

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PROGRESSIVE NORTHERN  
INSURANCE CO.,

Plaintiff,

v.

FRED BACHMANN,

Defendant.

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ORDER

03-C-566-C

This is an insurance coverage dispute arising out of a recreational boating accident that occurred on August 10, 2003. Plaintiff Progressive Northern Insurance Co. seeks to rescind a contract of marine insurance that it issued to defendant Fred Bachmann, on the ground that Bachmann made material misrepresentations of fact on his insurance application concerning the horsepower and maximum speed of his Scarab powerboat. Alternatively, Progressive seeks a declaration that its policy does not afford coverage for damages sustained to defendant's boat on August 10, 2003 because the damages were caused by mechanical failure or wear and tear as opposed to striking a submerged object. Defendant has filed a counterclaim for breach of contract and bad faith, alleging that plaintiff's investigation of his claim and its denial of coverage were unreasonable and ill-founded.

At the time he filed his counterclaim and answer, defendant filed simultaneously a motion for summary judgment on plaintiff's claims. The court allowed defendant to supplement his motion after plaintiff was granted leave to amend its complaint to include

a claim that defendant had misrepresented the boat's horsepower. (The original complaint alleged only that defendant had misrepresented the boat's maximum speed.) The motion for summary judgment, as supplemented to include the horsepower issue, has now been briefed by both sides and is under advisement.

Having reviewed the parties' submissions preliminarily, two matters come to the court's attention. First, defendant failed to file a separate statement of proposed facts, supported by citations to the evidence, as required by this court's procedures to be followed on summary judgment. Although defendant's initial default is excusable because he filed his motion before the court held the pretrial conference, his failure to comply properly with the procedure when he filed his supplemental motion and reply is not. Nonetheless, because defendant's "Statement of the Facts" in his brief contains citations to the record, I will consider the motion in its present state instead of requiring defendant to refile it.

Second, I note that defendant's reply includes new evidentiary materials and arguments to support his contention that plaintiff is estopped from rescinding the policy because any misrepresentations on the application for insurance were the fault of the insurance agent, who was acting as the agent for plaintiff. Because plaintiff has not had an opportunity to respond to these submissions, I will allow it to do so by way of a response to defendant's reply. Plaintiff's response shall be limited to the agency issue. In its response, plaintiff should include a response to the facts proposed by defendant in his "Statement of

Facts” that relate to its agency argument. Defendant will not have the opportunity to reply to plaintiff’s response.

ORDER

IT IS ORDERED that plaintiff Progressive Northern Insurance Co. shall have until March 1, 2004, in which to file a response to defendant’s reply in support of his motion for summary judgment with respect to the agency issue.

Entered this 18<sup>th</sup> day of February, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge