2012 IL App (1st) 10-1237-U

FIFTH DIVISION
January 27, 2012

No. 1-10-1237

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BASHEER ABU HARB,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	
AMERICAN SERVICE INSURANCE CO.,	)	
	)	
Defendant-Appellee.	)	
	)	
and	)	No. 04 L 7604
	)	
AMERICAN SERVICE INSURANCE CO.,	)	
	)	
Counterplaintiff-Appellee,	)	
	)	
v.	)	
	)	
BASHEER ABU HARB,	)	Honorable
	)	Daniel T. Gillespie,
Counterdefendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

Held: An insurer seeking to void an automobile insurance policy pursuant to section 154 of the

Illinois Insurance Code has burden of proving that the insured made a material misrepresentation. Absent a threshold determination regarding the insurer's right to rescission based upon a material misrepresentation, the trial court erred in requiring insured to prove his breach of contract action. Although insured should not have been required, in first instance, to prove the breach of contract action, trial court erred in concluding he had not proved damages. Reversed and remanded.

¶ 1 Plaintiff, Basheer Abu Harb, appeals from the trial court's directed finding that he failed to prove the element of damages in his breach of contract action against defendant, American Service Insurance Co. (American Service). Plaintiff raises the following arguments on appeal: he was entitled to judgment as a matter of law because American Service failed to promptly rescind the insurance policy by filing a legal proceeding, thus forfeiting its right; the trial court erroneously denied his motion *in limine* that the burden of proof of insurance coverage be placed on American Service; and the trial court erroneously granted American Service's motion for a directed finding on the ground that plaintiff had not proved damages. For the reasons that follow, we reverse the judgment of the circuit court of Cook County and remand this cause for further proceedings.

¶ 2 BACKGROUND

¶ 3 Plaintiff purchased a 2003 Pontiac Grand Am on June 16, 2003. American Service issued plaintiff a six-month personal automobile policy for the period of November 7, 2003 to May 7, 2004. On January 14, 2004, plaintiff's vehicle was stolen in Arizona while plaintiff was working there. Plaintiff reported the loss to the police and to American Service.

¶ 4 On January 15, 2004, the vehicle was recovered in Arizona, but it had been burned and was deemed a total loss. On February 13, 2004, American Service sent plaintiff a letter informing him that his automobile policy "had been declared null and voided '*ab initio*' (from

inception) because of a material misrepresentation." According to the letter, plaintiff had not disclosed on the application for insurance that he resided in Arizona and had garaged the automobile there. American Service further stated in the letter that, "[h]ad this information been disclosed, the rating and or acceptability of this risk would have been materially affected." Plaintiff called American Service but they refused to pay for the car and claimed he was living in Phoenix.

¶ 5 *Pretrial Proceedings*

¶ 6 On July 7, 2004, plaintiff filed a two-count complaint against American Service alleging breach of contract and violation of various provisions of the Illinois Insurance Code relating to vexatious delay and other improper claims practices. On August 8, 2004, American Service filed a counterclaim for declaratory judgment asserting that the insurance policy was null and void because American Service had rescinded the policy based on a material misrepresentation. American Service sought a declaration that it had properly rescinded the policy and that it was not obligated to provide coverage for the damage to plaintiff's vehicle.

¶ 7 On September 1, 2008, plaintiff filed a motion for summary judgment arguing that he was entitled to coverage under the policy, as a matter of law. Plaintiff contended that American Service had no authority to declare the policy void *ab initio* because a material misrepresentation renders a contract voidable and not void. Plaintiff further asserted that American Service had forfeited its right to rescind the contract by failing to promptly file a legal proceeding for rescission. On December 18, 2008, the trial court denied plaintiff's motion for summary judgment concluding that there were genuine issues of material fact regarding plaintiff's

residence at the time of his application.

¶ 8 Before the bench trial began on December 28, 2010, plaintiff presented various motions *in limine*, which included a motion regarding the burden of proof. Although plaintiff maintained his position that American Service had waived its right to rescind the policy, plaintiff contended that American Service had the burden of proof on its rescission claim. The trial court denied plaintiff's motion *in limine*. The trial court made no determination as to the propriety of rescission and required plaintiff to proceed first with his case-in-chief.

