NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Admiral Insurance Company, Plaintiff, v. AZ Air Time, LLC, et al. Defendants.	No. CV-15-00245-PHX-SRB **ORDER**

The Court now considers Plaintiff's Motion for Summary Judgment ("MSJ") (Doc. 58).

I. BACKGROUND

This case arises out of an insurance policy that Plaintiff issued to Defendants Executive Professional Insurance Consultants ("EPIC") and its owners David Glenn Martin and Cynthia Rose-Martin ("the Martins" or "Broker Defendants"). (Doc. 18, Am. Compl. ¶ 1.) Plaintiff instituted this action requesting that the Court declare that the professional liability insurance policy it issued to EPIC and Broker Defendants provides no coverage for the claims and damages sought by Defendant AZ Air Time, LLC ("AZ Air Time") in an action currently pending in Maricopa County Superior Court. (*Id.* ¶¶ 76-82.) Plaintiff also seeks an order voiding and rescinding the professional liability insurance policy Plaintiff issued to EPIC and Broker Defendants. (*Id.* ¶¶ 83-92.) In the underlying state court case, AZ Air Time is alleging that Broker Defendants engaged in a scheme to defraud AZ Air Time from its insurance premiums while acting as AZ Air

Time's insurance broker for a professional liability policy. (*Id.* ¶¶ 12, 16-17.) AZ Air Time specifically alleges that it learned that Broker Defendants had never secured any liability policies on behalf of AZ Air Time, despite the fact that AZ Air Time had paid premiums to Broker Defendants. (*Id.* ¶¶ 20-25.)

On February 21, 2014, Mr. Martin submitted and signed EPIC's application for an Insurance Agents and Brokers Professional Liability Policy from Plaintiff. (Doc. 59, Pl.'s Statement of Facts in Supp. of MSJ ("PSOF") ¶ 1; Doc. 62, Def.'s Controverting Statement of Facts ("DSOF") ¶ 1.) Question 25 of the application asked, "In the last 5 years, have any past or present agency personnel been the subject of complaints filed, investigations and/or disciplinary action by any insurance or other regulatory authority or convicted of a criminal activity?" (PSOF ¶ 35; DSOF ¶ 35.) Broker Defendants answered "no" to Question 25. (PSOF ¶¶ 34-36; DSOF ¶¶ 34-36.)[1] Ms. Rose-Martin was investigated by the Arizona Department of Insurance ("DOI") in 2010 regarding allegations of fraud and embezzlement. (PSOF ¶¶ 37-38; DSOF ¶¶ 37-38.)[2] Ms. Rose-Martin was subsequently fired from her position at Bridging Insurance Group. (PSOF ¶ 39; DSOF ¶ 39.) The 2010 investigation stemmed from a complaint made by American Family Life Assurance Company of Columbus ("AFLAC") wherein they alleged that Ms. Rose-Martin enrolled clients in AFLAC supplemental coverages without the consent or

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[1] Plaintiff also alleges that Broker Defendants' answers to Questions 21 and 22 of their insurance application also entitle Plaintiff to rescission of the policy. (Am. Compl. ¶¶ 98-107; MSJ at 13-14.) Because the Court grants Plaintiff's Motion based on Broker Defendants' answer to Question 25, the Court will not analyze their answers to Questions 21 and 22.

[2] Defendants argue that the complaint Plaintiff submitted documenting the investigation against Ms. Martin is inadmissible hearsay. (DSOF ¶¶ 37-38.) Plaintiff cited to the DOI complaint and case summary in support of this allegation. (Doc. 59-13, Ex. 13 Original Compl. Report.) The DOI complaint and case summary are admissible as public records under Federal Rule of Evidence 803(8). *See* Fed. R. Evid. 803(8) (excepting a record of statement of a public office if it (a) sets out factual findings from a legally authorized investigation and (b) the opponent does not show that the source of the information or other circumstance indicate lack of trustworthiness); *Johnson v. City of Pleasanton*, 982 F.2d 350, 352-53 (9th Cir. 1992) (holding that district court erred in declining to admit city official's affidavit and associated staff reports regarding the investigation of plaintiff).

