IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ROBERT GREGORY, Plaintiff,	)	
v.	)	13 M1 120296
DIRECT AUTO INSURANCE CO., Defendant.	)	
DIRECT AUTO INSURANCE CO., Counter-Plaintiff,	)	
v.	)	
ROBERT GREGORY, Counter-Defendant.	)	

MEMORANDUM OPINION AND JUDGMENT

INTRODUCTION

On February 9 and 10, 2016, the court conducted the trial on the amended complaint filed by Plaintiff, Robert Gregory Jr., against Defendant, Direct Auto Insurance Company (DAIC), alleging breach of contract and violation of 215 ILCS 5/155, and on DAIC's counterclaim for rescission. The following witnesses testified: Gregory; DAIC claims adjuster, Richard Grabowski; DAIC claims manager, Michael Torello; DAIC underwriting manager, Rosalba Miranda; and Illinois Insurance Center (IIC) president, Thomas Uebele.

The court heard the testimony of the witnesses, evaluated their demeanor and assessed their credibility, and received documents in evidence. After considering all of the evidence and the reasonable inferences drawn from the evidence, as well as the

arguments of the parties, the court makes the findings and draws the conclusions that follow. That the findings and conclusions do not refer to all the facts established by the evidence does not mean that the court failed to consider all of the evidence.

PLEADINGS

On September 27, 2013, Gregory filed a two-count verified amended complaint seeking damages for breach of contract (Count I), and the statutory remedy for vexatious and unreasonable conduct and delay (215 ILCS 5/155) (Count II). He alleged that after his vehicle was stolen he made a claim to DAIC under his insurance policy, but DAIC refused to pay, taking the position that his failure to disclose that he had an auto stolen 10 years earlier was a breach of the insurance contract. Gregory further alleged that his failure to list the 10-year-old theft was unintentional and immaterial to the risk undertaken by DAIC in issuing the policy to him in 2012. In addition, he alleged that as a result of DAIC's breach of the insurance policy he was damaged in an amount totaling at least $11,950. Gregory also alleged that DAIC's denial of his claim based on a 10-year-old prior loss in which he had no fault was vexatious and unreasonable.

On June 3, 2013, DAIC filed its verified counterclaim for declaratory judgment. DAIC alleged that Gregory responded "no" to the underwriting question whether applicant or any operator had an automobile stolen. DAIC also alleged that DAIC relied on Gregory's representation when it determined the premium on the policy and it would not have issued the policy as written if it had known about the prior theft. Further, DAIC alleged that Gregory's material misrepresentation made the policy void

ab initio. Additionally, DAIC alleged that it rescinded the policy and returned Gregory's full premium based upon the material misrepresentation.

On October 9, 2013, Gregory filed his verified answer and his affirmative defenses to DAIC's counterclaim which follow. First, DAIC waited an unreasonably long time, until June 3, 2013, before attempting to rescind the policy. Second, DAIC failed to tender a refund of the policy premium to Gregory. Third, DAIC failed to exercise due care by performing little or no meaningful underwriting prior to the issuance of the policy. Fourth, DAIC waived any right to seek rescission by (a) not mentioning rescission in its letter of February 7, 2013; (b) not refunding Gregory's premium with the letter of February 7, 2013; (c) accusing Gregory in the February 7, 2013 letter of "breach of contract" which presupposes the existence of a contract rather than rescission; and (d) making a statement inconsistent with rescission by advising Gregory to contact the DAIC office if he wished to pursue a claim with reference to this loss.

DAIC POLICY

The pertinent provision of the DAIC policy follows.

> Fraud and Misrepresentation. Statements contained in the application are deemed to be representations relied upon by the Company in issuing this policy. In the event that any representation contained in the application is false, misleading or materially affects the acceptance or rating of this risk by the Company, by either direct misrepresentation, omissions, concealment of facts or incorrect statements, then coverage for the accident or loss in question shall not be provided by the Company and/ or this policy shall be null and void and of no benefit whatsoever from its inception.

ILLINOIS INSURANCE CODE

Pertinent provisions of the Illinois Insurance Code follow.

> No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company *** a policy or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less.

215 ILCS 5/154.

> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

215 ILCS 5/155.

TRIAL

Credibility

Gregory's testimony was entirely credible. In particular, Gregory testified credibly that he did not consider the prior stolen car to be his own. Further, Gregory's testimony does not support the inference that Gregory was dishonest in his application.

Miranda's testimony is given little weight due to the lack of any documents supporting her testimony, such as underwriting standards relating to auto theft claims, losses related to such claims, or classification of high risk vehicles.

