Prepared by the Court

DEBRA HILLS, RICHARD HILLS Plaintiffs, V. DINA Y. ROSALES, CHRISTOPHER LOPEZ, ALLSTATE NEW JERSEY INSURANCE COMPANY, JOHN DOES 1- 5, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY Docket # OCN-L-1955-20
FITCHBURG MUTUAL INSURANCE CO., Plaintiff, V. CHRISTOPHER LOPEZ T/A GL CUSTOM DRYWALL AND DENISE BALTAZAR, DEBORAH KANAREK, DOVID KANAREK, DINIA Y. ROSALES, CARLOS JOSE LUIS FERNANDEZ, DEBRA HILLS, RICHARD HILLS, CONNER HILLS AND MACKENZIE ANGELONE (as interested parties) Defendants.	OPINION

This matter comes before the Court on application of the Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment.

The underlying facts and procedural history are summarized here. Fitchburg Mutual Insurance Company (hereinafter referred to as "Fitchburg") issued a commercial automobile policy (hereinafter referred to as "the subject policy"), to the named insured, Christopher Lopez

t/a GL Custom Drywall. The subject policy was issued in connection with the January 16, 2014 application for insurance submitted by Defendant, Christopher Lopez t/a GL Custom Drywall (hereinafter referred to as "Lopez" or "Mr. Lopez"). The commercial automobile policy covered four vehicles: a 2002 Chevrolet Suburban 1500; a 2004 Toyota Sienna; a 2017 Chevrolet Express 3500; and a 2001 GMC Sierra 1500. Relevant to this case are the 2001 GMC Sierra 1500 (the "GMC Vehicle") and the 2004 Toyota Sienna (the "Toyota vehicle").

The subject policy contained a Business Auto Coverage Form, which provides in relevant part:

BUSINESS AUTO COVERAGE FORM

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

B. General Conditions

2. Concealment, Misrepresentation or Fraud

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any "insured", at any time, intentionally conceals or misrepresents a material fact concerning:

a. This Coverage Form;

b. The covered "auto"; or

c. Your interest in the covered "auto"; or

d. A claim under this Coverage Form.

On the application for insurance, Lopez was asked twice—in questions #3 and #15—whether his vehicles were provided to family members for personal use. The answer to this question, Fitchburg alleges, is critical as the application was for a commercial auto policy which has different rating features and guidelines than a policy that covers personal use. See Fitchburg Exhibit 3, Deposition of Laurie Mirchuk, 28:19-29:7. According to Fitchburg, the above question inquiring into family members and personal use is appropriate since Fitchburg's "intent is to cover vehicles that are used only for the business." Id. Mr. Lopez answered both sets of questions in the same manner, stating that the vehicles were not provided to his family members for personal use.

In addition to the questions centered around personal use, the application also contained a question that asked how many drivers would be driving the vehicles. Lopez answered that there were only two drivers on the policy. The application's question #10 asked if all drivers were between the ages of twenty-five and seventy, and further inquired as to whether the drivers have been licensed for at least seven years. Lopez answered that all drivers were between the ages of twenty-five and seventy, and affirmatively answered that all have been licensed for at least seven years. In the application for insurance, Christopher Lopez only submitted the driver's licenses of himself and Maribel Lopez.

Fitchburg relied on all of Mr. Lopez's representations in the January 16, 2014 Commercial Auto Application when issuing the Commercial Auto Policy to Christopher Lopez T/A GL Custom Drywall. See Certification of Laurie Mirchuk, paragraph #6; see also Fitchburg Exhibit 3, page 45.

Following Mr. Lopez's initial application for coverage on January 16, 2014, Mr. Lopez did not update information about the drivers on the subject commercial auto policy. While

Fitchburg did not require applications annually, the first application for the first year of coverage applied for each renewal. See Fitchburg Exhibit 3, Deposition of Laurie Mirchuk, 23-24:25-10. If the insured wanted to change information that was in the initial insurance application upon the yearly renewal, the insured would discuss the change with the agent and the agent would inform Fitchburg of those changes. Id. at 24:11-19. If there was a certain restriction on an application in terms of who would be driving any of the business vehicles, such as their age or how long they have been driving, that information would be part of any renewal. Id. at 24:20-25:12.

