

2011 IL App. (1st) 100810-U

FIRST DIVISION  
September 6, 2011

No. 1-10-0810

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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JENNIFER STANGE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 07 L 3737
	)	
RAYMOND MASSIE,	)	
	)	
Defendant	)	Honorable
	)	Charles R. Winkler,
(Country Casualty Insurance Company,	)	Judge Presiding.
	)	
Defendant-Appellee).	)	

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PRESIDING JUSTICE HALL delivered the judgment of the court.

Justices Hoffman and Lampkin concurred in the judgment.

**ORDER**

*HELD:* Promissory estoppel claim properly dismissed where it referred to the contract between the parties. The plaintiff failed to allege sufficient facts to support an award of statutory penalties. No genuine issues of material fact barred summary judgment for the insurer on the breach of contract claim and the negligent spoilage of evidence claim. The plaintiff's violation of Supreme Court Rule 341(h)(7) (eff. July 1, 2008) forfeited her argument that summary judgment on her claim seeking reformation of the insurance policy was error.

¶ 1 The plaintiff, Jennifer Stange, appeals from orders of the circuit court of Cook County, dismissing certain counts of her amended complaint against the defendant, Country Casualty Insurance Company, and granting summary judgment to the defendant on the remaining counts against it in her second amended complaint. On appeal, the plaintiff contends that the circuit court erred when it dismissed her claims for promissory estoppel and for statutory penalties under section 155 of the Insurance Code (215 ILCS 5/155 (West 2006)) and that the court erred in awarding summary judgment to the defendant.

**BACKGROUND**

¶ 2 The following factual allegations are taken from the complaints in the record. In June 2006, the plaintiff purchased from Raymond Massie, an insurance agent, a Country Casualty all-risk homeowners' insurance policy providing coverage for her residence at 1176 Ridgeland, Oak Park, Illinois. The policy was issued on June 28, 2006, and provided coverage for one year commencing on June 23, 2006. On or about November 1, 2006, the plaintiff contacted Mr. Massie's office and spoke to Christi Vehrs, an agent's assistant. The plaintiff informed Mrs. Vehrs that the Ridgeland residence was now vacant pending its sale. Mrs. Vehrs informed the plaintiff that Country Casualty did not like to insure vacant houses. The plaintiff informed Mrs.

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Vehrs that she had already moved but assured her that the heat at the Ridgeland residence would be kept at 60 degrees. The only coverage the plaintiff and Mrs. Vehrs discussed eliminating was for the plaintiff's personal property. On December 5, 2006, the Ridgeland residence sustained damage from a water leak, which plaintiff alleged was the result of one or more of the following: a plumbing system failure, vandalism or extreme cold weather.

¶ 3 On December 7, 2006, the plaintiff reported the loss to the defendant. Acknowledging coverage, the defendant hired a company to fix the water damage and dry out the premises. The company removed water-damaged walls, ceilings, floors and carpets, and the entire kitchen. On December 11, 2006, the defendant's adjuster arrived at the Ridgeland residence and ordered the work stopped on the order of Mr. Massie, who had informed the defendant that the plaintiff's loss was not covered. Based on the water damage and damage resulting from the unfinished remedial work, an independent adjuster estimated the plaintiff's loss at \$66,318.09.

¶ 4 On April 11, 2007, the plaintiff filed a multicount complaint against the defendant and Mr. Massie, based on the defendant's denial of coverage. The plaintiff alleged that the denial of coverage was based on a November 16, 2006, policy modification, which eliminated the all-risk coverage on the residence, but which the plaintiff denied authorizing. She further alleged that the modified policy declaration that she received prior to the loss did not communicate in any meaningful way the reduction in coverage for the residence and that the defendant would have known that the plaintiff would not drop the all-risk coverage at the beginning of the colder weather season for a premium reduction of five dollars.

¶ 5 Subsequently, the plaintiff filed an amended complaint, alleging that the defendant had

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breached the insurance contract, that she was entitled to statutory fees based on the defendant's vexatious and unreasonable conduct in dealing with her claim and that the insurance policy must be reformed due to mutual mistake of fact. The amended complaint further alleged claims for promissory estoppel, and spoilage of the evidence against the defendant and Mr. Massie. The remaining counts of the amended complaint alleged breach of an implied contract and acts of negligence by Mr. Massie and the defendant's responsibility for his acts.

