2012 IL App (1st) 113473

SECOND DIVISION
August 28, 2012

No. 1-11-3473

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MYRNA CASAS,	)	Appeal from the
	)	Circuit Court of
Defendant-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CH 05919
	)	
AMERICAN SERVICE INSURANCE	)	
COMPANY,	)	The Honorable
	)	LeRoy K. Martin,
Plaintiff-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Quinn and Justice Connors concurred in the judgment.

ORDER

Held: We hold that summary judgment was not proper in this case because the record, viewed in the light most favorable to the nonmovant, shows there are genuine issues of material fact concerning the insurer's diligence in securing the cooperation of its insureds in the underlying suit and whether or not one of its insureds willfully refused to cooperate.

¶ 1 Plaintiff, American Service Insurance Company (ASI) filed a complaint for declaratory judgment against defendants Myrna Casas, Francisco Martinez-Sanchez, and Taxi Mex.[1] ASI issued an insurance policy (policy) to Taxi Mex to insure one of its vehicles. Casas made a claim against the policy and thereafter filed a personal injury action against Martinez-Sanchez and Taxi Mex seeking damages which arose from an automobile accident in which Martinez-Sanchez was driving the vehicle insured under the policy (underlying lawsuit). ASI, under a reservation of rights, defended Martinez-Sanchez and Taxi Mex in the underlying lawsuit, which was tried in February of 2010, and resulted in a verdict in Casas's favor. ASI stipulated to Martinez-Sanchez's and Taxi Mex's negligence, and only contested damages in the underlying lawsuit.

¶ 2 In this case, which was filed in February of 2010,[2] ASI alleged that Martinez-Sanchez and Taxi Mex breached a cooperation clause of the policy which caused it to suffer prejudice. In its complaint, ASI sought a finding that Martinez-Sanchez and Taxi Mex were in breach of contract, that it had no duty under the policy to defend or indemnify Martinez-Sanchez or Tax Mex in the underlying suit, and that Casas was entitled to no monies under the policy.

¶ 3 ASI subsequently filed a motion for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010) (Code)), which the circuit court granted. The circuit court found that Martinez-Sanchez and Taxi Mex breached the cooperation clause of the policy, ASI had no duty to defend or indemnify Taxi Mex or Martinez-

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[1] Defendants Martinez-Sanchez and Taxi-Mex are not parties in this appeal.

[2] It is unclear from the record if ASI filed its declaratory judgment action after the underlying lawsuit was tried.

Sanchez in the underlying suit, and Casas was entitled to no monies under the policy.

¶ 4 At issue is whether the circuit court properly entered summary judgment in ASI's favor. We hold that summary judgment was not proper in this case because our review of the record, viewed in the light most favorable to Casas, the nonmovant, shows there are genuine issues of material fact concerning ASI's diligence in securing both Martinez-Sanchez's and Taxi Mex's cooperation in the underlying suit and whether or not Martinez-Sanchez and Taxi Mex willfully refused to cooperate.

¶ 5 JURISDICTION

¶ 6 On October 31, 2011, the circuit court granted ASI's motion for summary judgment. On November 29, 2011, Casas timely filed her notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 7 BACKGROUND

¶ 8 On February 11, 2010, ASI filed a complaint for declaratory judgment against Martinez-Sanchez, Taxi Mex, and Casas. ASI alleged it issued policy number C2 CM901225-01 to Taxi Mex. A 1996 Crown Victoria automobile, vin number 2FALP71W7XTX147609, was an insured vehicle under the policy. The policy contained the following cooperation clause:

> "**10. Insured's Duties in the Event of Accident, Claim or Suit**
>
> * * *
>
> (d) The **Insured** shall cooperate with the company and

upon the company's request, assist in making settlements, in the conduct of **suits** and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **insured** because of injury or damage with respect to which insurance is afforded under this policy, and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The **insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of **accident**.

11. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the **insured's** obligation to pay shall have been finally determined either by judgment against the **insured** after actual trial or by written agreement of the **insured**, the claimant and the company."

(Emphasis in original).

