IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00118-PAB-STV

RAYSHUN WALKER,

Plaintiff,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This insurance dispute comes before the Court on Defendant's Motion for Summary Judgment [#26] (the "Motion"). This Court has carefully considered the Motion and related briefing, the entire case file and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the instant Motion. For the following reasons, I respectfully RECOMMEND that Defendant's Motion be GRANTED, that summary judgment be entered in favor of Defendant, and that all claims be dismissed.

I. BACKGROUND

As alleged in the Complaint, on December 21, 2014, a vehicle rented by Plaintiff, Rayshun Walker, was stolen along with approximately $60,000 of personal property inside of the vehicle. [#4 at ¶¶ 6-7] At the time of the theft, Mr. Walker was the beneficiary of a renters insurance policy with Defendant, State Farm Fire & Casualty Company. [*Id.* at ¶ 5] Mr. Walker alleged that he fully cooperated with Defendant's

investigation and valuation of the stolen personal property by providing documentation confirming the value of his property and submitting to examinations under oath. [*Id.* at ¶ 8] Defendant asserted that Mr. Walker failed to cooperate in the investigation and did not reimburse him for his claimed losses. [*Id.* at ¶ 9] In addition to these personal property losses, Mr. Walker alleged that during an examination one of Defendant's employees "either removed or directed the removal of a passport book from [Mr.] Walker's backpack, and failed to return it. At that time, there was approximately $500 cash inside the passport book." [*Id.* at ¶ 10]

Mr. Walker brought four claims against Defendant: (1) breach of contract, (2) bad faith breach of contract, (3) unreasonable delay or denial of payment of covered benefits under Colorado Revised Statute section 10-3-1115, and (4) civil theft. [*Id.* at ¶¶ 11-30] The matter was removed to this Court based on the complete diversity of the parties. [#1][1]

Defendant's Motion puts forth three main arguments. First, Mr. Walker forfeited his right to collect insurance benefits because he failed to comply with the insurance contract's terms and conditions requiring him to cooperate with Defendant's investigation. [#26 at 6-8] Next, Mr. Walker has not alleged facts establishing that Defendant acted unreasonably. [*Id.* at 15] Third, there is no evidence that Defendant's employees or agents obtained or exercised control over Mr. Walker's passport book. [*Id.* at 14]

As the Court will explain, it concludes that the undisputed facts demonstrate that Mr. Walker failed to cooperate as required by the insurance policy and that such failure

[1] Because the Complaint seeks damages for "two times the covered benefit," [#4, ¶ 25], the amount in controversy exceeds $75,000.

prejudiced Defendant. The Court, therefore, RECOMMENDS that summary judgment be entered in favor of Defendant as to Mr. Walker's claim for breach of contract. Because the contract was not breached and Mr. Walker was not entitled to benefits, the Court also RECOMMENDS that summary judgment be entered in Defendant's favor with respect to Mr. Walker's claims for bad faith breach of contract and statutory unreasonable denial/delay of payment. Finally, the Court RECOMMENDS the entry of summary judgment in Defendant's favor on Mr. Walker's civil theft claim because he has not put forth evidence supporting such a claim.

II. FACTUAL ALLEGATIONS

The undisputed facts are as follows. On January 7, 2015, Mr. Walker filed a claim with Defendant for the theft of personal property from a rental truck. [#26, Undisputed Fact ("UF") 1; #52, Response to Undisputed Fact ("RUF") 1] At the time of the theft, Mr. Walker was the named insured of a renters insurance policy with Defendant. [*Id.* at UF & RUF 2 & 3] The insurance policy specifically directed Mr. Walker to prepare an inventory of the stolen property detailing the quantity, description, age, replacement cost, and amount of loss. [*Id.* at UF & RUF 4] Additionally, Mr. Walker was required to provide all bills, receipts, and related documentation substantiating his claim. [*Id.*] Furthermore, Mr. Walker was "as often as [Defendant] reasonably require[d]," to provide reports and documents upon request and "submit and subscribe" to statements and examinations under oath. [*Id.*]

