

No. 1-15-0941

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAIRY DYNAMICS, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 L 9428
)	
HANOVER INSURANCE COMPANY,)	Honorable
)	Sanjay T. Taylor,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirmed the circuit court's grant of summary judgment in favor of insurer where insured had not agreed to the renewal of the policy; the nonrenewal was confirmed by the agent of the insured; and no question of fact existed as to the agent's relationship to the insured.

¶ 2 Defendant-appellee, Hanover Insurance Company (Hanover) issued, as a renewal, a commercial lines policy (policy number 4009940-03) to plaintiff-appellant, Dairy Dynamics, LLC (Dairy), for a term of one year: February 6, 2012 to February 6, 2013 (the 2012/2013 policy). According to Dairy, Hanover automatically renewed that policy for an additional one-year term: February 6, 2013 to February 6, 2014 (policy number 4009940-04). On June 3, 2013,

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Dairy suffered a loss by theft. Hanover denied the claim for coverage of the loss and Dairy brought a breach of contract claim. The parties filed cross-motions for summary judgment. The circuit court denied Dairy's motion, but granted Hanover's motion for summary judgment. We affirm.

¶ 3 On August 21, 2015, Dairy filed suit against Hanover and, as set forth in its second amended complaint, Dairy raised a breach of contract claim. Dairy alleged that it was covered by a commercial lines policy of insurance issued by Hanover with an effective term of February 6, 2013 to February 6, 2014 (policy number 4009940-04) (the renewal policy). Dairy contended that the 2012/2013 policy had been "automatically renewed" for that time period, but Hanover cancelled the renewal policy without providing Dairy notice in violation of the policy terms. Hanover denied Dairy's claim for the June 3, 2013, theft of its "utility 4000 DX trailer and inventory contained therein" on the ground that the renewal policy had been cancelled.

¶ 4 In its original complaint, Dairy had alleged, "under information and belief," that the 2012/2013 policy had been renewed and attached only the 2012/2013 policy. Dairy attached the renewal policy to the second amended complaint which, apparently, had been produced during discovery.

¶ 5 Hanover answered the second-amended complaint and denied Dairy's allegations that the 2012/2013 policy had been renewed, and that Dairy had coverage on June 3, 2013, the day of the loss. Hanover also pled affirmative defenses. As one of its affirmative defenses, Hanover asserted that Dairy, by its agent Art Latter of Bradish Associates, Ltd. (Bradish), requested that the renewal policy be cancelled effective to its inception date, February 6, 2013, as Dairy had chosen not to renew the 2012/2013 policy.

¶ 6 On October 24, 2014, Dairy filed a motion seeking summary judgment and argued, in part, that Hanover, through its agent Mr. Latter, improperly cancelled the renewal policy. In support of its position that Mr. Latter and Bradish, at the relevant times, were acting on behalf of Hanover only, Dairy submitted a contract between Bradish and Hanover which allowed Bradish to act as an agent for Hanover for certain policies of insurance listed in the contract; the list did include commercial line policies. Dairy submitted the affidavit of H.J. (Jim) Sewell, president of Dairy, in support of its motion for summary judgment. Mr. Sewell averred, in part, that he reported the theft of the trailer within three to seven days of June 3, 2013 to "Art Latter, Hanover Insurance Company's agent."

¶ 7 Hanover filed both a response to Dairy's motion for summary judgment, and a cross-motion for summary judgment. Hanover argued that Mr. Latter, as Dairy's broker, had informed Hanover that the 2012/2013 policy (which was effective until February 6, 2013), should not be renewed and "Hanover honored that." Thus, there was no policy in effect on the date of the alleged theft: June 3, 2013. Hanover submitted the transcript of the deposition of Mr. Latter, the exhibits from that deposition, and the affidavit of Kirsten Swanson of Hanover in support of its cross-motion.

¶ 8 In his deposition, Mr. Latter testified that he is a producer or sales person and customer service representative with Bradish. In 2012 and 2013, Bradish had direct contracts with a number of different carriers to write insurance, including Hanover and its affiliates. Additionally, Bradish procured types of insurance which were not available through its direct insurance carriers from excess or surplus brokers. Mr. Latter testified that Bradish did not act as an agent of Hanover as to the transactions at issue.