¶ 9 ASI alleged that on January 28, 2006, Martinez-Sanchez was operating the insured vehicle when an accident occurred with Casas. Casas filed the underlying lawsuit against Martinez-Sanchez and Taxi Mex in the circuit court of Cook County in case number 07 L 009736 seeking damages for personal injuries she sustained. ASI hired the law firm of Andreou & Casson (appointed counsel) to represent Martinez-Sanchez and Taxi Mex in the underlying lawsuit. ASI alleged that Martinez-Sanchez and Taxi Mex refused to assist and cooperate in the underlying lawsuit, which caused it substantial prejudice. Specifically, ASI alleged that it was not able to determine whether or not there was coverage under the policy or "to determine the nature and extent of the accident, liability, and injuries as alleged by Casas for her claim and lawsuit." Due to Martinez-Sanchez's and Taxi Mex's alleged lack of cooperation and breach of contract, ASI alleged that it owed no duty to defend either Martinez-Sanchez or Taxi Mex in the underlying lawsuit, and that Casas was not entitled to any monies under the policy. Notwithstanding, appointed counsel represented Martinez-Sanchez and Taxi Mex in the underlying lawsuit stipulating to negligence and contesting damages.

¶ 10 Casas answered the complaint denying that the insureds breached the cooperation clause, and requested that the court find ASI was obligated to defend and indemnify Martinez-Sanchez and Taxi Mex in connection with the underlying lawsuit.

¶ 11 On July 28, 2010, ASI filed a motion for default against Taxi Mex, which the circuit court granted on August 10, 2010. On November 17, 2010, ASI filed a motion for default against Martinez-Sanchez, which the circuit court granted on December 15, 2010.

¶ 12 On July 22, 2011, ASI filed a motion for summary judgment against Martinez-Sanchez, Taxi Mex, and Casas pursuant to section 2-1005 of the Code. 735 ILCS 5/2-1005 (West 2010). In its motion, ASI referenced its complaint for declaratory judgment, which it attached to the motion, where it sought a judicial declaration that it owed no duty to indemnify or defend Taxi Mex or Martinez-Sanchez in the underlying lawsuit and that Casas was not entitled to any monies under the policy in the underlying lawsuit. Initially, ASI argued that it is entitled to summary judgment against both Taxi Mex and Martinez-Sanchez because both Taxi Mex and Martinez-Sanchez had orders of default entered against them in this case. ASI attached to its motion both orders of default.

¶ 13 As to Casas, ASI argued that it owed no duty to defend or indemnify Taxi Mex or Martinez-Sanchez in the underlying lawsuit because of both Taxi Mex's and Martinez-Sanchez's breach of the cooperation provision in the policy. ASI asserted that Taxi Mex and Martinez-Sanchez had a contractual duty to cooperate in the defense of the underlying lawsuit, which they failed to do. ASI stated that Taxi Mex and Martinez-Sanchez failed to communicate with ASI and appointed counsel, and they failed to appear at a mandatory arbitration, "which directly result[ed] in an award being entered in Casas's favor." ASI further argued that as "a direct result" of Taxi-Mex's and Martinez-Sanchez's failure to cooperate, appointed counsel could not introduce testimony from Taxi Mex and Martinez-Sanchez, could not cross-examine Casas with evidence from Taxi Mex and Martinez-Sanchez, and "could not adequately and properly defend" the underlying lawsuit.

¶ 14 As to Martinez-Sanchez, ASI argued that it, and appointed counsel, attempted to gain his

cooperation through "multiple letters and telephone calls." Both ASI and appointed counsel hired investigators "in an attempt to find good addresses for" Martinez-Sanchez. As evidence of Taxi Mex's and Martinez-Sanchez's failure to cooperate, ASI attached exhibits to its motion detailing its attempts to communicate with both Taxi Mex and Martinez-Sanchez during the underlying lawsuit. Correspondence addressed to Martinez-Sanchez was sent to five different addresses. However, all except one of those letters was addressed to Martinez-Sanchez at 82 Hamilton, Bensenville, Illinois, 60106 (Bensenville address). Delivery to Martinez-Sanchez at the Bensenville address was not successful as the items were returned "moved left no address" or similar. On January 20, 2010, prior to the February 2010 trial in the underlying lawsuit, ASI sent an identical letter to Martinez-Sanchez to five different addresses, one of which was the Bensenville address. Attempts to reach him by phone were unsuccessful as they were disconnected numbers or places where he was no longer employed. ASI employed private investigators to locate him, but were unable to do so.

