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SUMMARY JUDGMENT MASS. R. CIV. P. 56	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1877CV00558	Thomas H. Driscoll, Jr., Clerk of Courts
CASE NAME Holzberg, Edward P vs. MetLife Auto & Home Insurance Agency Inc et al	COURT NAME & ADDRESS Essex County Superior Court - Newburyport 145 High Street Newburyport, MA 01950

JUDGMENT FOR THE FOLLOWING DEFENDANTS(S)

MetLife Auto & Home Insurance Agency Inc

Metropolitan Property and Casualty Insurance Company

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)

Holzberg, Edward P

This action came before the Court, Hon. Kathleen McCarthy-Neyman, presiding, upon Motion for Summary Judgment of the defendants named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendants is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

That Plaintiff's Complaint be and hereby is DISMISSED.

It is further ORDERED and ADJUDGED that judgment shall enter for Defendants, MetLife Auto & Home Insurance Agency Inc. and Metropolitan Property and Casualty Insurance Company, on their Counterclaim.

Further, in accordance with G. L. c. 231A, § 1, it is ORDERED and DECLARED that:

(1) in failing to identify Wood as an individual who would be "customarily" operating the Cadillac, Edward P. Holzberg provided false or misleading information in connection with the Application;

(2) this false and misleading information constituted a material misrepresentation in the negotiation of an insurance policy under G. L. c. 175, § 186, which affected Metropolitan's risk of loss; and

(3) consequently, Metropolitan is entitled to void the Policy, and is relieved of any obligation to pay Edward P. Holzberg any insurance proceeds for coverage provided for under the Policy in connection with the collision that occurred on December 24, 2014, including defending or indemnifying Wood.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
04/08/2020	X Anne L. Mitchell

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1877CV00558

EDWARD P. HOLZBERG,
Plaintiff/Defendant-in-Counterclaim,

vs.

METLIFE AUTO & HOME INSURANCE AGENCY, INC., et al.,[1]
Defendant/Plaintiff-in-Counterclaim.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM FOR DECLARATORY JUDGMENT (PAPER NO. 20)

INTRODUCTION

This matter involves a dispute concerning insurance coverage. The defendants, MetLife Auto & Home Insurance Agency, Inc. and Metropolitan Property and Casualty Company (collectively, "Metropolitan"), issued the plaintiff, Edward Holzberg ("Holzberg"), automobile insurance policy #7795815110 (the "Policy"), covering a 1993 Cadillac Fleetwood Limousine VIN # 1G6DW5271PR71992 (the "Cadillac"). During the coverage period, the Cadillac was involved in an accident in which Holzberg was not the driver. Thereafter, he made a claim for collision coverage under the Policy's optional coverage provisions and Metropolitan denied his claim. According to Metropolitan, the Policy is void and Holzberg is not entitled to coverage because he made material misrepresentations on his insurance application that increased the risk of loss.

Following Metropolitan's denial of coverage, Holzberg filed the Complaint and Demand for Jury Trial (Paper No. 1), asserting claims against Metropolitan for: breach of contract (Count

[1] Metropolitan Property and Casualty Company

I); breach of the implied covenant of good faith and fair dealing (Count II); and unfair and deceptive insurance practices, in violation of G. L. c. 176D and 93A (Count III). In response, Metropolitan filed the Answer, Jury Claim, and Counterclaim of Defendants, MetLife Auto & Home Insurance Agency, Inc. and Metropolitan Property and Casualty Insurance Company (Paper No. 3), asserting a counterclaim against Holzberg for declaratory relief pursuant to G. L. c. 231A, § 1. More specifically, Metropolitan requests a declaratory judgment stating the misrepresentations Holzberg made in the application relieve it from having to provide coverage under the Policy.

This matter is currently before the court on Defendants' Motion for Summary Judgment on Its Counterclaim for Declaratory Judgment (Paper No. 20) (the "Motion for Summary Judgment"), wherein Metropolitan seeks judgment as a matter of law on its claim for declaratory relief. For the reasons outlined below, the Motion for Summary Judgment is **ALLOWED**.

FACTUAL BACKGROUND

The following facts are undisputed.