Based on his demeanor and considering Gregory's credible testimony, for the most part, Grabowski was not a credible witness.

Findings of Fact

Gregory owned a 2006 Dodge Charger SXT.

On June 27, 2012, DAIC issued Gregory an automobile liability insurance policy for the Charger on a "point of sale" basis.

The policy, which included coverage for theft, was in effect from June 27, 2012, to June 27, 2013.

Gregory paid the insurance premiums and kept the policy in force.

An IIC agent took Gregory's information over the phone, filled out the application for him, and sent it to DAIC.

Gregory never saw or signed the application.

Gregory voluntarily disclosed that from 1999 to 2009 he had five traffic violations, including an at-fault accident.

Gregory answered "yes" to the application question whether an "applicant, operator or any household resident [has] had a driving or driver's license revocation, suspension, an expired license or require[d] an SR22?"

Gregory reported that he applied for Financial Responsibility Insurance (an SR-22) as required by the State of Illinois for problem drivers.

After the question, "Has applicant or any operator had an automobile stolen?" the application had an X in the box for 'No.'

On July 10, 2012, DAIC's underwriter ran a motor vehicle report through Soft Tech and discovered that Gregory had had another at-fault accident and a ticket from August 23, 2009. As a result, DAIC increased the premium by $124.

DAIC chose not to rescind Gregory's policy in July 2012 for failure to disclose an at-fault accident.

After DAIC discovered that Gregory lived in the same building as his mother and stepfather, DAIC looked into whether Gregory's mother and stepfather should be added to the policy, but DAIC found that doing so would not raise the premium.

On December 17, 2012, Gregory's vehicle was stolen from outside his home.

Gregory filed a police report and that morning made a claim with DAIC under the policy for the value of his vehicle.

When he reported the theft to DAIC, Gregory mentioned that he had had a car stolen a long time ago.

On January 16, 2013, claims adjuster Grabowski ran a second motor vehicle report and called Gregory to investigate the loss.

Grabowski attempted to dissuade Gregory from filing a claim, suggesting that whoever put the alarm system on Gregory's car might be responsible.

Grabowski told Gregory that the claim would be denied because Gregory had undisclosed members of his household and an undisclosed prior theft.

Gregory told Grabowski that the vehicle that had been stolen in the 1990s belonged to his mother, although he admitted that he had co-signed for it.

Grabowski did not investigate the prior loss at all.

Gregory lived in the basement unit of a building owned by his mother and stepfather.

Gregory had his own entrance to the unit, own laundry, and no one else had keys to his apartment or to his car.

At the end of the January 2013 conversation, Grabowski said he would "get back" to Gregory.

Grabowski sent a letter to Gregory dated February 7, 2013, cancelling the contract because Gregory failed to disclose pertinent information on his application related to "proof of financial responsibility for the future."

The "Loss Notes" from February 7, 2013 reflect that Grabowski reviewed the file with management and found a material misrepresentation for not disclosing the prior theft.

The February 7, 2013 letter concluded, "Please contact our office if you still wish to pursue a claim [in] reference to this loss."

Gregory called Grabowski again after receiving the February 7, 2013 letter.

Grabowski stated to Gregory over the telephone, "If you would pay Direct Auto $11,000, then Direct Auto would pay your claim."

Grabowski said nothing to Gregory about the policy being rescinded or canceled, or about receiving a refund.

Gregory called DAIC again in February and asked to speak to someone else because Grabowski had been rude to him. The unidentified woman to whom he spoke refused to let him talk to anyone else.

DAIC sent a cancellation notice to IIC in a letter dated March 12, 2013, signed by Miranda, declaring the policy,

> null and void from inception due to a MATERIAL MISREPRESENTATION on the policy application. Investigation of the loss shows that the insured misrepresented her [sic] address on her [sic] application. The insured signed an application stating that neither the applicant nor any operator has had an automobile stolen. However our investigation reveals that the insured has had an automobile stolen.

The second page of the letter stated, "[T]he insurance policy referenced above has been cancelled effective 6/27/2012."

Gregory did not receive a copy of the March 12, 2013 letter to IIC.

IIC's president, Uebele, was not aware that the DAIC policy was rescinded until March 2014.

IIC refunded Gregory's premium plus interest, $886.00, on April 25, 2014.

A letter from DAIC's files dated March 12, 2013, from DAIC claims manager Torello to Gregory states that the policy was rescinded because Gregory "failed to disclose all household residents."

