SIXTH DIVISION
January 22, 2016

No. 1-15-1267

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIRECT AUTO INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellant, v. STATE FARM INSURANCE COMPANY, Defendant and Counterplaintiff-Appellee (Juan Gonzalez, Everett Robinson, Rodney Wilson, and the Hertz Corporation d/b/a Hertz Rental Car, Defendants).	)))))))))))))	Appeal from the Circuit Court of Cook County. No. 2010 CH 32673 Honorable Kathleen M. Pantle, Judge Presiding.

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

ORDER

¶ 1 *Held*: Summary judgment granted against plaintiff-insurer and corollary order finding plaintiff-insurer had a duty to indemnify are affirmed in this declaratory judgment action, where plaintiff-insurer failed to even attempt to demonstrate that it was prejudiced by its insured's alleged breach of the assistance and cooperation clause contained in insured's automobile insurance policy.

¶ 2 Plaintiff and counterdefendant-appellant, Direct Auto Insurance Company (DAI), brought this declaratory judgment action against its insured, Juan Gonzales, defendant and counterplantiff-appellee, State Farm Insurance Company (State Farm), and a number of others. DAI's complaint sought: (1) rescission of the policy it had issued to Mr. Gonzales because, by

allegedly omitting residents of his household from his application for insurance, he had allegedly made material misrepresentations, or, and in the alternative, (2) a declaration that DAI was not obligated to provide Mr. Gonzalez with insurance coverage as to a July 5, 2009, automobile collision, due to Mr. Gonzales' alleged refusal to cooperate with DAI as was required by the assistance and cooperation clause of his policy. State Farm, which insured the second automobile involved in the July 5, 2009, collision, filed a counterclaim, seeking—*inter alia*—a declaration as to DAI's duty to indemnify. We dismissed DAI's prior appeal from an order granting summary judgment in favor State Farm for a lack of appellate jurisdiction. *Direct Auto Insurance Co. v. State Farm Insurance Co*., 2015 IL App (1st) 142119-U, ¶ 3.

¶ 3 Upon remand, the circuit court entered a final order which concluded that DAI had a duty to indemnify State Farm with respect to a $10,500 judgment entered against Mr. Gonzales and which also "dispose[d] of all matters in this case." DAI has now once again appealed from the circuit court's order granting summary judgment in favor of State Farm, and once again seeks reversal of only that part of the order granting summary judgment against DAI on its claim that Mr. Gonzales breached the assistance and cooperation clause of his policy. DAI also seeks reversal of the circuit court's order finding that it had a duty to indemnify State Farm. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 Many of the facts underlying this matter were fully set out in our prior order. *Id.* ¶¶ 5-11. In the interests of consistency and clarity, we restate the relevant facts here, along with those additions that are necessary to the resolution of the instant appeal.

¶ 6 Mr. Gonzales was the named insured under DAI policy number 30418 (policy), issued on May 24, 2009, which covered a 2003 Chrysler Town & Country van. On July 5, 2009, Mr.

Gonzales was driving his vehicle on 63rd Street in Chicago, in the lane next to a vehicle driven by Everett Robinson in which Rodney Wilson was a passenger. Mr. Robinson's vehicle was owned by the Hertz Corporation d/b/a Hertz Rental Car (Hertz), and was insured by State Farm. When Mr. Gonzales attempted to change lanes, his vehicle side-swiped Mr. Robinson's vehicle.

¶ 7 DAI filed suit on July 29, 2012, alleging "upon information and belief" that: (1) State Farm had paid benefits to Mr. Robinson for injuries he suffered as a result of the collision; and (2) Mr. Robinson, Mr. Wilson, Hertz, and State Farm "have made, or may in the future, make claims presumptively seeking coverage under the DAI policy." In its two-count complaint, DAI sought rescission of the policy based upon undisclosed residents in Mr. Gonzales' household (count I) or, in the alternative, for a declaration that DAI had no duty to defend or indemnify Mr. Gonzales in connection with any suit or claim brought against him as a result of the July 5, 2009, collision, because he had violated the assistance and cooperation provision of the policy (count II). DAI's complaint named Mr. Gonzales, Mr. Robinson, Mr. Wilson, Hertz, and State Farm as defendants. State Farm is the only defendant participating in this appeal.