On August 15, 2014, Holzberg applied for a Standard Massachusetts Automobile Insurance Policy with Metropolitan by signing an "ACCORD Application for Massachusetts Motor Vehicle Insurance" (the "Application"). Holzberg submitted the Application to obtain motor vehicle insurance coverage for his Cadillac and his Kia Optima Sedan. At the time he signed the Application, Holzberg was a licensed attorney practicing personal injury law in the Commonwealth, and he was familiar with the terms of the Standard Massachusetts Automobile Insurance Policy. He purchased the Cadillac on July 12, 2014, intending to use it in connection with his law practice. However, although he contemplated using the Cadillac to transport clients, he had no intention of driving them himself "unless he had to."

Sometime prior to August 6, 2014, Holzberg and Jonathan Wood (Wood) communicated relative to Wood providing his (Wood's) services to operate the Cadillac in connection with Holzberg's law practice. Holzberg paid Wood to operate the Cadillac twice prior to signing the Application, once on August 6, 2014, and once on August 13, 2014. Prior to the accident, Wood was the only person to operate the Cadillac on the "open road."[2] Wood operated the Cadillac eight times between August 6, 2014 and December 24, 2014. And, in each instance, Holzberg compensated Wood for his driving services.

The Application contained an instruction to "[f]urnish information for the applicant and each individual who customarily operates the auto, whether or not a household member[;]" and stated "[y]our failure to list a household member or any individual who customarily operates your auto may have serious consequences." In addition, the Application stated that:

> If you or someone else on your behalf gives us false, deceptive, misleading or incomplete information in this application and if such false, deceptive misleading or incomplete information increases our risk of loss, we may refuse to pay claims under any or all of the Optional Insurance Parts and we may cancel your policy. Such information includes the description and place of garaging of the vehicle(s) to be insured, the names of household members and customary operators required to be listed and the answers given above for all listed operators.

Wood's name does not appear on the Application as an identified operator who customarily operated the Cadillac. Only Holzberg's name appears on the Application as an individual who customarily operated the Cadillac.

[2] Holzberg claims that he and another individual moved the Cadillac from one parking space to another in the parking lot where he operated his law practice. Nevertheless, based on the record before the court, Wood is the only person that drove the Cadillac off the business property. The fact that Holzberg moved the Cadillac from one parking space to another space on the same property is irrelevant to the court's resolution of the current matter.

Holzberg contends that he advised his insurance agent that others would be driving the Cadillac; however, it is undisputed that he never specifically identified Wood as a driver when completing the Application. In fact, Holzberg never identified Wood as a prospective operator to Metropolitan or its agents any time prior to the accident. Holzberg contends he did not identify Wood as an operator because Wood was not an individual who was going to "customarily" operate the Cadillac. He states that he would have identified Wood as a potential operator, if his agent had asked him to identify "everybody" who was going to drive the Cadillac. The Application states: the "1992 CADILLAC IS BEING USED TO PICK UP CLIENTS."

During the application process, Holzberg appeared to understand the questions Parente Insurance posed regarding who would be driving the Cadillac. He did not request clarifications or explanations regarding any terms used on the Application. Holzberg examined the Application to ensure it was true and accurate prior to signing it. Holzberg understood that the premium charged by an automobile insurer was based on the driving record of the proposed operators identified on the policy, and drivers with surchargeable events would be charged higher premiums. Holzberg acknowledged that his driving record made him a better risk than Wood for purposes of issuing insurance. In fact, Holzberg admitted that, based on a comparison of their driving records, if Wood owned a law firm in the same location as his firm and the automobile was in Wood's name, Wood would have been charged a higher premium.

Holzberg's signature appears beneath a declaration that the statements contained within the Application were "complete and true." Holzberg received a copy of the Policy's declaration page as well as a copy of the Policy itself. He was familiar with the Standard Massachusetts Automobile Insurance Policy's cooperation provisions.

Holzberg acknowledged that, under the Policy, he was required to provide Metropolitan with information about any changes that could affect his coverage or premiums. The Policy contained a general provision, which stated that, if the insured provided "false, deceptive, misleading or incomplete information in any application or policy change request and if such false, deceptive, misleading or incomplete information increases our risk of loss, we may refuse to pay claims under any or all of the Optional Insurance Parts of this policy." Such information included: the description and the place where any insured vehicle was to be garaged; the names of all household members and customary operators who the applicant was required to identify; and the answers the applicant provided for all listed operators. After filling out the Application, Holzberg never filled out any other application or change request relative to the Cadillac.

