

No. 1-13-1408

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EBONY DRAPER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 L 13053
)	
JOHN STAMPS and UNITED)	
AUTOMOBILE INSURANCE COMPANY,)	Honorable
)	William E. Gomolinski,
Defendant-Appellee.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court's judgment granting motion to dismiss plaintiff's request for sanctions based on alleged vexatious and unreasonable delay, pursuant to 215 ILCS 5/155, is affirmed where the record supports a *bona fide* dispute regarding coverage.

¶ 2 The circuit court granted defendant United Automobile Insurance Company's (UAIC) 735 ILCS 5/2-619 motion to dismiss plaintiff Ebony Draper's (Draper) request for sanctions under section 155 of the Illinois Insurance Code (215 ILCS 5/155) (West 2010)) (Code). For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On July 4, 2004, Draper was injured in a one-car auto accident. At the time of the accident, Draper was a named insured under a personal auto policy issued by defendant UAIC. The accident occurred while defendant John Stamps (Stamps) was driving Draper's vehicle, with Draper as a passenger.

¶ 5 In August 2004, UAIC was notified of the accident, and on August 31, 2004, it sent correspondence to Draper requesting documentation to allow UAIC to further investigate her claim. After receiving a Notice of Attorney Lien from Draper's counsel, UAIC sent said counsel a letter in September 2004, specifically requesting "[a]ll hospital bills"; "[a] comprehensive medical report"; "[v]erification of lost wages"; the "Illinois traffic Crash Report"; "photographs of" and a "repair estimate for" the "damaged vehicle"; and "any other expenses incurred as a result of [the] loss." UAIC received no response from either Draper or her attorney.

¶ 6 On June 30, 2006, Draper filed a one-count negligence action for damages against Stamps (*Ebony Draper v. John Stamps*, 06 L 6887). After receiving notification of the negligence action, UAIC sent another letter, dated August 7, 2006, to the attorney representing Draper in her negligence suit. In this letter, UAIC acknowledged receipt of a copy of the negligence complaint and again requested certain information from Draper "for [its] investigation and evaluation of [the] bodily injury claim(s) in order to possibly make a settlement offer and resolve this case." Once again, UAIC received no response to its request for information. UAIC then sent a third letter, dated January 8, 2007, to Draper's counsel asking for this information but again received no response. Draper has not disputed this chronology of UAIC's communications, which was set forth in UAIC's section 2-619 motion and supported by the accompanying exhibits and affidavit.

¶ 7 On August 3, 2007, after receiving no response from Draper or her counsel, UAIC filed a three-count declaratory judgment action against Draper, Stamps, and Draper's grandmother, Mozella King, alleging that it had no duty under the policy for liability coverage and uninsured motorist claims related to the July 4, 2004 accident. (*United Automobile Insurance Company v. John Stamps, et al.*, 07 CH 20783). UAIC contended that coverage was excluded under the policy because Stamps did not possess a valid driver's license at the time of the accident. UAIC also maintained that it had not received a written demand for arbitration of an uninsured motorist claim within two years of the date of the accident. In Count I, UAIC sought a declaration that the policy issued to Draper provided no liability coverage to Stamps or anyone else for the accident and that it was not obligated to defend or indemnify Stamps in the negligence action pursuant to Exclusion (p) of the policy. In Count II, UAIC prayed for a finding that it was "not obligated by said policy to settle or arbitrate [Draper's] uninsured motorist claim" pursuant to Exclusion (h) of the policy, and requested an order permanently staying arbitration of Draper's uninsured motorist claim. In Count III, UAIC sought a declaration that, pursuant to an exclusion in the policy, any uninsured motorist claim by Draper was barred because UAIC did not receive a written demand for arbitration within two years of the July 4 accident date.

¶ 8 UAIC subsequently filed a motion for summary judgment, and Draper and Mozella King filed a combined motion to dismiss and motion for summary judgment, on all three counts of UAIC's complaint. On January 15, 2009, the circuit court in the declaratory judgment action entered an order granting the parties' respective motions in part and denying said motions in part. As to Count I, the court granted summary judgment in favor of UAIC and found that Stamps was excluded under Exclusion (p) of the policy. As to Count II, the court denied UAIC summary judgment and found that Exclusion (h) of the policy did not apply to Draper as a passenger. As

to Count III, the court denied UAIC summary judgment and held that UAIC was estopped from raising the two-year limitations period as a bar to Draper's uninsured motorist claim because UAIC's "failure to notify Draper of the uninsured status of Stamps effectively prevented Draper from complying with the limitations period."

¶ 9 On January 19, 2009, Draper sent UAIC a written demand for arbitration of her uninsured motorist claim.

