**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION**

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| PROASSURANCE CASUALTY COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>WILSON R. SMITH, ROBERT L. JENKINS, and SMITH AND JENKINS, P.C.,<br><br>Defendants. | ) | CASE NO. CV415-051 |

**O R D E R**

Before the Court is Plaintiff ProAssurance Casualty Company's Motion for Summary Judgment. (Doc. 31.) After the benefit of oral argument and for the following reasons, Plaintiff's motion is **GRANTED** and Plaintiff is entitled to rescind the insurance policy at issue in this case. The Clerk of Court is **DIRECTED** to close this case.

**BACKGROUND**

The origins of this case lie in Defendant Wilson R. Smith's theft of over one million dollars of his client's money.[1] To his misfortune, Defendant Robert L. Jenkins practiced in a law partnership—Defendant Smith and Jenkins,

[1] For the purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court construes the facts in the light most favorable to Defendants. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 577-78 (1986).

P.C. ("S&J")—with Defendant Smith. (Doc. 43 ¶ 1.) In June 2014, Defendant Smith renewed Defendant S&J's professional liability insurance policy issued by Plaintiff. (Id. ¶ 2.) As part of that application, Defendant Smith stated that there were "no circumstances, acts, errors or omissions of which I am aware that have been or could result in a professional liability claim that have not been previously reported." (Doc. 1, Ex. F at 1.) Plaintiff provided Defendants a quote for insurance, which Defendant Smith accepted on behalf of the firm. (Doc. 31 at 2-3.) As part of that acceptance, Defendant Smith

> warrant[ed] on behalf of each lawyer and employee that there are no changes in the application most recently submitted to you and furthermore warrant[ed] that there are no circumstances, acts, errors or omission of which I am aware arising since the date of our most recent application which have or could result in a professional liability claim.

(Doc. 43 ¶ 6.)

Defendant Smith's statement, however, was false. (Doc. 31 at 3.) In August 2013, Defendant Smith forged the signatures of his clients—the Mallettes—and settled their claims without their consent. (Doc. 43 ¶¶ 12-14.) Defendant Smith also forged the Mallettes' signatures on the settlement checks and deposited the funds, approximately $500,000, into a personal account. (Id. ¶ 14.) Defendant

Smith dismissed the Mallettes' case without prejudice in January 2014 and, over the next year, misled them into believing that their case remained pending. (Id. ¶¶ 15-16.)

In addition, Defendant settled the claims of Dewey Williams on June 17, 2014 without obtaining authorization. (Id. ¶ 17.) On the same day, Defendant Smith dismissed Mr. Williams's case with prejudice. (Id. ¶ 18.) Once again, Defendant Smith fraudulently obtained Mr. Williams's settlement proceeds, approximately $750,000. (Doc. 31 at 5.)

Ultimately, Defendant Smith pled guilty in federal court to mail fraud and identity theft. (Id. at 3-5.) The Mallettes, Mr. Williams, and a third party have filed lawsuits against Defendants based on Defendant Smith's conduct. (Id. at 5.) The plaintiffs in those suits seek punitive damages and attorney's fees. (Id.) Plaintiff assumed the defense of both suits under reservations of rights. (Id.)

Plaintiff filed suit in this Court seeking rescission of the policy or, in the alternative, a declaratory judgment that the policy does not provide coverage for Defendant Smith's conduct. (Doc. 1.) In its Motion for Summary Judgment, Plaintiff argues that it is entitled to rescind the policy under O.C.G.A. § 33-24-7(b) because

Defendant Smith "falsely represented that he knew of no circumstances that could lead to a professional liability claim when in fact there were numerous such circumstances present in the practice through his criminal actions." (Doc. 31 at 7.) Plaintiff maintains that it would not have issued the policy if it knew of the potential malpractice claims stemming from Defendant Smith's conduct. (Id.) Moreover, Plaintiff contends that the innocent insured provision of the insurance policy is inapplicable because the policy itself is due to be rescinded under § 33-24-7(b). (Id. at 14-16.) Finally, Plaintiff reasons that the policy does not provide coverage for these claims because they were made prior to the effective date of the policy. (Id. at 17-18.)

In response, Defendant Jenkins argues that rescission is improper under § 33-24-7(b) because Defendant Smith's statements were not made on Defendant Jenkins's individual behalf. (Doc. 42 at 3-5.) Defendant Jenkins also contends that his coverage under the policy cannot be rescinded because of the policy's innocent insured provision, which provides coverage for individuals who did not participate in the dishonest, criminal, malicious or fraudulent act

giving rise to the malpractice claim.[2] (Doc. 42 at 5-12.) The crux of Defendant Jenkins's argument is that the innocent insured language of the policy provides him protection from false statements made by the individual applying for the insurance. Defendant Jenkins, therefore, reasons that Plaintiff is not entitled to rescind the policy as to Defendant Jenkins personally because he had no knowledge of the potential claims against Defendant Smith at the time Defendant Smith completed the insurance application.

