2018 IL App (1st) 152438-U

FOURTH DIVISION
May 31, 2018

No. 1-15-2438

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Z GEORGE MANAGEMENT CORPORATION, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CH 40810
	)	
INDIAN HARBOR INSURANCE COMPANY,	)	Honorable
	)	Thomas R. Allen,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of defendant affirmed. There was no question of fact that plaintiff insured made material misrepresentations that voided coverage under terms of insurance policy.

¶ 2 In this insurance-coverage action, Z George Management Corporation, Inc. appeals the grant of summary judgment in favor of defendant Indian Harbor Insurance Company. Because we find no dispute that the insured made intentional misrepresentations of material fact in its claim, we affirm.

¶ 3 BACKGROUND

¶ 4 Z George Management Corporation, Inc. (Z George) owns and rents residential property in Chicago Heights (the Property). Zachariah George (Mr. George) is the sole shareholder and

owner of Z George. Z George procured an insurance policy with Indian Harbor Insurance Company (Indian Harbor) to cover physical damage and lost rental income at the Property.

¶ 5 On December 20, 2007, the Chicago Heights fire department was called to the Property after a tenant reported smelling gas. The fire department traced the smell to a stove in a vacant unit that vagrants were using for heat. The responders also indicated that other units had been broken into, and that vagrants were using the vacant units as a "flophouse." The next day, Don Garcia (Garcia), a building inspector for Chicago Heights, inspected the building. Based on the condition of the Property, Chicago Heights posted a notice that the Property was "uninhabitable," and Garcia told Mr. George that he needed to post security guards. Due to the Property being "uninhabitable," the remaining tenants were required to move out (though a handful did not).

¶ 6 On December 28, unknown individuals broke into and vandalized the Property. It is unknown how they entered the Property, but they did considerable damage, including spraying gang graffiti, putting holes in walls, and splashing paint on the carpet. There is some evidence in the record that indicates that vandals also ripped out the fire alarm system on that date, though Mr. George provided conflicting statements about when the fire system was damaged. This second incident caused Chicago Heights to post a notice that the Property was "condemned." The remaining tenants were ordered to vacate, and the city boarded up the Property.

¶ 7 Approximately a week later—the parties generally fix on the date of January 3—unknown vandals climbed through air conditioning vents and stole copper piping installed throughout the Property. The cutting of the pipes caused significant water damage to the basement of the Property. At some point in February, Mr. George was told that he had to gut the

entire Property and allow city inspectors to view all of the electrical and plumbing, if he wanted to repair the building and bring it up to code.

¶ 8 On January 7, 2008, Mr. George initiated a claim with his insurance agent. The January 7 Property Loss Notice indicated that Z George was claiming a loss for "vandalism at location" which occurred on "12/28/2007." The Property Loss Notice does not indicate the probable amount of loss—and it made no mention of any incidents of vandalism on December 20 or in early January.

¶ 9 In April, L.J. Shaw & Company, on behalf of Indian Harbor, sent a letter to Mr. George informing him of his obligations under the policy and requesting "any documents pertinent" to his claim, listing several examples. On June 20, Z George and Mr. George's attorney, David L. Yanoff, responded to the April letter and provided documents relevant to the claim, including a sworn Proof of Loss. The attorney's letter said, in part:

> "On December 27, 2007, unknown persons did criminal damage to [the Property]. As a result of the damage, the City of Chicago Heights vacated the tenants at the subject property and boarded up the building.
>
> ***
>
> On January 30, 2008, [Z George] received an estimate to repair the subject property. *** However, due to the delays in the receipt of insurance proceeds, [Z George] was unable to complete the necessary work at that time. This delay exacerbated the existing conditions at the property. The property became water damaged and this resulted in the growth of mildew throughout the property.
>
> ***

> In order to bring the building into full compliance following the act of vandalism, the City demands numerous additional repairs *** estimated at $500,000.00."

¶ 10 The sworn Proof of Loss stated that "a vandalism loss occurred about 12:01 o'clock a.m. on the 28th day of December 2007." The proof of loss indicated that the "full cost of repair or replacement" was $603,065. This amount was marked as the "actual case value loss" and "replacement cost loss." The Proof of Loss was signed by Mr. George, as president, and notarized by David L. Yanoff, on June 19th. The $603,065.00 includes: a $7,845 board-up fee charged by the city, the $500,000 repair estimate, and $95,220 in lost rent.