¶ 15 As to Taxi Mex, ASI or appointed counsel sent correspondence to seven different addresses for Taxi Mex. On May 7, 2009, according to an affidavit ASI attached to its motion from one of its employees, Jerry Zboinski (Zboinski affidavit), appointed counsel "called 630-540-1640 and spoke with Jose Cambria, who identified himself as the new president of Taxi Mex and promised to assist [appointed counsel], including locating *** Martinez-Sanchez; Cambria provided a telephone number for Martinez-Sanchez as 773-306-5481."

¶ 16 On June 23, 2009, according to the Zboinski affidavit, appointed counsel "called 630-540-1640 and spoke with Jose Cambria regarding Defendant's answers to interrogatories that had

been sent to him twice but had not been signed and returned."

¶ 17 On September 10, 2009, appointed counsel requested that Stern and Associates, an investigator, serve a reservation of rights letter on Taxi Mex. This was evidenced in ASI's exhibits by a letter sent from appointed counsel to Stern and Associates. The letter to Stern and Associates stated that it believed the most current address of Taxi Mex was 27 W 415 Dearborn Avenue, Hanover Park, Illinois, 60133. The letter stated that the new president and contact person for Taxi Mex was Jose Cambria. The letter also listed a phone number for Jose Cambria.

¶ 18 ASI attached to its motion two affidavits from Stern and Associates regarding their attempts to serve Taxi Mex with the reservation of rights letter. The first affidavit stated that Stern and Associates were unable to serve Taxi Mex at 27 W415 Devon Avenue, Hanover Park, Illinois, 60133.[3] The affidavit listed five attempts at service between September 19, 2009 to September 25, 2009. The affiant attested on the final attempt, " I spoke with president Jose Cambria via phone and he agreed to meet me at a parking lot at 917 Irving Park Road, Hanover Park, Illinois. Service will be attempted at this address." The second affidavit ASI attached showed that Taxi Mex was served on September 27, 2009, in a parking lot at 917 Irving Park Road, in Hanover Park, Illinois.

¶ 19 On December 10, 2009, appointed counsel sent a letter titled "TRIAL NOTICE!!!!" to Taxi Mex at 27 W 415 Dearborn Avenue, Hanover Park, Illinois, 60133. The letter stated that

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[3] We note that the September 10, 2009, letter appointed counsel sent to Stern and Associates listed Taxi Mex's "most current address" as 27 W 415 Dearborn Avenue in Hanover Park, Illinois. It is not explained in the record why Stern and Associates attempted to personally serve Taxi Mex at 27 W 425 Devon Avenue in Hanover Park, Illinois.

the underlying lawsuit was set for trial on February 17, 2010.

¶ 20 In addition to requesting that the circuit court enter an order of summary judgment against Taxi Mex, Martinez-Sanchez, and Casas, ASI requested that the court make the following findings as a matter of law: that Taxi Mex and Martinez-Sanchez breached the terms and conditions precedent to coverage under the policy; that ASI owed no duty to defend or indemnify Taxi Mex and Martinez-Sanchez in the underlying lawsuit; and that Casas was entitled to no monies under the policy in the underlying lawsuit.

¶ 21 In response, Casas argued that ASI was not diligent in its attempt to have Taxi Mex and Martinez-Sanchez appear at trial. Casas pointed out that ASI continued to send correspondence to Martinez-Sanchez even though it knew the address was not proper. Casas also argued that ASI only sent correspondence by regular U.S. mail, as opposed to certified mail. Casas maintained that ASI's hiring of an investigator was only to obtain addresses, not to locate the actual whereabouts of Taxi Mex and Martinez-Sanchez. Additionally, Casas argued that ASI did not establish that Taxi Mex's and Martinez-Sanchez's failure to appear at trail was due to an intentional failure to cooperate. As to Martinez-Sanchez, Casas pointed to ASI's continued correspondence to an address that it knew was condemned. As to Taxi Mex, Casas maintained that the evidence shows that at some point Taxi Mex did cooperate with ASI. Casas stated that ASI "offered evidence as to its minimal efforts to contact its insured, but it has offered no evidence that the failure of its insureds' to attend trial was an intentional refusal to cooperate." Finally, Casas argued that ASI did not show that it was harmed by Taxi Mex's and Martinez-Sanchez's alleged failure to cooperate. As evidence of a lack of prejudice, Casas argued

