FILED
United States Court of Appeals
Tenth Circuit

June 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SUSAN CLEVELAND,

Plaintiff - Appellant,

v.

AUTO-OWNERS INSURANCE COMPANY,

Defendant - Appellee.

No. 22-1109
(D.C. No. 1:20-CV-00676-CMA-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

I. Introduction

Following a car accident in 2016, Susan Cleveland brought a breach of contract claim against her insurance carrier, Auto-Owners, for failure to pay underinsured motorist ("UIM") benefits. After initial pleadings, Auto-Owners filed a motion for summary judgment, asserting Cleveland did not comply with the terms of the parties' policy. Instead of replying to the summary judgment motion, Cleveland filed a motion to stay her response pursuant to Fed. R. Civ. P. 56(d) until further discovery could be conducted. Nine months after the Rule 56(d) motion was filed,

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

and over four months after the requested discovery was completed, Cleveland had yet to file a response to Auto-Owners' summary judgment motion. Accordingly, the district court issued an order granting summary judgment to Auto-Owners and denying Cleveland's request to stay. The district court similarly denied Cleveland's subsequent request for reconsideration and additional relief under Fed. R. Civ. P. 59(e) and 60(b). On appeal, Cleveland challenges the district court's grant of summary judgment; denial of her Rule 56(d) motion; and refusal to reconsider. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** the summary judgment award and the district court's discretionary decisions to deny Cleveland's motions to stay and reconsider.

II. Background

On October 14, 2016, an underinsured driver made a prohibited left turn at an intersection in southeast Denver, striking a pickup truck operated by Prime Window Systems, LLC. The truck was redirected by the collision into the rear of Cleveland's vehicle. Although the crash did not result in immediate injury to Cleveland, she has since experienced chronic neck and back pain associated with the event. On December 28, 2017, Cleveland initiated a lawsuit against the other accident participants in Colorado state court. She settled for the remainder of the available policy limits with the underinsured motorist, but the case against the truck driver and Prime Window Systems went to trial. On November 6, 2019, a jury returned a verdict against Cleveland on the issue of negligence.

Cleveland's insurance policy with Auto-Owners required she promptly notify the insurer of a loss and any associated lawsuits. The policy also obligated her to cooperate with the investigation of claims by providing access to medical records and submitting to physician examinations as needed. Less than one month after the accident, on November 3, 2016, Cleveland's counsel sent a letter informing Auto-Owners of a possible UIM claim. On March 14, 2017, Auto-Owners sent a letter to Cleveland's counsel requesting a status update and information regarding the potential claim, including medical expenses and tortfeasor coverage limits. Cleveland's counsel did not respond. Nor did counsel respond to fifteen out of sixteen subsequent letters Auto-Owners sent from April 13, 2017, to March 8, 2019, inquiring about the UIM claim. The only reply came on October 10, 2017, when Cleveland's counsel provided Auto-Owners with limited bills to substantiate medical payments coverage. Still, Cleveland's counsel remained equivocal, stating "[a]t this time we do not know for certain if there will be UM/UIM exposure." On April 9, 2019, after Cleveland's counsel failed to reply to eleven consecutive letters requesting information, Auto-Owners closed the UIM claim file.

On April 22, 2019, two weeks after Cleveland's file was closed, her counsel sent Auto-Owners the liability report for the accident. They also notified Auto-Owners of several pieces of information for the first time, including (a) the existence of the underlying suit; (b) mediation had already been conducted between the accident parties; (c) there had been issues with settlement and the underlying suit was scheduled for trial; (d) the underinsured driver's policy limits; and (e) over $40,000

in additional medical expenses. Auto-Owners subsequently attempted to intervene in the underlying lawsuit on two occasions, each of which was denied. Cleveland and Auto-Owners agreed, however, that Auto-Owners would not be bound by any determination in the suit.

On September 24, 2019, Auto-Owners informed Cleveland it would not extend UIM benefits due to her lack of cooperation with the terms of the parties' policy. In response, Cleveland commenced this action in Colorado state court for breach of contract. After initial pleadings and removal to federal court, Auto-Owners filed a motion for summary judgment on December 14, 2020, asserting Cleveland failed to perform under the terms of the policy by not cooperating with claim investigation procedures and not timely notifying it of the underlying lawsuit. On January 5, 2021, Cleveland filed a motion, pursuant to Fed. R. Civ. P. 56(d), to stay her response to the summary judgment motion. Specifically, she sought to delay her reply until after she could conduct a Fed. R. Civ. P. 30(b)(6) deposition of Auto-Owners officials. Her motion requested a response be due twenty days after the completion of discovery in the case. The district court elected not to rule immediately on Cleveland's motion. On March 31, 2021, the parties submitted a joint status report, which indicated the relevant Rule 30(b)(6) deposition was scheduled for May 12, 2021. The status report also proposed a discovery cutoff of September 21, 2021. On July 7, 2021, Cleveland filed an unopposed motion to extend the discovery deadline to October 30, 2021, which was granted the same day.

On September 23, 2021, the district court granted Auto-Owners' summary judgment motion and denied Cleveland's motion to stay. It concluded Cleveland failed to cooperate under the terms of the insurance policy and, therefore, could not prove an essential element of her breach of contract claim. The district court determined Cleveland "offer[ed] no acceptable reason why 'facts precluding summary judgment cannot be presented'" and she "should know what steps she took to comply with the policy or what excuse she ha[d] for nonperformance." The district court further reasoned that even if Cleveland could show discovery was necessary, the relevant depositions were completed several months prior. On October 8, 2021, Cleveland filed a motion for relief from the district court's judgment. She urged the court to reconsider its judgment pursuant to Fed. R. Civ. P. 59(e); or, alternatively, determine Cleveland's failure to respond to Auto-Owners' summary judgment motion amounted to excusable neglect under Fed. R. Civ. P. 60(b). The district court denied this motion, concluding Cleveland failed to raise grounds supporting reconsideration or produce facts demonstrating excusable neglect.[1]

III. Analysis

a. Motion for Summary Judgment

This court reviews a district court's grant of summary judgment de novo, applying the same standard used by the district court. *Hall v. Allstate Fire & Cas.*

[1] In her appellate briefing, Cleveland does not challenge the district court's Rule 60(b) analysis. Any argument regarding excusable neglect, therefore, is treated as waived. *See Therrien v. Target Corp.*, 617 F.3d 1242, 1253 (10th Cir. 2010).

Ins. Co., 20 F.4th 1319, 1323 (10th Cir. 2021). Summary judgment is properly granted if the moving party demonstrates there is no genuine dispute of material fact and it is entitled to judgment as a matter of law. *Id*. When the moving party does not bear the burden of persuasion at trial, it may carry its burden of production by pointing to "a lack of evidence for the nonmovant on an essential element of the nonmovant's claim." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). Given a properly supported summary judgment motion, a nonmoving party must set forth specific facts upon which a rational trier of fact could find in its favor. *Id*. "If the nonmoving party fails to respond, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its initial burden." *Reed v. Bennett*, 312 F.3d 1190, 1194–95 (10th Cir. 2002).[2]

Colorado law requires proof of four elements to establish breach of contract: "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted). Performance under this standard must be "substantial," meaning the expected benefit under the contract has been conferred without material deviation from its terms. *Id*. When an affirmative defense of noncooperation is asserted, the insurer bears the additional burden of proving it

[2] Although a party's failure to respond to a summary judgment motion "is not, by itself, a sufficient basis on which to enter judgment against the party," by failing to file a response "the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion." *Reed*, 312 F.3d at 1195.

suffered material and substantial disadvantage as a result of the insured's noncooperation. *Hansen v. Barmore*, 779 P.2d 1360, 1364 (Colo. App. 1989). "[T]he standard to establish a material and substantial disadvantage is whether an insured's conduct prevented a reasonable investigation under the circumstances, not whether an insurer's investigation was rendered impossible." *Hall*, 20 F.4th at 1324.

