

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

████████████████████,

Plaintiff,

vs.

**ALLSTATE INSURANCE
COMPANY,**

Defendant.

Civil Action No.: 14-763-SDD-SCR

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

MAY IT PLEASE THE COURT:

Summary Judgment as to liability and partial summary judgment as to damages should be issued against Allstate Insurance Company and in favor of ██████████. There are no issues of material fact as to coverage, Allstate's breach of the duties of good faith and fair dealing, and certain of the monetary damages due.

Last year, ██████████ rented condominium burned to the ground, destroying all of her personal property. A policy of insurance covering that property was in place with Allstate at all pertinent times. All premiums were paid and current. Just as Ms. ██████████ paid her premiums, Allstate should have paid her claim.

For these and the reasons set forth below, ██████████ Motion for Summary Judgment should be granted.

Factual Background and Procedural Posture

On or about September 24, 2014, Ms. ██████'s condominium located at 5087B Weaver Road, Lake Charles, Louisiana, burned to the ground, destroying over \$25,000.00 worth of her personal property. [First Amended Complaint, Record Document 5.]

The contents were insured by a renter's insurance policy issued and serviced by Allstate Insurance Company. The loss occurred during the policy period and all premiums were paid and current. Ms. ██████ timely submitted a satisfactory proof of loss. In turn, Allstate, dispatched a field adjuster who verified that the value of Ms. ██████'s destroyed personal property met or exceeded the policy limits of \$25,000.00. [Id; (unanswered) Requests for Admissions to Allstate at no. 7, attached as **Exhibit A.**]

However, Allstate denied Ms. ██████'s insurance claim on the rationalization that she failed to disclose prior theft claims on her application. By way of its October 29, 2014 denial letter, Allstate misquoted its insurance policy by relaying:

“This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts. If it is determined that this policy is void, all premiums paid will be returned to you since there has been no coverage under this policy.

“We do not cover any loss of occurrence in which any insured person has concealed or misrepresented any material fact or circumstance.”

This omits an essential clause. The first sentence actually reads: “This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts if such misrepresentation, fraud, or concealment of material facts was made with the intent to deceive.” (emphasis supplied) [See the denial letter attached as **Exhibit B** and the insurance policy at p.5, attached as **Exhibit C.**]

The evidence shows, however, that before the policy was issued, Ms. ██████ disclosed her prior insurance claims to Allstate's representative, Mark Marlon, who took her application via

telephone. In turn, Mr. Marlon sent the completed application to Ms. [REDACTED] for her to sign and return. Believing he had completed the application accurately, Ms. [REDACTED] signed it. [Record Document 5; Affidavit of [REDACTED], dated October 9, 2015, attached as **Exhibit D**.] Allstate did not make the application a part of the insurance policy. [**Exhibit C**, passim.].

Before issuing the policy, Allstate ran an industry standard loss history report which disclosed [REDACTED] previous claims. [**Exhibit A** at no. 12.]

In view of these facts, [REDACTED] filed a Complaint against Allstate on December 10, 2014 and a First Amended Complaint on December 19, 2014, both alleging that Allstate breached the terms of the renter's insurance policy by not paying the claim in a timely fashion and breached the duty of good faith and fair dealing by misrepresenting pertinent policy provisions. Allstate filed an Answer denying [REDACTED] claims and contending that the insurance policy was void *ab initio* because [REDACTED] allegedly failed to disclose material information relevant to the underwriting process.

On or about June 25, 2015, [REDACTED] served Allstate with Requests for Admissions. The Requests were not answered within 30 days, and have not been answered to this day. Accordingly, they are considered admitted under Federal Rule of Civil Procedure 36(a)(3).

[REDACTED] now submits this Motion praying that: summary judgment as to liability and partial summary judgment as to damages be granted against Allstate Insurance Company and in favor of [REDACTED]

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Argument

I. THE ALLSTATE INSURANCE POLICY PROVIDES COVERAGE AND WAS PROPERLY OBTAINED BY ██████████. ALLSTATE'S DEFENSE CANNOT BE SUPPORTED BY EVIDENCE SINCE THE APPLICATION WAS NOT ATTACHED TO THE POLICY AND THE PRIOR CLAIMS WERE DISCLOSED.