¶ 9 *Trial*

¶ 10 Plaintiff testified that he resided in Chicago both at the time he applied for the insurance policy and on the date the automobile was stolen and destroyed by fire. Plaintiff had been employed as an accountant by Five-Star Laundry in Chicago since June 13, 2001. Although he had mainly worked in Chicago for the first three years, he had also been assigned to work in Florida, Texas, and Arizona. He testified that, in June 2003, he was sent temporarily to work in Phoenix to solve some problems that Five-Star was having with its employees at a start-up business. He stated that while he was working temporarily in Arizona, he was still married, he had an apartment in Chicago, his wife lived there, and he returned to Chicago on several occasions. He also testified that, during his temporary assignment, he stayed at Five Star's guest house, along with several other employees who resided in Chicago. Plaintiff also testified that he had purchased the new Pontiac Grand Am in Chicago. The bill of sale, which is also an attachment to plaintiff's complaint, was entered into evidence and shows a date of purchase of June 16, 2003 and a purchase amount of $26,480.23.

¶ 11 Plaintiff testified that his car was stolen in Arizona on January 14, 2004. He reported the vehicle stolen to the police and also reported the loss to American Insurance. He testified that he called the police from the home of Nicolette who would become his future wife. At the time, she lived two blocks from the guesthouse where he was staying with his coworkers. He testified that he told the police that he lived in Chicago.

¶ 12 Plaintiff testified that, after he made the claim, American Service sent him a letter on February 13, 2004, notifying him that it was rescinding his policy as void *ab initio* based on a material misrepresentation he made regarding his address. Plaintiff returned to Chicago in February 2004. He testified that he stayed in the apartment with his wife but for only three days because things were not going well between them. He then stayed with a friend in Chicago and went back to Arizona in March 2004.

¶ 13 On cross examination, plaintiff admitted that he was dating Nicolette in November 2003 and would spend the night at her house, but he could not remember how many days per week he would stay there. On March 7, 2004, he purchased a Camaro in Arizona with the help of a friend. Plaintiff then returned to Chicago in April 2004. During that time, he continued to work for Five Star in the Chicago office and in Arizona. He moved to Arizona in May 2005 and started his own business. He married Nicolette in 2006. Plaintiff's 2004 federal tax return, which listed an Arizona address, was admitted into evidence. Plaintiff testified that the address was that of his friend who had helped him purchase the Camarro. He testified that he wanted her to get his tax refund because he was supposed to pay her back for the vehicle. Plaintiff's 2003 federal tax return also listed an Arizona residence which plaintiff testified was that of the laundry where he

worked.

¶ 14 Mark Havis, a litigation adjuster for American Service, was called as a witness by plaintiff. Havis became involved in the claim in 2007 after the instant lawsuit had been filed. He testified that he had nothing to do with the claim from 2003 through 2006.

¶ 15 Havis admitted that the only investigation conducted by American Service was obtaining a copy of the police report and talking to plaintiff. Havis conceded, however, that plaintiff's January 19, 2004 statement to American Service, was recorded in the claims file as follows:

> "Insured called, he works as an accountant for laundromat shops all over the country, has been living in Phoenix on and off since June 2003, *still has his home in Chicago*, vehicle was recovered, burned, and is in a tow yard, will get address and phone number of the yard." (Emphasis added.)

Havis noted that the file contained a note stating that plaintiff also wanted paperwork sent to his Phoenix address, but Havis conceded he was not aware that it was plaintiff's *business* address. The file also contained an entry stating: "will need the police report and it will help to find out how long insured has been living in Phoenix."

¶ 16 The court asked Havis: "Talk to the plaintiff, and they got the police report. That is all they did for investigation?" Havis responded: "Correct, and the notes."

¶ 17 Plaintiff's employer, Mr. Samarest was unavailable to testify. Plaintiff presented the parties' stipulation that Samarest would testify that he had employed plaintiff for a long time and had sent him to different places at different times. He would also testify that, in the spring of 2003, his company had problems with a new facility in Phoenix, Arizona and that Samarest,

along with three employees, went to work there on a temporary basis. Samarest would further testify that the four of them "were all Chicago residents, lived in Illinois, had residences in Illinois, and all of them intended to go back to Illinois when they were done with the job down in Phoenix." Samarest would also testify that, to his knowledge, plaintiff was living in the guest house in Phoenix, which was owned and controlled by Five Star.

