; R. Gutman Dep. at 6, 58.) The question itself indicates that Martin had reason to know or suspect that plaintiff was Russian, a suspicion that might have been prompted by Russian-sounding names among plaintiff’s client base, or by plaintiff’s speech pattern or accent.¹ While there is no evidence that defendant was aware of plaintiff’s Jewish ancestry, plaintiff has shown sufficient evidence from which a rational jury could find that defendant was aware of plaintiff’s Russian ancestry, and held prejudiced opinions regarding Russians. I conclude that plaintiff has made out a prima facie case of discrimination under 42 U.S.C. § 1981.

At this point, the burden of production shifts to the defendant, who must proffer a legitimate and nondiscriminatory reason for the termination. *Geraci*, 82 F.3d at 580. The reason offered by defendant is that plaintiff’s performance as TICO’s agent was unusually poor. (Martin

1. Plaintiff’s speech pattern and grammar in his deposition testimony occasionally appears to be nonstandard or foreign. (*See, e.g.*, R. Gutman Dep. at 54, 60.) Furthermore, during plaintiff’s deposition, there is a colloquy involving the witness, the court reporter, and counsel for both parties. Asking plaintiff to slow down, the court reporter interjects, “Your accent is very difficult for me to understand. I’m not an interpreter.” (*Id.* at 107.) This statement by the court reporter obviously is unsworn. Nevertheless, in addition to ordinary uses of a deponent’s testimony, Rule 32 provides that “[a]ny deposition may be used by any party . . . for any other purpose permitted by the Federal Rules of Evidence.” Fed.R.Civ.P. Rule 32(a)(1). If necessary, it is not unheard of for a court reporter to be called as a fact witness where events that took place at a deposition are relevant. *E.g., Ballentine v. Taco Bell Corp.*, 135 F.R.D. 117, 120 (E.D.N.C. 1991); *Baker v. Ace Advertisers’ Service, Inc.*, 134 F.R.D. 65, 69 (S.D.N.Y. 1991).

Dep. at 36-37, 41-42, 54, 102.) This is supported by evidence that plaintiff's loss ratio ranged from 2,518% at its worst to over 250% at its best. (Def.'s Mem. Summ. J. Ex. F.) There is testimony that the loss ratio must be lower than 70% for TICO to make money, and that the company's average loss ratio was between 59% and 63%. (Martin Dep. at 54, 113.)

Because the defendant has proffered a legitimate, non-discriminatory reason, the plaintiff no longer enjoys the presumption of discrimination arising from the prima facie case. *Geraci*, 82 F.3d at 580. To survive summary judgment, plaintiff must show that there is a disputed issue of material fact as to whether the proffered non-discriminatory reasons are both false and pretextual. Plaintiff has not met this burden. Plaintiff responds to the charge of poor performance with two points: (1) defendant's "laudatory correspondence" recognized him as a profitable agent, and (2) plaintiff's loss percentages improved over time.

Defendant's three allegedly "laudatory" letters are not addressed personally to plaintiff, but respectively to "TICO Pennsylvania Agent," "To Our Best TICO Agents," and "To Our Loyal TICO Pennsylvania Agent." (Pl.'s Mem. Opp. Summ. J. Ex. C.) Plaintiff points to the sentence, "Thank you for your superior underwriting for TICO." (*Id.*) This sentence is found in the December 12, 1996, letter, which explains how TICO has responded to agent suggestions. Martin characterized this letter as an advertisement, sent erroneously to plaintiff three months after his agency contract had been terminated. (Martin Dep. at 104.) This letter uses the words "you" and "your" repeatedly, *e.g.*, "your three major suggestions," but plaintiff does not claim that he personally made the suggestions to which TICO responds. Placed in context, the phrases offered by plaintiff are clearly not addressed to any individual agent, and each of the three letters cannot be fairly read as anything other than a form letter.

The “laudatory” content of these letters is addressed generally to TICO’s agents, thanking them collectively for contributing to TICO’s performance, *e.g.*, “We continue to grow and make money thanks to you,” and “Thank you for another great, profitable, growing year.” (Pl.’s Mem. Opp. Summ. J. Ex. C.) The profitability referred to in these phrases is obviously that of TICO, rather than any individual agent.

