

2011 IL App (2d) 110333-U
No. 2-11-0333
Order filed December 1, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PIERCE FOOD SERVICE EQUIPMENT COMPANY, INC.,)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,)	
v.)	No. 10-MR-1403
AMERICAN ECONOMY INSURANCE COMPANY,)	Honorable Bonnie M. Wheaton,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where plaintiff alleged that an insurance policy obligated defendant to cover plaintiff's property loss sustained during the execution of a search warrant, plaintiff's complaint seeking a declaratory judgment failed to state a claim upon which relief could be granted because the policy contained an exclusion for loss resulting from seizure of property pursuant to an order of governmental authority; the trial court's dismissal of plaintiff's complaint was affirmed.

¶ 1 Plaintiff, Pierce Food Service Equipment Company, Inc., appeals from the trial court's order granting defendant's motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure

(Code) (735 ILCS 5/2-615 (West 2010)), and dismissing with prejudice its complaint. For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 The following facts are taken from the complaint and attached exhibits. Defendant, American Economy Insurance Company, issued a business insurance policy to plaintiff. The policy was in effect from November 22, 2008, through November 22, 2009. In September 2009, plaintiff entered into a contract to purchase “food service equipment as discussed and photographed” from Joey Rovito, the owner of two restaurants. Rovito’s restaurants were located on property owned by Brandon Barrett. Barrett employed Judd Lofchie “as his licensed real estate broker.” Throughout the month of September, plaintiff made payments to Rovito totaling \$12,275 on their \$22,275 contract, with the balance to be paid later as agreed by the parties. On September 18, 2009, plaintiff removed restaurant equipment from Rovito’s restaurant premises. Plaintiff further alleged:

“16. Between September 18 and September 30, 2009, Lofchie and Barrett falsely reported to the City of Warrenville Police Department, Raymond Turano [chief of police], and [Kenneth] Dawson [City of Warrenville police detective] that the Rovito restaurant equipment located on the premises of the Rovito restaurant had been stolen.

17. On or about September 29, 2009, as a result of the false statements by and at the direct request of Lofchie and Barrett, the City of Warrenville, Turano and Dawson filed with the 18th Judicial Circuit Court, DuPage County, IL a Complain[t] for Search Warrant. It was the intent of the aforesaid to obtain a search warrant to search Plaintiffs’ [sic] business premises and to seize certain property or other items of the Plaintiffs [sic]. Two search warrants, one for each of the

Plaintiffs [*sic*] business premises^[1] were then issued by the Honorable [Terence] Sheen, Judge of the 18th Judicial Circuit Court, DuPage County, IL. ***

* * *

20. On September 30, 2009, Dawson and other unidentified City of Warrenville police officers acting under the supervision and direction of Raymond Turano, together with Barrett and Lofchie entered upon Plaintiffs' [*sic*] business premises with the intent to not only seize property or items listed on the issued search warrants, but to aide Barrett in (i) seizing and converting property not listed on the search warrants, and (ii) seizing and converting the property and other items listed on the search warrant all for Barrett's possession and benefit, and with the intent to permanently deprive Plaintiffs [*sic*] of certain of it's [*sic*] property and other items.

22. On September 30, 2009, Dawson together with other unidentified City of Warrenville police officers acting under the supervision and at the direction of Raymond Turano and aided and abetted by Barrett legally seized certain property and other items as specified in the issued search warrants, and at the same time unlawfully seized other property and items not authorized by the search warrants issued by the Honorable [Terence] Sheen to be seized.

23. On September 30, 2009, Warrenville, Turano, Dawson and other unidentified Warrenville Police officers gave permission to and allowed all of Plaintiff's seized property *** to be loaded onto

¹Review of the search warrants attached to the complaint reveals that each warrant authorized a search of "Pierce's Chef's Mart" in Countryside, Cook County, Illinois—one warrant provided for a search of 5301 Dansher Road, and the other warrant for a search of 9685 West 55th Street. Only the warrant for the 55th Street location indicates that it was executed.

a 50ft semi-trailer rented by and operated for the benefit of Defendant [sic] Barrett and allowed Defendant [sic] Barrett to take possession of and remove all of Plaintiffs' [sic] seized property to a location owned by Defendant [sic] Barrett, all with the intent that Plaintiffs [sic] be permanently deprived of the use of his [sic] property.”

According to plaintiff, following the execution of the search warrants, no criminal charges were filed against it, and the Du Page County state's attorney's office advised that no charges were contemplated. Plaintiff also alleged that, although a few of the seized items were returned to plaintiff, they were damaged and unusable, and most of the seized items were still in Barrett's possession.

¶ 4 On February 15, 2010, pursuant to the insurance policy, plaintiff submitted to defendant a sworn statement in proof of loss, claiming a property loss of \$151,127.38 as a result of theft.

¶ 5 In a letter dated March 4, 2010, defendant rejected plaintiff's claim, denying coverage based on a provision contained in section I of the policy, entitled “Property,” subsection (B), entitled “Exclusions,” which stated in relevant part:

“1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

* * *

c. Governmental Action

Seizure or destruction of property by order of governmental authority.

