2013 IL App (5th) 120304-U

NO. 5-12-0304

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JEFFREY M. CASTELLANO, Plaintiff-Appellant, v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Williamson County. No. 11-L-60 Honorable Brad K. Bleyer, Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justice Goldenhersh concurred in the judgment.
Presiding Justice Spomer dissented.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the plaintiff's complaint with prejudice where the factual allegations in the complaint are sufficient to state a claim for breach of contract and for extracontractual penalties pursuant to section 155 of the Insurance Code. Reversed and remanded.

¶ 2 The plaintiff, Jeffrey M. Castellano, filed an action in the circuit court of Williamson County, against the defendant, State Farm Mutual Automobile Insurance Company (State Farm), and alleged that State Farm vexatiously and unreasonably delayed payment of underinsured motorist benefits in breach of its duties under an automobile insurance contract. The plaintiff prayed for damages and for extracontractual remedies pursuant to section 155 of the Illinois Insurance Code (Code) (215 ILCS 5/155 (West 2004)). The trial court dismissed the case with prejudice, finding as a matter of law that the factual allegations in the second amended complaint failed to give rise to a cause of action under section 155 of

the Code. On appeal, the plaintiff contends that the trial court erred in dismissing the case with prejudice because the factual allegations in the second amended complaint sufficiently state a claim for the breach of his insurance contract and for section 155 penalties. We reverse and remand for further proceedings.

¶ 3 On April 2, 2007, the plaintiff was seriously injured when a vehicle driven by Roger Sigmon rear-ended his vehicle. At that time, both vehicles were insured by State Farm. Sigmon's policy provided a bodily injury liability limit of $50,000 per person. State Farm paid $50,000, the full limit of Sigmon's policy, to the plaintiff. Because this amount was not sufficient to compensate the plaintiff for his injuries and damages, the plaintiff filed a claim for underinsured motorist benefits under his own auto insurance contract with State Farm. The plaintiff carried underinsured motorist limits of $100,000 per person.

¶ 4 The section of the plaintiff's policy covering underinsured motorist benefits provides: "We will pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle." Further along in the underinsured section of the policy, there is a subsection, "Deciding Fault and Amount." That section provides in pertinent part:

> "Two questions must be decided by agreement between the insured and us:
>
> 1. Is the insured legally entitled to collect damages from the owner or driver of the uninsured or underinsured motor vehicle; and
> 2. If so, in what amount.
>
> If there is no agreement, these questions shall be decided by arbitration."

¶ 5 In this case, the parties agreed that the plaintiff was legally entitled to collect damages from the driver of the underinsured vehicle, and so they commenced discussions on the amount. State Farm initially offered $5,000 to settle the plaintiff's underinsured claim, and the plaintiff rejected it. State Farm then offered $10,000, and the plaintiff rejected it. At that

point, the plaintiff notified State Farm's claims representative that he would pursue his contractual right to arbitrate the claim, and he requested that State Farm tender the sum of $10,000 pending arbitration since both parties agreed the claim was worth at least that amount. The claims representative responded with a letter advising that State Farm had assigned the case to its attorneys to prepare for arbitration and that it had enclosed a payment of $5,000. In the letter, the claims representative stated that it is "our policy" to pay the amount of the first offer. The claim was arbitrated a few months later, and the plaintiff was awarded $25,000.

