UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-60191-CIV-DIMITROULEAS

SHORELINE FOUNDATION INC.,

Plaintiff,

V.

NEW YORK MARINE AND
GENERAL INSURANCE COMPANY,

Defendant.
_____/

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendant's Motion Summary Judgment [DE 17, 19] (the "Motion"). The Court has considered the Motion, Plaintiff's Response in Opposition [DE 23], Defendant's Reply [DE 26], the statements of material facts [DE 18, 23-2] and is otherwise fully advised in the premises.

For the reasons stated herein the Court grants Defendant's Motion for Summary Judgment.

I. BACKGROUND

Plaintiff Shoreline Foundation Inc. ("Plaintiff" or "Shoreline") brings its breach of contract claim against Defendant New York Marine and General Insurance Company ("Defendant" or "New York Marine") based on Defendant's failure to pay for loss sustained by Shoreline's 120 foot unmanned deck barge (the "Vessel").

On or about December 12, 2018, David LeMay, an insurance broker working on behalf of Plaintiff requested a quote to renew Plaintiff's marine insurance policy from an underwriter at

ProSight Specialty Management Company. DSMF ¶ 11; PRSMF ¶ 11.[1] Peter DiLalla, the underwriter contacted by LeMay, reviewed the quote request along with all insurance applications submitted by or on behalf of Shoreline and issued a quote for a renewal of the marine insurance policy (the "Policy"). DSMF ¶ 43. Underwriter DiLalla, on behalf of Defendant New York Marine, issued the renewal of the Policy for the period from February 15, 2019 to February 15, 2021. DSMF ¶ 2; PRSMF ¶ 2. The Policy, therefore, was in effect when the Vessel sank on September 8, 2019. DSMF ¶ 2; PRSMF ¶ 2. Plaintiff subsequently filed a claim for coverage under the Policy. DSMF ¶ 3; PRSMF ¶ 3.

Crucial to the present matter, Defendant contends that in submitting the insurance applications for the Policy, Shoreline made a material misrepresentation. The insurance application submitted for the renewal of the Policy asked in Question 7 whether, in the last five years, "any applicant had been indicted or convicted of any degree of the crime of fraud, bribery, arson, or any other arson-related crime in connection with this or any other property". DSMF ¶ 43. Question 7 was answered with an "N". DSMF ¶ 43. Relatedly, in 2018 Shoreline entered into a plea agreement as to a charge of false, fictitious, or fraudulent claims in violation of Title 18 USC § 287 and 2. Exh. H 1, [DE 18-8]. On October 23, 2018, Shoreline signed a factual proffer stating that it had performed demolition work under a contract with the United States Coast Guard ("USCG") without performing required pre-demolition surveys. The proffer further stated that Shoreline had submitted an invoice to the USCG certifying that its work had been performed in accordance with the specifications and conditions in the contract. Exh. I 5 [DE 18-9]. Judge Kathleen Williams entered a judgment in the case ("2018 criminal case") on February

[1] Defendant's statement of material facts and Plaintiff's responsive statement of material facts include various citations to portions of the record. Defendant's statement of material facts [DE 18] is cited as "DSMF", Plaintiff's response [DE 23-2] thereto is cited as "PRSMF". Any citations herein to the statements of facts should be construed as incorporating those citations to the record.

13, 2019 sentencing Shoreline to five years of probation for "False, Fictitious, and Fraudulent Claims" and ordered it to pay a $70,000 fine. Exh. K [DE 18-11]. Plaintiff contends that Question 7 did does not encompass the fraud charge in the 2018 criminal case because it was not related to Shoreline's property. PRSMF ¶ 33. Accordingly, Shoreline believes that it did not make a material misrepresentation or omission in completing the insurance applications. PRSMF ¶ 33.

Defendant now moves for summary judgment on Plaintiff's breach of contract claim under the theory that the Policy was void at the time the Vessel sank.

