UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JAMES NALDER, Guardian Ad Litem for minor Cheyanne Nalder, real party in interest, and GARY LEWIS, Individually; Plaintiffs, vs. UNITED AUTOMOBILE INSURANCE COMPANY, DOES I through V, and ROE CORPORATIONS I through V, inclusive Defendants.	2:09-cv-1348-ECR-GWF **Order**

Plaintiffs in this automobile insurance case allege breach of contract, breach of the implied covenant of good faith and fair dealing, bad faith, breach of Nev. Rev. Stat. § 686A.310, and fraud. Now pending is Defendant's "motion for summary judgment on all claims; alternatively, motion for summary judgment on extra-contractual remedies; or, further in the alternative, motion stay [sic] discovery and bifurcate claims for extra-contractual remedies; finally, in the alternative, motion for leave to amend" ("MSJ") (#17).

The motion is ripe, and we now rule on it.

I. Background

Plaintiff Gary Lewis ("Lewis") is a resident of Clark County, Nevada. (Compl. ¶ 2 (#1).) Plaintiff James Nalder ("Nalder"), Guardian ad Litem for minor Cheyanne Nalder, is a resident of Clark County, Nevada. (Id. at ¶ 1.) Defendant United Automobile Insurance Co. ("UAIC") is an automobile insurance company duly authorized to act as an insurer to the State of Nevada and doing business in Clark County, Nevada. (Id. at ¶ 3.) Defendant is incorporated in the State of Florida with its principal place of business in the State of Florida. (Pet. for Removal ¶ VII (#1).)

Lewis was the owner of a 1996 Chevy Silverado insured, at various times, by Defendant. (Compl. at ¶ 5-6 (#1).) Lewis had an insurance policy issued by UAIC on his vehicle during the period of May 31, 2007 to June 30, 2007. (MSJ at 3 (#17).) Lewis received a renewal statement, dated June 11, 2007, instructing him to remit payment by the due date of June 30, 2007 in order to renew his insurance policy. (Id. at 3-4.) The renewal statement specified that "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy." (Pls.' Opp. at 3 (#20).) The renewal statement listed June 30, 2007 as effective date, and July 31, 2007 as an "expiration date." (Id.) The renewal statement also states that the "due date" of the payment is June 30, 2007, and repeats that the renewal amount is due no later than June 30, 2007. (MSJ at 7-8 (#17).) Lewis made a payment on July 10, 2007. (Id.)

Defendant then issued a renewal policy declaration and automobile insurance cards indicating that Lewis was covered under

an insurance policy between July 10, 2007 to August 10, 2007. (Pls' Opp. Exhibit 1 at 35-36; MSJ at 4.)

On July 8, 2007, Lewis was involved in an automobile accident in Pioche[1], Nevada, that injured Cheyanne Nalder. (MSJ at 3 (#17).) Cheyanne Nalder made a claim to Defendant for damages under the terms of Lewis's insurance policy with UAIC. (Compl. at ¶ 9 (#1).) Defendant refused coverage for the accident that occurred on July 8, 2007, claiming that Lewis did not have coverage at the time of the accident. (Id. at ¶ 10.) On October 9, 2007, Plaintiff Nalder, as guardian of Cheyanne Nalder, filed suit in Clark County District Court under suit number A549111 against Lewis. (Mot. to Compel at 3 (#12).) On June 2, 2008, the court in that case entered a default judgment against Lewis for $3.5 million. (Id.)

Plaintiffs then filed their complaint in this action in Nevada state court on March 22, 2009 against Defendant UAIC. On July 24, 2009, Defendant removed the action to federal court, invoking our diversity jurisdiction. (Petition for Removal (#1).)

On March 18, 2010, Defendant filed the MSJ (#17). On April 9, 2010, Plaintiffs opposed (#20), and on April 26, 2010, Defendant replied (#21). We granted leave for Plaintiffs to file a supplement (#26), and Defendant filed a supplement (#33) to its reply (#21).

[1] Plaintiffs' complaint originally alleged that the accident occurred in Clark County, Nevada. It is unclear from the documents which site is the correct one, but neither party disputes jurisdiction and the actual location of the accident is irrelevant to the disposition of this motion.

II. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. N.W. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form — namely, depositions, admissions, interrogatory answers, and affidavits — only evidence which might be admissible at trial may be considered

by a trial court in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

III. Analysis

Defendant seeks summary judgment on all claims on the basis that Lewis had no insurance coverage on the date of the accident. Plaintiff contends that Lewis was covered on the date of the accident because the renewal notice was ambiguous as to when payment

must be received in order to avoid a lapse in coverage, and any ambiguities must be construed in favor of the insured. Defendants request, in the alternative, that we dismiss Plaintiffs' extra-contractual claims, or bifurcate the claim of breach of contract from the remaining claims. Finally, if we deny all other requests, Defendant requests that we grant leave to amend

