2013 IL App (1st) 120135-U

FIFTH DIVISION
June 21, 2013

No. 1-12-0135

KIRK MCDUFFORD, Plaintiff-Appellant, v. AMERICAN SERVICE INSURANCE COMPANY, INC., Defendant-Appellee (Great Northern Insurance Agency, Inc., and Great Northern Payment Plan, Inc., Defendants).	)	Appeal from the Circuit Court of Cook County No. 08 CH 29397 Honorable Rita M. Novak, Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 Held: Circuit court grant of summary judgment to defendant insurer is affirmed where plaintiff failed to allege damages under insurance policy.

¶ 2 Plaintiff Kirk McDufford appeals from an order of the circuit court granting summary judgment to defendant American Service Insurance Company (American Service) on his declaratory judgment, breach of contract and bad faith claims against

American Service. The court found plaintiff failed to establish that he suffered damages under an automobile insurance policy issued to him by American Service. On appeal, plaintiff contends that the court erred in granting summary judgment to American Service because it conflated two principles: damages covered under the policy and damages sufficient to state a claim for breach of contract. We affirm.

¶ 3 BACKGROUND

¶ 4 In 2000, plaintiff brought suit in the circuit court of Cook County against American Service. He asserted three counts: (I) declaratory judgment, (II) breach of contract and (III) bad faith under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2010)). Plaintiff asserted American Service had issued him an automobile insurance policy and improperly denied him coverage under the policy for damages he suffered in a hit and run collision in April 1998. In June 2009, the circuit court dismissed plaintiff's claims for want of prosecution.

¶ 5 In July 2010, plaintiff refiled the complaint. On March 29, 2011, he filed the amended complaint at issue here.[1]

¶ 6 The following facts are taken from plaintiff's amended complaint. On March 14, 1998, plaintiff met with a representative of Great Northern Insurance, Inc., an insurance broker. During the meeting, plaintiff submitted a $90.00 premium payment and an application for automobile insurance coverage for a 1995 Nissan Pathfinder. Plaintiff

[1] Plaintiff also named Great Northern Insurance Agency, Inc., and Great Northern Payment Plan, Inc., as defendants. These defendants are not parties to this appeal.

did not have title to the Pathfinder. He was in process of purchasing it under a sale/purchase agreement with the car's titled owner, Dave Dakota. Under the agreement, plaintiff was making monthly payments to Dakota. Upon completion of the payments, Dakota would transfer the car title to plaintiff. The policy named Dakota as the "loss payee."

¶ 7 On March 18, 1998, plaintiff returned to Great Northern Insurance to add additional coverage to the policy. He made an additional $260 premium payment and was told that he would receive comprehensive and collision coverage on the Pathfinder through an insurance policy issued by American Service (the policy). Plaintiff did not receive a copy of the policy. He made no additional premium payments after March 18, 1998.

¶ 8 On April 25, 1998, plaintiff was involved in a car accident. He and the Pathfinder were struck by another car while he was standing next to the Pathfinder. Plaintiff suffered bodily injuries and the Pathfinder was damaged. The driver of the other car did not stop. On April 27, 1998, plaintiff's wife informed Great Northern Insurance of the hit and run collision.

¶ 9 On June 2, 1998, American Service sent plaintiff a letter stating that it could not assist him with his claim because the policy had been cancelled on April 25, 1998, and was not in effect on the day of loss. Plaintiff learned that Great Northern Payment Plan, Inc., a financing company affiliated with Great Northern Insurance, had contacted American Service on April 28, 1998, and cancelled the policy, effective 12:01 a.m. on

April 25, 1998. In June 1998, Dakota repossessed the Pathfinder.

¶ 10 Plaintiff asserted three counts against American Service in his amended complaint, claiming he was damaged as a result of American Service's failure to pay for repairs to the Pathfinder under the policy. In count I, he sought a "declaration that American Service has a duty to reimburse all lost equity in the Insured Vehicle incurred by [plaintiff] as a result of the hit and run collision." He alleged that Dakota's repossession of the Pathfinder and plaintiff's resultant loss of equity in the Pathfinder were foreseeable consequences of American Service's refusal to provide coverage.

¶ 11 In count II, plaintiff alleged that American Service had breached the policy by failing to reimburse him for the loss he incurred as a result of the hit and run collision. He sought "his actual damages sustained as a result of American Service's breach of its insurance contract in an amount to be established through proof at trial." In count III, he claimed that American Service denied him coverage and claimed his policy was cancelled with full knowledge of the wrongfully backdated notice of cancellation from Great Northern Payment Plan. He asserted American Service acted in bad faith by vexatiously and unreasonably delaying or failing to pay his claim for the hit and run collision. He sought an award for "the maximum amount of damages, attorney's fees, and costs allowed pursuant to 215 ILCS 5/155."[2]

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[2] Section 155 of the Insurance Code is an extracontractual remedy for policy holders available when an insurer's refusal to comply with its policy obligations is vexatious and unreasonable. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 523-24 (1996). Section 155 provides as follows:

" (1) In any action by or against a company wherein there is in issue the liability

¶ 12 American Service filed an answer to the amended complaint. It then moved for summary judgment on all counts against it, arguing that plaintiff failed to assert any damages covered under the policy. American Service noted that there were questions regarding whether a valid policy was in effect at the time of plaintiff's accident, but, for purposes of the motion for summary judgment, it would assume *arguendo* that a valid policy was in effect at that time. American Service asserted that the insurance policy provided for payments for the repair or replacement of the damaged car when the actual cost of repair or replacement exceeded the deductible under the policy. It argued that plaintiff failed to show any damages to the Pathfinder, let alone damages in excess of the deductible, and, therefore, the policy was never implicated and summary judgment was proper.

¶ 13 In plaintiff's response to the motion for summary judgment, he explained that:

"[his] claims for damages against American Service are not for the monetary

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of a company on a policy or policies of insurance or the amount of the loss payable there under, 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 any one of the following amounts:

(a) 60% of the amount which the court or jury finds such party is entitled to recover against the company exclusive of all costs;

(b) $60,000;

(c)the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (West 2010).

> value of the costs to repair or replace the *** [Pathfinder]. Rather, [he] seeks damages in the form of the lost equity in the Insured Vehicle, which was repossessed after American Service refused coverage for the damage sustained to the vehicle in the hit and run accident."

He asserted that "such a loss of equity is a foreseeable consequence of American Service's denial of coverage, and is covered under the *** policy."

¶ 14 Plaintiff asserted that his claims for damages were "specifically" as follows:

> (1) American Service knew plaintiff leased and did not own the insured vehicle;
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> (2) the hit and run accident damaged the insured vehicle;
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> (3) American Service wrongfully denied coverage under its collision and comprehensive liability policy for the damage caused by the hit and run collision;
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> (4) because American Service denied coverage, plaintiff was unable to pay for the cost of repair to the insured vehicle;
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> (5) "as a direct and foreseeable consequence" of plaintiff's inability to pay for the repairs, Dakota repossessed the vehicle; and
>
> (6), "as a direct and foreseeable consequence of the repossession of the vehicle, *** plaintiff lost the equity that he had accrued in the Insured Vehicle."

Plaintiff argued that, because his lost equity was a direct and foreseeable result of American Service's breach of the policy, the motion for summary judgment should be denied.

¶ 15 On December 15, 2011, the court granted the motion for summary judgment and

dismissed American Service with prejudice. It found no just reason to delay enforcement or appeal of the order pursuant to Illinois Supreme Court Rule 304(a). Plaintiff filed a timely notice of appeal on January 12, 2012.

¶ 16 ANALYSIS

¶ 17 Summary judgment is only appropriate where the "pleadings, depositions, and admissions on file, together with the 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); *Williams v. Manchester,* 228 Ill. 2d 404, 417 (2008). When ruling on a motion for summary judgment, courts should construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the respondent. *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (1994). The right of the moving party must be clear and free from doubt. *Williams,* 228 Ill. 2d at 417. Although the nonmoving party need not prove his case at the summary judgment stage, he must present a factual basis that would arguably entitle him to a judgment. *Gauthier*, 266 Ill. App. 3d 213, 219 (1994). If the nonmoving party cannot establish an essential element of his cause of action, summary judgment is proper. *Gauthier*, 266 Ill. App. 3d at 219. The construction of an insurance policy is a question of law that is appropriate for disposition by summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). We review the trial court's grant of summary judgment de novo. *Williams,* 228 Ill. 2d at 417.