On or about December 30, 2018, while the subject policy was in force and effect, Mr. Lopez's 2001 GMC Sierra 1500 was operated by interested party defendant, Dinia Y. Rosales and was involved in a motor vehicle accident at the intersection of West County Line Road and Brewers Bridge Road in Jackson, New Jersey, with a vehicle owned and operated by interested party defendant, Debra Hills and occupied by interested party defendants, Angelone Mackenzie and Connor Hills. Interested party defendant, Carlos Jose Luis Fernandez, was an occupant of the Lopez vehicle at the time of the December 30, 2018 motor vehicle accident.

Debra Hills and interested party defendant, Richard Hills, filed a personal injury lawsuit against Dinia Y. Rosales and Christopher Lopez arising out of the December 30, 2018 motor vehicle accident that is captioned, Debra Hills and Richard Hills v. Dina Y. Rosales and Christopher Lopez, et. als, Docket number L-1031-20 and venued in the Ocean County Superior Court (hereinafter referred to as the "Underlying Complaint.")

Fitchburg provided a defense to Mr. Lopez in the underlying bodily injury action under a Reservation of Rights. Fitchburg subsequently commenced an investigation of the December 30, 2018 motor vehicle accident. In the course of its investigation, Fitchburg requested that Mr. Lopez and interested party defendants, Dinia Rosales and Carlos Jose Luis Fernandez, appear for

Examinations Under Oath. Pursuant to the Examinations Under Oath, inconsistencies arose regarding Mr. Lopez's initial answers in his application for insurance.

During his Examination Under Oath, Mr. Lopez admitted that his wife drove the 2004 Toyota Sienna in an emergency or if her car broke down. See Fitchburg Exhibit H, 31:11-15. Similarly during his deposition, Mr. Lopez testified that his wife would drive the 2002 Chevy Suburban, for emergencies. See Fitchburg Exhibit N, 19-20:24-4; 35:14-19.

Fitchburg submits that contrary to what was represented in the application for insurance, Mr. Lopez admitted during his deposition that his son, Gustavo Lopez, Jr., drove the 2017 Chevrolet Express for personal use in situations where he had to get rid of large household items, like a bed or mattress. See Fitchburg Exhibit H, 27:20-24. Mr. Lopez's Examination Under Oath also revealed that Gustavo would drive the 2001 GMC during an emergency, at a time when he was under the age of twenty-five. See Fitchburg Exhibit H, 33:7-10.

Interested party defendant Dinia Rosales testified during her Examination Under Oath that Christopher Lopez routinely gave permission to his unlicensed employee, Carlos Jose Luis Fernandez, to drive the policy vehicles—another deviation from Mr. Lopez's representation that the only drivers of the vehicles were himself and his wife.

Accordingly, on June 1, 2020, Fitchburg rescinded the subject policy and declared it void *ab initio* due to the alleged material misrepresentations made in the application submitted to Fitchburg. When the policy was rescinded, the premiums were returned to Mr. Lopez. Based on the above rescission, Fitchburg issued a declination of coverage letter to Mr. Lopez t/a GL Custom Drywall on June 2, 2020, based on the absence of any policy in place on the date of loss pursuant to the alleged material misrepresentations presented in his application for insurance.

On September 20, 2023, this Court conducted a Proof Hearing. Mr. Lopez and his adult son, Gustavo Lopez, testified. During his testimony, Mr. Lopez indicated that one of the vehicles insured under the Fitchburg commercial policy – the Suburban – was routinely operated by his wife for personal use rather than commercial use. Mr. Lopez affirmed several times that his wife drove the car for her personal use and never operated it for a commercial use. Mr. Lopez also discussed a prior automobile accident on December 25, 2018 at the hands of Denise Baltazar, occurring mere days before the December 30, 2018 accident involving Dinia Rosales and the Hills. At this time, Mr. Lopez advised his employee, Carlos Jose Luis Fernandez , that he could not touch any of the vehicles all the while leaving the cars parked outside of Mr. Fernandez's residence and leaving a set of keys in his possession. Mr. Lopez recalls that Mr. Fernandez swore not to touch the car after the first accident. Days later, Mr. Fernandez advised his employer, Mr. Lopez, of the December 30, 2018 accident with a female—Ms. Rosales—in the car.