In addition to the text, the two 1997 letters contain several lines of individualized statistics for plaintiff’s agency, each stating that the agency had a loss ratio of over 250%. (*Id.*) As plaintiff understood, a loss ratio of 250% meant that TICO had incurred claims of \$2.50 for every dollar of earned premiums paid in by plaintiff’s clients. (R. Gutman Dep. at 68.) Because of this, and because any laudatory content in the text is not addressed personally to plaintiff, I conclude that no rational finder of fact could understand these three letters to imply that TICO regarded plaintiff individually as a profitable agent.

As to plaintiff’s second point, it is uncontested that plaintiff’s loss percentages improved over time. (*See* Martin Dep. at 101.) At its worst, reflecting plaintiff’s first and only policy written in 1995, plaintiff’s loss ratio was 2,518%. (Def.’s Mem. Summ. J. Ex. F.) However, plaintiff has not presented any evidence showing that the loss ratio fell below 250% at any time. (*Id.*) Accepting all of plaintiff’s evidence as true, and construing all reasonable inferences therefrom in plaintiff’s favor, there is no evidence that plaintiff’s agency was ever profitable to TICO.

At this stage, the court “must determine whether the plaintiff has cast sufficient doubt upon the [defendant]’s proffered reasons to permit a reasonable factfinder to conclude that the reasons are incredible.” *Sheridan v. E.I. Dupont de Nemours and Co.*, 100 F.3d 1061, 1072 (3d

Cir. 1996). While plaintiff's evidence sufficed to state a prima facie case, I conclude that the record taken as a whole is insufficient to create a disputed issue of material fact that the proffered reason for termination of the contract is false and that plaintiff's Russian and/or Jewish ancestry was the real reason for the termination. Plaintiff has failed to demonstrate any "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in TICO's proffered reasons for its action, such that a reasonable jury "could rationally find them unworthy of credence." *Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994) (quotation omitted). Accordingly, I will grant defendant's motion for summary judgment on plaintiff's claim under 42 U.S.C. § 1981.

2. Defamation

Under Pennsylvania law, a plaintiff bringing an action for defamation bears the burden of proving: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) an understanding by the readers of the statement's defamatory meaning; (5) an understanding by the readers that it is intended to apply to the plaintiff. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (citing 42 Pa. C.S.A. § 8343(a)).

The communication at issue is TICO's statement in a letter to policyholders whose policies were cancelled, explaining TICO's reason for cancellation: "Agent exceeded his binding authority to market the TICO program." (Pl.'s Compl. ¶ 24, Ex. E.) The name and address of plaintiff's agency, "R&J Insurance Agency," is printed at the top of the letter next to the label "Name and Address of Agent." (Pl.'s Compl. Ex. E.) There is no issue as to the application of the word "Agent" to the plaintiff, or the understanding by the recipients that "Agent" was intended to be applied to the plaintiff. It is also uncontested that defendant published this

statement to approximately fifty policyholders for whom plaintiff wrote an insurance policy within the 60-day period prior to the termination of his contract. (Def.'s Mem. Summ. J. at 6 & n.5.)

The defamatory character of the statement is for the court to determine in the first instance. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir. 1990). The court must decide whether the statement of which the plaintiff complained is capable of a defamatory meaning, *i.e.*, one that “tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *12th Street Gym, Inc. v. General Star Indem. Co.*, 93 F.3d 1158, 1163 (3d Cir. 1996) (citations and internal quotations omitted). A statement imputing business misconduct is defamatory *per se* where, taken in context, it tends to accuse a person of unprofessional conduct in a fashion “peculiarly harmful to one engaged in [that] business or profession.” *Clemente v. Espinosa*, 749 F.Supp. 672, 678 (E.D. Pa. 1990) (citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS, cmt. e (1977)). Under Pennsylvania law,

the court must determine what effect the statement is fairly calculated to produce and the impression it would naturally engender in the minds of average persons among whom it is intended to circulate. A statement which ascribes to another conduct, character, or a condition which would adversely affect her fitness for the proper conduct of her lawful business, trade or profession is defamatory.

Walker v. Grand Central Sanitation, Inc., 634 A.2d 237, 240 (Pa. Super. Ct. 1993) (citations omitted). The nature of the audience receiving the remarks is a critical factor. *Baker v. Lafayette College*, 532 A.2d 399, 402 (Pa. 1987).

