COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
No. 18-01314

PREFERRED MUTUAL INSURANCE COMPANY

vs.

290 AUTO BODY, INC.

FINDINGS AND VERDICT ON PLAINTIFF'S COMPLAINT

The plaintiff, Preferred Mutual Insurance Company (Preferred or plaintiff), brought this complaint seeking declaratory relief and alleging fraud and deceit and violations of Chapter 93A against the defendant, 290 Auto Body, Inc. (290 or defendant). Preferred alleges that 290 fraudulently and inappropriately overcharged it for repairs and storage of a 2012 Honda CR-V owned by Preferred's insured, Erika Hoekstra. A jury-waived trial was held before me on November 19, 2021. Three witnesses testified for the plaintiff: Jessica White, Patrick Serra, and Paul McKeen. I credit their testimony. Justin Forkuo, the owner of 290, testified for the defendant. I do not credit his testimony regarding the invoices the defendant submitted or the mechanism by which he calculated those invoices. Twenty-one exhibits were introduced. After review of the credible evidence and relevant law, I find that the plaintiff has proven the elements of each count by a preponderance of the evidence. Judgment shall enter for Preferred Mutual Insurance Company on each count.

13

FINDINGS OF FACT

Preferred provides automobile insurance in Massachusetts. During 2018, it insured a 2012 Honda CR-V (Honda) owned by Erika Hoekstra (Hoekstra). On June 2, 2018, Hoekstra

was involved in an accident and the Honda sustained significant front-end damage. The vehicle was initially towed to her residence, but then was transferred to the defendant's facility. Preferred was notified of the claim on June 5, 2018. On June 6, Hoekstra signed a repair authorization permitting 290 to work on the vehicle. The document did not authorize 290 to tear down the vehicle. That same day, 290 sent Preferred a "Direction to Pay"[1] in the amount of $12,025.00.[2]

Jessica White (White), an experienced auto collision adjuster employed by Preferred, testified to the course of dealings between Preferred and 290 regarding the Honda. I credit her testimony. She stated that Preferred sent an appraiser to 290 to view the car on June 7. The appraiser found the Honda had already been significantly dismantled, even though it was readily apparent to any qualified car appraiser that the Honda had suffered significant front-end damage, was a total loss, and therefore not a candidate for repair. Based upon the appraiser's examination, Preferred deemed the car a total loss. Preferred did not authorize 290 to tear down or repair the car. The net value of the car was estimated at $6,577.52.

Preferred frequently used Copart, an automobile transportation company with a branch in West Warren, Massachusetts, to transport its insureds' vehicles. On June 14, White instructed Copart to arrange with 290 to pick up the Honda, in order to prevent storage charges from

---

[1] A "Direction to Pay" is a form signed by an insured, instructing an insurer to pay an auto body repair shop directly, rather than paying the insured for the repairs to a vehicle.

[2] The Direction to Pay contained the following language:

> **WARNING:** Please take our business as seriously as we do. Any unfair treatment of our company will result in our claims against you to the full extent of the law, including (a) any violations of the 1963 Consent Decree in the case of *United States Association of Casualty and Surety Companies, et al* (Civ. No. 63 Civ. 3106) (SDNY 1963); (b) any violations of the public policy expressed in guidelines issued by the Massachusetts Department of Insurance for determining reasonable rates for parts and labor; and (c) violations of any of the Massachusetts General Laws, including the consumer protection provisions of the Massachusetts General Laws, Chapter 93A (M.G.L. c. 93A).

I have reviewed the New York decision cited in this document and it is irrelevant to this litigation and, in any event, not binding on the plaintiff.

accumulating and to move the car toward the auction or scrapping process. Patrick Serra, a manager of Copart, testified regarding the difficulties Copart had in retrieving the vehicle from 290. I credit his testimony. Much of the problem resulted from the fact that, contrary to other auto body shops, 290 would only deal with Copart, or Preferred, by email, addressed to: totalloss@290autobody.com. Copart emailed 290 on multiple dates in June (on June 14, 15, 18, and 20), but consistently received an automated reply. The replies included the same language cited in the Direction to Pay sent to the plaintiff on June 6.

