Civil Action No. 02-CV-6390 (DGT)
United States District Court, E.D. New York

Staten Island Supply Co., Inc. v. Lumbermens Mut. Cas. Co.

Decided Mar 29, 2005

Civil Action No. 02-CV-6390 (DGT).

March 29, 2005

MEMORANDUM AND ORDER

DAVID TRAGER, District Judge

Plaintiff, Staten Island Supply Company, Inc. ("SISCO" or "plaintiff"), initially brought this action in New York State Supreme Court seeking damages for breach of its insurance contract with defendant, Lumbermens Mutual Casualty Company ("Lumbermens" or "defendant"). Defendant subsequently removed the case to federal court on December 5, 2002.

Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) on the grounds that SISCO's principal Robert Schwimer concealed and misrepresented material information and refused to answer
2 questions concerning material subjects during defendant's investigation of a claim. *2

Background (1) The Cancellation of Plaintiff's Insurance Policy

SISCO is a small, closely-held corporation that at one time sold plumbing supplies and general merchandise. (Defendant's Exhibits to Motion for Summary Judgment Exhibit ("Def. Ex.") O at 1). Lumbermens issued an insurance policy to SISCO providing coverage for a commercial property at 1390 Richmond Terrace, Staten Island, New York ("insured property") from November 13, 2000 to November 13, 2001.[1] (Def. Ex. C at 7).

On December 14, 2000 Lumbermens mailed a cancellation notice stating that the policy at issue would be canceled for lack of payment unless the back due premium was paid in full within fifteen days of the mailing of the notice. (Def. Ex. G). Plaintiff claims that on December 19, 2000 a check was mailed to Lumbermens, for the past due premium ("premium check"). (Plaintiff's Local Rule 56.1 Statement ("Pl.'s 56.1") ¶¶ 4-5; Def. Ex. H). The check was written on the account of Larisa Solovyova at the Staten Island Savings Bank. (Id.).

On January 7, 2001 the insured property flooded as a result of a burst sprinkler pipe. (O'Rourke Affidavit, ¶ 4,
3 ("O'Rourke *3 Aff."); Pl.'s 56.1 ¶ 6). Subsequently, on January 11, the post office allegedly returned the premium check. (Pl.'s 56.1 ¶ 7). The envelope bore the stamp: "found in supposedly empty equipment" along with a postmark dated December 19, 2000. (Def. Ex. M at 26). SISCO then mailed the check to Lumbermens, who received it on January 12th. (Def. Ex. R at 861; Pl.'s 56.1 ¶ 8). SISCO notified Lumbermens of the January 7th flood and filed a claim for recovery on January 12th as well. (O'Rourke Aff. ¶ 4; Pl.'s 56.1 ¶ 9). The premium check cleared on January 17th. (Pl.'s 56.1 ¶ 10).

Despite receiving and cashing premium check, Lumbermens denied SISCO's claim because the policy had been canceled for non-payment as of January 4, 2001. (Def. Ex. L). In response, SISCO wrote a letter to Lumbermens stating that SISCO had mailed the premium payment to Lumbermens on December 19th. (Def. Ex. M at 24). SISCO contended that, pursuant to the mailbox rule, the premium payment was constructively received when SISCO mailed the check, even though Lumbermens did not receive the check until nearly a month later. (Id.).

Lumbermens hired independent adjuster Michael Palais ("Palais") to evaluate SISCO's assertions and investigate both the policy cancellation and the claim. (Palais Affidavit ¶ 3 ("Palais Aff."); O'Rourke Aff. ¶ 10).
4 Palais interviewed Robert Schwimer ("Schwimer"), SISCO's principal, and prepared a *4 handwritten statement based on the interview. ("Palais Statement") (Def. Ex. D; Palais Aff. ¶¶ 5-6). Schwimer signed the statement, but did not read it because the handwriting was illegible. Plaintiff claims that Palais read the statement to Schwimer, but that Palais' recitation of the statement did not include any of the inaccuracies that now appear in the document. (Def. Ex. F at 243-4, 248-9). Schwimer maintains he would not have signed the document if he knew about the misstatements.[2] (Id. at 249). The Palais statement, which bears Schwimer's signature, declares Schwimer was not married and the premium check was written on Larisa Solovyova's ("Solovyova") account because Schwimer was traveling at the time the premiums were due. (Defendant's Local Rule 56.1 Statement ¶¶ 11-13 ("Def.'s 56.1"); Def. Ex. S at 1). Lumbermens also alleges that Schwimer told Palais during the interview that Solovyova was SISCO's bookkeeper and that she often paid corporate bills with her own account and was reimbursed. (Palais Aff. ¶ 12; O'Rourke Aff. ¶ 12).

2 Schwimer stated during his examination that he did not always read documents that he signed and that it would not be unusual for him to sign a document he had not read. (Def. Ex. F at 246).

After Palais interviewed Schwimer, Lumbermens initiated a coordinated review by its legal, accounting and claims departments concerning its position regarding the mailbox rule. Ultimately, Lumbermens chose to
5 reinstate SISCO's policy. *5 (Def.'s 56.1 ¶¶ 21-22; O'Rourke Aff. ¶¶ 13-14). Lumbermens then began an investigation into SISCO's flood damage claim filed on January 12th. (Pl.'s 56.1 ¶ 13; O'Rourke Aff. ¶ 15).

(2) The Investigation into the January 7th Flood

Lumbermens hired an engineer to inspect the insured property and determine the cause of the flood. (O'Rourke Aff. ¶ 15; Def. Ex. R at 875). In the Palais statement, Schwimer acknowledged that shortly before the January 7th flood, he noticed a leak in the sprinkler system and that part of the building was cooler than usual. (Def. Ex. S). Since Schwimer was going to be away for several days, he lit the boiler and turned off the domestic water and sprinkler system. (Id; Def. Ex. R at 881). Lumbermens' engineer reported that the attic sprinkler valve had not been properly closed, leaving water in the pipes. (O'Rourke Aff. ¶ 15; Def. Ex. R at 881). The engineer determined that cold weather made the sprinkler pipes freeze and burst, causing the flood. (Id.). Lynne O'Rourke ("O'Rourke"), Lumbermens' Senior Claim Representative assigned to manage SISCO's claim, knew that Schwimer was in the plumbing supply business and had some expertise in sprinkler systems. (O'Rourke Aff. ¶ 15). She therefore found it strange that he would mistakenly leave a sprinkler valve open. (Id.). In her
6 affidavit, O'Rourke stated that this oversight raised a concern in her mind that Schwimer *6 may have intentionally shut down the sprinkler system improperly. (Id.). For this reason, O'Rourke requested Lumbermens' counsel examine Schwimer under oath. (Id. ¶¶ 16-18).

(3) The Examination Under Oath

On March 20, 2002 and July 18, 2002, Lumbermens' counsel examined Schwimer under oath ("Examination Under Oath" or "EUO"). (Def. Ex. E; Def. Ex. F). Defendant largely bases its claims for summary judgment on Schwimer and his attorney's responses to questions asked in the EUO.

A. Defense's Claims that Schwimer Lied to Palais

Defendant claims Schwimer breached the insurance contract by making false statements to Palais during their interview, thereby negating coverage. First, defendant alleges Schwimer lied about who wrote the premium check. (Kenneth Feit's Affidavit in Support of Motion ("Feit Aff.") ¶¶ 38-40). During the EUO, Lumbermens' counsel asked Schwimer several questions concerning the premium check. (Def. Ex. E at 127-8). Specifically, counsel asked if Schwimer wrote the check himself, where Schwimer was when the check was written, and who signed the check. (Id.). Schwimer responded that he wrote the check while in his apartment and that Solovyova signed it. (Id.). Defendant claims that this statement directly contradicts Schwimer's previous
7 statement, recorded by Palais, that Solovyova wrote the check because *7 Schwimer was traveling at the time. (Feit Aff. ¶ 40). Additionally, defendant asserts Schwimer's EUO statements were further contradicted by Solovyova's deposition, taken in connection with the current action. (Id.). In that deposition, Solovyova stated that she had nothing to do with SISCO, that she did not write any checks for the business, and that the signature on the premium check was Schwimer's and not hers. (Def. Ex. J at 53).

Next, defendant claims that Schwimer lied to Palais concerning why the check was written on Solovyova's account and not on plaintiff's corporate account with Chase Manhattan Bank. (Feit Aff. ¶ 40). During the EUO, Schwimer stated that the company had not been doing well financially, that the company had last extended credit to a plumber five years earlier and had last purchased supplies in 1998 or 1999. (Def. Ex. E at 25). He said that neither he nor his sister (the only other SISCO employee) had received any remuneration for the year 2000. (Id. at 28). Schwimer acknowledged that there had been no money in SISCO's corporate account at Chase Manhattan Bank for several years, and that he used Solovyova's account to deposit corporate funds and pay corporate debts.[3] (Id. at 16). However, defendant claims Schwimer told Palais that he used Solovyova's
8 account because she *8 was SISCO's bookkeeper and frequently wrote checks on her own account and was reimbursed by the corporation. (Feit Aff. ¶ 38-40). Defendant also asserts that Solovyova's deposition contradicts Schwimer's account in the Palais statement. In her deposition, Solovyova denied ever being the plaintiff's bookkeeper or having anything to do with the corporation's finances. (Def. Ex. J at 60).

[3] Schwimer later admitted he had used some SISCO corporate funds to pay his living expenses, though he had not informed his sister of these payments. (Def. Ex at 38-40, 49-50).

Lastly, defendant claims that in the Palais statement, Schwimer claimed he was not married, when in fact he was married. (Feit Aff. ¶ 40). During Solovyova's deposition, she acknowledged that she married Schwimer in 1999. (Def. Ex. J at 29).

B. Schwimer's Refusal to Answer Questions During the Examination

Defendant also claims Schwimer's refusal to answer questions during his EUO negated coverage for the loss. (Feit Aff. ¶ 49). Specifically, during the March EUO, Lumbermens' attorney asked several questions concerning why Schwimer wrote the premium check on Solovyova's account. After stating that he did not use the corporate account with Chase Manhattan Bank, Schwimer explained that he considered Solovyova's account to be the SISCO account and that he used it to pay both corporate and personal bills. (Def. Ex. E at 129, 133). When asked why Solovyova's account was in her name and not his, Schwimer answered, "I don't
9 [sic] want anything in my name after I went through the divorce." (Id. at *9 131). Lumbermens' counsel

followed this answer by asking, "[a]re you trying to hide assets from your ex-wife?" (Id. at 132). At this point Schwimer's attorney instructed his client not to answer the question because it was immaterial. (Id.). Lumbermens' counsel continued with the examination and several questions later asked Schwimer if the Solovyova account was "established to attempt to hide assets from creditors?" (Id. at 134). Again Schwimer's attorney instructed his client not to answer the question, asserting that Lumbermens' counsel had not even established that Schwimer had creditors and therefore the question was immaterial. (Id.).

During the July EUO, Lumbermens' counsel asked Schwimer a number of questions concerning the sprinkler system in the insured property. (Def. Ex. F at 232). During this line of questioning, Lumbermens' counsel focused specifically on Schwimer's knowledge of the sprinkler loop which controlled the hallway sprinklers. (Id. at 232-5). Lumbermens' counsel asked twice whether Schwimer knew about this loop. (Id. at 232-34, 234-5). Schwimer stated that he did not know the hallway sprinklers were on a separate loop from the other sprinklers. (Id. at 232). The third time Lumbermens' counsel asked this question, Schwimer's attorney instructed him not to answer the question because it had been asked and answered. (Id. at 234-5). Schwimer's
10 attorney argued that Lumbermens' counsel was badgering *10 his client by asking the same question "over and over again." (Id. at 235).

Discussion (1) Schwimer's Statement to Palais

Defendant claims that when Schwimer signed the Palais statement he violated the fraud clause of the insurance policy by swearing to information he knew to be false. This fraud clause states:

> We do not provide coverage for any insured . . . who has made fraudulent statements . . . in connection with any loss . . . or damage for which coverage is sought. . . .

(Def. Ex. C at P11). Defendant maintains that, during the EUO, Schwimer contradicted representations contained in the Palais statement concerning who had written the premium check, why the check had been written on Solovyova's account and Schwimer's relationship with Solovyova. Defendant argues that these contradictions are proof that Schwimer lied to Palais, which is a violation of the fraud clause. Therefore,
11 defendant contends it does not have to honor the insurance contract.[4] *11

[4] In a letter dated February 16, 2005, eight months after the parties filed their briefs, defendant sought leave to supplement its summary judgment motion because it claimed to discover an additional misrepresentation. During the EUO, Lumbermens' attorney asked Schwimer if SISCO had ever been sued. Schwimer answered that SISCO had only been sued by angry customers in small claims court for "minor things". (Def. Ex. E at 52). Lumbermens' counsel then asked if any of the suits were still pending. Id. Schwimer responded that none were pending at that time. Id. However, in their February 16 motion, defendant presented the docket for Vermont Teddy Bear Company v. Schwimer, 00-CV-6740, a case filed November 9, 2000, which names both Schwimer and SISCO as defendants. This case was still pending at the time of Schwimer's EUO. Therefore, defendant alleged that Schwimer lied concerning pending actions against SISCO. Plaintiff, during oral argument, claimed that Schwimer did not intend to mislead Lumbermens; rather Schwimer forgot that theVermont Teddy Bear case named SISCO and not just Schwimer as defendants. This explanation seems dubious given that Schwimer is appearing pro se in the Vermont Teddy Bear litigation. Still, defendant's claim cannot be resolved on summary judgment. Although the correct answer to this question may have affected the course of Lumbermens' investigation, Schwimer's answer does not appear to have unduly prejudiced Lumbermens. The materiality of the pending Vermont Teddy Bear litigation remains a mixed question of law and fact for a jury to decide. See Fine v. Bellefonte Underwriters Ins., 725 F.2d 179, 182-3 (2d Cir. 1984).

Plaintiff, however, asserts that the Palais statement was illegible and, as a result, Schwimer did not realize that the statement contained inaccuracies. In New York, to void an insurance contract on the basis of fraud, an insurer must show the insured willfully made a false and material statement under oath with the intent to defraud the insurer. See Fine v. Bellefonte Underwriters Ins., 758 F.2d 50, 52 (2d Cir. 1985) ("[A]ccording to the law of New York, a false statement made on an examination under oath must be both material and willful.");Deitsch Textiles, Inc. v. N.Y. Prop., 62 N.Y.2d 999, 1001, 479 N.Y.S.2d 487, 488 (1984) (requiring
12 intent to defraud be an element of the defense of fraud and misrepresentation). *12 Plaintiff maintains that because Schwimer was unaware of the alleged errors in the Palais statement, Schwimer never intended to defraud Lumbermens. As a result, plaintiff argues that the fraud clause was not violated and, therefore, Lumbermens should not be relieved of their duty to pay under the insurance contract. See Sunbright Fashions, Inc. v. Greater N.Y. Mut. Ins. Co., 34 A.D.2d 235, 237, 310 N.Y.S.2d 760, 761 (2d Dep't 1970) ("[U]nintentional fraud or false swearing or the statement of any opinion mistakenly held are not grounds for vitiating a policy.").

Whether Schwimer made conflicting statements is clearly an issue of credibility as there is a conflict between Palais and Schwimer's version of the events surrounding the preparation of the Palais statement. Although Palais asserts that Schwimer read the statement and did not see any errors when he signed it, Schwimer claims the statement was illegible and the version Palais read to him did not contain any of the inaccuracies that now appear in the statement. (Palais Aff. ¶¶ 6-7; Def. Ex. F at 243-4, 248-9). To the court, the statement does appear to be barely legible. On a motion for summary judgment, a court may not weigh evidence, evaluate the credibility of witnesses or resolve issues of fact. Rodriguez v. City of N.Y., 72 F. 3d 1051, 1061 (2d Cir. 1995).
13 Therefore, defendant's motion can not be granted because whether the plaintiff violated the fraud *13 clause depends on whether Palais or Schwimer are telling the truth — clearly a matter of fact for a jury to decide. See U.S. v. Rem, 38 F.3d 634, 644 (2d Cir. 1994) ("Resolutions of credibility conflicts and choices between conflicting versions of the facts are matters for the jury, not for the court on summary judgment.").

(2) Schwimer's Refusal to Answer Questions

Defendant's other claim for summary judgment rests on Schwimer's refusal to answer three questions during the EUO, which defendant contends violated the insurance policy's cooperation clause. Lumbermens' insurance contract contains a cooperation clause that reads:

> [w]e may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records.

(Def. Ex. C at P18). Schwimer refused to answer questions regarding two specific areas during the EUO, whether he was trying to hide money from his ex-wife or creditors and whether he knew the attic sprinkler system was on a separate loop.

Plaintiff argues that defendant has not shown that Schwimer failed to cooperate with Lumbermens
14 investigation. Plaintiff contends that the New York courts require the insurer to *14 demonstrate (1) that it diligently sought the insured's cooperation; (2) that its efforts were calculated to bring about the cooperation; and (3) that the insured had an attitude of "wilful and avowed obstruction." (Plaintiff's Memorandum of Law at 16).

Plaintiff's reliance on this standard, however, is misplaced.[5] In order, to prove a failure to cooperate under an all-risk insurance policy, an insurer need only show that the insured engaged in a pattern of "willful refusal to answer material and relevant questions . . . and to supply material and relevant documentation[.]" Averbuch v. Home Ins. Co., 114 A.D.2d 827, 829, 494 N.Y.S.2d 738, 379 (2d Dep't 1985).See generally 2423 Mermaid Realty Corp. v. N.Y. Prop. Ins. Und. Assoc., 142 A.D.2d 124, 131-2, 534 N.Y.S.2d 999, 1004 (2d Dep't 1988) (analyzing the cases dealing with cooperation clauses); *15 Dyno-Bite, Inc. v. Travelers Co., 80 A.D.2d 471, 473, 439 N.Y.S.2d 558, 560 (4th Dep't 1981) (reviewing the purpose and history of cooperation clauses). The most common example of a willful failure to cooperate is when the insured declines to answer questions about his personal finances or to turn over personal tax records. See, e.g., Harary v. Allstate Insurance Co., 988 F. Supp 93, 103-5 (E.D.N.Y. 1998); Dlugosz v. Exch. Mut. Ins. Co., 176 A.D.2d 1011, 574 N.Y.S.2d 864 (3d Dep't 1991); 2423 Mermaid Realty Corp., 142 A.D.2d at 124, 534 N.Y.S.2d at 1003. Defendant has not established that its questions were material as a matter of law. In any case, Schwimer's refusal to answer Lumbermens' questions during the EUO did not amount to a failure to cooperate sufficient to relieve Lumbermens of its duty under the insurance policy.

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[5] New York courts apply plaintiff's proposed standard only with regard to cases dealing with liability insurance policies.See Pawtucket Mut. Ins. Co. v. Soler, 184 A.D.2d 498, 584 N.Y.S. 2d 192 (2d Dep't 1992); Thrasher v. U.S. Liab. Ins. Co., 9 N.Y.2d 159, 212 N.Y.S.2d 33 (1967). Courts analyzing New York law have distinguished failure to cooperate under a liability insurance policy from failure to cooperate under a fire or all-risk insurance policy like the one in question here. See Harary v. Allstate Ins. Co., 988 F. Supp. 93, 102-3 (E.D.N.Y. 1997) (distinguishing a standard proposed by the plaintiff in a fire insurance case where all the cases cited concerned a third party's ability to seek recovery); 2423 Mermaid Realty Corp., 142 A.D.2d at 131, 534 N.Y.S.2d at 1004 ("A valid distinction has been cast between actions to recover on fire insurance policies and automobile insurance cases involving injured third parties[.]").

A. Schwimer's Refusal to Answer Questions Accusing Him of Hiding Assets

Defendant maintains that the questions concerning hiding assets were material and that Schwimer was required to answer them. Defendant argues, if Schwimer was willing to cheat his creditors or ex-wife, he may be willing to cheat his insurer. (Feit Aff. at 28). This assertion is questionable at best. To be material in this context the statement must concern "a subject relevant and germane to the insurer's investigation as it was then proceeding." Fine v. Bellefonte Underwriters Ins., *16 725 F.2d 179, 183 (2d Cir. 1984) (discussing the materiality requirement of false statements); Allstate Ins. Co. v. Longwell, 735 F. Supp. 1187, 1194 (S.D.N.Y. 1990) (applying the Fine standard to a cooperation clause issue). Because materiality depends on the scope of the insurer's investigation, it is sometimes a question of law and other times a mixed question of law and fact. Fine, 725 F.2d at 182-3.

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Although defendant does present evidence, in the form of affidavits, which indicate that Lumbermens suspected Schwimer deliberately caused the flood; these unconfirmed suspicions do not, as a matter of law, give the insurance company carte blanche to inquire into any perceived wrongdoing. There are many non-culpable reasons a person would not want to have assets in his name after a divorce. Based on defendant's submissions, it is not clear that the questions concerning hiding assets were related to Lumbermens' investigation. Moreover, the very nature of the questions raise doubts as to its materiality. The purpose of the EUO is to collect information — not to make confrontational accusations. Because the questions were not clearly material, and here the materiality of the questions is a mixed issue of law and fact, Schwimer's refusal to answer these questions is not sufficient to find, on summary judgment, that he violated the cooperation clause of the insurance policy. *17

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Even if one was to assume, arguendo, that the questions were material, the state of SISCO and Schwimer's finances as well as the reasons for putting SISCO funds into Solovyova's account had been well covered earlier in the EUO. As a result, Schwimer substantially cooperated with Lumbermens investigation on this issue and his refusal to answer just two questions does not amount to a failure to cooperate.

Forfeiture of the right to recover on an insurance contract is an extreme remedy for the court to impose. Therefore, the insurer may not point only to a "technical or unimportant omission" as proof that the insured willfully failed to cooperate with its investigation. C-Suzanne Beauty Salon, Ltd. v. Gen. Ins. Co. of America, 574 F.2d 106, 110-111 (2d Cir. 1978) (citing Porter v. Traders' Ins. Co., 164 N.Y. 504, 509 (1900)). The first New York case to discuss this issue was Porter v. Traders' Insurance Company, 164 N.Y. 504 (1900). In that case, the insured answered every question put to him during the EUO except one. Id. at 507. The one question he did not answer, the court found was not clearly a material question. Id. at 508. As a result, the court concluded that the insured had substantially cooperated with his insurer and therefore the insured's refusal to answer the question did not constitute a failure to cooperate.Id. *18

Similarly to the facts in Porter, Schwimer's refusal to answer the two questions concerning hiding assets is not sufficient to find a failure to cooperate. During the EUO, Lumbermens' attorney requested (and presumably received) both SISCO's corporate tax returns and Schwimer's personal tax returns. (Def. Ex. E at 18, 34). Schwimer was very forthcoming concerning both SISCO's and his financial difficulties. (Def. Ex. E at 13-35). When Lumbermens' attorney asked Schwimer why he chose to use Solovyova's account to deposit SISCO funds Schwimer answered that Solovyova's account was more cost effective and that after his divorce he had not wished to have any financial accounts in his name. (Def. Ex. E at 16, 131). The only questions that Schwimer refused to answer were those that accused him of illegally hiding assets. (Def. Ex. E at 131-135). Schwimer substantially cooperated with Lumbermens investigation and provided sufficient information from which it could evaluate his financial situation. As a result, defendant's contention that in refusing to answer the two accusatory questions Schwimer violated the cooperation clause is without merit. *19

B. Schwimer's Refusal to Answer Questions About the Sprinkler System

Defendant's final assertion, that Schwimer refused to answer a question concerning his knowledge of the sprinkler system, also fails to establish a lack of cooperation. Under the Fine standard for materiality, because Lumbermens suspected plaintiff purposely caused the flood, the questions to Schwimer regarding his knowledge of the sprinkler system were relevant and material to its investigation. (O'Rourke Aff. ¶ 15). However, Schwimer complied with this inquiry. On no less than two occasions during the EUO Lumbermens' attorney asked Schwimer if he was aware that the hallway sprinkler system had a separate shut off valve. (Def. Ex. F at 232, 234). Both times, Schwimer stated that he was unaware of this fact. (Id.). Since Schwimer complied with both of Lumbermens' previous inquires on the subject, he substantially cooperated with the investigation and was under no further duty to answer the question again. See Porter, 164 N.Y. at 509. That defendant believed Schwimer was lying in his first two responses does not make out a failure to cooperate when he refused to repeat the alleged lie a third time. *20

Conclusion

Accordingly, defendant's motion for summary judgment is denied.

SO ORDERED.

*1