A. Contract Interpretation Standard

In diversity actions, federal courts apply substantive state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Nitco Holding Corp. v. Boujikian, 491 F.3d 1086, 1089 (9th Cir. 2007). Under Nevada law, "[a]n insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." Farmers Ins. Exch. v. Neal, 64 P.3d 472, 473 (Nev. 2003). When the facts are not in dispute, contract interpretation is a question of law. Grand Hotel Gift Shop v. Granite State Ins. Co., 839 P.2d 599, 602 (Nev. 1992). The language of the insurance policy must be viewed "from the perspective of one not trained in law," and we must "give plain and ordinary meaning to the terms." Farmers Ins. Exch., 64 P.3d at 473 (internal quotation marks omitted). "Unambiguous provisions will not be rewritten; however, ambiguities are to be resolved in favor of the insured." Id. (footnote omitted); see also Fed. Ins. Co. v. Am. Hardware Mut. Ins. Co., 184 P.3d 390, 392 (Nev. 2008) ("In the insurance context, we broadly interpret clauses providing coverage, to afford the insured the greatest possible coverage; correspondingly, clauses excluding coverage are interpreted narrowly against the insurer.") (internal quotation marks omitted); Capitol Indemnity Corp. v. Wright, 341 F.

Supp. 2d 1152, 1156 (D. Nev. 2004) (noting that "a Nevada court will not increase an obligation to the insured where such was intentionally and unambiguously limited by the parties"). "When a contract is unambiguous and neither party is entitled to relief from the contract, summary judgment based on the contractual language is proper." Allstate Ins. Co. v. Fackett, 206 P.3d 572, 575 (Nev. 2009) (citing Chwialkowski v. Sachs, 834 P.2d 405, 406 (Nev. 1992)).

B. Plaintiff Lewis' Insurance Coverage on July 8, 2007

Plaintiffs contend that Lewis was covered under an insurance policy on July 8, 2007, the date of the accident, because Lewis' payment on July 10, 2007 was timely. Plaintiffs rely on the sentence "[t]o avoid lapse in coverage, payment must be received prior to expiration of your policy" contained in the renewal statement. Defendant contends that "expiration of your policy" did not refer to the expiration date of the renewal policy listed on the renewal statement, but to the expiration of Lewis' current policy, which coincided with the listed due date on the renewal statement. Plaintiffs contend that Lewis reasonably believed that while there was a due date on which UAIC preferred to receive payment, there was also a grace period within which Lewis could pay and avoid any lapse in coverage.

The renewal statement cannot be considered without considering the entirety of the contract between Lewis and UAIC. Plaintiff attached exhibits of renewal statements, policy declarations pages, and Nevada automobile insurance cards issued by UAIC for Lewis. The contract, taken as a whole, cannot reasonably be interpreted in favor of Plaintiffs' argument.

Lewis received a "Renewal Policy Declarations" stating that he had coverage from May 31, 2007 to June 30, 2007 at 12:01 A.M. (Pls' Opp., Exhibit A at 29 (#20-1); Pls' Supp., Exhibit A at 11-12 (#26-1); Pls' Supp., Exhibit A at 15 (#26-1).) The declarations page stated that "[t]his declaration page with 'policy provisions' and all other applicable endorsements complete your policy." (Pls' Opp., Exhibit A at 29 (#20-1).) Lewis also received a Nevada Automobile Insurance Card issued by UAIC stating that the effective date of his policy was May 31, 2007, and the expiration date was June 30, 2007. (Id. at 30; Pls' Supp., Exhibit A at 11-12 (#26-1).) The renewal statement Lewis received in June must be read in light of the rest of the insurance policy, contained in the declarations page and also summarized in the insurance card.

"In interpreting a contract, 'the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself.'" Anvui, LLC v. G.L. Dragon, LLC, 163 P.3d 405, 407 (Nev. 2007). Plaintiffs contend that there was a course of dealing between Lewis and UAIC supporting a reasonable understanding that there was a grace period involved in paying the insurance premium for each month-long policy. In fact, the so-called course of dealing tilts, if at all, in favor of Defendant. Lewis habitually made payments that were late. UAIC never retroactively covered Lewis on such occasions. Lewis' new policy, clearly denoted on the declarations page and insurance cards Lewis was issued, would always become effective on the date of the payment.

Plaintiffs point to the fact that in April 2007, Lewis was issued a revised renewal statement stating that the renewal amount was due on May 6, 2007, a date after the effective date of the policy Lewis would be renewing through the renewal amount. This isolated occasion occurred due to the fact that Lewis added a driver to his insurance policy, resulting in an increase in the renewal amount, after UAIC had previously sent a renewal notice indicating that a lower renewal amount was due on April 29, 2007. UAIC issued a revised renewal statement dated April 26, 2007, and gave Lewis an opportunity to pay by May 6, 2007, instead of April 29, 2007, when the original renewal amount had been due upon expiration of his April policy. In that case, Lewis made a timely payment on April 28, 2007, and therefore there is not a single incident Plaintiffs can point to in which Lewis was retroactively covered for a policy before payment was made, even in the single instance UAIC granted him such an opportunity due to a unique set of circumstances.