Consistent with this policy, Defendant sent Mr. Walker a letter on January 12, 2015, asking him to complete an inventory of the stolen personal property. [*Id.* at UF & RUF 6] Mr. Walker responded by providing an inventory of the stolen property, but he

did not attach any bills, receipts, or documentation establishing ownership of the approximately $58,000 in stolen luxury goods; including over $14,000 of items from Louis Vuitton, a $9,999 Canon digital camera, and two pairs of glasses and a watch made by Cartier valued at over $16,000. [#26-5 at 1] On January 15, 2015, Defendant sent a letter requesting a sworn statement of proof of loss. [#26 at UF 7; #52 at RUF 7] Defendant then sent a letter on January 20, 2015, identifying sixteen different areas requiring more information concerning Mr. Walker's claim. [*Id.* at UF & RUF 8]

On February 3, 2015, Defendant sent one letter identifying information it still needed from Mr. Walker to investigate his claim, and a second letter notifying Mr. Walker that it was handling his claim under a reservation of rights because he had not complied with the terms and conditions of the insurance policy. [*Id.* at UF & RUF 9] A week later, Defendant sent another letter asking Mr. Walker to attend an examination and advising him that he had not provided the requested income verification information or the "cash/bank" purchases for the stolen property. [*Id.* at UF & RUF 10] Mr. Walker responded on February 11, 2015, and February 15, 2015, with three letters disputing whether he had failed to cooperate and stating his desire to "fully cooperate," nonetheless, he did not attach responsive documents. [#52 at 20-25] Still lacking the previously requested documents, Defendant sent Mr. Walker letters on February 20, 2015, and again on March 25, 2015, indicating that it had not received the proof of loss statement or other information previously requested in January of 2015. [# 26 at UF 13-14; #52 at RUF 13-14]

Mr. Walker attended an examination on April 9, 2015; the parties dispute whether Mr. Walker refused to cooperate at this examination. [*Id.* at UF & RUF 15][2] With the exception of documentation establishing approximately $24,000 of income from 2013, Mr. Walker did not provide any other income documentation. [#26-6 at 2-3] At this examination, Mr. Walker also would not verify details with respect to his Wells Fargo accounts or an American Express credit card. [#26-6 at 4-5, 14-15] He further claimed to not know whether he earned any income from Walktunes, LLC, a business Mr. Walker established, or whether he compensated the person who was in charge of Walktunes, LLC's finances. [#26-7 at 17-18] A follow-up letter was sent to Mr. Walker explaining that the information he had submitted was insufficient to conclude his claim's investigation given various inconsistencies. [#26 at UF 16; #52 at RUF 16]

A second examination was conducted; again, the parties dispute whether Mr. Walker refused to cooperate at this examination. [*Id.* at UF & RUF 17] Although Defendant received the bank records for Mr. Walker's Wells Fargo accounts, he refused to verify those records. [#26-9 at 2-4] And even though Mr. Walker submitted photographs of the allegedly stolen items, he would not verify those photographs at the examination or state what stolen items were depicted in the photographs. [#26-9 at 13-14] Thus, similar to the first examination, the second examination ended without Defendant obtaining the documents it requested. Moreover, to the extent Defendant received any documentation, Mr. Walker refused to verify or substantiate proof of his income or ownership of the stolen luxury goods. So, Defendant informed Mr. Walker

[2] Mr. Walker denied the allegation that he did not cooperate but did not deny attending the deposition.

that it would not provide coverage for his loss because he failed to comply with the insurance policy's terms and conditions. [#26 at UF 18; #52 at RUF 18]

III. STANDARD OF REVIEW

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co., Inc.,* 41 F.3d 567, 569 (10th Cir. 1994). "[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury. *See Anderson,* 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.,* 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Serv.,* 812 F.2d 621, 623 (10th Cir. 1987). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson,* 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). In reviewing a motion for summary judgment the Court views all evidence in the light most favorable to the non-moving party. *See Garrett v. Hewlett-Packard Co.,* 305 F.3d 1210, 1213 (10th Cir. 2002).

IV. ANALYSIS

The Court's jurisdiction in this matter is based on diversity of citizenship under 28 U.S.C. § 1332(a) and, therefore, the Court applies the substantive law of Colorado. *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1223 (10th Cir. 2016).