appointed counsel admitted liability on behalf of its insureds at trial. As exhibits to her response, Casas attached the deposition testimony of ASI employee Jerry Zboinski and the deposition testimony of Kevin Lahey, an attorney for appointed counsel. We will discuss both depositions in the following paragraphs.

¶ 22 Zboinski, an employee of ASI, testified that he "handled" the case for ASI. Zboinski's job title at the time of the case was either litigation adjuster or senior litigation adjuster; he could not recall his exact title. When asked whether he had any independent recollection of the case, he answered "[o]nly thing I remember is we could not get either of these parties to cooperate in an investigation." During the deposition, after looking at his notes on the matter, Zboinski could not recall where he found the Bensenville address for Martinez-Sanchez. He testified that he did not send correspondence to Martinez-Sanchez by certified mail nor did he have a personal process server deliver it in person. Zboinski could not recall if he talked to anyone from Taxi Mex regarding this case. He believed that appointed counsel did manage to speak with Taxi Mex "on several occasions." He also testified that if a letter is undeliverable, it will be returned to them. When asked whether there was a time when Taxi Mex did cooperate with appointed counsel, Zboinski testified, after looking at his notes, that it appeared that Taxi Mex did cooperate in May of 2009. Martinez-Sanchez, however, never cooperated. Zboinski's notes indicated, however, that Taxi Mex was not cooperating by July 1, 2009. He could not recall what actions Taxi Mex did to not cooperate. When asked about physically investigating for Martinez-Sanchez, the following exchange occurred:

Q. Now, you on behalf of [ASI] never sent a private

investigator out to locate [Martinez-Sanchez]; is that correct?

A. I don't know how you mean by -

Q. Not outside - - not when defense counsel did it, I meant internally at [ASI]. Did they ever have somebody physically go out and try to locate [Martinez-Sanchez]?

A. You mean go to the various addresses?

Q. Yeah, go to the addresses.

A. I don't believe that was the case.

Q. And the same would have been true for Taxi Mex; is that correct?

A. As far as our investigator. But I do believe defense counsel has given authority to somebody [to] personally go out and deliver the documents to Taxi Mex.

Q. Do you know if they were successful on that delivery?

A. I believe they were, but I'm not positive."

¶ 23 Kevin Lahey, an attorney for appointed counsel, testified during his deposition that he was the trial attorney in the matter. Lahey testified that neither Taxi Mex nor Martinez-Sanchez appeared at trial. Lahey also testified that they sent out letters to Taxi Mex and Martinez-Sanchez by regular U.S. mail. Additionally, Lahey stated that the investigator that his firm hired, E.F. Rice Company, was not successful in locating Martinez-Sanchez. Lahey testified further, "I know that I made attempts to contact Mr. Martinez-Sanchez at all the numbers and addresses that

were given to us by either the insurance company or as a result of skip traces." He believed that in addition to himself, another associate, a partner, and a clerk at his firm made some attempts to telephone Martinez-Sanchez. When asked whether his firm was ever able to make contact with Taxi Mex, Lahey testified:

> "What I recall is this. I know that at some point somebody from Taxi Mex did contact our office and I remember that the person's name was Jose and that Jose had informed us that he is the new owner of Taxi Mex and was not the owner of Taxi Mex at the time of this accident.
>
> I remember this because I remember as we were getting ready to decide whether or not to just stipulate to negligence and challenge the case on damages only that this was a conversation that we had both at the firm and with the insurance company.
>
> I don't know Jose's last name. I'm positive that it's on the contact sheet. I just can't recall it off the top of my head. But I know that Jose was a new or recent owner, either the principle owner, sole owner, or shareholder in Taxi Mex and he eventually did contact us. I remember him saying I don't know who Francisco Martinez-Sanchez is. Francisco Martinez-Sanchez was not around by the time I got involved with this company and that Jose didn't know anything about this accident or this lawsuit until we finally

> got his attention probably through numerous phone calls and letters telling him he needs to contact us."

