

Progressive Express Ins. Co. v. Faura

United States District Court for the Southern District of Florida

December 13, 2018, Decided; December 13, 2018, Entered on Docket

CASE NO. 18-22116-CIV-ALTONAGA/Goodman

Reporter

2018 U.S. Dist. LEXIS 211156 *

PROGRESSIVE EXPRESS INSURANCE
COMPANY, Plaintiff, v. JOSEPH J. FAURA, et
al., Defendants.

Counsel: [*1] For Progressive Express Insurance
Company, Plaintiff: Stuart Jeffrey Freeman,
Freeman, Goldis & Cash, P.A., St. Petersburg, FL.

Joseph J Faura, Defendant, Pro se, Baltimore, MD.

Jose Faura, Defendant, Pro se, Miramar, FL.

For TD Auto Finance, LLC, Defendant: Daniel
James Pasky, Emily Yandle Rottmann, Sara F.
Holladay-Tobias, LEAD ATTORNEYS, McGuire
Woods, Jacksonville, FL.

Judges: CECILIA M. ALTONAGA, UNITED
STATES DISTRICT JUDGE.

Opinion by: CECILIA M. ALTONAGA

Opinion

ORDER

THIS CAUSE came before the Court upon Plaintiff, Progressive Express Insurance Company's Motion for Entry of Final Summary Judgment [ECF No. 56], filed November 14, 2018. Defendants have not filed briefs in opposition to the Motion. The case is currently stayed as to Defendant Jose Faura [ECF No. 42], and a Clerk's Default was entered as to Defendant Joseph J. Faura [ECF No. 51]. The only appearing

Defendant, TD Auto Finance, LLC, filed a Notice [ECF No. 59] of non-opposition to the Motion. The Court has carefully considered the Motion, the record, and applicable law. For the reasons that follow, the Motion is granted.

I. BACKGROUND

Plaintiff brought this action for declaratory judgment and rescission in connection with an automobile insurance policy [*2] (the "Policy") issued on a 2015 Lamborghini Huracan (VIN: ZHWUC1ZF0FLA01138). (*See generally* SAC [ECF No. 40]). In May 2017, Jose Faura contacted Plaintiff by telephone to request a quotation for the price of insuring the Lamborghini. (*See* Plaintiff's Statement of Material Facts ("SMF") [ECF No. 57] ¶ 2). Jose Faura felt the yearly premium, \$24,995.00, was too high and elected not to purchase coverage at that time. (*See id.*). Later on, Palm Beach Insurance Consultants, who issue policies for Plaintiff, received a telephone call from a person identifying himself as Joseph J. Faura requesting coverage on the same Lamborghini. (*See id.* ¶ 3). The person on the telephone stated Joseph J. Faura and Andrew W. Manokoune would be the drivers of the vehicle. (*See id.*). Joseph J. Faura submitted a signed application for insurance to Palm Beach Insurance Consultants. (*See id.* ¶ 4). Plaintiff now contends the signature was forged, although it was unbeknownst to it at the time. (*See id.*).

A policy was subsequently issued to Joseph J. Faura, insuring the Lamborghini for a yearly

premium of \$6,938.00. (*See id.* ¶ 5). On October 13, 2017, the Lamborghini was involved in an accident resulting in the death [*3] of the driver, Kevin James, and the "total destruction of the Lamborghini." (*Id.* ¶ 6). At the time of the accident, Defendant TD Auto Finance, LLC, was financing the purchase of the vehicle. (*See id.* ¶ 7).

Plaintiff claims the Policy was actually intended for the use and benefit of Jose Faura and was fraudulently obtained by Joseph J. Faura to secure coverage at a lesser premium rate than had been quoted to Jose Faura. (*See id.* ¶ 8). Given this belief, Plaintiff began investigating the circumstances under which the Policy was obtained and attempted to schedule Examinations Under Oath of both Joseph J. Faura and Jose Faura. (*See id.* 10-11). The individual Defendants failed to appear for the examinations. (*See id.*).

Plaintiff then brought this suit, arguing it has been "prejudiced in its ability to investigate" and determine whether the Policy was obtained by fraud or misrepresentation and whether it provides coverage for the claimed losses to the Lamborghini. (SAC ¶ 21). Plaintiff maintains the Policy issued to Joseph J. Faura was obtained by "fraud or forgery" and thus Plaintiff is not liable for any damage to the vehicle. (*See SMF* ¶ 8-10).

Plaintiff's Motion for Summary Judgment is unopposed. [*4] On July 31, 2018, Defendant Jose Faura filed a Suggestion of Bankruptcy [ECF No. 41], and the Court entered an Order [ECF No. 42] staying the case as to Jose Faura, allowing the case to proceed against the remaining Defendants. (*See Order*). On August 9, 2018, a Clerk's Default was entered as to Joseph J. Faura [ECF No. 51]. TD Auto Finance, LLC, does not oppose the relief sought in the Motion. (*See* [ECF No. 59]).

II. LEGAL STANDARD

Summary judgment is rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits "show there is no genuine issue as to any

material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate [*5] the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (alterations and internal quotation marks omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party has shouldered its initial burden, the burden shifts to the non-moving party to "'set forth specific facts showing that there is a genuine issue for trial,' not just to 'rest upon the mere allegations or denials of the adverse party's pleading.'" *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) (quoting *Resolution Tr. Corp. v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992)).