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¶ 9 Mr. Latter explained that he first started doing business with Dairy after being contacted by HK&T Insurance, an insurance firm representing Consumer Specialty Insurance (Consumer) which did not sell insurance directly to a purchaser. As a result, Mr. Latter and Bradish represented Dairy in obtaining a Consumer liability policy. In late 2011, however, the Consumer liability policy was not renewed by Bradish when Dairy did not respond to Mr. Latter's requests about renewing it.

¶ 10 After Mr. Latter obtained the Consumer policy for Dairy, Dairy asked Mr. Latter to procure coverage for its property. Mr. Latter and Bradish worked through an agent, Colemont, now known as AmWINS to place Dairy's property coverage with Hanover. Mr. Latter testified that Bradish could not have obtained this particular coverage through its direct contract with Hanover, but the coverage was available through AmWINS. The record includes a January 13, 2009, proposal from Hanover to Colemont for coverage of Dairy's property which would begin in February 2009. Hanover later issued Dairy a policy (number 4009940) effective February 6, 2009, through February 6, 2010. Mr. Latter testified that he and Bradish were representing Dairy at all times in their dealings with AmWINS to obtain the property coverage with Hanover.

¶ 11 Mr. Latter explained that the Hanover property policy issued to Dairy was an "agency bill" policy, which meant that AmWINS billed the premiums to Bradish as the agent for Dairy. Bradish would then send an invoice for the premium payment to Dairy. After Dairy made the premium payment to Bradish, Bradish would pay AmWINS. Mr. Latter identified exhibit 2 as an invoice from Bradish to Dairy as to the premium payment for renewing the property insurance for 2011/2012 and the corresponding invoice for the renewal premium from AmWINS to Bradish.

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¶ 12 Mr. Latter testified that an agency bill policy does not automatically renew as the renewal premium must be billed to the insured's agent. The insurer renews an agency bill type of policy only when directed to do so by the insurer's agent.

¶ 13 In his deposition, Mr. Latter explained the renewal process for Dairy's agency bill property policy. First, AmWINS provided Bradish with a premium quote for the renewal of the existing policy and inquired whether there would be any changes in coverage. Mr. Latter then corresponded by email or voicemail with Jim Sewell and inquired whether Dairy wished to renew the policy with the same or different coverage. In response to the inquiry, Mr. Sewell indicated to Mr. Latter whether the policy should be renewed and, whether or not the coverage should remain the same. If Dairy requested a renewal with a change in coverage, Mr. Latter asked AmWINS for a premium quote, which Mr. Latter then provided to Dairy. In the absence of a specific direction from Dairy to renew the policy, Mr. Latter would not request a renewal from AmWINS. An agency bill policy allowed Dairy the option to obtain property coverage from another insurer and with a different agent.

¶ 14 Per customary practices in the industry as to agency bill policies, AmWINS and Hanover did not directly contact Dairy, but corresponded only with Mr. Latter and Bradish. AmWINS sent the Hanover property policies insuring Dairy to Bradish, and Bradish sent them to Dairy. The policies, however, issued to Dairy listed AmWINS as the agency for Hanover. Mr. Latter received commissions as a result of procuring Dairy's property coverage policies which Hanover paid to AmWINS and AmWINS paid to Bradish.

¶ 15 Mr. Latter identified exhibit 3 as an email exchange between himself and Mr. Sewell from December 2011 with regard to the renewal of Dairy's property insurance for the 2012/2013

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time period. Mr. Latter sent an email to Mr. Sewell asking if he wanted a renewal quote for 2012/2013. Mr. Sewell responded that he was "evaluating all [Dairy's] insurance" and would like a quote for the renewal. Mr. Latter negotiated a lower premium for the 2012/2013 policy.

¶ 16 As to the possible renewal of the 2012/2013 policy, in an email dated November 5, 2012, to Mr. Latter, AmWINS asked whether Dairy wished to renew the 2012/2013 policy and stated that Dairy must provide certain documentation before Hanover could make a renewal quote (exhibit 5). Mr. Latter testified that, as was his practice, he then contacted Dairy about the renewal request from AmWINS. Exhibit 8 includes a copy of an email from Mr. Latter to Mr. Sewell which asked if Dairy wished to renew the coverage for 2013/2014. Mr. Latter, in a July 9, 2014, email to Bill Bradish, explained that he had left voicemails and sent emails to Dairy about the renewal of the 2012/2013 policy (exhibit 7), but received no response. Therefore, he had not requested the renewal of Dairy's policy for the 2013/2014 time period.