While not entirely clear, Defendant S&J appears to argue that Defendant Smith's false representation on the application cannot be imputed to the firm, calling itself an "innocent applicant." (Doc. 49 at 6.) Defendant S&J also contends that the application and quotation required ambiguous responses that must be construed against Plaintiff, precluding an award of summary judgment in Plaintiff's favor. (Id. at 8-11.) Additionally, Defendant S&J maintains that Plaintiff's reservation of rights letters waived rescission because they did not "clearly define[] the rights it [was] reserving." (Id. at 13.) Defendant S&J states that Plaintiff waived its right to

[2] All parties appear to agree that Plaintiff may rescind the policy with respect to Defendant Smith.

rescind the policy by retaining a portion of the insurance premiums and including the innocent insured provision in the policy. (Id. at 14-18.) With respect to coverage, Defendant S&J contends that the innocent insured provision provides it coverage under the policy and that the ambiguities contained in the policy necessitate a finding of coverage for all claims.

The Court held a hearing on this matter. (Doc. 75.) Following the hearing, the parties submitted supplemental briefing. (Doc. 76; Doc. 77.) As result, Plaintiff's motion is now ripe for review.

**ANALYSIS**

I. SUMMARY JUDGMENT STANDARD

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56 advisory

committee notes). Summary judgment is appropriate when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The substantive law governing the action determines whether an element is essential. DeLong Equip. Co. v. Wash. Mills Abrasive Co., 887 F.2d 1499, 1505 (11th Cir. 1989).

As the Supreme Court explained:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the nonmovant's case. Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The Court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmovant. Matsushita, 475 U.S. at 587-88. However, the nonmoving party "must do more than simply show that there is some

metaphysical doubt as to the material facts." Id. at 586. A mere "scintilla" of evidence, or simply conclusory allegations, will not suffice. See, e.g., Tidwell v. Carter Prods., 135 F.3d 1422, 1425 (11th Cir. 1998). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the Court should refuse to grant summary judgment." Barfield v. Brierton, 883 F.2d 923, 933-34 (11th Cir. 1989).

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Dispositive in this case is whether Plaintff may rescind the policy as to all Defendants based on Defendant Smith's misrepresentations. Georgia law provides that

> Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

O.C.G.A. § 33-24-7(b). This statute permits insurers to rescind a contract for insurance where an insured makes a material misrepresentation in the insurance application. Fid. & Guar. Life Ins. Co. v. Thomas, 559 F. App'x 803, 805 (11th Cir. 2014). A misrepresentation is material where it " 'would influence a prudent insurer in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance.' " Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC, 555 F.3d 1331, 1340 (11th Cir. 2009) (quoting Lively v. S. Heritage Ins. Co., 256 Ga. App. 195, 196, 568 S.E.2d 98, 100 (2002)). The standard does not focus on the subjective belief of either the insured or insurer, but rather on the objective falsity of the statement and the action of a prudent insurer. See id.; White v. Am. Family Life Assurance Co., 284 Ga. App. 58, 61, 643 S.E.2d 298, 300 (2007).

In this case, there is no doubt that Defendant Smith's statement was both objectively false and material, entitling Plaintiff to rescind the entire policy. Nevertheless, Defendants Jenkins and S&J argue that Plaintiff may not rescind the policy because their lack of knowledge concerning Defendant Smith's wrongdoing falls under the policy's innocent insured provision. The innocent insured provision states that

> if a claim is made involving the dishonest, criminal, malicious or fraudulent act, error, or omission of an Insured, this policy will apply to any Insured who did not participate in, acquiesce in or fail to take appropriate action after having knowledge of such acts, errors or omissions, provided that such Insured complied with all policy provisions.

(Doc. 1, Ex. E, § 4.2.1.) Additionally, the policy provides that "[i]f a claim has been concealed from the Company by any Insured, this policy will apply to any Insured who has complied with all policy provisions and did not participate in, acquiesce in or fail to promptly notice the Company of such concealment." (Id. § 4.2.2.) Defendants Jenkins and S&J contend that these provisions protect them from Defendant Smith's misrepresentations because the policy contractually limits Plaintiff's ability to rescind the policy with respect to any insured that lacked knowledge of the misrepresentations.

Defendants' argument, however, ignores the fact that the materially false statement was provided on the application for insurance. In this respect, Plaintiff is entitled to rescission of the policy, rendering the policy void. See Jackson v. Peerless Ins. Co., 519 F. App'x 638, 639 (11th Cir. 2013) (affirming district court's conclusion that misrepresentations in insurance application rendered policy void ab initio). Therefore, the innocent insured

provision is inapplicable because there is and never was a contract for insurance.