¶ 11 Indian Harbor conducted an investigation. Having received little in the way of documentation from Z George after multiple requests, Indian Harbor, among other things, issued a FOIA request to the city of Chicago Heights for documentation concerning the Property. Between the FOIA request and other investigative avenues, Indian Harbor learned about the December 20 and January 3 incidents, in addition to the December 28 incident. Indian Harbor also learned at this time of various code violations cited against the Property that pre-dated the first act of vandalism on December 20.

¶ 12 Based on the results of its investigation, Indian Harbor exercised its right to an examination under oath and deposed Mr. George in December. During the examination under oath, Mr. George gave a number of statements that Indian Harbor contends are material misrepresentations. During the examination, Mr. George was questioned by Matthew Ponzi, on behalf of Indian Harbor. Regarding prior incidents of trespassing, the following exchange occurred:

> "Q. Where there any issues with regard to vacant apartments and people accessing vacant apartments?

A. You know, one of the apartments there was somebody kicked in, you know, vacant apartment. And then they have the gas left on or something. That happened at night. Not prior to this. It happened that night when they did the complete vandalism.

Q. When you say that night, what night are you referring to?

A. The night I had marked it down on the date.

Q. The one that's on the claim, December 28th?

A. Yeah, whatever the date is there's nothing more.

Q. So your testimony is that prior to December 28th there wasn't any issue with people trespassing on the property?

A. No. We do have secure doors there, metal doors."

¶ 13 Later in the examination, Mr. George confirmed that there were two other incidents of vandalism and trespassing (which we described above): one earlier, on December 20, 2007, and one later, on January 3, 2008.

¶ 14 Mr. George explained that on January 30, a contractor quoted him $76,770 to repair the damage to the building. But due to the water damage from the January 3 incident, the city required the building to be "gutted" so the city could see the exposed plumbing and electrical. Mr. George was quoted $500,000 to "gut" the property.

¶ 15 On April 20, 2009, Indian Harbor denied Z George's claim regarding the December 28 vandalism. Indian Harbor cited the "concealment, misrepresentation or fraud" and, alternatively, the "duties in the event of loss" provisions of the policy. The policy states, in pertinent part:

"This Coverage Part or Coverage Form is void if you or any other insured ("insured"), at any time subsequent to the issuance of this insurance, commit fraud or intentionally conceal or misrepresent a material fact relating to:

(1) This coverage Part or Coverage Form;

(2) This Covered Property;

(3) Your interest in the Covered Property; or

(4) A claim under this Coverage Part or Coverage Form."

¶ 16 With regard to the misrepresentation provision, Indian Harbor determined that "the misrepresentations in your Proof, at your [examination under oath], and your attempted concealment of the code violations all constitute breaches of the above quoted policy provisions. Consequentially, Indian Harbor considers your policy void, and denies any and all liability to you for the claimed loss or any amounts whatsoever."

¶ 17 Z George filed suit, claiming Indian Harbor wrongfully denied his claim. Indian Harbor moved for summary judgment, arguing: Mr. George's misrepresentations precluded any coverage; late notice; the insured's failure to preserve and protect the Property; and the insured's neglect of the property. The consistent theme running through Indian Harbor's various arguments was that Z George lied to Indian Harbor about the amount of lost rent by inflating the number of people who resided there; lied to Indian Harbor about the number of vandalism incidents, to avoid multiple per-incident deductibles, to avoid the duty of mitigation that would have been triggered each time, and to thwart its investigative efforts; and allowed the property to be vandalized repeatedly so the property would fall into disrepair, all to the end of getting Indian Harbor to indemnify Z George for a rehab of the building that Z George had been planning to undertake, anyway, to correct numerous code violations.

¶ 18 In granting summary judgment to Indian Harbor, the trial judge stated in open court:

"This is not—I mean, this thing is—the facts aren't going to change at trial. There's so much in the record here. There's no genuine issue of material fact, and I don't do this

> very often, but this is—I'm granting defendant's motion for summary judgment based on fraud, the false statements, the late notice, not protecting property, having the Village pay to protect his property, and for the whole laundry list of things that Mr. Shukis argued. I'm not going to take them in order, but any one of them I think the Court finds that there's no genuine issue of material fact."