¶ 17 Although Mr. Latter had not directed AmWINS to renew the 2012/2013 policy, by an email dated December 20, 2012, AmWINS sent Mr. Latter the renewal policy attached to the second amended complaint (exhibit 6). In this correspondence, AmWINS stated:

"The captioned account is an Automatic Renewal with Hanover Insurance Company. Attached is a copy of the renewal policy which is effective 2/6/13. Please review the policy and if there are any changes or amendments that need to be made. Please let me know if you have any questions or concerns."

When asked at his deposition about the reference to "automatic renewal," Mr. Latter testified that he believed that "Hanover's contract with AmWINS allowed [AmWINS] to just renew the policy." When he received the December 20, 2012, email, Mr. Latter concluded that "Hanover

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was just agreeing *** to renew the policy and then AmWINS is contacting [Bradish and asking] *** what should we do with it." Mr. Latter testified that he would not have contacted Dairy after receiving this email because Dairy did not respond to his earlier inquiries about renewing coverage for the 2013/2014 period. Mr. Latter testified that because Dairy had not requested a renewal for 2013/2014, he did not request such a renewal from AmWINS and, therefore, the 2012/2013 policy could not have been renewed.

¶ 18 AmWINS, on January 23, 2013, sent an email to Mr. Latter stating the 2012/2013 policy expired on February 6, 2013, and AmWINS had not received the requested "renewal submission" from Dairy to obtain a renewal premium quote. Dairy did not send Bradish a premium payment for the renewal of the 2012/2013 policy.

¶ 19 In response to a March 8, 2013, email from Mr. Latter inquiring as to the renewal policy (exhibit 10), AmWINS, by return email, confirmed for him that the renewal policy was not in effect. AmWINS further stated that it "went too fast with [its] renewal list" (exhibit 10). Mr. Latter replied to AmWINS that Dairy had never responded to his "renewal request" (exhibit 10). Based on this email exchange, AmWINS informed Hanover that the 2012/2013 policy had not been renewed and Hanover asked AmWINS to return the renewal policy (exhibit 10).

¶ 20 At his deposition, Mr. Latter was asked whether "the [Dairy] policy placed through AmWINS with Hanover [was] cancelled at your request." He responded that "cancelled is really the wrong word. It was not renewed."

¶ 21 Exhibit 9 to the deposition of Mr. Latter is a "cancellation memorandum" dated March 27, 2013, from Hanover to AmWINS cancelling the renewal policy "flat" as of February 6, 2013, with no premium owed. The memorandum stated that the "insured requested cancellation" and

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identified Dairy's insurance as an "agency bill." Mr. Latter explained that if the 2012/2013 policy, in fact, had been properly renewed and then cancelled in March 2013, Bradish normally would have been billed a *pro rata* premium.

¶ 22 On June 3, 2013, Mr. Sewell, by email, asked Mr. Latter whether he was still handling Dairy's property insurance as he had not received an invoice from Bradish in some time (exhibit 7). On that date, Mr. Sewell verbally informed Mr. Latter of the theft of the trailer. On June 4, 2013, Mr. Latter sent to Mr. Sewell by email a copy of his November 5, 2012, email asking whether Dairy wished to renew the 2012/2013 policy with the same coverage (exhibit 8). In a June 5, 2013, email to Mr. Sewell, Mr. Latter stated that an agency-billed policy is not automatically renewed and that the renewal policy had been cancelled at his request because Dairy had not responded to his November 2012 inquiry as to renewal (exhibit 8).

¶ 23 In her affidavit, Ms. Swanson, a marine territorial executive with Hanover, stated she is familiar with Hanover's relevant business procedures and protocols and the indemnity file for Dairy. Hanover never received a premium for the renewal policy. Ms. Swanson stated that AmWINS was the agent of Hanover as to its dealings with Dairy. Bradish and Mr. Latter had no relationship with Hanover as to Dairy's property policies.

¶ 24 After a hearing, the circuit court denied Dairy's motion for summary judgment and granted the motion for summary judgment of Hanover. Dairy has appealed.