¶ 8 State Farm answered the complaint and filed a counterclaim which was subsequently amended several times. On December 5, 2012, State Farm filed a fourth-amended counterclaim which asserted a claim for a declaratory judgment that the policy covered Mr. Gonzales as to the July 5, 2009, collision (count I), and which also reasserted—solely for purposes of preserving the issue for appeal—a previously dismissed claim for a declaration that the policy could not be rescinded (count II). State Farm alleged that as a result of DAI's denial of coverage, both Mr. Robinson and Mr. Wilson had made uninsured motorist claims under State Farm's policy for their injuries resulting from the July 5, 2009, collision. The fourth-amended counterclaim alleged Mr. Wilson's claim had been resolved and resulted in a payment of $50,000 by State

Farm. According to the fourth-amended counterclaim, at that time, State Farm was defending against Mr. Robinson's claim. In count I, State Farm sought declarations that the policy afforded Mr. Gonzales liability coverage for the July 5, 2009, collision and that DAI had both the duty to defend and to indemnify Mr. Gonzales with respect to Mr. Robinson's claim. Additionally, State Farm sought an order directing DAI to reimburse State Farm $20,000 of the $50,000 it paid to Mr. Wilson and reimburse its attorney fees and costs.

¶ 9 DAI moved to dismiss the fourth-amended counterclaim and argued, in part, that the circuit court could not "make a finding of a duty to indemnify because no determination of liability has been made and the determination of liability *is not before this Court*." (Emphasis in original.) On March 22, 2013, the circuit court struck all prayers for relief in the fourth-amended counterclaim, except the prayer for a declaration that DAI had a duty to indemnify State Farm with respect to Mr. Robinson's suit. The circuit court also found that the issue of indemnification was not ripe because there had been no finding that the policy provided coverage and "no finding of liability against [Mr.] Gonzales in the underlying case." The circuit court stayed State Farm's fourth-amended counterclaim for a declaration as to indemnification "pending further orders in this case and the underlying case." DAI then answered count I of the fourth-amended counterclaim.

¶ 10 On November 19, 2013, State Farm moved for summary judgment against DAI on both count I of its fourth-amended counterclaim and on DAI's complaint. As to its fourth-amended counterclaim, State Farm contended only that it had demonstrated that the policy covered Mr. Gonzales at the time of the collision, as a matter of law and as set forth in count I of its fourth-amended counterclaim. The motion for summary judgment did not make an argument as to DAI's duty to indemnify, nor as to the ripeness of the indemnification issue. Further, State Farm

did not seek to vacate the stay of its indemnification claim. As to DAI's complaint, State Farm argued that Mr. Gonzales had not made material misrepresentations, DAI could not meet its burden of establishing Mr. Gonzales breached the assistance and cooperation provision of the policy, and that DAI have not even attempted to establish any resulting prejudice.

¶ 11 In opposition to the motion for summary judgment, DAI argued that Mr. Gonzales had failed to: (1) inform DAI of residents in his household; (2) provide notice to DAI about the loss; and (3) cooperate with DAI in its investigation of the collision. However, DAI's response to the motion for summary judgment made no argument as to the issue of prejudice resulting from Mr. Gonzales' noncooperation. DAI also made no argument as to the fourth-amended counterclaim; in particular, DAI made no argument as to its duty to indemnify State Farm with respect to Mr. Robinson's suit.

¶ 12 On July 2, 2014, the circuit court entered a written order granting State Farm's motion for summary judgment. After finding, as a matter of law, that Mr. Gonzales had not made any material misrepresentations as set forth in count I of the complaint, the circuit court found—as to count II of the complaint—that DAI had not produced sufficient evidentiary facts to show a breach of the assistance and cooperation clause by Mr. Gonzales and had not even attempted to establish any resulting prejudice. The circuit court took no action with respect to the issue of indemnification, nor did its summary judgment order contain an express written finding that there is no just reason for delaying either enforcement or appeal or both. See Ill. S. Ct. 304(a) (eff. Feb. 26, 2010).

¶ 13 DAI previously appealed, but only as to that part of the summary judgment order finding that Mr. Gonzales did not breach his contractual duty to assist and cooperate with DAI's investigation into the collision. We dismissed the prior appeal for a lack of appellate

jurisdiction, however, because the fact that State Farm's request for a declaration as to DAI's duty to indemnify remained pending below deprived this court of appellate jurisdiction. *Direct Auto Insurance Co.*, 2015 IL App (1st) 142119-U, ¶ 21.

¶ 14 Upon remand, State Farm filed a "Motion for Judgment" in which it contended that: (1) "[t]he only remaining issue before this Court is the issue of indemnification," (2) a $10,500 judgment has been entered against Mr. Gonzales in Mr. Robinson's underlying suit, and (3) the circuit court should therefore enter an order finding that DAI has a duty to indemnify State Farm in the amount of $10,500, plus interest. On May 4, 2012, the circuit court entered a final order which concluded that DAI had a duty to indemnify State Farm with respect to the $10,500 judgment entered against Mr. Gonzales in Mr. Robinson's suit, and which also "dispose[d] of all matters in this case." DAI timely appealed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, DAI has once again appealed from the circuit court's order granting summary judgment in favor of State Farm, and once again seeks reversal of only that part of the order granting State Farm summary judgment on DAI's claim that Mr. Gonzales breached the assistance and cooperation clause of his policy. DAI also seeks reversal of the circuit court's order finding that it had a duty to indemnify State Farm.