On June 20, Hoekstra signed a vehicle release form. On June 22, 290 sent an invoice to Preferred in the amount of $5,750. It was comprised of: a fee of $3,200 to dismantle the vehicle, calculated at $100 per hour for 32 hours; a $150 gate fee; a $50 hazardous waste storage fee; a $350 blue print fee; a $150 administration fee; a $150 collision access fee; and $1,700 in storage fees, calculated at the rate of $100 per day for 17 days.

White, based upon her experience, found the invoice to be clearly excessive. Angel Waggoner, an employee of Preferred, attempted to speak with 290 on June 22, but was informed that all communications had to be done by email. On June 25, Preferred retained counsel in the hope of resolving the conflict regarding the invoice. On June 27, Preferred, by a letter from counsel, offered $1,050.00 to 290 to resolve the dispute. On July 3, 290 responded with a boilerplate email to Preferred's counsel, Carrie Strasser, which did not answer any of the questions or concerns raised by Preferred in the June 27 letter, and began with the sentence, "**Hello Carrie**, in order to avoid losing another case in the court of law once again, please read and abide by the following" (emphasis in the original). At the end of a litany of demands and threats, the email concluded with the boilerplate language contained in the Direction to Pay.

On July 10, Preferred requested that 290 issue a final invoice for storage through July 11, in order to resolve the claim and prevent any claims for additional storage. That same day the defendant submitted an updated invoice in the amount of $8,500, which included storage through July 11, and a claim for estimated attorneys' fees of $750.[3] On July 10, Preferred issued, under duress, a payment of $7,750, which was calculated by subtracting the $750 in estimated attorneys' fees from the July 10 invoice. On July 11, Audrey Hunter (Hunter) of Copart spoke with 290 Auto and confirmed that the check had been received and the Honda would be released. However, when the driver from Copart arrived, the defendant did not release the car, and claimed additional fees were owed.

On July 16, Hunter sent an email to 290 complaining about the refusal to release in the car; in response she received an automated reply that the personnel at 290 were on vacation and storage charges accrued until July 23 would be vacated "if any delay is caused by us." Nevertheless, on July 20, the defendant sent another invoice, crediting the plaintiff with the $7,750 payment, and seeking an additional $1,950. This invoice comprised additional storage fees and the estimated attorney's fees. In response, on July 20, by overnight mail, Preferred sent to the defendant an additional check in the amount of $1,200. The payment was also made under duress. Preferred again refused to pay any estimated attorney's fees.

On July 25, an employee of Copart went directly to the defendant with a check in the amount of $200 to cover additional storage fees. A 290 employee stated the actual amount owed for storage was $300. In order to finally resolve the issue and retrieve the vehicle, the Copart employee wrote a check to the defendant for $300 and retrieved the car. This payment was also

[3] The invoice contained the following language, in small print: "All of 290 Auto Body Inc.'s charges were carefully calculated using fair and balanced business practices. All minimums are subject to increase or decrease annually. All fees listed above apply during normal business hours (8 a.m. – 4 p.m.) and to passenger vehicles as defined by Wikipedia. . . ."

made under duress. In total, the plaintiff paid the defendant $9,250 under duress in order to retrieve the Honda. White testified that the actual, reasonable amount Preferred should have been required to pay 290 is $1,050.00.

Paul McKeen (McKeen) testified as an expert on behalf of Preferred. He is the President of Viking Auto Appraisal, Inc. and has been a licensed vehicle appraiser since the late 1970's. I credit his testimony. He stated that in determining whether a vehicle is a total loss, the appraiser must weigh the cost of repairing the vehicle against the value of the vehicle as salvage. The plaintiff retained him to review the dispute in this case. He reviewed Forkuo's deposition, photographs of the vehicle, and the invoices from 290. He provided a written appraisal of the Honda in which he found that the car was total loss, and the reasonable labor involved in examining the vehicle amounted to 2.3 hours at $40 per hour, for a total of $92. He found the market value of the vehicle to be $3,389. He opined, and I find, that the car should have been declared a total loss on the first inspection, that there was no justification for dismantling it, that the fifty days of storage were more than excessive, and that the Honda should have been turned over to the insurer promptly.

