IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

BERKLEY ASSURANCE COMPANY		
Plaintiff	:	August Term, 2013 Case No. 00129
v.	:	Commerce Program
GRIFFIN T. CAMPBELL, d/b/a/ **CAMPBELL CONSTRUCTION,** *et al.*	:	Control Nos. 16072892, 16072854, 16092517, 16092540.
Defendants	:	

ORDER

AND NOW, this 18th day of April, 2017, upon consideration of the motion for summary judgment of plaintiff Berkley Assurance company, motion control No. 16072892, the two Responses in opposition of defendants, the respective *memoranda* of law, and the reply brief of plaintiff Berkley, it is **ORDERED** that the motion for summary judgment is **GRANTED** as to Counts II and III of plaintiff's Third Amended Complaint because the insurance policy issued by plaintiff Berkley, No. VUMC0029300, is **VOID *AB INITIO***. Berkley has no duty to defend and/or indemnify any party in the underlying tort lawsuits. Summary Judgment as to Count 1 is **DENIED** as **MOOT.**

All remaining motions for summary judgment, at control Nos. 16072854, 16092517 and 16092540 are **DENIED** as **MOOT**.

BY THE COURT

RAMY I. DJERASSI, J.

Berkley Assurance Compa-ORDRF

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MEMORANDUM OPINION

This motion for summary judgment turns on whether an insurance policy is void *ab initio*, where misrepresentations knowingly made on an application for insurance were material to the risk and the insurer relied on the misrepresentations when it issued its policy. Because the misrepresentations in this case are palpably and manifestly material to the insurance company's decision to take on a risk, plaintiff Berkley Assurance Company's policy covering defendant Griffin T. Campbell is void *ab initio*, and summary judgment is granted in favor of plaintiff.

BACKGROUND

This is a declaratory judgment action arising out of the June 5, 2013 collapse of a wall between a vacant four-story building at 2138 Market Street, in Philadelphia, Pennsylvania, and an adjacent, one-story Salvation Army thrift store located at 2140 Market Street. The wall collapsed in the course of demolition work and crashed upon the adjacent thrift store below. As the thrift store crumbled under the weight of the

collapsing wall, six people within were instantly crushed to death, one died some time later, and others suffered horrific bodily injuries.

At all times relevant to this action, plaintiff, Berkley Insurance Company ("Berkley"), an entity based in Richmond, Virginia, was in the business of providing commercial liability insurance to businesses.

At all times relevant to this action, defendant STB Investments, Corp. ("STB"), owned the building located at 2138 Market Street, in Philadelphia, Pennsylvania. Defendant Richard Basciano is an individual who owns shares in defendant STB. Defendants 2100 West Market Street Corp. ("West Corp") and 2132 West Market Realty Corp. ("Realty Corp"), are entities affiliated with defendant STB. Whenever required hereinafter, STB, Basciano, West Corp and Realty Corp shall be identified as the "STB Defendants."

At all times relevant to this action, defendant, "The Salvation Army," owned and operated the one-story thrift-store at 2140 Market Street.

Defendant Griffin Campbell, also trading as Campbell Construction, LLC, ("Campbell"), is an individual who was engaged in the construction trade. At all times relevant to this action, Campbell was contracted to perform demolition work at a number of properties located on the 2100 block of Market Street, in Philadelphia Pennsylvania. Pursuant to the terms of a "Demolition Agreement" executed by Campbell as the contractor, and by STB and other entities identified as "Owners," Campbell agreed to demolish the building located at 2138 Market Street among others owned by STB.[1]

[1] Demolition Agreement (properly titled STANDARD FORM AGREEMENT BETWEEN OWNER AND CONTRACTOR FOR A PROJECT OF LIMITED SCOPE), Exhibit 2 to plaintiff Berkley's Second Amended Complaint.

Defendant Sean Benschop ("Benschop"), an individual, was engaged by Campbell to demolish the buildings identified in the Demolition Agreement, including 2138 Market Street, which shared a common wall with the Salvation Army's thrift shop.