A. Defendant is Entitled to Summary Judgment on the Breach of Contract Claim Because Mr. Walker Failed to Cooperate

Defendant argues that summary judgment should be entered in its favor with respect to Mr. Walker's claim for breach of contract because he failed to cooperate with its investigation of his insurance claim. Mr. Walker's response is that genuine issues of material fact exist with respect to his level of cooperation prior to and during the examinations. [#52 at 2] In his Response, Mr. Walker disputes the assertion that he failed to cooperate because he contends that he supplied Defendant with requested documents and answered questions to the best of his knowledge at both of his examinations and throughout Defendant's investigation. [*Id.* at 6-14]

It is undisputed that the insurance policy required the insured, Mr. Walker, to cooperate with Defendant in its investigation of his claim. [#26 at UF 4; #52 at RUF 4] Under Colorado law an insured may forfeit the right to recover under an insurance policy if he or she fails to cooperate in violation of a policy provision. *See Soicher v. State Farm Mut. Auto. Ins. Co.*, 351 P.3d 559, 564 (Colo. App. 2015); *Hansen v. Barmore*, 779 P.2d 1360, 1364 (Colo. App. 1989). "The purpose of a cooperation clause is to protect the insurer in its defense of claims by obligating the insured not to take any action intentionally and deliberately that would have a substantial, adverse effect on the insurer's defense, settlement, or other handling of the claim." *State Farm Mut. Auto. Ins. Co. v. Secrist*, 33 P.3d 1272, 1275 (Colo. App. 2001). Although the

question of whether an insured violated an insurance policy by failing to cooperate is generally a question of fact, if "the record can produce no other result, [a court] may determine the issue of non-cooperation as a matter of law." *Hansen*, 779 P.2d at 1364; *see also Edge Constr., LLC v. Owners Ins. Co.*, No. 14-cv-00912-MJW, 2015 WL 4035567, at *3 (D. Colo. June 29, 2015), *aff'd*, No. 15-1261, 2016 WL 4727376, (10th Cir. Sept. 9, 2016).

But the failure to cooperate is a breach of the insurance contract only if the insurer suffers a material and substantial disadvantage. *Ahmadi v. Allstate Ins. Co.*, 22 P.3d 576, 579 (Colo. App. 2001). And the scope of such noncooperation is dependent on the specific policy provisions at issue. *Soicher*, 351 P.3d at 565. Where an insured seeks coverage for a loss already sustained, whether the insurer suffered a material and substantial disadvantage is determined by:

> [W]hether the insurer has been able to complete a reasonable investigation with regard to whether the insured's claim is valid. If the insured's refusal to cooperate prevents the insurer from completing such a reasonable investigation, prejudice should be found to exist. Specifically, it has been held that the insurer can deny coverage, following an insured's refusal to provide documents reasonably requested by the insurer, on the basis that the insurer has been prejudiced because the insured's refusal prejudices the insurer by putting the insurer in the untenable position of either denying coverage or paying the claim without the means to investigate its validity.

1 Allan D. Windt, *Insurance Claims & Disputes* § 3.2 (6th ed. 2016). When the insured's failure to provide some of the requested records is undisputed, the court may determine their relevance to the insurer's investigation as a matter of law. *See Doerr v. Allstate Ins. Co.*, 121 F. App'x 638, 641 (6th Cir. 2005) (holding that insured's refusal to produce

requested records for insurer was a breach of the duty to cooperate with insurer and materially prejudiced insurer's investigation).

1. Mr. Walker failed to cooperate in the investigation

To begin, the Court notes that many of Mr. Walker's responses to simple direct questions at the examinations were unhelpful and evasive. The following series of questions and answers are illustrative:

> Defense Counsel: Is there anybody else that has access to the Wells Fargo checking account other than you?
>
> Mr. Walker: I need to know what you mean by "access."
>
> Defense Counsel: Able to make deposits.
>
> Mr. Walker: Everyone is able to make deposits into anyone's account.
>
> . . .
>
> Defense Counsel: Okay. Are you able to give me any estimate as to what's in the savings account?
>
> Mr. Walker: No.
>
> Defense Counsel: Do you know whether it's more than $100
>
> Mr. Walker: I'm not sure
>
> Defense Counsel: Okay. So it could be less than $100 – or, excuse me, it could be $100 or less?
>
> Mr. Walker: I'm not sure how much money is in my savings account.
>
> Defense Counsel: But it could be so de minimis, so little, so piddly, that it's less than $100?
>
> Mr. Walker: I do not know how much money is in my savings account.