As a preliminary matter, the parties dispute whether Auto-Owners' summary judgment motion was based on (a) Cleveland's failure to establish an essential element of her claim; or (b) an affirmative defense of noncooperation, thereby subjecting Auto-Owners to an additional burden of proving material and substantial disadvantage. The district court interpreted the motion as the former, concluding Cleveland's failure to respond and provide notice of the underlying lawsuit prevented her from establishing the performance element required for breach of contract. As the following analysis demonstrates, this court concludes Cleveland failed to perform under the policy terms *and* such noncooperation materially and substantially disadvantaged Auto-Owners. Auto-Owners has satisfied both possible burdens of production on summary judgment and, therefore, this court need not classify whether the motion was based on an affirmative defense.

Failure to answer an insurer's investigatory requests to assess UIM claims "violate[s] [the insured's] basic contractual duty to provide information." *Hall*, 20 F.4th at 1324. Chronically failing to respond to an insurer's requests for information not only amounts to lack of performance, but it can "only be viewed as a failure to cooperate in a material and substantial way." *Id.*; *see also id*. at 1322–24 (insured's

failure to respond to three letters and two calls over three months regarding a potential UIM claim qualified as materially disadvantaging the insurer); *Polland v. State Farm Mut. Auto. Ins. Co.*, No. 19-CV-01416-KLM, 2019 WL 10258801, at *5 (D. Colo. Oct. 25, 2019) (insured's failure to respond to at least six letters regarding claim investigation amounted to nonperformance with material effect); *Walker v. State Farm Fire & Cas. Co.*, No. 16-CV-00118-PAB-STV, 2017 WL 1386341, at *8 (D. Colo. Feb. 23, 2017) (insured's "repeated refusal" to provide certain documents required for claim investigation deemed a material disadvantage to the insurer).

Cleveland was plainly obligated by her policy to cooperate with Auto-Owners' investigation of her claim and she did not do so. She failed to respond to sixteen out of seventeen letters from her insurer seeking fundamental details about her UIM claim. Her only reply was incomplete and was nonresponsive to many of Auto-Owners' basic inquiries. This lack of response to reasonable inquiries for policy limits, medical bills, and liability details effectively placed Auto-Owners in "the untenable position of either denying coverage or paying the claim without the means to investigate its validity." *Walker*, 2017 WL 1386341, at *8 (quotation omitted). Accordingly, Cleveland's noncooperation violated the terms of the contract and materially and substantially disadvantaged Auto-Owners' ability to carry out its duty under the policy.

Cleveland asks this court to conclude Auto-Owners' summary judgment motion actually admitted she performed and, therefore, no material disadvantage could have occurred. Specifically, she asserts she (a) notified Auto-Owners of a

possible UIM claim; (b) provided Auto-Owners with medical records and bills; (c) sent Auto-Owners a liability report for the accident; and (d) notified Auto-Owners of the underlying suit. Providing some information on an untimely basis, however, does not necessarily qualify as performance, nor does it render noncooperation immaterial. *See Polland*, 2019 WL 10258801, at *5; *Walker*, 2017 WL 1386341, at *7. Although Cleveland placed Auto-Owners on notice of a potential UIM claim in a timely manner, she did not send the liability report for the accident until two and a half years after the incident. Further, she submitted $40,000 worth of medical expenses after ignoring eleven requests for updates over the course of nineteen months. She also did not notify Auto-Owners of the underlying lawsuit until a year and half had passed after it was filed. Each of these nonactions amounted to discrete violations of Cleveland's duty to perform under the policy and her eventual communication did not cure the material and substantial disadvantage created by Auto-Owners' inability to properly investigate the claim.[3] Auto-owners successfully carried its burden of

