UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LARSON MOTORS, INC.,

Plaintiff,

v.

PHOENIX INSURANCE COMPANY,

Defendant.

CASE NO. C15-85 BHS

ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on Defendant Phoenix Insurance Company's ("Phoenix") motion for partial summary judgment (Dkt. 11). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. PROCEDURAL HISTORY

On January 20, 2015, Plaintiff Larson Motors, Inc. ("Larson") filed a complaint against Phoenix asserting causes of action for declaratory judgment regarding covered losses under an insurance contract, breach of contract, violations of the Washington Consumer Protection Act, violation of the duty of good faith and fair dealing, and violations of the Washington Insurance Fair Conduct Act. Dkt. 1.

On October 20, 2015, Phoenix filed a motion for partial summary judgment. Dkt. 11. On November 9, 2015, Larson responded. Dkt. 27. On November 13, 2015, Phoenix replied. Dkt. 34.

On December 1, 2015, the case was transferred to the Tacoma division and assigned to the undersigned. Dkt. 42.

II. FACTUAL BACKGROUND

This case concerns a Commercial Auto Policy that Phoenix issued to Larson for a policy period of August 1, 2010, to August 1, 2011. Dkt. 15, Declaration of John Westra ("Westra Decl."), Exh. A (the "Policy"). The Policy contains an endorsement for False Pretense Coverage that provides coverage for "[s]omeone causing [the policy holder] to voluntarily part with the covered 'auto' by trick, scheme or under false pretenses." *Id*. at 59.

In early 2011, Larson entered into two dealer trades or dealer sales with Valley Cadillac Buick GMC Truck, Inc. ("Valley"). On January 25, 2011, Valley agreed to purchase a 2011 Cadillac CTS (the "CTS") from Larson in exchange for payment in the amount of $46,994.50. Dkt. 17, Declaration of Robert S. Larson ("Larson Dec."), ¶ 5. On February 2, 2011, Valley agreed to purchase a 2011 Cadillac Escalade (the "Escalade") from Larson for $69,348.91. *Id*. ¶ 6. Although vehicle records show that the cars were sold to retail customers, Valley did not and has not paid Larson for the cars. *Id*. ¶ 7. In fact, Larson has sued Valley for breach of contract, negligent misrepresentation, violation of the Washington Consumer Protection Act, corporate disregard, and shareholder liability in Snohomish County Superior Court for the State of Washington. Westra Dec., Exh. J.

However, before the sales, Valley had entered into a management agreement with Riverside Auto Group, LLC ("Riverside"). The parties entered into the agreement

because Riverside intended to buy Valley. Ragnar Patterson, the former owner of Valley, declares that "prospective purchasers and sellers commonly enter into a management agreement as an interim measure while the [purchase] transaction is pending." Dkt. 13, Declaration of Ragnar Patterson, ¶ 4. It appears to be undisputed that, under this agreement, Riverside assumed liability to pay for all vehicles that were purchased by Valley while Riverside was managing Valley, which includes the CTS and Escalade purchases from Larson. Westra Dec., Exh. D.

III. DISCUSSION

A. Motions to Strike

Both parties move to strike evidence submitted by the other party. Instead of addressing each evidentiary challenge, the Court will set forth the evidence it relies upon to reach its decision.

B. Summary Judgment

Phoenix moves for summary judgment on the issue of whether the CTS and Escalade loses are covered by the false pretenses clause of the Policy.

