IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS HUTCHINSON, Plaintiff, vs. ALLSTATE INSURANCE COMPANY, Defendant.	:	CIVIL ACTION NO. 1:16-CV-3744-CC

OPINION AND ORDER

This matter is before the Court on Defendant Allstate Insurance Company's Motion for Summary Judgment [Doc. No. 15]. For the reasons stated below, the Court **GRANTS** the Motion for Summary Judgment.

I. FACTS

This action arises from a fire that occurred on September 2, 2014, at a house located at 1261 East Main Street, Hogansville, Georgia. (Defendant Allstate Insurance Company's Statement of Material Facts About Which There is No Dispute "DSMF" [Doc. No. 15-6] ¶ 1.) Following the fire, Plaintiff Thomas Hutchinson ("Plaintiff") submitted a claim under an Allstate policy of insurance, and Allstate undertook an investigation of the claim. (Id. ¶ 2.)

As part of its investigation, Allstate attempted to examine Plaintiff under oath pursuant to the terms of the insurance contract. (Id. ¶ 3.) Allstate scheduled an examination under oath for a date, time, and location certain. (Id. ¶ 6.) Plaintiff appeared for the examination under oath, as scheduled, but thereafter refused to respond to any substantive questions. (Id. ¶ 7.) Once Allstate completed the investigation it was able to complete, given Plaintiff's refusal to respond to questions under oath as required by the Allstate policy, Allstate denied Plaintiff's claim in writing on March 24, 2015. (Id. ¶ 10.)

More than a year after Plaintiff's claim was denied, Plaintiff's counsel wrote

to Allstate's counsel and demanded payment from Allstate. (Id. ¶ 11.) Plaintiff offered to sit for a second examination under oath. (Plaintiff's 56.1(B)(2)(b) Statement of Additional Facts "PSAF" [Doc. No. 18] ¶ 12.)

Counsel for Allstate responded and pointed out what Allstate contended were errors in the demand letter. (DSMF ¶ 12.) While specifically reserving all rights, Allstate offered Plaintiff an additional chance to appear for an examination under oath and requested that Plaintiff "provide mutually convenient dates, times and locations" for the same. (Id. ¶ 13; see also July 21, 2016 email from Allstate's counsel [Doc. No. 15-3, pp. 46-47 of 50].) At no time before filing this lawsuit did Plaintiff provide Allstate with any dates when he would agree to appear and submit to questioning under oath. (DSMF ¶ 14.)

Prior to the filing of this lawsuit but subsequent to Allstate's request for dates from Plaintiff, Plaintiff's counsel stated that he would ask Plaintiff for some available dates for his examination under oath, but Plaintiff's counsel also asked Allstate's counsel on which dates it wished to take the an examination under oath. (PSAF ¶ 13; see also July 21, 2016 email from Plaintiff's counsel [Doc. No. 15-3, p. 48 of 50].) Allstate never provided dates and/or requested such an examination under oath. (PSAF ¶ 14.) Hence, neither party responded to the other party's request for dates, and no second examination under oath was scheduled.

The parties dispute whether Plaintiff resided at the house in question at the time of the fire. Allstate states that its investigation revealed that Plaintiff did not reside at the house at the time of the fire and that the Allstate policy therefore did not provide any coverage for the claim submitted by Plaintiff. Plaintiff states, with many supporting facts, that he split his time residing at the house in question and another house. However, for the reasons set forth below, the Court finds that this dispute between Plaintiff and Allstate is not material.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 requires the entry of summary judgment

when no genuine issue as to any material fact is present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In seeking summary judgment, the moving party bears the initial responsibility to demonstrate that there is no genuine issue as to any material fact and that summary judgment is appropriate. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Allen v. Bd. of Public Educ., 495 F.3d 1306, 1313 (11th Cir. 2007). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

When evaluating the merits of a motion for summary judgment, the court must view all evidence and factual inferences raised by the evidence in the light most favorable to the non-moving party and resolve all reasonable doubts concerning the facts in favor of the non-moving party. Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (11th Cir. 1999) (citation omitted). The court is not permitted to make credibility determinations, weigh conflicting evidence to resolve disputed facts, or assess the quality of the evidence. Reese v. Herbert, 527 F.3d 1253, 1271 (11th Cir. 2008).

A fact is material if proof of its existence or nonexistence would affect the outcome of the case under controlling substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Additionally, an issue of fact is genuine when the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. Id. An issue of fact is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or "not significantly probative." Id. at 249-250. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original).

III. ANALYSIS

Allstate moves for summary judgment, arguing that Plaintiff is barred from recovery under the insurance policy for two reasons. Allstate contends, as an initial matter, that Plaintiff is barred from recovery because he failed to comply with the requirement that he appear for an examination under oath and respond to Allstate's questions. Allstate likewise argues that Plaintiff is barred from recovery because he did not reside at the subject house at the time of the fire, as is required by the Allstate policy. Because of the undisputed evidence that Plaintiff refused to answer substantive questions at the examination under oath, the Court agrees with Defendant that Plaintiff is barred from recovery under the Allstate policy. The Court need not and does not address the parties' dispute regarding whether Plaintiff resided at the house in question at the time of the fire.

