2012 IL App (2d) 110798-U
No. 2-11-0798
Order filed September 19, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL THOMAS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 11-L-56
TRAVELERS CASUALTY INSURANCE	)	
COMPANY OF AMERICA,	)	Honorable
	)	John T. Elsner,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: The trial court erred when it dismissed plaintiff's complaint, which alleged that defendant improperly denied coverage: to the extent that plaintiff made a false statement during defendant's investigation of the loss, questions of fact existed as to whether it was material (caused defendant any prejudice) and whether plaintiff intended to deceive and defraud defendant. We reversed the judgment of the trial court and remanded.

¶ 1 During the night of March 7-8, 2010, a truck leased by plaintiff, Michael Thomas, was stolen from his driveway. The truck was insured under two policies issued by defendant, Travelers Casualty Insurance Company of America. Defendant denied coverage, and plaintiff sued for breach

of contract. Defendant moved to dismiss the complaint, contending that it properly denied coverage because plaintiff made a material false statement during its investigation of the incident. The trial court granted the dismissal motion, and plaintiff appeals. He contends that factual issues existed about whether he intentionally deceived defendant and whether the statement was material should have precluded dismissal. We reverse and remand.

¶ 2 According to the complaint, plaintiff was a distributor for Matco Tools. He traveled his designated territory in a leased GMC truck. On the morning of March 8, 2010, he awoke to discover that the truck was not in his driveway. He told Du Page County sheriff's deputies investigating the incident that he left the truck's keys in the ignition but left the truck locked. Plaintiff would typically leave the keys in the locked truck, unlocking it using a second set of keys.

¶ 3 On March 17, 2010, defendant's agent, Richard Sanford, took an unsworn statement from plaintiff. During this interview, the following exchange took place:

> "Q. I, I only have a couple more questions ***. You had two keys; one set you have with you and the other set is where?
>
> A. No, actually, one set is in the Jeep and one set is at the shop."

¶ 4 Later, defendant exercised its right under the policy to have plaintiff submit to an examination under oath. On May 19, 2010, the examination took place. After being confronted with the deputies' report, plaintiff admitted that he had left the ignition key in the locked truck. He said that it was his habit, both with the truck and with his personal vehicles, to leave the keys in the locked vehicles. He testified that he did not tell Sanford about this because he was embarrassed.

¶ 5 Defendant denied coverage. Plaintiff sued, alleging that defendant breached its contract by refusing to cover the loss. Defendant moved to dismiss on the ground that plaintiff made a material

false statement of fact by telling Sanford that he could account for both sets of keys. Defendant contended that plaintiff's answer was inconsistent with his later statement that one of the keys was in the truck when it was stolen. The trial court granted the motion, and plaintiff timely appeals.

¶ 6 Plaintiff contends that whether he made a material false statement is a jury question. He argues that, to void an insurance policy, a false statement must have been made intentionally. He points out that Sanford never directly asked him where the keys were when the truck was stolen and that he did not volunteer this information because he was embarrassed about it, not because he intended to defraud defendant.

¶ 7 Section 2-619(a)(9) of the Code of Civil Procedure provides for the dismissal of a cause of action where the claim asserted "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). A section 2-619 motion admits the legal sufficiency of the complaint along with all well-pleaded facts and reasonable inferences drawn from those facts. *Giannini v. Kumho Tire U.S.A., Inc.*, 385 Ill. App. 3d 1013, 1015 (2008). In deciding a motion brought under section 2-619, a reviewing court must interpret the pleadings in the light most favorable to the nonmoving party. See *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 699 (2005). We review *de novo* the dismissal of an action pursuant to section 2-619(a)(9). *Mutual Management Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶ 4.

¶ 8 Each of the policies at issue provides that defendant may deny coverage if plaintiff makes a false statement of material fact. To void an insurance policy, a misrepresentation or concealment by the insured must have been made willfully and with the intent to deceive and defraud the insurer. *Bloomgren v. Fire Insurance Exchange*, 162 Ill. App. 3d 594, 600 (1987) (citing *Weininger v. Metropolitan Fire Insurance Co.*, 359 Ill. 584, 598 (1935)). Plaintiff argues that defendant did not

prove as a matter of law that he intended to deceive. In support of this argument, plaintiff notes the following: he testified that he did not tell defendant about the keys being in the truck because he was embarrassed; Sanford never asked him directly where the keys were when the truck was stolen; he told the truth to sheriff's deputies investigating the theft and admitted the truth at his examination under oath; and defendant eventually learned the truth.

¶ 9 We agree with plaintiff that whether he intended to deceive and defraud defendant is a jury question. Initially, we note that Sanford never directly asked him whether the keys were in the truck when it was stolen. Instead, Sanford asked a rather confusing compound question. First, he asserted that plaintiff "had" two keys, which he unquestionably did at one time. Sanford then asked, "one set you have with you and the other set is where?" Thus, Sanford asked plaintiff where the keys were at the time of the interview. Alternatively, given the initial use of the past tense, plaintiff could reasonably have interpreted the question as referring to his habits prior to the theft. In neither case, however, was plaintiff asked where the keys were when the truck was stolen.

¶ 10 Plaintiff further asserts that he did not volunteer the information because he was embarrassed about having left the keys in the truck. This statement, while self-serving, is also uncontradicted. Thus, to the extent that plaintiff made a false statement, a fact question exists regarding whether he intended to deceive and defraud defendant or merely sought to avoid disclosing a potentially embarrassing fact.

