IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

ROBERT LURIE, Plaintiff,	
vs.	Cause No. 15SL-CC02883
COMMONWEALTH LAND TITLE COMPANY, LLC, Defendant.	Division 21

MEMORANDUM and JUDGMENT

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Missouri Supreme Court Rule 74.04. Plaintiff Robert Lurie ("Lurie") filed this action asserting claims for breach of contract, vexatious refusal to pay, and unjust enrichment related to a title insurance policy issued by Defendant Commonwealth Land Title Company, LLC ("Commonwealth"). On September15, 2017, the Court held a hearing on the motions and, on September 25, 2017, following the submission of briefs and proposed findings of fact and conclusions of law, took the matter under submission. The Court, having considered the undisputed material facts, the law, and the arguments of the parties now enters summary judgment in favor of Defendant and against Plaintiff.

I. SUMMARY JUDGMENT STANDARD

The Missouri Rules of Civil Procedure encourage the use of summary judgment "to permit resolution of claims as early as they are properly raised in order to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *ITT Comm. Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

Summary judgment is proper when the moving party demonstrates there is no genuine dispute about material facts and, under the undisputed facts, that the moving party is entitled to judgment as a matter of law. A party can demonstrate entitlement to summary judgment by showing:

> (1) facts negating any of the claimant's necessary elements; (2) the claimant, after an adequate period of discovery, has been unable, and will not be able, to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) there is no genuine dispute of the existence of facts required to support the defending party's properly pleaded affirmative defense.

Parr v. Breeden, 489 S.W.3d 774, 778 (Mo. banc 2016) (citing Rule 74.04(c) *and ITT Comm. Fin. Corp.*, 854 S.W.2d at 380); *see also Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 225 (Mo. 2013).

In ruling on a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, and afford it the benefit of all reasonable inferences from the record. *Truck Ins. Exch. v. Prairie Framing, LLC*, 162 S.W.3d 64, 95 (Mo. App. W.D. 2005) (citing *ITT Comm. Fin. Corp.*, 854 S.W.2d at 376). "A lack of genuine dispute regarding material facts plays a role in determining the propriety of summary judgment, but '[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question.'" *Id.* (quoting *ITT Comm. Fin. Corp.*, 854 S.W.2d at 380).

A "genuine issue" exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. *ITT Comm. Fin. Corp.*, 854 S.W.2d at 382. A "genuine issue" is a dispute that is real, not merely argumentative, imaginary, or frivolous. *Id.* Where the "genuine issues" raised by the non-movant are merely argumentative, imaginary, or frivolous, summary judgment is proper. *Id.* Once a defendant makes a proper showing of evidence that either negates one of the essential elements of Plaintiffs' claims or

indicates an absence of evidence for such an element, the burden shifts to Plaintiffs to proffer evidence meeting the requirements of Rule 74.04 and showing there is a genuine issue for trial. *See Id.* at 381.

II. UNDISPUTED MATERIAL FACTS

A. Background

Lurie purchased an Owner's Policy of Title Insurance, ALTA Owner's Policy (10-17-92) dated August 5, 1998 (the "Policy") issued and underwritten by Commonwealth. (Pl.'s Ex. 2.). The Policy insured, subject to certain terms and conditions, the title to Lurie's property commonly described as 44 Hillvale Drive, Clayton, Missouri 63105. In July 2003, Lurie's neighbor, Michael Polinsky ("Polinsky"), erected a fence between Polinsky's and Lurie's properties. (PL's Ex. 7.)[1] Subsequently, a dispute arose between Lurie and Polinsky regarding the placement of the fence because Lurie believed the fence encroached on his property and Polinsky, who disagreed, refused to remove the fence. On July 24, 2008, Lurie filed suit against Polinsky regarding the fence dispute. Lurie ultimately dismissed that lawsuit without prejudice on December 16, 2009. On December 10, 2010, Lurie filed a second suit against Polinsky regarding the fence dispute. Lurie dismissed that lawsuit without prejudice on June 29, 2012. Lurie and Polinsky ultimately resolved their fence dispute via private agreement.

On June 22, 2012, in conjunction with Lurie's sale of the Hillvale property, an email was sent by Pat Feagans to Susan C. Graves purporting to notify Commonwealth of a claim under

[1] The parties dispute whether, prior to 2003 and at the time that Lurie entered into the Policy, there was another fence on or near the location of the fence erected in July of 2003. Because the Court concludes that the question of notice rather than policy exclusion resolves all claims here, this factual dispute is not a material issue precluding resolution of the case on summary judgment. In addition, the Court need not resolve this factual question.

the Policy, relating to attorneys' fees incurred in prosecuting the 2008 and 2010 lawsuits. (Pl.'s Ex. 13.) The June 22, 2012 email read: "Copy of owner's policy 44 Hillvale Dr," and Schedule A of the Policy was attached to the e-mail. (Pl.'s Ex. 13.) Lurie has not identified the business or other affiliation of either the sender or the recipient of the June 22, 2012 email. In addition, the record does not indicate how the email was intended to convey potential claim information to Commonwealth. It is undisputed that neither Commonwealth nor Lurie were parties to the June 22, 2012 email.

On August 27, 2015, Lurie filed the instant lawsuit against Commonwealth. After filing this suit, Lurie submitted a Consent Memo dated February 9, 2016, asserting a claim against Commonwealth for $68,740.25 in attorneys' fees related to the 2008 and 2010 lawsuits against Polinsky. (Feb. 9, 2016 Order and Claim Letter.) In the Claim Letter, Lurie stated that, "[t]he erection of this new fence on Hillvale is the nexus of the title dispute between Polinsky and Lurie." (Claim Letter, p. 2. (emphasis added)). On July 6, 2016, Commonwealth issued a formal denial of Lurie's claim. (Pl's Ex. 14.).

B. The Policy

With respect to notification of claims, the Policy generally requires "prompt notice" and states that:

> The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. *If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required: provided, however, that failure to notify the Company shall in no case prejudice the*

rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

Pl.'s Ex. 2 at p. 2 (emphasis added)).

In addition, the Policy excludes from coverage, any "[d]efects, liens, encumbrances, adverse claims or other matters . . . attaching or created *subsequent to Date of Policy.*" (Id. at, p. 1, 13 (emphasis added)).

III. ARGUMENTS OF THE PARTIES

Lurie asserts that he is entitled to judgment on his claims under the Policy because: (1) he incurred attorneys' fees with respect to the allegedly encroaching fence on the Hillvale property, and (2) he provided notice to Commonwealth of that claim, albeit some years after its resolution. Lurie contends that the question of whether he provided prompt notice is a factual dispute precluding the entry of summary judgment. He further asserts that the delay in the provision of notice does not preclude his claim because Commonwealth was not prejudiced by his delay.

Commonwealth urges the Court to determine that it is entitled to judgment as a matter of law on Lurie's claims for breach of contract because the allegedly encroaching fence was erected after the issuance of the Policy and is therefore excluded from coverage under the Policy. In addition, Commonwealth argues that, as a matter of law, Lurie failed to provide Commonwealth with prompt notice under the Policy and that Commonwealth was prejudiced by Lurie's delay in providing such notice. Therefore, Commonwealth asserts that its denial of Lurie's claim under the Policy was proper, precluding not only his claim for breach of contract but also his claims of vexatious refusal to pay and unjust enrichment.

IV. APPLICABLE LAW

Under Missouri law, the insured under a title insurance policy bears the burden of proving compliance with the notice requirements of the policy. *See Green Tree Serv., LLC v. Chicago Title Ins. Co.*, 499 S.W.3d 771, 776 (Mo. App. E.D. 2016); *see also*, *Tresner v. State Farm Ins. Co.*, 913 S.W.2d 7, 9 (Mo. banc 1995) (noting that an insured must prove compliance with policy provisions requiring performance on the insured's part or provide an acceptable excuse for failure to do so). Where a title insurance policy requires "prompt" notification, "[t]he determination of whether an insured provided prompt notice to its insurer is normally an issue of fact, but it may become a question of law where all reasonable persons would conclude that notice or proof was not given or made within [a reasonable time]." *Green Tree,* 499 S.W.3d at 776 (internal quotation omitted).

Not every failure to provide proper notice terminates an insurer's liability to the insured, but the insurer is relieved from the obligation to proceed on the claim if the insurer is prejudiced by the lack of notice. *Id.* The burden of proof regarding prejudice rests with the insurer, but an unexcused failure to provide notice as required under a policy gives rise to a rebuttable presumption that the insurer was prejudiced. *Rocha v. Metro Prop. & Cas. Ins. Co.*, 14 S.W.3d 242, 248 (Mo. App. W.D. 2000) (affirming a trial courts grant of summary judgment in favor of the insured on the ground that the insured failed to notify an insurer of an amended petition and thus impaired the insurer's ability to defend the claim). Prejudice is presumed in such cases because the disadvantage arising from delayed notice may be difficult to prove, and it would be unjust to force the insurer to demonstrate prejudice in such a case. *Id.* The "'rebuttable presumption' puts the burden of producing some substantial evidence on the party presumed against," thus shifting the burden to the insured to offer some excuse for the failure or to

demonstrate an absence of prejudice. *Berra v. Danter,* 299 S.W.3d 690, 697 (Mo. App. E.D. 2009).

V. ANALYSIS

The parties raise arguments with respect to policy exclusion and notice. The Court concludes that the notice issue resolves the matter and will not therefore further address the policy exclusion question.

With respect to the question of notice, Lurie asserts that either the June 22, 2012 email or the Claim Letter sent after the initiation of this suit constituted the written notice of claim required under the Policy. Because the June 22, 2012 email did not provide sufficient notice to Commonwealth of the dispute with Polinsky, the Court finds it was not an effective notice of claim. However, even if the Court were to assume that the June 22, 2012 email constituted the required written notice of claim, the Court is satisfied that no reasonable person could conclude that the June 22, 2012 email constituted the "prompt" notice required under the Policy. *See Green Tree,* 499 S.W.3d at 776. The June 22, 2012 email was sent nearly four years after Lurie filed his first lawsuit against Polinsky and more than a year and a half after Lurie filed his second lawsuit against Polinsky. Moreover, the letter sent during the pendency of this suit came approximately five years after the second lawsuit against Polinsky.

Lurie has offered no excuse for his failure to provide prompt notification of his claim, but asserts that the delay should be excused because Lurie resolved his dispute with Polinsky without Commonwealth's assistance and thus avoided prejudice to Commonwealth. Lurie argues that Commonwealth would have been prejudiced only if Lurie had failed to resolve the fence dispute.

Policy conditions requiring that the insured promptly notify the insurer of a claim "are valid, enforceable, binding, and of vital importance to the insurer," and go to "the very essence

of the insurance contract." *Rocha,* 14 S.W.3d at 247-48. An unexcused failure to provide prompt notice gives rise to a presumption of prejudice because courts recognize that delay interferes with the insurer's ability to pursue the claim effectively but in a manner that may be difficult to prove. *Id.* at 248. In this case Lurie failed to promptly notify Commonwealth of two lawsuits and a settlement, but offers no excuse for that failure. Regardless of the manner in which the dispute with Polinsky was ultimately resolved, Lurie's unexcused failure to explain his delay in providing notice creates a presumption that Commonwealth was prejudiced and Lurie offers no evidence to rebut this presumption.

Moreover, even in the absence of the unrebutted presumption, the Court's review of the Policy demonstrates that Commonwealth was prejudiced by the lack of notice. The Policy states that Commonwealth has the right to choose its own counsel, and the lack of notice prevented Commonwealth from exercising this right. (Pl.'s Ex. 2 at p. 2, ¶ 4(a)). Similarly, the Policy reserves to Commonwealth the right to direct litigation and settle claims "with parties other than the insured or with the insured claimant." (Pl.'s Ex. 2 at p. 2, ¶¶ 4(b) & 6(b).) In the absence of notice regarding the alleged claim, Commonwealth was unable to control the progress or settlement of Lurie's claim. Rather than incur the $68,740.25 in attorneys' fees Lurie now seeks, Commonwealth could have chosen to pay Lurie for the diminution in value of his property due to alleged encroachment or could have settled with Polinsky regarding his claim to the affected property. It was therefore prejudiced by its inability to pursue these resolutions of Lurie's claim.

On the basis of the forgoing, the Court concludes that: (1) no reasonable juror could find that Lurie provided prompt written notice of his claim, (2) Lurie has offered no excuse for this failure thus giving rise to a presumption of prejudice to Commonwealth which Lurie has offered no evidence to rebut. Therefore, Lurie's claims for breach of contract fails.

The Court also concludes that Commonwealth is entitled to summary judgment on Lurie's claim for unjust enrichment predicated upon Commonwealth's retention of the Policy premium. The undisputed record reflects that Lurie received the Policy and the title insurance coverage, for which he paid and Commonwealth's retention of the Policy premium was not unjust. *See Am. Stand. Ins. Co. of Wis. v. Bracht,* 103 S.W.3d 281, 292-293 (Mo. App. S.D. 2003). The failure of the contract claim also mandates a determination that Count III, the claim for vexatious refusal to pay, also fails as a matter of law. *See Bd. of Educ. of City of St. Louis ex rel. Bertolino v. Vince Kelly Constr. Co., Inc.,* 963 S.W.2d 331, 335 (Mo. App. E.D. 1997).

Accordingly,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment is entered in favor of Defendant Commonwealth Land Title Company, LLC, and against Plaintiff Robert Lurie on Plaintiff's Second Amended Petition.

Dated this 20th day of October, 2017.

SO ORDERED:

Nancy Watkins McLaughlin

Nancy Watkins McLaughlin
Saint Louis County Circuit Judge