¶ 6 Both the defendant and Mr. Massie filed motions to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006) (the Code)). The circuit court denied the motion as to claims against the defendant for breach of contract and reformation of the insurance policy. The court also dismissed the promissory estoppel claim against the defendant and Mr. Massie and the causes of action alleged against Mr. Massie and the defendant based on Mr. Massie's conduct. The court dismissed without prejudice the statutory penalties claim against the defendant and the spoilage of evidence claim against the defendant and Mr. Massie.

¶ 7 The plaintiff filed her second amended complaint. In addition to the breach of contract and reformation counts, the plaintiff re-alleged all of the dismissed counts. Thereafter, the plaintiff entered into a settlement with Mr. Massie, and the counts against him were dismissed.

¶ 8 The defendant filed a motion for summary judgment. Following the filing of the plaintiff's response and the defendant's reply, the circuit court granted summary judgment to the defendant. The plaintiff filed a timely notice of appeal.

## ANALYSIS

### I. Dismissal of Promissory Estoppel and Statutory Penalties Claims

#### A. Standard of Review

¶ 9 The granting of a motion to dismiss pursuant to section 2-615 of the Code is reviewed under the *de novo* standard of review. *Carroll v. Faust*, 311 Ill. App. 3d 679 (2000).

#### B. Applicable Principles

¶ 10 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint based upon defects appearing on the face of the complaint. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005). "When reviewing the sufficiency of a complaint, the court must accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts." *Guinn*, 361 Ill. App. 3d at 586. Legal and factual conclusions, unsupported by allegations of fact, may be disregarded. *Guinn*, 361 Ill. App. 3d at 586. Taking the allegations of the complaint in the light most favorable to the nonmovant, the court determines whether the allegations are sufficient to state a cause of action upon which relief may be granted. *Guinn*, 361 Ill. App. 3d at 586. We will not affirm the dismissal of a complaint unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief. *Guinn*, 361 Ill. App. 3d at 586.

#### C. Discussion

##### 1. Promissory Estoppel

¶ 11 The plaintiff maintains that the circuit court erred in dismissing her promissory estoppel claim. She correctly notes that a party may plead alternative claims for breach of contract and promissory estoppel in the same complaint. *Prentice v. UDC Advisory Services, Inc.*, 271 Ill.

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App. 3d 505, 512 (1995). In *Prentice*, the court reiterated its holding that if a party's performance under a written contract is the same performance which satisfies the requirement of detrimental reliance, then a promissory estoppel claim is barred. *Prentice*, 271 Ill. App. 3d at 511 (citing *Wagner Excello Foods, Inc. v. Fearn International, Inc.*, 235 Ill. App. 3d 224, 235-37). The plaintiff maintains that in her promissory estoppel claim, her detrimental reliance was on the defendant's representation to her that her loss was covered, as well as its actions in hiring the demolition company, and not on the defendant's performance owed her under the insurance contract. However, the plaintiff's argument fails for another reason.

¶ 12 While a plaintiff may plead inconsistent claims in the same complaint, the plaintiff "may not include allegations of an express contract which governs the relationship of the parties, in the counts for \*\*\* promissory estoppel." *Guinn*, 361 Ill. App. 3d at 604 (quoting *The Sharrow Group v. Zausa Development Corp.*, No. 04 C 6379, slip op. at \_\_\_ (N.D. Ill. December 6, 2004)). In the present case, the plaintiff incorporated the allegations from her breach of contract claim into her promissory estoppel count. Those allegations acknowledged the existence of the contract for insurance between the parties. In addition, the plaintiff attached a copy of the insurance policy to her complaints. Therefore, the circuit court properly dismissed her promissory estoppel claim for failure to state a cause of action. See *Guinn*, 361 Ill. App. 3d at 604-05.