[3] While it is clear Cleveland also failed to perform her obligation under the policy by not promptly notifying Auto-Owners of the underlying lawsuit, it is not clear from the record that such noncooperation was material. If Auto-Owners could have shown "that representation of its interest 'is or might be' inadequate in an action between its insured and an uninsured motorist . . . it has the right to intervene in an action between the insured and uninsured motorist." *Briggs v. Am. Fam. Mut. Ins. Co.*, 833 P.2d 859, 863 (Colo. App. 1992); *see also* Colo. R. Civ. P. 24(a). As a result of Auto-Owners' inability to intervene, however, the parties agreed the insurer would not be bound by the underlying case's determinations. On appeal, Auto-Owners argues it was precluded from protecting its rights because it speculates key witnesses to the accident are no longer available. Auto-Owners cites no authority for the proposition that access to witnesses impacts an insurer's ability to protect its rights. *Cf. State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 192 (Colo. 2004) (an

production and Cleveland has failed to set forth facts upon which a rational trier of fact could find in her favor.[4] In turn, summary judgment was properly granted.

b. Rule 56(d) Motion to Stay

Fed. R. Civ. P. Rule 56(d) allows a party to request additional time to "obtain affidavits . . . or take discovery" to present "facts essential to justify its opposition" to summary judgment. The rule allows the court to (a) defer consideration of the motion or deny it; (b) allow time to obtain affidavits or take discovery; or (c) issue any other appropriate order. Fed. R. Civ. P. 56(d). A request under Rule 56(d) "must specify (1) the probable facts not available, (2) why those facts cannot be presented

---

insurance provider may participate in tort litigation against uninsured motorists "only to the extent necessary to protect its interest in a fair hearing on legitimate defenses," and public policy dictates that the insurer bears the burden of proof in showing it was prejudiced by the insured in such circumstances). It is plain, however, that Auto-Owners was already materially and substantially disadvantaged by Cleveland's independent lack of cooperation with claim investigation procedures. Thus, this court need not determine if Auto-Owners suffered material disadvantage from Cleveland's failure to provide notice of the underlying lawsuit. Similarly, because Auto-Owners has already satisfied its burden to show material disadvantage, this court need not determine whether Auto-Owners was prejudiced merely by having to defend itself in this case. *Cf.*, *e.g.*, *Cribari v. Allstate Fire & Cas. Ins. Co.*, 861 F. App'x 693, 702 (10th Cir. 2021) (insurer materially disadvantaged by having to defend a bad faith suit following the insured's noncooperation).

[4] Cleveland also argues Colo. Rev. Stat. § 10-3-1118 requires certain measures to prove a failure-to-cooperate defense and that Auto-Owners did not comply with those procedures. This statute became effective on September 14, 2020, nearly four years after the loss and seven months after this action was filed. Courts have indicated this statute should not impact cases already in litigation, even if the summary judgment motion was filed after the passage of the law. *See Frias v. Auto-Owners Ins. Co.*, No. 19-CV-0903-WJM-SKC, 2021 WL 3931218, at *5, n.8 (D. Colo. Sept. 2, 2021); *see also Ma v. Auto-Owners Ins. Co.*, No. 19-CV-2203-WJM-NYW, 2021 WL 2473898, at *7 n.12 (D. Colo. June 17, 2021). This court will similarly not apply it under the circumstances of this case.

currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1249 (10th Cir. 2015) (quotations omitted). The denial of a Rule 56(d) motion is reviewed for abuse of discretion. *Adams v. C3 Pipeline Constr. Inc.*, 30 F.4th 943, 968 (10th Cir. 2021). The burden rests on the moving party to demonstrate that the court's decision was not "guided by the rules and principles of law." *Id*. "Requests for further discovery should ordinarily be treated liberally. But relief under Rule 56(d) is not automatic." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1110 (10th Cir. 2017) (citations omitted).

