

STATE OF MICHIGAN  
COURT OF APPEALS

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FIRAS QARANA,

Plaintiff-Appellant,

v

NORTH POINTE INSURANCE COMPANY,

Garnishee-Defendant-Appellee.

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UNPUBLISHED

October 14, 2004

No. 244797

Oakland Circuit Court

LC No. 00-022528-NI

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting North Pointe Insurance Company summary disposition in this garnishment action. This case arises out of plaintiff's claims of assault and battery, and premises liability stemming from an incident when plaintiff was allegedly attacked by three unidentified individuals at the Royal Oak Music Theater. North Pointe issued an insurance policy to Paragon Investment Company in connection with Paragon's operation of the theater. When default judgment was taken against Paragon in the underlying action, plaintiff filed this garnishment action against North Pointe. We reverse.

I

Plaintiff first argues that he was entitled to summary disposition under MCR 2.116(C)(9) because North Pointe failed to allege a valid defense to plaintiff's garnishment claim. Plaintiff asserts that North Pointe failed to plead actual prejudice as a result of Paragon's noncooperation in defending the underlying action. Accordingly, North Pointe's defense that Paragon's noncooperation relieves North Pointe of any obligation under the insurance contract fails as a matter of law. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Relying on MCR 3.101, "Determination of Garnishee's Liability," plaintiff apparently argues that North Pointe was required to plead both noncooperation and prejudice. However, merely alleging noncooperation is sufficient to state a valid defense to a garnishment action. Although the defendant has the added burden to then ultimately show that he was prejudiced by the noncooperation, there is nothing that requires that the prejudice be actually pleaded in the initial disclosure or responsive pleadings. See *Allen v Cheatum*, 351 Mich 585, 596; 88 NW2d 306 (1958); *Anderson v Kemper Ins Co*, 128 Mich App 249, 253-254; 340 NW2d 87 (1983).

Therefore, North Pointe pleaded a valid defense to the garnishment action by alleging noncooperation.

## II

Plaintiff also argues that he, rather than North Pointe, was entitled to summary disposition under MCR 2.116(C)(10) because North Pointe made very little effort to encourage Paragon's cooperation and there is no genuine issue of material fact concerning the lack of prejudice to North Pointe from Paragon's noncooperation. We disagree. While we agree that the court erred in granting summary disposition in favor of North Pointe, we find no error in the trial court's denial of plaintiff's motion for summary disposition. We conclude that a material factual dispute exists concerning the issue of noncooperation and North Pointe's obligation under the insurance contract.

It has long been held that failure to comply with an insurance policy condition may constitute a breach of that policy and thereby preclude recovery under the policy. *Brogdon v American Auto Ins Co*, 290 Mich 130, 135, 137; 287 NW 406 (1939); see also *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998) (addressing contract provision requiring notice). Breach of a cooperation clause is one such condition. *Brogdon, supra*. An insured's failure to cooperate in the defense of a claim may relieve an insurer of its obligation for coverage. *Id.*; *Allen, supra* at 589. Under Michigan law, an insurer has the burden of showing noncooperation and that it was prejudicial. *Id.* at 595. This is generally a question of fact to be determined by the trier of fact. *Id.*

North Pointe argued below that Paragon breached the insurance policy by not cooperating with its own defense. The trial court agreed, citing an affidavit by attorney Michael Ewing concerning his withdrawal<sup>1</sup> and Paragon's failure to respond to discovery. The court found that North Pointe presented documentary evidence that "established that it was materially prejudiced in its ability to defend or settle the case due to Paragon's total lack of cooperation."

The court noted that Ewing's affidavit stated that he attempted to gather information from Paragon on numerous occasions so that he could answer plaintiff's discovery requests, but he was unsuccessful in obtaining the information necessary to defend the underlying action. After the bankruptcy stay was lifted, Ewing contacted Paragon's corporate counsel, Michael Novak, and was told that Paragon no longer existed. He contacted the bankruptcy trustee, who was unable to provide any assistance. Consequently, Ewing was permitted to withdraw as counsel in the underlying action.

It is undisputed North Pointe presented numerous proofs below to show a lack of cooperation by Paragon. However, these proofs consisted primarily of a lack of involvement by Paragon's corporate counsel despite numerous letters and contacts, and no response from Paragon's president and resident agent, Robert Fox, despite two letters and a phone call. These contacts occurred over a four-month period between the filing of the lawsuit and Paragon's filing for bankruptcy. We conclude that a mere showing of a lack of response or information from

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<sup>1</sup>Ewing was hired by North Pointe to represent Paragon in the underlying action.

Paragon's corporate counsel and Fox is not "tantamount to a showing of prejudicial noncooperation as matter of law." *Id.* at 592-593.

An insurer's and insured's obligations under the cooperation clause of a liability policy are reciprocal. 22-138 Holmes' Appleman on Insurance Law and Practice (2d ed), § 138.6(B). The insured must cooperate with the insurer, and the insurer must use reasonable diligence in obtaining the insured's cooperation. *Id.* "It is the combination of steps allegedly taken by the insurer, and the strength of the proof that they were, in fact, taken, which determines whether the efforts were diligent." 14 Couch on Insurance (3<sup>d</sup> ed), § 199.22; see also *Coburn, supra* at 307 (noting that this Court did not address whether the insurer used due diligence in attempting to secure the insured's cooperation).

Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In this case, reasonable minds could differ regarding whether North Pointe's efforts to secure Paragon's cooperation in defending the underlying action were diligent or whether they were minimal and perfunctory. Although North Pointe made numerous contacts with Novak, little if any of the contacts, were productive from the beginning. North Pointe contacted Fox beginning in May 2000, immediately after the underlying action was initiated, and received no response. Defendant acknowledges that during May and June 2000, Fox and Novak did not return phone calls or respond to written requests for information.

On May 1, 2000, North Pointe sent a letter to Novak, advising him that North Pointe would defend against plaintiff's claim, but specifically instructing him that the policy required Paragon's cooperation. North Pointe reserved the right to deny coverage if Paragon failed to cooperate. On May 9, 2000, Ewing sent a letter to Paragon, copied to Novak, notifying them that he had been retained to defend the action on Paragon's behalf and requesting a list of employees who worked on the date of the incident. Ewing testified that he made a follow-up call, but he was "stonewalled."

On June 23, 2000, Ewing contacted Paragon with instructions to complete plaintiff's interrogatories. Ewing testified that he had several follow-up phone conversations with Novak and Novak kept telling Ewing that he would get back to him, but the interrogatories were never answered. Ewing stated he had never had any trouble getting information in the past dealings with the Royal Oak Music Theater, but the information always came from Novak, and Ewing did not know how Novak obtained the information. Ewing wrote to Novak three more times to notify him of various court proceedings and informing him that his attendance was mandatory. Novak did not attend any of these proceedings.

On January 3, 2001, the court granted plaintiff's motion to compel discovery. On that same day, Ewing contacted Novak, pointing out that, regardless of Paragon's defunct status (Paragon filed bankruptcy on August 17, 2000), the insurance policy between North Pointe and Paragon required that Paragon cooperate with the defense. Ewing also warned Novak that absent

Paragon's compliance, the court would likely enter a default judgment. Further, Ewing put Novak on notice that given Paragon's lack of cooperation, North Pointe would likely seek a declaratory judgment that North Pointe had no duty to indemnify or defend Paragon, and Ewing would have to withdraw as counsel.

On January 8, 2001, Novak responded that it was impossible to provide the requested discovery because Paragon no longer existed. Novak suggested, however, that Ewing contact Paragon's bankruptcy trustee. As suggested, Ewing contacted the trustee both by phone and letter, but the trustee responded that he had no firsthand knowledge regarding the operation of Paragon's business prior to the bankruptcy proceedings. Ewing contacted Novak on January 16, 2001, informing him that the trustee had been unable to provide any assistance, and considering that the compliance deadline was January 17, a default judgment was likely imminent. Ewing also put Novak on notice that in the event of default, North Pointe would not satisfy any sanctions imposed as a result of Paragon's noncompliance. Novak responded that because of the bankruptcy there was nothing he could do to assist in defending the claim.

As Ewing predicted, plaintiff moved for a default judgment on January 18, 2001, and as warned, Ewing moved to withdraw as counsel for Paragon. The court granted Ewing's motion to withdraw. On January 31, 2001, North Pointe sent Novak a letter notifying him that Ewing had made several attempts to gain Paragon's cooperation and that in the event that Paragon's noncooperation prejudiced North Pointe's ability to defend the claim, North Pointe would invoke its right to deny coverage. On that same day, Ewing sent one last letter to Novak notifying him of his withdrawal as counsel, and that North Pointe would not indemnify Paragon based on its failure to cooperate with its own defense.

Given Paragon's impending bankruptcy and dissolution, it is unsurprising that Fox did not respond to Ewing's contact for information. It is also unsurprising that information was not forthcoming from corporate counsel, who had represented Paragon in past matters. Despite the lack of attention to the lawsuit and lack of response from Novak and Fox early on, Ewing made little attempt otherwise to obtain information pertaining to the suit.<sup>2</sup> According to Ewing's deposition, he had previously represented Paragon in other claims, and he must have been at least somewhat familiar with the company's structure and operations.

We find the facts of this case sufficiently similar to other cases in which the courts have rejected the insurer's affirmative defense of noncooperation to warrant submission of the issue in this case to the trier of fact. See *American Guarantee & Liability Ins Co v Chandler Mfg Co, Inc*, 467 NW2d 226 (Iowa, 1991) (no finding of noncooperation in defense of bankrupt company where insurer failed to take statement or deposition of company president or attempt to secure his presence at trial); *Wallace v Woolfolk*, 312 Ill App 3d 1178; 728 NE2d 816 (2000) (insurer failed to establish defense of noncooperation despite six letters and a phone call to the insured because the insured either was not receiving the letter or was ignoring them and there was no attempt to remedy either of these possibilities); *Lappo v Thompson*, 87 Ill App 3d 253; 409 NE2d 26 (1980) (more could and should have been done to secure the insured's cooperation because

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<sup>2</sup> As a routine matter, Ewing obtained the police incident report, which was not helpful in providing additional information concerning contacts or witnesses.

her failure to respond to numerous letters served as constructive notice that a problem existed). Given Ewing's lack of effort to otherwise defend the lawsuit, prejudicial noncooperation cannot be found as a matter of law such that North Pointe was entitled to summary disposition of the plaintiff's garnishment action.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Jane E. Markey