¶ 24 Lahey testified that eventually his firm decided to stipulate to negligence in the underlying lawsuit. When asked whether he had spoken with ASI prior to stipulating to negligence, he stated that "I know that it was done and I know that we spoke with them prior to the case being assigned out for trial because I'm certain that there were numerous motions to compel discovery or to compel depositions that we were not able to satisfy those orders because we didn't have an insured." He testified further that "at some point it became either necessary for us to stipulate because a court order was violated or that a decision was made just to stipulate as to ***negligence only and to proceed on the issue of damages only in this case." This was done before the case was actually tried. He did not believe anyone spoke with Martinez-Sanchez prior to making the decision to stipulate to negligence. He was also not sure whether the stipulation applied to Taxi Mex and Martinez-Sanchez individually or to both of them. He did know "that in no way, shape or form was negligence questioned at the time of trial."

¶ 25 Lahey also recalled that during the search for Martinez-Sanchez, he become aware that Martinez-Sanchez was out of the country. Lahey could not recall whether his firm continued to search for Martinez-Sanchez in Mexico, but testified that "[w]e represent a lot of taxicab companies ***and a lot of the drivers are from Mexico or a lot of the drivers do spend time in Mexico. And I can recall at least one case where we located a driver in Mexico and actually flew him up for an evidence deposition to preserve his testimony. So it would not be unheard of or uncommon for us to keep looking for somebody even though they crossed the border." When

asked why his firm still sent letters to Martinez-Sanchez's address in Bensenville, even though they knew that the city of Chicago had taken over the property, he answered that typically there is a "forwarding address or forwarding procedure." As they did not have a better address for Martinez-Sanchez, he testified it was their "only option" to send it to the address in Bensenville in the hopes that it would be forwarded "and would somehow some way get this letter to Mr. Martinez-Sanchez."

¶ 26 When asked whether his firm ever used a process server to personally serve deposition notice letters, he answered "[s]ometimes, we do." Lahey testified further that "[i]f it's somebody that is where the address says that they should be and is clearly avoiding our mail or purposefully not returning our calls, sometimes we will send somebody out and grab them and tell them you need to come with me for your deposition or just explain to them in person. Often times with individuals where English may not be their first language we do send somebody who can communicate with them." He did not think that his firm sent someone out to speak with Martinez-Sanchez because his address no longer existed and they had information that he was gone. Lahey testified that if an envelope is not returned to them, it is implied that the letter was delivered as addressed.

¶ 27 On October 31, 2011, the circuit court granted ASI's motion for summary judgment. In addition to granting ASI's motion for summary judgment, the circuit court made the following findings: Taxi Mex and Martinez-Sanchez breached the terms and conditions precedent to coverage; ASI had no duty to defend or indemnify Taxi Mex or Martinez-Sanchez in the underlying lawsuit; and that Casas was entitled to no monies under the policy. On November 29,

2011, Casas timely appealed.

¶ 28 ANALYSIS

¶ 29 Before this court, Casas argues that ASI did not exercise a reasonable degree of diligence in seeking the participation of either Martinez-Sanchez or Taxi Mex. Casas points to several facts in the record of ASI's failure to diligently contact either Martinez-Sanchez, Taxi Mex, or both. These include: ASI's continued mailings that it knew were undeliverable; that ASI did not follow up on several leads that could have lead to contact; and that ASI used only regular mail as opposed to certified mail or special process server. Casas argues further that ASI has not proved, as a matter of law, that either Martinez-Sanchez or Taxi Mex willfully refused to cooperate. Additionally, Casas maintains that ASI was not substantially prejudiced.