knowledge of those clients. (PSOF ¶ 43; DSOF ¶ 43.)[3] Following the investigation by the DOI, Ms. Rose-Martin voluntarily surrendered her license to act as an insurance agent and broker in the State of Arizona. (PSOF ¶ 46; DSOF ¶ 46.) In 2012, the DOI also investigated EPIC because of claims that Ms. Rose-Martin was acting illegally as an insurance broker. (PSOF ¶¶ 47- 48; DSOF ¶¶ 47-48.) The investigation stemmed from a complaint that Ms. Rose-Martin asked an EPIC client to provide Broker Defendants with a blank check that could not include the word "void" on the check. (PSOF ¶ 48; DSOF ¶ 48.) The DOI investigation resulted in EPIC entering into a consent judgment on March 15, 2013, which imposed a $2,500.00 monetary sanction for violations of Arizona Revised Statutes ("A.R.S") §§ 20-295 (A)(2), (8), (10), and 20-286 (C)(2). (PSOF ¶ 50; DSOF ¶ 50.) In the consent judgment, Broker Defendants agreed that the DOI investigations were correct in finding that EPIC was "using fraudulent, coercive or dishonest practices, or demonstrating incompetence, untrustworthiness, or financial irresponsibility" and "forging another's name to any document related to an insurance transaction." (PSOF ¶ 51; DSOF ¶ 51.)

Both the aforementioned DOI investigations and their related disciplinary actions occurred within five years of Broker Defendants' application for insurance. (PSOF ¶ 52; DSOF ¶ 52.) Plaintiff moves for summary judgment on its rescission claim, arguing that the misrepresentations by Broker Defendants in answering Question 25 of the insurance application entitles Plaintiff to rescission of the insurance policy under A.R.S. § 20-1109.

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[3] Defendants do not dispute the allegation contained in the AFLAC Complaint but argue that the documents Plaintiff relies on are inadmissible hearsay. (DSOF ¶ 43.) Plaintiff cites to the DOI case complaint and summary, which the Court has already determined is admissible, and the AFLAC Complaint to support its proposition. (Original Compl. Report; Doc. 59-20, Ex. 20 Aug. 24, 2010 Letter.) The AFLAC Complaint is a letter from AFLAC to the DOI stating that Ms. Martin had been investigated and as a result of their investigation, she had been terminated. The letter constitutes hearsay because it was made outside of the Court by a non-present party and is being used for the truth that Ms. Martin had been the subject of an investigation and was subsequently terminated. Fed. R. Evid. 801(c). The letter is not excepted from hearsay because while it documents the facts obtained during Ms. Martin's investigation and was part of DOI's public record, the letter would be hearsay from AFLAC and is not excepted by another rule. Fed. R. Evid. 803(6) (requiring testimony from a custodian or qualified witness before relying on the business record exception). Therefore, the Court will not consider the AFLAC Complaint when determining the Motion.

(MSJ at 2.)[4]

II. LEGAL STANDARD AND ANALYSIS

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

Plaintiff moves for summary judgment on its claim for rescission of Broker Defendants' insurance policy. Arizona law allows for rescission of an insurance contract based on misrepresentations in an insurance application, provided that the misrepresentations were (1) fraudulent, (2) material to either the acceptance of the risk, or to the hazard assumed by the insurer, and (3) that the insurer in good faith would not have issued the policy as it did if the true facts had been known. A.R.S. § 20-1109.

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[4] The defendants who respond to Plaintiff's Motion for Summary Judgment are not Broker Defendants, but are AZ Air Time, Reid and Heidi Stewart, and Superior L&L, LLC ("Defendants"). (*See* Doc. 61, Def. AZ Air Time, LLC's Rule 56(d) Resp. to MSJ ("Resp.") at 1.)

A. Fraud

Plaintiff alleges that Broker Defendants' answer to Question 25 of their insurance application was legally fraudulent because it did not disclose the previous DOI investigations. (MSJ at 13-14.) Legal fraud occurs when (1) a question asked by the insurer seeks facts that are "presumably within the personal knowledge of the insured," (2) the insurer would naturally contemplate that the insured's answer represented the actual facts, and (3) the answer is false. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 921 (9th Cir. 2008). Legal fraud, unlike actual fraud, does not require intent to deceive. *Equitable Life Assurance Soc'y of the U.S. v. Anderson*, 727 P.2d 1066, 1068 (Ariz. Ct. App. 1986).

1. Facts Within the Knowledge of the Insured

Plaintiff alleges that Question 25 asked for factual information regarding the DOI investigations, which Broker Defendants knew and did not disclose. (MSJ at 13-14.) Defendants contend that Question 25 asked for the opinion of the insured and therefore requires evidence of actual fraud. (Resp. at 6-7.) A question elicits a factual response, as opposed to an opinion, if reasonable persons could not differ about whether the answer was a statement of opinion or fact. *Equitable Life Assurance Soc'y*, 727 P.2d at 1068. Statements of fact do not require exercising subjective judgment to determine whether specific factual conditions exist. *James River Ins. Co.*, 523 F.3d at 921-22. A question about awareness of prior events elicits a factual statement unless the question contains ambiguous terminology which can be reasonably construed by the insured in a manner that requires subjective analysis to answer the question. *See Stewart v. Mut. of Omaha Ins. Co.*, 817 P.2d 44, 49 (Ariz. Ct. App. 1991). Facts that were actually known to the insured at the time of the insurance application satisfy the element that the information was also presumably within their personal knowledge. *Cont'l Cas. Co. v. Mulligan*, 460 P.2d 27, 29 (Ariz. Ct. App. 1969).

Question 25 asked if any of EPIC's personnel had been investigated or disciplined by any insurance or regulatory authority in the last five years and requested that a copy of

any such the action be included with the application. (Doc. 59-1, Ex. 1, Appl. at 5.) The previous DOI investigations were prior factual occurrences which did not require a subjective analysis to answer Question 25 accurately. It is not disputed that Broker Defendants knew of the DOI investigations demonstrated by the voluntary relinquishment of Ms. Rose-Martin's license and the entering of a consent judgment with the DOI at the conclusions of the respective investigations. (*See* Doc. 59-21, Ex. 21 Voluntary Surrender of Insurance License; Doc. 59-23, Ex. 23 Consent Order.) These actions by Broker Defendants satisfy the personal knowledge requirement.

Defendants argue that the term "regulatory authority" is ambiguous and elicits a statement of opinion because it was unclear that Question 25 required disclosure of an investigation or disciplinary action by a government licensing agency rather than by insurance companies. (Resp. at 6-7.) "[I]f a question in an insurance application is vague and ambiguous, a reasonable interpretation of that question by the applicant may be of controlling effect, and legal fraud may not be predicated upon an honest response based upon such reasonable interpretation." *Mulligan*, 460 P.2d at 30. The DOI is unquestionably a regulatory authority. *Fid. Sec. Life Ins. Co. v. State, Dep't of Ins.*, 954 P.2d 580, 582 (Ariz. 1998) ("The Arizona Department of Insurance regulates insurance companies doing business in the state."). Defendants do not explain how the language of Question 25 is ambiguous, nor do they provide any reason as to why "regulatory authority" would not include the DOI. *See Greves v. Ohio State Life Ins. Co.*, 821 P.2d 757, 762 (Ariz. Ct. App. 1991). Because Defendants fail to provide a reasonable interpretation rebutting Plaintiff's plain language interpretation of Question 25, Plaintiff has established that reasonable persons could not differ on whether Question 25's language regarding "investigations by regulatory authorities" elicited factual information. *Mulligan*, 460 P.2d at 31. As Defendants do not contest that Broker Defendants knew of the investigations, no genuine dispute of material fact exists regarding the first prong of legal fraud.

2. Insurer Would Naturally Assume Disclosure of Facts

Plaintiff argues that it naturally contemplated Broker Defendants' answer regarding prior investigations would represent the actual facts because the information sought was known by Broker Defendants. (MSJ at 15.) Defendants do not contest Plaintiff's assertion. An insurer can assume that an answer on an application represents the actual facts when the question calls for facts arising out of the insured's personal experience. *Howard v. Certain Underwriters at Lloyd's of London*, No. CV-09-1042-PHX-GMS, 2011 WL 1103040, at *7 (D. Ariz. Mar. 25, 2011); *see also Mann v. New York Life Ins.Co*, 83 F. App'x 877, 879 (9th Cir. 2003). Defendants do not contest that Broker Defendants had personal knowledge of the DOI investigations. (DSOF ¶ 52.) Because the question asked for facts arising from circumstances which Broker Defendants knew of and were personally involved in, Plaintiff would naturally contemplate that Broker Defendants' answer represented the actual facts. *Howard*, 2011 WL 1103040, at *7. Therefore, there is no genuine issue of material fact as to whether Plaintiff naturally contemplated that Broker Defendants' answer regarding personal experience would represent the actual facts.

3. Answer was False

Plaintiff argues that Broker Defendants' answer to Question 25 is false. (MSJ at 14.) Defendants do not argue otherwise. (*See* Resp. at 6 (contesting only whether Questions 21 and 25 sought opinions rather than facts).) Defendants admit that Broker Defendants knew about the DOI investigations, which occurred prior to the Broker Defendants' application for insurance, and still answered "no". (PSOF ¶¶ 35, 52-53; DSOF ¶¶ 35, 52-53.) That answer to Question 25 was false. Therefore, no genuine issue of material fact exists as to whether Broker Defendants' answer to Question 25 was false. Plaintiff has demonstrated that there is no genuine issue of material fact as to the fraudulence prong of Plaintiff's rescission claim.

B. Materiality

Plaintiff argues that Broker Defendants' fraudulent statement was material to Plaintiff's acceptance of the risk because it never would have issued a policy to Broker

Defendants had they known about the DOI investigations. (MSJ at 15.) Defendants do not contest Plaintiff's assertion. (*See* Resp. at 8 (providing only a citation to the applicable legal standard).) "The test of materiality is whether the facts, if truly stated, might have influenced a reasonable insurer in deciding whether to accept or reject the risk." *Cent. Nat. Life Ins. Co. v. Peterson*, 529 P.2d 1213, 1216 (Ariz. Ct. App. 1975). Plaintiff supports its claim with the testimony of Nir Gabay, the Vice President of Professional Liability at Admiral Insurance, who stated that Plaintiff would not have issued a policy had they known the true facts. (Doc. 59-27, Ex. 27 Decl. of Nir Gabay ¶¶ 12-16.)[5] Because Defendants do not contest Mr. Gabay's statements, no genuine issue of material fact exists about whether the fraudulent statements were material to Plaintiff's acceptance of the risk. *Valley Farms, Ltd. v. Transcon. Ins. Co.*, 78 P.3d 1070, 1075 (Ariz. Ct. App. 2003) (concluding that defendant's failure to disclose was material because defendant did not dispute plaintiff's statement that the information was material).

C. Good Faith Denial or Modification

Plaintiff argues that it would not have issued a policy to Broker Defendants had the true facts been known about the DOI investigations. (MSJ at 15-16.) Defendants do not directly contest Plaintiff's assertion and instead argue that they should be given the opportunity to depose Mr. Gabay and discover Plaintiff's conditions for insurance. (Resp. at 8-9.) To satisfy the third requirement of § 20-1109, Plaintiff must show (1) that it would not would not have issued the policy if it had known the truth, (2) that it would not have issued the policy in as large an amount, or (3) that it would not have provided coverage with respect to the hazard resulting in loss. *State Comp. Fund v. Mar Pac Helicopter Corp.*, 752 P.2d 1, 6 (Ariz. Ct. App. 1987). To show that it would not have

[5] Defendants argue that they have not had an opportunity to discover information concerning Plaintiff's investigation or conditions for issuing insurance, noting that Mr. Gabay's declaration was disclosed for the first time in Plaintiff's Statement of Facts. (DSOF ¶¶ 59-63.) Because Defendants do not contest Mr. Gabay's knowledge or the truthfulness of his declaration, the Court does not consider their contention. *Frank v. Certain Underwriters at Lloyds London Syndicate 4141*, No. CV-10-00381-PHX-NVW, 2011 WL 1770536, at *5 n.1 (D. Ariz. May 10, 2011) (relying on an affidavit that defendant argued was conclusory because defendant did not "offer reason to doubt" its truth).

issued the policy, Plaintiff must demonstrate that they would not have issued any policy. *Greves*, 821 P.2d at 764 (distinguishing between not issuing a policy from issuing a policy at a higher premium). Mr. Gabay averred that a policy would not have been issued had the DOI investigations been disclosed and Defendants have not offered any reason to doubt his statement. (*See* Decl. of Nir Gabay ¶¶ 14-15); *Frank*, 2011 WL 1770536, at *5 n.1. Because Plaintiff's evidence showing that it would not have issued the policy is not disputed, no genuine issue of material fact exists as to whether Plaintiff would not have issued the policy to Broker Defendants had it known the true facts. The Court grants summary judgment for Plaintiff.

