

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

LIONEL SAVADOVE and : CIVIL ACTION
PATRICIA SAVADOVE :
 :
v. :
 :
THE VIGILANT INSURANCE COMPANY :
THE CHUBB GROUP OF INSURANCE :
COMPANIES : NO. 98-5011

MEMORANDUM

Dalzell, J.

April 21, 1999

Currently before us are cross-motions for summary judgment in a dispute over insurance coverage for a vanished antique grandfather clock.

In January, 1992 plaintiffs Lionel and Patricia Savadove¹ requested (through their insurance agent) defendant Vigilant Insurance Company, a member of the Chubb Group of Insurance Companies, that the "Deluxe Contents Coverage" on the Savadoves' "Masterpiece" homeowners insurance policy be increased by \$150,000 to include an antique Thomas Tompion grandfather clock ("the Clock"). On September 1, 1996, the Clock was reported as destroyed in a fire. After a lengthy investigation of the Savadoves' insurance claim, on April 1, 1998 Vigilant denied the Savadoves' claim and the current litigation ensued.²

¹ Although Lionel and Patricia Savadove (the "Savadoves") are the named plaintiffs in this case, the primary actor here is Lionel Savadove, whom we will refer to herein as "Savadove".

² The Savadoves have sued Vigilant for breach of contract (Count I), bad faith (Count II), and deceit (Count III), and Vigilant has counterclaimed for fraud. See Plaintiffs' First Amended Complaint and Defendants' Answer to the First Amended
(continued...)

I. The History of the Clock³

The facts of this case, after extensive pre-suit investigation and post-suit discovery, are for the most part not in dispute.

The Clock in question was purchased at an estate sale in England in May, 1989 by one Dr. Donald Nathanson ("Dr. Nathanson"), an acquaintance of Savadove, with a \$39,672.50 cash

²(...continued)

Complaint and Counterclaim. As our jurisdiction over this case is based upon diversity of citizenship, 28 U.S.C. § 1332, Erie Railroad v. Tompkins, 304 U.S. 64 (1938), and its progeny instruct us that we must apply the state law as if we were a state court. See also Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 823 (3d Cir. 1994). It is undisputed that Pennsylvania law applies to this controversy.

³ As we will grant defendants' motion for summary judgment and deny plaintiffs' motion for summary judgment, see infra, where there are discrepancies in the facts we have viewed the facts in the light most favorable to plaintiffs. Furthermore, upon a review of both parties' motions for summary judgment, we noticed that the parties were relying on several unauthenticated and inadmissible documents, such as claims reports and letters by insurance agents, to describe the facts of this case. On April 9, 1999, we ordered the parties to supplement the record by filing affidavits authenticating those reports and documents in compliance with Fed. R. Civ. P. 56(c) & (e). On April 19, 1999, the defendants submitted a motion to supplement the record, with several affidavits to supplement their motion for summary judgment, along with a joint "stipulation of authenticity" that was signed by both parties. To the extent that the parties have not raised any objections to the authenticity or admissibility of documents utilized in these motions, we deem such objections waived. See 10A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure, § 2722 (3d ed. 1998) (citing cases and explaining that on a motion for summary judgment uncertified or otherwise inadmissible documents may be considered by the court if not challenged and that any objection to the authenticity or admissibility of documents must be timely or will be deemed waived).

advance Savadove provided. Dr. Nathanson took title to the Clock and had it shipped to the United States.

On June 6, 1989, Dr. Nathanson and Savadove entered into a signed "Memorandum of our Agreement", see Defendants' Motion for Summary Judgment, Exhibit 2 ("Memorandum of Agreement"), whereby they agreed that Dr. Nathanson would retain title to the Clock and would insure it in the United States, and Savadove would retain a security interest in the Clock.⁴ The Memorandum of Agreement made it clear that their intent was to sell the Clock within one year for between \$80,000 and \$100,000 and then share the profits equally, after deducting Dr. Nathanson's expenses (e.g., the cost of freight, insurance, and sale) as well as Savadove's original payment of \$39,672.50.⁵ The Memorandum of Agreement provided that should the sale of the Clock not be accomplished within a "reasonable" time, "and if we

⁴ It appears that the Memorandum of Agreement was drafted by Savadove and sent to Dr. Nathanson for his signature. We note, not-at-all-parenthetically, that Savadove graduated from the University of Pennsylvania's Wharton School in 1956 and Harvard Law School in 1959, and he practiced tax and corporate law for over fifteen years at a private law firm before becoming general counsel to a large, publicly-held corporation. See Examination under Oath of Lionel Savadove, September 12, 1997 at 107-09, taken in connection with Vigilant's investigation of the claim at issue here (hereinafter "Deposition of Lionel Savadove"). Other pre-suit examinations under oath will be so cited and identified by the date of the examination.