## 2. Statutory Penalties

¶ 13 Section 155 (1) of the Illinois Insurance Code (215 ILCS 5/155(1) (West 2006)) provides in pertinent part as follows:

"In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs \*\*\*." 215 ILCS 5/155(1) (West 2006).

¶ 14 While acknowledging that the defendant's denial of coverage was based on the November 2006, policy modification, the plaintiff alleged that the defendant's conduct was vexatious and unreasonable because of its knowledge that no insured would agree to eliminate all-risk coverage given the dangers of cold weather, and its knowledge that the plaintiff would not have understood from the policy modification that the all-risk coverage for the Ridgeland residence had been eliminated. The plaintiff further alleged that, as the Ridgeland residence remained insured against vandalism, the defendant destroyed the evidence the plaintiff needed to prove her loss was caused by vandalism.

¶ 15 An insured fails to state a cause of action for a section 155 claim where the insured fails to support his claim of vexatious and unreasonable conduct on the part of an insurer with factual allegations. *American Alliance Insurance Co. v. 1212 Restaurant Group, L.L.C.*, 342 Ill. App. 3d 500, 511 (2003). The plaintiff's allegations as to what the defendant knew regarding the elimination of all-risk coverage and policy language was based solely on the defendant's status as a "major insurance company," not on any actual knowledge on the part of the defendant. See *Connelly v. Robert J. Riordan & Co.*, 246 Ill. App. 3d 898, 902 (1993) ( an insurer has no duty to

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review the adequacy of an insured's coverage). An insurer has the right to limit coverage on a policy. Where it has done so, the court must give effect to the plain language of the limitation, unless there is a conflict with the law. *Britamco Underwriters, Inc. v. J.O.C. Enterprises, Inc.*, 252 Ill. App. 3d 96, 102 (1993). The plaintiff has not alleged that the elimination of the all-risk violated the law.

¶ 16 The plaintiff also alleged that understanding the change in the coverage required a comparison between the June 2006 policy provisions and the November 2006 modification. However, the insured bears the burden of knowing the contents of insurance policies and has the affirmative duty to bring any discrepancies in the policy to the attention of the insurer. *Connelly*, 246 Ill. App. 3d at 902.

¶ 17 Finally, the plaintiff alleged that the defendant destroyed her ability to prove that the water leak resulted from vandalism, a covered loss under the policy modification. However, the plaintiff failed to allege any facts establishing that the defendant deliberately destroyed the evidence in order to deprive her of coverage for possible vandalism. There are no facts indicating that the remediation efforts were initiated for any reason other than the need to prevent further damage to premises.

¶ 18 We conclude that the plaintiff's statutory penalties claim was properly dismissed for failure to state a cause of action.

## II. Summary Judgment

### A. *Standard of Review*

¶ 19 This court reviews the grant of summary judgment *de novo*. *Millennium Park Joint*

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*Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

### B. *Applicable Principles*

¶ 20 Our review of a grant of summary judgment is guided by the well-settled principle that "[s]ummary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). The purpose of summary judgment is not to try an issue of fact but to determine if one exists. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517 (1993). In determining whether a genuine issue of material fact exists, a court must construe the pleadings, admissions and affidavits strictly against the movant and liberally in favor of the opponent. *Gilbert*, 156 Ill. 2d at 518. A triable issue of fact precluding summary judgment exists where the material facts are disputed or, where the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Gilbert*, 156 Ill. 2d at 158. Summary judgment should only be allowed when the right of the moving party is clear and free from doubt. *Gilbert*, 156 Ill. 2d at 518.

¶ 21 We conduct a *de novo* review of the entire record in ruling on the circuit court's grant of summary judgment. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993). Our determination does not depend on the circuit court's reasoning; we may rely on any grounds called for by the record. *Makowski*, 249 Ill. App. 3d at 115.