Campbell needed insurance coverage to lawfully perform his obligations under the Demolition Agreement. To obtain insurance, Campbell completed and executed an insurance application (the "Application"), dated March 6, 2013.[2] The Application stated as follows:

> [t]his application does not bind the applicant nor the company to complete the insurance, but it is agreed that the information contained herein shall be the basis of the contract should a policy be issued.[3]

The Application required Campbell to answer all questions therein, unless any specific question did not apply. Below are a few questions formulated in the Application, and the respective answers provided by Campbell:

> Q. Are the conditions of nearby structures documented before demolition begins?
> A. Yes.[4]
>
> Q. Does the applicant have a formal loss control or safety program?
> A. Yes.[5]
>
> Q. Does the applicant have a risk manager and/or safety director who is responsible for safety activities?
> A. Yes.[6]
>
> Q. Does applicant use subcontractors?
> A. No.[7]

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[2] Demolition Contractors—Annual Policy—General Liability Application, Exhibit 17 attached to the affidavit of Gail White, Esquire, counsel for plaintiff Berkley, motion for summary judgment, control No. 16072892.
[3] Id., p. 6 of 7.
[4] Id., p. 2 of 7, no. 12(d).
[5] Id., p. 2 of 7, no. 19.
[6] Id.
[7] Id., p. 3 of 7, no. 20.

After receiving this Application, Berkley issued a policy to Griffin Campbell, d/b/a/ Campbell Construction, LLC, No. VUMC0029300 (the "Policy"). The Policy stated that "[i]n return for the payment of premium, and subject to all the terms of this policy, we [Berkley] agree with you to provide the insurance as stated in this policy."[8] The Policy ran for the one year period, March 6, 2013 through March 6, 2014.[9]

On June 5, 2013, the common wall between 2138 Market Street and the thrift shop collapsed in the course of demolition work performed by Benschop on behalf of Campbell. Defendant STB and its affiliates, including shareholder Basciano and others, tendered to Berkley their claims for defense and indemnification in the underlying personal injury actions which had been filed in Philadelphia County by the victims of the accident.

Between January 11 and February 2, 2016, defendant Campbell was deposed several times in the course of the underlying personal injury actions. During his depositions, Campbell was questioned about statements that he had made in his insurance Application. As noted above, Campbell answered "No" to the question asking him whether he had documented the conditions of the nearby buildings prior to demolition. On this topic, the following exchanges took place during his deposition:

> Q. I want to talk a little ... about the Market Street demolition project. Can you tell me, before you first did any work on the project, did you do anything to go out and look through the buildings or walk through the buildings at all?
> A. I went with Mr. Marinakos [the project's Architect] once or twice.
>
> Q. And this was before you started any work?
> A. Yes.
>
> ***

[8] General Commercial Liability Declarations, Exhibit 1 to the Second Amended Complaint, p. 1 of 3.
[9] Id.

Q. Did you take any notes about any of the buildings that you walked through?
A. No.

Q. Did Mr. Marinakos take any notes of the buildings you walked through?
A. I can't recall....[10]

In the Application, Campbell had answered "Yes" to two distinct-yet-related questions –namely, whether he had a risk manager/safety director, and whether he had a safety program in place. The following exchange took place in the course of Campbell's deposition:

Q. And Griffin Campbell doing business as Campbell Construction did not have a risk manager, correct?
A. No, I didn't.

Q. Did you have a safety director?
A. No.

Q. Did you have anybody who was in charge of safety on the job?
A. No.

Q. Did you have any formal safety procedures or policies in place for Griffin Campbell doing business as Campbell Construction?
A. No. We just took safety procedures on our own.

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Q. But you didn't have any written documentation—
A. No.
Q. — that would discuss what those safety procedures were or how they should be implemented, did you?
A. No.

Q. And you didn't have any sort of written safety manual, did you?
A. No.

Q. Did you have any documentation that you would provide to employees that described safety and [the] safety measures they should take?
A. No.[11]

[10] Deposition of Campbell dated January at 1193:25—1195:7, Exhibit A—22 to Berkley's motion for summary judgment, control no. 16072892.
[11] Id., at 1200:23—1202:6.

In the Application, Campbell had also answered "No" to the question asking him whether he used subcontractors. On this topic, the following exchange took place during Campbell's deposition:

> Q. And you consider Mr. Benschop your employee or subcontractor?
> A. I considered Mr. Benschop as a subcontractor.
>
> Q. And that's how you considered him on other jobs, too; correct?
> A. Yes.
>
> Q. Why did you consider him a subcontractor?
> A. Because that's his equipment. I have no idea how to operate the equipment. He's a subcontractor. That's his equipment. Darryl was his employee. Eric was his employee. If they're his employees and that's his equipment, he's a subcontractor.[12]

On August 5, 2015, Berkley commenced this declaratory judgment action. Berkley asks *inter alia* for a declaration that the Policy is void *ab initio* because it was issued to Campbell after he had made certain material misrepresentations in the insurance Application. Stated another way, Berkley seeks a declaration that it owes no duty to defend or indemnify any insured under the Policy because the Policy is void *ab initio*.

Between July 25, 2016 and September 19, 2016, Berkley filed four distinct motions for summary judgment. One of the four motions, under control No. 16072892, seeks a declaration that there is no coverage under the Berkley policy due to material misrepresentations made by Campbell in his Application for insurance. On August 25, various defendants filed responses in opposition to this

[12] Id. at 797:7—21. BLACK'S LAW DICTIONARY, 7th ed., p. 1437 defines the term sub-contractor as "[o]ne who is awarded a portion of an existing contract by a contractor, esp. a general contractor. For example, a contractor who builds houses typically retains subcontractors to perform specialty work such as installing plumbing, laying carpet, making cabinetry and landscaping –each subcontractor is paid a somewhat lesser sum than the contractor receives for the work."

specific motion for declaratory relief. The respondents include the administrators of the victims who died, the victims who survived, and the Salvation Army of Greater Philadelphia, its affiliates or associates. On September 9, 2016, Berkley filed a reply in support of its motion for summary judgment. This *Memorandum* Opinion shall discuss only the motion seeking a declaration that the Policy is void *ab initio*, found at motion control No. 16072892.[13]

DISCUSSION

The law on summary judgment is well-settled:

> Summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.... When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party.... In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt.[14]

I. **Pennsylvania permits an insurer to rescind a policy obtained through material misrepresentations in the insurance application.**

Berkley asserts that a policy of insurance is voidable where such a policy was issued as a result of material misrepresentations contained in the application. Citing Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of Pa., Berkley persuasively argues that insurers have a right under common law to rescind a

[13] The other three motions for summary judgment, also filed by plaintiff Berkley, are found respectively under control Nos. 16072854, 16092517 and 16092540. These three motions for summary judgment have been fully briefed.

[14] Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010).

policy obtained by means of material misrepresentations.[15]/[16] In Metropolitan, a homeowner applied for insurance in 1984 under the Pennsylvania Unfair Insurance Practices Act, 40 P.S. § 1171.5, ("UIPA"). In the application, the homeowner answered "No" to questions regarding any incidents or losses during the prior five years.[17] Afterwards, in 1985, the homeowner tendered to the insurer a claim for loss of property caused by fire. The insurer investigated the claim and discovered that the homeowner had tendered three similar claims within the past five years. Based on discovery that the homeowner had made material misrepresentations in the application, the insurer rescinded the policy and the homeowner challenged the rescission by filing a complaint with the Office of the Pennsylvania Insurance Commissioner. The Insurance Commissioner ruled that the insurer was prohibited from rescinding the policy under the UIPA statute and the Commonwealth Court affirmed the Commissioner. On further appeal to the Supreme Court, the issue was whether the UIPA precluded the insurer from rescinding the policy notwithstanding the misrepresentations made by the homeowner in the insurance application.

Reversing, the Supreme Court explained that UIPA had been enacted in part to prevent unfair insurance trade practices such as the arbitrary "cancellation or refusal to renew a policy '**unless the policy was obtained through material misrepresentation.**'"[18] (Emphasis added)

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[15] *Memorandum* of law in support of its motion for summary judgment, control no. 16072892 at IV. C., p. 23.
[16] Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania., 580 A.2d 300, 301 (Pa. 1990).
[17] Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of the Commonwealth of Pennsylvania., 580 A.2d 300, 301 (Pa. 1990).
[18] Id. at 303 (emphasis added).