⁵ The Memorandum of Agreement also explained that while Dr. Nathanson and Savadove had documentation that the "movement" of the Clock (e.g. the mechanical workings) was an original Thomas Tompion movement, "the case may not be the original" but that it "is certainly a very high quality case of the same period." See id.

reach no other agreement for disposition of the clock, you [(Dr. Nathanson)] shall reimburse the amount advanced by me [(Savadove)] and I shall surrender my security interest." See Defendants' Exhibit 2. The Memorandum of Agreement also provided that Savadove "may assign my interest in this transaction to a corporation which I [(Savadove)] am in the process of organizing." See id.

Soon thereafter, the Savadoves established RIM Arts and Industries, Inc. ("RIM Arts"), a Pennsylvania Corporation, in which they were the sole shareholders.⁶ Effective July 1, 1989, Savadove assigned to RIM Arts all of his rights and liabilities under the June 6, 1989 Memorandum of Agreement. See Defendants' Motion for Summary Judgment, Exhibit 4 ("Said corporation shall, hereafter, be entitled to all rights and subject to all liabilities thereunder."). Under the terms of the assignment, RIM Arts would later "reimburse" Savadove his initial payment of \$39,672.50 in accordance with the terms of the Memorandum of Agreement with Dr. Nathanson. See id.

In early 1992, with the Clock still unsold, Dr. Nathanson advised Savadove that he could no longer afford to

⁶ According to Savadove, RIM Arts's primary business was selling automobiles and automobile parts to Russia. See Deposition of Lionel Savadove, September 12, 1997, at 105. RIM Arts also provided managerial and financial services to troubled shopping centers, see Deposition of Lionel Savadove, February 26, 1999 at 75-88, and was also used as a "confidentiality shield" to buy art at the New York auction houses such as Christie's and Sotheby's when the Savadoves did not want other people to know that they were involved in buying or selling fine art. See Deposition of Lionel Savadove, September 12, 1997, at 128-29.

insure the Clock because he was paying approximately \$1,000 per year for a commercial fine arts floater premium. Dr. Nathanson recommended to Savadove that they use a third party, Patrick Mangan ("Mangan"), a horologist, to sell the Clock. It was agreed that Mangan would take possession of the Clock, offer it for sale, and that the proceeds from the sale of the Clock (less expenses) would be shared three ways among Mangan, Dr. Nathanson, and Savadove. See Deposition of Lionel Savadove, May 5, 1997 at 62-63. In early-1992, therefore, Savadove needed to find insurance for the Clock.

From March 15, 1991 through March 15, 1992, and continuing thereafter until the present, Vigilant has provided the Savadoves with a "Masterpiece" homeowners insurance policy, which provided "Deluxe Contents Coverage." See Defendants' Motion for Summary Judgment, Exhibit 8. On January 13, 1992, Savadove requested through his insurance agent, Robert Seltzer, that Vigilant increase the "Deluxe Contents Coverage" on his homeowners policy by \$150,000 to cover the Clock. When he increased the coverage on his homeowners policy, Savadove did not disclose to Vigilant (1) where he purchased the Clock, (2) when he purchased it, (3) where it was kept at that time, or (4) the business arrangement he had with Mangan and Dr. Nathanson. It also does not appear that Vigilant then asked many questions about the Clock. Although the parties dispute whether Savadove told Vigilant that he was trying to sell the Clock, an "underwriting note" found during discovery states that "[i]t

seems the insured has had a \$150,000 clock but did not have it scheduled. He now wants to put it on his VAC [(valuable articles coverage)] because he sent it to be appraised and will then send it to Christies [(the auction house)] to be sold." Plaintiffs' Motion for Summary Judgment, Exhibit E. Viewing the evidence in the light most favorable to plaintiffs, we will assume for purposes of these motions that Vigilant was at least aware of the fact that the Savadoves intended to sell the Clock at an auction house after it was appraised.

For about the next four-and-a-half-years, Mangan kept the Clock. The Savadoves never had it during this time. See Deposition of Lionel Savadove, May 5, 1997, at 51-52 (in which Savadove explains that he never took possession of the Clock, it was never in his home, and that he only saw it perhaps three or four times).

On September 1, 1996, the Clock was said to have been destroyed while being stored overnight inside of an automobile parked outside of Mangan's house in Bath, Pennsylvania. On November 19, 1996, Savadove sent a letter to the Independent Underwriters Agency, Inc. (Robert Seltzer's Agency) to "make a formal claim . . . for the destruction by fire of my Thomas Tompion longcase clock No. 339." See Defendants' Motion for Summary Judgment, Exhibit 9. In the letter Savadove explained that at the time of the fire "[t]he clock was in the possession of my horologist, Patrick Mangan, for maintenance." Id. Savadove stated that he had been told that the Clock was

destroyed when Mangan was transporting it by automobile from his storage area to his shop. Savadove reported that he had the remnants of the Clock in his possession and that they were available for inspection and removal. Savadove also enclosed with the letter the written appraisals of Catchia A. Goggin ("Goggin") and William E. Berger ("Berger"), who valued the Clock at \$65,000 and \$75,000, respectively. See Defendants' Motion for Summary Judgment, Exhibit 9 (letter), Exhibit 15 (Goggin appraisal), Exhibit 17 (Berger appraisal).

