UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-22781-CIV-SMITH

MUSASHI AZ LLC,

Plaintiff,

v.

ACCELERANT SPECIALTY INSURANCE COMPANY,

Defendant.
_____/

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

This cause is before the Court on Defendant/Counterclaim-Plaintiff Accelerant Specialty Insurance Company ("Accelerant") and Counterclaim-Plaintiff Certain Underwriters at Lloyd's of London Subscribing to Cover Note No. B0507RN2200289 ("Lloyd's") Motion for Summary Judgment [DE 40], Plaintiff's Response in Opposition [DE 44], and Accelerant and Lloyd's (jointly, "Insurers") Reply [DE 46]. Plaintiff filed this action after Accelerant failed to pay Plaintiff's claim on a Premier Private and Pleasure Yacht Insuring Agreement (the "Policy") issued by the Insurers to Plaintiff. Plaintiff's Amended Complaint [DE 7] alleges a single count for breach of contract against Accelerant. The Insurers' Counterclaim [DE 14] alleged two claims seeking declaratory judgment declaring the insurance policy void *ab initio*, one based on the admiralty doctrine of *uberrimae fidei* and one based on language in the insurance policy incorporating the doctrine of *uberrimae fidei*. By separate order the counterclaim based on the language of the insurance policy was dismissed. For the reasons set forth below, Defendant's Motion is granted as to Count I of the Counterclaim.

I. MATERIAL FACTS[1]

Plaintiff is the owner of a 2021 47' Azimut Verve, hull identification number XAX47026F122 (the "Vessel"), which was purchased on August 24, 2021, for $1,575,000. On February 28, 2023, the Vessel caught fire while at a marina. As a result, the Vessel was a constructive total loss. Plaintiff sought coverage for the loss under an insurance policy issued by Accelerant, with Lloyd's providing excess liability coverage (the "Policy"). The Policy insured the Vessel for an agreed hull value of $1,850,000.

On August 26, 2021, two days after Plaintiff purchased the Vessel, Plaintiff submitted a signed "Application Form" [DE 14-7] ("Application"), on which it stated that the purchase price of the Vessel was $2,000,000. Plaintiff's principal, Diego LePage, did not read the Application before signing it. Prior to signing the Application, Plaintiff negotiated a lower insured value of the Vessel in order to obtain a lower premium. (LePage Dep. [DE 39-9] 17:10–18:2.) On the top of each page of the Application is the heading "Concept Special Risks Ltd" ("CSR"). (*See* Application.) Clear Spring Property and Casualty Company ("Clear Spring"), through CSR as managing underwriter, issued a policy covering the Vessel for 2021-2022. The Privacy and Data Protection section of the CSR Cover Note for the Clear Spring policy contained the following language.

> By using our website or by requesting insurance services from us, you consent to us collecting and using personal data about you as specified below in accordance with this Statement. . . . We will only share your personal data with third parties used in order to fulfil our obligations in the provision of insurance services. Examples of such organisations are insurance and reinsurance carriers, your insurance broker, claims adjusters and claims service providers.

(DE 39-13 at 26–27.)

[1] The Court omits citations to undisputed facts.

Clear Spring chose not to renew the policy. On June 28, 2022, CSR, through Ropner Insurance Services, sent Plaintiff's insurance agent a "Notice of Non-Renewal" of the Clear Spring policy and a "Renewal Questionnaire." (DE 39-14.) The Notice of Non-Renewal from CSR states that Clear Spring is withdrawing from the market but that "replacement renewal terms will be available through our facility with Accelerant." (DE 39-14 at 38.) The Renewal Questionnaire contained the following language:

> When quoting your renewal, we have assumed that there have been no changes to your policy during the current policy period. If there are any other changes since your original application form was submitted to us, please give details below. If you are unsure whether any change might have an influence upon the quotation that we have provided you with, please contact your broker for advice.

(DE 39-14 at 37.)

Accelerant's corporate representative, Liam Gilhooly ("Gilhooly"), testified that, through its agents, Rivington Insurance Services and CSR, it relied on the information Plaintiff provided in its initial Application used in the issuance of the Clear Spring policy. CSR relied on that information to prepare the quote for the Accelerant Policy. On October 5, 2022, Plaintiff signed the Renewal Questionnaire. LePage did not read the Renewal Questionnaire before signing it. According to Gilhooly, Plaintiff never provided the correct purchase price of the Vessel and never notified the Insurers that the originally disclosed purchase price was incorrect. Gilhooly testified that, as a result, Accelerant wrote the Policy based on a purchase price of the Vessel of $2,000,000.