Moreover, while an insurer can agree to limit its right to rescind, it is a far stretch to interpret the innocent insured provision in this case as limiting that right. In this regard, Defendants' reliance on Exec. Risk Indem., Inc. v. AFC Enter., Inc., 510 F. Supp. 2d 1308 (N.D. Ga. 2007), is misplaced. In Exec. Risk, the policy expressly stated that "[i]n the event that any of the particulars or statements in the Application [are] untrue, this Policy will be void with respect to any Insured who knew of such untruth." 510 F. Supp. 2d at 1325. Based on this language, the district court concluded that "the Policy can only be rescinded with respect to any insured who 'knew of [an] untruth' in the Application." Id. (alteration in original).

In this case, the innocent insured provision does not reference any falsity in the application. Rather, the provision only states that the policy will continue to provide coverage for claims brought under the policy where an individual insured did not participate in and lacked knowledge of the potential claim. It would take a contorted reading of the innocent insured provision in this case to conclude that it limited Plaintiff's ability to rescind the

policy based on misrepresentations in the insurance application. As evidenced by the policy in Exec. Risk, the parties could enter into an insurance contract that limits the insurer's right to rescind. However, such language was not included in the policy at issue in this case. As a result, Plaintiff is free to rescind the policy based on Defendant Smith's misrepresentations.

Defendants' argument is further weakened by the numerous cases holding that rescission is permissible under similar circumstances. For example, in ProAssurance Cas. Co. v. Farr, CV110-058 (M.D. Ga. Mar. 30, 2012), the court interpreted the very language on the insurance application at issue in this case. In Farr, the managing partner of a law firm truthfully claimed that he had no knowledge of any possible claims. However, one member of the firm had been knowingly manufacturing settlements in pending cases that he had previously abandoned. The court held that the policy could be rescinded even though the managing partner had no knowledge of the wrongdoing because the partner's statement on the application concerning the absence of potential malpractice claims was objectively false. Similarly, in Medmarc Cas. Ins. Co. v. Reagan Law Grp., P.C., 525 F. Supp. 2d 1334 (N.D. Ga. 2007), the court concluded that the insurer could rescind a professional liability policy as to

both the attorney and the law firm based on the applicant's failure to disclose her theft of client funds. In Home Indem. Co. Manchester, N.H. v. Toobs, 910 F. Supp. 1569 (N.D. Ga. 1995), the court granted the insurer's request for rescission of a professional liability policy covering both an applicant and law firm where the applicant knowingly omitted a possible claim based on his improper dismissal of a client's case.

This great weight of persuasive authority supporting rescission is difficult to ignore. To be fair, these cases are silent as to the whether the insurance policies at issue involved innocent insured provisions. It appears that, at the very least, no insured raised the applicability of an innocent insured provision as a defense to rescission. Nonetheless, Defendants have failed to point to any authority, persuasive or otherwise, suggesting that rescission would be improper under the facts of this case. Defendants rely instead on a general argument that rescission would render the innocent insured provision a nullity and leave law firms to face a parade of horribles.

The Court, however, is unpersuaded by both prongs of Defendants' general argument. First, the innocent insured provision would not be rendered a nullity by allowing rescission because it is still applicable to claims of

dishonest, criminal, malicious, or fraudulent acts that arise after the applicant warrants that there are no existing circumstances that could result in a professional liability claim. Second, while this Court recognizes the hardship faced by both lawyers and law firms that find their professional liability insurance policy subject to rescission at precisely the time they need it most, the unenviable nature that results from rescission is not proper grounds for this Court to ignore state law.

Make no mistake, nothing would be more pleasing to this Court than to provide any measure of relief from the shock and sense of betrayal that must be felt upon learning that your longtime law partner violated his most solemn of ethical obligations by stealing his clients' money. This Court desire to assuage Defendant Jenkins's anguish is, however, an inadequate basis to provide him the relief he seeks. It is quite obvious to this Court that Defendant Jenkins fell victim to the deception of his former law partner, much in the same way Defendant Smith deceived his former clients. Constrained by state law, however, the Court is restricted to offering Defendant only the cold comfort of knowing that like all things, this too must pass. In this matter, unfortunately, Plaintiff's Motion for

Summary Judgment must be **GRANTED** and Plaintiff permitted to rescind the insurance policy.[3]

**CONCLUSION**

For the foregoing reasons, Plaintiff ProAssurance Casualty Company's Motion for Summary Judgment (Doc. 31) is **GRANTED** and Plaintiff is entitled to rescind the insurance policy at issue in this case. The Clerk of Court is **DIRECTED** to close this case.

SO ORDERED this 9th day of August 2016.

WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

[3] Defendants' arguments concerning Plaintiff's improper reservation of rights and failure to return Defendants' entire premium are wholly without merit, and do not provide any basis for relief.