¶ 6 The plaintiff then filed an action against State Farm, and therein alleged that State Farm vexatiously and unreasonably delayed payment of underinsured motorist benefits in breach of its contractual duties and obligations, and he sought section 155 penalties. The sufficiency of the second amended complaint is at issue here. The second amended complaint, pared to its core, alleges that State Farm sold an automobile insurance contract to the plaintiff; that in accordance with underinsured provisions of the contract, State Farm promised to pay damages for bodily injury that its insured is "legally entitled to recover" from the owner or operator of an underinsured vehicle; that State Farm evaluated the plaintiff's underinsured motorist claim and determined that the plaintiff's damages exceeded the amount that the plaintiff recovered under the negligent driver's policy; and that in breach of its contractual duties, State Farm: (a) offered $5,000, a sum which was less than the amount it had determined the plaintiff was legally entitled to recover; (b) made a subsequent offer of $10,000, but then refused to tender that sum and arbitrate the question of what amount over $10,000 the plaintiff was legally entitled to recover, despite the plaintiff's agreement that he was entitled to at least $10,000 in underinsured benefits; (c) and after determining that the plaintiff was legally entitled to recover $10,000 in underinsured benefits and offering that sum, tendered only $5,000 and agreed to arbitrate what amount over $5,000 the plaintiff was

legally entitled to recover, despite the plaintiff's agreement that he was entitled to at least $10,000 in benefits. The complaint further alleges that in consequence of State Farm's breach, the plaintiff was deprived of his contractual bargain to have State Farm evaluate, communicate, and tender the amount that it concluded he was legally entitled to recover from the underinsured motorist, and thus State Farm deprived him of the use of $5,000 in underinsured benefits pending the arbitration.

¶ 7 State Farm filed a motion to dismiss the complaint, and alternatively for a judgment on the pleadings, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)). Therein, State Farm asserted that the complaint failed to allege that it had breached any provision in the insurance contract or any duty recognized by law, and that the plaintiff had misread or misapplied provisions in the insurance contract in order to impose nonexistent contractual duties upon it. State Farm claimed that the breaches alleged were vague, conclusory, and not found within the terms of the contract. State Farm argued that while there was no disagreement between the parties regarding whether the plaintiff was legally entitled to collect damages from the underinsured driver, there was a *bona fide* disagreement regarding the amount the plaintiff was legally entitled to collect, and that the insurance contract provided a means to resolve such a disagreement through arbitration. State Farm further argued that the plaintiff made an unwarranted assumption that if State Farm and its insured could not agree on the full amount of damages, then State Farm had a duty to tender to the insured its highest offer in advance of arbitration. State Farm stated that there was no such duty set forth in the insurance contract. State Farm claimed that it had fully complied with the terms of the insurance contract in that it evaluated the underinsured motorist claim, it determined a range of value for the claim, and it agreed to arbitration when the parties could not agree on the value of the claim. State Farm concluded that it was entitled to a dismissal of the complaint or a judgment on the pleadings.

¶ 8 In response, the plaintiff pointed out that in accordance with the underinsured provisions of the insurance contract, State Farm promised to pay to him the amount he was "legally entitled to recover" from the underinsured driver; that the amount was to be determined by agreement, but absent an agreement, the amount would be determined in arbitration; and that in order to comply with its contractual duties, State Farm was required to evaluate the claim, to determine the amount the plaintiff was legally entitled to recover, and to communicate that value to the plaintiff. The plaintiff argued that State Farm evaluated the claim, but then vexatiously and unreasonably withheld payment, pending arbitration, of the undisputed portion of underinsured benefits that it had determined the plaintiff was legally entitled to recover. The plaintiff asserted that as a result of the breach of contractual duties and the vexatious and unreasonable delay in payment of benefits, he lost the value of the money withheld, and he incurred litigation expenses and arbitration costs associated with prosecuting the arbitration case. The plaintiff concluded that he had adequately alleged a breach of contract claim and a claim for extracontractual penalties under section 155 of the Code.

¶ 9 Upon reviewing the allegations in the second amended complaint and the insurance contract, the trial court found, as a matter of law, that the factual allegations in the complaint failed to give rise to a cause of action under section 155, and the court dismissed the plaintiff's case with prejudice. This appeal followed.

¶ 10 On appeal, the plaintiff contends that the trial court erred in dismissing the case with prejudice because the factual allegations in the second amended complaint sufficiently state a claim for the breach of his insurance contract and for section 155 penalties.