Accelerant first learned of the real purchase price of the Vessel during the investigation of the fire loss claim. According to Gilhooly, had Accelerant known the actual purchase price of the Vessel, it would not have insured the Vessel for more than the purchase price and the premium would have been lower. Gilhooly testified that had CSR and Accelerant known that the purchase price was misrepresented in the original Application for the Clear Spring policy, he would have

inquired further and, depending on Plaintiff's response, Accelerant might not have written the Policy. CSR's Underwriting Manual [DE 39-16] and CSR's Underwriting Procedures Manual [DE 39-17] both state, "we do not insure vessels for more than their purchase price to the current owner without evidence in the form of receipts of genuine investment to increase the vessel's value." (DE 39-16 at 4, DE 39-17 at 5.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)); *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 991 (11th Cir. 2001). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251–52)).

In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the

jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

III. DISCUSSION

A. Choice of Law

Before reaching the merits of the Motion, the Court must address which law applies. The Insurers maintain that Eleventh Circuit law addressing the doctrine of *uberrimae fidei* applies, while Plaintiff argues that the Policy requires the application of New York law and the Second Circuit's interpretation of the doctrine of *uberrimae fidei*.

The Policy states:

> It is hereby agreed that any dispute or claim arising hereunder (including non–contractual disputes or claims), or in connection with this Insuring Agreement, shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, any dispute or claim arising hereunder (including non–contractual disputes or claims), or in connection with this Insuring Agreement, is subject to the substantive laws of the State of New York.

(Policy [DE 14-10] at 17.) Plaintiff argues that pursuant to this provision, the Court must apply the law of New York and the Second Circuit.

The Court notes that both parties agree that the doctrine of *uberrimae fidei* is an entrenched principal of United States admiralty law. Thus, based on the Policy language, there is no need to turn to the law of the State of New York. Nonetheless, relying on this Policy provision, Plaintiff argues that the Court should turn to Second Circuit law in applying the doctrine of *uberrimae fidei*. However, Second Circuit law is not the law of the State of New York; it is federal law. The Policy does not address what federal law is applicable. Nothing in this Policy provision requires the application of Second Circuit law. The issues here are addressed by well-established United States Federal Admiralty law and Plaintiff has provided no authority requiring this Court to apply the

Second Circuit's interpretation of Federal Admiralty law instead of the Eleventh Circuit's interpretation of Federal Admiralty law. Consequently, as a district court within the Eleventh Circuit, this court will apply the entrenched admiralty doctrine of *uberrimae fidei* as interpreted by the Eleventh Circuit.

B. Analysis

The Insurers seek summary judgment declaring that the Policy is void *ab initio* under the doctrine of *uberrimae fidei*. Under the doctrine of *uberrimae fidei*, an insured must "fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk." *HIH Marine Servs., Inc. v. Fraser*, 211 F.3d 1359, 1362 (11th Cir. 2000). "A misrepresentation is material if it might have a bearing on the risk to be assumed by the insurer." *Id.* at 1363 (internal quotation and citation omitted). This duty to disclose even extends to those material facts not directly inquired into by the insurer. *Id.* at 1362. Thus, "the *insured* bears the burden of full and voluntary disclosure of facts material to the decision to insure." *Id.* at 1363 (emphasis in original). A failure to fully disclose material facts is grounds for voiding the policy. *Id.* at 1363.

The Insurers contend that Plaintiff violated its obligation to disclose under the doctrine of *uberrimae fidei* by misrepresenting the purchase price of the Vessel. Plaintiff responds that: (1) it never made any representations to the Insurers about the purchase price of the Vessel and (2) whether the purchase price was material is a question of fact for a jury. The Court will address the issue of materiality first.

i. Materiality

"In the context of marine insurance disputes, the issue of materiality is a mixed question of law and fact that the court can answer as a matter of law only if reasonable minds could not differ on the question." *Great Lakes Ins. SE v. SEA 21-21 LLC*, 568 F. Supp. 3d 1318, 1324 (S.D.

