STATE OF MICHIGAN
BERRIEN COUNTY TRIAL COURT - CIVIL DIVISION
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UNITED SPECIALTY INS. CO.,

Plaintiff,

Case No. 2019-0232-CB

-v-

HON. DONNA B. HOWARD

COSMO EXTENDED STAY, INC.,
d/b/a COSMO EXTENDED STAY,

Defendant.

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OPINION & ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

At a session of the Berrien County Trial Court, held
On the 30th day of November 2022, in the City of
St. Joseph, Berrien County, Michigan

I. BACKGROUND

This matter is before the Court on United Specialty Insurance's ("Plaintiff," or "United") filing of a July 18, 2022 motion for reconsideration of the Court's May 26, 2022 ruling, wherein it made certain rulings but ultimately denied Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and granted, in part, summary disposition to Defendant Cosmo Extended Stay, Inc. under MCR 2.116(I)(2) as it related to Plaintiff's claim for rescission involving alleged

misrepresentations in the policy applications for commercial property insurance,[1] based upon square footage and water damage. The Court's Order regarding its May 26, 2022 hearing was formally entered on June 28, 2022, after the Court heard Defendant's objection to Plaintiff's proposed order. The Court notes that since the filing of Plaintiff's motion, the Court has entered a stipulated order dismissing Defendant State Bank of Texas from the present case (*see,* Order, 8/10/22). Plaintiff has filed its motion for reconsideration challenging the Court's interpretation and application of *Burton v Wolverine Mut. Ins Co*, 213 MichApp 514; 540 NW2d 480 (1995), in rendering its decision; and its finding of genuine issues of material fact remaining on certain of Defendant's alleged misrepresentations, determinative of Plaintiff's right to rescission (Pltf Brf, 7/18/22, pp 4-14). For the reasons discussed more fully below, the Court grants, in part only, Plaintiff's motion for reconsideration, namely reversing its partial grant of summary disposition to Defendant Cosmo pursuant to MCR 2.116(I)(2), as stated in its June 28, 2022 Order, ¶2, p 3.

II. STANDARD OF REVIEW

The Court reviews Plaintiff's motion for reconsideration pursuant to MCR 2.119(F). MCR 2.119(F)(3) states the following:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, **will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.**

(emphasis added). For the purposes of MCR 2.119(F)(3), the term "palpable" is defined as "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, [or] manifest." *Luckow v Luckow*, 291 MichApp 417, 426; 805 NW2d 453 (2011), *citing, Stamp v Mill Street Inn*, 152 MichApp 290, 294; 393 NW2d 615 (1986). A mere difference in opinion regarding the equities of the matter does not constitute a palpable error. *Luckow, supra* at 427. However, the "palpable error provision in MCR 2.119(F)(3) is not mandatory and only provides guidance to a court when it may be appropriate to consider a motion for rehearing or reconsideration." *People v Walters*, 266 MichApp 341, 350; 700 NW2d 424 (2005).

[1] Defendant's policy (QJT-US000106-00) also included "Crime & Fidelity" coverage, which is not relevant to the loss or coverage part Plaintiff seeks to rescind (*see,* Policy, attached to Complaint as Exhibit A).

The Court's decision to grant a motion for reconsideration is an exercise of discretion. *Kokx v Bylenga*, 241 MichApp 655, 658-659; 617 NW2d 368 (2000). The Court has considerable discretion to reconsider a matter in order to correct mistakes, preserve judicial economy, and minimize costs to the parties. *Id.* at 659. It noted that a trial court does not abuse its discretion by rejecting arguments in a motion for reconsideration that could have been made at the time of the original hearing or motion. *Yoost v Caspari,* 295 MichApp 209, 220; 813 NW2d 783 (2012). Yet, the trial court additionally has the discretion to give a litigant a second chance even if the motion for reconsideration presents nothing new. *Id.*

III. ANALYSIS

A. Interpretation & Application of *Burton* Decision

Plaintiff contends that the Court palpably erred in its reliance and/or interpretation of the Michigan Court of Appeals decision in *Burton*, *supra,* both from a distinguishing factual basis standpoint, as well as, its application of the election of remedies doctrine (Pltf Brf, 7/18/22, pp 7 & 11). Notwithstanding the implications of *Burton, supra,* to the case at bar, the substantive law on the rights of a contracting party, namely an insurer like Plaintiff, to rescind, and on the election of remedies doctrine, is well-established and not in dispute. That is, rescission is a mechanism used to abrogate a contract and restore the parties to the relative positions that they would have occupied if the contract had never been made. *Bazzi v Sentinel Ins Co*, 502 Mich 390, 409; 919 NW2d 20, 29 (2018). It is well-settled that a material misrepresentation made in an application for insurance may be rescinded *ab initio*. *Lash v Allstate Ins Co*, 210 MichApp 98, 103; 532 NW2d 869, 872 (1995). A fact or representation in an application is "material" where communication of it would have had the effect of "substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Oade v Jackson Nat Life Ins Co of Michigan*, 465 Mich 244, 253–54; 632 NW2d 126, 131 (2001). Generally, rescission is justified even when an innocent misrepresentation is made to another party that induces them to assent. *Lash*, 210 MichApp at 103.