D. Defendants' Rule 56(d) Motion

Defendants argue that they need more time, 90 days, to depose Mr. Gabay and discover the information on which he relies before adequately responding to Plaintiff's Motion. (Resp. at 1-2.) Plaintiff argues that Defendants have failed to meet their burden of showing they are entitled to Rule 56(d) relief. (Doc. 63, Reply at 8.) Federal Rule of Civil Procedure 56(d) allows the Court to grant a party opposing a motion for summary judgment additional time to conduct discovery if the requesting party provides an affidavit stating: (1) specific facts it hopes to elicit from further discovery; (2) that the facts sought exist; and (3) that the sought-after facts are essential to oppose summary judgment. *Family Home & Finance Cir. Inc. v. Federal Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008). "The failure to comply with these requirements is a proper ground for denying discovery and proceeding to summary judgment." *Id.* (internal quotation marks omitted). Rule 56(d) only applies "where the non-moving party has not had the opportunity to discover information that is essential to its opposition." *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1169 (9th Cir. 2011) (internal citation omitted).

1. Opportunity to Discover Information and Facts Sought

Defendants' attorney Jeffrey Haws declared that Defendants had not been provided Mr. Gabay's declaration before April 5, 2016. (Doc. 61-1, Haws Decl. ¶ 3.) Defendants also argue that Mr. Gabay was not disclosed as a witness until April 21, 2016.

(Haws Decl. ¶ 8.) Plaintiff argues that Defendants failed to conduct any discovery for over eight months. (Reply at 8-9.) While Mr. Gabay was not disclosed by name, Plaintiff disclosed that representatives of its company would "testify regarding [their] underwriting guidelines and policies, [their] rescission and cancellation of the insurance policy issued to the Martins and EPIC, the fact that [they] would not have issued an insurance policy to the Martins or Epic had the Martins and EPIC disclosed the true facts." (Doc. 63-1, Ex. 1, Initial Disclosure Statement at 5.) This information is exactly what Mr. Gabay testified to in his affidavit. (*See* Gabay Decl.) Defendants do not explain why they did not seek a deposition of at least the company representative prior to Plaintiff's filing for summary judgment.

Defendants do not specifically allege that Mr. Gabay's declaration presented new facts. Plaintiff argues that Defendants have not alleged that Mr. Gabay's declaration presents new facts because its theory of the case was fully disclosed in its initial disclosure. (Reply at 10.) As the Court noted above, Mr. Gabay's declaration reiterated the theory Plaintiff set forth in its initial disclosure. Plaintiff's initial disclosure put Defendants on notice of the need to seek Plaintiff's policies, procedures, underwriting guidelines, and other documents relating to their investigation in an insurance coverage dispute case. Therefore, the Court concludes that Defendants had an opportunity to discover the information and the information sought is not new.

2. Necessity to Oppose Summary Judgment

Defendants argue that "[i]n order to substantiate or refute the statements made in the January 12, 2016 declaration of Nir Gabay" they will need to identify evidence contained in Plaintiff's investigation of Broker Defendants; identify the evidence of Plaintiff's policies, procedures, underwriting guidelines, and other documents; and depose Mr. Gabay. (Haws Decl. ¶¶ 9-10.) Plaintiff argues that Defendants did not set forth specific facts that are essential to them opposing summary judgment. (Reply at 11-12.) Because the Court concludes that Defendants had the opportunity to discover the

information now sought, it need not consider whether the facts sought are necessary to oppose summary judgment.

IV. CONCLUSION

Because Broker Defendants' failure to disclose the DOI investigations constituted legal fraud, involved facts material to Plaintiff's risk, and resulted in Plaintiff issuing a policy it would not have otherwise issued, the Court grants Plaintiff's Motion for Summary Judgment. The Court denies Defendants' Rule 56(d) request because they have not alleged that the sought-after facts are new and could not have been previously discovered.

IT IS ORDERED granting Plaintiff Admiral Insurance Company's Motion for Summary Judgment (Doc. 58).

IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly.

Dated this 10th day of August, 2016.

Susan R. Bolton
United States District Judge