Gustavo Lopez, Jr., testified during the Proof Hearing that he only operated the commercial vehicles in the periods of time that he worked for his father, which was on a sporadic basis. Gustavo Lopez, Jr., indicated on the record that he has his own vehicle, on his own insurance policy, that he drives for personal use. Interested party defendant, Dinia Rosales, also testified at the Proof Hearing. Ms. Rosales testified that she believed defendant Lopez allowed her ex-boyfriend, Carlos Jose Luis Fernandez, to borrow the vehicle and assumed he had permission during the course of their one-year relationship.

LEGAL STANDARD

Summary judgment should be granted when "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 challenged and that the moving party is entitled to a

judgment or order as a matter of law." R. 4:46-2(c). An issue is "genuine" if "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The core of a summary judgment inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 536. Under Brill, "once the moving party presents sufficient evidence in support of the motion, the opposing party must demonstrate by competent evidential material that a genuine issue of fact exists." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479-80 (2016) (internal quotation marks and citations omitted). If the opponent offers "only facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious," the court must deem the movant's statement of facts undisputed and grant the motion. Id. at 480 (quoting Brill at 529). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact," then that fact is not in "genuine" dispute. Id.

Because the grant of summary judgment serves as a final disposition of the issues contemplated by the order, courts generally "seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988).

I. Recission

It is well-established in the State of New Jersey that equitable fraud provides a basis for a party to rescind a contract. Jewish Ctr. Of Sussex Cty. v. Wahle, 86 N.J. 619 (1981). Recission voids the contract *ab initio*, meaning that it is considered "null from the beginning" and treated

as if it does not exist for any purpose." First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 136 (2003).

An insured's rights under an insurance policy will be forfeited upon proof that the insured made a representation in the application for insurance that is (1) untruthful, (2) material to the particular risk assumed by the insurer, and (3) actually and reasonably relied upon by the insurer in the issuance of the insurance policy. First American Title Insurance Company v. Lawson, 177 N.J. 125, 137 (2003). A misrepresentation on an application for insurance is considered "material" if it "naturally and reasonably influenced the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premiums." Mass. Mutual Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991). Put differently, a misstatement of fact will be deemed material if, when it was made, the insurer would have considered the fact relevant to its concerns and important to the determination of its course of action. Longobardi v. Chubb Insurance Company of New Jersey, 121 N.J. 530 (1990). The materiality test is structured to "encourage applicants to be honest." Mass. Mutual Ins. Co. v. Manzo, 122 N.J. 104, 115 (1991); see also Palisades Safety, supra, 175 N.J. 144, 148-49.

New Jersey courts have found that rescission of an insurance policy is appropriate "if the insured's application for coverage included a misrepresentation of fact that materially affects the insurer's decision to enter the contract, the estimation of the risk or the rate of the premium." Chen v. Vigilant Ins. Co., 2009 WL 2341444 at *3 (N.J. Super. Ct. App. Div. July 31, 2009); see also Lawson, 177 N.J. 125, 135; Ledley v. William Penn Life Ins. Co., 138 N.J. 627, 637-39 (1995).

To establish a claim for rescission based on material misrepresentations in a policy application, an insurer needs to prove equitable fraud, but not legal fraud. See Ledley, 138 N.J.

"In general, equitable fraud requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party." Liebling v. Garden State Indem., 337 N.J. Super. 447, 453 (2001). A plaintiff's reliance must be reasonable. Daibo v. Kirsch, 316 N.J. Super. 580, 588 (App. Div. 1998). These elements must be proven by clear and convincing evidence. Id.

Where an objective question is posed, "[e]ven an innocent misrepresentation can constitute equitable fraud justifying rescission." Ledley, 138 N.J. at 635. "Objective questions call for information within the applicant's knowledge [.]" Id. at 636. "Examples of subjective information include when an insurer asks an insured to indicate a belief about the status of his or her health [.]" Lawson, 177 N.J. 125, 137.