¶ 17 Summary judgment is appropriate only where the pleadings, depositions, admissions and affidavits, viewed in the light most favorable to the nonmovant, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2014). We review *de novo* the circuit court's entry of summary judgment. *Illinois Insurance Guaranty Fund v. Virginia Surety Co.*, 2012 IL App (1st) 113758, ¶ 15.

¶ 18 Similarly, "[t]he construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). An insurance policy will generally be interpreted to give effect to the intention of the parties, as that intention is expressed by the language of the policy when given its plain and ordinary meaning. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362-63 (2006). However, any ambiguities in the language of an insurance policy will be interpreted in favor of the insured. *Id.* at 363. The construction of an insurance contract is also subject to *de novo* review. *Id.* at 360.

¶ 19 DAI contends that Mr. Gonzales breached the following portion of the insurance policy it issued to him:

"PART VI – CONDITONS

* * *

5. Assistance and Cooperation of the Insured. The insured shall cooperate with the Company and, upon the Company's request or through attorneys selected by the Company to represent the Insured, attend hearings and trials; assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this Insurance." (Bolded text in original.)

¶ 20 Numerous courts have interpreted similar assistance and cooperation clauses in policies of automobile insurance, and some general rules have been developed for use when an insurer claims that its insured has breached such a clause. Specifically, it is generally recognized that:

"An assistance and cooperation provision 'enables an insurer to prepare its defense

> to a loss claim and prevents collusion between the insured and injured party.' [Citation.] 'In an action wherein the insurer asserts a breach of the cooperation clause, the burden of proof is upon the insurer to prove what in law constitutes the breach.' [Citation.]
>
> 'In order to establish [a] breach of 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.' [Citation.] The refusal to cooperate must be willful. [Citations.] These determinations are made by examining the particular facts of the case at hand and must be shown by a preponderance of the evidence. [Citation.]
>
> Because automobile policies serve to protect members of the public who are injured by the insured's negligence, '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.' [Citation.] To prove substantial prejudice, the insurer has the burden 'to demonstrate that it was actually hampered in its defense by the violation of the cooperation clause.' [Citation.] A presumption of prejudice does not exist when an insurer raises a breach of the cooperation clause. [Citation.]" *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, ¶¶ 26-28.

See also, *American Access Casualty Co. v. Alassouli*, 2015 IL App (1st) 141413, ¶¶ 17-18 (same).

¶ 21 DAI and State Farm heavily dispute whether the facts of this matter either affirmatively establish or reveal a genuine issue of material fact as to both the reasonableness of DAI's diligence in seeking Mr. Gonzales' participation and as to whether DAI's failure to contact Mr.

Gonzales was due to his refusal to cooperate. They also dispute whether DAI even had a duty to demonstrate substantial prejudice resulting from any such refusal to cooperate in this matter. We need not address the parties' former dispute, because we conclude that DAI was required to demonstrate substantial prejudice. DAI has made absolutely no effort to do so, and our resolution of this issue proves dispositive of this appeal.

¶ 22 As we noted above, it is generally understood that "[b]ecause automobile policies serve to protect members of the public who are injured by the insured's negligence, '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.' [Citation.]" *Buckley*, 2011 IL App (1st) 103666, ¶ 28; *Alassouli*, 2015 IL App (1st) 141413, ¶ 18 (same). Despite this general understanding, DAI contends on appeal that "if there is a substantial or material lack of cooperation found as a matter of fact, *the insurer is not required to establish prejudice* or detriment thereby in order to disclaim liability." (Emphasis in original.) In support of this position, DAI cites to *Gallaway v. Schied*, 73 Ill. App. 2d 116 (1966), wherein this court stated just that; *i.e.*, "that if there is a substantial or material lack of cooperation found as a matter of fact, the insurer is not required to establish prejudice or detriment thereby in order to disclaim liability." *Id*. at 125. DAI goes on to assert that "[i]n other words, if the insured fails entirely to cooperate, prejudice is presumed."