On November 26, 1996, Vigilant was notified of the claim and sent an inside claims representative, Cathy Sullivan-Funaro ("Sullivan-Funaro"), to contact Savadove and discuss the facts of the loss and the value of the Clock. At that meeting, Sullivan-Funaro says she requested that Savadove provide some proof that he had purchased the Clock. Savadove advised her that the Clock had been with his horologist, Mr. Mangan, for maintenance, that his only proof of purchase was a wire transfer from his bank account, and that he had received two appraisals on the Clock, but that he expected the Clock to be worth a lot more because when he purchased it in 1989 he "got a really good deal on it." See Affidavit of Katherine Sullivan-Funaro.

Several days later, an outside claims representative of Vigilant, John Little ("Little"), visited the Savadoves' house to take photographs of the remains of the Clock. Little was given a pre-loss Polaroid photograph of the Clock and Savadove told him

that the Clock had been with Mangan for about a month or two for repairs.

Vigilant then assigned a special investigator, William Dietrich ("Dietrich"), who visited Savadove on January 21, 1997 to obtain a recorded statement. Although Savadove refused to give a recorded statement, he did give an interview. In the interview, Savadove reportedly told Dietrich that Mangan had picked up the Clock from Savadove's house in order to perform routine care and maintenance and to have a "ding" repaired on the door. Dietrich recalls that Savadove told him that the Clock had never been for sale, but that if an offer had ever been made to purchase the Clock he might consider selling it. At that time Dietrich collected the remains of the Clock for the purpose of having them examined by an expert. See Affidavit of William J. Dietrich, Jr.⁷

On January 22, 1997, Dietrich interviewed Catchia A. Goggin, the author of one of the appraisals provided to Vigilant by Savadove. Goggin told Dietrich that she had never inspected the Clock and that her appraisal was based upon a description Mangan faxed to her. See id.; see also, Deposition of Catchia A. Goggin, January 8, 1999, at 16, 20.

After further investigation, Vigilant then contacted Sotheby's, the New York auction house, and learned that the Clock

⁷ Dietrich also visited Mangan that same day, January 21, 1997, and Mangan told him that the Clock had never been for sale. See id.

had in fact been offered for sale there in 1993.⁸ In his deposition, Savadove stated that the Clock was offered for sale through Sotheby's under the name RIM Arts as the seller.⁹ See Deposition of Lionel Savadove, September 12, 1997, at 128-29. An October 16, 1993 catalog from Sotheby's shows that the price range for the Clock was "\$50,000-60,000", that its wooden case had been restored, and that its case was "possibly associated," apparently meaning that the case was not definitively manufactured by Thomas Tompion. See Defendants' Motion for Summary Judgment, Exhibit 21. Furthermore, at the Sotheby's auction in 1993, the auctioneer placed a reserve price of \$35,000 on the Clock, which was a moot issue in view of the absence of bids registered at that price. See Defendants' Motion for Summary Judgment, Exhibit 22, Deposition of Larry J. Sirolli, January 7, 1999 at 38.

In late-1996 and early-1997, Vigilant's investigation uncovered two extraordinary facts, both of which the parties do not now appear to dispute. First, it turns out that the fire outside Mangan's house was incendiary in origin and not accidental. Second, the clock remains turned over to Vigilant

⁸ Vigilant also learned that the Clock had been offered for sale at Christie's.

⁹ In his deposition, Savadove explained that he always used his corporation, RIM Arts, as the official buyer or seller when he dealt with Sotheby's or Christie's because he needed a "confidentiality shield" so that other people would not know he was involved in buying or selling artwork. See Deposition of Lionel Savadove, September 12, 1997, at 128-29.

were not the remains of the Thomas Tompion Clock that Dr. Nathanson purchased in England in 1989.¹⁰

Eight months after the September 1, 1996 car fire, Savadove was examined under oath for the first time. At that examination, Savadove produced the Memorandum of Agreement and assorted other correspondence with Dr. Nathanson proving that Dr. Nathanson in fact purchased the Clock in 1989. See Deposition of Lionel Savadove, May 5, 1997, at 34-35. In that examination, and in a later examination on September 12, 1997, see Defendants' Motion for Summary Judgment, Exhibit 7 (Deposition of May 5, 1997) and Defendants' Motion for Summary Judgment, Exhibit 25 (Deposition of September 12, 1997), Savadove admitted that in his January 21, 1997 interview with William Dietrich, Vigilant's special investigator, he had "not [been] fully forthcoming," Defendants' Exhibit 25 at 16, and that he had been "brief" and "curt" in his explanations. See Defendants' Exhibit 7 at 137. Furthermore, when asked whether he told Dietrich that he was not trying to sell the Clock, Savadove stated that he could not specifically recall, but that he remembered being "very

¹⁰ For purpose of these motions and viewing the evidence in the light most favorable to plaintiffs, we note that these two facts play no role in our decision because there has been no evidence presented that the Savadoves had any connection to either the car fire or to the handling of the Clock before or after the fire. We will assume, therefore, that the Clock was lost, without any concrete explanation of what happened to it. See Plaintiffs' First Amended Complaint at ¶ 5 ("Based upon the defendants investigations, [plaintiffs] now believe their Tompion Tall Case Clock is not represented by the clock remains delivered to them. Their clock is, however, lost to them.")

circumspect" when asked about selling the Clock. See Defendants' Exhibit 7 at 134. Savadove explained that at the time Dietrich interviewed him he was "annoyed" and "upset" because Dietrich had been the third investigator to question him about the Clock without offering him a settlement or discussing the payment of the claim. See Defendants' Exhibit 7 at 35. Savadove also explained that at that time he considered the prior attempts to sell the Clock irrelevant to his claim, see Defendants' Exhibit 7 at 135 and Defendants' Exhibit 25 at 17-18, and that his arrangement with Dr. Nathanson was "personal" and "confidential." Defendants' Exhibit 25 at 17-18. Savadove explained that at that time he "wanted to keep it simple which is that I owned a clock and it disappeared." Defendants' Exhibit 7 at 35. Savadove stated that once Vigilant uncovered questions about the authenticity of the remains of the Clock as well as the origin of the car fire, he at last realized the relevance of Vigilant's inquiry and disclosed more information about the Clock. See Defendants' Exhibit 7 at 35-36 and 135-36; Defendants' Exhibit 25 at 16-19.

On January 28, 1999, Mangan was examined under oath. See Defendants' Motion for Summary Judgment, Exhibit 28. In his deposition, Mangan testified that while he thought the value of the Clock was "substantially less" than \$75,000, see id. at 67, after the car fire Savadove directed him to produce two different appraisals for the Clock that averaged out to be \$75,000 ("in that ballpark") and that were worded with specific language

Savadove chose.¹¹ See id. at 65-70. Mangan further reports that when he brought the remains of the alleged "Clock" over to Savadove's house, he and Savadove began a "storytelling time", see id. at 78, to create an explanation about where the Clock had been located in the Savadoves' home and why it had been in Mangan's possession:

I think he was trying to sort out things he was going to tell the insurance company. I brought back the parts. Where could I put the clock if they asked me where it was; if they ask me whether it was in for service, why you had the clock. And it was like storytelling time.

At this point, quite honestly, I wouldn't say that I -- I just wanted to help the man. Okay?

. . . .

Just I, believe like a little massaging as to why the clock was with me for such a while or whether it was there or whether it was here, and I better have it at my house. And I don't think Mr. Savadove would recognize the clock if he woke up with it in bed, quite honestly, because I don't think he ever lived with the clock. He maybe would recognize a photo of a clock that looks like his but I don't know.

Id. at 78-79.

In addition, Mangan testified that he received a phone call from Savadove just before Mangan was interviewed by Vigilant's special investigator, William Dietrich. See id. at

¹¹ Mangan explained that although Savadove never spoke directly to the two appraisers, Berger and Goggin, Savadove recommended specific descriptions of the Clock to Mangan to be passed on to the two appraisers. See id. at 69-74.

77. Mangan stated that Savadove called because “[h]e was trying to get a story that was at least consistent for the insurance company.” Id. In that conversation, Mangan recalled that Savadove specifically told him to tell Dietrich that the Clock had been in Mangan’s possession only for maintenance and repairs, rather than explaining that the Clock had been with Mangan for several years. See id. at 79-80.

II. Breach of Contract

Vigilant now moves for summary judgment on plaintiffs’ breach of contract claim (Count I of the First Amended Complaint), arguing that: (i) the Savadoves have no insurable interest in the Clock because they neither owned nor possessed the Clock after 1989; and (ii) the Savadoves are not entitled to recover the insurance proceeds for the Clock because they intentionally concealed and misrepresented material facts about the acquisition, ownership, possession, physical whereabouts, status, and marketing of the Clock both before and after they filed an insurance claim.

The Savadoves also move for summary judgment on their breach of contract claim, arguing that: (i) the terms of their insurance policy are clear; (ii) the fact the Clock was purchased as an investment and that it was not in their possession does not

terminate their rights under the insurance policy; and (iii) they did not misrepresent or conceal any material facts to Vigilant.¹²

A. Insurable Interest

Defendants first argue that the Savadoves have no insurable interest in the Clock because they neither owned nor possessed the Clock after 1989. Under the terms of the Savadoves' "Masterpiece" insurance policy, the insured's property must be "contents," which is defined under the policy as "unscheduled personal property you or a family member owns or possesses." See Defendants' Motion for Summary Judgment, Exhibit 8, at C-1 emphasis added).