¶ 10 In February 2009, Draper amended her complaint in the negligence action against Stamps to add a claim for sanctions against UAIC, pursuant to section 155 of the Code, based on UAIC's alleged actions in the declaratory judgment case. On May 18, 2009, UAIC filed a section 2-615 motion to dismiss this section 155 claim.

¶ 11 On June 22, 2010, the circuit court in the declaratory judgment action entered an order denying UAIC's motion to reconsider the court's January 15, 2009 order regarding Count III. UAIC served a Notice of Filing Notice of Appeal on Draper's counsel on July 22, 2010, but the notice was never filed with the circuit court nor was an appeal ever pursued. Draper's counsel eventually contacted the appellate court clerk's office on November 29, 2010, and learned that an appeal had not been filed.

¶ 12 UAIC subsequently filed a section 2-615 motion to dismiss the section 155 claim in the negligence action. On December 6, 2010, while UAIC's motion to dismiss was pending and prior to disposition on the motion, Draper voluntarily non-suited her negligence action.

¶ 13 Draper did not re-file this lawsuit until almost a year later, on December 5, 2011. In Count II, which is directed against UAIC only, Draper alleged that UAIC's conduct was vexatious and unreasonable under section 155 because (1) "UAIC failed to advise Plaintiff for over three years that it considered Stamps to be an uninsured motorist"; (2) "[f]iled and pursued a

meritless declaratory judgment action with respect to Plaintiff's uninsured motorist coverage"; and (3) "[c]aused the subject arbitration to be further delayed by sending counsel a Notice of Appeal signed by an attorney when UAIC had no intention of going through with an appeal."

¶ 14 On March 22, 2012, UAIC filed its section 2-619 motion to dismiss Count II of Draper's complaint. On July 19, 2012, following a hearing, the circuit court granted UAIC's motion, finding that "there [were] no material facts in dispute" and that the conduct alleged was not "vexatious or unreasonable." The circuit court later entered a default judgment on Count I of the action—the negligence claim against Stamps, on November 7, 2012.

¶ 15 Draper's motion to reconsider the July 19, 2012 order dismissing Count II was denied on April 5, 2013. In denying Draper's motion for reconsideration, the circuit court found that the January 15, 2009 order, dismissing Count III of UAIC's complaint in the declaratory judgment action, "does not constitute that [UAIC's] conduct was unreasonable and vexatious" and that Draper's "counter affidavit *** did not present any material issue of fact."

¶ 16 Draper has appealed the dismissal of the section 155 claim against UAIC (Count II), and this court has jurisdiction pursuant to Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008).

ANALYSIS

¶ 17 On appeal, Draper raises three primary arguments for reversing the circuit court's judgment. Namely, she contends that the court (1) misapplied the standard for section 2-619 motions; (2) improperly made a factual determination on a section 2-619 motion; and (3) failed to afford collateral estoppel effect to the chancery court's prior judgment dismissing Count III of

UAIC's declaratory judgment action. For the reasons explained below, we are not persuaded by these arguments and, accordingly, affirm the judgment of the circuit court.¹

¶ 18 "[S]ection 2-619(a)(9) of the Code of Civil Procedure allows involuntary dismissal of a plaintiff's claim where the claim is 'barred by other affirmative matter avoiding the legal effect of or defeating the claim.' " *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003) (quoting 735 ILCS 5/2-619(a)(9) (West 1994)). "The term 'affirmative matter' as used in section 2-619(a)(9) has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Krilich v. American National Bank & Trust Co.*, 334 Ill. App. 3d 563, 570 (2d Dist. 2002). "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter*, 207 Ill. 2d at 367.

¶ 19 "In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). If the movant's "supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Id.* We can affirm the section 2-619 dismissal on any proper basis in the record. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (noting, on review of section 2-619 motion, that the court "can affirm *** on any basis present in the record").

¶ 20 Section 155 of the Insurance Code provides for sanctions, including attorney fees and costs, in any action where certain conduct by the insurance company has been "vexatious and

¹ In its response brief, UAIC asks that we strike certain statements from Draper's Statement of Facts as being objectionably argumentative. The motion is denied, but we emphasize that we are cognizant of the requirements of Supreme Court Rule 341(h)(6). In resolving Draper's appeal, we have ignored any argumentative statements or those facts not supported by citation to the record.

unreasonable":

"In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed [certain enumerated amounts]." 215 ILCS 5/155.

¶ 21 In general, " [w]hile the question of whether the insurer's action and delay is vexatious and unreasonable is a factual one, it is a matter for the discretion of the trial court." " *Gaston v. Founders Insurance Co.*, 365 Ill. App. 3d 303, 325 (1st Dist. 2006) (quoting *Dark v. United States Fidelity & Guaranty Co.*, 175 Ill. App. 3d 26, 30-31 (1988)). Accordingly, " 'the trial court's determination will not be disturbed unless an abuse of discretion is demonstrated in the record.' " *Id.* (quoting *Dark*, 175 Ill. App. 3d at 30-31). We note that this abuse of discretion standard applies even though we are reviewing a dismissal under section 2-619, which is generally reviewed *de novo*. See *Van Meter*, 207 Ill. 2d at 377 (applying *de novo* review standard to section 2-619 dismissal). Illinois courts frequently apply the abuse of discretion standard to review section 155 claims resolved by the trial court on summary judgment. See *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 745 (3d Dist. 2010) ("[T]he abuse of discretion standard of review applies [to dismissal of § 155 claim] even though the trial court granted summary judgment." (citing *Gaston*, 365 Ill. App. 3d at 324-35)); *Baxter International, Inc. v. American Guarantee & Liability Insurance Co.*, 369 Ill. App. 3d 700, 703 (1st Dist. 2006)

(declining to apply de novo standard to review denial of motion for section 155 sanctions which was brought in connection with parties' summary judgment motions).

¶ 22 "Because a dismissal under section 2-619(a)(9) resembles the grant of a motion for summary judgment," (*Van Meter*, 207 Ill. 2d at 377), and the parties here had an opportunity to present evidence outside of the pleadings, we conclude that the abuse of discretion standard of review similarly applies to the court's dismissal under section 2-619(a)(9). Under either standard, however, our result would be the same.

¶ 23 In determining whether an insurer's conduct is "unreasonable and vexatious" under section 155, Illinois courts consider "the totality of the circumstances," "including the insurer's attitude, whether the insured was forced to sue to recover and whether the insured was deprived of the use of his property." *Baxter*, 369 Ill. App. 3d at 710. "An insurance company does not violate section 155 merely by unsuccessfully litigating a dispute." *Ulrich Children's Advantage Network v. National Union Fire Co.*, 398 Ill. App. 3d 710, 723 (1st Dist. 2010). Moreover, "where a *bona fide* dispute concerning coverage exists, costs and sanctions are inappropriate." *State Farm Mutual Automobile Insurance Co. v. Smith*, 197 Ill. 2d 369, 380 (2001); *Baxter*, 369 Ill. App. 3d at 710 ("An insurer's delay in settling a claim will not be deemed vexatious or unreasonable for purposes of section 155 sanctions where a *bona fide* dispute over coverage exists."); *West Bend*, 406 Ill. App. 3d at 745 ("[A] delay in settling a claim does not violate the Code if the delay is caused by a *bona fide* dispute concerning coverage.").

¶ 24 Here, Draper does not dispute that the presence of a *bona fide* coverage dispute is "affirmative matter" that can be the basis for a section 2-619(a)(9) motion to dismiss. However, she maintains that the trial court could not resolve either the *bona fide* dispute issue or the ultimate question of whether UAIC's conduct was unreasonable and vexatious on a section 2-619

motion because these issues present questions of fact. We disagree. Illinois courts routinely determine whether an insurer had a *bona fide* coverage dispute (such that its conduct was not unreasonable and vexatious) without holding an evidentiary hearing where, as here, the underlying facts are undisputed. See *State Farm*, 197 Ill. 2d 369; *Ulrich*, 398 Ill. App. 3d 710; *Gaston*, 365 Ill. App. 3d 303; *Baxter*, 369 Ill. App. 3d 700; *General Star Indemnity Co. v. Lake Bluff School District No. 65*, 354 Ill. App. 3d 118 (2d Dist. 2004). Indeed, *West Bend*, cited by Draper, affirmed the trial court's conclusion on summary judgment that the dispute was *bona fide*, such that section 155 sanctions were not warranted. *West Bend*, 406 Ill. App. 3d at 746. Again, whether an insurer's conduct is unreasonable and vexatious is a question for the trial court to resolve. As Draper notably has neither identified any disputed material facts which prevented the trial court from determining whether there was a *bona fide* coverage dispute nor explained what additional discovery was necessary for that determination, we conclude that the trial court could properly resolve this issue at the early stage in the proceedings without an evidentiary hearing or additional discovery. Thus, contrary to Draper's contentions, we find no reversible error in the section 2-619 standard or procedures applied by the trial court.

¶ 25 Further, because we agree with UAIC that the coverage dispute was *bona fide*, the trial court did not abuse its discretion in dismissing Draper's section 155 claim. We will address each of Draper's allegations underlying her request for section 155 sanctions in turn.

¶ 26 First, with respect to UAIC's delay in bringing the declaratory judgment action, the undisputed facts evidence a *bona fide* dispute as to coverage during this time period. Section 10 of Draper's policy with UAIC provides that "[a]s soon as practicable, the insured or other person making claim shall give to the Company written proof under oath, if required, including full particulars of the nature and extent of the injuries, treatment, and other details entering into the

determination of the amount payable." UAIC's repeated correspondence to Draper and her counsel during the time period leading up to the declaratory judgment action requested such information, as outlined in the policy, including "[a]ll hospital bills"; "[a] comprehensive medical report"; "[v]erification of lost wages"; the "Illinois traffic Crash Report"; "photographs of" and a "repair estimate for" the "damaged vehicle"; and "any other expenses incurred as a result of [the] loss." This requested information was reasonably necessary for UAIC to further investigate Draper's claim, determine whether coverage under the policy applied, and if, and under what conditions, it should settle the claim. It is undisputed that Draper never responded nor provided the requested information. Without the requested information, or at the very least a response from Draper as to why the information was not forthcoming, UAIC's obligation to provide coverage remained unresolved, demonstrating a *bona fide* coverage dispute during the period leading up to the declaratory judgment action.

¶ 27 Moreover, we note that "it is axiomatic that a cause of action based upon vexatious delay in settling a claim must be rooted in an insurer's refusal to settle a claim." *West Bend*, 406 Ill. App. 3d at 746. Here, based on the undisputed evidence, UAIC made repeated attempts to contact Draper throughout the three-year period between the accident and the filing of its declaratory judgment action, demonstrating its willingness—not refusal—to settle the claim.

¶ 28 Second, with respect to Counts II and III of UAIC's declaratory judgment action, UAIC had reasonable legal positions, such that the circuit court did not abuse its discretion in holding that the pursuit of those claims was not unreasonable and vexatious. Specifically, as Draper admits, there was a *bona fide* dispute as to whether Stamps, as an unlicensed driver, was excluded from coverage under the policy—the issue UAIC presented in Count I of its declaratory judgment action. Under Exclusion (p), which applied to Stamps, the policy expressly excluded

coverage for "any person who operated or used an owned automobile or a non-owned automobile without a reasonable belief that he or she is entitled to do so." The court in the declaratory judgment action agreed with UAIC that an unlicensed driver such as Stamps was excluded from coverage under this provision. Our supreme court subsequently accepted a similar argument in *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424 (2010).

¶ 29 Count II of UAIC's declaratory judgment action applied this same legal rationale to Draper and sought a declaration that she was not covered by the policy's uninsured motor coverage. Exclusion (h) of the policy's uninsured motorist provisions excludes coverage for "any claim by a person who operated or used an owned automobile *** without a reasonable belief that he or she was entitled to do so." Under UAIC's theory, Draper did not have a "reasonable belief" that she was entitled to "use" her vehicle while knowing that an unlicensed driver—here, Stamps—was driving. Although the court in the declaratory judgment action ultimately rejected this theory, we cannot say it was unreasonable, particularly in light of *Founders*, the authority upon which the circuit court in this negligence lawsuit relied.

¶ 30 Nor has Draper identified any authority holding that a passenger does not "use" a vehicle she owns for determining whether coverage applies. *Pekin Insurance Co. v. Fidelity & Guarantee Insurance Co.*, 357 Ill. App. 3d 891 (4th Dist. 2005), the only case cited by Draper to argue that a passenger cannot "use" a vehicle, addressed "whether a tow truck 'uses' or 'operates' the vehicle it tows so as to be an omnibus insured under the towed vehicle's policy." *Id.* at 898. That holding did not resolve whether Draper was "using" her vehicle in this case.

¶ 31 Count III of the declaratory judgment action requested an order that Draper was barred from pursuing an uninsured motorist claim based on the policy provision that a claimant must send UAIC a written demand for arbitration within two years of the date of the accident. Given

Draper's undisputed lack of communication with UAIC and refusal to provide the requested information, coupled with the limitation provisions in the policy, UAIC had a reasonable argument that, under these circumstances, the court in the declaratory judgment action could bar her from pursuing an uninsured motorist claim. Again, that the court in that action ultimately disagreed with this theory does not render UAIC's conduct unreasonable and vexatious. See *Ulrich*, 398 Ill. App. 3d at 723.