Based on information Holzberg provided on the Application, on August 29, 2014, Metropolitan issued the Policy, insuring the Cadillac and his Kia Optima sedan for a total premium charge of $1,097.00. Thereafter, on September 29, 2014, Metropolitan issued Holzberg a revised coverage selections page, which listed a premium of $1,097.00 less $244.00, equaling $853.00. Wood's merit rating, on August 15, 2014, was an "8," which was worse than Holzberg's rating; consequently, his prospective use of the Cadillac posed additional risk to Metropolitan.[3] If Holzberg had disclosed Wood as an additional operator of the Cadillac, Metropolitan would have charged Holzberg a higher premium totaling $1,514.00.

[3] Holzberg's request to strike the affidavit of Jason Hammond ("Hammond") is **DENIED**. He argues Hammond submitted no document supporting the statements contained therein, and he lacks any "basis for establishing [the] personal knowledge" necessary to provide a foundation for his statements. The court disagrees. Hammond is a supervisor for Met Life Auto & Home Underwriting/East Region who has thirteen years of experience as an underwriter. This experience establishes Hammond's qualifications to opine on matters related to Metropolitan's underwriting process. Furthermore, although Holzberg initially disputed that Wood had a merit rating of "8" and that his driving record was poorer than his own, during the summary judgment hearing on February 11, 2020, the parties stipulated that Wood's merit rating was an "8."

On December 24, 2014, while being operated by Wood, the Cadillac was involved in a motor vehicle accident resulting in damage to the vehicle. Holzberg submitted a claim for collision coverage under the optional coverage provisions of the Policy. In connection therewith, he provided Metropolitan with information claiming Wood was a "friend" who "seldom" operated the Cadillac.[4] In addition, in connection with his claim, Holzberg submitted to an examination under oath, which Metropolitan's counsel conducted, wherein he provided testimony concerning the information provided in the Application and his employment of Wood. Following this examination, on May 15, 2015, Metropolitan denied Holzberg's claim, referencing his failure to identify Wood as the Cadillac's primary, if not exclusive, operator.

DISCUSSION

Metropolitan asserts a counterclaim against Holzberg for declaratory relief, requesting the court issue a declaration, under G. L. c. 231A, § 1, declaring the Policy void because Holzberg made material misrepresentations in the Application that affected its underwriting process.[5] Currently, Metropolitan seeks summary judgment on this claim and on Holzberg's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive insurance practices, which allege Metropolitan wrongfully denied his claim for collision coverage.

[4] Holzberg was not related to Wood and they did not share a residence; their relationship arose out of Wood's role as a paid driver who operated the Cadillac in connection with the business operations of Holzberg's law firm.

[5] Under G. L. c. 231A, § 1, the court "may . . . make binding declarations of right, duty, status and other legal relations . . . in any case in which an actual controversy has arisen[.]" And, significant for purposes of the current matter, "'[a] declaratory judgment . . . provides an appropriate means of deciding a dispute concerning the meaning of language in an insurance policy.'" Hanover Ins. Co. v. Fasching, 52 Mass. App. Ct. 519, 520 (2001), quoting Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 685 (1990).

I. Standard of Review

Under Massachusetts law, a judge shall grant a motion for summary judgment 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 where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles him or her to judgment as a matter of law. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 808-809 (1991); Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989); see Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing parties' claim or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner, 410 Mass. at 809; Kourouvacilis, 410 Mass. at 716.

The court considers the evidence presented in the light most favorable to the nonmoving party. Mass. R. Civ. P. 56(c); Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991); Parent v. Stone & Webster Eng'g Corp., 408 Mass. 108, 113 (1990); Flynn v. Boston, 59 Mass. App. Ct. 490, 491 (2003). However, "a court does not resolve issues of material fact, assess credibility, or weigh evidence." Kernan v. Morse, 69 Mass. App. Ct. 378, 382 (2007), cited in Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 689 (2016). And, the nonmoving party cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment, LaLonde v. Eissner, 405 Mass. 207, 209 (1989); instead, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine

dispute. Pederson, 404 Mass. at 17. "[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." Polaroid Corp. v. Rollins Envtl. Servs., Inc., 416 Mass. 684, 696 (1993).

II. Declaratory Judgment – Metropolitan is Entitled to Void the Policy

Metropolitan argues it is entitled to void the Policy because, on the Application, Holzberg failed to identify Wood as an individual who would "customarily operate[]" the Cadillac, and this failure constituted a material misrepresentation that affected Metropolitan's risk of loss and impacted the premium it charged Holzberg. In response, Holzberg argues summary judgment is not warranted because the question on the Application, which required the applicant to identify individuals who would be "customarily" using the Cadillac, was ambiguous and capable of more than one meaning. Consequently, according to Holzberg, his failure to identify Wood cannot be deemed a misrepresentation. The court agrees with Metropolitan.

General Laws c. 175, § 186(a), provides as follows:

> No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.

In accord with this provision and under common-law principles, "when an insured makes a material misrepresentation during the application or renewal period for an insurance policy, the insurer may be able to deny coverage on that basis." Schultz v. Tilley, 91 Mass. App. Ct. 539, 542 (2017) (internal citations omitted); see also Hanover Ins. Co. v. Leeds, 42 Mass. App. Ct. 54, 57 (1997) ("[a] misrepresentation in an application for insurance will enable the insurer to avoid the policy if the misrepresentation was made with actual intent to deceive, or it is material").

A misrepresentation is "material" if it would "naturally influence the judgment of an underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium." Employers' Liab. Assur. Corp. Ltd. v. Vella, 366 Mass. 651, 655 (1975); see also Northwestern Mut. Life Ins. Co. v. Iannacchino, 950 F. Supp. 28, 31 (D. Mass. 1997) (stating facts are material where disclosure of truth would have influenced judgment of underwriter), cited in A. W. Chesterton Co. v. Massachusetts Insurers' Insolvency Fund, 445 Mass. 502, 513 (2005). In other words, "if an insured falsely states a fact that would increase the premium, the misrepresentation is material." Barnstable County Ins. Co. v. Gale, 425 Mass. 126, 128 (1997). And, the insurer bears the burden of proving that the misrepresentation was material. Id.

Importantly, however, under G. L. c. 175, § 186, "risk of loss" is not limited to the degree or character of a specific loss, but refers to an insurer's general risk of economic loss or exposure to liability under the insured's policy as a whole. Id. at 128-129. Put another way, the statute does not restrict the insurer's remedy to the denial of specific portions of the policy; instead, it permits the insurer to void the policy in its entirety, where the insured has made misrepresentations affecting the calculation of the policy's premium, even if the actual risk of loss was not increased. Id. This construction of G. L. c. 175, § 186, is incorporated into the exclusions set forth in the Standard Massachusetts Automobile Insurance Policy, which is established by the Commissioner of Insurance.[6]

Therefore, the dispositive question in this case is whether, by failing to identify Wood as an individual who would be "customarily" operating the Cadillac, Holzberg made a material

[6] The Standard Policy states that the insurer "may refuse to pay claims under any or all of the Optional Parts" of the Policy because of false or misleading information provided by the insured "in any application or policy change request" that increases the insurer's risk of loss.

misrepresentation affecting the cost of the premium Metropolitan charged him. This requires the court to determine the meaning of "customarily." See Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 394 (2003); see also Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 355 (2009). The parties have provided no, and the court has found no, case interpreting this phrase in the insurance context. However, there is some general guidance from the appellate courts about how to determine whether an insured has made a misrepresentation on an insurance application.

"In order to determine whether an answer [provided on an insurance application] is a misrepresentation, . . . [the court] must identify the information sought by the question." Hingham Mut. Fire Ins. Co. v. Mercurio, 71 Mass. App. Ct. 21, 24 (2008). "Where . . . there is more than one rational interpretation of policy language, 'the insured is entitled to the benefit of the one that is more favorable to it.'" Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 281 (1997), quoting Trustees of Tufts Univ. v. Commercial Union Ins. Co., 415 Mass. 844, 849 (1993). "The rationale behind this rule is to encourage insurers, who typically draft the policy and are in the best position to avoid future misunderstandings, to be as clear and explicit as possible . . . . This same rationale extends to insurance questionnaires and applications." Mercurio, 71 Mass. App. Ct. at 24 (internal quotations and citations omitted). Thus, "[w]here a question on an application lends itself to more than one reasonable interpretation, an honest answer to one of those reasonable interpretations cannot be labeled a misrepresentation." Id.