Forkuo, the president and owner of 290 Auto Body, Inc., also testified. He stated that he is a high school graduate, and New England Technical School graduate, from which he received a certificate in automobile body repair. He worked for two collision repair shops prior to opening 290 in 2010. I credit this portion of his testimony. He stated he is a licensed motor vehicle appraiser.

He stated that 290 does not declare cars to be a total loss; only insurance companies do. He acknowledged receiving emails and communications from Copart but stated he doesn't trust Copart and is reluctant to work with them. With regard to the Honda, he stated both that it was

not a total loss, but also, "I do not know how to total vehicles." His belief is that he works for the vehicle owner, not the insurer, and so he does not take direction or orders from insurers.[4]

Forkuo was unable to relate the costs on the invoices to this specific vehicle; they are general costs which he attempts to collect on all vehicles. He uses a computer program, called "CCC" to estimate costs and labor, but does not know what "CCC" stands for, and was unable to explain the program in detail. The software does not keep records for vehicles which have been declared a total loss. He acknowledged that he does not negotiate bills with insurers by telephone and stated that none of his responses to email communications in this case were auto-generated; he stated he wrote each response individually. I do not credit this statement. He was unable to justify including an estimated attorney's fee in his invoices, as he did not show that 290 had actually utilized the services of an attorney during this dispute. He refused to vacate the storage fees that accrued while he was on vacation, as he blamed the plaintiff for the accrual of those fees.

In short, I find that Forkuo was unable to provide any paperwork or explanation justifying the invoices he sent in this matter and that the invoices were excessive. I also find that he created the billing and email system used in this matter for the express purpose of frustrating insurance carriers like the plaintiff, with the intent of forcing them to pay excessive and unwarranted fees in order to avoid accrual of storage charges.

[4] I note that 290 Auto Body's Repair Authorization (Ex. 8), signed by Hoekstra, states that all complaints regarding service must be send to a post office box in Venice, Florida. Forkuo provided no rational explanation for this requirement.

RULINGS OF LAW

1. Fraud and Deceit

A plaintiff alleging a claim for fraud and deceit must show that the defendant (1) made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act on this representation, (4) which the plaintiff justifiably relied on as being true to the plaintiff's detriment. *Greenleaf Arms Realty Trust I, LLC* v. *New Boston Fund, Inc.*, 81 Mass. App. Ct. 282, 288 (2012). Deception need not be direct to come within the reach of the law; declarations and conduct calculated to mislead, and which in fact do mislead, one who is acting reasonably are enough to constitute fraud. *Sullivan* v. *Five Acres Realty Trust*, 487 Mass. 64, 73 (2021), citing *Boston Five Cents Sav. Bank* v. *Brooks*, 309 Mass. 52, 55 (1941).

290 made multiple false representations of material fact to Preferred with knowledge of their falsity for the purpose of inducing Preferred to make additional payments not actually due. On July 11, 290 represented to Hunter of Copart that the Honda would be released to Preferred upon payment of $7,750. When Copart's agent arrived at 290 to make the demanded $7,750 payment under duress and collect the Honda, 290 falsely represented that additional payment beyond the agreed-to $7,750 was due. 290 knowingly misrepresented that additional payment was due to delay release of the Honda and induce Preferred to pay more than was due.

On July 16, in response to an email from Hunter complaining of 290's refusal to release the Honda, 290 sent an automated reply which stated that 290 personnel were on vacation and that any storage charges accrued as a result thereof would be vacated "if any delay is caused by us." The representation that 290 would vacate any storage charges resulting from its own unavailability was knowingly false and was made by 290 to further delay release of the Honda so that 290 could charge additional storage fees to Preferred. In fact, on July 20, 290 transmitted an

invoice to Preferred, crediting Preferred with the above-referenced payment of $7,750 and seeking additional payment for attorney's fees and storage fees. The storage fees sought by 290 in that invoice included the storage fees that 290 promised would be "vacated" in its July 16 email to Preferred.