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,

323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

2. False Pretenses

In Washington, the interpretation of an insurance policy is a question of law. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 424 (2002). The court must give the terms of the policy a "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Id*. Undefined terms are given their "ordinary and common meaning, not their technical, legal meaning." *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 932 P.2d 1244, 1246 (1997). Any ambiguities are to be resolved in favor of the insured and of coverage. *Weyerhaeuser v. Commercial Union*, 142 Wn.2d 654, 703 (2000). An ambiguity exists whenever a provision is susceptible to two or more reasonable interpretations. *Id.*

In this case, the parties dispute the meaning of "under false pretenses." Although the parties offer various meanings, the meaning that is most favorable to Larson is "[a]ny similar misrepresentation or deception for an ulterior motive." Dkt. 27 at 15 (citing *Webster's Third New Int'l Dictionary* 819 (2002); *The American Heritage Dictionary of the English Language* 473 (1981)). Under this meaning, Larson asserts that it "believed it was dealing with Valley and that Valley would be responsible for payment." Dkt. 27 at 15. Larson then concludes that this "is a misrepresentation or deception for the ulterior motive of inducing third parties to do business with Riverside . . . ." *Id*. The problem with this conclusion is that Larson did business with Valley and not Riverside. Valley is the party to the purchase contracts (Westra Decl., Exh. F), and Larson is suing Valley for breach of those contracts (*id*., Exh. J). While Riverside may ultimately be contractually obligated to indemnify Valley, this does not lead to the conclusion that Larson did

business with Riverside. Larson's position is essentially based on the idea that Valley acted as a shell corporation to cover the actions of Riverside. But Valley was a legitimate company and, as set forth in Larson's action against Valley, Larson intends to pierce the corporate veil in relation to the owners of Valley and not as to Riverside. Therefore, under the plain language of the contract, taken in the light most favorable to Larson, Larson did not voluntarily part with the vehicles under false pretenses.

Another critical aspect of Larson's position is that Larson was unaware of Riverside's involvement with Valley. In support of its position, Larson submitted the declaration of Robert Larson, the President and CEO of Larson. Dkt. 17, Declaration of Robert S. Larson. Mr. Larson asserts that Larson first learned of the Valley-Riverside relationship in 2014 because the relationship was never disclosed to Larson. *Id*. ¶¶ 8–9. Phoenix, however, correctly moves to strike this testimony because it is not based on personal knowledge. In other words, Mr. Larson may not speak on behalf of the individuals that actually consummated the transactions with Valley. In fact, Mr. Larson, when testifying as the corporate representative, answered as follows:

> Q: And you're not -- you don't know one way or the other whether or not the sales managers who put together these two transactions, you don't know if they had knowledge about Riverside or not, is that correct?
> A. Correct.
> Q. And you don't know whether or not, for example, you go up to the Valley dealership, they have got Riverside logos, Riverside business cards, or anything like that?
> A. Yes, I can't -- I don't -- I don't know, Tom. I wasn't there.
> Q. And again, you don't know what if any disclosures were made by Valley about the existence of Riverside to the actual managers who put together these transactions?
> A. That's -- I don't know.

Dkt. 14-2, Deposition of 30(b)(6) representative Robert Larson. This is a basic failure to submit evidence on an essential aspect of a claim. In the absence of such evidence, it is improper for the Court to speculate as to what the relevant managers actually knew. *Lujan*, 497 U.S. at 889 ("missing facts will not be presumed."). Therefore, the Court concludes that Larson has also failed to submit sufficient evidence in support of its claim.

With regard to Larson's request for a Rule 56(d) continuance, Larson has failed to identify any possible fact that will alter either the parties to or the terms of the purchase contracts. Larson has also failed to identify any fact that will alter the management agreement such that Riverside is directly liable to Larson for failure to honor the purchase contracts. Moreover, with regard to the unnamed managers, Larson does not request an extension to obtain discovery from them on the issue of what they knew when the transactions were consummated. Larson requests additional time to depose Phoenix employees (Dkt. 27 at 20), which Larson fails to show will lead to discoverable information on this aspect of the claim. Therefore, the Court concludes that there is no reason to delay ruling on Phoenix's motion.

IV. ORDER

Therefore, it is hereby **ORDERED** that Phoenix's motion for partial summary judgment (Dkt. 11) is **GRANTED**.

Dated this 17th day of December, 2015.

BENJAMIN H. SETTLE
United States District Judge