Defense Counsel: All right. How much money is in your checking account?

Mr. Walker: I do not know how much money is in my checking account.

Defense Counsel: Are you able to estimate?

Mr. Walker: No, I'm not.

Defense Counsel: In December when this loss occurred, how much money was in your savings account?

Mr. Walker: I'm not sure.

Defense Counsel: In December when this loss occurred, how much money was in your checking account?

Mr. Walker: I think that's the same question, but the answer is still: I'm not sure.

. . .

Defense Counsel: Has anybody lived with you on a part-time basis?

Mr. Walker: What does "lived with" mean?

Defense Counsel: Reside.

Mr. Walker: What does part time mean?

Defense Counsel: Less than full time.

Mr. Walker: I don't know.

. . .

Defense Counsel: Do you have a concern about sharing her telephone number with us because you want to talk to her before we do?

Mr. Walker: I've told you that if you officially ask me for her number via email or via any type of - -

Defense Counsel: You're under oath. It doesn't get any more official than this moment right now.

Mr. Walker: Right. That would require me to go into my phone and my phone is not a part of this [examination]. I'm not using my phone at all concerning this examination.

. . .

Defense Counsel: (inquiring about a $5,800 watch allegedly purchased two years earlier) And you don't even know whether the band is leather or metallic?

Mr. Walker: No, the reality is I don't know if it's offered in either, and so that's why I'm not to – again, we're on record and I'm not going to answer a question where the band could have possibly been replaced from white gold, which is what I am assuming, to leather. I'm not going to respond to that because I don't know what the interchangeable options are. And so that's why I'm not being – I'm not immediately responding to it.

Defense Counsel: This isn't a question where you have to dodge it with all sorts of interchangeable options. The question is the watch that you claim to have owned. And you can't tell me whether the band was leather or metallic?

Mr. Walker: Oh, no, I'm very clear. I'm not going to guess at what is offered.

Defense counsel: So is it your testimony that what you listed when you submitted your claim to State Farm was something you saw on the Internet versus something you remember having on your wrist?

Mr. Walker: Oh, not at all.

Defense Counsel: Okay. So do you remember ever having it on your wrist?

Mr. Walker: Most definitely.

Defense Counsel: Do you have an image of that in your mind?

Mr. Walker: Well, not really. Right now, no.

Defense Counsel: So, again, you can't tell me whether the band was metallic or leather, correct?

Mr. Walker: With all certainty, I don't know if the watch is offered in an interchangeable band, which would make –

Defense Counsel: It doesn't matter whether it's offered that way.

Mr. Walker: Oh, yes, it does.

Defense Counsel: It matters what you owned and what you claim to have owned.

Mr. Walker: Okay. You can move to the next question.

Defense Counsel: So you're not going to answer that question?

Mr. Walker: I'm going to reserve that question.

. . .

Defense Counsel: (after showing Mr. Walker a document purporting to be the cover letter to documents Mr. Walker delivered to Defense Counsel): And is that consistent with the letterhead that you use?

Mr. Walker: I couldn't say without comparing them to each other.

Defense Counsel: Well, you use this letterhead, correct?

Mr. Walker: I couldn't say without comparing it to the letterhead that I use.

Defense Counsel: So you don't recognize your own letterhead; is that your testimony?

Mr. Walker: Recognition is so broad.

Defense Counsel: Do you recognize this as your letterhead or not?

> Mr. Walker: Without comparing it to my letterhead, I can't say what it is.
>
> . . .
>
> Defense Counsel: Why are you threatening me?
>
> Mr. Walker: I'm not threatening you. I just said or, as in what's the or.
>
> Defense Counsel: You're leaning forward, you're being aggressive.
>
> Mr. Walker: Is that what you consider aggressive?
>
> Defense Counsel: I do consider calling me an idiot to be aggressive.
>
> Mr. Walker: You are an idiot.

[#26-6 at 4, 5, 9, 22; #26-8 at 2-3; #26-9 at 2, 14] The Court finds it hard to believe that a reasonable jury could conclude that Mr. Walker cooperated during this examination.