Gregory never received this March 12, 2013 letter.

The counterclaim of June 3, 2013, was the first notice Gregory had from DAIC that it sought to rescind his contract.

DAIC has no proof of mailing the March 12, 2013, letter to Gregory.

Torello admitted that the reason for cancellation stated in the March 12 letter was a mistake, and he stated, "The exposure of paying for the current theft is why [Gregory's policy] is rescinded."

Torello admitted that neither the application nor the policy manual defines "household."

Torello made the decision to rescind the policy, even though he is not an underwriter, and he does not have any authority to make underwriting decisions.

Torello testified that a rescission letter is supposed to state with specificity the reasons for the rescission per DAIC policy, but he admitted that his letter did not.

DAIC has no underwriting manual or policy manual establishing that failure to disclose a prior stolen vehicle is a serious negative factor to underwriting.

DAIC's underwriting manual does not list car models it considers to be high-risk for theft.

The underwriting manual states the "experience period" is 36 months for all accidents and major and minor violations. This means that any accidents regardless of fault that fell within the preceding three years would be assigned a point value, which would increase the price of the premium.

The parties stipulated that after Gregory's $500 deductible, the reasonable value of the vehicle was $11,100.

The following facts from the testimony of Miranda are found not credible:

DAIC has a hardline, underwriting rule that "there will be no insuring of high theft risk vehicles where the insured has had a prior auto theft."

DAIC considers failing to disclose a prior stolen auto a "very, very serious negative factor to underwriting."

A Dodge Charger is a high risk vehicle under DAIC's standards.

From an underwriting perspective, an at-fault accident within the experience period, which is 36 months for all accidents and major and minor violations, is less important and less material than a 16-year-old prior stolen auto loss.

Conclusions of Law

IIC had binding authority from DAIC to issue policies on its account.

Under the Insurance Code, a policy may be avoided where a misrepresentation in an application was false and the false statement was made with intent to deceive or materially affects the acceptance of the risk or hazard assumed by the insurer. *Golden Rule Insurance Company v. Schwartz*, 203 Ill. 2d 456, 464 (2003).

DAIC bears the burden of proof. See *Crest v. State Farm Mutual Automobile Insurance Company*, 20 Ill. App. 3d 382, 385 (1974) ("The burden is on the party raising a misrepresentation in a policy or application as a ground for avoidance to establish either that the misrepresentation was made with actual intent to deceive or that it was material to the hazard assumed or to the acceptance of the risk.")

Whether an insured's statements are material "is determined by whether reasonably careful and intelligent persons would have regarded the facts stated as substantially increasing the chances of the events insured against, so as to cause a rejection of the application or different conditions such as a higher premium." *Northern Life Insurance Company v. Ippolito Real Estate Partnership*, 234 Ill. App. 3d 792, 801 (1992).

DAIC failed to prove either materiality or the intent to deceive.

DAIC correctly notes that materiality may be established by the testimony of the insurer's underwriter. *Ratcliffe v. International Surplus Lines Insurance Company*, 194 Ill. App. 3d 18, 28 (1990).

DAIC's witnesses testified that a prior loss would result in non-issuance of the policy, but that testimony was not credible.

DAIC's official Underwriting Manual for 2012 lists 29 "unacceptable risks," but does not include a previous auto theft.

It strains credibility to assert that a hardline, unacceptable risk would not be written into the underwriting manual.

Also undermining DAIC's assertion of materiality is the length of time elapsed since the 1999 loss. DAIC's underwriting manual calculates the drivers' premium based on events within the 36 months prior to the application.

DAIC correctly contends that it is not necessary to prove intent to deceive, as long as the misrepresentation was material to the assumed risk. *Styzinski v. United Security Life Insurance Company*, 332 Ill. App. 3d 417, 422 (2002).

DAIC implicitly concedes that it cannot prove intent to deceive.

The evidence does not support a finding of intent to deceive because Gregory's testimony is credible that he did not consider the stolen car his own.

DAIC did not prove that Gregory was asked Underwriting Question No. 2, and lied in his answer. Gregory testified that he was not asked Question No. 2. DAIC

offered no evidence from IIC to contradict Gregory's testimony. Gregory answered the question willingly when Grabowski asked him about it in January 2013.

The parties dispute whether IIC was an agent of DAIC or of Gregory for the purpose of attributing the misrepresentation.

Independent insurance agents "possess a certain duality" which allows them to perform as both agents and brokers. *A & B Freight Line, Inc. v. Ryan,* 216 Ill. App. 3d 1093, 1097 (1991).