Finally, the invoices and demands 290 sent to Preferred did not accurately reflect work performed or charges incurred by 290. 290's "Direction to Pay" to Preferred indicated that 290 was due payment for, among other things, work dismantling the Honda, a gate fee, a hazardous waste fee, a blueprint fee, an administration fee, and a collision access fee. However, Forkuo was unable to specifically relate the itemized costs in the "Direction to Pay" to the Honda. As Forkuo failed to maintain accurate records of what work was actually performed on the Honda, and as I credit McKeen's testimony that the reasonable cost to appraise the Honda was less than $100, 290 grossly overstated the amounts due from Preferred, seeking payment for at least some work not actually performed by 290 and not actually due from Preferred. Further, 290's repeated demands for reimbursement of attorney's fees by Preferred were fraudulent as 290 failed to demonstrate that it actually incurred those attorney's fees for which it sought reimbursement from Preferred.

Taking these findings together, 290 knowingly made multiple false representations of material fact to Preferred for the purpose of inducing Preferred to pay more to 290 than was actually due. Further, Preferred reasonably relied on 290's false representations to its detriment. Faced with falsely overstated and ever-increasing demands for payment from 290, Preferred reasonably made payment to 290 under duress to prevent 290's excessive and unreasonable charges from continuing to grow. 290 induced Preferred to act to its detriment with its false and overstated invoices and demands. Preferred has demonstrated that 290 made false representations

of material facts with knowledge of their falsity for the purpose of inducing Preferred to act thereon, and that Preferred reasonably relied upon 290's representations as true and acted upon them to its detriment.

One who makes a fraudulent misrepresentation is subject to liability for the pecuniary loss suffered by the party who justifiably relies upon the truth of the matter misrepresented, if the party's reliance was a substantial factor in determining the course of conduct that results in his loss. *Reisman* v. *KPMG Peat Marwick LLP*, 57 Mass. App. Ct. 100, 112 (2003), citing Restatement (Second) of Torts § 546 (1977). That is, the damages recoverable are those which naturally flow from the fraud. *Id.*, citing *David* v. *Belmont*, 291 Mass. 450, 453 (1935).

Here, Preferred paid 290 $9,250 in total for release of the Honda. The actual, reasonable amount that Preferred should have been required to pay 290 was $1,050, inclusive of the reasonable cost of labor to determine that the Honda was a "total loss" and reasonable storage and administrative fees. Thus, Preferred is entitled to $8,200 in damages on its count for fraud and deceit, representing the damages which naturally flowed from 290's fraudulent conduct.

2. Violation of G. L. c. 93A, § 11

Section 11 of G. L. c. 93A prohibits unfair or deceptive acts or practices among those engaged in trade or commerce. To prevail on a claim of violation of G. L. c. 93A, § 11, a plaintiff must demonstrate (1) that the defendant committed an unfair or deceptive trade practice within the meaning of G. L. c. 93A, § 2, (2) that the plaintiff suffered a loss of money or property as a result, and (3) a causal connection between the loss suffered and the defendant's unfair or deceptive act or practice. See G. L. c. 93A, § 11; *Auto Flat Car Crushers, Inc.* v. *Hanover Ins. Co.*, 469 Mass. 813, 820 (2014).

Taken alone, 290's fraudulent misrepresentations to Preferred, see Section 1., *supra*, establish 290's unfair or deceptive trade practices under G. L. c. 93A, § 11. See *HI Lincoln, Inc.* v. *South Washington St., LLC*, 489 Mass. 1, 18 (2022) ("[C]ourts have repeatedly affirmed that fraudulent misrepresentation is sufficient to establish deception under G. L. c. 93A, § 11."); *McEvoy Travel Bur., Inc.* v. *Norton Co.*, 408 Mass. 704, 714 (1990) ("Common law fraud can be the basis for a claim of . . . deceptive practices under [G. L. c. 93A]"); *Levings* v. *Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504 (1979) ("A misrepresentation in the common law sense would . . . be the basis for a c. 93A claim"). However, 290's unfair and deceptive trade practices warrant further discussion.