II. STANDARD OF LAW

Under Rule 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears "the stringent burden of establishing the absence of a genuine issue of material fact." *Suave v. Lamberti*, 597 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

"A fact is material for the purposes of summary judgment only if it might affect the outcome of the suit under the governing law." *Kerr v. McDonald's Corp*., 427 F.3d 947, 951 (11th Cir. 2005) (internal quotations omitted). Furthermore, "[a]n issue [of material fact] is not 'genuine' if it is unsupported by the evidence or is created by evidence that is 'merely colorable' or 'not significantly probative.'" *Flamingo S. Beach I Condo. Ass'n, Inc. v. Selective Ins. Co. of Southeast*, 492 F. App'x 16, 26 (11th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). "A mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment; there must be evidence from which a jury could reasonably find for the non-moving party." *Id.* at 26-27 (citing *Anderson*, 477

U.S. at 252). Accordingly, if the moving party shows "that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the nonmoving party" then "it is entitled to summary judgment unless the nonmoving party, in response, comes forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Rich v. Sec'y, Fla. Dept. of Corr.*, 716 F.3d 525, 530 (11th Cir. 2013) (citation omitted).

III. DISCUSSION

Defendant contends that Plaintiff neglected its vessel, allowing it to deteriorate to the point where it was unseaworthy, that the unseaworthy condition was the reason Plaintiff's barge sank, and that, therefore, there is no coverage. In moving for summary judgment, Defendant puts forth two independent reasons why the Court should find that there was no coverage under the Policy. The first is that the Policy is void under the doctrine of *uberrimae fidei* due to a material misrepresentation Defendant contends Plaintiff made on its insurance applications. The second is that the vessel was unseaworthy in violation of the warranty of seaworthiness both at the time the Policy commenced and at the time the Vessel sank. For the following reasons the Court finds that Defendant is entitled to have the policy declared void under the doctrine of *uberrimae fidei.*

"It is well-settled that the maritime doctrine of *uberrimae fidei* is the controlling law of this circuit." *HIH Marine Servs. v. Fraser,* 211 F.3d 1359, 1362 (11th Cir.2000). The doctrine of *uberrimae fidei*, or utmost good faith, requires an "insurance applicant [to] voluntarily and accurately disclose to the insurance company all facts which might have a bearing on the insurer's decision to accept or reject the risk." *Certain Underwriters at Lloyds, London v. Giroire*, 27 F. Supp. 2d 1306, 1311 (S.D. Fla. 1998). The duty extends to all facts which are material to the calculation of the insurance risk regardless of whether the insurer, underwriter, or

application specifically inquires into them. *HIH Marine Servs.*, 211 F.3d at 1362. A fact is material if it could "possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risk." *Kilpatrick Marine Piling* v. *Fireman's Fund Ins. Co.*, 795 F.2d 940, 942–43 (11th Cir. 1986) (stating that Eleventh Circuit believes the foregoing "to be a correct statement of law").

"[A]n insurer may void the policy even if the failure to disclose material facts was the result of actions by a person acting on behalf of the actual insured." *Great Lakes Reinsurance (UK) PLC v. Atl. Yacht & Marine Servs., Inc*., No. 07-20295-CIV, 2008 WL 2277509, at *3 (S.D. Fla. Feb. 26, 2008) (citing *Underwriters at Lloyd's v. Giroire,* 1998 A.M.C. 2153 (S.D.Fla.1998); *Royal Insurance Co. Of America v. Cathy Daniels, Ltd.,* 684 F.Supp. 786 (S.D.N.Y.1986)).

Defendant claims that Plaintiff's omission on the insurance application of Shoreline's 2018 criminal conviction for fraud was a non-disclosure of a material fact in violation of the doctrine of *uberrimae fidei*. There is no genuine issue of fact regarding whether the 2018 criminal conviction was disclosed to Defendant prior to the issuance of the policy, though the Parties do dispute whether the insurance application specifically asked about such a fraud conviction. Whether the doctrine of *uberrimae fidei* applies to the present case then, turns on whether the omission was material to the calculation of insurance risk. Based on the following analysis the Court finds that there is no genuine issue of fact as to whether the omission was material.