If the non-moving party does not respond to a motion for summary judgment, "the district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed, but, rather, must consider the merits of the motion." *United States v. One Piece of Real Prop. Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1101 (11th Cir. 2004) (citing *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988) (per curiam)). While a "district court need not sua sponte review all of the evidentiary materials on file at the time the motion is granted," the Court "must ensure [] the motion [] is supported by evidentiary materials." *Id.* (alterations and added; citation omitted).

III. ANALYSIS

Plaintiff seeks a summary judgment determining that the insurance policy does not provide coverage for the Lamborghini and rescinding the Policy *ab initio*. (See Mot. 12). Since Defendants did not file a response in opposition to the Motion, all of Plaintiff's material facts [*6] that are supported by evidence in the record are deemed admitted.¹ See *One Piece of Real Property*, 363 F.3d at 1102 n.4 (confining review of the record to the materials submitted by the moving party because the non-moving party failed to respond); [Vega v. Bank of Am., N.A., No. 14-CV-21931, 2015 WL 12556300, at *3 n.4 \(S.D. Fla. July 20, 2015\)](#) ("Because [Defendant] failed to respond . . . the Court . . . must accept [Plaintiffs]' Statement of Material facts as true, to the extent [it is] supported by the record." (alterations and emphasis added; citation omitted)).

Per the terms of the Policy, Plaintiff was permitted to take Examinations Under Oath of its insured. (Mot. 11). Defendants Joseph J. Faura and Jose Faura's failure to attend the Examinations did not allow Plaintiff to complete its investigation into the circumstances under which the Policy was obtained. (See SMF ¶ 12). The Court has reviewed Plaintiff's Statement of Material Facts and the record and finds Defendants, Joseph J. Faura and Jose Faura, breached their duty of cooperation by failing to attend the scheduled Examinations Under Oath, which constitutes a material failure to cooperate such that Plaintiff has been substantially prejudiced. See *Barthelemy v. Safeco Ins. Co. of Ill.*, No. 4D17-1254, [2018 WL 5291274, at *2 \(Fla. 4th DCA Oct. 24, 2018\)](#) (citing *Bankers Ins. Co. v. Macias*, 475 So. 2d 1216 (Fla. 1985) (holding that to establish a failure to cooperate an insurer [*7]

must prove both a material breach of the policy and substantial prejudice)). Therefore, the insurance policy issued by Plaintiff to Defendant, Joseph J. Faura, for the policy period from June 1, 2017 to June 1, 2018, Policy No. 06197710-0, does not provide coverage for the damages caused to the 2015 Lamborghini Huracan, VIN: ZHWUC1ZF0FLA01138, owned by Defendant, Jose Faura, as a result of the accident on October 13, 2017.

The Court further finds that the policy of insurance issued by Plaintiff to Defendant, Joseph J. Faura, for the policy period from June 1, 2017 to June 1, 2018, Policy No. 06197710-0, was obtained by fraud and misrepresentation pursuant to [Florida Statutes section 627.409](#), making the policy void *ab initio*. See *MetLife Ins. Co. USA v. Larose*, No. 16-61051-CIV, 2017 WL 2901696, at *5 (S.D. Fla. May 10, 2017) (holding that an insurance policy can be held to be void *ab initio* and rescinded pursuant to [Florida Statutes section 627.409](#)); see also *Darwin Nat. Assur. Co. v. Brinson & Brinson, Attorneys at Law, P.A.*, No. 6:11-CV-1388-ORL-36, [2013 WL 2406154, at *5 \(M.D. Fla. June 3, 2013\)](#) (same)).

Accordingly, it is

ORDERED AND ADJUDGED that the Motion [ECF No. 56] is **GRANTED in part**.

Plaintiff, Progressive Express Insurance Company, is entitled to summary judgment as follows:

1. The policy of insurance issued by Plaintiff to Defendant, [*8] Joseph J. Faura, for the policy period from June 1, 2017 to June 1, 2018, Policy No. 06197710-0, does not provide coverage for the damage caused to the 2015 Lamborghini Huracan, VIN: ZHWUC1ZF0FLA01138, as a result of the accident of October 13, 2017; and

2. The policy of insurance issued by Plaintiff to Defendant, Joseph J. Faura, for the policy period from June 1, 2017 to June 1, 2018, Policy No. 06197710-0, is void *ab initio* and is hereby

¹The Court notes one exception: the only appearing Defendant, TD Auto Finance, LLC, in its Notice of non-opposition stated it does not oppose the relief sought in Plaintiff's Motion, but "does not otherwise admit or concede to the allegations and facts asserted against [it], Joseph J. Faura, or Jose Faura" (Notice [ECF No. 59] (alterations added)).

rescinded.

3. The case remains stayed as to Defendant Jose Faura.

4. The Clerk shall close the case.

Judgment shall be entered by separate order.

DONE AND ORDERED in Miami, Florida, this 13th day of December 2018.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

UNITED STATES DISTRICT JUDGE