

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

SCOTTSDALE INSURANCE COMPANY,	§	
<i>Plaintiff,</i>	§	
v.	§	Civil Action H-05-1443
	§	
PARVIN SHAHINPOUR, D/B/A	§	
TASTE OF KATY,	§	
<i>et al.,</i>	§	
<i>Defendants.</i>	§	

**MEMORANDUM AND RECOMMENDATION**

This is essentially a three-way insurance coverage dispute involving a property insurer (Scottsdale), a restaurant owner (Shahinpour), and the restaurant's landlord (Mason Park). Before the court are plaintiff Scottsdale's motion for summary judgment against defendants Shahinpour and Mason Park (Dkt. 47), and Mason Park's cross-motion for partial summary against Scottsdale (Dkt. 59). Having considered the parties' submissions, the court recommends<sup>1</sup> that Scottsdale's motion be granted as to Mason Park and denied as to Shahinpour, and that Mason Park's motion be denied.

**BACKGROUND**

The following facts are undisputed except where otherwise noted. The Taste of Katy restaurant was severely damaged by a fire on the night of October 31, 2004. Four months earlier, Parvin Shahinpour had purchased this restaurant, previously known as Texas Burger & Grill, from her sister Simin and Simin's husband, Amir Mahdejian. Scottsdale alleges that

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1 This case has been referred to this magistrate judge for all pretrial matters. (Dkt. 46).

the total purchase price was \$40,000, but Shahinpour claims that the actual purchase price was \$120,000 and that she still owed a balance of \$80,000 at the time of the fire.

Scottsdale issued property damage and commercial general liability insurance policy number CPS0645636, to Shahinpour effective August 1, 2004 through December 31, 2004. The policy carried limits of liability of \$400,000.00 for business personal property and \$87,750.00 for business interruption. On November 1, 2004, Shahinpour made a claim in the amount of the policy limits for losses due to the fire.

Mason Park is the owner of the shopping center in which the Taste of Katy restaurant was a tenant. The lease agreement required Shahinpour to secure insurance designating the landlord as a loss payee for property insurance and as an additional insured for commercial general liability insurance. On July 12, 2004, Katy Insurance Agency, Inc. (“Katy”) issued a certificate of liability insurance showing that Shahinpour had \$1,000,000 worth of commercial general liability coverage plus \$100,000 worth of property damage coverage for damage to rented premises. The certificate of liability insurance identifies Mason Park as a “certificate holder.” Mason Park alleges that this certificate proves it was an additional insured under the Scottsdale policy and that it relied upon the certificate when it consented to the assignment of the lease from Mahdejian to Shahinpour.

Scottsdale seeks summary judgment declaring that: (1) Shahinpour is the insured under the commercial property coverage part of policy CPSO645636; (2) Mason Park is not insured under the commercial property coverage part of the policy; (3) Shahinpour’s

insurable interest under the policy is limited to her financial interest in the loss; (4) Shahinpour's financial interest is limited to \$51,323.19, before offsets; (5) Mason Park's damages claim is not covered under the policy and therefore Mason Park cannot recover on its counterclaims; and (6) Scottsdale's obligations under the policy arising from claims resulting from the Taste of Katy fire are satisfied and discharged in full.<sup>2</sup> Mason Park seeks partial summary judgment<sup>3</sup> on its counterclaims seeking recovery from Scottsdale as an insured under the policy in an amount between \$255,000 and \$575,000.<sup>4</sup>

### ANALYSIS

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is genuine if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001).

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2 Defendant Burke Orr has also made a claim for the insurance proceeds. Orr alleges that the transfer from Amir Mahdejian to Shahinpour was a fraudulent transfer and in direct violation of a temporary injunction issued by the 125th district court for Harris County, Texas prohibiting any sale of the Texas Burger & Grill. Scottsdale does not move for summary judgment as to Orr's claim to the proceeds, and neither Orr nor Shahinpour have pursued summary judgment vis a vis the other's claim to the proceeds. Therefore, the issue of which party, Orr or Shahinpour, is entitled to the proceeds is not ripe for determination by the court.

3 Mason Park's motion is for partial summary judgment because it has not moved for summary judgment on its claims under the Texas Insurance Code.

4 Mason Park's claim has grown; it alleged damages of \$160,620.24 in its counterclaim.

“An issue is material if its resolution could affect the outcome of the action.” *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002).

If the movant meets this burden, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)). If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255.

**1. Scottsdale vs. Shahinpour**

By its motion Scottsdale requests a declaration that it has fully discharged its policy obligation to Shahinpour by tendering two checks totaling \$10,000 and depositing \$41,323.19 into the registry of this court. In essence, Scottsdale’s motion seeks to establish as a matter of law that Shahinpour’s damages from the fire do not exceed \$51,323.19.

Scottsdale argues that the credible evidence proves that Shahinpour’s purchase price was \$40,000, not \$120,000 as Shahinpour contends. Scottsdale further asserts that Shahinpour put little or no money into improvements and personal property, and the

restaurant was not profitable.<sup>5</sup> Therefore, Scottsdale asserts that Shahinpour's total insurable interest could not exceed the \$51,323.19 already tendered.<sup>6</sup>

“[A]n insurable interest exists when the assured derives pecuniary benefit or advantage by the preservation and continued existence of the property or would sustain pecuniary loss from its destruction.” *Smith v. Eagle Star Ins. Co.*, 370 S.W.2d 448, 450 (Tex. 1963). Therefore, Shahinpour's “insurable interest” is not limited as a matter of law to the purchase price of the property. Scottsdale does not argue otherwise, and in fact allows for minimal additions to the purchase price in its calculation of Shahinpour's insurable interest. However, Scottsdale argues that Shahinpour has no credible evidence of any insurable interest in the property beyond her \$40,000 purchase price and approximately \$11,000 in improvements, and has no proof of business income loss because the restaurant was losing money.

Shahinpour has submitted an affidavit<sup>7</sup> stating that she purchased the business for \$120,000 to be paid in three installments. She further states that prior to the fire she had paid \$105,000 toward the purchase and improvements. Shahinpour identifies the following expenses she incurred prior to the fire: (1) \$25,000 deposited in September 2004 into the

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5 Scottsdale presents evidence of improvements made by Shahinpour in the amount of \$11,128.19. *See* Scottsdale's motion, at 15-16 and exhibits cited therein.

6 Scottsdale has not rejected the claim in its entirety and does not contend that Shahinpour was involved in setting the fire, or that she was aware that her purchase of the restaurant was in violation of an injunction.

7 Affidavit of Parvin Shahinpour, Exhibit B to Shahinpour's response.

Taste of Katy account for the purchase of furniture and equipment and remodeling; (2) \$20,927.12 in cash advances on Shahinpour's American Express Card for inventory and part of the purchase price in August 2004; (3) \$6,171.75 charged on Shahinpour's Discover Card for furniture, decorations, and equipment in August 2004; (4) \$6,272.85 charged on Shahinpour's Visa card for glass, office supplies, signage and remodeling in August 2004, plus \$4,750 prior charge for a sign. Shahinpour further attests that she put personal items into the restaurant, including two large paintings, two couches, two decorative partitions, and one sideboard. Equipment in the restaurant included one walk-in freezer, four or five other freezers, two grills, three fryers, several steamers, one computer, two registers, numerous tables and chairs, a fax machine, one commercial microwave oven, four freezers containing perishable food, three paintings and two sofas. In addition, Shahinpour asserts that the restaurant had revenues of \$35,000 for the month before the fire, and she expected to generate \$7,000-\$8,000 per month in profits.

Shahinpour has also submitted the affidavit of Arthur J. Jansen, Jr., an adjuster she hired to assist in determining the losses from the fire. Jansen prepared a "Partial Contents Claim" itemizing lost property valued at \$412,557.41.

Scottsdale attacks each of Shahinpour's itemized losses. Scottsdale primarily contends that Shahinpour's affidavit contradicts her testimony in her examination under oath. Scottsdale also contends that Shahinpour's property damage claim is improperly based on replacement value instead of fair market value as required by the policy.

There are some discrepancies in Shahinpour's evidence. For example, she states that she spent \$105,000 for the purchase of the business and improvements prior to the fire, but the itemized expenses she goes on to list do not match this amount. Specifically, she attributes a \$20,927.12 balance on her American Express card to the purchase price and inventory, but she also includes this balance in addition to the \$40,000 purchase price in calculating her approximately \$105,000 in expenses. Moreover, Shahinpour provides no accounting records to support her statement that revenues before the fire were \$35,000 and that she expected to realize \$7,000-\$8,000 per month in profits. It is also true that the Jansen estimate is improperly based on replacement value, not fair market value, and is not conclusive as to the covered value of the property lost.

Nonetheless, the court concludes that Shahinpour has presented some evidence that her insurable interest may exceed \$51,323.19. In addition to the items that were previously owned by Amir and Simin that remained in the restaurant after Shahinpour's purchase, which Scottsdale contends had a value of no more than \$50,000, Shahinpour testified both in her affidavit and examination that she brought personal items into the restaurant that were damaged in the fire. She also testified that she redecorated the restaurant, buying all new tables and chairs for instance. As to the purchase price, Shahinpour has consistently testified that she was obligated to make two additional payments of \$40,000 for a total price of \$120,000.<sup>8</sup> Scottsdale points out that the letter agreement setting out the three \$40,000

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8 See affidavit, ¶ 4; Examination Under Oath, Exhibit B to Scottsdale's motion, at 19.

payments has a “rec’d” date of 12/13/04, months after the sale, weeks after the fire, and only a few days before Shahinpour’s examination.<sup>9</sup> But that date does not conclusively refute the possibility that this after-the-fact document accurately reflects the parties’ original agreement.<sup>10</sup>

The court is not inclined to give controlling weight to the examination under oath to the discredit of Shahinpour’s affidavit. First, it is not clear that the two are in direct conflict. Shahinpour repeatedly stated her uncertainty about her answers in the examination. Shahinpour is a 64 year old woman born in Tehran, Iran who, while she apparently speaks and understands English, cannot write in English.<sup>11</sup> Her younger sister Simin controlled all operations of the restaurant, and Shahinpour in her testimony repeatedly deferred to Simin on financial matters. Shahinpour’s assets in Iran from her father’s estate are controlled by her brother, and she is not aware even of the value of her inheritance. Second, despite her confusion as to the allocation of certain costs and expenses represented by her various credit card statements and lack of knowledge of details of the restaurant’s finances, Shahinpour has personal knowledge of her initial \$40,000 investment in the restaurant, of the fact that she

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9     *See* Scottsdale’s Exhibit B(3).

10    In its reply, Scottsdale contends that Shahinpour’s purchase price was \$40,000 even if the original deal contemplated two additional \$40,000 payments because Shahinpour is relieved of the obligation to pay the additional \$80,000 due to Amir and Simin’s violation of the injunction against the sale. The effect of the state court injunction on Shahinpour’s rights is well beyond the scope of the current motion. The parties have not fully briefed the legal effect of the state court injunction on Shahinpour’s rights.

11    Examination Under Oath, at 62.

invested some amount of money beyond the initial \$40,000 payment in the restaurant, and of the fact that two further \$40,000 payments were due. While the court cannot find that the entirety of Shahinpour's claim is valid, it also cannot say that her claim is limited to \$51,323.19 as a matter of law. Scottsdale's objection to Shahinpour's evidence of her insurable interest in the restaurant is primarily one of credibility. Shahinpour has presented sufficient evidence to be allowed to present her case to the jury.

## 2. Scottsdale vs. Mason Park<sup>12</sup>

The court has scoured the policy<sup>13</sup> and finds no support for the contention that Mason Park is a loss payee, an additional insured, or otherwise has coverage under the policy for losses incurred in the fire. The court further finds that the policy is not ambiguous in this regard.

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12 Scottsdale's motion for summary judgment against Mason Park mirrors Mason Park's motion for partial summary judgment, covering practically the same legal ground. For this reason the two motions will be considered together here.

13 The parties have stipulated (Dkt. 83) that the policy is Exhibit E to the affidavit of Thomas Mitchell (Dkt. 64) submitted in response to Scottsdale's motion for summary judgment, "except that 13 pages should not have been included, specifically, 12 pages being the 8th, 18th through 28th pages thereof are underwriting documents that are not part of the insurance policy . . . . An additional page should not have been included as the 60th page is a duplicate of the 59th page." In addition, a September 8, 2004 change endorsement should be included as part of the policy. That document is the first page of Exhibit D to Dkt. 64. Thus, the policy consists of a 90 page document the court cites as "Stipulated policy, at page \_\_\_\_." The parties' stipulation renders moot Mason Park's objection to Scottsdale's evidence. (Dkt. 57).

Contrary to Mason Park’s allegations, the endorsement containing the loss payee provision of the policy<sup>14</sup> does not indicate that Mason Park is a “loss payee” under the policy. Instead, the loss payable provision, which modifies the building and personal property coverage part of the policy, states that the name and address of the loss payee is “to follow.” There is nothing in the loss payable provision endorsement to give Scottsdale notice that Mason Park was the intended loss payee.