But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this policy.”

¶ 6 Thereafter, plaintiff filed its complaint seeking a declaration that defendant was obligated under the policy to cover its loss. Attached to the complaint were copies of the insurance policy, the contract between plaintiff and Rovito, the search warrants, the warrant inventories, a list of damaged property returned to plaintiff, plaintiff’s sworn statement of loss, and defendant’s letter denying coverage.

¶ 7 Defendant filed a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to section 2-615 of the Code. After briefing by the parties, the court heard argument and granted the motion. The court found that:

“I think the policy is absolutely clear that excluded from coverage is seizure or destruction of property by order of governmental authority. The order by which it was seized was the warrant signed by Judge Sheen. I think that order is exactly the type of document that is excluded under the terms of the policy. I don’t think that this Court can go into the reasons why it was ordered—why it was entered or what happened to the property after it was seized.

It’s quite clear that the seizure took place pursuant to a valid order of governmental authority, namely, Judge Sheen. I think you have a cause of action against somebody, but I don’t think it’s for coverage under this policy.”

The court entered an order dismissing with prejudice plaintiff’s complaint. Plaintiff timely appeals.

¶ 8

ANALYSIS

¶ 9 Plaintiff argues that the trial court erred in granting defendant's section 2-615 motion to dismiss. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 21. Exhibits attached to the complaint are considered part of the complaint, and facts stated therein are considered as having been alleged in the complaint. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 9; *Davis v. Keystone Printing Service, Inc.*, 111 Ill. App. 3d 427, 433 (1982). In ruling on a section 2-615 motion, we accept as true all well-pleaded facts and construe the allegations and inferences to be drawn from them in the light most favorable to the plaintiff. *Clark*, 2011 IL 108656, ¶ 21. However, conclusions of law and conclusory allegations not supported by specific facts are not admitted. *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1092 (2010). A complaint should not be dismissed pursuant to section 2-615 "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). Our review is *de novo*. *Clark*, 2011 IL 108656, ¶ 21.

¶ 10 Plaintiff contends that it had a valid claim for theft under the insurance policy and that the governmental-authority exclusion did not apply because the actions of the Warrenville police officers, Barrett, and Lofchie did not constitute actions by order of governmental authority within the meaning of the policy. We first address the applicability of the exclusion.

¶ 11 An insurance policy is a contract to which we apply the rules of contract construction. *Hobbs v. Hartford Insurance Company of the Midwest*, 214 Ill. 2d 11, 17 (2005). Our goal is to effectuate the intent of the parties as expressed in the policy's language. *Hobbs*, 214 Ill. 2d at 17. Where the

policy language is unambiguous, we apply the language as written. *Hobbs*, 214 Ill. 2d at 17. Language is ambiguous when it is subject to more than one reasonable interpretation; however, “we will not strain to find an ambiguity where none exists.” *Hobbs*, 214 Ill. 2d at 17. Although coverage exclusions should be liberally construed in favor of the insured, this rule should be invoked only when the policy language is ambiguous. *Hobbs*, 214 Ill. 2d at 17.

¶ 12 Our initial inquiry here is whether the policy language is ambiguous. The policy excluded from coverage loss or damage caused by governmental action, specifically, “[s]eizure or destruction of property by order of governmental authority.” Plaintiff argues that the term “governmental authority” was ambiguous and maintains that the term must refer to only valid or lawful authority. We disagree. The term governmental authority in the policy includes no qualifying language and is clear and unambiguous. Therefore, we must give the language its “plain, ordinary, and popular meaning.” *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). See *Hobbs*, 214 Ill. 2d at 17 (stating that “we will not strain to find an ambiguity where none exists”).

¶ 13 We conclude that the search warrants were orders of governmental authority within the plain and ordinary meaning of the parties’ insurance policy. The warrants were issued by Judge Sheen of the 18th Judicial Circuit Court. They indicated that he had examined the complaints sworn to by police detective Kenneth Dawson and had found facts sufficient to show probable cause. The warrants authorized the Warrenville police to seize specifically itemized property from plaintiff’s premises as particularly described. Therefore, the warrants were orders of governmental authority within the meaning of the policy exclusion.

¶ 14 Given our conclusion that the term is unambiguous, plaintiff’s argument that the trial court was required to construe the exclusion in its favor, as well as its reliance on *Dash Messenger Service*,

Inc. v. Hartford Insurance Company of Illinois, 221 Ill. App. 3d 1007 (1991), is without merit.² The rule of liberal construction in favor of an insured applies only where the policy language is ambiguous. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010); *Hobbs*, 214 Ill. 2d at 17. And, in *Dash Messenger Services*, the court held that the policy language at issue was ambiguous. *Dash Messenger Services*, 221 Ill. App. 3d at 1016.

¶ 15 Plaintiff further argues that the actions of the police, Barrett, and Lofchie constituted a theft, to which the exclusion for seizure pursuant to lawful governmental authority did not apply. Plaintiff contends that the warrants were improperly obtained and executed based on the following factual allegations contained in its complaint: Barrett and Lofchie made false theft reports that were used to obtain the warrants; the police harbored a criminal intent to aid Barrett in converting plaintiff's property; Barrett and Lofchie, two civilians, assisted in the execution of the warrants; the police also seized property that was not included on the warrants; the police failed to comply with proper procedure following the execution of the warrants; and, the police allowed Barrett to take ultimate possession of the seized property.