¶ 32 *American Service Insurance Co. v. Pasaulka*, 363 Ill. App. 3d 385, 394 (1st Dist. 2006), cited by Draper, is distinguishable and does not establish that Count III lacked merit. There, the policy at issue had a two-year limitations period for bringing a claim for uninsured motorist coverage. The court in *American Service* held that limitations provision did not bar an insured's claim, which was brought outside the two-year window, because the insurance companies for the tortfeasors involved in the accidents became insolvent (thereby triggering, for the first time, the need for uninsured motorist coverage) more than two years after the accidents occurred. In reaching this conclusion, the court emphasized that the limitations provision did not include an exception "for an insured who *could not discover* the insolvency of the tortfeasor's insurer before the two-year limitation has passed." (Emphasis added.) *Id.* at 391-92. *American Service* does not address whether such a limitation provision could bar a claim when the facts triggering the uninsured motorist coverage (*e.g.*, that the driver of the insured's vehicle is unlicensed) are reasonably discoverable by the insured prior to the expiration of the limitations period.

¶ 33 Finally, Draper alleges that UAIC was unreasonable and vexatious by sending her counsel a notice of appeal that UAIC ultimately did not pursue. According to Draper, this conduct resulted in additional delay of the arbitration over her uninsured motorist coverage claim. Again, the circuit court did not abuse its discretion when determined that this conduct did

not justify an award of sanctions. Based on the undisputed facts in the affidavits presented by the parties, by at least November 29, 2010, Draper's counsel received confirmation from the appellate court clerk's office that an appeal had not been filed. After receiving this information, Draper did not move forward with the arbitration but rather continued to delay it, sending a letter to the arbitration association in March 2011 to keep the arbitration in abeyance. The delay in the arbitration, therefore, was not related to UAIC's accused conduct. Moreover, Draper bears responsibility for monitoring the litigation and pursuing her claims. *Cf. Mitchell v. Fiat-Allis, Inc.*, 158 Ill. 2d 143, 151 (1994) (attorneys are required to "monitor their cases to insure that appeals are timely filed" even if they do not receive notice of court orders "caused by clerical oversight"). And UAIC's conduct in this case did not prevent her from doing so. Accordingly, we find no error in the circuit court's conclusion that this allegation did not support section 155 sanctions.

¶ 34 We also can summarily dispose of Draper's argument that the chancery court's order dismissing Count III of UAIC's declaratory judgment action prevents UAIC from arguing that its conduct was not unreasonable and vexatious. In dismissing Count III—which sought a declaration that Draper was barred from pursuing an uninsured motorist claim because UAIC did not receive a written demand for arbitration within two years of the July 4 accident date—the chancery court held that UAIC's "failure to notify Draper of the uninsured status of Stamps effectively prevented Draper from complying with the limitations period." Accordingly, the court found that UAIC was "estopped from raising the limitations period." From this language, Draper concludes that the court in the declaratory judgment action " 'necessarily decided' that [UAIC's] conduct was unreasonable or vexatious." Again, we disagree.

¶ 35 In general, the doctrine of collateral estoppel "prevent[s] the relitigation of issues that have already been resolved in earlier actions." *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). It applies "where [the] issue was actually or necessarily decided by a court of competent jurisdiction in the earlier proceeding." *Hexacomb Corp. v. Corrugated Systems, Inc.*, 287 Ill. App. 3d 623, 631 (1st Dist. 1997). Contrary to Draper's contentions, the chancery court's application of estoppel to prevent UAIC from asserting the limitations period as a defense did not resolve the issue of whether UAIC's conduct was unreasonable and vexatious for purposes of section 155. *Zak v. Fidelity-Phenix Insurance Co.*, 34 Ill. 2d 438 (1966), cited by Draper, squarely undermines her argument and resolves this issue. There, our supreme court held that, based on the insurance company's conduct with its insured, the company was estopped from asserting a non-coverage defense. *Id.* at 441-44. But despite concluding that estoppel applied, the court nevertheless refused to find that the insurance company's conduct warranted an award of attorney fees: "We cannot agree, however, that defendant's refusal to assume liability under its policy was 'vexatious and without reasonable cause' so as to entitle plaintiff to reasonable attorney fees under the provisions of the Insurance Code." *Id.* at 444. Similarly here, the chancery court's application of estoppel does not necessarily amount to a determination that UAIC's conduct was unreasonable and vexatious for purposes of section 155. Indeed, nowhere in the court's order does it state that UAIC was either unreasonable or vexatious; nor did the court ever address section 155 sanctions. As that issue was not necessarily determined in the prior declaratory judgment action, collateral estoppel does not apply.

¶ 36

CONCLUSION

¶ 37 We find that the circuit court did not abuse its discretion in dismissing Draper's section 155 claim. For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 38 Affirmed.