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IN THE COURT OF APPEALS OF INDIANA

DONALD T. HAYGOOD and DEBBIE OSMAN,[1]	)	
Appellants-Defendants,	)	
vs.	)	No. 72A01-0903-CV-156
SAFE AUTO INSURANCE CO.,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE SCOTT CIRCUIT COURT
The Honorable Roger L. Duvall, Judge
Cause No. 72C01-0607-PL-18

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

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[1] Debbie Osman is not seeking relief on appeal. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Case Summary

Donald T. Haygood appeals the grant of summary judgment in favor of Safe Auto Insurance Company on its declaratory judgment action. We affirm.

Issue[2]

We address the issue raised by Haygood of whether the trial court erred in granting summary judgment in favor of Safe Auto on the basis that it was prejudiced by its insured failing to timely tender notice of the underlying lawsuit.

Facts and Procedural History

On August 28, 2004, Debbie Osman and Haygood were involved in an automobile accident in Scott County, Indiana. The next day Osman reported the accident to Safe Auto, her automobile insurance carrier. In the initial notes in the claim file opened by Safe Auto, it was noted in part:

> CLMNT [later determine to be Haygood] was transported from the scene to the ER. No info on the CLMNT at this time. INSD states that both parties were travelling side-by-side, and the INSD states that the C/V came across her lane and struck the I/V. CLMT said that our INSD crossed the line and struck the C/V. No liability determination as of yet. Awaiting PR and will also question CLMT when ID'd.

Appellant's Appendix at 83. Safe Auto was in contact with Osman during the next month regarding the repairs to her vehicle. On September 23, 2004, the police report was requested for the accident. The claim file included a note on October 8, 2004, that the police report

[2] Because we resolve the summary judgment issue on the determination of reasonable notice and presumed prejudice, we do not reach Haygood's issue on whether the trial court erred in not considering the "Affirmation of Stanley White."

was returned as no report found. The response from the Indiana State Police District Fifty-One read that "[it] did not work the accident as you have described it. We recommend that you contact the following agency or agencies to see if they worked the accident. {clarify location & contact agency in that area}." Id. at 87 ({}- handwritten). The next notation in the claim file was "nothing else pending on this file, closing file." Id. at 84.

On May 19, 2005, Haygood filed a complaint against Osman in the United States District Court for the Southern District of Indiana for his physical injuries from the car accident. On July 18, 2005, Osman received service of Haygood's amended complaint. On August 30, 2005, an entry of default was entered against Osman. On November 3, 2005, Osman contacted Safe Auto and informed it that she had received "suit papers." Id. at 84. Safe Auto advised Osman to fax the papers to it so that the matter could be forwarded to the litigation department.

Osman called Safe Auto again on January 5, 2006, to advise the insurer that she had received "suit papers." Id. at 85. Osman said that she would fax the papers to Safe Auto but no fax was received. On January 13, Safe Auto called Osman to obtain the "suit papers," but the phone number for Osman was disconnected. Safe Auto then sent a contact letter to Osman stating that it was unable to reach her. Five days later, Osman left a message alleging that Safe Auto had not attempted to contact her. In that message she provided her phone number. Safe Auto returned the call and left a message advising Osman to fax the "suit papers." On February 13, 2006, Safe Auto called Osman at the number she provided, but the number was disconnected. On March 21, Safe Auto again attempted to reach Osman at the

disconnected number. Unable to contact Osman by telephone, Safe Auto sent Osman a second contact letter advising her to send it the "suit papers."

On the motion of Haygood and after a hearing, default judgment was entered against Osman in the federal court suit on March 13, 2006, in the amount of $600,000. On April 24, 2006, there is a note in Safe Auto's claim file that it had yet to receive the lawsuit paperwork, so it would "find out another route to see if suit was actually filed." Id. at 85. One month later, Safe Auto discovered the federal default judgment against Osman.

On May 22, 2006, counsel appeared for Osman in the federal lawsuit and filed a motion to set aside the default judgment based on Indiana Trial Rule 60(B)(1) and (6).[3] After a hearing on the motion on November 1, 2006, the federal trial court denied the same. On July 19, 2006, Safe Auto filed this declaratory judgment action seeking a determination that it did not owe Osman a duty to defend or indemnify due to her failure to forward the legal papers and failure to cooperate. The complaint named Osman and Haygood as defendants. As no response was entered, a default judgment was entered as to Osman on February 5, 2007.

On December 17, 2007, Safe Auto filed a motion for summary judgment against Haygood, alleging that Osman's failure to timely tender notice of the lawsuit relieved Safe Auto of any duty to defend or indemnify her for any claims or judgment entered as a result of the car accident. Haygood filed a response opposing summary judgment on the basis that there was a material question of fact as to whether Safe Auto suffered prejudice based on the

[3] These subsections of Indiana Trial Rule 60(B) include the bases of mistake, surprise, or excusable neglect and that the judgment is void as potential reasons to set aside a judgment.

failure of prompt notice of the federal suit and cooperation on the part of Osman. The day of the hearing on the motion, Haygood submitted an "Affirmation of Stanley White" to which Safe Auto objected. After the hearing, the trial court granted the objection as to the consideration of the Affirmation as well as the motion for summary judgment. This appeal ensued.

