[Cite as *Valley Paint & Body v. Ins. Co. of Pennsylvania*, 2011-Ohio-1307.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

VALLEY PAINT & BODY dba Mercedes Benz of Cincinnati Collision Center, et al.,	:	
	:	CASE NO. CA2010-08-059
Plaintiffs-Appellants,	:	O P I N I O N
	:	3/21/2011
- vs -	:	
	:	
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2009CVH01660

Becker & Cade, Dennis A. Becker, 526 A Wards Corner Road, Loveland, Ohio 45140, for plaintiffs-appellants

Garvey Shearer, PSC, John J. Garvey III, and Jason E. Abeln, 300 Buttermilk Pike, Suite 336, Ft. Mitchell, Kentucky 41017, for defendant-appellee

POWELL, P.J.

{¶1} The trial court found that an insurance company was no longer obligated to perform on a particular claim after the insureds failed to cooperate with their insurance company by assigning to an auto body shop the right to collect the difference between the amount the insurance company paid and the repair bill. The court also found the

insureds were unable to show any damages when the body shop released the vehicle and did not seek from the insureds payment of the difference. We affirm the municipal court's judgment because the insureds failed to cooperate with the insurance company and failed to show any damages from the insurance company's alleged breach.

{¶2} Bob and Yuko Lees' 2001 automobile was damaged when it struck a deer in 2007. The vehicle was repaired at Valley Paint & Body dba Mercedes Benz of Cincinnati Collision Center (Valley Paint). Valley Paint obtained an assignment from the Lees for the right to collect the difference between the amount listed on the invoice as the cost of repair and what the Lees' insurance company paid on the claim.

{¶3} The "Assignment of Proceeds" specifically states that the Lees "in consideration of repairs to my vehicle * * * for property damage occurring as a consequence of a loss on 12-08-07; such vehicle to be repaired by Valley Paint ***, the undersigned acknowledges such vehicle is to be repaired per the estimate and Authorization to Repair; the deductible, if any, pursuant to such coverage will be paid by myself; I hereby assign any outstanding claim I may have against [named insurance company] * * * pursuant to the property damage/collision/comprehensive sections of such policy, for benefits payable thereunder, occurring as a consequence of the loss occurring 12-08-07 at [location]." The authorization also states that "I hereby acknowledge that a deficit balance due of $1887.70 remains unpaid by [the insurance company] for the repairs performed per the Invoice dated 01-08-08 and I agree to co-operate with Valley Paint & Body * * * in any causes of action necessary to collect from [insurance company] any deficit."

{¶4} Valley Paint filed a small claims complaint against the Insurance Company of the State of Pennsylvania in the Clermont County Municipal Court for $1,887.70. The insurance company moved the case to the civil docket. Valley Paint later amended its

complaint adding the Lees as a plaintiff. The insurance company moved for summary judgment citing various arguments, including a challenge to the validity of the assignment of proceeds. We note that the insurance company claims the amount allegedly due is incorrect after all of the company's payments are subtracted from the repair invoice.

{¶5} Valley Paint filed a voluntary dismissal without prejudice, which left the Lees as the only party plaintiff against their insurance company. While not cited by Valley Paint in its voluntary dismissal, the parties do not contest that the dismissal occurred after this court released *Mercedes-Benz of West Chester v. American Family Insurance,* Butler App. Nos. CA2009-09-244, CA2009-09-245, CA2009-09-246, 2010-Ohio-2307. In that case, this court found that an anti-assignment clause in an insurance contract requiring the insurance company's written consent to an assignment was valid and, therefore, the insureds' assignment of proceeds to an auto body repair shop without written consent was invalid.

{¶6} In the instant case, the trial court granted summary judgment to the insurance company, finding the Lees colluded with Valley Paint to obtain payment from their insurance company for Valley Paint when Valley Paint could not do so on its own. The trial court found that, by this conduct, the Lees failed to cooperate with the insurance company to its prejudice. The trial court also found the Lees failed to state a cause of action for breach of contract because they showed no loss or damage, as Valley did not seek payment of the difference from them.

{¶7} The Lees appealed, and argue in their single assignment of error that the trial court erred in granting summary judgment to the insurance company.

{¶8} Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party,

construing the evidence most strongly in that party's favor. See Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. An appellate court reviews a lower court's decision to grant summary judgment de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 2000-Ohio-186.

{¶9} The Lees first challenge the trial court's decision on the cooperation clause of the insurance contract. The insurance contract contains the following under the heading of insureds' duties after an accident or loss: "Coverage will not apply unless there is full compliance with the duties listed in this policy: * * *; (B) Anyone seeking coverage under this policy must: 1. Cooperate with us in the investigation, settlement, and defense of any claim or lawsuit."

{¶10} Lack of cooperation may relieve an insurance company of an obligation on a claim when the insured's failure to cooperate substantially prejudices a material right of the insurance company. *FT Mortg. Companies v. Williams*, Fayette App. No. CA2000-09-023, 2001-Ohio-8694, citing *Gabor v. State Farm Mut. Auto Ins. Co.* (1990), 66 Ohio App.3d 141 and *State Farm Mut. Auto. Ins. Co. v. Holcomb* (1983), 9 Ohio App.3d 79.