Defendant’s communication that “[a]gent exceeded his binding authority to market the TICO program” is one whose full meaning is not necessarily transparent to a person outside the

insurance industry. It is presumably even less comprehensible to people for whom English is a second language, which might apply to some of the ethnic Russians who comprised 99% of plaintiff's client base. (See Def.'s Mem. Summ. J. Ex. C.) However, the statement appears in the context of a Notice of Cancellation. (Pl.'s Compl. Ex. E.) Taken in this context, defendant's statement would suggest to a reasonable policyholder that TICO canceled her auto insurance policy because of some improper business conduct undertaken by the plaintiff in his professional capacity. I conclude that defendant's words, taken in context, are capable of defamatory meaning, although it is a very close question.

Defendant urges, however, that there is no liability for defamation because its statement was conditionally privileged. When a communication involves an interest of the publisher, the recipient, a third party or the public, a conditional privilege may arise. *Momah v. Albert Einstein Medical Center*, 978 F.Supp. 621, 635 (E.D. Pa. 1997); *Elia v. Erie Ins. Exchange*, 634 A.2d 657, 660 (Pa. Super. Ct. 1993). Such a communication must be made "on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause." *Elia*, 634 A.2d at 660 (quoting *Chicarella v. Passant*, 494 A.2d 1109, 1113 (Pa. Super. Ct. 1985)). The defendant has the burden of proving privilege. 42 Pa. C.S.A. § 8343(b)(2).

Here, the defendant was required by state law to send a written notice of cancellation to each affected policyholder. 40 P.S. § 1008.5. In the written notice, defendant was required by law to "[s]tate the specific reason or reasons of the insurer for cancellation." *Id.* § 1008.5(3). The allegedly defamatory statement was accordingly properly made and "based upon reasonable cause," see *Elia*, 634 A.2d at 660, because defendant's proffered reason for terminating plaintiff's agency agreement has not been refuted by any of plaintiff's evidence. Because both

TICO and the insured have a financial interest in the cancellation of an insurance policy, an interest of the publisher and the recipient was involved in the communication. I conclude that defendant's statement to policyholders was a conditionally privileged communication.

“Once a matter is deemed conditionally privileged, the plaintiff must establish that the defendant abused that conditional privilege.” *Elia*, 634 A.2d at 661 (citing *Chicarella*, 494 A.2d at 1113). Plaintiff claims that there was an abuse of privilege based on malice, which is defined under Pennsylvania's defamation precedents as “a wrongful act, done intentionally without cause or excuse.” *Simms v. Exeter Architectural Products, Inc.*, 916 F.Supp. 432, 436 (M.D. Pa. 1996) (quoting *Beckman v. Dunn*, 419 A.2d 583, 588 & n.3 (Pa. Super. Ct. 1980)). The only motive for defendant's statement that finds support in the record is that defendant intended to comply with Pennsylvania law by giving a specific reason for cancellation that was truthful, but without revealing unnecessary information that might have “negative connotations.” (Martin Dep. at 48-49.) Martin testified that his intent was to give “probably a little bit more generous of a reason” than he might have, by using the phrase “exceeded his binding authority to market” in describing plaintiff's conduct in continuing to write business at a loss. (*Id.* at 49.) In addition to plaintiff's loss ratio, the phrase was intended to generally describe “other items” (*id.*), including plaintiff's advertisement in a Russian-language newspaper, using the name “Tico” without prior consent. (Pl.'s Compl. Ex. B; Martin Dep. at 58-59.) The phrase chosen might have been overly technical and ultimately unhelpful to a policyholder wishing to understand why plaintiff's conduct caused her policy to be cancelled. However, even construing all inferences from the record in favor of plaintiff, there is a total absence of evidence to support a finding that defendant acted out of malice toward the plaintiff.

Because the statement in question was not made without excuse, and because there is no evidence from which a jury could rationally infer a malicious or improper motive on defendant's part toward plaintiff, I conclude that plaintiff has not sustained his burden of proving that defendant abused its privilege. *See Elia*, 634 A.2d at 661. Defendant's motion for summary judgment on the defamation claim will be granted.

3. Intentional Infliction of Emotional Distress

The United States Court of Appeals for the Third Circuit has predicted that Pennsylvania “will impose liability for intentional infliction of severe emotional distress in an appropriate case.” *Williams v. Guzzardi*, 875 F.2d 46, 51 (3d Cir. 1989). The Pennsylvania Supreme Court, while not specifically adopting the tort, has set forth the minimum elements that would be necessary to establish a claim of intentional infliction of emotional distress. Liability for intentional infliction of emotional distress may arise “only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 991 (Pa. 1987) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).

