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COMMONWEALTH OF KENTUCKY  
MUHLENBERG CIRCUIT COURT  
CIVIL ACTION NO. 15-CI-00364

JUAN ORTIZ and MARIA ORTIZ

PLAINTIFFS

v.

KENTUCKY GROWERS INSURANCE COMPANY,  
C. A. LAWTON & SON, INC.; SOLUTIONS FIRST, LLC  
d/b/a LAWTON INSURANCE and LISA PAYTON

DEFENDANTS

**OPINION AND ORDER GRANTING SUMMARY JUDGMENT  
MOTION OF LAWTON INSURANCE AND PAYTON**

FACTS

This matter is before the Court on Motion for Summary Judgment filed on behalf of defendants Lawton Insurance Agency (Lawton) and Lisa Payton (Payton). Also named as defendants is Kentucky Growers Insurance Company (Growers) which likewise moved for Summary Judgment, which motion is granted simultaneously with this Order. It should be noted that the claims against Growers and Lawton and Payton are based on different theories of recovery.

The claim against Growers sounds on the theory of breach of contract and the claims against Lawton and Payton sound in negligence. However, the grounds for granting both motions for summary judgment is the same. The defendants, Ortiz, made misleading and fraudulent statements in their application for insurance.

One of the basis for summary judgment argued to the Court by Growers was that the application specifically provided that coverage would not be sold to anyone purchasing

property sought to be insured by way of contract or bond for deed. This is the specific manner in which the Ortiz are purchasing their property. The Ortiz counter, stating that regardless of that fact, their contract and bond for deed was shown to Payton (Lawton's employee), and thereby both Lawton and Growers had constructive, if not actual, notice of the method of purchase by the Ortiz. If this were the sole argument offered by these defendants, summary judgment may not be appropriate. However, summary judgment in these claims is based solely on Ortiz's misrepresentations and fraud in their application. Regardless of whether Lawton and/or Payton were negligent in not seeking coverage from another carrier because of the type or method of ownership of the Ortiz, that claim of negligence does not survive the misrepresentation and fraud in the application. Stated differently, even if this Court ruled that all named defendants had notice that Ortiz was purchasing pursuant to contract and bond for deed and were estopped from denying coverage on that basis, recovery is still impossible for Ortiz because of the misrepresentation and fraud perpetrated in their application and to this Court.

Ortiz represented in his application for insurance that he had not had a previous cancelation or refusal to renew insurance. In fact, Ortiz coverage had been canceled by Kentucky Farm Bureau Mutual Insurance Company only a brief period before his application to Growers. Ortiz argues that he was unaware of the notice of cancelation, however there is no argument that the notice was mailed to him at the proper address, nor that mail service was inadequate. Regardless of whether he read it or understood it he is by law charged with knowledge of it. That is he must offer some proof that the cancelation notice was not issued or not delivered, but he has offered none.

The issue of fraud is the more compelling issue for granting summary judgment. In the application to Growers, Ortiz was asked if he had been in foreclosure proceedings within the last ten years. In the application Ortiz stated that he had not been in foreclosure, then, in his deposition he stated that he had been in foreclosure in Florida. Then in an Affidavit submitted to this Court attached to the response to a Summary Judgment Motion Ortiz stated:

3. I was asked in my deposition whether I had ever had a foreclosure and I said that I had a foreclosure in Florida in 2007. In actuality I have never been in a foreclosure proceeding. I was threatened with foreclosure in 2007 in Florida when I fell behind in my payments. However, no foreclosure lawsuit was filed, and the house was not sold at foreclosure sale. The house was actually sold in a short sale without any legal proceedings taking place. So the truth is I have never been I a foreclosure proceeding.

Growers filed a Reply to Ortiz Response and attached thereto a copy of a Foreclosure Complaint filed in Dixie County, Florida, naming both Juan and Maria Ortiz as defendants. With the complaint are two affidavits of service on both Ortiz. Ortiz has made no response.

Ortiz statement in his application to Growers and his affidavit to this Court were false. This fraud precludes recovery on either breach of contract or negligence. Regardless of any negligence by Lawton or Payton, the summary judgment for Growers is based on Ortiz misrepresentation and fraud. No negligence by Lawton or Payton

contributed to Ortiz misrepresentation and fraud. This is the basis for the conclusion by this Court that it would be impossible for Ortiz to recover at trial.

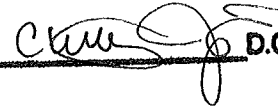
The law in Kentucky has long held that a material misrepresentation contained in an application for insurance avoids the policy. *North British Mercantile Ins. Co. v. London and Edinburg v. Union Stockyards Co.*, 87 S.W. 285 (Ky. 1905); *Niagra Fire & Ins. Co. v. Layne*, 172 S.W. 1090 (Ky. 1915); *Nationwide Mutual Ins. Co. v. Nelson*, 912 F. Supp. 2d 452 (E.D. Ky. 2012). This circumstance did not arise as a result of Lawton's negligence.

Based on the foregoing, IT IS ORDERED that the Summary Judgment Motion of Lawton and Payton be and they are hereby **GRANTED**.

This is a final and appealable judgment, There is no just cause for delay.

This the 31 day of January, 2017.

  
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JAMES C. BRANTLEY, SPECIAL JUDGE

ENTERED  
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CAMRON LAYCOCK  
BY:  D.C.