It is uncontested that neither Savadove nor any member of his family possessed the Clock at any time. See Deposition of Lionel Savadove, May 5, 1997, at 51-52 (in which Savadove explains that he never took possession of the Clock and the Clock

¹² A summary judgment motion should only be granted if we conclude 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). With a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party. See id. at 587. Once the movant has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (holding that the non-moving party must produce evidence such that a reasonable jury could find for that party); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the non-moving party must go beyond the pleadings to show that there is a genuine issue for trial).

was never in his home). Furthermore, after Dr. Nathanson and Savadove signed the Memorandum of Agreement in June, 1989, Savadove then assigned his only remaining ownership interest in the Clock, his "security interest", to RIM Arts with the understanding that Savadove would later be reimbursed by RIM Arts for the initial purchase price of \$39,672.50.¹³ See Defendants' Motion for Summary Judgment, Exhibit 4. Defendants argue, therefore, that because the Savadoves have neither an ownership interest nor a possessory interest in the Clock, they have no insurable property interest.¹⁴

¹³ Plaintiffs have presented no evidence that RIM Arts ever assigned the security interest in the Clock back to the Savadoves.

¹⁴ In response to defendants' argument that plaintiffs neither owned or possessed the Clock since 1989, plaintiffs raise three arguments that we reject outright. First, plaintiffs argue that RIM Arts never really had an ownership interest in the Clock, because RIM Arts was merely a "confidentiality shield" for the Savadoves' art purchases, and that Savadove never really intended to transfer any interest to RIM Arts. We reject this self-serving argument because: (i) RIM Arts is a real corporation that the Savadoves used for a variety of business ventures, see supra (explaining that RIM Arts engaged in numerous business ventures such as selling automobiles in Russia); and (ii) the plaintiffs have provided no evidence that the assignment of the Savadoves' "security interest" in the Clock to RIM Arts in 1989 was anything other than a legitimate (and intentional) business transaction. See In re Purman's Estate, 56 A.2d 86 (1948) (explaining that an assignment is a transfer of property or some other right from one person to another, and unless in some way qualified, it extinguishes the assignor's right to performance by the obligor and transfers that right to the assignee); In re Lease-A-Fleet, 141 B.R. 853, 861-62 (Bankr. E.D. Pa. 1992) (explaining that an assignment is an absolute and complete transfer of property from one party to another). We will not allow Savadove to disclaim RIM Arts as a corporation and disregard his 1989 assignment to RIM Arts when it suits his needs, while continuing to utilize RIM Arts as a legitimate
(continued...)

While the insurers' argument is attractive as plain English-based logic, under Pennsylvania law the general rule is that anyone who derives a pecuniary benefit or advantage from the preservation or continued existence of property, or who will suffer pecuniary loss from its destruction, has an insurable interest in that property. See Luchansky v. Farmers Fire Ins. Co., 515 A.2d 598, 599 (Pa. Super. 1986) (explaining that a reasonable expectation of benefit from the preservation of the property is a sufficient insurable interest); Keller v. Aetna Cas. & Sur. Co., 605 F. Supp. 331, 333 (M.D. Pa. 1984) ("It is an elementary principle of insurance law that an insurable interest exists in any party who would be exposed to financial loss by the destruction of a certain property."); In re Jacqueline Matthews, 229 B.R. 324, 327-28 (Bankr. E.D. Pa. 1999) (citing cases).

¹⁴(...continued)
corporation for other business transactions.

Second, Savadove argues that because Dr. Nathanson failed to sell the Clock in a "reasonable" amount of time, the Memorandum of Agreement between Savadove and Dr. Nathanson is void. If this were the case then all right, title, and interest in the Clock would now be transferred to RIM Arts pursuant to the assignment from Savadove to RIM Arts in 1989. Under this interpretation of the facts, Dr. Nathanson would owe RIM Arts \$39,672.50 (the initial purchase price of the Clock) under the terms of the Memorandum of Agreement, and RIM Arts would owe Savadove the same amount under the terms of the assignment.

Third, Savadove argues that because Vigilant covered some of RIM Arts' paintings under the "Masterpiece" insurance policy, the Clock should also be covered under the same insurance policy. The documentary evidence presented, however, indicates that Vigilant was willing to cover some of RIM Arts' painting under the Savadoves' Masterpiece policy because those paintings were physically located in the Savadoves' home. As noted above, it is undisputed that the Clock was never kept in the Savadoves' home.