Plaintiff's policy with Allstate contains several conditions precedent to coverage. "A condition precedent is one which must be performed before any right to be created thereby accrues. It requires performance by one party before performance by the other." Wolverine Ins. Co. v. Sorrough, 122 Ga. App. 556, 560, 177 S.E.2d 819 (1970) (citations omitted). "When a plaintiff's right to recover on a contract depends upon a condition precedent, to be performed by him, he must allege, and prove the performance of such condition precedent, or allege a sufficient legal excuse for its nonperformance." Id. (citations omitted).

The policy at issue in this case requires the insured to do the following, among other things, after a loss to property that may be covered by the policy: "at [Allstate's] request submit to examinations under oath, separately and apart from any other person defined as you or insured person and sign a transcript of the same." (Policy, Section 1 - Conditions, subparagraph 3(f)(2) [Doc. No. 15-2, p. 39 of 51].) Plaintiff's insurance policy further provides that "[n]o suit or action may be brought against [Allstate] unless there has been full compliance with all policy terms." (Policy, Section 1 - Conditions, subparagraph 12 [Doc. No. 15-2, p. 42 of 51].)

A contractual provision requiring an insured to submit to an examination under oath is frequently included in insurance policies and "has been upheld by many courts." Pervis v. State Farm Fire and Cas. Co., 901 F.2d 944, 947 (11th Cir. 1990) (citations omitted). A "plaintiff's refusal to submit to [a] requested examination under oath constitutes a breach of the insurance contract, unless some privilege excuses [the insured]'s failure to comply with the contractual condition." Id. In Pervis, the United States Court of Appeals for the Eleventh Circuit held that not even the assertion of the Fifth Amendment privilege against self-incrimination excuses an insured from appearing and responding to questions under oath. 901 F.2d at 947-48.

Here, Plaintiff's undisputed refusal to answer substantive questions at his examination under oath constitutes a material breach of the insurance policy and bars this lawsuit. Allstate unequivocally invoked its right to examine Plaintiff under oath. While Plaintiff technically appeared for the examination under oath, he failed to provide required, material information, with no legal excuse, by not responding to substantive questions. In essence, then, Plaintiff did not "submit" to the examination under oath, as required by the policy. Thus, Plaintiff's failure to comply fully, or even substantially, with the policy term regarding the examination under oath constituted a breach of the insurance contract and precluded him from commencing this action against Allstate. See Halcome v. Cincinnati Ins. Co., 254 Ga. 742, 744, 334 S.E.2d 155 (1985) (holding that an insured's failure to provide any material information called for under an insurance policy is a breach of the insurance contract); Allstate Ins. Co. v. Hamler, 274 Ga. App. 574, 577, 545 S.E.2d 12 (2001) (same).

Plaintiff maintains that his subsequent offer to appear for a second examination under oath remedied his breach of the insurance policy. However, Allstate never waived its right not to pay Plaintiff's claim or to contest the commencement of a lawsuit based on Plaintiff's initial breach. Indeed, Allstate,

through counsel, expressly stated that it was "reserving all rights and defenses under the policy and Georgia law" and that its appearance at a second examination under oath was "expressly subject to a full and complete reservation of all rights and defenses by Allstate." (See July 21, 2016 email from Allstate's counsel [Doc. No. 15-3, pp. 46-47 of 50].)

Moreover, Allstate had no obligation to seek or schedule a second examination under oath after Plaintiff breached the contract, notwithstanding Plaintiff's offer to submit to a second examination more than a year after Allstate denied his claim and almost two years after the fire occurred. Cf. Pervis, 901 F.2d at 948 ("State Farm had no obligation to repeat its request for an examination after appellant breached the contract"); Watson v. Nat'l Sur. Corp. of Chicago, 468 N.W.2d 448, 452 (Iowa 1991) ("In order to determine whether to pay or deny an insured's claim, the insurer needs the evidence at the time of the investigation when facts are more easily recalled and before crucial evidence is destroyed or becomes otherwise unavailable."). The second proposed examination under oath essentially was at Plaintiff's request, given his prior refusal to answer Allstate's questions at the first examination under oath. Plaintiff never offered a date for the examination under oath that he requested, notwithstanding the indication by Plaintiff's counsel that he would provide Allstate some available dates. Under the circumstances of this case, Plaintiff's failure to offer a date further indicates the absence of a genuine attempt by Plaintiff to comply with the condition precedent and is fatal to his attempt to seek relief against Allstate.

In sum, the policy at issue bars Plaintiff from bringing this lawsuit. Plaintiff did not comply with a condition precedent, and he cannot recover against Allstate. Allstate is entitled to summary judgment.

IV. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant Allstate Insurance Company's Motion for Summary Judgment [Doc. No. 15].

SO ORDERED this 4th day of January, 2018.

s/ CLARENCE COOPER
CLARENCE COOPER
SENIOR UNITED STATES DISTRICT JUDGE