¶ 30 In response, ASI argues that it did diligently attempt to gain both Taxi Mex and Martinez-Sanchez's cooperation in the underlying lawsuit. As evidence of such, ASI points to the multiple mailings and phone calls it made to both Taxi Mex and Martinez-Sanchez, as shown in its exhibits to its motion for summary judgment. ASI argues that it was prejudiced by their alleged failure to cooperate because, during the underlying lawsuit, it could not introduce testimony from Martinez-Sanchez or Taxi Mex. Further, possible evidence from Taxi Mex and Martinez-Sanchez was not available to aid in cross-examination, and generally ASI could not adequately prepare for the underlying lawsuit without Martinez-Sanchez's or Taxi Mex's cooperation.

¶ 31 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West

2010). Although summary judgment is encouraged to expedite the disposition of lawsuits, "it is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt." *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986); see also *In re Estate of Hoover*, 155 Ill. 2d 402, 410 (1993) ("Summary judgment is, therefore, proper only when the resolution of a case hinges on a question of law and the moving party's right to judgment is clear and free from doubt."). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Admissions, affidavits, depositions, and pleadings will be construed strictly against the movant and liberally in favor of the nonmovant when determining whether a genuine issue as to any material fact does exist. *Bagent v. Blessing Care Corporation*, 224 Ill. 2d 154, 162 (2007). "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id.* at 162-63. We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 32 The terms of an insurance policy control and define the scope of the duties imposed upon an insurance provider and its insured. *Waste Management, Inc., v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 191 (1991). The general rules that apply to contract interpretation also apply to the interpretation of an insurance policy because an insurance policy is a contract. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). In construing an insurance policy, "it is our duty to ascertain and give effect to the intent of the parties and the best

indicator of the parties' intent is the language used in the agreement." *Benedict v. Federal Kemper Life Assurance Co.*, 325 Ill. App. 3d 820, 824 (2001). Unambiguous terms in an insurance policy will be interpreted by their plain and ordinary meaning. *Id*.

¶ 33 The purpose of a cooperation clause "is to prevent collusion between the insured and the injured, as well as to make possible the insurer's investigation." *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 496 (1977). The insurer has the burden of proving that a breach of a cooperation clause occurred. *Id.* To prove that an insured breached a cooperation clause, "the insurer must show that it exercised a reasonable degree of diligence in seeking the insured's participation and that the insured's absence was due to a refusal to cooperate." *Founders Insurance Co. v. Shaikh*, 405 Ill. App. 3d 367, 374 (2010). The insurer must establish this by the preponderance of the evidence. *Lappo v. Thompson*, 87 Ill. App. 3d 253, 254 (1980); *Wallace v. Woolfolk*, 312 Ill. App. 3d 1178, 1180 (2000). An insured's "refusal to cooperate must be wilful." *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, ¶27. The facts of the particular case must be examined in order to make these determinations. *Founders Insurance Co.*, 405 Ill. App. 3d at 374. We will look at both what an insurer did do to have an insured cooperate and what an insurer did not do. *Lappo*, 87 Ill. App. 3d at 254; *Wallace*, 312 Ill. App. 3d at 1180.

¶ 34 In addition to showing that the insured breached the cooperation clause, the insurer must show that due to the breach, it suffered substantial prejudice in defending the underlying action. *M.F.A. Mutual Insurance Co.*, 66 Ill. 2d at 499-500. Prejudice is not presumed, and the insurer must "demonstrate that it was actually hampered in its defense by the violation of the cooperation

clause." *Id.* at 500; see also *Founders Insurance Co.*, 405 Ill. App. 3d at 375 ("Therefore, as a matter of public policy, an insurer will not be relieved of its contractual responsibilities unless it proves it was substantially prejudiced by the insured's actions or conduct in regard to its investigation or presentation or defense of the case.").

¶ 35 In this case, we hold that the circuit court erred in granting ASI's motion for summary judgment because the evidence presented shows there are genuine issues of material fact. After our review of the evidence presented in the light most favorable to Casas, the nonmovant, we cannot say that ASI is entitled to summary judgment. *Bagent*, 224 Ill. 2d at 162. In order to prevail at this stage in the proceedings, ASI's right to judgment had to be "clear and free from doubt." *In re Hoover*, 155 Ill. 2d at 410. ASI has not shown this to be the case. Specifically, Casas has raised several genuine issues of material fact regarding ASI's diligence in attempting to secure Taxi Mex's and Martinez-Sanchez's cooperation in the underlying suit. Additionally, ASI has not shown that either Martinez-Sanchez's or Taxi Mex's alleged failure to cooperate was wilful. We will discuss the genuine issues of material fact as they pertain to both Taxi Mex and Martinez-Sanchez in the following paragraphs.

¶ 36 Martinez-Sanchez

¶ 37 Casas has shown that Martinez-Sanchez did not willfully refuse to cooperate as there are genuine issues of material fact regarding ASI's diligence in attempting to secure Martinez-Sanchez's cooperation in the underlying lawsuit. Initially, ASI never served notice on Martinez-Sanchez requesting his cooperation. ASI cannot show that they diligently attempted to secure Martinez-Sanchez's cooperation due to the fact that, despite knowing that he could not be found

at the Bensenville address, ASI and appointed counsel continued to send correspondence to that failed address. The record shows ASI knew the Bensenville address was not a proper address as of December 5, 2007, when the investigator from E.F. Rice Company informed appointed counsel that the house at the Bensenville address was vacant and owned by the city of Chicago to be used for the expansion of O'Hare airport. ASI knew the Bensenville address was not a proper address as early as November of 2007 when the two letters it sent to Martinez-Sanchez on November 5, 2007, at that address were returned. Despite this knowledge, appointed counsel continued to send correspondence to Martinez-Sanchez at the Bensenville address. On June 6, 2008; August 20, 2008; and December 10, 2009;[4] appointed counsel sent correspondence addressed only to the Bensenville address. On January 20, 2010, ASI sent correspondence to Martinez-Sanchez to the Bensenville address, but also sent an identical letter to addresses in: Wood Dale, Illinois; Addison, Illinois; Midlothian, Illinois; and Van Nuys, California. According to the exhibits ASI attached to its motion for summary judgment, nearly all of its correspondence to Martinez-Sanchez was sent to an address it knew was not a proper address for Martinez-Sanchez. The only correspondence with Martinez-Sanchez that was not sent solely to the Bensenville address was sent right before the trial in the underlying lawsuit: *i.e.* the January 20, 2010, letter ASI sent to him at five addresses. Every other correspondence, as shown in its exhibits, was addressed only to the undeliverable Bensenville address.

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[4] Appointed counsel additionally sent correspondence to Martinez-Sanchez at the Bensenville address on November 6, 2007. However, as this was only one day after ASI sent its initial two letters on November 5, 2007, we assume ASI and appointed counsel were still unaware that mail sent to the Bensenville address was undeliverable.

¶ 38 Further, the record also shows that ASI failed to investigate several leads that reasonably could have led to finding Martinez-Sanchez. On December 5, 2007, the investigator from E.F. Rice Company informed appointed counsel that a "Guadeloupe Sandoval" previously occupied the house at the Bensenville address. The investigator found an address for Sandoval in Mount Prospect, Illinois. However, ASI never investigated this lead. Besides calling a disconnected phone number, there is no evidence of any investigation as to Sandoval at the Mount Prospect address in order to inquire about Martinez-Sanchez.

¶ 39 On January 14, 2008, an ASI investigator, Nicholas Hamilton, learned that Martinez-Sanchez had been in prison and may have been deported. However, the record is absent of any efforts on ASI's behalf to confirm that Martinez-Sanchez was in fact deported. Kevin Lahey, appointed counsel in the underlying lawsuit, during his deposition even testified that "it would not be unheard of or uncommon for us to keep looking for somebody even though they crossed the border." No explanation was offered for why ASI did not do so in this case.

¶ 40 Also on January 14, 2008, Hamilton listed three address where Martinez-Sanchez could be if he was in fact, still in the United States. However, ASI failed to send any correspondence to these three addresses until right before trial, on January 20, 2010. Even then, ASI only sent the January 20, 2010, letter. The record contains no other letters sent to these additional addresses. Despite the three new addresses for Martinez-Sanchez, appointed counsel continued to send correspondence to the undeliverable Bensenville address during the time period between January 14, 2008, and January 20, 2010. The record is also devoid of any efforts by ASI to confirm that either of the three addresses were correct. Further, there was evidence that Martinez-Sanchez's

possible wife, "Cristina (formerly Lopez)," had a phone number listed in connection with an address in Wood Dale, Illinois. Absent from the record is any follow up regarding this lead. With the exception of the Bensenville address, it does not appear that ASI ever sent an investigator to personally examine the possible addresses for Martinez-Sanchez. According to both Jerry Zboinski of ASI and Kevin Lahey of appointed counsel, a special process server was not sent to investigate the possible addresses in person.

