

No. 1-09-3290

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23 (e) (1).

FOURTH DIVISION
March 10, 2011

IN THE
THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TERRI BLASCO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
CARLOS VENCES,)	
)	No. 06 M1 300826
Defendant-Appellee,)	
)	
UNITED AUTOMOBILE INSURANCE COMPANY,)	The Honorable
)	James E. Snyder,
Third-Party Respondent-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred
in the judgment.

O R D E R

HELD: Where insurer failed to prove its affirmative defense of non-cooperation of the insured, the trial court's judgment ordering insurer to indemnify insured was not against the manifest weight of the evidence.

United Automobile Insurance Company (United) appeals from an

order of the trial court rejecting its affirmative defense of non-cooperation and ordering it to indemnify its insured, Carlos Vences, for an underlying judgment. For the reasons that follow, we affirm.

Terri Blasco and Carlos Vences were involved in an automobile collision in 2005. Blasco sued Vences for negligence, claiming personal injuries. After Vences rejected the mandatory arbitration award, the case proceeded to trial. Over the next year, numerous continuance orders were entered setting prospective dates for trial. Eventually, a jury trial was held on December 9, 2008. Vences did not appear in court that day. The jury rendered a verdict in favor of Blasco and against Vences in the amount of \$9,185 plus costs. United thereafter sent a letter to Vences, informing him that due to his failure to cooperate, it was denying him coverage with regard to the judgment against him.

Blasco issued a third party citation to discover assets, seeking to collect the judgment against Vences by way of his automobile insurance policy in garnishment proceedings. United filed an affirmative defense, asserting that by not appearing at trial, Vences had violated the "condition precedent to [United's] duty of indemnity" that the insured must appear at hearings, give evidence, and otherwise cooperate fully. The third party citation proceeded to a bench trial at which Vences appeared *pro*

se and Blasco and United appeared through counsel.

Blasco's first witness was Ubi O'Neal, the attorney who had represented her in the underlying action. O'Neal testified that Vences was present at pre-arbitration status calls, at the arbitration hearing, and in court the "first two or three" times the case was set for trial. Blasco also called Vences as a witness. Through an interpreter, Vences testified that subsequent to the arbitration proceedings, he attended more than five or six court sessions. Vences stated, "Well, I went several times; but every time I showed up, they'd say, 'Well, we're not going to go through with the trial now.'" According to Vences, he was not present in court on December 9, 2008, because he was not notified of that trial date. He subsequently learned that there had been a trial and that judgment had been rendered against him. He asserted, "I never failed to show up on a court date that I knew about." Vences testified that he knew he "had to be there if they called me because the letter that I got said that if I didn't show up, I would have my license suspended."

United's first witness was Ellen O'Day, a secretary for the law firm that represented Vences in the underlying action. O'Day identified a series of letters, which she had prepared, from the firm to Vences, informing him of upcoming court calls. Among the letters was one dated October 1, 2008, advising Vences that the case would be called for trial on December 9, 2008. O'Day

admitted that the letters were not sent by certified mail.

Erica Maya Carrasco, a receptionist for the same firm, testified that as part of her job, she would call Spanish-speaking individuals to tell them to come into court for trial. Carrasco identified a notation on the file jacket for the underlying case indicating that on December 9, 2008, she called Vences and left a message. According to Carrasco's testimony, she also made a second telephone call to Vences and left another message, informing him that he should be in court for the trial that was set for that day.

Anna Gonis, an attorney with the firm, testified that she received the Vences trial assignment the night before the trial. That night, she telephoned Vences to "put him on standby" for trial and left a message. Gonis identified a notation on the file jacket indicating that she had done so. When Vences did not appear in court the next day, Gonis had Carrasco call him.

Following closing arguments, the trial court announced its findings. First, the trial court addressed whether United met its initial burden on its affirmative defense. The court stated, "It's a burden of showing by a preponderance that it acted in good faith to secure the driver's attendance at the trial. I believe that [United] did."