¶ 23 We reject both this contention and DAI's reliance upon the *Gallaway* decision. In *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492 (1977), our supreme court noted this exact language in *Gallaway* in the course of discussing the requirement for prejudice under such circumstances, before reaching the following opposite conclusion:

> "Mindful of the fact that the public is the beneficiary of the automobile policy, that the prime objective of the cooperation clause is to prevent collusion between the injured and insured, as well as to enable the insurer to prepare its defense, we believe the rule currently followed in most jurisdictions best serves the ends of justice. It is this: unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract. This is the test to be employed in our courts in cases where the issue is a breach of the cooperation clause. This is not a tyranny of labels but a direct statement of the criterion to be employed where the cooperation clause is in issue." *Id*. at 498-99.

Our supreme court went on to conclude that "[p]roof of substantial prejudice requires an insurer to demonstrate that it was actually hampered in its defense by the violation of the cooperation clause. [Citation.] Nor is there any presumption of prejudice when the insurer attempts to avoid responsibility for a breach of the cooperation clause. [Citation.]" *Id*. at 499.

¶ 24 The reasoning contained in *Gallaway* was therefore abrogated by our supreme court in *Cheek,* a point this court specifically recognized in *Alassouli*. *Alassouli*, 2015 IL App (1st) 141413, ¶ 19. Moreover, the requirement for an insurer to demonstrate substantial prejudice resulting from an insured's breach of a cooperation clause has been consistently recognized since *Cheek*. See, e.g., *Buckley*, 2011 IL App (1st) 103666, ¶ 28; *Piser v. State Farm Mutual Automobile Insurance Co*., 405 Ill. App. 3d 341, 347 (2010); *Founders Insurance Co. v. Shaikh*, 405 Ill. App. 3d 367, 375 (2010); *Country Mutual Insurance Co. v. Livorsi Marine, Inc*., 222 Ill. 2d 303, 320 (2006).

¶ 25 Having concluded that DAI was required to show that it was substantially prejudiced by Mr. Gonzales' alleged refusal to cooperate, we also conclude that the circuit court properly

granted summary judgment in favor of State Farm after it found that DAI made no effort to establish any such prejudice. In its complaint, DAI merely alleged that due to Mr. Gonzales' refusal to cooperate, it was "unable to investigate the claim and is unable to determine whether there is coverage for this loss and if coverage is afforded, whether there is any liability for any DAI insured." These allegations are at best conclusory, and it has long been recognized that "[a]llegations amounting to no more than conclusions of fact are insufficient to create an issue of material fact." *Lackey & Lackey, P.C. v. Prior*, 228 Ill. App. 3d 397, 399-400 (1992); *Soderlund Brothers v. Carrier Corp.*, 278 Ill. App. 3d 606, 622 (1995) (same); *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 519 (2001) (same).

¶ 26 Moreover, in its response to State Farm's motion for summary judgment below, DAI made *no argument* that any prejudice had been established, or that there was at the very least a factual question as to prejudice. DAI focused solely on the question of Mr. Gonzales' alleged refusal to cooperate. The only *possible* factual support for the conclusory allegations regarding prejudice contained in DAI's complaint comes from an affidavit filed by a DAI claims manager, in which it was generally averred that "[c]ooperation from its insured allows [DAI] to collect information by which it may establish the validity of claims and coverage." However, this general assertion is not specifically tied to this matter in any way, and the fact that an insured's cooperation might generally assist an insurer does nothing to show how DAI was substantially prejudiced by any noncooperation in this matter. See *Buckley*, 2011 IL App (1st) 103666, ¶ 53 (finding no substantial prejudice where insurer did not show it was dependent upon its insured for a full and complete disclosure of the facts or for preparation of a defense).

¶ 27 Finally, we note that even if there was some basis to challenge the circuit court's conclusion that there was no factual support for any assertion of substantial prejudice, the fact

remains that DAI has made no such effort to do so on appeal. Rather, on appeal DAI relies *solely* upon the contentions (which we have now rejected) that it either need not establish any prejudice or that prejudice should be presumed. By failing to challenge the circuit court's ruling on this point, DAI has forfeited this issue. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued on appeal are forfeited). Further, by contending on appeal—in the context of asserting there is no prejudice requirement—that there is "no way to know what type of prejudice has developed *** if the insured does not communicate with his or her insurer," DAI has arguably affirmatively waived this issue. *Home Insurance Co. v. Cincinnati Insurance Co*., 213 Ill. 2d 307, 326 (2004) ("Waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right.").

¶ 28 Because DAI has made no effort to establish any prejudice resulting from Mr. Gonzales' alleged refusal to cooperate, we affirm the circuit court's grant of summary judgment in favor of State Farm. In light of this conclusion, we also affirm the circuit court's subsequent, corollary order finding that it had a duty to indemnify State Farm.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 31 Affirmed.