In the present case, the Application was clear and unambiguous. Holzberg's contrary contention, i.e., his assertion that the Application's request to identify those individuals who would be "customarily" using the Cadillac was ambiguous, is wholly without merit. While

neither the Application nor the Policy specifically define which individuals count as "customar[y]" operators, "customarily" is a form of the root word "custom," which the Merriam-Webster Dictionary defines as: (1) "a usage or practice common to many or to a particular place or class or habitual with an individual"; (2) "long-established practice considered as unwritten law"; (3) "repeated practice"; or (4) "the whole body of usages, practices, or conventions that regulate social life[.]" And, applying this plain meaning to the Application's instruction for the applicant to "[f]urnish information for the applicant and each individual who *customarily* operates the auto, whether or not a household member," leads to the inescapable conclusion that Holzberg was clearly and unambiguously being asked to provide identifying information for himself and any other operators who regularly or repeatedly made use of the Cadillac.

Accepting the above-stated plain meaning of the term "customarily," by identifying himself, and failing to identify Wood, as a regular and repeated operator of the Cadillac, Holzberg provided Metropolitan with false or misleading information.

First, Wood had driven the Cadillac twice before Holzberg filled out the Application. Second (and more significantly), Holzberg acknowledged that, at the time he filled out the Application, although he intended that the Cadillac would be used to transport clients in connection with his law practice, he did not intend to drive clients himself "unless he had to." And, in fact, Wood was the only person who ever drove the Cadillac off Holzberg's business premises. It is clear that, at the time Holzberg filled out the Application, he knew that Wood was going to be the primary, i.e., the common, regular, "customar[y]" driver of the Cadillac.[7] Thus, the only remaining issue is whether Jolzberg's misrepresentation was "material."

[7] Holzberg seems to argue that the Application's request to identify who would "customarily" operate the Cadillac is ambiguous, because the term itself is unclear, where there is no absolute line, i.e., established number of uses, between a customary and a non-customary operator. While this argument might have merit in some situations, based on the

As mentioned above, a misrepresentation is material if it would "naturally influence the judgment of an underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium." Employers' Liab. Assur. Corp. Ltd., 366 Mass. at 655 (internal quotations and citations omitted). Applying this definition of materiality to the present matter, it is clear that Holzberg's failure to identify Wood as an individual who would be "customarily" operating the Cadillac, was a material misrepresentation. The undisputed material facts at issue in the current matter establish that, if Holzberg had disclosed Wood as an additional operator, Metropolitan would have charged him a premium of $1,514.00 (rather than the $853.00 it actually charged him), because Wood's poor driving record and low merit rating increased Metropolitan's risk of loss. Thus, Holzberg's failure to identify Wood as a regular operator on the Application constituted a material misrepresentation entitling Metropolitan to void the Policy.[8]

For the reasons stated, Metropolitan is entitled to summary judgment on its counterclaim for declaratory judgment, under G. L. c. 231A, § 1, as well as on Holzberg's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive insurance practices.

CONCLUSION AND ORDER

For the reasons explained above, it is hereby **ORDERED** that Metropolitan's Motion for Summary Judgment (Paper No. 20) is **ALLOWED**, as to Metropolitan's claim for declaratory

facts of this case, a definitive dividing line between customary and non-customary operators is largely irrelevant. Wood was the Cadillac's only operator and, thus, by default, the Cadillac's "customar[y]" operator.

[8] As an alternative argument, Metropolitan states that, in August 2014, when it issued the Policy, it did not offer commercial vehicle policies to cover an employee or independent contractor's paid operation of a vehicle in connection with business operations. Thus, if Holzberg had disclosed that Wood was going to be paid to drive the Cadillac to transport Holzberg's clients as part of an employment arrangement, Metropolitan would not have issued the Policy. The court need not address this argument, since, as discussed above, it concludes Holzberg made material misrepresentations entitling Metropolitan to void the Policy.

judgment (Counterclaim I), and Holzberg's claims for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and unfair and deceptive insurance practices (Count III) shall be **DISMISSED**. Further, in accordance with G. L. c. 231A, § 1, it is **ORDERED** and **DECLARED** that:

(1) in failing to identify Wood as an individual who would be "customarily" operating the Cadillac, Holzberg provided false or misleading information in connection with the Application;

(2) this false and misleading information constituted a material misrepresentation in the negotiation of an insurance policy under G. L. c. 175, § 186, which affected Metropolitan's risk of loss; and

(3) consequently, Metropolitan is entitled to void the Policy, and relieved of any obligation to pay Holzberg any insurance proceeds for coverage provided for under the Policy in connection with the collision that occurred on December 24, 2014, including defending or indemnifying Wood.

SO ORDERED.

/s/Kathleen M. McCarthy
Kathleen M. McCarthy
Justice of the Superior Court

Dated: April 6, 2020