The underwriter who issued the renewal of the Policy, Mr. DiLalla, has submitted an affidavit which unequivocally states that he would not have agreed to renew the policy at any

premium figure if he had been made aware of the fraud judgment entered in a criminal case against Shoreline. DSMF ¶ 54 [DE 18] (citing DiLalla Aff. ¶ 39).[2]

In its Response in Opposition, Plaintiff contends that the materiality of the criminal conviction is genuinely disputed. The only evidence proffered in response to Mr. DiLalla's statement, however, is the fact that Shoreline did obtain insurance in 2020 from a different insurance company. *See* PRSMF ¶ 35. In addition to Shoreline's own statement on this fact, Plaintiff puts forth two statements which Mr. Lemay stated were correct: 1) he did not know of any underwriting guidelines which would say that the type of fraud that was pled would increase or decrease an insurance premium and 2) an underwriter would not deny a renewal of an insurance policy on the basis of the fraud conviction because an underwriter made a quote and offered a renewal to Shoreline for 2020. *See* PRSMF ¶ 36.

Plaintiff, however, ultimately fails to raise a genuine dispute as to whether the fraud conviction could possibly influence the mind of a prudent and intelligent insurer in evaluating the risk. Shoreline declares that it "was able to obtain insurance coverage with the broker having full knowledge of the criminal plea and some of the coverages were less expensive that Prosights/New York Marine's quotes." Shoreline Dec. ¶ 28 [DE 23-1]. This declaration, however, does not demonstrate that a prudent and intelligent insurer would not consider the fraud conviction in evaluating an insurance risk. The declaration does not even evidence that any of the insurers who provided these lower quotes were "prudent and intelligent insurers", that the insurers themselves were aware of the criminal conviction, nor that the insurers would have

[2] Mr. DiLalla also states that he is currently employed "as a Senior Inland Marine Underwriter at Crum & Forster"; prior to present employment, Mr. DiLalla states that he "was employed at ProSignt Specialty Management Company as a Niche Underwriting Manager & Maine Underwriter." DiLalla Aff. ¶¶ 1, 2 [DE 18-14]. At all times material, Mr. DiLalla had full authority to underwrite marine insurance policies on behalf of Defendant New York Marine and General Insurance Company. *Id.* at 2. Plaintiff does not point to any evidence in the record which would demonstrate that Mr. DiLalla is not a prudent and intelligent underwriter.

provided the renewal quotes days, weeks, or months after the criminal judgment was entered. Further, the statements of Mr. Lemay, who is not an insurance underwriter, amount to little more than an observation that Shoreline did in fact obtain a renewal of its insurance.

Shoreline also attempts to argue that the statements of Mr. DiLalla are impermissible, speculative and subjective opinions. Plaintiff cites to certain cases where a court found that summary judgment could not be supported on the affidavits of underwriters alone. The cases relied on by Plaintiff, however, do not stand for the proposition that the statements of underwriters are inherently speculative and self-serving. Rather, they affirm that when underwriters' statements are inherently contradictory or entirely conclusive, they are insufficient to support a finding of materiality on summary judgment. For instance, in *Great Lakes Reinsurance (UK) PLC. v. Roca*, the magistrate judge found that the statements of the insurer's underwriter were at times "inconsistent with and unsupported by [the insurer's] own written guidelines." No. 0723322-CIV, 2009 WL 200252, at *6 (S.D. Fla. Jan. 27, 2009). At another point, the magistrate judge in *Roca* found that the underwriter's statement that he had relied on a misrepresentation in granting a discount on the insurance premium was contradicted by the insurance policy which, in fact, did not reflect a discount. *Id.* at *5. In *AXA Glob. Risks (UK) Ltd. v. Pierre*¸ the district court found that the underwriter's statements were insufficient to find materiality on summary judgment because the statements were conclusory and stopped short of saying the misrepresentation alone would have affected his decision to insure the vessel. *See* No. 00-388-CIV, 2001 WL 1825853, at *9 (S.D. Fla. Nov. 8, 2001).

