2013 IL App (2d) 120492-U
Nos. 2-12-0492 & 2-12-0937, cons.
Order filed June 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

VILLA PARK PLAZA, LLC and MILWAUKEE CASUALTY INSURANCE COMPANY,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 09-L-1206
DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY, ACE HARDWARE CORPORATION, VILLA PARK HARDWARE, INC., JACY ELSESSER as authorized agent for ACE HARDWARE,	)	
Defendants-Appellees,	)	Honorable Dorothy F. French,
(Amber Management, Inc., Defendant).	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the plaintiffs' complaint because the plaintiffs failed to state a valid cause of action for breach of lease, breach of contract, *quantum meruit* or equitable contribution.

¶ 2 On March 10, 2008, a fire damaged an Ace Hardware store in the Villa Park Plaza shopping center. The Ace Hardware store (Ace) was operated by Villa Park Hardware, Inc. Villa Park Hardware had insurance through both Discover Property & Casualty Insurance Company (Discover) and Milwaukee Casualty Insurance Company (Milwaukee). Jacy Elsesser, the president of Villa Park Hardware, hired Braun Construction to repair the Ace store. After Braun Construction completed the work but no one agreed to pay for it, Braun filed a lien against the landlord of the shopping center, Villa Park Plaza, LLC (VPP). VPP was also insured by Milwaukee. Milwaukee paid Braun Construction $165,000 to have the lien released. Milwaukee and VPP subsequently filed a complaint against Discover and Ace seeking the reimbursement of $165,000. The complaint sounded in breach of lease, breach of contract, *quantum meruit*, and equitable contribution. The circuit court of Du Page County subsequently dismissed all the counts of the plaintiffs' third amended complaint via two separate orders. The plaintiffs filed a timely notice of appeal from each order. On the plaintiffs' motion, we consolidated the plaintiffs' appeals. We now affirm.

¶ 3 BACKGROUND

¶ 4 Milwaukee provided commercial property insurance for VPP. One of the tenants in the plaza was Ace. Ace was owned by Villa Park Hardware. The president of Villa Park Hardware was Jacy Elsesser. The lease for the subject premises required Villa Park Hardware to pay VPP "a prorated share of the total cost of landlord's fire insurance coverage based upon the amount of square feet rented." The lease also contained a mutual release of liability between VPP and Villa Park Hardware in favor of Villa Park Hardware to the extent that any fire damage was covered by insurance. Villa Park Hardware also had insurance through Discover. That insurance covered improvements and betterments, business personal property, and business interruption.

¶ 5 On March 10, 2008, a fire caused damage at the Ace store. Elsesser subsequently retained Braun Construction to repair the premises. When Braun Construction was not paid, it filed a lien against VPP. Milwaukee entered into a settlement agreement and paid Braun Construction $165,000. As part of the settlement agreement, Braun Construction assigned all of its rights to collect all sums due to it from Ace and its insurers to Milwaukee.

¶ 6 Milwaukee subsequently filed a complaint against Discover, Villa Park Hardware, Ace, and Elsesser. In its third amended (and final) complaint, Milwaukee alleged causes of action sounding in (1) breach of lease; (2) breach of contract ; (3) *quantum meruit*; and (4) equitable contribution. Milwaukee alleged that the defendants had breached the insurance contract by hiring Braun Construction without getting VPP's approval to do so. In separate orders entered on April 5, 2012, and August 7, 2012, the trial court granted the defendants' motion to dismiss the plaintiffs' action pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)). The plaintiffs filed a timely notice of appeal from each of those orders. On October 18, 2012, this court consolidated both appeals for our review.

¶ 7 ANALYSIS

¶ 8 We first address the plaintiffs' contention that the trial court erred in dismissing its breach of lease claim against Elsesser. The plaintiffs argue that Elsesser breached article 22 of its lease with VPP. Section 22.01 of the lease provided that if the Ace store was damaged, VPP had 30 days from when the damage occurred to inform Villa Park Hardware if it intended to restore the damaged area or to terminate the lease. Section 22.02 of the lease provided that if VPP decided to restore the Ace store, it would have a reasonable time to do so. The plaintiffs insist that because Elsesser did not

wait 30 days after the fire before he hired Braun Construction to restore the store, he breached the lease and therefore was not entitled to any insurance coverage from Milwaukee.

¶ 9 A motion to dismiss under section 2-619 allows for a threshold disposition of questions of law and easily proven issues of fact. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (2005). Under section 2-619, a motion to dismiss should be granted if, after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the court finds that no set of facts can be proved upon which relief could be granted. *Id.* A reviewing court considers whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal was proper as a matter of law. *Id.* Motions to dismiss under section 2-619 are reviewed *de novo*. *Id.*

¶ 10 Milwaukee's claim against the defendants is one of subrogation. In *Dix Mutual v. LaFramboise*, 149 Ill. 2d 314 (1992), our supreme court explained this doctrine, in the context of fire damage to a tenant's building:

> "The doctrine of subrogation is a creature of chancery. It is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt so paid. [Citation.] The right of subrogation is an equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall. [Citation.] Subrogation is allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so. [Citation.] There is no general rule which can be laid down to determine whether a right of subrogation exists since the right depends upon the equities of each particular case. [Citation.]