¶ 41 ASI failed to show that it acted diligently in securing Martinez-Sanchez's cooperation at trial. The record shows it sent multiple correspondence to an address it knew was not valid and it failed to follow up on several leads. Casas, on the other hand, showed in her response to ASI's motion for summary judgment and before this court, that there are genuine issues of material fact regarding ASI's diligence in attempting to secure the cooperation of Martinez-Sanchez. Due to these genuine issues of material fact, ASI cannot show that Martinez-Sanchez willfully refused to cooperate in the underlying lawsuit. Accordingly, ASI is not entitled to judgment as a matter of law and the circuit court erred in granting ASI's motion for summary judgment as to Martinez-Sanchez.

¶ 42 Taxi Mex

¶ 43 Casas has also shown that there are genuine issues of material fact regarding both whether Taxi Mex willfully refused to cooperate and whether ASI diligently sought Taxi Mex's cooperation in the underlying suit. Despite having a process server personally serve an owner of Taxi Mex, and evidence in the record of several phone conversations with various employees of Taxi Mex, ASI has not shown in the record before this court that any of the addresses they sent

correspondence to were correct. At no point did ASI show that an agent of Taxi Mex correctly identified a good address for service of documents related to the underlying lawsuit. Instead, the record shows that ASI and appointed counsel continued to send correspondence to several different addresses. The record does not disclose that ASI ever asked a Taxi Mex agent or owner what was its correct address for correspondence, despite the fact that contacts were made with both a possible owner of Taxi Mex and several of its employees. As with Martinez-Sanchez above, ASI found several addresses for Taxi Mex, but the record does not disclose that ASI did any further investigation to confirm the veracity of those addresses. Rather, ASI continued to send correspondence to several addresses repeatedly proven to be unproductive.

¶ 44 Further, on May 7, 2009, appointed counsel actually spoke to the "new president" of Taxi Mex, Jose Cambria, who according to the Zboinski affidavit, "promised to assist." Zboinski testified during his deposition that Taxi Mex did cooperate with appointed counsel, but it appeared that Taxi Mex stopped cooperating as of May of 2009. What is absent from the record is the factual basis upon which Zboinski concluded Cambria stopped cooperating. Although numerous correspondence was sent to several different addresses for Taxi Mex, it is unclear whether Taxi Mex stopped cooperating or whether ASI sent correspondence to the wrong address. Accordingly, viewing the evidence in the light most favorable to Casas, the nonmovant, we cannot say ASI has proven it diligently sought Taxi Mex's cooperation or that Taxi Mex willfully refused to cooperate.

¶ 45 Casas has shown there are genuine issues of material fact concerning ASI's diligence in securing Taxi Mex's cooperation and whether Taxi Mex ever willfully refused to cooperate.

Accordingly, the circuit court erred in granting summary judgment as to Taxi Mex.

¶ 46 Overall, our review of the record, in the light most favorable to Casas, the nonmovant, shows there are genuine issues of material fact concerning ASI's diligence in securing both Martinez-Sanchez's and Taxi Mex's cooperation and whether Martinez-Sanchez and Taxi Mex willfully refused to cooperate. Accordingly, we hold the circuit court erred in granting summary judgment in ASI's favor and finding that, as a matter of law, Taxi Mex and Martinez-Sanchez breached the terms and conditions precedent to coverage; that ASI had no duty to defend or indemnify Taxi Mex or Martinez-Sanchez in the underlying lawsuit; and that Casas was entitled to no monies under the policy. Therefore, we reverse the judgment of the circuit court and remand the matter for further proceedings consistent with this order.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court is reversed, and the cause is remanded.

¶ 49 Reversed and remanded.