Under certain circumstances, an independent insurance agent may be an agent of both the insured and the insurer. *Id.*

Ultimately, whether IIC was Gregory's agent or DAIC's agent within the legal definition is irrelevant, because the misrepresentation did not materially affect DAIC's acceptance of the risk.

DAIC knew or should have known about the undisclosed theft since at least July 10, 2012, when it first ran the motor vehicle report. It chose not to rescind the policy then, even though it could have. By continuing to accept premiums, DAIC had no basis for rescission when it learned of the December 2012 loss.

DAIC's claim for rescission under 215 ILCS 5/154 fails.

Gregory proved breach of contract. DAIC failed to prove materiality, meaning that the policy was not avoided. Therefore, DAIC's failure to pay Gregory's claim is a breach of contract.

Section 155 of the Illinois Insurance Code allows the court to make a finding that the insurer's conduct constituted vexatious or unreasonable delay in any cause where

there is an issue of the insurer's liability on a policy or where the issue revolves around the amount of the loss payable under the policy. *Mohr v. Dix Mutual County Fire Insurance Company*, 143 Ill. App. 3d 989, 996–97 (1986).

The court is to consider the "totality of the circumstances, taken in broad focus" in determining whether there has been vexatious delay. *Deverman v. Country Mutual Insurance Company*, 56 Ill. App. 3d 122, 124 (1977).

Refusing to settle a case alone does not qualify as vexatious conduct. *Id.*

If there is a *bona fide* coverage dispute, then a delay in settling does not violate section 155. *Morris v. Auto-Owners Insurance Company*, 239 Ill. App. 3d 500, 503 (1993).

The court should examine the evidence as it existed prior to trial in determining whether a defendant insurer reasonably relied upon evidence sufficient to establish a *bona fide* dispute. *Id.*

"The statutory penalty for vexatious refusal of an insurer to pay a claim should not be inflicted unless the evidence and circumstances show that such refusal was wilful and without reasonable cause as the facts appeared to a reasonable and prudent man *before the trial;* and it is not enough that the judgment, after trial, is adverse to the insurer." *Morris*, 239 Ill. App. 3d at 509, quoting 44 Am. Jur. 2d *Insurance* § 1772, at 760 (1982) (emphasis in original).

In *Deverman*, the insurer offered well below the destroyed car's demonstrated market value and evinced a "take it or leave it" attitude. The insurer made minimal effort to negotiate, after 10 months it produced a small raise, still far below market value. *Id.* The claims supervisor admittedly overlooked items of value in the car, in its

valuation, and the insurer threatened economic reprisal against the plaintiff. *Id.* The court noted that during the negotiation period of several months, the plaintiff was deprived of the use of his automobile completely. *Id.* at 125. The court concluded that the insurer's attitude was "not only vexatious, but irritating, exasperating and provoking." *Id.*

Here, as in *Deverman*, the insurer's attitude was of significance. DAIC staff was unhelpful and rude to Gregory. DAIC gave Gregory inconsistent reasons for rescission. Gregory has been deprived of his car for over three years. DAIC's attitude was also "irritating, exasperating, and provoking."

In light of the totality of the circumstances, DAIC's rescission of the policy was a pretext to avoid payment, in particular because, as stated above, DAIC was unable to demonstrate with underwriting standards that the theft was an unacceptable risk.

Here, there was no *bona fide* coverage dispute to protect DAIC from section 155 liability. DAIC's employee admitted under oath that the basis for the attempted rescission was the exposure from the theft, and not the reasons listed in the letters of February 7 and March 13, 2013. DAIC failed to show that the omission was intentional or material.

DAIC's vexatious and unreasonable actions include asserting pretextual reasons to rescind, bad faith in responding to Gregory, an unsupported assertion of a right to rescind Gregory's policy, the wrongful denial of his claim, and discovery violations.

The court finds for Gregory on Counts I and II and against DAIC on its counterclaim.

IT IS HEREBY ORDERED:

1. Judgment is entered in favor of Gregory and against DAIC in the amount of the value of the claim ($11,100), and an additional 60 percent ($6,600) penalty pursuant to 215 ILCS 5/155. In addition, Gregory is awarded prejudgment interest, costs, and reasonable attorney fees in an amount to be determined pursuant to prejudgment interest calculations and an invoice of attorney fees and costs to be filed by Gregory within seven days of this judgment.

2. This case is continued to October 31, 2016 at 10:15 a.m. for status.

ENTER:

_____

Judge Kathleen G. Kennedy

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Circuit Court – 1718