2017 IL App (1st) 160856-U
No. 1-16-0856
Order filed March 14, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

AMCO INSURANCE COMPANY, Plaintiff & Counter-Defendant-Appellee, v. PAUL RIES & SONS, INC., and JOSEPH ZEMAN, Defendants & Counter-Plaintiffs-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 12 CH 42015 The Honorable Sophia H. Hall, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendants' request for sanctions against plaintiff for "vexatious and unreasonable" conduct under 215 ILCS 5/155.

¶ 2 Defendants asked their insurance company, Amco Insurance, to defend a personal injury suit arising from an incident at their auto body shop. Amco eventually filed a declaratory judgment action alleging that defendants were not entitled to coverage. Defendants countered, alleging Amco's conduct was "vexatious and unreasonable" under 215 ILCS 5/155 (West 2015). After Amco settled the personal injury suit, the trial court dismissed the request for section 155

damages. We find that the trial court did not err in dismissing the section 155 counterclaim, and affirm.

¶ 3 BACKGROUND

¶ 4 Daniel Zak filed a complaint against Ries (an auto body shop) and Zeman (who owned the shop), alleging he had been injured on the shop's premises because Ries and Zeman failed to secure an "off road dirt bike" there for service. Amco Insurance, which had issued a commercial general liability policy to Ries, defended Zak's suit. Nevertheless, three years after the incident, Amco issued a reservation of rights letter based on an investigation indicating that Ries and Zeman might have colluded with Zak, violating the cooperation provision. Amco stated that it would defend the case under a reservation of rights, reserve the right to assert coverage issues, and might try to settle.

¶ 5 Thereafter, Amco filed a complaint for declaratory judgment against Zak, Ries, and Zeman. In the first count, Amco alleged that the insurance policy did not cover bodily injuries caused by any "auto" owned by the insured, and that Zak's injury (caused by Zeman's motorcycle) was not covered. The second count alleged that Ries and Zeman breached the cooperation clause of the policy by providing inaccurate information to Amco and colluding with Zak.

¶ 6 Ries moved to dismiss the declaratory judgment complaint, alleging that the "off road dirt bike" was not excluded by the policy, and that Amco had not alleged facts supporting the claim that Ries and Zeman breached the cooperation clause. The trial court denied the motion without prejudice. Ries and Zeman then answered the declaratory judgment complaint, and the parties proceeded with discovery.

¶ 7 Amco filed an amended complaint for declaratory judgment, raising three counts: (i) the "auto" exclusion precluded coverage; (ii) Ries and Zeman had breached the policy's cooperation clause; and (iii) coverage was excluded under an umbrella insurance policy related to the underlying policy. In expanding its breach of the cooperation clause, Amco alleged that Ries first reported to Amco that Zak's injury occurred on May 28, 2009, and that Zeman, Zak, and a Ries employee told Amco that the injury had been caused by an object or metal plate falling from a lift onto Zak's foot. Amco further alleged that later on, it discovered that the injury had actually occurred on May 15, 2009, and was caused by a vehicle. By that point, Zeman had sold the vehicle and did not have any documentation about its existence. Amco alleged that these actions compromised Zeman's credibility and prejudiced Amco's ability to defend the lawsuit.

¶ 8 Ries and Zeman moved to dismiss the amended complaint, and the trial court granted that motion in part while giving Amco the opportunity to replead. Amco filed a second amended complaint, raising the same three claims, and later dismissed the "auto exclusion" claim without prejudice.

¶ 9 Ries and Zeman filed a counterclaim for damages under 215 ILCS 5/155, alleging that Amco's declaratory judgment suit was "vexatious and unreasonable." They alleged that, for three years after they reported Zak's injury to Amco, the insurance company had (i) investigated and defended the suit without a reservation of rights and totally controlled the defense; (ii) failed to plead certain affirmative defenses, and (iii) failed to secure expert witnesses regarding Zak's injury. Defendants alleged that Amco took recorded statements from Zeman and another Ries employee without any reservation of rights, but later used those statements to deny coverage under the "breach of cooperation" clause. After a couple of years, however, Amco issued a reservation of rights, but only on the breach of cooperation clause, not on the auto exclusion.

Defendants maintained Amco's "auto exclusion" claim, voluntarily dismissed, was pursued in bad faith. Due to Amco's declaratory judgment action, defendants had to retain their own counsel and incurred attorneys' fees. They asked for attorneys' fees plus $60,000 in costs.

¶ 10 Amco moved to dismiss the section 155 counterclaim, stating that the breach of the cooperation clause was a *bona fide* coverage defense. After the trial court dismissed the counterclaim without prejudice, Ries and Zeman filed an amended counterclaim under section 155, asserting that Amco had acted in bad faith and the cooperation clause was not a *bona fide* coverage defense. Amco moved to dismiss, which the trial court granted with leave to replead.

¶ 11 In their second amended counterclaim under section 155, Ries and Zeman alleged that the breach of cooperation clause claim had been asserted in bad faith, solely to motivate Zak to settle the suit. Zak had indeed settled his lawsuit with Amco for $2.25 million, less than Zak's original demand of $7 million. Ries and Zeman alleged that defending the declaratory judgment suit had cost them over $100,000 in attorneys' fees.

¶ 12 Amco again moved to dismiss the counterclaim under 735 ILCS 5/2-615, and the trial court dismissed the counterclaim with prejudice. Ries and Zeman moved for reconsideration, which the trial court also denied.

¶ 13 STANDARD OF REVIEW

¶ 14 We review the trial court's grant of a section 2-615 motion to dismiss *de novo*. *Turczak v. First America Bank*, 2013 IL App (1st) 121964, ¶ 15.

¶ 15 ANALYSIS

¶ 16 A section 2-615 motion attacks a complaint's legal sufficiency, based on defects apparent on its face. *Saletech, LLC v. E. Balt., Inc.*, 2014 IL App (1st) 132639, ¶ 11. The trial court must consider whether the allegations, considered in the light most favorable to the plaintiff, are

sufficient to state a cause of action. *Id.* All well-pleaded facts must be accepted as true, and the trial court should grant the motion only if it clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Turczak*, 2013 IL App (1st) 121964, ¶ 15.

¶ 17 Under 215 ILCS 5/155, in an insurance action where there is an issue of liability, or "unreasonable delay" in settling the claim, the insured may recover attorneys' fees and costs from the insurance company "if it appears to the court that such action or delay is vexatious and unreasonable." The statute seeks to punish insurance companies that improperly delay paying, or reject, legitimate claims. *Cook*, 2014 IL App (1st) 123700, ¶ 47. Section 155 is an "extracontractual remedy" to give policyholders an equal playing field with insurance companies that often have superior financial resources. *Area Erectors, Inc. v. Travelers Property Casualty Co. of America*, 2012 IL App (1st) 111764, ¶ 32.

¶ 18 Whether the action or delay is "vexatious and unreasonable" presents a question of fact, assessed based on the totality of the circumstances, with no one fact controlling. *Cook*, 2014 IL App (1st) 123700, ¶ 48. Courts consider several factors, including (i) the insurer's attitude, (ii) whether the insured was forced to file suit to recover, (iii) whether the insured was deprived of use of its property, (iv) whether a *bona fide* coverage dispute exists, (v) the extent of the insurance company's evaluation of the claim, and (vi) the adequacy of communications between the company and the insured. *Id*. Section 155 fees are not merited simply because the insurance company refused to settle or lost the case; rather, it is the company's attitude that matters. *Rosalind Franklin University of Medicine & Science v. Lexington Insurance Co.*, 2014 IL App (1st) 113755, ¶ 110.

¶ 19 Ries and Zeman allege that Amco's declaratory judgment action was "vexatious and unreasonable" because it was filed simply to motivate Zak to settle, denying Ries and Zeman

coverage during this time and forcing them to spend money defending the declaratory judgment action. In support, Ries and Zeman point to the timeline of events.

¶ 20 Considering the facts in the light most favorable to Ries and Zeman, the facts plead in the counterclaim for 155 damages are legally insufficient and not enough to constitute "vexatious and unreasonable" conduct. We find the trial court did not err in dismissing the counterclaim.

¶ 21 The wisdom of Amco's strategy (contesting coverage before ultimately settling with Zak) could be debated, but tough litigation tactics do not fulfill the section 155 standard. To be "vexatious and unreasonable," there must be more as in *La Grange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 868 (2000) (insurer's response to being notified about underlying suit was to destroy subject policy); *Estate of Price v. Universal Casualty Co.*, 322 Ill. App. 3d 514, 518 (2001) (insurance company refused to pay award mandated by arbitration, failed to appeal award, and forced insured to initiate collection proceedings to receive money); and *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 427 (2009) (insurance company failed to defend insured, failed to defend under a reservation of rights, failed to file any declaratory judgment action, and there was no bona fide coverage dispute). In those cases, the insurer's "attitude" (which is what we must examine) was shown through deliberate acts of illegality, refusal to comply with court orders, or complete negligence of the case.

¶ 22 Amco's actions are not analogous. In contrast, Amco did communicate with Ries and Zeman, issued a reservation of rights letter after a thorough investigation, filed a declaratory judgment action, and ultimately settled the claim with Zak. That Amco settled the claim while simultaneously pursuing the declaratory judgment action does not change our conclusion; an insurance company may maintain an "inconsistent position" without meeting the section 155

standard. See *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 746 (2010) (insurance company that agreed to arbitration but also filed declaratory judgment action seeking to avoid coverage was not vexatious or unreasonable). Amco was permitted to contest coverage and pursue legal avenues to cut their losses without being "vexatious and unreasonable." The trial court did not err in granting the motion to dismiss.

¶ 23 Affirmed.