290's conduct in this matter possessed an extortionate quality designed to obtain undeserved benefits from Preferred in violation of G. L. c. 93A, § 11. The use of coercive or extortionate tactics by one business to extract undeserved concessions from another business constitutes unfair conduct under G. L. c. 93A, §§ 2 and 11. See *HI Lincoln, Inc.*, 489 Mass. at 14-15 (defendant threatened breach of contract in effort to extract additional benefits not provided by contract); *Anthony's Pier Four, Inc.* v. *HBC Assoc.*, 411 Mass. 451, 472-476 (1991) (landowner asserted pretextual disapproval of development plan to gain additional compensation from developer); *Frank J. Linhares Co.* v. *Reliance Ins. Co.*, 4 Mass. App. Ct. 617, 622-623 (1976) (defendant held truck hostage to obtain waiver of warranty rights).

Here, 290's withholding of the Honda while repeatedly demanding unreasonable and ever-changing payments constituted a form of commercial extortion, violating G. L. c. 93A, §§ 2 and 11. On July 11, 290 misrepresented to Preferred that additional payment was due before the Honda could be released for the purpose of delaying the vehicle's release and causing Preferred to accrue additional, inflated storage fees. 290 refused to deal with Preferred or its agents over

the telephone, and required that all negotiations be conducted via email, but when Preferred emailed 290 to negotiate release of the Honda on or about July 16, 290 replied with an automated reply that its personnel were on vacation and unavailable. This delayed Preferred's collection of the Honda so that additional storage fees would accrue. Further, 290's general practice of withholding the Honda until Preferred pay its ever-changing, unreasonable fees – fees which Forkuo could not even specifically relate to the Honda – possessed a plainly extortionate quality..

As a direct result of 290's unfair and deceptive trade practices, Preferred suffered a loss of money within the meaning of G. L. c. 93A, § 11. 290's unfair and deceptive trade practices caused Preferred to suffer a loss of $8,200, made up of the $9,250 paid by Preferred to 290 to release the Honda less $1,050, representing the reasonable cost of labor to determine that the Honda was a "total loss" and reasonable storage and administrative fees.

Further, 290's unfair and deceptive practices in its dealings with Preferred were knowing and willful, justifying an award of double damages. To recover double damages under G. L. c. 93A, a plaintiff is required to demonstrate that the defendant committed its unfair or deceptive acts or practices knowingly or willfully. See G. L. c. 93A, § 11; *International Fidelity Ins. Co.* v. *Wilson*, 387 Mass. 841, 853 (1983). Here, 290's repeated misrepresentations to Preferred that additional payment was due before the Honda could be released were knowingly designed to delay release of the Honda so that additional, inflated storage fees could be collected. Similarly, 290's practices of refusing to negotiate except via email, then relying on automated email responses to Preferred, was likewise knowingly designed to delay release of the Honda so that 290 could collect additional, inflated storage fees.

The evidence at trial demonstrated that 290 knowingly engaged in business practices to delay resolution of Preferred's payment disputes, to delay release of the Honda, and to

disingenuously claim that additional payment was due, starting the cycle anew. As 290 knowingly engaged in unfair and deceptive business practices in its dealings with Preferred, Preferred is entitled to double damages, totaling $16,400. Such damages encompass the damages awarded to Preferred on its claim of fraud and deceit.