¶ 18 After plaintiff rested, American Service stated that its "lengthy" cross-examination of Mark Havis would stand as its case-in-chief. The record shows that, during cross-examination, Havis was asked two questions and gave two answers, as follows:

"Q. If [American Service] was aware at the time of the application of Mr. Abu Harb, which was in November of 2003, that Mr. Abu Harb lived in Arizona, would [American Service] have written the policy?

A. No.

Q. Why?

A. We aren't licensed in that state."

American Service moved for a directed finding, arguing that plaintiff failed to prove the element of damages because he did not present evidence regarding the value of the automobile at the time of loss. The trial court agreed and entered a directed finding in favor of American Service. The trial court then dismissed American Insurance's counterclaim as moot. The court made no findings of fact and, again, made no determination as to the propriety of rescission. The court denied plaintiff's posttrial motion. This appeal followed.

¶ 19 ANALYSIS

¶ 20 *Summary Judgment*

¶ 21 Plaintiff first argues that the trial court should have granted his motion for summary judgment. He asserts that he is entitled to judgment as a matter of law because American Service failed to promptly rescind the insurance policy by filing a legal proceeding, thus forfeiting its right to rescind the policy.

¶ 22 Generally, a trial court's decision to deny a motion for summary judgment is not appealable where a case proceeds to trial, resulting in a merger of issues raised at summary judgment. *Labate v. Data Forms, Inc.*, 288 Ill. App. 3d 738, 740 (1997). An exception exists, however, where this court is presented with a question of law that we may decide *de novo*, particularly where, as here, the party raised the issue anew in its posttrial motion. *Walters v. Yellow Cab Co.*, 273 Ill. App. 3d 729, 736 (1995). The interpretation of a statute presents a question of law that we review *de novo*. *In re Estate of Wilson*, 238 Ill. 2d 519, 552 (2010). Plaintiff argues correctly that American Service's right to rescind plaintiff's policy is governed by section 154 of the Illinois Insurance Code. 215 ILCS 5/154 (West 1998). Thus, we shall address plaintiff's argument.

¶ 23 Summary judgment is intended to determine whether triable issues of fact exist and "is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333 (1996). "A party cannot seek summary judgment on a theory that was never pled in the complaint." *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 373

Ill. App. 3d 895, 900 (2007). Although summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law, it is a drastic means of disposing of litigation. *Erie Insurance Exchange v. Triana*, 398 Ill. App. 3d 365, 368 (2010). Therefore, summary judgment "should be allowed only where the right of the moving party is clear and free from doubt." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007).

¶ 24 "The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. [Citation.]" *People v. Comage*, 241 Ill. 2d 139, 144 (2011). "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *People v. Jackson*, 2011 IL 110,615. Section 154 states in relevant part

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance * * * shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. With respect to a policy of insurance * * *, *a policy or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less.*" (Emphasis added.) 215 ILCS 5/154 (West 1998).

¶ 25 Section 154 has been interpreted by several courts and the parties do not dispute the following propositions. "Under section 154 of the Illinois Insurance Code which provides the defense that a misrepresentation on a policy will void the policy if either it was made with the intent to deceive or it materially affects the risk, the insurer has the burden of proving the intent or the materiality." *Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d 861, 876 (1983). The Illinois Supreme court has explained that section 154 is to be used in situations where insurance polices *may be voided*. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 464 (2003). As this court has noted, nowhere in its analysis of section 154 did the *Golden Rule* court state that a material misrepresentation under section 154 renders a policy void *ab initio*. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Ins. Co.*, 355 Ill. App. 3d 156, 167 (2004) (citing *Golden Rule*, 203 Ill. 2d at 464). "One seeking to rescind a transaction on the ground of fraud or misrepresentation must elect to do so promptly after learning of the fraud or misrepresentation, must announce his purpose and must adhere to it." *Mollihan v. Stephany*, 35 Ill. App. 3d 101, 103 (1975). The language of section 154 includes an "outer limit of what constitutes promptness by imposing a one-year time limit within which an insurer *must act* to void a policy." (Emphasis added.) *Illinois State Bar Ass'n Mut. Insurance Co. v. Coregis Insurance Co.*, n.4, 355 Ill. App. 3d 156, 167 (2004); see also *American Service Insurance Co. v. United Auto. Insurance Co.*, 409 Ill. App. 3d 27, 36 (2011) (stating that one-year time period does not merely create a bar for when an insurance policy can no longer be rescinded, but also created a time period that satisfies "prompt" rescission).

¶ 26 The parties disagree as to what action was required by American Service that would

satisfy the requirement of prompt rescission. The issue, more specifically, is whether an insurer is required to file a declaratory judgment action in order to void a policy under section 154.

¶ 27 Citing *Coregis*, plaintiff asserts that American Service had no right to "simply send a letter to its insured that the policy is void *ab initio*" because a material misrepresentation, assuming it exists, merely rendered the policy voidable. According to plaintiff, it follows that American Service was required to file a "legal proceeding" or institute rescission "litigation" within the time limits imposed by section 154. Plaintiff argues that although American Service filed a counterclaim for a declaratory judgment, it failed to do so within the statutory time limit.

¶ 28 American Service, also citing *Coregis*, agrees that a material misrepresentation merely renders an insurance policy voidable, but notes that the *Coregis* court also explained that it "grant[s] an insurer the option to ratify the policy despite the misrepresentation if it so chooses, but also impos[es] a duty upon an insurer that chooses instead to void the policy to do so promptly, or risk waiving that right." *Id.* at 169. American Service argues that it chose to void the policy and did so promptly. American Service also contends that it was not required to file an action but, rather, the only steps necessary to rescind the policy were to notify plaintiff, return the policy premium, and not stray from that position.

¶ 29 Nothing in the plain language of section 154 requires that a court action be instituted by an insurer. None of the cases cited by plaintiff stand for the specific proposition that "promptly seeking rescission" is synonymous with "promptly filing a legal proceeding or a declaratory judgment action in court." We have found no case squarely addressing the issue of whether an insurer must first commence litigation in order to rescind an insurance policy based upon a

misrepresentation. Nonetheless, even assuming *arguendo* that American Service was required to file a court action seeking rescission, and failed to do so within the limitation period imposed by section 154, we believe American Service could nonetheless seek rescission in a counterclaim pursuant to section 13-207 of the Code of Civil Procedure. 735 ILCS 5/13-207. Section 13-207, known as the "saving" provision, provides:

> "Counterclaim or set-off. A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise."

See also *Barragan v. Casco Design Corp*., 216 Ill. 2d 435 (2005) (noting that counterclaim that was otherwise barred by a statue of limitations could proceed where the plaintiffs' underlying claim was timely). Thus, plaintiff was not entitled to judgment as a matter of law.

¶ 30 We feel compelled to note that the procedure that was followed by American Service in the instant case in which, although the insured disputed the insurer's decision that he made a material misrepresentation, he was forced to file a lawsuit, appears to run counter to the philosophy underlying section 154. American Service concedes that under section 154 the insurer has the burden of proving the intent or the materiality of an alleged misrepresentation on a policy. See *Hildebrand*, 118 Ill. App. 3d at 876.

¶ 31 In a different context, the Illinois Supreme Court has explained the responsibility of an insurer where there is a dispute over coverage, as follows:

> "Illinois law is well established that where an underlying complaint alleges

> facts within or potentially within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent. [Citation.] The insurer may not refuse to defend unless it is clear from the face of the underlying complaint[ ] that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage. [Citation.] The underlying complaint and the policy must be construed in favor of the insured, with all doubts resolved in the insured's favor. [Citation.] Moreover, *** where a complaint alleges facts potentially within the policy's coverage, an insurer taking the position that a claim is not covered cannot simply refuse to defend the suit. Rather, the insurer must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these actions, the estoppel doctrine applies." (Emphasis omitted) (Internal quotation marks omitted) *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 153 (1999).

See also *American Service Ins. Co. v. Franchini*, 396 Ill. App. 3d 413, 417 (2009) (noting that actions taken by insurer of defending insured under a reservation of rights and filing declaratory judgment action to determine coverage, despite evidence of a misrepresentation on the part of insured, were "precisely those endorsed by our supreme court in *Employers Insurance of Wausau* *** as those which a responsible insurance company should take").