A district court is not obligated to rule on a motion to stay prior to granting summary judgment. *See Alpine Bank v. Hubbell*, 555 F.3d 1097, 1114 (10th Cir. 2009); *Wilson v. Vill. of Los Lunas*, 572 F. App'x 635, 639 (10th Cir. 2014) (unpublished disposition cited solely for its persuasive value). The rule expressly vests discretion in the district court to delay consideration of the motion. Fed. R. Civ. P. 56(d). By not considering a Rule 56(d) motion for several months, a district court can "effectively defer[] ruling on the summary judgment motion and allow[] time for the requested discovery." *Wilson*, 572 App'x at 638. When the relevant discovery has been completed and the requesting party has "made no attempt to provide the district court with evidence from the new depositions that would support their opposition to summary judgment," it is within the district court's discretion to grant summary judgment without first ruling on the Rule 56(d) motion. *Alpine Bank*, 555 F.3d at 1114. Here, the district court allowed nine months to pass after Cleveland's Rule

56(d) motion before it granted summary judgment to Auto-Owners. Its ruling was rendered over four months after completion of the deposition used as the basis for Cleveland's Rule 56(d) motion. At no point during that time period did Cleveland leverage the depositions to substantively respond to the outstanding motion for summary judgment.[5] In the total absence of such action, therefore, it was not an abuse of discretion for the district court to deny the Rule 56(d) motion and grant summary judgment.

Cleveland argues the district court erred by denying her motion on the basis that the requested discovery was already completed. Her motion requested a stay until twenty days after completion of discovery in the case, which was set for October 30, 2021. A court does not abuse its discretion in denying a Rule 56(d) motion simply because the discovery deadline had yet to pass. *See Wilson*, 572 F. App'x at 639 (denial of Rule 56(d) request for further discovery is appropriate even when "the discovery deadline . . . had not run before the district court granted summary judgment"). Cleveland was required under Rule 56(d) to specify what potential facts warranted further discovery and what steps were required to obtain

[5] Cleveland argues on appeal that the district court abused its discretion by not considering the impact of the COVID-19 pandemic on court procedures: "[B]ased on the nature of the pandemic and the dramatic upheaval the world was suffering, it was not surprising to Cleveland's Counsel that the District Court had not ruled on the Amended Motion to Stay as 2021 progressed." Cleveland, however, offers no analogous authority in which the pandemic absolved a party from responding to a motion. Further, the record demonstrates the pandemic did not prevent Cleveland from obtaining the required discovery, nor did it prevent her from submitting a response. Given these facts, the pandemic's influence does not render the district court's denial of Cleveland's Rule 56(d) motion unreasonable.

those facts. *Birch*, 812 F.3d at 1249. The only discovery Cleveland specified in her Rule 56(d) motion was the Rule 30(b)(6) deposition of Auto-Owners. The district court offered ample time for Cleveland to respond after she completed the discovery upon which the Rule 56(d) motion was based and, therefore, it did not "exceed[] the bounds of the rationally available choices given the facts and the applicable law in the case at hand." *Adams*, 30 F.4th at 968.[6]

c. Rule 56(e) Motion for Reconsideration

District court rulings on Rule 59(e) motions to reconsider are reviewed for abuse of discretion. Rule 59(e) allows parties to request an altered judgment where the district court has "misapprehended the facts, a party's position, or the controlling law." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Id*. at 1012. Cleveland's motion did not offer any intervening change in law, nor did it provide new evidence. Rather, she contends the district court committed clear error for the same reasons she argued granting summary judgment and denying her Rule 56(d) motion were improper: (a)

[6] Similarly, Cleveland's nebulous request for time to conduct any "additional discovery expected to arise out of information gathered in the [30(b)(6)] deposition" did not automatically protect her from summary judgment prior to the discovery deadline. This request lacks the specificity required for Rule 56(d) motions and it is within the district court's discretion to not give weight to such general statements. *See Gutierrez v. Cobos*, 841 F.3d 895, 909 (10th Cir. 2016).

Auto-Owners admitted to her performance; (b) Auto-Owners possessed additional burdens of proof under an affirmative defense of noncooperation; and (c) Cleveland genuinely required further discovery after the 30(b)(6) deposition of Auto-Owners. As previously discussed, the district court properly granted summary judgment and denied the Rule 56(d) motion. Cleveland's arguments for reconsideration on the same grounds, therefore, do not amount to a misapprehension of the law requiring an altered judgment under Rule 56(e).

IV. Conclusion

The judgment of the United States District Court for the District of Colorado is hereby AFFIRMED.

Entered for the Court

Michael R. Murphy
Circuit Judge