{¶11} Whether an insured has violated the cooperation clause of his insurance policy must be determined in light of the facts and circumstances of the case. *Templin v. Grange Mut. Cas. Co*., (1992), 81 Ohio App.3d 572, 576. What constitutes "cooperation," within a policy requiring the assured to cooperate with the insurer, is usually a question of fact. *Costa v. Cox* (1958), 168 Ohio St. 379, 383. However, a court may decide this issue as a matter of law when the facts are not in dispute. *Gabor* at 144, citing *Luntz v. Stern* (1935), 135 Ohio St. 225, 237; *FT Mortg*. at *3. The burden of proving the defense of lack of assistance and cooperation rests on the insurance company. *Weaver v. Ballard* (1962), 174 Ohio St. 59, paragraph four of the syllabus.

{¶12} In discussing examples of cooperation clause issues, the *Luntz* court noted

that an insured is required to act with honesty and good faith, to make a fair and frank disclosure of information demanded by the company so it can determine if there is a genuine defense, and may not condition his cooperation upon the conformance of the insurer to his arbitrary demands for payment or settlement of claims or that it undertake to pay judgments at all events. Id. at 231-32.

{¶13} Also, a material misrepresentation of the facts to the insurer respecting an accident is a violation of the terms of the policy and constitutes grounds for avoidance of the policy, and an insured may not arbitrarily or unreasonably decline to assist in making a fair and legitimate defense, or refuse to permit any defense to be made in his name. Id.

{¶14} The Lees argue that they cooperated with the insurance company when they timely notified the company of the loss and provided any information requested. The trial court, however, found that the Lees acted in collusion with Valley Paint by cooperating with Valley Paint in its attempt to obtain $1,887.70 from the insurance company when Valley Paint could not recover on its own.

{¶15} The Circuit Court in *Scofield v. Excelsior Oil Co*. (1905), 6 Ohio C.C. (N.S.) 176, 20 Ohio C.C.(N.S.) 525, 1905 WL 1124, listed a number of definitions for "collusion" as follows: (a) where two persons, apparently in a hostile position and having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court; (b), an agreement between two or more persons unlawfully to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law; or in law, a deceitful arrangement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third-party of his right; (c) a secret understanding between two parties, who plead or proceed fraudulently against each other, to the prejudice of a third person; or an agreement between two or more

persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

{¶16} A review of the applicable record before this court reveals that the material facts are not disputed. Construing the evidence most favorably for the Lees, and considering the definitions of collusion, we cannot find as a matter of law that the Lees colluded with Valley Paint against their insurance company.

{¶17} However, reasonable minds could come to but one conclusion regarding the cooperation clause and that conclusion is adverse to the Lees. Reasonable minds could find that the Lees, by "co-operat[ing]" with Valley Paint "in any causes of action necessary to collect" from their insurance company, failed to cooperate with their insurance company and that conduct substantially prejudiced a material right of the insurance company when it had to respond to the complaint from Valley Paint. Therefore, summary judgment to the insurance company was appropriate on this issue.

{¶18} In addition, the trial court also ruled that the Lees could not prove breach of contract because they have no damages. The trial court found that Valley Paint returned the repaired vehicle to the Lees, did not seek payment of the difference from the Lees, and secured the assignment so that it could pursue the difference from the insurance company.

{¶19} To set forth a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract, (2) the plaintiff fulfilled its contractual obligations, (3) the defendant failed to fulfill its contractual obligations, and (4) the plaintiff incurred damages as a result. *S&G Invests., L.L.C. v. United Cos., L.L.C.*, Clermont App. No. CA2010-03-017, 2010-Ohio-3691, ¶12.

{¶20} The Lees argue that the insurance company estimates involved after-market parts, and the measure of their damages is the difference in the amount required to

restore their vehicle to its pre-loss condition and the amount the insurance company paid on its estimates.

{¶21} Construing the evidence most favorably for the Lees, we find that reasonable minds could only come to but one conclusion on the issue of damages and that conclusion is adverse to the Lees.

{¶22} According to the record, the Lees approved the repair work on their vehicle per Valley Paint's estimates using the parts the Lees wanted and the repair work was completed. Valley Paint did not seek from the Lees the difference in the amount it charged and the amount the insurance company paid. Therefore, the Lees failed to provide evidence of economic damages resulting from the alleged breach of contract by the insurance company, and summary judgment to the insurance company was appropriate. See *DeCastro v. Wellston City School Dist. Bd. of Edn*., 94 Ohio St.3d 197, 201-202, 2002-Ohio-478.

{¶23} The trial court did not err in granting summary judgment to the insurance company. The assignment of error is overruled.

{¶24} Judgment affirmed.

YOUNG and HENDRICKSON, JJ., concur.

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