¶ 32 American Service notes that an insured who disputes the insurer's unilateral declaration that a policy is void is free to file his own breach of contract suit, as plaintiff did in the instant

case. Plaintiff notes, however, that an insured whose insurer denies coverage on an automobile policy may not have the means to hire an attorney, pay the fees and institute an action. We believe that, where a dispute arises between an insurer and an insured over the existence of a misrepresentation, considering that the insurer bears the burden of proving a material misrepresentation, the better procedure would be for the insurance company to file a declaratory judgment action. Our Supreme Court has characterized section 154 as one "designed to relieve against the rigorous consequences of the common-law rules as to warranties and misrepresentations concerning insurance." See *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d at 464. The *Golden Rule* court also explained that "[s]uch statutes provide insureds with basic protections." *Id.*

¶ 33 As the law is currently written, however, despite the underlying philosophy of section 154, we hold that an insurer is not required to file a declaratory judgment action under these circumstances. We caution, though, that an insurer who instead opts for requiring the insured to file its own lawsuit runs the risk of subjecting itself to claims of bad faith or vexatious delay should a court later determine that the insurer failed to prove a material misrepresentation and that there was no *bona fide* dispute. *Id.* at 468 (noting that if there is a *bona fide* dispute about coverage, a delay in settling a claim may not violate section 155, which is the statute Illinois courts have regarded as the legislature's "remedy to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits").

¶ 34 *Trial Court Erred in Denying Plaintiff's Motion in Limine That Insurer Be Required to Establish Plaintiff's Material Misrepresentation*

¶ 35 The procedural posture of the instant case did not involve a declaratory judgment action

filed by an insurer. Instead, plaintiff was required to file a breach of contract suit to obtain coverage under his insurance policy. As noted earlier, the parties do not dispute that under section 154 of the Illinois Insurance Code the insurer has the burden of proving the intent or the materiality of a misrepresentation. *Hildebrand v. Franklin Life Ins. Co.*, 118 Ill. App. 3d at 876. Consistent with this burden of proof placed upon insurers, the trial court erred in requiring plaintiff to proceed first and prove his case-in-chief. Instead, the trial court should have granted plaintiff's motion *in limine* requesting that American Service first be required to satisfy its burden of proof on its counterclaim for rescission and prove that plaintiff made a material misrepresentation that allowed American Service to rescind the policy.

¶ 36 *Damages*

¶ 37 American Insurance has claimed on appeal that the only issue before this court is whether it was entitled to a directed finding and further contends that the directed finding was appropriate because plaintiff failed to show damages at trial. We shall address the issue because it may arise on remand. We agree with plaintiff that, even though he should not have been so obligated, he established a *prima facie* case and he proved damages.

¶ 38 The evidence showed that plaintiff purchased a new Pontiac Grand Am for $26,480 in June 2003 from a Chicago dealer. In addition to plaintiff's testimony, the bill of sale was in evidence and was also attached to plaintiff's complaint. It was undisputed that plaintiff's vehicle was declared a total loss seven months after the date of purchase. American Service contends, in effect, that plaintiff failed to establish a *prima facie* case because he failed to prove "a definitive value for the car" on the day it was destroyed. We disagree. Absolute certainty with respect to

the "amount" of damages is not required. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 307 (2005) (recognizing that damages are speculative only if their existence itself is uncertain, not if the amount is uncertain or yet to be fully determined); accord *Doornbos Heating and Air Conditioning, Inc. v. James D. Schlenker, M.D., S.C.*, 403 Ill. App. 3d 468, 485 (2010); *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008) (in proving breach of contract damages, a plaintiff is required to establish a reasonable basis for computing damages and absolute certainty is not required); *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 457 (1997) (a plaintiff need only present evidence that tends to show a basis with which to compute the damages with a fair degree of probability). In any event, now that plaintiff is entitled to enforce the parties' contract and its policy provisions, the value of the car can be determined accordingly.

¶ 39 In terms of damages, plaintiff was deprived of the use, enjoyment and possession of his vehicle. He was required to obtain use of another vehicle with a cosigner. Moreover, plaintiff produced evidence designed to show that he was entitled to additional economic damages and punitive damages including a replacement vehicle, attorney fees, costs and punitive damages for the delay in paying his claim. This evidence would have been sufficient to survive American Service's motion for a directed finding.

¶ 40 CONCLUSION

¶ 41 In view of the foregoing, we reverse the judgment of the circuit court of Cook County. We conclude that, pursuant to section 154 of the Illinois Insurance Code, the trial court erred in

requiring plaintiff to prove his breach of contract action, absent a threshold determination regarding American Service's right to rescind the automobile insurance policy. Moreover, the trial court erred in concluding he had not proved damages. We remand this matter for further proceedings consistent with this judgment.

¶ 42 Reversed and remanded.