¶ 11 A motion to dismiss brought pursuant to section 2-615 of the Code of Civil Procedure tests the legal sufficiency of the complaint. *Karas v. Strevell*, 227 Ill. 2d 440, 451, 884 N.E.2d 122, 129 (2008). In ruling on a section 2-615 motion, the question is whether the

allegations of the complaint, when taken in a light most favorable to the plaintiff, are sufficient to state a cause of action for which relief may be granted. *Karas*, 227 Ill. 2d at 451, 884 N.E.2d at 129. An order granting a section 2-615 motion to dismiss is reviewed *de novo*. Karas, 227 Ill. 2d at 451, 884 N.E.2d at 129.

¶ 12 In this case, the plaintiff brought an action against State Farm, and therein alleged that State Farm vexatiously and unreasonably delayed payment of underinsured motorist benefits in breach of its contractual duties and obligations, and he sought extracontractual remedies pursuant to section 155 of the Code. Section 155 states:

> "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 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(1) (West 2004).

¶ 13 Section 155 provides an extracontractual remedy for policyholders when an insurer's unreasonable delay in recognizing liability or in settling a claim is vexatious and unreasonable. 215 ILCS 5/155 (West 2004); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520, 675 N.E.2d 897, 900 (1996). It is important to note that section 155 does not establish an independent cause of action, but rather expands a plaintiff's relief to include

reasonable attorney fees, costs, and a limited penalty in addition to a breach of contract action to recover the amount due under an insurance contract. *Cramer*, 174 Ill. 2d at 520, 675 N.E.2d at 901. Thus, the plaintiff must adequately allege a cause of action for a breach of the insurance contract as mere allegations of vexatious conduct are not sufficient to constitute an independent cause of action. Additionally, in seeking section 155 remedies, the plaintiff may not simply allege that the insurer's conduct was vexatious, he must include a modicum of factual support. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681, 734 N.E.2d 144, 151 (2000).

¶ 14 The key question in an action brought under section 155 is whether the insurer's conduct is vexatious and unreasonable. *McGee*, 315 Ill. App. 3d at 681, 734 N.E.2d at 151. Whether an insurer's action or delay is vexatious and unreasonable is a factual one, and the decision whether to allow section 155 fees and penalties lies within the sound discretion of the trial court. *McGee*, 315 Ill. App. 3d at 681, 734 N.E.2d at 151.

¶ 15 An insurer does not violate section 155 merely because it unsuccessfully litigates a dispute involving the scope of coverage or the magnitude of the loss or it delays settlement because of a *bona fide* coverage dispute. *McGee*, 315 Ill. App. 3d at 681, 734 N.E.2d at 151. That said, an insurer's conduct may be vexatious and unreasonable if the insurer refuses to settle and proceeds to arbitration without presenting a *bona fide* defense. *McGee*, 315 Ill. App. 3d at 681, 734 N.E.2d at 151. In addition, an unreasonable delay in the payment of benefits may give rise to a section 155 action despite the fact that benefits were eventually paid. *Green v. International Insurance Co.*, 238 Ill App. 3d 929, 935, 605 N.E.2d 1125, 1129 (1992); *Calcagno v. Personalcare Health Management, Inc.*, 207 Ill. App. 3d 493, 503-05, 565 N.E.2d 1330, 1337-39 (1991). Further, where an insurer does not dispute its obligation to an undisputed amount of a disputed claim, it may not withhold that amount to force the insured to accede to its position regarding the disputed portion of the claim. See,

e.g., *Millers Mutual Insurance Ass'n of Illinois v. House*, 286 Ill. App. 3d 378, 387, 675 N.E.2d 1037, 1043-44 (1997); *Mohr v. Dix Mutual County Fire Insurance Co.*, 143 Ill. App. 3d 989, 999, 493 N.E.2d 638, 645 (1986); *Deverman v. Country Mutual Insurance Co.*, 56 Ill. App. 3d 122, 124-25, 371 N.E.2d 1147, 1149 (1977).