*C. Discussion*

1. Breach of Contract

¶ 22 The plaintiff contends that there is a genuine issue of material fact as to whether the June 2006, policy declarations or the November 2006, policy modification, eliminating the all-risk coverage, controls. She argues that there is no evidence that she agreed to the elimination of the all-risk coverage. However, "[w]hen an insured sues his or her insurer after failing to note a discrepancy between the policy issued and received and the policy requested or expected, the insured will be bound by the contract terms because he or she is under a duty to read the policy and inform the insurer of any discrepancy so that a prompt correction may be made without prejudicing the rights of either party." *Perelman v. Fisher*, 298 Ill. App. 3d 1007, 1011 (1998). The court will not excuse an insured from the burden of knowing the contents of the policy unless there are allegations that the language of the policy was ambiguous (*Perelman*, 298 Ill. App. 3d at 1011) or where the insured has been misled or does not understand the policy (*Britamco Underwriters, Inc.*, 252 Ill. App. 3d at 102).

¶ 23 The second amended complaint alleged that the defendant knew that the policy modification did not "meaningfully communicate to the reader" that the all-risk coverage was eliminated. It further alleged as follows:

"The description of why revised declarations are being issued reads: 'Multi-Policy Discount Change; Dwelling Change; Name and/or Address Change.' None of these phrases suggests that Country Casualty is intending to repeal coverage for many of the risks that a homeowner in Illinois is likely to face. County Casualty knows that its cryptic

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references to 'Peril 2-10 on Exhibit D [the policy modification] could only convey this message if Exhibit D was carefully compared to Exhibit A [original declarations page] and Exhibit B [policy terms and conditions], and that Exhibit B is incomprehensible to most of its policyholders. Country Casualty also knows that even if this comparison were performed, the most logical conclusion, in light of the modest \$5 premium reduction and the fact that '0' is adjacent to '9' on a standard keyboard, would be that its references to 'Peril 2-10' were typographical errors and intended to read 'Peril-19.' "

¶ 24 The plaintiff did not allege that the language of the policy was ambiguous. Moreover, the above allegations were insufficient to raise a question of fact as to her failure to understand the modification to the policy or that she was misled as to the contents of the policy modification by any action on the part of the defendant. She acknowledged that the elimination of the all-risk coverage could have been discovered by comparing the provisions of the original policy and declarations with the policy modification. The plaintiff did not allege that she read the policy modification. Any failure on her part to understand the modification to her policy resulted from her failure to read the policy modification, not the language of the policy modification. She attributes her failure to review the policy modification to the limited amount of time she had between the issuance of the November 16, 2006, policy modification and the December 5, 2006, water leak, as well as the Thanksgiving holiday. However, the plaintiff failed to allege any facts, such as the date she actually received the policy modification or her activities during that period, to support her claim that she could not have reviewed the policy modification between the time she received it and the occasion of the damage to the Ridgeland residence.

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¶ 25 The plaintiff's allegations failed to raise a question of fact as to whether she was misled by the defendant. In *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100 (1994), the insurer acknowledged its error in repeatedly billing the decedent-insured for premium payments higher than stated in the policy. The reviewing court found that the insurer's acts misled the decedent-insured and refused to apply the rule that the insured was required to know the contents of his policy. *Estate of Blakely*, 267 Ill. App. 3d at 109. In the present case, the plaintiff alleged that she was misled by the language of the policy. However, she could hardly be misled by the language of a policy modification she never read.

¶ 26 In the absence of a genuine issue of material fact, we conclude that summary judgment for the defendant on the breach of contract claim was proper.

## 2. Negligent Spoilage of Evidence

¶ 27 The spoliation of evidence is not an independent tort, but such a claim can be stated under negligence principles. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004), citing *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995). A plaintiff must allege that the defendant owed him a duty, that the defendant breached the duty and that the breach proximately caused the plaintiff's damages. *Dardeen*, 213 Ill. 2d at 336. In general, there is no duty to preserve evidence, but such a duty may arise under the following circumstances: by an agreement, pursuant to a contract, a statute, special circumstances or a voluntary undertaking. *Dardeen*, 213 Ill. 2d at 336. " In a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit." (Emphasis in

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original.) *Boyd*, 166 Ill. 2d at 196.