Common law principles of rescission were at the heart of the Court's holding as applied specifically to insurance contracts under the UIPA. Metropolitan explained that an insurance policy was voidable by an insurer "upon a finding that an insured had ... misrepresented material information."[19] This is because insurance contracts are "viewed as an ordinary contract .... subject to the laws that traditionally governed contractual relationships."[20]

Applying similar traditional contract principles to this case, we find Berkeley's insurance policy covering Campbell is an ordinary contract "subject to the laws that traditionally govern[] contractual relationships."[21] In this case, the deposition testimony of Campbell shows that he not only made misrepresentations in his Application for demolition insurance, but was also aware that he was lying.[22] Specifically, Campbell knew that he had not documented the conditions of nearby buildings prior to demolition, yet answered "Yes"---that he had. He knew that he had no risk manager/safety director, nor any safety measures in place, yet he answered "Yes". And he wrote "Yes" to two related questions asking whether he had such personnel and safety plans. He also knew that he used a subcontractor to demolish 2138 Market Street, yet answered "No" to the question asking him whether he indeed had such a subcontractor. Indeed, Campbell not only knowingly misstated this fact, but his

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[19] Id.
[20] Id. at 302.
[21] Id.
[22] See also Kearns v. Philadelphia Life Insurance Co., 585 A.2d 53, 55 (Pa. Super. 1991) (stating that "where it affirmatively appears, from sufficient documentary evidence, that the policy was issued in reliance on false and fraudulent statements ... [and] where ... [the applicant] must have been aware of their falsity ... the court may ... enter judgment for the insurer.") (Citing Evans v. Penn Mutual Life Ins. Co., 186 A.2d 133 (Pa. 1936)).

deposition transcripts show he thoroughly understood the difference between an employee and a subcontractor.[23]

II. The misrepresentations made by Campbell in the Application were material.

The next step in the analysis requires a ruling whether these specific Application misrepresentations by Campbell are material.

In Rohm & Haas Co. v. Cont'l Cas. Co., plaintiff "Rohm & Haas" purchased and operated a pharmaceutical company in Pennsylvania.[24] In 1964, Rohm & Haas discovered that the plant and surrounding land were heavily polluted with arsenic. Tests showed that nearby privately-owned water wells were also contaminated. Rohm & Haas began to provide bottled water to the families that owned such wells. In December 1964, Rohm & Haas added the plant and land to its excess liability insurance, and continued to purchase excess liability insurance over years without informing the excess insurance carriers that the property was contaminated.[25] After Congress passed an environmental law imposing strict liability upon land owners of polluted sites, Rohm & Haas tendered a claim for excess insurance to the "Insurers."[26] The claim was denied and Rohm & Haas brought suit for coverage. At trial, the jury determined that Rohm & Haas had "failed to disclose material facts about the arsenic pollution ... when it purchased the excess policies."[27] The trial judge entered judgment in favor of Rohm & Haas notwithstanding the jury's verdict, and the Insurers appealed.

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[23] Deposition of Campbell dated January at 797: 7—21, Exhibit A—22 to Berkley's motion for summary judgment, control no. 16072892.
[24] Rohm & Haas Co. v. Cont'l Cas. Co., 732 A.2d 1236 (Pa. Super. 1999), aff'd, 781 A.2d 1172 (Pa. 2001).
[25] Id.
[26] Id., at 1244. The U.S. Congress enacted the Comprehensive Response and Liability Act (CERCLA), also known as Superfund.
[27] Id. at 1245.

Tackling whether Rohm & Haas had failed to disclose a material fact, the Pennsylvania Superior Court explained that—

> [i]nformation withheld is material for purposes of allowing an insurer to rescind a policy if the information, if given, would have influenced the judgment of the insurer in issuing the policy, in estimating the degree and character of the risk, or in fixing a premium rate.[28]

The Superior Court went on to note that—

> Evidence was presented at trial regarding the ... pervasive nature of the contamination. It was uncontroverted that Rohm & Haas was aware of the problem within weeks of the purchase of the site. Evidence was also presented which showed that Rohm & Haas failed to disclose the pollution problem to ... [the excess insurers].... Moreover, evidence was presented that the undisclosed information was material to the risk for which coverage was sought.[29]

Based on the foregoing, the Superior Court agreed with the jury that Rohm & Haas had failed to disclose material information to the excess insurers.[30]

Similarly, Griffin Campbell misrepresented that he had documented the condition of nearby structures before undertaking the demolition work, and he knew his statement was a lie. He similarly lied when claiming he had a safety program in place. He lied when he told insurance companies that he had a risk manager or safety director assess the demolition job on Market Street. And he lied when he said he was not using a subcontractor when in fact Sean Benschop was his subcontractor.

