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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

ERIC B. BETTAG and JOAN BETTAG,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiffs-Appellants,)	
)	
v.)	No. 08—L—198
)	
RICHARD J. KONOW and R & R)	
ELECTRICAL CONTRACTORS, INC.,)	
)	
Defendants)	
)	Honorable
(Auto Owners Insurance Company,)	Stephen Sullivan,
Intervenor-Appellee).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Bowman concurred in the judgment.

ORDER

Held: The trial court erred in granting summary judgment for an insurer asserting breach-of-contract claims against its insureds: the policy stated that the insureds could not “prejudice” the insurer’s right to collect damages, and the insureds’ release of their claims against a third party did not prevent the insurer from seeking damages from that party; the insurer did not otherwise specify how the release required expenditure or precluded recovery.

¶ 1 Plaintiffs, Eric B. Bettag and Joan Bettag, appeal from a summary judgment entered by the circuit court of Kane County in favor of intervenor, Auto Owners Insurance Company (Auto

Owners), on breach -of-contract claims stemming from allegations that the Bettags' settlement of personal injury and loss-of-consortium claims against defendant Richard J. Konow prejudiced Auto Owners' subrogation rights under an insurance policy issued to the Bettags. We conclude that Auto Owners failed to establish damages flowing from the alleged breach. Accordingly, Auto Owners was not entitled to judgment as a matter of law, and we reverse the summary judgment entered in its favor and remand the cause.

¶ 2 In April 2008, the Bettags filed a complaint against Konow, alleging that, on March 13, 2007, a motor vehicle operated by Konow proceeded through a red light at the intersection of Randall Road and Dean Street in St. Charles and collided with Eric Bettag's vehicle, a Ford Expedition. The complaint alleged that Eric Bettag sustained severe and permanent injuries, including a serious injury of the cervical spine. The complaint further alleged that the Expedition was destroyed and rendered worthless. Joan Bettag sought recovery for loss of consortium. The Bettags subsequently amended the complaint to seek recovery under the doctrine of *respondeat superior* from an additional defendant, R & R Electrical Contractors, Inc. (R & R).

¶ 3 On March 16, 2009, Auto Owners was granted leave to intervene and to file a complaint in intervention alleging that, in connection with the collision, it had paid \$29,800.38 to the Bettags for damage to the Expedition and \$5,000 for medical expenses connected with Eric Bettag's injuries. Auto Owners sought repayment of these amounts from Konow in the event that his liability was established in the underlying lawsuit.

¶ 4 On November 13, 2009, Konow moved for entry of a dismissal order. He stated that he and the Bettags had agreed to settle the Bettags' claims for \$3 million, which was the policy limit of Konow's insurance coverage for the accident. Konow further indicated that on or about September 10, 2009, his attorney received a letter from the Bettags' attorney indicating that all liens on the

proceeds of the settlement had been resolved and that Auto Owners had agreed to reduce its claim to \$3,333.33. According to the motion, the Bettags executed a release of all claims and Konow's insurer issued settlement drafts, including one in the amount of \$3,333.33 payable to the Bettags and Auto Owners. However, counsel for Auto Owners later advised Konow's counsel that there was, in fact, no agreement between the Bettags and Auto Owners relative to the property-damage claim. Konow sought entry of an order dismissing the Bettags' and Auto Owners' claims with prejudice or, alternatively, voiding the settlement agreement and ordering repayment of the proceeds. In a written response to Konow's motion, Auto Owners argued that the release executed by the Bettags did not bar Auto Owners from pursuing its claim.

¶ 5 On December 23, 2009, with leave of court, Auto Owners filed a four-count amended complaint in intervention. Count I sought recovery from Konow of \$28,800.38 paid to the Bettags for property damage.¹ Count II, which named the Bettags' attorney, Joseph Sauber, as a defendant, alleged that Sauber had converted the proceeds of the insurance policy covering Konow by falsely advising Konow's counsel that Auto Owners had agreed to reduce its subrogation claim to \$3,333.

¶ 6 Counts III and IV of the amended complaint in intervention, which are at issue here, alleged that Eric Bettag (count III) and Joan Bettag (count IV) executed a release of all claims against Konow, R & R, and Konow's insurer, and thereby violated the following provision of the policy issued by Auto Owners to the Bettags:

¹It will be observed that the amount sought in Auto Owners' original complaint in intervention was \$1,000 higher. Auto Owners evidently neglected to reduce its claim by the amount of the Bettags' deductible under the policy.

“If **we** make a payment under this policy and the person to or for whom the payment is made has a right to recover damages from another, **we** will be entitled to that right. That person shall do everything necessary to transfer that right to **us** and shall do nothing to prejudice it.”

In each count, Auto Owners sought an award of damages in the amount of \$28,800.38 plus costs.

¶ 7 The Bettags and Sauber unsuccessfully moved to dismiss the claims against them. After the Bettags and Sauber filed their answers, Auto Owners moved for summary judgment on the two counts of its amended complaint in intervention seeking recovery from the Bettags. On June 24, 2010, the trial court granted Auto Owners’ motion and found that “[Auto Owners] is entitled to the relief requested as a matter of law.” The Bettags moved to reconsider. Konow again moved to dismiss the lawsuit. On October 21, 2010, the trial court denied the Bettags’ motion to reconsider. On November 29, 2010, the trial court heard Konow’s motion to dismiss and entered an order dismissing the action, including all pending claims. This appeal followed.