¶ 18 Plaintiff states the issue on appeal as follows: "whether the circuit court erred

when it determined that American Service did not breach its policy of auto insurance with plaintiff by refusing to pay for damages resulting from an auto accident that occurred on April 25, 1998." There is no basis for plaintiff's assertions that the court found no breach of contract. As defendant points out, the record is silent as to the court's reason for granting the motion for summary judgment. Further, since the motion for summary judgment was based solely upon plaintiff's failure to assert damages covered under the policy, we presume the circuit court granted summary judgment on those grounds.

¶ 19 Plaintiff argues that the basis for American Service's motion for summary judgment is specious. He argues that the argument "conflates two very different principles: (1) damages covered under the [p]olicy and (2) damages sufficient to state a claim for breach of contract" and, in granting the motion for summary judgment, the court "wrongly confused these two principles."

¶ 20 We note initially that there are questions regarding whether a valid policy was in effect at the time of plaintiff's hit and run accident. These issues were not explored below because, given the inadequacy of the damage claims in plaintiff's amended complaint, the court granted summary judgment on the damage question alone and the existence of a valid policy was irrelevant. As we resolve this appeal on the same basis, for purposes of our analysis, we will assume the policy was in effect as plaintiff claims.

¶ 21 The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law that we review *de novo*. *Traveler's*

Insurance Co. v. Eljer Manufacturing, Inc., 197 Ill. 2d 278, 292 (2001); *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391. Our main objective in construing policy language is to determine and give effect to the intent of the parties to the contract, construing the policy as a whole and taking into account the type of insurance purchased, the subject matter, the risks undertaken and purchased, and the overall purpose of the contract. *Traveler's Insurance Co.*, 197 Ill. 2d 278 at 292; *Crum & Forster Managers Corp.*, 156 Ill. 2d at 391. If the words in a policy are clear and unambiguous, there is no need for construction and we will enforce the policy according to its terms, as written, unless to do so would contravene public policy. *Rohe v. CNA Insurance Co.*, 312 Ill. App. 3d 123, 127 (2000); *Traveler's Insurance Co.*, 197 Ill. 2d 278 at 292-93. Plaintiff, the insured, has the burden of establishing that his claim falls within the policy's terms. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009).

¶ 22 The parties agree that Part V, subsection 7, of the comprehensive and collision policy sets forth the relevant coverage provision. It provides as follows:

> "Collision Coverage. At the Company's option to have repaired or to pay for loss caused by collision to the owned automobile or to a non owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the Declarations as applicable hereto."

Part V(J)(2) of the policy defines "loss" as "direct and accidental loss of or damage to the automobile, including its equipment."

¶ 23 These provisions show that a collision, standing alone, does not trigger a duty to

cover damages under the policy. Instead, the duty to cover damages is triggered when a collision occurs *and* there is "loss caused by collision to the owned automobile or to a non owned automobile." Only if there is such loss to an insured vehicle will American Service's duty to "repair[ ] or to pay for loss caused by collision to the owned automobile or to a non owned automobile" be triggered. Moreover, American Service's duty to repair or pay for loss to an insured vehicle is triggered only if the insured can show that damages sustained by the insured vehicle exceeds the deductible, here $500.

¶ 24 In his amended complaint, plaintiff asserts that the Pathfinder suffered damages as a result of the hit and run collision. He attached a copy of the traffic crash report made by the Chicago police department showing that the Pathfinder sustained damages on the driver's side as a result of the collision. He also filed an affidavit in which he claims that he examined the Pathfinder and found that the rear driver's side door was dented, driver's side front fender was dented, driver's side mirror was torn off and driver's side front bumper was torn off.