¶ 25 On appeal, Dairy argues that Mr. Latter was not its broker but was, rather, as a matter of law, the agent of Hanover. Dairy maintains that Hanover, through Mr. Latter, improperly cancelled the renewal policy. Dairy urges that we find the circuit court erred by granting Hanover's motion for summary judgment and by denying its motion.

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¶ 26 Hanover responds that the uncontroverted evidence established that Mr. Latter acted as Dairy's broker as to the property coverage policies and that AmWINS was the agent of Hanover. Hanover also argues that the 2012/2013 policy was not renewed as Mr. Latter had never sought the renewal and, in fact, informed Hanover to cancel the renewal policy which AmWINS had mistakenly sent him. Hanover further argues that, under the industry practice and procedures for an agency bill policy, the 2012/2013 policy was not "automatically renewed," and Dairy had not requested the renewal nor paid the premium for the renewal. We agree with Hanover.

¶ 27 A court may grant summary judgment "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005) (citing 735 ILCS 5/2-1005(c) (West 2002)). "When, as in this case, parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Id.* (citing *Continental Casualty Co. v. Law Offices of Melvin James Kaplan*, 345 Ill. App. 3d 34, 37-38 (2004)). We review *de novo* any decision on a motion for summary judgment. *Id.* (citing *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001)). Accordingly, "[w]e may affirm the trial court's grant of summary judgment on any ground apparent from the record." *Filliung v. Adams*, 387 Ill. App. 3d 40, 53 (2008) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)).

¶ 28 From our review of the record, there is no question of fact that the 2012/2013 policy was not renewed. Generally, a policy of insurance will not be renewed unless the insured accepts an offer to renew the policy. 2 Couch on Insurance 3d § 29.19. Further, "while there may be an

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implied acceptance of an offer to renew a term policy, it will not be presumed from the mere failure to decline." *Id.* See *Roberts v. Buske*, 12 Ill. App. 3d 630, 632 (1973).

¶ 29 The property policies issued by Hanover to Dairy were for definite yearly terms. Mr. Latter testified as to the industry practice as to the renewal of "agency bill" policies. Such a policy could be renewed only if the insured directed its broker to renew the policy, and the insured's broker then directed the insurer or its agent to renew. Specifically, as to the Hanover/Dairy policy, AmWINS, on behalf of Hanover, first contacted Mr. Latter/Bradish and inquired whether the existing policy was to be renewed. Mr. Latter then contacted Mr. Sewell, the president of Dairy, and inquired whether Dairy wished the renewal of the policy. Mr. Latter would not request that Hanover renew the policy unless Dairy instructed him to do so. Dairy was familiar with this process as the Hanover policy had been renewed in this manner in 2010, 2011, and 2012.

¶ 30 As to the possible renewal of the 2012/2013 policy Hanover, in November 2012, made an inquiry to Mr. Latter as to whether the policy should be renewed and informed him that Dairy would need to provide certain documentation for a premium quote. As was the practice, Mr. Latter contacted Mr. Sewell and asked whether Dairy wished to renew. Dairy did not respond to Mr. Latter's inquiries. Thus, Mr. Latter never instructed Hanover to renew the 2012/2013 policy. Although Hanover sent the renewal policy to Mr. Latter in December 2012, Hanover also sent an email in January 2013 stating coverage expired on February 6, 2013, and AmWINS had not received the requested submission for a renewal quote. In March 2013, Mr. Latter informed Hanover that Dairy had not requested the renewal. AmWINS verified the renewal policy was not in effect and had been sent in error. Dairy never paid a premium for the renewal of the

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2012/2013 policy. Dairy did not offer contrary evidence as to the renewal practices and did not contest that it had ignored Mr. Latter's request about renewing the 2012/2013 policy and failed to pay the renewal premium. This evidence established, as a matter of law, that the 2012/2013 policy had not been renewed and Hanover properly denied the claim as to the June 3, 2013, theft.