In the present matter, the Court finds that the questions on the application for insurance – whether or not the vehicles would be furnished to family members for personal use, the amount of drivers that would operate the vehicles, and whether the drivers were between the ages of twenty-five and seventy—are objective questions. Mr. Lopez was asked twice—in questions #3 and #15—whether his vehicles were provided to family members for personal use. Mr. Lopez answered both sets of questions in the same manner, stating that the vehicles were not provided to his family members for personal use. In response to the question pertaining to how many drivers would be driving the vehicles, Mr. Lopez answered that there were only two drivers on the policy. The application's question #10 asked if all drivers were between the ages of twenty-five and seventy, to which Mr. Lopez affirmatively answered that all drivers were between the ages of twenty-five and seventy. While no Fitchburg policy explicitly required yearly applications, Mr. Lopez never alerted his insurance agent each year at renewal that his answers

on the initial application had changed. See Fitchburg Exhibit 3, Deposition of Laurie Mirchuk, 23:10-25:19.

The December 25, 2018 and December 30, 2018 accidents themselves indicate that individuals other than the Lopezes were driving the vehicles covered by the Fitchburg policy. Mr. Lopez's testimony demonstrates that Mr. Fernandez alerted him to the December 25, 2018 accident and knew someone else was driving. The Proof Hearing testimony further indicates that Mr. Lopez's representations about the intended use of the vehicles as strictly commercial was not accurate. Even if Gustavo Lopez, Jr., only operated the vehicles in his capacity as an employee, he was still under twenty-five years old when doing so, in direct violation of the parameters of the insurance policy. Additionally, it is undisputed that Mrs. Lopez used at least one of the commercial vehicles solely for personal use.

The Court also finds that whether Mr. Lopez intended to defraud Fitchburg Mutual is not material to the Court's inquiry. The law of recission indicates that where an objective question is posed, "[e]ven an innocent misrepresentation can constitute equitable fraud justifying rescission." Ledley, 138 N.J. at 635. Fitchburg maintains that had it been disclosed that the policy vehicles were being provided to family members for personal use, Fitchburg would not have issued the Commercial Auto Policy. See Certification of Laurie Mirchuk, paragraph #13. Fitchburg alleges that it relied on Mr. Lopez's representation in the January 16, 2014 Commercial Auto Application that there were only two drivers, Christopher Lopez and Maribel Lopez, on the policy when issuing the Commercial Auto Policy. See Certification of Laurie Mirchuk, paragraph #6. Again, Fitchburg Insurance maintains that they would not have issued the Commercial Auto policy had they known there were more than two drivers. See Certification of Laurie Mirchuk, paragraph #13. Lastly, Plaintiff indicates that had Lopez truthfully disclosed

on the January 16, 2014 Commercial Auto Application that a driver under the age of twenty-five was using the vehicles, Fitchburg would not have issued the Commercial Auto Policy. Id.

Here, there is no genuine dispute of fact that more than two drivers used the policy vehicles, that the insured vehicles were being provided to family members for personal use, and that a driver under the age of twenty-five was using the vehicles, even if for a commercial use. Fitchburg Mutual Insurance Company relied on Mr. Lopez's representations in the application to its detriment when it considered whether the insurance policy should issue. See Certification of Laurie Mirchuk, paragraph #13. Fitchburg is permitted to rescind the policy when there are material misrepresentations in the application for insurance. See First American Title Insurance Company v. Lawson, 177 N.J. 125, 137 (2003) (citing Allstate Ins. Co. v. Meloni, 98 N.J. Super. 154, 158-59 (App. Div. 1967)). Under these circumstances, the court finds that recission of the insurance policy issued by Fitchburg Mutual is the appropriate remedy.

Therefore, this Court finds that the appropriate remedy here is to grant Plaintiff's Motion for Summary Judgment seeking recission of the Fitchburg Mutual Insurance Company policy and deny Defendant's Cross Motion for Summary Judgment. Even when the materials presented are viewed in the light most favorable to the non-moving party, this Court finds that the testimony from the parties' examinations under oath, as well as the sworn testimony from the proof hearing, leads to the inescapable conclusion that rescission is proper. Despite the recission, however, the parties are still entitled to the statutorily required minimum limits of coverage for the accident. For plans issued or renewed prior to January 1, 2023, N.J.S.A. 39:6B-1(a) mandates a $15,000.00 statutory minimum. Here, Mr. Lopez applied for coverage in 2014. Thus, Fitchburg is required to provide the $15,000.00 statutory minimum coverage allowed by New Jersey Statute, notwithstanding the policy recission.