¶ 11 Plaintiff further contends that he told the truth to the sheriff's deputies and eventually admitted the truth at his examination under oath. Defendant points out that the reviewing court in *Passero v. Allstate Insurance Co.*, 196 Ill. App. 3d 602 (1990), rejected the argument that the information presented in forged purchase receipts was not material because the actual receipts were

in existence and the insurance company eventually learned the truth. We agree with that holding, but we think that plaintiff's argument is slightly different. Plaintiff appears to maintain that he would not have tried to deceive defendant when he knew that the truth was already in the police reports, which defendant was bound to discover. Defendant's argument that in this technological age, nearly every document is "of record" somewhere, but it has no obligation to investigate the truth of an insured's responses, rings somewhat hollow in light of its admission that it actually had the police reports and confronted plaintiff with them at his examination under oath.

¶ 12 In addition, defendant has not suggested what plaintiff's motive would be for lying about the keys being in the truck. Defendant does not argue, for example, that leaving the keys in the truck would itself be a basis to deny coverage. Parenthetically, we note that defendant asserted at one point that it denied coverage for several reasons, but did not elaborate; thus, it has forfeited any argument that we may affirm the dismissal on the basis of some other reason for denying coverage. Most of the reported cases involved inflated values of allegedly lost property (see *Passero*), or the causes of fires. The insureds' motives in those cases were transparent, but it is not so clear to us how plaintiff could have intended to defraud defendant by falsely implying that the keys were not in the truck when it was stolen if defendant could not have denied coverage on this basis.

¶ 13 Defendant devotes much of its brief to arguing that the statement was material, but largely sidesteps the issue of whether plaintiff intended to deceive and defraud. An insurer may not void a policy based on an innocent misrepresentation, regardless of whether it was material. See *Sentry Insurance v. Rice*, No. 09-3013, 2011 WL 296599, at *7 (C.D. Ill. 2011) (honest effort at valuing loss will not void policy). As defendant points out, the purpose of the false-statement provision is

to facilitate the insurer's investigation of the loss, not to allow the insurer to void the policy for an innocent mistake.

¶ 14 In any event, it is far from clear that the statement was material. Generally, a false statement is material if it concerns a subject relevant to the insurer's investigation as it is then proceeding. False answers 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 that time, a relevant area to investigate. *Passero,* 196 Ill. App. 3d at 608-09 (citing *Fine v. Bellefonte Underwriter's Insurance Co.*, 725 F.2d 179, 183-84 (2d Cir. 1984)).

¶ 15 Citing *Passero*, defendant contends that it need not show prejudice, *i.e.*, that it altered the course of its investigation based on plaintiff's statement. Defendant seems to read *Passero*'s statement, that a misrepresentation is material if it "might have seemed to [the insurer], at that time," a relevant area to investigate (*id.* at 609), to mean that it can unilaterally decide what is material, regardless of whether the statement affected its investigation. We disagree.

¶ 16 In its motion, defendant cited *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163 (2008). Although defendant does not cite *Barth* in its appellate brief, we nonetheless find it instructive. In *Barth*, the plaintiff's home was destroyed by fire. The defendant denied coverage, in part on the ground that the plaintiff made material false statements during its investigation. In the trial court, the plaintiff argued that the jury should be instructed that the materiality provision required proof of the common-law-fraud elements of reasonable reliance and prejudice. The trial court disagreed, instead giving the jury the following instruction derived from *Passero*:

" 'A concealment, misrepresentation, or false statement is material if a reasonable insurer would attach importance to it at the time it was made. A reasonable insurer would attach importance to any fact or statement that would affect the insurer's action or attitude regarding a claim by an insured.

A concealment, misrepresentation, or false statement is material if it is calculated to discourage, mislead or deflect an insurer's investigation in any area that could be relevant to the insurer at the time of the investigation.

Whether a concealment, misrepresentation, or false statement is material does not depend on whether it relates to a matter that ultimately proves to be significant in the insurer's final disposition of the claim.' " *Id.* at 173.

¶ 17 The supreme court held that the insurer was not required to show reasonable reliance or prejudice and that, accordingly, the instruction the trial court gave was proper. The supreme court explained:

"As Barth concedes in another portion of his brief, the materiality requirement necessarily 'implies an element of prejudice.' Moreover, the requirement implicates a reasonable connection between the insured's concealment, misrepresentation, or false statement and the insurer's actions or attitude in investigating the claim. Thus, the instruction adequately covers the fundamental concerns raised by Barth's argument about the need for a showing of reasonable reliance and injury to preclude any potential 'mischief' by unscrupulous insurers. The exclusion at issue is not based on common law fraud and, thus, need not require all the elements of that tort to avoid injustice to insureds." *Id.* at 173-74.

¶ 18 Thus, the supreme court, citing *Passero*, acknowledged that "materiality" implies at least some degree of prejudice to the insurer. *Id.* Defendant's argument here goes further, contending that it does not need to show any prejudice. Plus, *Barth* echoed the requirement that the misrepresentation have been "calculated to discourage, mislead or deflect an insurer's investigation." *Id.* at 173. Questions for the jury exist on both points. As discussed above, it is at least arguable that the allegedly deceptive answer was not material. Moreover, a question exists whether plaintiff intended to deceive and defraud defendant.

¶ 19 Accordingly, we reverse the dismissal of the complaint and remand the cause for further proceedings consistent with this order.

¶ 20 Reversed and remanded.