

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Statement of Uncontested Material Facts

Fact #1: Plaintiff, Farley Trucking, Inc. (“Farley”), is a corporation organized and existing under the laws of Columbia, with its principal place of business in Columbia.

Undisputed Because: This fact is alleged in paragraph 1 of Plaintiff’s complaint and is admitted in paragraph 1 of Defendant’s answer.

Fact #2: Defendant, Dunn Insurance Company (“Dunn”), is an insurance corporation incorporated under the laws of Columbia, with its principal place of business in Columbia.

Undisputed Because: This fact is alleged in paragraph 2 of Plaintiff’s complaint and is admitted in paragraph 2 of Defendant’s answer.

Fact #3: Dunn insures certain types of liabilities, including liabilities associated with the commercial trucking industry

Undisputed Because: This fact is alleged in paragraph 3 of Plaintiff’s complaint and is admitted in paragraph 3 of Defendant’s answer.

Fact #4: Exhibit A (the one-page letter) is a true and correct copy of the July 11, 2006 letter.

Undisputed Because: This fact is alleged in paragraph 8 of Plaintiff’s complaint and is admitted in paragraph 8 of Defendant’s answer.

Fact #5: Exhibit B (policy statement) is a true and correct copy of portions of the policy purchased by Farley from Dunn.

Undisputed Because: This fact is alleged in paragraph 9 of Plaintiff’s complaint and is admitted in paragraph 9 of Defendant’s answer.

CLEARLY STATED TERMS WITHIN THE FOUR CORNERS OF AN INSTRUMENT CANNOT BE CONTROVERTED BY EXTRINSIC EVIDENCE

The proper construction of a contract is an appropriate matter for resolution on summary judgment. First Data. A Court must first look to the four corners of the instrument to determine the construction of the contract. First Data. In First Data, the agreement between the parties stated its terms “with absolute clarity” that the defendant was under no obligation to continue business with the plaintiff. The court held that the lower court erred when it based its ruling on contradictory parol evidence.

Like in First Data, Exhibit B (policy statement) explicitly states: “TERM: The policy term shall be one year, from August 1, 2006 to August 1, 2007.” This is a statement of “absolute clarity” that is not ambiguous since it says the term is to “be one year.” It is, within the four corners of the instrument, sufficient to construe the contract as limiting the term to one year, not three years.

Moreover, if the language is ambiguous after applying constructive rules, only then may extrinsic evidence be considered to resolve the ambiguity. First Data. Since the language is not

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Also, below this section, there should be a heading for the standard for summary judgment under FRCP.

ambiguous after applying these constructive rules, extrinsic evidence, such as parol evidence, cannot be considered to interpret Exhibit B (policy statement).

Therefore, the instrument does not purport to convey that the term extends to three years as Plaintiff suggests. That is parol evidence that cannot be considered in interpreting Exhibit B.

A MERGER CLAUSE SUPERSEDES CONTRADICTORY PRE-CONTRACTUAL REPRESENTATIONS

Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning. First Data. In contracts with a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties. First Data. The court in First Data held that any of the plaintiff's impressions based on pre-contractual representations were superseded by the merger clause in the parties' agreement.

In this case, like in First Data, Exhibit B (policy statement) contains a merger clause stating, "This policy constitutes the entire agreement between the insured and the insurer concerning this insurance." This is another explicit and unambiguous statement. Thus, it must be afforded its literal meaning that it constitutes a merger clause. Therefore, under this merger clause, Plaintiff's pre-contractual notions that Plaintiff was entitled to a continuous three-year term were superseded by this merger clause when both parties signed the policy statement on July 20, 2006.

Thus, Plaintiff varies the one-year term. Exhibit A (one-page letter) is *not* enforceable as a contract that extends the term to three years.

Antecedent fraud may invalidate a contract and allow parol evidence, but the policy statement including the one-year term is not invalid

On the other hand, if the entire contract is invalid because of alleged prior fraud which induced the execution of the contract, then under Dana, the disclaimer provision therein is ineffectual because there is no contract between the parties. In such a case, parol evidence of the alleged misrepresentation is admissible on the question of fraud and deceit. Dana. In Dana, the buyer of a used car purchased it with the understanding that the car had never been wrecked, allegedly based on the representation of the seller's sales agent. The purchase agreement stated that the car is sold "as is."

This case is distinguishable from Dana because Plaintiff negotiated with Defendant through Bradford Insurance Brokers, Inc. ("Bradford"). Bradford is an insurance broker that retained by Plaintiff, and at most independent, i.e., *not Defendant's agent* as in Dana. Thus, it cannot be said that Defendant made misrepresentations to Plaintiff. Moreover, Exhibit A (one-page letter from July 11, 2006) showing the purported three-year term (1) was not even directed to Plaintiff, (2) there is no "as is" clause tending to shift blame away from the Defendant, and (3) Exhibit B (policy statement from July 20, 2006) supersedes Exhibit A as the later document that contains a merger clause.

FOR COMMON LAW TORT OF FRAUD, PLAINTIFF'S RELIANCE ON MISREPRESENTATION IS NOT JUSTIFIABLE WHEN THE EXPRESS TERMS OF A CONTRACT ARE CLEAR

Under Columbia common law, the five-part test for fraud includes the element of “justifiable reliance by plaintiff” on a false representation. Callaway. In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish that his reliance is justifiable. Callaway. The court in Callaway held that the express statements in the parties’ contract could not be any clearer, and so the plaintiff could not justifiably rely on the alleged misrepresentation.

Here, it has been established above that the alleged fraudulent representation by Defendant that the policy term is three years is controverted by the express terms within Exhibit B (policy statement). The terms expressly state that the “policy term shall be one year.” Like in Callaway, the terms could not be any clearer: The term is one year. Since these terms are explicit, Plaintiff reliance on the alleged misrepresentation that the term was three years was not justifiable.

Therefore, since the elements for fraud under Columbia common law cannot be met, Exhibit A is not a sufficient basis for Plaintiff’s fraud allegation.

LACK OF GENUINE ISSUES AS TO MATERIAL FACTS AND A SHOWING THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW MAKE SUMMARY JUDGMENT PROPER

Summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law. Col. R. Civ. P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. First Data.

Defendant is entitled to judgment as a matter of law

Here, an issue is whether the policy term is three years or one year. Based on the arguments put forth above and the evidence on record, the terms of Exhibit B (policy statement) supersede any pre-contractual representations. Exhibit B was signed by both parties, who understood the merger clause precluded any contradictory representations. This set the term to one year, and made any prior representations such as the one-page letter (Exhibit A) not enforceable. The policy statement (Exhibit B) expressly noted that the term was to be for one year (with a non-renewal provision but with renewal options having modified terms). Defendant advised Plaintiff that pursuant to the non-renewal provision, it was not renewing the 2006-2007 policy.

Plaintiff also lacks a basis for fraud since a plaintiff cannot establish the elements of Columbia common law fraud where a representation is controverted by the express terms of a contract. Since the terms in the policy statement (Exhibit B) are clear and unambiguous, Plaintiff cannot assert fraud. Thus, Defendant is entitled to judgment as a matter of law.

There are no genuine issues as to material facts

Based on the above, the factual allegations in Plaintiff's complaint are rendered unambiguous because Plaintiff cannot assert them reasonably in light of the legal arguments put forth. Specifically, Defendant has not breached the agreement according to paragraph 21 of the complaint because the agreement was for one year, and Defendant provided services for one year. Additionally, Plaintiff has not justifiably relied on the July 11 agreement according to paragraph 25 of the complaint because it could not have as a matter of law, as explained above.

Since there are no genuine issues of material fact, Defendant is entitled to summary judgment.