¶ 19 Z George timely filed its Notice of Appeal.

¶ 20 ANALYSIS

¶ 21 We first address deficiencies in Z George's appellate brief. Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017) requires an appellant's brief to include an "argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." The purpose of the rule "is to require parties before a reviewing court to present clear and orderly arguments so that the court can properly ascertain and dispose of the issues involved." *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. A contention that is not supported by citations may be considered forfeited. See *County Preferred Insurance Company v. Groen*, 2017 IL App (4th) 160028, ¶ 12.

¶ 22 Z George's brief fails to comply with Illinois Supreme Court Rule 341(h)(7). The argument section of appellant's brief contains four separate arguments. But there are only two case citations in the entire brief, both of which are in the section regarding promptness of notice. Z George's argument does not contain any citation to the record and does not even state this court's standard of review on appeal. The violations are not so flagrant as to preclude our review (see *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 12), so we will consider the merits of the appeal, but with the admonition that supreme court rules are mandatory, not discretionary.

¶ 23 An order granting summary judgment is reviewed *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15. Summary judgment is appropriate when " 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id*. (quoting 735 ILCS 5/2-1005(c) (West 2010)). Summary judgment is not the forum for resolving disputed facts, weighing evidence, or making credibility determinations. *Watkins v. Schmitt*, 172 Ill. 2d 193, 211 (1996); *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 948 (1993). While a drastic means of resolving cases, it is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *American Economy Insurance Co. v. DePaul University*, 383 Ill. App. 3d 172, 177 (2008).

¶ 24 Indian Harbor cited four independent reasons why summary judgment was proper. The trial court seemed to find them all of them meritorious. We can affirm summary judgment on any of those bases. *Shared Imaging, LLC v. Hamer*, 2017 IL App (1st) 152817, ¶ 13.

¶ 25 We begin with Indian Harbor's claim that Z George made material misrepresentations regarding the number of vandalism incidents. Indian Harbor cites the policy provision that voids coverage if the insured "intentionally conceal[s] or misrepresent[s] a material fact."

¶ 26 Indian Harbor argues that there were three separate acts of vandalism—December 20; December 28; and January 3—but Z George's claim identified only the December 28 incident. Z George responds that it did not make any false statements under oath that were not subsequently corrected under oath, that it was "inadvertent, a mistake and not significant," and that a question of fact exists as to whether its incorrect statement constituted a material misstatement of fact.

¶ 27 While the concept of an "intentional misrepresentation of material fact" suggests the doctrine of common-law fraud, that concept "is quite different in the realm of insurance law" and

has been “broadly defined” in that context. *Barth v. State Farm Fire and Casualty Co.*, 228 Ill. 2d 163, 172 (2008); *Passero v. Allstate Insurance Company*, 196 Ill. App. 3d 602, 609 (1990). The phrase does not incorporate the elements of common-law fraud and does not require a showing of such things as reliance or prejudice. *Barth*, 228 Ill. 2d at 172.

¶ 28 Indeed, our supreme court has specifically rejected the notion that a misrepresentation is not “material” if the insurer discovers the misrepresentation before paying out on a claim. *Id.* at 172-73. In doing so, our supreme court favorably discussed *Passero*, where the Passeros claimed that their misrepresentations to the insurer were not material because “the insurer discovered the misrepresentations before paying the filed claims in reliance on the misstatements.” *Barth*, 228 Ill. 2d at 172 (discussing *Passero*, 196 Ill. App. 3d at 608-609). The court in *Passero* rejected that argument, citing a body of case law dating back to the U.S. Supreme Court’s decision in *Claflin v. Commonwealth Insurance Co.*, 110 U.S. 81, 96-97 (1884), for the proposition that false sworn answers to an insurer are material

> “if they might have affected the insurer’s action or attitude, or if they may be said to have been calculated to discourage, mislead, or deflect the insurer’s investigation in any area that might have seemed to it, at the time, a relevant area to investigate.” *Passero*, 196 Ill. App. 3d at 609; see also *Barth*, 228 Ill. 2d at 172-73.