¶ 28 In order to determine the existence of a duty to preserve evidence, the court applies a two-part test: the court must determine whether such a duty arises by agreement, contract, statute, special circumstances or voluntary undertaking, and if any, the court must determine whether the duty extends to the evidence at issue. In other words, whether a reasonable person should have foreseen that the evidence was material to a potential civil action. *Dardeen*, 213 Ill. 2d at 336. Both parts of the test must be satisfied before the court will find a duty to preserve evidence. *Dardeen*, 213 Ill. 2d at 336. Whether a duty exists is a question of law and therefore, appropriate for decision by the circuit court on a motion for summary judgment. *Ralls v. Village of Glendale Heights*, 233 Ill. App. 3d 147, 154 (1992).

¶ 29 The plaintiff contends that the circuit court erred in granting summary judgment to the defendant on her spoilage of evidence claim on the grounds that she could not establish the cause of the water leak that damaged her residence. She maintains that the defendant should have known that its denial of coverage would result in a claim and that its demolition of the Ridgeland residence and the disposing of the debris would prevent the plaintiff from proving her coverage claim. The defendant maintains that the plaintiff failed to identify the specific piece of evidence that was lost or destroyed by the demolition, without which she could not prove her claim that vandalism, a covered loss, was the cause of the water leak.

¶ 30 When a party moves for summary judgment, he bears the initial burden of production. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 604 (2009). "That burden may be met by either affirmatively showing that some element of the case must be resolved in the defendant's favor or

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by establishing that there is no evidence to support the nonmovant's case." *Brouillette*, 389 Ill. App. 3d at 604. Once that initial burden is satisfied by the defendant, the burden shifts to the nonmovant to present a factual basis entitling it to a favorable judgment. *Brouillette*, 389 Ill. App. 3d at 605.

¶ 31 In moving for summary judgment, the defendant did not support its motion with affidavits or other relevant and admissible evidence. "When a defendant seeks to establish that the nonmovant lacks sufficient evidence to prove an essential element, the defendant is required to do more than 'point out' the absence of evidence." *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). Where the movant fails to meet his burden of production, the nonmovant is entitled to rely on his or her pleadings to create an issue of material fact. *Nedzvekas*, 374 Ill. App. 3d at 625.

¶ 32 In her second amended complaint, the plaintiff alleged that the demolition company hired by the defendant destroyed the Ridgeland residence and disposed of the debris, depriving her of the ability to prove that her loss was caused by vandalism. She also alleged that, prior to the demolition, the Ridgeland residence "sustained a massive amount of damage" from the water leak. However, the plaintiff failed to allege any facts establishing that, prior to its demolition, an inspection of the heavily damaged residence could have revealed any evidence leading to the conclusion that the leak possibly resulted from deliberate acts of destruction rather than the onset of cold weather.

¶ 33 In the absence of any such factual allegations, the plaintiff cannot establish that, but for the demolition of and the removal of the debris from the Ridgeland residence, she had a

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reasonable chance of proving that vandalism caused the water leak and thus allowing her to succeed on her claim against the defendant. Since the allegations of plaintiff's second amended complaint failed to raise a genuine issue of material fact as to an essential element of her cause of action, the defendant was entitled to summary judgment on the plaintiff's spoliation of evidence claim as a matter of law.

### 3. Reformation of Insurance Policy Claim

¶ 34 The plaintiff contends that the defendant was not entitled to summary judgment on her claim for reformation of the insurance policy. She argues that the evidence did not support the defendant's argument that, as a matter of law, it could not insure vacant property with all-risk coverage. In the alternative, the plaintiff argues that the evidence raised a genuine issue of material fact whether the defendant could provide such coverage.

¶ 35 We do not reach the merits of the plaintiff's argument because in her appellant's brief, she failed to cite relevant authority in support of her argument, and in her reply brief, she cited a case relied on by the defendant but only to distinguish it. As a result, she forfeited her argument as to her claim of error. See Ill. S. Ct. R.341(h)(7) (eff. July 1, 2008).

### CONCLUSION

¶ 36 We conclude that the promissory estoppel and the statutory penalties claims were properly dismissed and that summary judgment for the defendant on the claims for breach of contract, negligent spoilage of evidence and reformation of the insurance policy was proper.

¶ 37 The judgment of the circuit court is affirmed.

¶ 38 Affirmed.

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