Finally, as Preferred has prevailed on its claim against 290, it is entitled to an award of attorney's fees. See G. L. c. 93A, § 11, par. 6 ("If the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action."). The provision for attorney's fees under G. L. c. 93A reflects "the Legislature's manifest purpose of deterring misconduct by affording both private and public plaintiffs who succeed in proving violations of G. L. c. 93A, § 2(a), reimbursement for their legal services and costs." *Commonwealth* v. *Fall River Motor Sales, Inc.*, 409 Mass. 302, 316 (1991). Such legislative purpose to deter future misconduct by 290 will be served here. As Preferred has prevailed on its claim against 290 for violation of G. L. c. 93A, § 11, it is entitled to an award of reasonable attorney's fees. Preferred shall submit to the court an application for attorney's fees in accordance with Superior Court Rule 9A.

3. Declaratory Judgment

To maintain an action for declaratory judgment under G. L. c. 231A, § 1, a party must demonstrate the existence of (1) an actual controversy in the pleadings and (2) legal standing. *Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc.* v. *Commissioner of Ins.*, 373 Mass. 290, 292 (1977). Chapter 231A is remedial in nature and is to be liberally construed. G. L. c. 231A, § 9.

Preferred has established that an actual controversy exists. An actual controversy exists where there is a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter. *Gay & Lesbian Advocates & Defenders* v. *Attorney General*, 436 Mass. 132, 134 (2002). Here, an actual controversy exists through Preferred's denial of 290's claim of legal right to collect payment of $9,250 for hours worked on the Honda, a gate fee, a hazardous waste fee, a blueprint fee, an administration fee, a collision access fee, and a storage fee.

Preferred has likewise established that it has legal standing to pursue its claim of declaratory judgment. Standing to pursue a declaratory judgment claim requires that the plaintiff have a "definite interest in the matters in contention in the sense that his rights will be significantly affected by a resolution of the contested point." *Bonan* v. *Boston*, 398 Mass. 315, 320 (1986). Here, Preferred has a definite and concrete interest in the resolution of the contested issue of whether 290 maintains a legal right to collect payment of $9,250 for hours worked on the Honda, a gate fee, a hazardous waste fee, a blueprint fee, an administration fee, a collision access fee, and a storage fee.

As Preferred has established that an actual controversy exists between it and 290 and that Preferred has standing to sue for declaratory judgment, the court makes the following declaration of the rights and responsibilities of the parties to this matter in accordance with G. L. c. 231A, § 1 after consideration of the facts presented at trial: Preferred is not obligated to make payments to 290 for any charges imposed by 290 in relation to the Honda beyond $1,050, representing the reasonable cost of labor to determine that the Honda was a "total loss" and reasonable storage and administrative fees.

ORDER FOR JUDGMENT

For the foregoing reasons, it is hereby ORDERED that:

1. Judgment shall enter for Plaintiff Preferred Mutual Insurance Company and against Defendant 290 Auto Body, Inc. on Count I (Declaratory Judgment), Count II (Fraud and Deceit), and Count III (Violation of G. L. c. 93A, § 11) of the complaint.

2. On Count I of the complaint, this court explicitly finds that Plaintiff Preferred Mutual Insurance Company is not legally obligated to make payments to Defendant 290 Auto Body, Inc. for any charges in relation to the Honda beyond $1,050, representing the reasonable cost of labor to determine that the Honda was a "total loss" and reasonable storage and administrative fees.

3. On Count II of the complaint, Plaintiff Preferred Mutual Insurance Company shall be awarded damages of $8,200, plus costs and interest calculated from June 20, 2018.

4. On Count III of the complaint, Plaintiff Preferred Mutual Insurance Company shall be awarded damages of $16,400, plus costs and interest calculated from June 20, 2018. Such damages encompass the damages awarded under Count II, and Plaintiff Preferred Mutual Insurance Company shall not recover damages (exclusive of attorney's fees) exceeding $16,400 plus costs and interest for any combination of Counts II and III.

5. On Count III of the complaint, Plaintiff Preferred Mutual Insurance Company shall be awarded its reasonable attorney's fees. Plaintiff Preferred Mutual Insurance Company shall submit to the court an application for attorney's fees pursuant to Superior Court Rule 9A within sixty days of the date of this order.

J. Gavin Reardon, Jr.
Justice of the Superior Court

DATE: September 12, 2022

Entered and Copies Mailed 9/15/22