A. *To be used as evidence, insurance applications must have been made part of the insurance policy.*

██████████'s insurance application was neither attached to nor made a part of the renter's insurance policy.

Controlling case precedent shows that applications for insurance are not admissible in evidence unless made a part of or attached to the insurance policy. *Estate of Borer v. Louisiana Health Serv. & Indem. Co.*, 398 So.2d 1124 (La., 1981); *Riner v. Allstate Life Ins. Co.*, 131 F.3d 530 (5th Cir. 1997); and *Mitchell v. State Farm Fire and Casualty Company*, 473 So.2d 399 (La., 3rd Cir., 1985).

In *Mitchell*, an insured's home burned down. The insured, in turn, made a claim with State Farm. Because the insured had allegedly misrepresented pertinent facts on his insurance application concerning prior fires and insurance policy cancellations, State Farm denied the claim. Accordingly, the insured filed suit. State Farm raised the affirmative defense of material misrepresentations in the application. The insured filed a motion in limine to exclude the application from evidence on the ground that the application was not attached to the policy. The trial court granted the motion and excluded the application from evidence. On writs, the court of appeal affirmed, relying on *Estate of Borer v. Louisiana Health Serv. & Indem. Co.*, 398 So.2d 1124.

Similar to the policy at issue in *Mitchell*, the Allstate policy sued upon does not contain the insurance application. [Exhibit C.] Thus Allstate is foreclosed from presenting evidence to argue that ██████████ did not disclose her prior insurance claims on her application.

B. *Since ██████████ disclosed her prior claims prior to purchasing the policy, the policy cannot be voided.*

Regardless of the admissibility of the application, the evidence shows that ██████████ did disclose the prior small theft claims to Allstate. [Exhibit D.]

La. R.S. 22:1314 memorializes the well settled jurisprudential rule that an insurance policy cannot be voided based on material misrepresentation in the application if the facts constituting a misrepresentation were “known to any officers or agents of the insurer”. This statute is in accord with long standing precedents of the Louisiana Supreme Court and courts of appeal. See, e.g., *Hardy v. Commercial Standard Ins. Co.*, 134 So. 407 (La., 1931) (“There is no merit in this contention for the reason that the application for the policy sued on was filled out by Mayfield-Jones, the agents of the company, and not by plaintiff.”); *Willhite v. Hartford Fire Ins. Co.*, 8 La. App. 538, 541 (2nd Cir., 1928) (“Defendant cannot escape liability under the policy because of the error of its agent in writing in the application plaintiff’s answer.”); *Parker v. Citizen Fire Ins. Co. of Missouri*, 4 La. App. 711, 713 (1st Cir., 1926) (“The insurer can not avoid its policy because of mis-statement in the application, material to the risk, but due to mistake or negligence of its agent and not to fraud or bad faith of the insured.”)

Here, it is undisputed that Ms. ██████████ disclosed the prior theft claims to Allstate’s representative, Mark Marlon, via telephone and that he completed the application. [Record Document 5; Exhibit D.] Allstate has not disputed these facts because it cannot dispute them. Ms. LeBlanc’s interrogatories have gone unanswered, Mr. Marlon has not been produced for

deposition, and the discovery deadline lapsed on September 10, 2015. [Record documents 20, 21, and 22.]

It is also undisputed that Allstate ran an industry standard loss report before issuing the policy and discovered her prior claims history. [Exhibit A.] Thus, Allstate's affirmative defense of material misrepresentation is not and cannot be supported.

██████████ purchased insurance in case of catastrophic loss. That happened when her condominium burned to the ground destroying her personal property. The policy provides coverage.

II. ALLSTATE INSURANCE COMPANY BREACHED THE DUTIES OF GOOD FAITH AND FAIR DEALING BY MISREPRESENTING PERTINENT POLICY PROVISIONS AND NOT MAKING A WRITTEN OFFER TO SETTLE WITHIN 30 DAYS.