¶ 25 The policy covers the cost to repair or pay for loss caused to an insured vehicle by a collision if that cost exceeds the $500 deductible amount. Arguably, therefore, any damage caused by the hit and run collision to the Pathfinder's doors, fenders and mirror would be covered under the policy. Plaintiff did not, however, make a claim for this damage to the Pathfinder. He failed to allege or claim any specific monetary costs for the damage to the Pathfinder, let alone that these costs for the damage to the Pathfinder exceeded the deductible. As he admitted in his answer to the motion for

summary judgment, he was not seeking "the monetary value of the costs to repair or replace" the Pathfinder but rather "damages in the form of the lost equity" in the Pathfinder.

¶ 26 The policy defines "loss" as “direct and accidental loss or damage *to* the automobile.” (Emphasis added.) Plaintiff’s loss of equity in the Pathfinder certainly does not fall under this definition. "Equity" is "[t]he residual value of a business or property beyond any mortgage thereon or liability therein." American Heritage Dictionary 462 (2nd college ed. 1985). Plaintiff's loss of equity in the Pathfinder is a monetary loss he suffered personally. It is his loss of the residual value he had built up in the Pathfinder over the course of his payments to Dakota. This "damage" is in no way a "loss caused by collision to" the Pathfinder, *i.e.*, a damage covered under the policy. The policy provides coverage for damage to an insured vehicle, not for monetary damage to the insured or holder of the policy. Accordingly, plaintiff's claims for the loss of equity do not allege any recoverable claims under the policy.

¶ 27 Plaintiff asserts that his loss of equity was a “foreseeable consequence of American Service’s denial of coverage and, therefore, covered under the policy." Even if loss of equity was a foreseeable consequence of the denial of coverage, this does not negate the fact that the policy provides coverage for the cost of damage to the insured vehicle, not for the cost of personal damage to the insured. Plaintiff agreed to the terms of the policy and he is, therefore, bound by those terms. No court can rewrite the terms of a policy to provide a better bargain to suit one of the parties. *Resolution Trust*

Corp. v. Holtzman, 248 Ill. App. 3d 105, 112 (1993). The court properly granted summary judgment to American Service on plaintiff's declaratory judgment claim.

¶ 28 Turning to plaintiff's assertion that he has a valid claim for breach of contract against American Service, his claim fails because he did not claim damages covered under the policy. In order to prevail in a breach of contract action, plaintiff has to prove all four elements of his claim: existence of a contract, his performance of the contract, breach of the contract by American Service and the existence of damages resulting from the breach. *Catania v. Local 4250/5050 of Communications Workers of America*, 359 Ill. App. 3d 718, 724 (2005).

¶ 29 As discussed above, plaintiff's claim for loss of equity failed to state a covered loss under the policy/contract. The contractual relationship between the parties is defined and limited by the policy. Since plaintiff's loss of equity claim was not covered under the policy, American Service had no duty to pay for that loss of equity and its failure to pay was, therefore, not a breach of the policy. Accordingly, as plaintiff did not prove the third element of a breach of contract action, a breach by American Service, his claim must fail and we need not address whether plaintiff sufficiently proved the remaining elements. As plaintiff failed to show "damages covered under the [p]olicy," he necessarily could not show "damages sufficient to state a claim for breach of contract." The court did not improperly conflate these two types of damages and properly granted summary judgment to American Service on plaintiff's breach of contract claim.

¶ 30 With regard to plaintiff's claim for damages under section 155 of the Insurance Code, section 155 allows for “an extracontractual remedy” for an insurer's “unreasonable and vexatious” refusal to comply with its policy obligations. *Illinois State Bar Ass'n Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810983, ¶ 26 (quoting *Cramer*, 174 Ill. 2d at 523–24 (1996); 215 ILCS 5/155(1) (West 2010)). However, " '[w]here the policy does not apply, there can be no finding that the insurer acted vexatiously and unreasonably [in denying a claim].' ” *Illinois State Bar Ass'n Mutual Insurance Co.*, 2012 IL App (1st) 111810983, ¶ 26 (quoting *American Family Mutual Insurance Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 533 (2009)). The policy here did not cover plaintiff's damage claims. Accordingly, there can be no finding that American Service acted vexatiously and unreasonably in refusing to pay for those damages and the trial court properly granted summary judgment to American Service on plaintiff's section 155 bad faith claim.

¶ 31 Conclusion

¶ 32 For the reasons stated above, we affirm the circuit court granting summary judgment to American Service on all three counts.

¶ 33 Affirmed.