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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-734

Filed 17 December 2024

New Hanover County, No. 19 CVS 2293

KARL MILLER, Plaintiff,

v.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY, Insolvent Defendant, and NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, Defendant.

Appeal by Plaintiff from order entered 4 January 2022 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 13 February 2023.

Waldrep Wall Babcock & Bailey PLLC, by Chris W. Haaf, for plaintiff-appellant.

Lewis Brisbois Bisgaard & Smith LLP, by Christopher J. Derrenbacher, for defendant-appellees.

MURPHY, Judge.

When a plaintiff fails to sit for a requested Examination Under Oath (“EUO”) which is a condition precedent to filing suit under his insurance contract, summary judgment in the insurance company’s favor is proper. We affirm the trial court’s order

granting summary judgment to Defendant.

BACKGROUND

In October 2018, Plaintiff filed an insurance claim with Defendant alleging storm-related damage from Hurricane Florence to property he owned in Wilmington. Three days after the claim was filed, Defendant sent an independent adjusting firm to evaluate the extent of damage to the property. Based on this evaluation, Defendant denied coverage as the cost of repairs was less than the cost of the deductible. Plaintiff contested Defendant's decision and sent an estimated budget for fixing the property to Defendant that exceeded the deductible. Disputes regarding the cost of repair continued for several months, and ultimately Defendant became concerned that the information Plaintiff provided in the above referenced evaluation was neither "prepared nor necessarily approved by" the contractor it appeared to be prepared by.

On 22 February 2019, Defendant, through counsel, contacted Plaintiff's personal assistant requesting an opportunity to conduct an EUO of Plaintiff pursuant to the terms of the insurance contract. The insurance policy, in section I of Conditions under subsection C regarding "Duties After Loss," states:

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an "insured" seeking coverage, or a representative of either:

7. As often as we reasonably require:

. . .

c. Submit to examination under oath, while not in the presence of another ‘insured’, and sign the same[.]

On 26 February and 28 March 2019, Defendant sent additional letters directly to Plaintiff through mail and email seeking to schedule an EUO.

Plaintiff, however, informed his personal assistant that he would not participate in an EUO and, despite numerous subsequent attempts by Defendant to schedule an EUO, Plaintiff did not sit for an EUO prior to the filing of his complaint.

Regarding the consequences of failing to sit for an EUO, the insurance policy, in section I of Conditions under subsection H regarding “Suit Against Us,” states:

No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy and the action is started within two years after the date of loss.

On 20 June 2019, Plaintiff filed a complaint against Defendant for breach of contract and unfair and deceptive trade practices in New Hanover County Superior Court. Defendant timely filed an answer and a motion for summary judgment. By order dated 4 January 2022, the Superior Court granted *Defendant’s Motion for Summary Judgment*. The trial court reasoned, in part, that “Plaintiff did not comply with the terms of the insurance policy in that [] Plaintiff did not submit to an examination under oath prior to filing the lawsuit.” Plaintiff timely appeals from this order.

On 23 March 2023, after oral arguments in this appeal, Defendant moved to

stay the appellate proceedings for 120 days due to Defendant being declared insolvent and the impending assumption of claims by the North Carolina Insurance Guaranty Association (“NCIGA”). We abstained from ruling on the motion at that time and stayed the proceedings until 27 June 2023. On 27 June 2023, the parties filed a consent motion to substitute NCIGA as Defendant-Appellee due to Defendant’s declaration of insolvency. Due to the limited nature of NCIGA’s statutory authority, the only claims that may be covered by NCIGA are the breach of contract claims. The parties maintained the action was otherwise subject to the injunction and automatic stay resulting from Defendant’s insolvency proceedings. 16 April 2024, we allowed the substitution of NCIGA for the purposes of the breach of contract claims and stayed the appeal for an additional 90 days. We subsequently proceeded with the appeal, and Plaintiff voluntarily dismissed the portion of his appeal related to extra-contractual claims that NCIGA would not cover.

ANALYSIS

On appeal, Plaintiff contends, among other things, that the trial court erred in granting summary judgment on the basis of the refusal to submit to an EUO. We find Plaintiff’s failure to submit to an EUO to be the dispositive issue on appeal and need not reach Plaintiff’s remaining issues.

“Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of

law.” *In re Will of Jones*, 362 N.C. 569, 573 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24 (2007)).

Here, there are no genuine issues as to any material fact regarding the EUO. Under the policy, there was a requirement that Plaintiff submit to an EUO prior to filing suit. The duty to submit to an EUO was based on section I, subsection C, which states, in relevant part:

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an “insured” seeking coverage, or a representative of either:

7. As often as we reasonably require:

. . .

c. Submit to examination under oath, while not in the presence of another ‘insured’, and sign the same[.]

Subsection H of section I, in turn, makes “full compliance with all of the terms under Section I of this policy” a precondition to filing suit.¹ Additionally, there is no dispute that Defendant made multiple requests for Plaintiff to submit to an EUO and

¹ Plaintiff argues the policy is ambiguous as to whether the prejudice requirement from section I subsection C is read into section I subsection H, which requires construction of the language in favor of coverage. *See Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 11 (2000) (“An ambiguity exists when the language used in the policy is susceptible to different, and perhaps conflicting, interpretations. In other words, a provision of the policy is ambiguous if the writing leaves it uncertain as to what the agreement was. As a general rule, ambiguities in insurance policies are to be strictly construed against the drafter, the insurance company, and in favor of the insured and coverage since the insurance company prepared the policy and chose the language.”) (citations and marks omitted). However, we conclude the language is not ambiguous; reading the relevant provisions in conjunction, the policy clearly requires Plaintiff to submit to an EUO prior to filing suit without the need for a showing of prejudice to Defendant. As a result, we reject Plaintiff’s proposed construction of the policy.