¶ 31 Dairy contends, however, that Mr. Latter, through Bradish, was acting as the agent for Hanover and not the broker for Dairy as to the transactions at issue. As to this question, this court has explained:

"A broker is an individual who procures insurance and acts as a middleman between the insured and the insurer, who solicits insurance business from the public under no employment from any special company and who, having secured an order, places the insurance with the company selected by the insured, or in the absence of any selection by the insured, with a company he selects himself. [Citation.] An agent is an individual who has a fixed and permanent relation to the companies he represents and who has certain duties and allegiances to such companies. [Citation.] It is a person's conduct, rather than his title, which is determinative of whether he serves as the agent of an insurance company or as the broker for an applicant for insurance in a particular transaction. [Citation.] Therefore, a court must examine the facts of a case closely to determine whether a seller of insurance is an agent or a broker and to whom he may owe a duty. [Citation.] Factors to be considered include who first set the individual in motion, who could control his action, who was to pay him, and whose interest he was there to protect. [Citations.]" *Krause v. Pekin Life Insurance Co.*, 194 Ill. App. 3d 798, 804-05 (1990).

¶ 32 The evidence shows that Dairy had an existing relationship with Mr. Latter and Bradish when Dairy requested that they procure insurance to protect Dairy's property. Hanover made a proposal for insurance to cover Dairy property to AmWINS and, based on that proposal, Hanover policy number 4009940, effective February 6, 2009, through February 6, 2010, was issued. Mr. Latter negotiated for yearly renewals of the property coverage. During those negotiations, the deposition testimony and exhibits demonstrated that Mr. Latter acted on behalf of Dairy and AmWINS on behalf of Hanover. The affidavit of Ms. Swanson confirms that AmWINS, and not Bradish, was its agent. Mr. Latter, in procuring and renewing the property insurance, protected Dairy's interests, for example, by obtaining a reduction in the premium for the 2012/2013 policy. Thus, there was uncontroverted evidence to show that Mr. Latter and Bradish were acting as the broker for Dairy and not the agent of Hanover.

¶ 33 Dairy argues that, because Bradish had a contract with Hanover to sell Hanover policies of insurance, a question of fact exists as to the whether Bradish was Hanover's agent. Mr. Latter explained that Bradish could not obtain the particular policy issued to Dairy pursuant to Bradish's direct contract with Hanover. Ms Swanson, in her affidavit, averred that Bradish and Mr. Latter did not have a relationship with Hanover as to the transactions at issue, and that AmWINS was the agent of Hanover. Dairy did not present controverting evidence that the Dairy policies were covered by the direct contact between Bradish and Hanover. Thus, the contract between Bradish and Hanover did not raise a question of fact as to whether Mr. Latter and Bradish were acting solely on behalf of Dairy. The uncontroverted evidence established, as a matter of law, that Mr. Latter and Bradish were the brokers for Dairy.

¶ 34 Dairy also argues that, because Bradish billed the premium payments and delivered the policies, and Hanover did not directly communicate with Dairy, Bradish and Mr. Latter were the agents of Hanover based on apparent authority. Dairy cites *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423 (1991), in support of its argument. The insurer in *Burgos* sought a declaratory judgment that there was no coverage under a liability policy because the insureds did not provide timely notice of the occurrence. *Id.* at 427. The insureds had given notice of the loss to the broker who had procured the policy for them. *Id.* The insurer was not notified of the occurrence until the injured party filed suit. *Id.* The broker visited the premises to discuss the incident and told the insureds "not to worry and that he would take care of the situation." *Id.* The broker had placed his name and address on the policy as the representative of the insurer and, by letter to the insureds, told them to notify him of any loss. *Id.* at 429.

¶ 35 Our supreme court found that the broker had the apparent authority to receive the notice of the occurrence and that the insurer was estopped to deny the broker's authority "in that respect." *Id.* at 434. In reaching this decision, the court "recognized that an insurance broker acts as an agent of the insured, rather than as an agent of the insurer." *Id.* at 431 (citing *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574, 582 (1985)). But "a principal will be bound by the authority he *appears* to give to another, as well as that authority which he actually gives." (Emphasis in original.) *Id.* (citing *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill. 2d 415, 426 (1980)).

¶ 36 The *Burgos* decision does not support a finding that Mr. Latter had apparent authority to act on behalf of Hanover as to the renewal of the 2012/2013 policy. It was clear from the parties' dealings that Mr. Latter and Hanover were the representatives of Dairy throughout the

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transactions, and that AmWINS represented Hanover. When Mr. Latter informed AmWINS that Dairy had not agreed to renew the 2012/2013 policy, he was not acting on behalf of Hanover.

¶ 37 For the reasons stated, we affirm the circuit court's denial of plaintiff's motion for summary judgment and the granting of defendant's motion for summary judgment.

¶ 38 Affirmed.