

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).

2012 IL App (4th) 120030-U

Filed 9/11/12

NO. 4-12-0030

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

SARAH TURNER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
PEKIN LIFE INSURANCE COMPANY,	)	No. 10L179
Defendant-Appellee.	)	
	)	Honorable
	)	Michael Q. Jones,
	)	Judge Presiding.

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JUSTICE COOK delivered the judgment of the court.  
Justices Appleton and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court erred in denying plaintiff's request for a continuance to pursue additional discovery.

¶ 2 In August 2011, the trial court granted summary judgment for defendant, Pekin Life Insurance Company, in plaintiff Sarah Turner's action to collect her claim to the benefits of a policy insuring her husband's life. The court also denied Turner's motion, under Illinois Supreme Court Rule 191(b) (eff. July 1, 2002), to continue its hearing on Pekin's summary-judgment motion so Turner could pursue further discovery.

¶ 3 Turner appeals, arguing the trial court erred by ruling in favor of Pekin on Pekin's motion for summary judgment and Turner's Rule 191(b) motion. We agree and, accordingly, reverse and remand.

¶ 4

## I. BACKGROUND

¶ 5 In March 2008, Turner's husband, Antonio Turner, applied for life insurance with Pekin, submitting a written application and paying a premium. The application asked a number of questions regarding the insured's medical history. Relevantly, in response to one such question, Antonio indicated that he had not, within the previous 10 years, received a diagnosis of or been treated for "any disorder of the heart or circulatory system, such as high blood pressure[.]" Antonio named Turner as the primary beneficiary of the \$100,000 policy. In June 2008, the policy was issued. The policy included a clause concerning "incontestability," which indicated that, except in the event premiums were unpaid, Pekin was not authorized to deny a claim for benefits under the policy unless three conditions were met: (1) the insured died within two years of the policy date; (2) an answer in the application was untrue or incomplete; and (3) Pekin would not have issued the policy if the true or complete answer had been provided.

¶ 6 In September 2008, Antonio died. Turner submitted a claim for the benefits. In November 2008, during a routine investigation undertaken because the insured died less than two years after the policy was issued, Pekin determined that Antonio had materially misrepresented his medical history. Specifically, according to Pekin, Antonio's medical records reflected that, contrary to the information he provided in his application, he was informed by doctors on two occasions, in 2001 and 2005, that he had high blood pressure that required monitoring or treatment. That month, Pekin sent a letter notifying Turner of its intention to rescind the insurance contract and tendered the premium Antonio paid. The check refunding the premium was never cashed or deposited.

¶ 7 In September 2010, on the two-year anniversary of Antonio's death, Turner sued

Pekin to collect the insurance benefits. Turner asserted that Pekin's "attempted" rescission of the policy was ineffective and that Pekin was required to file suit to contest Turner's claim. Since Pekin had not filed suit in two years, the relevant "contestability period," according to Turner, Turner claimed Pekin was precluded from contesting the policy and Turner was entitled to the benefits.

¶ 8 In October 2010, Pekin filed a motion to dismiss. In its memorandum in support of the motion, Pekin argued that it had effectively rescinded the policy due to Antonio's misrepresentation and that Turner's claim had no legal basis. In support of its position, Pekin attached an affidavit by Diane K. Steiner, its director of life and health underwriting. Steiner averred that, as stated above, Pekin's investigation into Turner's claim revealed a material misrepresentation with respect to Antonio's health history such that, had Pekin known the truth about his condition, Pekin would not have insured him.

¶ 9 In February 2011, the trial court held a hearing on Pekin's motion to dismiss. Relying on two supreme court cases—*Powell v. Mutual Life Insurance Co. of New York*, 313 Ill. 161, 144 N.E. 825 (1924), and *Ramsey v. Old Colony Life Insurance Co.*, 297 Ill. 592, 131 N.E. 108 (1921)—the court held that Pekin was required to file suit within two years of the issuance of the policy to contest Turner's claim. As Pekin had not done so, the court denied Pekin's motion to dismiss and indicated it would likely rule for Turner on the merits.

¶ 10 In March 2011, Pekin filed its answer and a counterclaim for declaratory judgment. In its counterclaim, Pekin asserted that Pekin's rescission of the insurance policy by letter accompanied with a reimbursement for the premium absolved it of liability to Turner. Pekin asserted it was entitled to a declaration that Turner was not entitled to the benefits.

Turner's motions attacking Pekin's answer and counterclaim were never called for argument.

¶ 11 In May 2011, Pekin moved to certify the following question for interlocutory appeal under Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010): "Whether an insurer must file suit within the contestability period to rescind a life insurance policy it issued based on a material misrepresentation rather than issue a letter and [return] premiums." The trial court denied this motion.

¶ 12 The parties subsequently filed opposing motions for summary judgment. Pekin attached Steiner's affidavit to its summary-judgment motion. In response to Pekin's motion for summary judgment, Turner requested, under Rule 191(b), a stay on that motion so that Turner could pursue additional discovery. Attached to Turner's request was an affidavit by her attorney, who averred that "material facts \*\*\* are known only to persons whose affidavits I am unable to procure by reason of hostility or otherwise." The names of these persons were unknown "as extensive discovery has not been completed in this case and the names of Pekin \*\*\* employees or agents who investigated the death of Antonio Turner \*\*\* have not been disclosed or determined." Pekin moved to strike this affidavit for lack of compliance with Rule 191(b) and other alleged deficiencies, including Turner's delay in seeking the requested discovery.