¶ 16 Upon considering these principles and reviewing the allegations in the second amended complaint and the attachments, we find that the plaintiff has provided the modicum of factual support necessary to allege a cause of action for a breach of the insurance contract and a claim for extracontractual relief under section 155. The plaintiff has alleged sufficient facts to support a claim that State Farm, in breach of its contractual duties and its own internal company policy or practice, vexatiously and unreasonably refused to tender the undisputed amount of underinsured benefits pending arbitration, and instead arbitrarily tendered the amount of its first offer. In this first-party insurance claim, the allegations are adequate to allow for discovery on the factual questions regarding the insurer's attitude, its superior financial position, and its motivation for withholding payment of the undisputed sum of underinsured benefits pending arbitration. To be clear, we take no position on the merits of this matter. We merely decide today that the allegations in the second amended complaint are sufficient to avoid a section 2-615 dismissal at the pleading stage of the proceedings.

¶ 17 Accordingly, we find that the trial court erred in granting State Farm's section 2-615 motion and in dismissing the plaintiff's action with prejudice. The judgment of the circuit court of Williamson County is reversed and the case is remanded for further proceedings.

¶ 18 Reversed and remanded.

¶ 19 PRESIDING JUSTICE SPOMER, dissenting:

¶ 20 I respectfully dissent. I agree with the circuit court that, as a matter of law, the factual allegations in the second amended complaint fail to state a cause of action under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2004)). As the majority recognizes, and our supreme court explained in *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 523-24 (1996), section 155 "provides an extracontractual remedy for policyholders who have suffered unreasonable and vexatious conduct by insurers *with respect to a claim under the policy*." (Emphasis added.) By enacting section 155, the legislature provided for penalties to be imposed "*in addition to a breach of contract action to recover the amount due under a policy*." (Emphasis added.) *Id.* at 521. Section 155 does not create an independent cause of action against an insurer absent an underlying breach of contract claim. *Id*. Well-established tort actions, such as common law fraud, require proof of different elements and remedy a different sort of harm than section 155 does. *Id.* Here, the plaintiff does not plead any independent tort action such as common law fraud. The plaintiff merely seeks section 155 damages. As such, he must adequately plead a breach of the insurance policy by State Farm. My review of the second amended complaint, along with the insurance policy attached thereto, leads me to conclude, as the circuit court did, that the plaintiff has not alleged a breach of the insurance policy.

¶ 21 The insurance policy provided for underinsured motorist coverage on the condition that the insurer and the insured agreed to the amount the insured would be legally entitled to collect from the underinsured driver. If there was no agreement, the policy provided that the amount would be determined by arbitration. There is no requirement in the insurance contract, as the plaintiff alleges, that required State Farm to tender its greatest offer to the plaintiff pending arbitration in the absence of an agreement between the plaintiff and State Farm. In fact, there was no requirement in the contract that State Farm tender any amount to the plaintiff pending arbitration.

¶ 22 This is not a case where State Farm refused to arbitrate pursuant to the policy, as in *Millers Mutual Insurance Ass'n of Illinois v. House*, 286 Ill. App. 3d 378 (1997), or where State Farm refused to discuss a resolution of the plaintiff's claim before arbitration, as in *Buais v. Safeway Insurance Co.*, 275 Ill. App. 3d 587 (1995). In addition, this is certainly not a case where it is alleged that State Farm used tactics to delay negotiations on the settlement of the plaintiff's claim, as in *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673 (2000). Taking the allegations in the complaint as true, along with the terms of the policy, it is clear that the plaintiff cannot state a cause of action for breach of the insurance contract, and thus cannot state a claim for section 155 damages. For these reasons, I would affirm the order of the circuit court which dismissed the plaintiff's second amended complaint with prejudice.