Plaintiff did not sit for an EUO prior to filing suit. As a result, the only question is what our caselaw dictates must occur.

Plaintiff cites two cases to argue that “North Carolina law requires a showing of prejudice” before an insurance company may avoid coverage or lawsuit under an insurance policy due to the insured’s failure to sit for an EUO. *See Great Am. Ins. Co. v. C.G. Tate Constr. Co.* 303 N.C. 387 (1981); *Henderson v. Rochester Am. Ins. Co.* 254 N.C. 329 (1961). Both cases are readily distinguishable from our present dispute, and neither draws the bright-line rule Plaintiff purports they do.

Great American Insurance did not involve, or discuss, EUOs at any point, instead focusing specifically on a dispute over a condition precedent requiring the insured to provide written notice to the insurer “as soon as practicable” prior to filing a claim. *Great Am. Ins. Co.*, 303 N.C. at 390. There, our Supreme Court held that, “if the delay in giving notice has not materially prejudiced the ability of the insurer to defend the claim, its obligations under the insurance contract should not be excused.” *Id.* at 397.

Similarly, in *Henderson*, there was no discussion of EUOs. Instead, our Supreme Court was asked to determine whether the plaintiff had complied with a cooperation clause as a condition precedent to filing a claim. *Henderson*, 254 N.C. at 332. There, the insurance company sought to avoid coverage under the policy because the insured had made misstatements in the investigation of the accident. *Id.* at 330. The Court held “to relieve the insurer of liability on the ground of lack of cooperation,

discrepancies in statements by the insured must be made in bad faith and must be material in nature and prejudicial in effect.” *Id.* at 332-33 (citations omitted). A showing that a condition precedent is prejudicial may be applicable to *some* condition precedents like those in *Great American Insurance* and *Henderson*.

However, in the present case, the condition precedent at issue is not whether the Plaintiff has “cooperated” or provided notice “as soon as practicable” as in *Henderson* and *Great American Insurance*. Instead, the issue here is the consequence of the insured failing to submit to an EUO, which our caselaw has explicitly held properly prohibits an insured from filing suit without discussing prejudice. *See Fineberg v. State Farm Fire & Casualty Co.*, 113 N.C. App. 545 (1994); *Baker v. Ind. Fire Ins. Co.*, 103 N.C. App. 521 (1991).

In *Baker*, we affirmed the trial court’s grant of summary judgment where the insurance company “in writing requested plaintiff to submit to an examination under oath” as required by his policy and the plaintiff “refused this request and filed the action[.]” *Baker*, 103 N.C. App. at 522. We explicitly held that “[t]hese facts establish as a matter of law that plaintiff did not comply with a condition precedent to bringing suit on the policy and that the dismissal of her action was proper.” *Id.* Likewise, in *Fineberg*, we reviewed whether the trial court erred in granting summary judgment on the basis that the “plaintiff failed to comply with all conditions precedent under his insurance policy *in failing to submit to an examination under oath[.]*” *Fineberg*, 113 N.C. App. at 547 (emphasis added). Affirming the judgment of the trial court, we

held that “failure to comply with these conditions precedent bars recovery as well as the right to suit under the policy.” *Id.* at 548.

Like in *Baker* and *Fineberg*, Plaintiff’s policy required the insured to submit to a requested EUO as a condition precedent to filing suit. There are no genuine issues of material fact regarding Plaintiff’s lack of compliance with this term of the insurance policy. Here, like in *Baker* and *Fineberg*, Plaintiff did not comply with the condition requiring him to submit to an EUO before filing suit and the dismissal of his action was proper. *See Baker*, 103 N.C. App. at 522; *Fineberg*, 113 N.C. App. at 548.

CONCLUSION

The trial court granted summary judgment in favor of Defendant on the basis that Plaintiff failed to comply with all conditions precedent under his insurance policy; that is, Plaintiff failed to submit to an EUO, which his insurance policy required prior to the filing of an action against Defendant, and Plaintiff was therefore barred from filing his claim. For these reasons, we affirm the trial court’s grant of summary judgment in favor of Defendant.

AFFIRMED.

Judge STADING concurs.

Judge HAMPSON concurs by separate opinion.

Report per Rule 30(e).

No. COA23-734 – *Miller v. United Prop. & Cas. Ins. Co.*

HAMPSON, Judge, concurring.

I agree there is no genuine issue of material fact but that Plaintiff failed to satisfy a condition precedent to filing a claim under his insurance contract by refusing to sit for the EUO. However, I would further conclude that—to the extent the terms of the insurance contract required such non-compliance with this duty to be prejudicial to Defendant to result in a denial of coverage—there is, on this record, also no genuine issue of material fact but that Plaintiff's failure to comply with EUO requirement was prejudicial to Defendant. Thus, Summary Judgment was properly granted in favor of Defendant. Therefore, the Judgment is properly affirmed. Consequently, I concur in the Opinion of the Court.