¶ 16 While we must accept as true plaintiff's factual allegations, its conclusory allegations are not admitted for purposes of our review. *Rajterowski*, 405 Ill. App. 3d at 1092. The allegations

²In support of its position, plaintiff also cites *Northbrook Property and Casualty Insurance Co. v. Transportation Joint Agreement*, 309 Ill. App. 3d 261 (1999), *rev'd*, 194 Ill. 2d 96 (2000), without indicating that the judgment of the appellate court was subsequently reversed by our supreme court. While, as plaintiff argues in its reply brief, the proposition of law for which it cites *Northbrook Property* may itself still be good law, we caution plaintiff's counsel to be more diligent to fully cite authority to disclose possibly relevant subsequent history.

regarding Barrett's and Lofchie's false reports of theft and a criminal intent by police are conclusory. We also observe that plaintiff seemingly conceded the validity of the warrants themselves in paragraph 22 of the complaint, alleging that police officers, aided and abetted by Barrett, "*legally* seized certain property and other items as specified in the issued search warrants." (Emphasis added.) With respect to the allegations about the execution of the warrants and conduct thereafter, the policy's exclusion clause provided that the exclusion applied "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Plaintiff's loss occurred when the police executed the search warrants and seized its property. Barrett's and Lofchie's involvement in the warrants' execution, and the officers' allowing Barrett to take possession of seized property, may have contributed to the loss, but under the language of the policy, these factors had no bearing on the applicability of the exclusion.

¶ 17 Moreover, had the parties intended to limit the application of the exclusion by providing coverage for loss resulting from government action that was subsequently determined to be invalid, they could have included such language in the policy. They did not. Yet, the policy did provide a different limitation on the exclusion—namely, that loss resulting from government action to prevent the spread of a fire was covered if the fire itself was covered.

¶ 18 Plaintiff additionally relies on *United States v. Shamah*, 624 F.3d 449 (7th Cir. 2010), in support of the proposition that the actions of the Warrenville police officers constituted theft. In *Shamah*, the appellate court affirmed the defendant-police officer's convictions of several counts of various conspiracies and theft of government funds based on his obtaining search warrants with false information and keeping for himself seized money and drugs. *Shamah*, 624 F.3d at 452-53. *Shamah* stands for the proposition that police officers who commit crimes may be convicted of those

offenses. However, *Shamah* has no bearing on the instant case where the parties' rights were determined under an insurance policy.

¶ 19 Similarly unavailing is plaintiff's attempt to rely on case law addressing the rights of criminal defendants to support its position that the governmental authority exercised here was invalid. See, e.g., *Olson v. Tyler*, 825 F.2d 1116 (7th Cir. 1987) (addressing without deciding the arrestee's argument that a police officer who purposefully or recklessly withheld facts in a warrant application tending to negate probable cause was liable for a civil rights violation); *People v. O'Neill*, 135 Ill. App. 3d 1091 (1985) (affirming the trial court's grant of the defendant's motion to suppress where there were serious doubts about the credibility of the officer who submitted an affidavit in support of the complaint for a warrant). While it is true that if a warrant is found to be invalid subsequent to its execution, a criminal defendant may be entitled to relief, the constitutional protections afforded to those accused of crimes have no bearing on the rights of the parties here.

¶ 20 Essentially, plaintiff's argument that a theft occurred is dependent upon a lack of governmental authority for the seizure of its property. This is so because if the police acted under governmental authority, they could not have committed a theft. Given our conclusion that the warrants evinced valid governmental authority, we need not address plaintiff's reliance on various statutory provisions addressing proper procedure following a seizure and defining theft, as the provisions say nothing about the validity of the warrants. See 720 ILCS 5/16-1 (West 2010) (defining the offense of theft); 725 ILCS 5/108-2 (West 2010) (addressing procedure as to "things seized on a search *without a warrant*" (emphasis added)); 725 ILCS 5/108-10 (West 2010) (addressing procedure following a seizure pursuant to warrant).

¶ 21 Having concluded that the seizure of plaintiff’s property pursuant to the search warrants was by order of governmental authority that triggered the policy exclusion, we now turn to the allegations of the complaint to determine if plaintiff stated a claim upon which relief could be granted. In its complaint, including the attached insurance policy, plaintiff alleged that its property was seized by the Warrenville police department pursuant to search warrants issued by the circuit court and that the policy excluded from coverage any loss resulting from “[s]eizure or destruction of property by order of governmental authority.” In essence, plaintiff alleged that it suffered a property loss as the result of an event—seizure by order of governmental authority—that was not covered by the policy. Accordingly, because the complaint sought a declaratory judgment that defendant was obligated for plaintiff’s loss under the policy, but alleged a loss for which the policy excluded coverage, plaintiff failed to state a claim upon which relief could be granted, and the trial court properly dismissed the complaint.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 23 Affirmed.