Nonetheless, because Mr. Walker disputes whether these responses were cooperative, for purposes of issuing this Recommendation, the Court does not reach the question of whether Mr. Walker's evasive answers demonstrated a failure to cooperate. Instead, the Court focuses on Mr. Walker's repeated failure to provide numerous documents requested multiple times by Defendant that were required to be produced by Mr. Walker pursuant to the insurance policy.

The insurance policy required Mr. Walker to provide an inventory of the stolen property showing "in detail the quantity, description, age, replacement cost and amount of loss. Attach to the inventory all bills, receipts, and related documents that substantiate the figure in the inventory." [#26 at UF 4; #52 at RUF 4] Under the insurance policy Mr. Walker was "as often as [Defendant] reasonably require[d]" to

"[p]rovide [Defendant] with reports and documents [Defendant] request[ed] and permit [Defendant] to make copies," as well as "submit and subscribe" statements and examinations. [*Id.*] Defendant argues that the undisputed facts establish that Mr. Walker violated these provisions of the insurance policy. [#26 at 8]

On January 13, 2015, Mr. Walker provided an inventory of the stolen property including the brand, a description of the items, their age, the condition of the items, the cost of replacement, and where he purchased them. [#26-5 at 1] But Mr. Walker did not attach any bills, receipts, or documentation establishing ownership. [*Id.*] As a result, Defendant sent Mr. Walker a follow-up letter on January 20, 2015, requesting additional information. [#26 at UF 8; #52 at RUF 8] Mr. Walker did not send the requested information, thus, on February 3, 2015, Defendant sent him letters identifying the information still needed to investigate his claim, and informing him that the claim would be handled under a reservation of rights because he had not complied with the policy's provisions. [*Id.* at UF and RUF 9] Mr. Walker responded with a letter disputing whether or not he cooperated and stating, "I plan to continue to fully cooperate with your investigation on this claim." [#52 at 20-23] Despite his stated desire to cooperate, Mr. Walker did not attach any of the requested documentation with this letter. [*Id.*]

On February 10, 2015, Defendant sent Mr. Walker a letter advising him that he had not provided the requested documents verifying the purchases of the stolen

personal property or his income.[3] [#26 at UF 10; #52 at RUF 10] In response to this letter, Mr. Walker sent letters to Defendant on February 11, 2015, and February 15, 2015, telling Defendant that he would provide proof of his income from 2013-2014; including 1099s, W2s, a letter from his employer verifying his income, and cancelled checks. [#52 at 24-25] Although Mr. Walker stated in both letters that he "plan[ned] to continue to fully cooperate with [Defendant's] investigation," the documents were not provided. As a result, on February 20, 2015, and March 25, 2015, Defendant sent letters explaining that it had not received the documents it requested. [#26 at UF 13, 14; #52 at RUF 13, 14; #26-1 at 2]

At the examination on April 9, 2015, Defendant attempted to elicit responses from Mr. Walker verifying his income. Although Mr. Walker provided documentation of approximately $24,000 of income from 2013, he did not provide documentation of any other income. [#26-6 at 2-3] When asked why he had not provided W2s or 1099s, Mr. Walker responded that he was unable to find those documents. [#26-6 at 3] In any event, Mr. Walker said he did not have any tax documents because he had not filed his taxes since 2011 and had filed for extensions with the IRS since then. [#26-6 at 3] In order to verify that Mr. Walker had filed for these extensions, Defendant asked him to sign IRS release forms for himself and Walktunes, LLC. [#26-7 at 16-17] Mr. Walker refused to sign the release forms without consulting with counsel beforehand,

[3] Mr. Walker's inventory submission claimed approximately $58,000 in stolen luxury goods, nearly all of which were purchased in the last two years. [#26-5] But, for most of the luxury goods, Mr. Walker did not provide receipts or other proof of purchase. [*Id.*] As a result, Defendant was attempting to obtain documents to show that Mr. Walker had the financial ability to purchase these luxury goods. [#26 at 11] Nonetheless, Mr. Walker only provided documents verifying income of $24,000 in 2013, and did not provide any documents verifying income in 2014. [#26-6 at 3; #26-5 at 1]

nonetheless, there is no evidence in the record that these release forms were subsequently provided. [#26-7 at 17]

In an apparent attempt to find alternative ways of verifying Mr. Walker's income, Defendant asked him about his Wells Fargo checking and savings accounts. [#26-6 at 4] But Mr. Walker claimed to not know how much money was in the accounts or the individuals who had access to the accounts. [#26-6 at 4-6] Trying to gather more information about these accounts, Defendant asked Mr. Walker for the Wells Fargo checking and savings account bank records. [#26-6 at 7] Predictably, Mr. Walker declined to provide these records. [*Id.*] The examination ended and Defendant had not obtained W2s, 1099s, cancelled checks, bank records, or testimony that could otherwise verify the information contained in those records.

On May 26, 2015, Defendant sent Mr. Walker a letter stating that the information he had provided was insufficient to conclude the investigation of his claim. [#26, at UF 16; #52 at RUF 16] So, a second examination was conducted on June 1, 2015. [#26-9] Prior to this examination, Mr. Walker finally provided bank records for his Wells Fargo checking and savings accounts. [#26-9 at 2] But at the examination, Mr. Walker declined to confirm that these were the bank records he provided. [*Id.*at 4] When asked, "Does that not look like [the bank records] you provided us?" [*Id.*] Mr. Walker responded, "I can't say whether it does or does not because I don't have the original in front of me." [*Id.*] He was given multiple opportunities to verify the bank records and the information contained therein, but refused. [*Id.* at 4-6, 9-10] For the second time, the examination ended without Defendant obtaining W2s, 1099s, cancelled checks, or testimony verifying his income or the purchase of the stolen property. As a result of

failing "to comply with the terms and conditions of the insurance policy," Defendant informed Mr. Walker it would not provide coverage for his loss. [#26 UF at 18; #52 at RUF 18]

In his Response, Mr. Walker states that he provided bank records. [#52 at 6] A May 18, 2015, letter from Mr. Walker to Defendant's attorney states that Mr. Walker had attached bank records and IRS extensions. [#52 at 26][4] A May 26, 2015, letter from Defendant's attorney to Mr. Walker confirms receipt of these documents, but notes that the bank records appear incomplete and that the IRS extensions had long since expired. [#52 at 41-42] The letter from Defendant's attorney asks Mr. Walker to sign a release form so that Defendant could verify the IRS extensions. [*Id.* at 41-42] As discussed previously, Mr. Walker did not verify these bank records at his examination and did not sign a tax records release form. Nor is there any indication that Mr. Walker subsequently provided the records.

Indeed, in his Response to the Motion, Mr. Walker cites to Exhibit T as his proof that he "provided ownership records for each item included in the loss inventory to State Farm prior to its denial of this claim." [#52 at 8] In its entirety, Exhibit T includes: (1) various pictures of Mr. Walker himself wearing some of the allegedly stolen property, a receipt for his choir robes, a receipt for shoes and boots, and an affidavit from an individual claiming to have seen Mr. Walker with Louis Vuitton luggage. [#52 at 125-44] Many of the items listed in the inventory of stolen items were not in the pictures Mr. Walker submitted or documented by the receipts. [#26-5; #52 at 125-44][5]

[4] Mr. Walker's Response does not include the attachments to this letter.
[5] And as stated previously, Mr. Walker would not verify those photographs at the examination.

Moreover, the prices listed on the two receipts that Mr. Walker provided do not match the price Mr. Walker claimed on his inventory submission to Defendant. While Mr. Walker stated in his submission that he lost five choir robes and that the cost to replace these robes would be $1,380 [#26-5], the receipt for six choir robes showed a cost of $750 [#52 at 130]. Similarly, while Mr. Walker claimed to have lost a pair of Chukkas Boots with a replacement cost of $299 [#26-5], the receipt he provided showed boots purchased for $114 [#52 at 131].

Mr. Walker further argues that he contacted Defendant numerous times seeking clarity and offering to provide alternative documents. [*Id.* at 7] But, the vast majority of documents requested by Defendant were not complicated or confusing, such that Mr. Walker would need clarification on what was requested. Rather, Defendant was requesting receipts, W-2s, bank records, and tax releases. Moreover, Defendant's counsel examined Mr. Walker twice. If Mr. Walker had any questions about what was being requested, he could have asked. Instead, he refused to provide the documents.

The "alternative documents" that he did provide consisted entirely of a few photos, receipts that contradicted the claimed values for the lost items, and a single affidavit related to a single lost item. But, Mr. Walker even refused to assist with respect to the alternative documents that he provided. During the examination, Defendant's counsel asked Mr. Walker about the photographs in an attempt to ascertain which stolen items Mr. Walker claimed were depicted in the photographs. [#26-9 at 13-14] Mr. Walker refused to acknowledge that the pictures were the ones that he had sent, that he was even depicted in the pictures that he claims demonstrate that he was

wearing the stolen items, and refused to assist in identifying what stolen items were depicted in the pictures. [*Id.*]

The undisputed evidence shows that throughout the investigation Defendant requested information and documents from Mr. Walker that were material to the insurance claim at issue. Mr. Walker repeatedly refused to provide these documents. Thus, the undisputed facts demonstrate that Mr. Walker refused to cooperate in the investigation as required by the insurance policy.

2. Mr. Walker's failure to cooperate caused a material and substantial disadvantage to Defendant

Mr. Walker was claiming reimbursement for approximately $60,000 of luxury items. [#26-5] For the majority of the items, he could not produce a receipt. [*Id.*] Moreover, as explained above, the receipts that he apparently did produce contradicted the claimed value of the items. Mr. Walker did not submit verified bank records, credit card statements, or similar documentation that Defendant could rely upon to confirm the purchase of the stolen items.

Given the lack of documentation for these items, Defendant understandably sought to investigate further. Most of the stolen property was claimed to have been acquired in the last few years. [*Id.*] As a result, Defendant sought documents verifying Mr. Walker's income to establish his ability to purchase $60,000 worth of luxury goods. As detailed above, Mr. Walker repeatedly refused to provide these documents. As to the limited documents that he did provide, he refused to verify these documents during the examination. Without documentation showing proof of purchase or proof of income, and given Mr. Walker's repeated refusals during the second examination to even explain the "alternative documents" that he provided, Defendant was unable to complete

its investigation. This refusal "prejudice[d] [Defendant] by putting [Defendant] in the untenable position of either denying coverage or paying the claim without the means to investigate its validity." 1 Allan D. Windt, *Insurance Claims & Disputes* § 3.2 (6th ed. 2016). Thus, the Court concludes that Mr. Walker's failure to cooperate caused a material and substantial disadvantage to Defendant. The Court, therefore, RECOMMENDS granting summary judgment in Defendant's favor with respect to the breach of contract claim.

B. Defendant is Entitled to Summary Judgment on the Bad Faith Breach of Contract Claim and Statutory Unreasonable Delay/Denial Claim

Defendant asserts that Mr. Walker has not alleged facts establishing that it acted unreasonably and that it knew or recklessly disregarded the fact that its conduct was unreasonable. [#26 at 15] Similarly, Defendant contends that the undisputed facts demonstrate that it did not unreasonably delay or deny Mr. Walker's claim for insurance benefits. [*Id.* at 16] In essence, Defendant explains that because it properly denied coverage, summary judgment is appropriate with respect to the bad faith claim and the statutory unreasonable delay/denial claim. [#57 at 10] Mr. Walker's response is that Defendant acted unreasonably by conducting an overly invasive investigation with no reasonable connection to the claim at issue, thus violating its duty to act in good faith. [#52 at 2, 7]

"It is settled law in Colorado that a bad faith claim must fail if, as is the case here, coverage was properly denied and the plaintiff's only claimed damages flowed from the denial of coverage." *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184, 1193 (10th Cir. 2009); *see Gerald H. Phipps, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 14-cv-01642-PAB-KLM, 2016 WL 97756, at *5 (D. Colo. Jan. 8, 2016), *aff'd*,

No. 16-1039, 2017 WL 631637 (10th Cir. Feb. 16, 2017). Similarly, in order to prevail on a statutory unreasonable delay/denial claim a plaintiff must prove entitlement to benefits. *Edge Constr., LLC*, 2015 WL 4035567, at *6.