While the Savadoves neither owned nor possessed the property at issue after 1989, they nevertheless had a legitimate expectancy of benefit in the continued existence of the Clock, namely the \$39,672.50 that RIM Arts promised to "reimburse" Savadove, presumably once the Clock was sold. Therefore, viewing the record in the light most favorable to the plaintiffs, we find that the Savadoves had a potentially insurable interest in the Clock. Whether, and to what extent, plaintiffs concealed or misrepresented material facts to defendants about the nature and extent of their interest in the Clock is quite another matter, to which we now turn.¹⁵

B. Concealment or Fraud

The insurers next argue that the Savadoves are not entitled to recover the insurance proceeds for the Clock because they intentionally concealed and misrepresented material facts about the acquisition, ownership, possession, physical whereabouts, status, and marketing of the Clock both before and after they filed an insurance claim. In their cross-motion for summary judgment, plaintiffs argue that they neither misrepresented nor concealed any facts or, alternatively, that any facts that were misrepresented or concealed were not material to Vigilant's investigation and should be left to a jury.

¹⁵ Parenthetically, we note that to the extent that the plaintiffs' insurable interest in the Clock is limited solely to the initial purchase price of the Clock (\$39,672.50), the plaintiffs may not have met the jurisdictional threshold of \$75,000.01 pursuant to 28 U.S.C. § 1332(a).

The "Masterpiece" policy issued to the Savadoves contained a general condition stating:

Concealment or fraud. We do not provide coverage if you or any covered person has intentionally concealed or misrepresented any material fact relating to this policy before or after a loss.

Defendants' Motion for Summary Judgment, Exhibit 8, p. Y-1 (emphasis in original). In Pennsylvania, a violation of the fraud-and-concealment provisions in an insurance policy results in a total avoidance of the policy and is a bar to the insured's recovery under the policy. See Sack v. Glens Falls Ins. Co., 61 A.2d 852 (Pa. 1984); Ellis v. The Agric. Ins. Co., 7 Pa. Super. 264 (Pa. Super. 1898); Lavin v. Fireman's Ins. Co. of Newark, Civ. No. 91-114, 1992 WL 157691, at *2 (E.D. Pa. Jun. 29, 1992) ("So fundamental is the proposition that one cannot benefit from attempted or effected fraud, it needs no elaboration. Where any such fraud is shown, the forfeiture provisions of an insurance policy are to be strictly enforced.") (citations omitted).

Under Pennsylvania law an insurance policy is void for misrepresentation when the insurer establishes three elements: (1) the misrepresentation was false; (2) the insured knew that the misrepresentation was false when made or made it in bad faith; and (3) the representation was material to the risk being insured. See Matinchek v. John Alden Life Ins. Co., 93 F.3d 96, 102 (3d Cir. 1996); New York Life Ins. Co. v. Johnson, 923 F.2d

279, 281 (3d Cir. 1991); Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 652 (E.D. Pa. 1996).

1. Misrepresentations

Making all inferences in favor of plaintiffs, there are no genuine issues of material fact that (1) Savadove made many false representations to Vigilant, (2) Savadove knew those representations were false, and (3) he made them in bad faith and they were calculated to deceive the defendants. For example, it is undisputed that Savadove misrepresented the possession and physical whereabouts of the Clock between 1989 and 1996. While Savadove now admits that he never possessed the Clock at any time between 1989 and 1996, prior to the filing for a claim for the Clock Savadove and Mangan created a "story" about where the Clock had been located in the Savadoves' home and how long the Clock had been with Mangan. Furthermore, throughout Vigilant's initial investigation, Savadove repeatedly stated to Vigilant's investigators that Mangan had recently picked up the Clock from the Savadoves' home for "maintenance" and "repairs," statements that are now admittedly false.

Similarly, it is also clear that Savadove misrepresented the marketing and sales history of the Clock to Vigilant's investigators. In his deposition, Savadove now admits that he was "very circumspect" in answering questions about the sale of the Clock. See supra. Although we will assume for purposes of these motions that Vigilant knew that Savadove was

trying to sell the Clock in early-1992, see supra, Savadove told Vigilant's investigators on several occasions in 1996 that the Clock had never been for sale, statements that are indisputably false given the fact that the Clock was purchased in 1989 solely as an investment and that it had been continuously marketed between 1989 and 1996.

Furthermore, Vigilant has also shown that Savadove misrepresented the value and status of the Clock during Vigilant's investigation of the claim. During the initial investigation of the Clock in November, 1996, Savadove stated that he believed that the Clock was worth even more than the appraisals he had submitted to Vigilant. See supra. After significant discovery and investigation we now know: (i) Savadove played a role in the creation of the two appraisals -- recommending to Mangan the price and descriptions that the appraisers should use in the appraisals, even though Mangan thought the value of the Clock was "substantially less" than \$75,000, see supra; (ii) Savadove knew that the Clock's case was probably not an original Thomas Tompion case, see Defendants' Motion for Summary Judgment, Exhibit 2, Memorandum of Agreement (explaining that the case "may not be the original"), a conclusion that Sotheby's later confirmed, see Defendants' Motion for Summary Judgment, Exhibit 21, Sotheby's Catalog (explaining that the Clock's case is "possibly associated"); and (iii) at the Sotheby's auction in October, 1993, the Clock was unable to garner even a bid of \$35,000, the reserve price Sotheby's placed

on it. See Deposition of Larry J. Sirolli, January 7, 1999 at 37-39.