Discussion and Decision

Standard of Review

A party seeking summary judgment bears the burden of making a prima facie demonstration that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Warren v. IOOF Cemetery, 901 N.E.2d 615, 617 (Ind. Ct. App. 2009), trans. denied. Upon the satisfaction of this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

In reviewing the grant or denial of such motion, we apply the same standard as the trial court: whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C), (H). In our review, we only consider those portions of the pleadings, depositions and other matters specifically designated to the trial court for the purposes of the motion. Id. We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence, and resolve all doubts against the moving party. Cleary v. Manning, 884 N.E.2d 335, 337 (Ind. Ct. App. 2008). We will affirm summary judgment if it may be

sustained on any legal theory or basis found in the record. Indianapolis Car Exch., Inc. v. Alderson, 910 N.E.2d 802, 804 (Ind. Ct. App. 2009).

I. Timely Notice of Lawsuit

Haygood contends that the trial court erred in granting summary judgment in favor of Safe Auto because any prejudice to Safe Auto is rebutted by the failure of Safe Auto to investigate the accident. The insurance policy issued to Osman by Safe Auto provides in relevant part:

> **WHAT YOU SHOULD DO IN THE EVENT OF A LOSS OR AN ACCIDENT**
> NOTICE OF AUTO ACCIDENT OR LOSS
> In the event of an **auto accident** or **loss**, **you** must report it to **us** as soon as reasonably possible. **You** can report **your auto accident** or **loss** 24 hours a day . . . . The report must give the time, place and circumstances of the **auto accident** or **loss**, including the names and the addresses of any injured persons and of any witnesses.
>
> . . . .
>
> OTHER DUTIES
> **You** or any person claiming coverage under this policy must:
> 1. Cooperate with **us** in any matter concerning a claim or lawsuit and promptly send **us** any legal papers received relating to the claim or lawsuit.

Appendix at 129-30. Haygood argues that because the requirement to forward any legal papers is contained within the cooperation clause of the policy failure by an insured to provide notice to its insurer falls under the analysis for non-cooperation rather than notice. As we are constrained by past precedent, we disagree.

A finding of prejudice to the insurer from the insured's violation of a policy provision relieves the insurer from providing coverage under the insurance contract. Tri-Etch, Inc. v.

Cincinnati Ins. Co., 909 N.E.2d 997, 1005 (Ind. 2009). "[N]otice is a threshold requirement which must be met before an insurer is even aware that a controversy or matter exists which requires the cooperation of the insured." Miller v. Dilts, 463 N.E.2d 257, 265 (Ind. 1984) (quoting Indiana Ins. Co. v. Williams, 448 N.E.2d 1233, 1238 (Ind. Ct. App. 1983), Hoffman, J., dissenting). "Prejudice to the insurance company's ability to prepare an adequate defense can therefore be presumed by an unreasonable delay in notifying the company about the accident or about the filing of the lawsuit." Id. (emphasis added) The notion that untimely notice of a lawsuit results in a presumption of prejudice to the insurer was made even more explicit in Liberty Mutual Insurance Company v. OSI Industries, Incorporated. "If the notice of the filing of the lawsuit was not tendered within a reasonable time, there is a presumption of prejudice to the insured." Liberty Mut. Ins. Co. v. OSI Indus., Inc., 831 N.E.2d 192, 202 (Ind. Ct. App. 2005), trans. denied. The insured may rebut this presumption by presenting evidence that prejudice did not actually occur. Id.

The presumption of prejudice towards the insurer, here Safe Auto, is applicable. On May 19, 2005, Haygood filed the complaint against Osman, and Osman received service of the amended complaint a month later. On August 30, 2005, an entry of default was entered in favor of Haygood. Osman did not notify Safe Auto of the legal proceedings until November 3, 2005. Clearly, an insured notifying its insurer of legal proceedings two months after the entry of default against the insured is not timely notification. At this point, Osman was legally liable for the damages Haygood sustained as a result of the accident.

Haygood alternatively contends that even if prejudice is presumed that the resulting

prejudice was caused by Safe Auto's failure to diligently or reasonably investigate the facts of the accident. First, this argument is not supported by any authority. Second, knowing the details of the accident does not equate to the insurer's ability to predict the filing of a lawsuit by anyone involved in the accident. Thus, basic methods by which an insurer is informed of a lawsuit are either through notification by the insured or receiving constructive notice, such as receiving a subpoena duces tecum and a non-party request for production of documents. See Frankenmuth Mut. Ins. Co. v. Williams, 645 N.E.2d 605, 608 (Ind. 1995). "[A]n insurer cannot defend a claim of which it has no knowledge." Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1273 (Ind. 2009). Here, Safe Auto did not receive notice of the claim by Haygood until after the federal court had entered default against Osman. This prevented Safe Auto from being able to defend the claim, resulting in prejudice. Therefore, the trial court did not err in granting summary judgment in favor of Safe Auto.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.