The loss payable provision, denoted CP 12 18 06 95, was cancelled by a change endorsement effective August 1, 2004. Because Mason Park was not identified as the loss payee, Scottsdale had no obligation to give Mason Park notice of the cancellation.

The policy also contains a change endorsement for the commercial general liability coverage part of the policy providing for an “Additional Insured – Managers or Lessors of Premises.”<sup>15</sup> As with the loss payee provision, the Schedule on this change endorsement indicates that the name of the additional insured is “to follow.” Mason Park argues that because it is the landlord of the premises, Scottsdale was on notice that Mason Park was the party intended to be the additional insured under this endorsement. Mason Park’s argument, even if accurate, is immaterial. Mason Park in fact was named as the additional insured

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14 Stipulated policy, at page 10.

15 This endorsement provides: “WHO IS INSURED (Section II) is amended to include as an insured the person organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule . . .” Stipulated policy, at page 12.

under this provision by a change endorsement effective August 1, 2004.<sup>16</sup> However, this additional insured endorsement modifies only the commercial general liability coverage under the policy.<sup>17</sup> That coverage part of the policy obligates Scottsdale to pay the insured “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”<sup>18</sup> The property damage claim at issue is not covered by the liability coverage part of the policy, but by the property coverage part.<sup>19</sup> Mason Park was never named as an additional insured for purposes of property coverage.

Mason Park cannot claim coverage based on the certificate of liability insurance.<sup>20</sup>

This certificate contains the following statements in conspicuous type:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR

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16 *Id.* at page 90.

17 *Id.* at page 12.

18 *Id.* at page 62.

19 The building and personal property coverage form provides coverage, subject to certain exclusions, “for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” *Id.* at page 22.

20 Exhibit A to affidavit of Thomas Mitchell (Dkt. 64).

CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

And finally:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

The certificate of liability insurance plainly states that it is provided for information only, and does not alter the terms of the policy. Contrary to Mason Park's representations, the certificate does not identify Mason Park as an additional insured under the policy, nor does the certificate require Katy Insurance or Scottsdale to provide any notice to Mason Park. The certificate merely says that the insurer "will endeavor," but is not obligated, to give 10 days notice of policy changes.

In *TIG Ins. Co. v. Sedgwick James of Washington*, 184 F. Supp. 2d 591, 597-98 (S.D. Tex. 2001), a federal district court ruled in favor of an insurer and broker, holding that a third party, a company called Safety Lights, did not have a cause of action for negligence or misrepresentation because it was not reasonable for Safety Lights to believe it had coverage based on a certificate of insurance. The court held that a certificate of insurance could not extend the coverage of the policy by adding an additional insured. *Id.* at 603-04 (citing

*Granite Constr. Co. v. Bituminous Ins. Co.*, 832 S.W.2d 427, 429 (Tex. App.—Amarillo 1992, no writ)). The Fifth Circuit affirmed the district court’s ruling. *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002).

In this case, the certificate of liability insurance lists Mason Park only as a certificate holder, it does not expressly state that Mason Park is an additional insured. The certificate states only that Shahinpour has commercial general liability coverage, and does not mention property damage coverage. Most significantly, the certificate does not amend, extend, or alter any terms of the policy, and the policy does not provide property coverage to Mason Park.

Mason Park has asserted various causes of action against Scottsdale – breach of contract, breach of common law duty of good faith and fair dealing, and violations of the Texas Insurance Code and the Texas Deceptive Trade Practices-Consumer Protection Act. Because each of these causes of action is premised to a greater or lesser degree upon the rejected claim that Mason Park has policy coverage for losses incurred in the fire, Scottsdale is entitled to summary judgment on all of Mason Park’s claims.

### **CONCLUSION AND RECOMMENDATION**

For the reasons discussed above, the court recommends that Scottsdale’s motion for summary judgment against Mason Park be granted, Scottsdale’s motion for summary judgment against Shahinpour be denied, and Mason Park’s motion for partial summary

judgment against Scottsdale be denied. Mason Park's claims against Scottsdale in this case should be dismissed in their entirety.

Having recommended that Mason Park's claims be dismissed, the court denies as moot Scottsdale's opposed motion for leave to amend its answer to Mason Park's counterclaim (Dkt. 93), without prejudice to refiling if this Memorandum and Recommendation is not adopted by the district court.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on August 17, 2006.

  
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Stephen Wm Smith  
United States Magistrate Judge