¶ 8 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). “ ‘An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law.’ ” *International Brotherhood of Electrical Workers, Local 193 v. City of Springfield*, 2011 IL App (4th) 100905, ¶14 (quoting *Joseph P. Storto, P.C. v. Becker*, 341 Ill. App. 3d 337, 339 (2003)). A plaintiff who moves for summary judgment must present evidence to support every element of his or her cause of action. *Finch v. Illinois Community College Board*, 315 Ill. App. 3d 831, 835 (2000).

¶ 9 Auto Owners’ claims against the Bettags sound in contract. “To prevail on a breach of contract claim, the plaintiff must plead and prove that (1) a contract existed; (2) the plaintiff performed his obligations under the contract; (3) the defendant breached the contract; and (4) the plaintiff sustained damages as a result of the defendant’s breach.” *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009). There is no dispute that a contract existed—the insurance policy—and that Auto Owners performed its contractual obligation to pay for damage to Eric Bettag’s vehicle. Strictly speaking, it is the third element of the cause of action—breach—that is at issue in this appeal. However, the arguments concerning this element focus principally on whether, by releasing Konow and R & R from liability, the Bettags violated their contractual obligation to “do nothing to prejudice” Auto Owners’ right of recovery from those parties. It is not at all clear that “prejudice,” in the context of this case, could signify anything other than a monetary loss resulting from the allegedly prejudicial conduct. One might argue, perhaps, that the term embraces some more inchoate form of harm to Auto Owners’s interests. But even if such an interpretation is reasonable, it is in competition with the interpretation that limits prejudice to concrete pecuniary harm. Therefore, “prejudice” is, at best, an ambiguous term that must be strictly construed against Auto Owners. See *Pekin Insurance Co. v. Recurrent Training Center, Inc.*, 409 Ill. App. 3d 114, 120 (2011) (“if the language in the policy is susceptible to more than one meaning, it is ambiguous and will be strictly construed against the insurer”). Thus, the question of whether Auto Owners established a breach is essentially no different from the question of whether Auto Owners has established damages. It is in this regard that Auto Owners’ argument most clearly comes up short.

¶ 10 Auto Owners does not dispute that the release executed by the Bettags does not foreclose it from seeking recovery from Konow. In *Home Insurance Co. v. Hertz Corp.*, 71 Ill. 2d 210, 215 (1978), a decision cited by Auto Owners during the proceedings below, our supreme court held, “an

unlimited release executed by an insured-subrogor for consideration not specifically including an amount designated as covering the insurer's subrogation interest does not bar a subsequent subrogation action by an insurer-subrogee against the tortfeasor, if the tortfeasor or his insurance carrier had knowledge of the insurer-subrogee's interest prior to the release." Auto Owners' appearance in this case as an intervenor put Konow on notice of Auto Owners's asserted right to recover roughly \$30,000 for payment of a property-damage claim and \$5,000 for payment of Eric Bettag's medical expenses. The release did not specifically designate any amount as covering Auto Owners' interest, and only \$3,333.33 was set aside for that purpose.

¶ 11 Even though it retains its right to recover from Konow, Auto Owners claims that it suffered prejudice as a result of the release inasmuch as it "was been [*sic*] forced to expend time and funds to defend [*sic*] [Konow's] motion [to dismiss], and the claims were ultimately dismissed, all as a result of the Bettags' actions in executing the [release] and settling their own claims." This theory of prejudice is inconsistent with the relief Auto Owners sought in counts III and IV of its amended complaint. Auto Owners sought an award of damages equal to the amount it paid to the Bettags for damage to the Expedition—\$28,800.38. There is no correspondence between this amount and whatever expense Auto Owners incurred in responding to Konow's motion to dismiss. More importantly, the record contains no evidence of what amount Auto Owners expended in connection with Konow's motion to dismiss. Thus, even assuming, without deciding, that the Bettags can be considered responsible for prejudice flowing from Konow's motion to dismiss, Auto Owners, having failed to establish its damages, is not entitled to judgment as a matter of law.

¶ 12 Nor can an award of the damages requested in Auto Owners' amended complaint be sustained on the basis that Konow's insurance coverage has been exhausted. Damages in a breach-of-contract action "must be proved with reasonable certainty and cannot be based on conjecture or

speculation.” *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008). If Auto Owners is able to obtain and collect a judgment against Konow for the amount Auto Owners paid to the Bettags, it will have suffered no damages. We cannot simply assume that a judgment against Konow for property—if Auto Owners is able to obtain one—will be uncollectible. Absent some evidence that Konow is judgment-proof, any claim of damages arising from the exhaustion of his insurance coverage is purely contingent and entirely conjectural. Again, without proof of damages, Auto Owners is not entitled to judgment as a matter of law.

¶ 13 For the foregoing reasons, the summary judgment entered by the circuit court of Kane County on counts III and IV of Auto Owners’ amended complaint in intervention is reversed and the cause is remanded for further proceedings.

¶ 14 Reversed and remanded.