¶ 13 In August 2011, the trial court held a hearing on the parties' motions for summary judgment and Turner's Rule 191(b) motion. The court reconsidered its earlier position and found that Pekin was not, as Turner argued, precluded from contesting Turner's claim. Accordingly, based on the unrefuted statements in Steiner's affidavit, the court entered summary judgment in favor of Pekin, dismissing the complaint with prejudice. Further, the court agreed with Pekin that Turner's Rule 191(b) motion was deficient; the court also found that Turner had had

adequate time to conduct the requested discovery but had chosen to forgo it, relying instead on its legal argument that Pekin could not challenge Turner's claim notwithstanding the merits of Pekin's position. Accordingly, the court denied Turner's motion for continuance and struck her attorney's Rule 191(b) affidavit.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Turner argues the trial court's rulings on Pekin's summary-judgment motion and Turner's Rule 191(b) motion were erroneous. We agree with Turner that the court erred in denying her request for continuance. The grant of summary judgment in favor of Pekin was therefore premature.

¶ 17 The granting or denial of a motion to continue lies within the sole discretion of the trial court, and the disposition of such a motion will not be overturned absent an abuse of discretion. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 692, 737 N.E.2d 662, 670 (2000). "A decisive factor in reviewing a court's exercise of its discretion is whether the party seeking the continuance acted with due diligence in proceeding with the cause." *Id.* A trial court abuses its discretion when no reasonable person would agree with its decision. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 96, 961 N.E.2d 425, 446.

¶ 18 Rule 191(b) permits a trial court to grant a continuance to conduct further discovery if a party cannot obtain an affidavit containing material facts. An affidavit requesting such a continuance must name the persons in possession of the material facts, show why their affidavits cannot be obtained and what the affiant believes they would testify to if sworn, and indicate the basis of such belief. Ill. S. Ct. R. 191(b) (eff. July 1, 2002); *Williams*, 316 Ill. App.

3d at 692, 737 N.E.2d at 670. In general, "a party who fails to comply with Rule 191(b) may not complain on appeal that the trial court allowed an insufficient time for discovery." *Williams*, 316 Ill. App. 3d at 692, 737 N.E.2d at 671.

¶ 19 Appellate courts are reluctant to overturn the denial of a request for continuance under Rule 191(b) if the motion for continuance or the Rule 191(b) affidavit is formally deficient. See, e.g., *Janda*, 2011 IL App (1st) 103552 at ¶ 98, 961 N.E.2d at 446 (affirming the trial court's denial of the plaintiff's Rule 191(b) request for continuance since it was in the form of a motion, not an affidavit as required, and failed to state what the plaintiff believed the named witnesses would testify to); *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064-65, 599 N.E.2d 1183, 1192 (1992) (affirming summary judgment for the defendant, notwithstanding the plaintiff's Rule 191(b) affidavit, since the affidavit was signed by the plaintiff's attorney, not the plaintiff as required, and did not "contain the necessary disclosures" enumerated above). Formal defects—particularly, the failure of the party requesting a continuance to name the witnesses whose depositions or affidavits are sought or to state an opinion of what those witnesses would testify to—lead some courts to conclude the requested discovery would be a mere "fishing expedition." *Janda*, 2011 IL App (1st) 103552 at ¶ 98, 961 N.E.2d at 446. However, Rule 191(b)'s requirements should be relaxed where strict compliance cannot reasonably be expected. See, e.g., *Williams*, 316 Ill. App. 3d at 692-93 737 N.E.2d at 671 (excusing the plaintiffs' noncompliance with Rule 191(b) in arguing that the defendant's motion for summary judgment was premature and more discovery was needed because the plaintiffs had not finished deposing their lay witnesses and were not yet required to disclose their expert witnesses under the case-management order).

¶ 20 Here, the trial court abused its discretion in not continuing the hearing on Pekin's motion for summary judgment to allow Turner to pursue discovery. In denying Pekin's motion to dismiss, the court both validated Turner's theory of the case—that Pekin was precluded from challenging Turner's claim for benefits—and explicitly encouraged Turner to move for summary judgment to dispose of the case efficiently. Pekin understandably stuck to its defense—Turner now concedes that her claim of incontestability lacks merit—and filed an answer and a cross-motion for summary judgment inviting the court to reconsider its position. However, based on the court's earlier ruling, Turner justifiably anticipated that the court would grant summary judgment in her favor. Since no facts were at issue under Turner's incontestability theory, there was no reason for Turner to conduct discovery into the allegations supporting Pekin's fraud defense. From a contemporaneous perspective, Turner's decision not to pursue discovery in advance of moving for summary judgment was reasonable; proceeding with discovery would have wasted litigation resources.

¶ 21 When the trial court (correctly) reversed its earlier holding, however, some investigation into Pekin's claim that Antonio misrepresented his health condition, such that Pekin would not have insured him had it been reported truthfully, became necessary to overcome Pekin's fraud defense. The court erred in finding that Turner lacked diligence by not conducting discovery into Pekin's defense earlier and overlooked its own role in leading Turner down that path.

¶ 22 Pekin argues that the trial court did not err in denying Turner's Rule 191(b) request for a continuance because it was formally defective in three respects: (1) the affidavit was impermissibly signed by Turner's attorney, not Turner herself; (2) while he cited hostility as



¶ 27 JUSTICE McCULLOUGH, dissenting:

¶ 28 I respectfully dissent. The record shows that the plaintiff did not comply with Rule 191(b).

¶ 29 I would affirm the trial court's decision.