Fla. 2021) (internal quotations and citations omitted). Here, the undisputed facts establish that the purchase price of the Vessel was material. Gilhooly testified that had CSR and Accelerant known that the purchase price was misrepresented in the original Application for the Clear Spring policy, he would have inquired further and, depending on Plaintiff's response, Accelerant might not have written the Policy. This testimony is supported by CSR's Underwriting Manual and Underwriting Procedures Manual. Plaintiff has presented no evidence disputing the accuracy of the two Manuals or of Gilhooly's testimony. Thus, the purchase price of the Vessel is material as a matter of law. *See id.* at 1327 (finding purchase price material as a matter of law where undisputed statement of underwriter and undisputed Underwriting Manual establish that purchase price might have a bearing on the risk and the insurer's decision to insure).

ii. Misrepresentations to the Insurers

Plaintiff argues that it made no misrepresentations to the Insurers regarding the purchase price of the Vessel; Plaintiff maintains it only made representations to Clear Spring about the purchase price because the Insurers never inquired into the purchase price. The Insurers respond that under the doctrine of *uberrimae fidei* Plaintiff had a duty to disclose the purchase price to them, regardless of whether they asked for it. The Insurers rely on *HIH Marine*, 211 F.3d at 1362–63, for the proposition that "[t]he duty to disclose extends to those material facts not directly inquired into by the insurer." (citing *Jackson v. Leads Diamond Corp.*, 767 F. Supp. 268, 271 (S.D. Fla. 1991); *Cigna Property & Cas. Ins., Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 420 (9th Cir. 1998) ("Whether or not asked, an applicant for marine insurance is bound to reveal every fact within his knowledge that is material to the risk.")). Thus, the Insurers argue Plaintiff breached its duty of *uberrimae fidei* by failing to disclose the purchase price to the Insurers, regardless of whether they ever inquired about the purchase price.

The Court agrees. Under the doctrine of *uberrimae fidei*, Plaintiff had a duty to disclose the purchase price of the Vessel because, as set out above, the purchase price was material. Plaintiff's argument that the Vessel was insured for an agreed amount, fails because the agreed amount was based on the Insurers' belief that the purchase price was $2,000,000, not $1,575,000. As a result, the Vessel was over-insured, something that the Insurers were unaware of and was against their policies. Thus, regardless to whom Plaintiff made the misrepresentation about the purchase price of the Vessel, under the doctrine of *uberrimae fidei*, Plaintiff had a duty to disclose to the Insurers the purchase price. Plaintiff breached this duty. Consequently, the Policy is void *ab initio*.

Plaintiff also argues that the Insurers had no right to rely on the information Plaintiff had provided to obtain the Clear Spring policy. First, as set out above, Plaintiff had an obligation to disclose the purchase price to the Insurers, which it did not. Second, Plaintiff's misrepresentation about the purchase price was made to CSR, the managing underwriter for both the Clear Spring policy and the Insurers' Policy and Plaintiff knew the Policy was being treated as a renewal. CSR sent Plaintiff the "Notice of Non-Renewal," which indicated that "renewal terms will be available through our facility with Accelerant," and CSR sent Plaintiff the "Renewal Questionnaire," which referred to a "renewal" and asked if there had been any changes to the policy during the policy period or since the original application. Thus, Plaintiff was on notice that CSR and the Insurers were treating the issuance of the Policy as a renewal. Third, while Plaintiff argues that it did not give CSR permission to share its information, the Cover Note, issued by CSR for the Clear Spring policy, includes the following language:

> By using our website or by requesting insurance services from us, you consent to us collecting and using personal data about you as specified below in accordance with this Statement. . . . We will only share your personal data with third parties used in order to fulfil our obligations in the provision of insurance services.

> Examples of such organisations are insurance and reinsurance carriers, your insurance broker, claims adjusters and claims service providers.

Thus, Plaintiff was informed of how its information would be used by CSR and did not object when the Clear Spring policy was issued, when it received the Notice of Non-Renewal and Renewal Questionnaire, or when the Policy was issued. Consequently, Plaintiff's argument that it did not consent to the sharing of its information fails. Therefore, Plaintiff also breached its duty of *uberrimae fidei* by providing false information about the purchase price of the vessel and failing to correct that information upon receiving the Notice of Non-Renewal and the Renewal Questionnaire. As a result, the Policy is void *ab initio*.

Accordingly, it is

ORDERED that:

1. Defendant/Counterclaim-Plaintiff Accelerant Specialty Insurance Company and Counterclaim-Plaintiff Certain Underwriters at Lloyd's of London Subscribing to Cover Note No. B0507RN2200289 Motion for Summary Judgment [DE 40] is **GRANTED in part.** The Motion is granted as to Count I of the Counterclaim.

2. All pending motions not otherwise ruled upon are **DENIED as moot**.

3. The Court will enter a separate judgment.

4. This case is **CLOSED**.

DONE and ORDERED in Fort Lauderdale, Florida, this 30th day of May, 2024.

RODNEY SMITH
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record