However, a claim to rescind a policy is equitable in nature; it "is not strictly a matter of right," but is granted only in "the sound discretion of the Court." *Bazzi*, 502 Mich at 409, citing *Amster v Stratton*, 259 Mich 683, 686, 244 NW 201 (1932). In other words, "[w]hen a plaintiff is seeking rescission, the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks." *Bazzi,* 502 Mich at 410.

Additionally, the doctrine of election of remedies has been described by the Michigan Supreme Court as "a procedural rule which precludes one to whom there are available two inconsistent remedies from pursuing both." *Riverview Co-op, Inc v First Nat Bank & Tr. Co of Michigan*, 417 Mich 307, 311; 337 NW2d 225, 226 (1983). The doctrine's purpose is not to prevent recourse to alternate remedies, but to prevent double redress from a single injury. *Id.* at 312. In order for this doctrine to preclude a party from seeking two alternative forms of relief against another, three "essential conditions," must be met: 1) the existence of two or more remedies; 2) the inconsistency between such remedies; and 3) a choice of one of them. *Id.* at 313. "If any one of these elements is absent, the result of preclusion does not follow." *Id.*

In *Burton*, the plaintiff executed an application for automobile insurance with a defendant insurance company. *Id.* at 515. On the application, the plaintiff misrepresented his driving record. *Id.* at 515-16. The material misrepresentations by the plaintiff in the application were not discovered by the insurance company until October 1986. The discovery of the material misrepresentations by the insurer resulted in the insurer sending the plaintiff a notice of cancellation that would take effect on November 17, 1986. *Id.* at 516. Shortly before the cancellation date occurred, plaintiff's wife, who was also covered under the policy, was involved in a vehicle collision. *Id.* This prompted the insurer to notify plaintiff that it would be rescinding the policy based upon the material misrepresentations made on his insurance application. *Id.* The plaintiff subsequently sought relief in court in order to compel the insurer to honor its policy and cover the claim made by the plaintiff and his wife.

The Michigan Court of Appeals ultimately held that the insurer had waived its right of rescission when it cancelled the policy, stating in pertinent part:

> While we certainly do not wish to reward plaintiffs for the misrepresentation in the application for insurance, it was defendant who chose the remedy . . . **defendant did discover the misrepresentation** before the loss **and chose to issue a cancellation rather than rescission.**
>
> ***
>
> [D]efendant wishes to be able to earn a premium without having to provide coverage . . . it must either rescind the policy **upon discovery of the misrepresentation and refund the premium** or cancel the policy, retaining the premium earned until the effective date of the cancellation and provide coverage until the effective date of the cancellation.

Id. at 518-20 (emphasis added).

In its motion for reconsideration, Plaintiff contends that the Court palpably erred when applying *Burton, supra* to the present case, noting the factual distinctions that exist between them – namely that the cancellation in *Burton* was issued before the loss, and rescission was sought after the loss (Pltf Brf, 7/18/22, pp 5-6). Thus, Plaintiff posits, the case at bar is distinguishable from *Burton, supra,* and urges this Court to instead adhere to two unpublished decisions – *Roskamp v Fremont Ins Co (Unpublished)*, COA Docket No. 348054 (MichApp, March 18, 2021) and *Cheema v Progressive Marathon Ins Co (Unpublished)*, COA Docket No. 355910 (MichApp, June 2, 2022), (Pltf Brf, 7/18/22, p 6). Certainly, it is well settled that unpublished opinions are not binding authority. *Miclea v Cherokee Ins Co*, 333 MichApp 661, 670; 963 NW2d 665, 670 (2020); see also MCR 7.215(C)(1) ("An unpublished opinion is not precedentially binding under the rule of stare decisis..."). "Nevertheless, unpublished opinions may be persuasive, especially when the unpublished case involves similar facts or when little published authority exists that is on point." *Miclea*, 333 MichApp at 670. It is under that standard the Court reviews these unpublished decisions.

The first case, *Roskamp, supra*, involved appellate review of the trial court's grant of summary disposition on cross-claims among two defendant-insurers in a priority of coverage dispute following a serious injury accident involving the plaintiff, who was driving the insured's leased vehicle at the time. Initially after the accident (*i.e.* within a week), the first insurer sent a notice of nonrenewal of the policy to the insured after discovering certain misrepresentations in the insured's policy application. *Id.* at *5. Then, after further investigation relative to the insured's misrepresentations was conducted, confirming the extent of the misrepresentations, the insurer rescinded its policy. *Id.* Along with the rescission, the insurer issued a check for the return of the premium paid by the insured, which the insured cashed. *Id.* While the Michigan Court of Appeals considered the *Burton* decision, it ultimately held that the insurer was not precluded from seeking rescission of the no-fault policy issued to the insured "merely because [the insurer] first advised [the insured] that it would not renew the policy." *Id.* at *6. Notably, among several ways the Court of Appeals distinguished the situation in *Roskamp* from *Burton, supra*, was not only the fact that both the cancellation and rescission occurred after the loss, but also the recognition that the defendant-insurer performed "further investigation" after the quick cancellation to determine that the insured's misrepresentation warranted rescission. *Roskamp, supra* at *5. Additionally,

consistent with the reasoning in *Burton, supra* at 518-20, the insurer had returned the premium the insured had initially paid back to her, and the insured cashed the returned premium check. *Id.*

The second case, *Cheema, supra,* also involved a defendant-insurer that sent a post-loss notice of cancellation following the discovery of a misrepresentation made on an insured's insurance application, only to later attempt to rescind the agreement based on a similar misrepresentation. *Id.* at *2. Unlike the case at bar, the trial court in *Cheema* granted summary disposition on the basis of a mutual rescission (*i.e.* from primarily the insured using the returned premiums). *Id.* at *5-*6. Moreover, it should be noted that since Plaintiff's filing of the instant motion, the Court of Appeals more recently granted one of the appellee-insurers, Progressive Marathon, reconsideration and vacated its own June 2, 2022 decision as to that insurer. (Order, COA Docket 355910 (MichApp, September 29, 2022).[2] However, the Court of Appeals also appears, despite the grant of reconsideration, to reissue the same substantive opinion, *see, Cheema v Progressive Marathon Ins Co (Unpublished)*, COA Docket No. 355910, Opinion, (MichApp, September 29, 2022), leaving much question on the status of the trial court's rulings as it relates to Progressive.

In light of the holding of *Burton, supra*, a published decision, the facts of the instant case, which are likewise distinguishable to *Roskamp, supra,* and *Cheema, supra*, and the whole of the Court of Appeals' rulings in those unpublished decisions, this Court does not find them to be particularly persuasive to warrant complete reversal of the Court's rulings on Plaintiff's motion for summary disposition. If anything, the Court finds both of the decisions further support the Court's finding of genuine issues of material fact in this case, just as the Court of Appeals respectively remanded both cases back to the trial courts for a determination of whether the insurer was entitled to rescission under the circumstances of each of those cases. *See, Roskamp, supra* at *7-*8 (questions of fact existed concerning whether insured committed fraud in application, and whether rescission was appropriate remedy) and *Cheema, supra* at *5, *10-*11 (questions of fact whether insurer entitled to rescission and whether trial court should in balancing equities enforce remedy of rescission).

Notwithstanding the above, the Court does find, based on Plaintiff's other argument discussed herein, that the Court's decision to grant partial summary disposition to Defendant pursuant to MCR 2.116(I)(2) was premature, given the issues of fact, warranting reversal in that

[2] Notably, the Court of Appeals denied reconsideration to the other appellee-insurer, State Farm.

part only. In the case at bar, it is undisputed that Defendant sustained a loss on July 28, 2018, and on September 7, 2018, Plaintiff notified Defendant that it was cancelling Defendant's insurance policy, and that the cancellation would go into effect on October 11, 2018. Plaintiff's cancellation letter stated in relevant part:

> We are cancelling this policy . . .
>
> The reason for cancellation is Underwriting Reasons: **Poor Risk Quality**.

(Def MSD Resp Brf, 3/24/22, Notice of Cancellation, attached as **Exhibit J**)(emphasis added). Plaintiff did not seek to rescind the policy based upon alleged material misrepresentations made in Defendant's insurance application until well after its notice of cancellation, as it sought to rescind the policy through getting a declaratory action from this Court.[3] (Pltff's Brf, 7/18/22, pp 10-11). These alleged material misrepresentations are: 1) Defendant's representation that its motel building was only 30,000 square feet; 2) Defendant had not sustained any claims, losses, or occurrences that would give rise to claims within the past three years, including water damage; 3) the motel's occupancy rate was at least 65%.