As previously explained, Mr. Walker failed to cooperate with Defendant and, therefore, Defendant did not breach its contract with him. "There are no benefits owed under the policy . . . if the insured failed to cooperate." *Id.* Because Mr. Walker was not entitled to benefits under the insurance policy and all of his claimed damages flowed from the denial of coverage, Defendant is entitled to summary judgment.[6] Thus, the Court RECOMMENDS granting summary judgment in Defendant's favor with respect to the bad faith breach of contract claim and the statutory unreasonable delay/denial claim.

C. Defendant is Entitled to Summary Judgment on the Civil Theft Claim

Defendant contends that Mr. Walker failed to establish the elements of a civil theft claim. [#26 at 14] A plaintiff may bring a claim for civil theft pursuant to Colorado Revised Statute section 18-4-405. Under section 18-4-405, "[t]he owner [of the property obtained by theft] may maintain an action not only against the taker thereof but also against any person in whose possession he finds the property." The elements of a civil theft claim are that the defendant: (1) knowingly obtained or exercised control over the

[6] Moreover, contrary to Mr. Walker's contention, Defendant's requests for documentation were not overly invasive but were instead necessary to carry out its investigation of the claim. Defendant only requested bank records, income tax returns, and other documents because Mr. Walker could not provide records verifying his purchase of these luxury goods. The numerous requests for additional documentation were not the result of Defendant acting unreasonably, but were merely a result of Mr. Walker's failure to provide documents that had already been requested. Lacking any verified purchase of these luxury goods, naturally, Defendant sought alternate means of verifying whether Mr. Walker owned these items. Thus, Defendant sought financial records that could otherwise contain documentation of these purchases or indicate whether Mr. Walker had the financial wherewithal to purchase such items.

plaintiff's property without authorization, and (2) intended to permanently deprive the plaintiff of the benefit of the property. *West v. Roberts*, 143 P.3d 1037, 1040 (Colo. 2006); *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 509 (Colo. App. 2009).

The only evidence presented by Mr. Walker to support his civil theft claim is a police report that he made two weeks after the alleged theft and an alleged recording of a conversation between Defendant's employees. The police report consists entirely of Mr. Walker's own statements and does not mention Defendant or its employees. [#52 at 123-24] Moreover, as inadmissible hearsay, it cannot be used to defeat a summary judgment claim. *See Jackson v. Park Place Condos. Ass'n, Inc.*, 619 F. App'x 699, 703 (10th Cir. 2015) (pro se plaintiff's "statements contained in the police report constitute inadmissible hearsay that cannot be used to defeat summary judgment."), *cert. denied*, 136 S. Ct. 484 (2015).

The audio recording purports to be a conversation between Defendant's employees taken while Plaintiff was using the restroom during the April 9 examination. Given that the audio recording was apparently never disclosed in discovery [#57 at 9], the Court has some question as to whether it would be admissible. Even if it were admissible, however, it fails to demonstrate that Defendant or its employees either exercised control over the passbook or intended to permanently deprive Mr. Walker of it. While hard to hear, the audio recording at best shows that State Farm's claims specialist talks about pulling out a wallet and wanting to see it. [#26, Ex. A, a copy of which is on file with the Clerk of Court] The claims specialist and/or Defendant's counsel are laughing as the conversation takes place. The recording fails to show that

either individual actually took the wallet, and certainly fails to demonstrate that they intended to permanently deprive Mr. Walker of that wallet (as opposed to looking at it).

Mr. Walker argues that the Complaint gave sufficient facts to support his civil theft claim. But, "[a]t the summary judgment stage, merely pointing to an unsworn complaint is not enough." *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1150 (10th Cir. 2006). Because Mr. Walker has failed to present evidence to support his civil theft claim,[7] the Court RECOMMENDS that Mr. Walker's claim for civil theft be dismissed.

V. CONCLUSION

For the foregoing reasons, this Court respectfully **RECOMMENDS** that:

(1) Defendant's Motion for Summary Judgment [#26] be **GRANTED**; and

(2) Judgment enter in favor of Defendant as to all claims.[8]

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[7] In contrast to this lack of evidence, the claims specialist and the attorney each submitted sworn affidavits that they did not take possession of or otherwise exercise control over Mr. Walker's passport book. [#26-1 at 3; #26-10 at 2]

[8] Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc*., 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see,*

DATED: February 23, 2017

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

Morales-Fernandez v. INS, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).