Finally, defendants have shown that Savadove initially misrepresented the acquisition and ownership of the Clock when he told the investigators that he had purchased the Clock in 1989, but that he did not have any documentary evidence to prove that he purchased the Clock other than a wire transfer from his bank account. See supra. In fact, we now know that Savadove had in his possession several documents showing his business arrangement with Dr. Nathanson and proving that Dr. Nathanson purchased the Clock in England in 1989. Yet Savadove chose not to disclose these documents until several months after he filed his initial claim.

There are thus no genuine issues of material fact that Savadove made many false representations to Vigilant, he knew those representations were false, and calculatedly made them in bad faith to deceive the defendants.

2. Materiality

Alternatively, the Savadoves contend that any misrepresentations that they made to Vigilant were not material to Vigilant's investigation of the Clock. Generally, the issue of materiality of misrepresentations is a mixed issue of law and fact, but if the facts misrepresented are so obviously 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. Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 771 (3d Cir. 1976); see also, Fine v. Bellefonte Underwriters Ins. Co., 725 F.2d 179, 183 (2d Cir. 1984); Long v. Insurance Co. Of N. Am., 670 F.2d 930, 934 (10th Cir. 1982); Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 654 (E.D. Pa. 1996); Lavin v. Fireman's Ins. Co. of Newark, Civ. No. 91-114, 1992 WL 157691, at *2 (E.D. Pa. Jun 29, 1992).

Making all inferences on this record in the Savadoves' favor, we find that Lionel Savadove's intentional misrepresentation of the possession, physical whereabouts, marketing, status, acquisition, and ownership of the Clock are clearly material to Vigilant's coverage of the Clock (and Vigilant's subsequent investigation), and that no reasonable jury could find otherwise.

For example, in his affidavit, William Dietrich, Vigilant's special investigator, explained that the marketing of the Clock was important "because if Mr. Savadove had unsuccessfully tried to sell the clock for a long period of time, he may have had an incentive to destroy the clock and collect under his insurance policy." See Dietrich Affidavit. Furthermore, Dietrich explained that the marketing of the Clock was also important because it is possible that the Clock could have been sold prior to the fire.¹⁶ See id.

¹⁶ In addition, the marketing of the Clock (unsuccessful in this case over a period of seven years) and the status of the Clock (e.g. that it was probably not an original
(continued...))

Similarly, Dietrich also notes in his affidavit that Savadove's possession of the Clock (or more accurately, his lack of it since it was purchased in 1989) was also important to Vigilant's investigation because had he known that the Clock had never been in the Savadoves' possession, he would have questioned Savadove as to why the Clock had never been in his possession and whether the person(s) who had possession of the Clock had a financial interest in the Clock or an interest in its destruction, i.e., interests that would give greater assurance that the insured item would be kept safely. See id.

In response to defendants' argument that Savadove misrepresented and concealed the possession, physical whereabouts, marketing, status, acquisition, and ownership of the Clock, and that these misrepresentations were material, plaintiffs do not present any specific evidence creating a material issue of fact for trial. Plaintiffs' conclusory denials and legal arguments that such misrepresentations were not intentional, or that such misrepresentations were not material, cannot survive summary judgment. See, e.g., First Nat'l Bank v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 282 (3d Cir. 1987) (explaining that the party opposing a motion for summary judgment cannot "simply rest on mere denials," but must instead point to specific facts showing that there is a genuine issue for trial).

¹⁶(...continued)
Thomas Tompion clock case) were obviously material in the valuation of the claim.

One need not have a degree in actuarial science to understand the materiality of Lionel Savadove's wholesale misrepresentations in this matter. No reasonable jury could find them immaterial. Accordingly, we will grant summary judgment in favor of Vigilant on the Savadoves' claim for breach of contract.¹⁷

III. Bad Faith and Deceit

In Counts II and III of plaintiffs' First Amended Complaint, plaintiffs also contend that they are entitled to relief for Vigilant's alleged bad faith and deceit in the issuance of the Savadoves' policy and in the handling of their claim. In light of the preceding analysis, we may quickly dispose of these contentions.