C. Statutory Arguments

Plaintiffs' arguments that Lewis had coverage due to Nev. Rev. Stat. § 687B.320 and § 687B.340 are untenable. Section 687B.320 applies in the case of midterm cancellations, providing that:

> 1. Except as otherwise provided in subsection 3, no insurance policy that has been in effect for at least 70 days or that has been renewed may be cancelled by the insurer before the expiration of the agreed term or 1 year from the effective date of the policy or renewal, whichever occurs first, except on any one of the following grounds:

(a) Failure to pay a premium when due;

. . .

2. No cancellation under subsection 1 is effective until in the case of paragraph (a) of subsection 1 at least 10 days and in the case of any other paragraph of subsection 1 at least 30 days after the notice is delivered or mailed to the policyholder.

The policies at issue in this case were month-long policies with options to renew after the expiration of each policy. Lewis' June policy expired on June 30, 2007, according to its terms. There was no midterm cancellation and Nev. Rev. Stat. § 687B.320 simply does not apply. Plaintiffs' arguments that between terms is equivalent to "midterm" simply defies the statutory language and the common definition of midterm. In a Ninth Circuit case interpreting Montana law, the Ninth Circuit noted that the district court's observation that "the policy expired by its own terms; it was not cancelled" was proper, and the Montana statute at issue in the case, similar to the Nevada statute here, "appl[ies] only to cancellation of a policy, not to its termination." State Farm Mut. Auto. Ins. Co. v. White, 563 F.2d 971, 974 (9th Cir. 1977). The Ninth Circuit went on to note that situations in which "the policy terminated by its own terms for failure of the insured to renew" is controlled by a different statute, which "does not require any notice to the policy-holder when the reason for the non-renewal of the policy is the holder's failure to pay the renewal premiums." Id.

Nev. Rev. Stat. § 687B.340 provides:

> 1. Subject to subsection 2, a policyholder has a right to have his or her policy renewed, on the terms then being applied by the insurer to persons, similarly situated, for an additional period equivalent to the expiring term if the agreed term is 1 year or less, or for 1 year if the agreed term is longer than 1 year, unless:
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> . . .
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> (b) At least 30 days for all other policies,
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> before the date of expiration provided in the policy the insurer mails or delivers to the policyholder a notice of intention not to renew the policy beyond the agreed expiration date. If an insurer fails to provide a timely notice of nonrenewal, the insurer shall provide the insured with a policy of insurance on the identical terms as in the expiring policy.

Plaintiffs argues that Nev. Rev. Stat. § 687B.340 indicates how favorable the law is to the insured, and that there is no mention in the statute that payment is a prerequisite to a policyholder's "right to have his or her policy renewed." It is true that the Nevada statute does not include a provision similar to the one in the Montana statute providing that the section does not apply when the insured has "failed to discharge when due any of his obligations in connection with the payment of premiums for the policy, or the renewal therefor . . . ." White, 563 F.2d at 974 n.3. The Montana statute also stated that the section does not apply "[i]f the insurer has manifested its willingness to renew." Id.

Plaintiffs, however, fail to give credit to the entirety of the Nevada statute. The statute does not say that the policyholder's policy must be renewed, it says that the insurer shall provide the insured with a policy on "the identical terms as in the expiring policy." One of the terms of the expiring policy was payment of the renewal amount. UAIC did provide Lewis, the policyholder, with a renewal statement indicating that UAIC would renew the insurance policy as long as all the terms of the previous policy were met, i.e., payment.

Defendant correctly points out that this statute does not fit the circumstances of this case. Lewis' policy was not renewed not because UAIC had an intention not to renew, but because Lewis failed to carry out his end of the contract, that is, to pay a renewal amount. Lewis' policy was renewed on the date payment was received, but this date was after the date of the accident. Plaintiffs' statutory arguments, therefore, do not pass muster.

IV. Conclusion

Defendant's motion for summary judgment on all claims shall be granted because Lewis had no insurance coverage on the date of the accident. The renewal statement was not ambiguous in light of the entire contract and history between Lewis and UAIC. The term "expiration of your policy" referred to the expiration of Lewis' current policy, and Lewis was never issued retroactive coverage when his payments were late. His renewal policy would always begin on the date payment was received. We cannot find that Lewis was covered between the expiration of his policy in June and payment for

his next policy without straining to find an ambiguity where none exists, and creating an obligation on the part of insurance companies that would be untenable, i.e., to provide coverage when the insured has not upheld his own obligations under the contract to submit a payment.

The statutes cited by Plaintiffs simply do not apply. The expiration of Lewis' policy was not a midterm cancellation, and UAIC was not obligated to provide an insurance policy despite Lewis' failure to adhere to the terms of that policy.

Defendant's other requests are moot in light of our decision granting summary judgment.

IT IS, THEREFORE, HEREBY ORDERED that Defendant's motion for summary judgment on all claims (#17) is **GRANTED** with respect to all of Plaintiffs' claims.

The Clerk shall enter judgment accordingly.

DATED: December 17, 2010.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE