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AMENDED SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 8

UNIVERSAL UNDERWRITERS ACCEPTANCE CORP.

Plaintiff(s)

Index No. 1140/04
Motion Seq. 1 and 2
Motion for summary judg.,
and cross-motion to amend
Motion submission: 4/15/05

-against-

PEERLESS INSURANCE COMPANY,
QUINCY RUDOLPH and DANITA RUDOLPH

Defendant(s)

The following papers read on this motion:

- Notice of Motion.....X
- Cross-motion.....X
- Memo.....XX

Based upon the foregoing papers, it is hereby ordered that the Defendant,
Peerless' motion for summary judgment, and Plaintiff's motion to amend the

complaint are decided as follows:

The Defendants', Quincy Rudolph and Danita Rudolph (Rudolph) purchased a 1998 Honda on December 7, 2002, from Paragon Motors (PMW) in Woodside, New York. On the same date (Rudolph) executed a Retail Installment Agreement with Paragon to finance purchase of the Honda.

On December 8, 2002, (Rudolph) acquired a policy of insurance from Peerless, #31P0062686, effective December 8, 2002 to December 8, 2003, which insured the Honda.

On or about January 29, 2003, the Retail Installment Agreement between Rudolph and Paragon was assigned to the Plaintiff (Universal); a lien was filed with the N. Y. S. Motor Vehicle Department, and Universal's security interest was perfected.

On May 29, 2003, Rudolph was involved in a two-car accident with another car, insured by Geico Direct. Subsequently, Rudolph received a check from Geico for \$7,040 as its share of a settlement for physical damage to the Honda.

Under terms of the Peerless insurance policy, Universal, as assignee in said policy, claims to be entitled to payment as a "loss payee" in accordance with the Loss Payable Clause in said policy (AIP 1043 1101).

The payment of \$7,040 by Geico Direct to Rudolph was made without the

knowledge of Peerless and Universal. The demand by Universal for payment was rejected by Geico and Peerless, and Rudolph failed to respond.

Universal claims to be the “named payee” under the Peerless policy and entitled to full payment. Peerless contends that the payment to Rudolph invalidated its subrogation rights.

Universal argues that pursuant to the Peerless policy, it (Universal) would be entitled to coverage where the insured acted fraudulently (or by omissions) except where the loss was caused by Rudolph’s conversion, secretion, or embezzlement of “your covered auto”.

The appropriate language in the Peerless policy is as follows:

“Loss or damage under this policy shall be paid ... to you and the loss payee..... . This insurance with respect to the interest of the loss payee, shall not become invalid because of your (the insured’s) fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of “your covered auto”.

It is agreed that the loss payee here is Universal. The policy states that fraudulent acts or omissions (by Rudolph) would not invalidate coverage to the “loss payee”.

Peerless argues that the acceptance by Rudolph of Geico’s \$7,074 cuts off its subrogation rights and maintains that the language in the loss payable clause does not bar ongoing payments to Universal as assignees.

Peerless, likewise relies upon part of the language in the aforementioned Loss Payable Clause, which is part of the endorsement AIP 10 43 1101, and states as follows:

“However, we reserve the right to cancel the policy as permitted by its policy terms and the cancellation shall terminate this agreement as to the loss in payee’s interest.”

The complaint filed by Universal against Peerless contends Peerless breached its contract by failing to honor its obligations under the policy to satisfy Universal’s lien, (Paragraph 26).

The Plaintiff further contends that Rudolph’s action in converting to itself the proceeds of the Geico settlement with full knowledge of the Universal lien was fraudulent,(Paragraph 22).

Moreover, on these papers, the meaning of conversion secretion or embezzlement is ambiguous and subject to more than one definition.

The motion for leave to amend the complaint by incorporating the single word “fraud” is denied. The necessary elements of a fraud claim are misrepresentation of a material fact, falsity, scienter, and deception which have not been sufficiently alleged in the papers. **Barclay Arms v. Barclay**, 74 N.Y.2d 644. The addition of the word “fraud” will not satisfy the strict pleading allegations required by the CPLR.

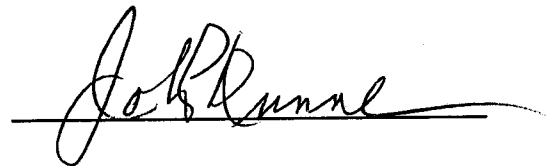
Adding a conclusory statement is insufficient to establish a cause of action in fraud.

The Defendant's motion for summary judgment is denied.

Plaintiff moves this Court for an interpretation of the meaning of the "Loss Payee" clause found in the Peerless policy of insurance. On these papers, the meaning of conversion, secretion or embezzlement is ambiguous and subject to more than one definition.

It is so Ordered.

Dated: February 14, 2005



Hon. John P. Dunne

ENTERED

FEB 16 2005

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COUNTY CLERK'S OFFICE**