In its June 28, 2022 Order, the Court determined that as a matter of law, these misrepresentations were material because they, at a minimum, affected Defendant's insurance premium amount (*see,* Order, 6/28/22, ¶ 1, p 2). However, it is undisputed that Plaintiffs had two separate site inspections done following Defendant's loss on July 28, 2018. These inspections, done at the behest of Plaintiff on August 6, 2018 and August 25, 2018 respectively, revealed that the building was approximately 62,808 square feet. (Pltf MSD Brf, 11/22/21, Tice Affidavit, attached as **Exhibit C**). The inspections also revealed that there was "significant water damage that appeared unrelated to the fire that occurred at the Cosmo Motel on July 28, 2018." (Pltf MSD Brf, 11/22/21, Leiter Affidavit, attached as **Exhibit B**). In addition to these site inspections, Plaintiff's underwriter, Michael VonFabian, who recommended the cancellation, testified at his deposition about why he sought to cancel of Defendant's policy, stating as follows:

> Q. . . . This is a Notice of Cancellation of Insurance. Do you see that, Mike?
>
> A. I see it, yes.
>
> Q. It says cancellation October 11, 2018, and it says the reason for cancellation is underwriting reasons, poor risk quality.

[3] Based upon the evidence provided and counsel's statements at the May hearing, it is unclear when Plaintiff first notified Defendant that it sought to rescind the policy.

A. Okay.

* * *

Q. Just so I understand here, poor risk quality, I think you said based on the conditions of the risk inspection of the Preferred Reports?

A. Yes. They had a fire. That was a big one for me. **The property did not look it was [sic] properly maintained in the pictures that we received, and then there was a discrepancy in the square footage**, which at this point the premium really wouldn't have mattered. We just did not want to be on that account.

(Pltff's MSD Reply Brf, 4/14/22, VonFabian Dep, pp 208-209, attached as **Exhibit A**)(emphasis added).

Upon reconsideration, the Court recognizes that after a break in the deposition, Mr. VonFabian later attempted to clarify his previous statements on the cancellation, testifying that he sought to cancel the policy due to poor risk quality rather than any misrepresentations made. (Pltff's Reply Brf, 4/14/22, VonFabian Dep, p 210, **Exhibit A**). For purposes of ruling on the summary disposition motion based upon MCR 2.116(C)(10), the Court was not in a position to assess the credibility of Mr. VonFabian's testimony. *See, Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475, 479 (1994). To the extent that Mr. VonFabian's testimony appears inconsistent, and the inconsistency bears on what was known or confirmed by Plaintiff at the time of cancellation, the Court agrees with Plaintiff, although for somewhat different reasons, that the partial grant of summary disposition pursuant to MCR 2.116(I)(2) was in error. More specifically, there remain genuine issues of material fact making summary disposition to either party, on Plaintiff's right to rescission, premature. While there remain issues of material fact, the Court cannot fully "balance the equities" of the circumstances, *see Bazzi,* 502 Mich at 410, to determine whether Plaintiff is entitled to or waived its right to rescission by first issuing a cancellation notice, consistent with *Burton, supra* (as well as, for that matter, *Roskamp, supra* and *Cheema, supra*).

IV. CONCLUSION

To clarify, the Court now finds that Plaintiff is not precluded from seeking rescission as a matter of law on the alleged misrepresentations in the application concerning water damage and/or square footage.

WHEREFORE, IT IS HEREBY ORDERED, that pursuant to MCR 2.119(F), Plaintiff's motion for reconsideration is in the part so stated above only, **GRANTED**; and the Court **SETS**

ASIDE its partial grant of summary disposition for Defendant pursuant to MCR 2.116(I)(2), as specified in Paragraph 3, p 3, of its June 28, 2022 Order.

IT IS FURTHER HEREBY ORDERED that in all other respects, the Court finds no palpable error has been shown, warranting reversal of its June 28, 2022 Order, and therefore, the balance of Plaintiff's motion for reconsideration, pursuant to MCR 2.119(F) is **DENIED**.

IT IS SO ORDERED.

This order is not a final order and does not resolve the case. MCR 2.602(A)(3).

11/30/2022
Date

DONNA B. HOWARD (P57635)
Trial Court Judge – Civil Division

Certificate of Service: The undersigned certifies that a copy of the foregoing Opinion and Order was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file with postage fully prepaid or interoffice office delivery, if available, on 11·30·22.

Rebecca Wilt
Deputy Clerk/Bailiff