Plaintiff's claim for intentional infliction of emotional distress was founded upon the allegedly outrageous nature of defendant's conduct giving rise to plaintiff's claims of defamation and intentional discrimination under 42 U.S.C. § 1981. Those claims have been found to lack merit. Even had there been racial discrimination, a discriminatory contract termination is “unfortunate and unquestionably causes hardship . . . [but] it is a common event and cannot provide a basis for recovery for intentional infliction of emotional distress.” *Cox v. Keystone*

Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988) (referring to loss of employment due to racial discrimination). Accepting all of plaintiff's evidence as true, defendant's conduct simply does not rise to the requisite level of outrageousness to support an intentional infliction of emotional distress claim.

In addition, plaintiff has not sustained his burden of production of medical evidence at this stage. “[T]o survive a motion for summary judgment, the plaintiff must still present ‘competent medical evidence of causation and severity’ of his emotional distress.” *Silver v. Mendel*, 894 F.2d 598, 607 n.19 (3d Cir. 1990) (quoting *Williams*, 875 F.2d at 52). This is in accord with the Supreme Court of Pennsylvania's statement in *Kazatsky* that if intentional infliction of emotional distress is to be recognized as a tort in Pennsylvania, “at the very least, existence of the alleged emotional distress must be supported by competent medical evidence.” *Kazatsky*, 527 A.2d at 995. Because plaintiff has offered no medical evidence, and because the evidence offered by plaintiff in support of his failed claims for defamation and racial discrimination fails to meet the standard of outrageousness, I will grant summary judgment to defendant on this claim.

4. Contract Claims

Plaintiff's claims of breach of contract and breach of the implied covenant of good faith and fair dealing are based upon two alleged breaches by defendant: (1) improper termination of the agreement, and (2) defendant's failure to pay commissions allegedly owed to plaintiff.

The contract provides that “[u]nless otherwise prescribed by state law, this agreement may be terminated at any time, with or without cause, by either party giving written notice to the other party of the effective date of termination.” (Pl.'s Compl. Ex. B.) Plaintiff admits to

receiving written notice of immediate termination, given by defendant in a letter dated September 11, 1996. (Pl.'s Compl. Ex. C.) Plaintiff's only basis for a claim of improper termination was founded upon his allegations of racial discrimination in violation of 42 U.S.C. § 1981, and I have held the § 1981 claim to be without merit.

Plaintiff alleges that defendant has failed to pay him commissions due for the policies that were cancelled within 60 days of binding, and renewal commissions for older policies that were actually renewed by the defendant. (Pl.'s Compl. Ex. D; *see* R. Gutman Dep. at 96-105.) Defendant denies that any unpaid commissions are due, and claims that none of plaintiff's clients was renewed. (*See* Martin Dep. at 78.) Plaintiff nevertheless testified that some of his former clients had policies that were renewed by defendant, stating, "I have evidence in my office of renewal of the policies." (R. Gutman Dep. at 96.) Plaintiff has not submitted any such evidence. However, plaintiff has submitted a statement of the commissions that he alleges are owed to him by defendant. (Pl.'s Compl. Ex. D.) On its face, it shows a column of numbers under the heading "Comm Amount," with no indication that they have been paid. (*Id.*) Defendant claims that this column of numbers "reflects that Plaintiff received commissions on the canceled insurance policies," but defendant has not offered evidence, such as canceled checks, that might support its contention that the commissions were paid. Construing all inferences from plaintiff's evidence in favor of the non-moving plaintiff, I find that there is a disputed issue of material fact. The record is unclear as to whether the correct commissions were actually paid to plaintiff, and defendant's motion for summary judgment will be denied on this contractual issue.

CONCLUSION

For the reasons cited above, defendant's motion for summary judgment will be granted in part and denied in part. An appropriate order follows.

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

ROMAN GUTMAN,	:	CIVIL ACTION
individually and t/a	:	
R&J INSURANCE AGENCY	:	NO. 97-5694
	:	
v.	:	
	:	
TICO INSURANCE COMPANY	:	

ORDER

AND NOW, this day of June, 1998, upon consideration of defendant's motion for summary judgment, plaintiff's response thereto, and additional submissions of the parties, IT IS HEREBY ORDERED that defendant's motion for summary judgment is:

1. DENIED on plaintiff's state law contract claims for breach of contract for unpaid commissions, and
2. GRANTED in all other respects.

This court will retain supplemental jurisdiction under 28 U.S.C. § 1367 of plaintiff's surviving claims.

William H. Yohn, Jr., Judge