¶ 29 So it is not necessary that an insurer rely on the misrepresentation. It makes no difference that the insurer discovered the misrepresentation in time, before paying out on the claim. If the misrepresentation was “calculated to discourage, mislead or deflect” the insurer’s investigation on a topic on which a reasonable insurer “would undeniably attach importance,” the misrepresentation is material. *Passero*, 196 Ill. App. 3d at 609.

¶ 30 We find that Mr. George's statements were material misrepresentations for the purposes of the policy exclusion. We agree with the trial court that there are no disputed questions of fact here. The Notice of Claim and Proof of Loss indicated only one act of vandalism on December 28, 2007. Mr. George ultimately admitted, when confronted at his sworn examination, that in fact there were three separate incidents of vandalism.

¶ 31 While Z George categorizes his omissions as "inadvertent," there is absolutely no citation to the record to support this conclusion. In fact, even during his examination under oath, Mr. George did not mention that vagrants broke in on December 20 to use the stove. Instead, he said that it occurred on the same night as the "complete vandalism" (which he claimed to be December 28) and "there was nothing more." It was only after being confronted with the multiple incidents that Mr. George back-tracked and corrected his statements.

¶ 32 Further, the June 20 letter specifically identified only one act of vandalism and blamed the delay in insurance proceeds for the water damage and increased repair costs—even though Mr. George knew, without question, that the water damage was caused by the third, undisclosed act of vandalism. Given the circumstances of these misrepresentations, there is no simply basis to characterize these misrepresentations as "inadvertent" or capable of being innocently construed.

¶ 33 The materiality of this misrepresentation is apparent in several ways. First, Z George owed a deductible for each incident of vandalism. By claiming only one incident, it owed only one deductible instead of three.

¶ 34 Second, each incident of vandalism—of reportable damage to his property—carried with it an obligation on the insured to "[t]ake all reasonable steps to protect the Covered Property from further damage." By not mentioning the first, December 20 incident, at which time the city of Chicago Heights declared Z George's property "uninhabitable," Z George was able to avoid

having to explain why it did not do what the city of Chicago Heights requested that it do at that time—post security guards at the property, much less board up the windows and doors. We are not taking sides on that issue; Mr. George said it was too expensive to hire security; Indian Harbor says it would have reimbursed him; our only point is that knowing of the December 20 incident surely would have been important to Indian Harbor for this reason.

¶ 35 Third and most importantly, it is undisputed that the bulk of the damages claimed by Z George—$500,000 of the roughly $600,000, or over 80 percent—was caused by water damage that occurred as a result of the January 3 incident. Any reasonable insurer would be keenly interested in the circumstances surrounding an incident that led to a half-million-dollar claim at a residential apartment building. There are any number of matters that a reasonable insurer would be within its rights and reason to explore—whether the insured had properly safeguarded the property; whether the incident happened exactly as described by the insured or whether other causes might be responsible that might set up a policy defense; even whether the insured, itself, might have been involved in the property damage as some kind of insurance fraud, much like insurers often investigate damage from suspicious fires for insured-caused arson.

¶ 36 But Indian Harbor could not conduct any such investigation without *knowing* that there was an incident on January 3. By omitting any reference to an incident that was responsible for the vast bulk of the insurance coverage claimed, Z George prevented Indian Harbor from conducting any investigation whatsoever on an incident of critical importance to it.

¶ 37 As we have already discussed, the fact that Indian Harbor ultimately discovered these separate incidents through FOIA requests and other investigative efforts does not change the materiality of the misrepresentations. *Barth*, 228 Ill. 2d at 172; *Passero*, 196 Ill. App. 3d at 608-609. The fact that Mr. George later admitted, at his examination under oath, to the existence of

three separate vandalism incidents does not magically cure his earlier misrepresentation, either. It was not as if Z George voluntarily came forward to correct a misimpression it had unintentionally given in the initial notice of loss. It is undisputed that Indian Harbor only discovered these other incidents through its independent investigation, and Mr. George admitted to them only after being summoned to an examination under oath.

¶ 38 As a matter of law, Z George's statement attributing all of the damage to its property to a single incident of vandalism on December 28 was an intentional misrepresentation of material fact that voided its insurance coverage. Summary judgment in Indian Harbor's favor was proper.

¶ 39 Affirmed.