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[28] Id. at 1250.
[29] Id. at 1251.
[30] Id.

All of these falsehoods are material misrepresentations since each one, "if given, would have influenced the judgment of ... [Berkley] in issuing the policy, in estimating the degree and character of the risk, or in fixing a premium rate."[31]

III. The misrepresentations of Campbell are palpably and manifestly material and the Court may enter judgment accordingly without a jury finding on bad faith or fraud.

In its opposition to Berkley's motion for summary judgment, the STB asserts that Berkley has failed to meet its burden of proof. According to STB, Berkley has failed to show that the statements made by Campbell in the Application were material, false, and in bad faith.[32] As to bad faith, STB argues that this element is a "question of fact [which] ... must be decided by a jury in all but the most clear cut and egregious cases."[33] Stated another way, STB argues that bad faith may not be determined at summary judgment but only at trial. In support of this argument, STB relies on Karcher v. Security Mutual Life Insurance Co.[34] Karcher actually holds, however, that a showing of bad faith is unnecessary where the misrepresentations contained in an insurance application were palpably and manifestly material to the risk assumed by the insurer.

In Karcher, a doctor applied for life insurance under a policy that would be voided if the doctor consulted with any physician between the date of his application for insurance, and the date by which he received the policy. The doctor consulted with a specialist the day following his application, and was diagnosed with cancer of the stomach before receiving the insurance policy. After receiving the policy, the doctor

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[31] Rohm & Haas Co. v. Cont'l Cas. Co., 732 A.2d 1236, 1250 (Pa. Super. 1999), aff'd, 781 A.2d 1172 (Pa. 2001).
[32] *Memorandum* of law in support to the response in opposition to the motion for summary judgment of Berkley, control no. 16072892, at IV—B.
[33] Id.
[34] Karcher v. Security Mutual Life Insurance Co., 186 Pa. Super. 580 (1958).

underwent exploratory surgery and died shortly thereafter. His widow tendered claims under the policy, and the insurer denied. After trial, the jury returned a verdict which entitled the widow to recover the amount of premium paid by the doctor but not the actual life insurance proceeds. Upon the widow's motion, the trial court granted a new trial on grounds that no credible testimony supported the jury's inference that the doctor had used bad faith or fraud when he executed the application for insurance.[35] The insurance company appealed.

On review, the Superior Court found that the trial court had erred. The Court relied on long settled precedent to hold that the statements made by Dr. Karcher were not only "far from true" but were also "material to the risk assumed [by the insurer]."[36] The Karcher Court stated that "[i]f these statements influenced the judgment of the insurer in selling the policy and in accepting the risk, then they were material."[37] Thus, the Superior Court reversed the trial court's grant of a new trial, and reinstated the jury's original verdict awarding recovery only recovery of the amount of premium paid by the doctor, but not the life insurance proceeds themselves. In voiding the life insurance policy without a jury finding of bad faith or fraud, the Court held:

> [w]here it appears that an insured has made false statements in an application for ... insurance ... the question of the materiality of such statements must be submitted to the jury if they are doubtful. If, however, the statements are **palpably and manifestly material to the risk**, it is the duty of the court to rule as a matter of law that they are material.[38] (Emphasis added).

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[35] Id.,
[36] Id. at 584.
[37] Id., (relying on Evans v. Penn Mutual Life Insurance Co., 186 A. 133 (Pa. 1936)).
[38] Id. at 584–585.

In this case, Campbell's blatant misstatements are similarly palpably and manifestly material to risk, specifically, Berkley's calculation of the its risk to insure Campbell.

In conclusion, intentional misrepresentations are material when they mislead an insurer in its determination of risk. When these intentional misrepresentations are palpably and manifestly material, in other words incapable of any other conclusion, a court may declare an insurance policy void *ad initio* without subjecting jurors and parties to the expense of a trial just to find the obvious.

This is the case here and the demolition insurance contract obtained by Campbell, policy No. VUMC0029300, is declared void *ab initio*.

The remaining three motions for summary judgment are therefore denied as Moot.

BY THE COURT

RAMY I. DJERASSI, J.