Next, the court addressed whether Vences's failure to appear at trial was due to his refusal to cooperate. Noting that Vences

appeared at the arbitration and "every trial date except for the one that actually mattered," the trial court found that evidence of cooperation existed. The court further found that the combination of the October, 1, 2008, letter to Vences, the telephone call the night before trial, and the telephone calls the day of trial did not constitute "sufficient diligence in attempting to secure him at the trial, sufficient to show refusal to cooperate on the affirmative defense." Accordingly, the trial court rejected United's affirmative defense and entered judgment in favor of Vences for the use of Blasco.

On appeal, United contends that the trial court's ruling was inappropriate "in light of the evidence and the applicable standard." United argues that once the trial court found United had made reasonable, good faith efforts to obtain Vences's cooperation, it should have entered judgment for United. In addition, United argues that the trial court should have found that Vences's failure to appear at the jury trial was willful, given its factual finding that the law firm representing Vences had sent him written notice and telephoned him the night before and the day of trial. United asserts that while the trial court recited the applicable burden of proof, it did not apply that standard correctly when it found Vences's absence was not willful.

As an initial matter, we address the standard of review,

which United asserts is *de novo*. We disagree. In this case, a garnishee's answer was contested. Accordingly, a trial of the issues was conducted as in other civil cases. 735 ILCS 5/12-711(c) (West 2008); *Buckner v. Causey*, 311 Ill. App. 3d 139, 142 (1999). The standard of review in a bench trial in a civil case is whether the trial court's judgment is against the manifest weight of the evidence. *Buckner*, 311 Ill. App. 3d at 142. For a judgment to be against the manifest weight of the evidence, an opposite conclusion must be apparent or the findings must be unreasonable, arbitrary, or not based on evidence. *Buckner*, 311 Ill. App. 3d at 142.

In garnishment proceedings, an insurance company that asserts the affirmative defense of non-cooperation must establish by a preponderance of the evidence that it acted in good faith to secure the insured's attendance at trial and that the insured's failure to appear was due to his refusal to cooperate. *Wallace v. Woolfolk*, 312 Ill. App. 3d 1178, 1180 (2000). "An insurer is not liable for a judgment rendered against its insured if the insured willfully failed to cooperate by refusing to appear at trial after receiving adequate notice. However, the insurer is liable if it was not sufficiently diligent in attempting to secure the insured's appearance or if the insured's failure to attend was not due to a refusal to cooperate." *Wallace*, 312 Ill. App. 3d at 1180.

Here, the measures taken to assure Vences's cooperation on December 9, 2008, consisted of a letter sent by regular mail two months earlier, a telephone message left the night before trial, and two telephone messages left the day of trial. Similar efforts had been successful before; there is no dispute that Vences cooperated with such forms of notice and appeared at his arbitration proceedings and numerous -- if not all -- court calls and trial dates prior to December 9, 2008.

Vences testified that he was not in court on December 9, 2008, because he did not receive notice of that trial date and asserted, "I never failed to show up on a court date that I knew about." Vences's history of consistently appearing at arbitration and pretrial proceedings lends credence to his testimony. The trial court apparently chose to believe Vences, as was its prerogative as the trier of fact. See *Buckner*, 311 Ill. App. 3d at 144.

The trial court found that United had failed to establish by a preponderance of the evidence that Vences's failure to appear at trial was due to his refusal to cooperate. Given Vences's lengthy and consistent history of cooperation, the corresponding unusualness of his failure to appear on December 9, 2008, and his testimony that he did not receive notice of that trial date, we cannot conclude that the trial court's finding was unreasonable, arbitrary, or not based on evidence. Accordingly, the trial

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court's judgment rejecting United's affirmative defense was not against the manifest weight of the evidence. See *Buckner*, 311 Ill. App. 3d at 144.

For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

Affirmed.