Under 42 Pa. Cons. Stat. Ann. § 8371, we may provide relief to the Savadoves if we find that Vigilant acted in bad faith in the handling of their insurance claim. Although the statute itself does not define "bad faith," it has nevertheless acquired a peculiar and universally-acknowledged meaning:

Insurance. 'Bad faith' on the part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of

¹⁷ As we will grant defendants' motion for summary judgment on Count I of plaintiffs' First Amended Complaint, we will deny plaintiffs' motion for summary judgment on Count I.

self-interest or ill will; mere negligence or bad judgment is not bad faith.

PolSELLI v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994) (citations omitted). While § 8371 provides an independent cause of action to an insured, to recover under a claim of bad faith the plaintiffs must show by clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy and that it knew or had recklessly disregarded the lack of a reasonable basis for denying the claim. See Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3rd Cir. 1997).

The Savadoves' deceit claim requires them to demonstrate (i) a misrepresentation, (ii) a fraudulent utterance thereof, (iii) an intention to induce action thereby, (iv) justifiable reliance thereon, and (v) damage as a proximate result. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Inv., 951 F.2d 1399, 1409 (3d Cir. 1991); Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315 (Pa. Super. 1991).

On this record it is by now clear that the Savadoves cannot make out a viable case of either bad faith or deceit, and indeed the bad faith and deceit go in the opposite direction. Putting aside (as we have) reasonable suspicion about the cause of the fire and the authenticity of the Clock remains, the insurers have shown that they had a reasonable basis for denying the Savadoves' claim, i.e., that Savadove concealed and misrepresented material facts about his and his wife's claim.

See supra. Furthermore, nothing in the record suggests that Vigilant handled the Savadoves' policy or conducted the investigation in a biased or improper fashion, or for the purpose of evading its contractual duty to pay valid claims.

Accordingly, we will award summary judgment to defendants on Counts II and III of plaintiffs' First Amended Complaint.

IV. The Counterclaim

In its Answer to the First Amended Complaint, defendants have filed a counterclaim alleging a violation of the Pennsylvania Insurance Fraud Act. 18 Pa. Cons. Stat. Ann. § 4117. Section 4117 provides:

(a) Offense defined.--A person commits an offense if the person does any of the following:

(2) Knowingly and with the intent to defraud any 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.

(g) Civil action.--An insurer damaged as a result of any violation of this section may sue therefor in a court of competent jurisdiction to recover compensatory damages, which may include reasonable investigation expenses, costs of suit and attorney fees. An insurer may recover treble damages if the court determines that the defendant has engaged in a pattern of violating this section.

18 Pa. Cons. Stat. Ann. § 4117. As neither side has moved for summary judgment on defendants' counterclaim, we will do no more than mention it in passing in the margin.¹⁸

An Order follows.

¹⁸ The Pennsylvania Insurance Fraud Act, a criminal statute, is aimed at serial offenders who are engaged in a "pattern" of conduct. Several courts have held that misrepresentations regarding the same subject matter or made in connection with a single transaction or claim generally do not constitute a "pattern" within the meaning of § 4117 and, therefore, cannot recover treble damages in civil actions brought under the Act. See Royal Indem. Co. v. Deli by Foodarama, Civ. No. 97-1267, 1999 WL 178543 at *6 (E.D. Pa. Mar. 31, 1999); Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 657 (E.D. Pa. 1996); Ferrino v. Pacific Indem. Co., 1996 WL 32146, *4 (E.D. Pa. Jan. 24, 1996); Peer v. Minnesota Mut. Fire & Cas. Co., 1995 WL 141899, *13 (E.D. Pa. Mar. 27, 1995).

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

LIONEL SAVADOVE and : CIVIL ACTION
PATRICIA SAVADOVE :
 :
v. :
 :
THE VIGILANT INSURANCE COMPANY :
CHUBB GROUP OF INSURANCE :
COMPANIES : NO. 98-5011

ORDER

AND NOW, this 21st day of April, 1999, upon consideration of defendants' motion for summary judgment (docket entry # 17), and plaintiffs' response thereto, and plaintiffs' motion for summary judgment (docket entry # 16), and defendants' response thereto, and defendants' motion to supplement the previously filed motion for summary judgment, it is hereby ORDERED that:

1. Defendants' motion to supplement the previously filed motion for summary judgment is GRANTED;
2. Defendants' motion for summary judgment is GRANTED;
3. Plaintiffs' motion for summary judgment is DENIED;
4. JUDGMENT IS ENTERED in favor of defendants Vigilant Insurance Company and the Chubb Group of Insurance Companies and against plaintiffs Lionel and Patricia Savadove on Counts I, II, and III of plaintiffs' First Amended Complaint;
5. By noon on Monday, May 10, 1999, the parties shall file a joint pretrial stipulation in accordance with the Court's attached Standing Order, as well as any motions in limine and proposed jury instructions, on defendants' counterclaim; and

6. Trial on defendants' counterclaim shall commence at 10:00 a.m. on Monday, May 17, 1999 in Courtroom 5-C.

BY THE COURT:

Stewart Dalzell, J.