A. *Allstate breached the duty of good faith and fair dealing owed to ██████████ under L.a. R.S. 22:1973.*

Under L.a. R.S. 22:1973, insurers like Allstate owe insureds like ██████████ a duty of good faith and fair dealing. Among other things, this duty requires Allstate to make a reasonable effort to settle claims with ██████████. Breach of the duty of good faith and fair dealing triggers liability for damages sustained. The act of “misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue” is a breach. *Id.* See also and e.g., *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328, 342 (La., 2015) (“A communication from the insurer that either states an untruth or fails to state the truth is contemplated by La. R.S. 22:1973(B).”).

Allstate misrepresented pertinent facts by way of its October 29, 2014 denial letter. Allstate misquoted its insurance policy by relaying:

“This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts. If it is determined that this policy is void, all premiums paid will be returned to you since there has been no coverage under this policy.

“We do not cover any loss of occurrence in which any insured person has concealed or misrepresented any material fact or circumstance.”

The trouble with this is that it omits an essential clause. The first sentence actually reads: “This policy is void if it was obtained by misrepresentation, fraud or concealment of material facts if such misrepresentation, fraud, or concealment of material facts was made with the intent to deceive.” (emphasis supplied). [**Exhibits B and C.**]

Thus, Allstate is liable for damages of at least \$5,000.00 in monetary damages as set forth in paragraphs A and C of 22:1973, as amplified by the Louisiana Supreme Court precedent of *Durio v. Horace Mann Ins. Co.*, 74 So. 3d 1159 (La. 2011).

B. Allstate breached the requirements of L.a. R.S. 22:1892.

Under L.a. R.S. 22:1892, Allstate is required to make a written offer to settle ██████████ property damage claim within 30 days of receiving satisfactory proof of loss. It is undisputed that Allstate received satisfactory proof of loss. [**Exhibit A.**] It is also undisputed that Allstate failed to make a written offer to settle the claim within 30 days. Thus, Allstate is liable for a penalty of 50% of the property damages and attorney fees under paragraph B of 22:1892.

The damages due are further quantified in the section below.

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III. DAMAGES OF MORE THAN \$55,275.00 ARE DUE.

Durio v. Horace Mann Ins. Co. makes clear that damages due under 22:1892 and 22:1973 are not mutually exclusive but instead complement each other. [REDACTED] prays for damages as follows:

A. Principal and La. R.S. 22:1892 Damages:

1. Property Damages, \$25,000.00 (see **Exhibit A**)
 2. La. R.S. 22:1892 Penalty: 50% of property damages, \$12,500.00
 3. La. R.S. 22:1892 Attorney fees: 33% per contract¹, applied to no.1 and no.2
(\$37,500.00), \$12,375.00
 4. Court Costs, currently \$400.00²
- Subtotal Part 1: at least \$50,275.00

B. Bad Damages per La. R.S. 22:1973 and *Durio v. Horace Mann Ins. Co.*, 74 So.3d 1159 (La., 2011):

[REDACTED], her fiancé and son have slept on temporary bedding since the date of the fire, do not have furniture, and do not have clothing and other personal effects all because Allstate has breached the duty of good faith and fair dealing and failed to pay the claim in contravention of 22:1973. General Damages under paragraph A for loss of enjoyment of life will be significant. For purposes of this motion for partial summary judgment, [REDACTED] prays for the statutory minimum penalty of \$5,000.00, reserving her rights to prove quantum for the loss of enjoyment of life plus the two times penalty under L.A. R.S. 22: 1973(C).

¹ Fees are 40% if the case progresses to trial, mediation, or arbitration. A copy of the attorney-client contract is attached as **Exhibit E**.

² See the docket text accompanying Record Document 1.

Conclusion

Accordingly, [REDACTED] prays for summary judgment in her favor and against Allstate Insurance Company for damages in the amount of \$55,275.00, reserving all rights to prove loss of enjoyment of life damages and penalties under 22:1973(C) at trial.

DATED: 10/12/15

RESPECTFULLY SUBMITTED,

By: /s/Nicholas Graphia

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CERTIFICATE OF SERVICE

I certify that this day, October 12, 2015 , a copy of the foregoing Memorandum in Support of Plaintiff's Motion for Summary Judgment, was filed electronically with the Clerk of Court using the CM/ECF system. Notice will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Nicholas M. Graphia
NICHOLAS M. GRAPHIA