The present case is distinguishable from the authority relied on by Plaintiff. Here, the underwriter clearly states that the criminal fraud conviction would have resulted in him not renewing the policy. DiLalla Aff. ¶ 39, 48 [DE 18-14]. Mr. DiLalla states that "[n]o prudent or

intelligent marine underwriter could possibly just ignore the fact that in the months and even in the few days prior to submission of the… application, there had been a criminal fraud case brought against Shoreline by the federal government. *Id.* at 44. Further, Mr. DiLalla's statements are more than conclusory. He explains that the application asks about fraud specifically because fraud related facts provide "critical information concerning the actions that a prospective insured… has taken in its commercial operations." *Id.* ¶ 41 [DE 18-14]. Mr. DiLalla further elaborates that because Shoreline is a relatively small company, the 2018 criminal conviction would be particularly important as he would assume the fraud had been perpetrated with either the direct participation or "at the very least the knowledge of one of the executives in the company…." *Id.* at ¶¶ 41, 45.

Further supporting Mr. DiLalla's statements regarding the omission, the insurance application specifically asks about fraud. The Court notes Plaintiff claims it did not interpret Question 7 as covering the criminal conviction. Even if, however, Plaintiff reasonably interpreted Question 7 as referring to fraud related to Shoreline's tangible property, excluding intangible property such as claims filed with the USCG, Shoreline should have been on notice that the one month-old fraud conviction was relevant and material to the insurance application. Mr. LeMay, Plaintiff's insurance broker, agreed at his deposition that Shoreline's answer to Question 7 was not accurate. *See* DSMF ¶ 56. Further, in response to interrogatories, Plaintiff stated that it did not know why the agent or broker did not disclose the information in the criminal conviction and that Plaintiff believed the broker was aware of the information in the criminal case. DSMF ¶ 57, PRSMF ¶ 38.

Finally, Plaintiff complains that Defendant has not put forth sufficient evidence to support a summary judgment finding and that it should be permitted to cross examine Mr.

DiLalla. Specifically, Plaintiff asserts that Defendant has not put forth underwriting guidelines which would support the finding of materiality. Complaints that better evidence could have been proffered by Defendant in support of its motion for summary judgment, however, do not alone create a genuine issue of material fact. In *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, the insured similarly argued that the best evidence of materiality was the relevant "industry standard." 389 F. Supp. 2d 1145, 1168 (D. Alaska 2005), *aff'd*, 518 F.3d 645 (9th Cir. 2008). The district court found this argument unpersuasive because the insured had failed to introduce any competent admissible evidence that the industry standard differed from the statements of underwriters proffered by the insurer. *Id.* The district court in *Inlet Fisheries* ultimately found that the uncontroverted deposition testimony of multiple underwriters, including the insurer's underwriter, "compel[ed]" summary judgment on the issue of materiality. *Id.* at 1173.

Based on the foregoing analysis, the Court finds that there is not a genuine dispute of material fact as to whether Plaintiff's omission of information regarding its 2018 criminal conviction was material to the calculation of the insurance risk. Non-disclosure of Shorline's 2018 fraud conviction prior to the issuance of the policy breached the doctrine of *uberrimae fidei*, and, accordingly, Defendant is entitled to have the policy declared void. As judgment for Defendant can be granted on the basis that the policy is void under the doctrine of *uberrimae fidei*, the Court need not address whether there are genuine issues of material fact as to the Vessel's seaworthiness.

IV. CONCLUSION

For the reasons stated herein, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment [DE 17] is **GRANTED**.

2. Pursuant to Fed. R. Civ. P. 58(a), the Court will enter a separate final judgment.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 23rd day of August, 2021.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

All Counsel of Record