> One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce. [Citation.] Consequently, in the case at bar, the insurance company may assert a right of subrogation against the tenant for the fire damage if: (1) the landlord could maintain a cause of action against the tenant and (2) it would be equitable to allow the insurance company to enforce a right of subrogation against the tenant." *Id.*

¶ 11 The defendants argue that the trial court properly dismissed the plaintiffs' claim because the plaintiffs did not name the proper plaintiff. In count II of their second amended complaint, the plaintiffs listed VPP as the party seeking relief against the defendants. The defendants assert that Milwaukee should have been listed as the plaintiff instead. At a hearing on the motion to dismiss the second amended complaint, the plaintiffs' attorney acknowledged this pleading mistake. The attorney stated:

> "When I read Count II, I thought to myself: the wrong party. I didn't—by way of explanation, I didn't draft it. I'm here to argue it. I looked it over and it is what it is. I'm stuck with what I got right now. But I believe the claim should not be in [VPP's] name. It should be in Milwaukee's name *** because Milwaukee is the assignee of [VPP's] rights."

The trial court struck count II of the plaintiffs' complaint because it named the wrong party and granted the plaintiffs leave to file an amended complaint. In its third amended complaint, the plaintiffs did not replead the breach of lease claim naming the correct party plaintiff. Instead, the plaintiffs repled Count II of the second amended complaint for "purposes of appeal."

¶ 12 Here, VPP could not maintain an action against the defendants for subrogation due to the alleged breach of the lease. Milwaukee was the only party that could do so. See *id.* Thus, the

plaintiffs' failure to identify the correct plaintiff was a proper basis for the trial court to dismiss this claim. See *Bovan v. American Family Life Insurance*, 386 Ill. App. 3d 933, 942 (2008) (trial court properly dismissed complaint where plaintiff failed to allege facts from which a legal duty would arise).

¶ 13 We also note that the plaintiffs named the wrong defendant. The lease at issue was between VPP and Villa Park Hardware. The plaintiffs however improperly sought relief against Elsesser instead of Villa Park Hardware. The plaintiffs' failure to name the proper defendant is also a basis to affirm the trial court's decision as to the breach of lease claim. See *id.*

¶ 14 Nonetheless, even if the plaintiffs had named the proper parties in count II of their second amended complaint, their claim would be still be without merit. As explained in *Dix Mutual*, an insurance company may assert a right of subrogation against a tenant for fire damage only if the landlord could maintain a cause of action against the tenant. The contract between VPP and Villa Park Hardware would not allow for such an action to proceed. Specifically, sections 11.06 and 11.07 of the lease provided:

> "Landlord and Tenant each hereby release the other, its officers, directors and employees, from any and all liability or responsibility to any third party to the extent that such liability is covered by insurance by way of subrogation or otherwise[.]"
>
> * * *
>
> In any case in which Tenant shall be obligated under any provision of this lease to pay the Landlord any loss, cost, damage, liability or expense suffered or incurred by the Landlord, the Landlord shall allow to Tenant as an offset against the amount thereof the net proceeds

of any insurance collected by the Landlord for or on account of such a loss, cost, damage, liabilities or expense."

¶ 15 These provisions clearly indicated that in the event that there was damage to Villa Park Hardware's building, both Villa Park Hardware and VPP would look to VPP's insurer for compensation. If VPP received compensation that made it whole, it could not then seek any additional compensation from Villa Park Hardware. That is exactly what happened in this case. Accordingly, as VPP cannot seek additional compensation against Villa Park Hardware, Milwaukee cannot seek such compensation either via subrogation. See *Dix Mutual,* 149 Ill. 2d at 319.

¶ 16 We next turn to Milwaukee's argument that its breach of contract action against the defendants should not have been dismissed. Milwaukee argues that the contract between Elsesser and Braun Construction is "not even related to the lease" between Villa Park Hardware and VPP. We disagree. The alleged contract was directly related to the lease agreement as it provided that Braun Construction would repair damages to a building in VPP's shopping center and operated by Villa Park Hardware. Milwaukee insured that building. Thus, whether Milwaukee was obligated to pay Braun Construction for repairing a building that it insured was governed by its insurance contract with VPP. It is clear that Milwaukee was obligated to reimburse VPP. As such, the only way that Milwaukee could recover against Villa Park Hardware was if the lease agreement between Villa Park Hardware and VPP would allow for such a recovery. As explained above, based on the circumstances of this case, the lease agreement between Villa Park Hardware and VPP did not allow Milwaukee to recover against Villa Park Hardware.

¶ 17 Furthermore, for the same reasons that Milwaukee cannot recover against the defendants on a theory that Villa Park Hardware breached its contract with Braun Construction, Milwaukee cannot

recover on a theory that Elsesser or Villa Park Hardware should be the party required to reimburse Braun Construction on the basis of *quantum meruit*.

¶ 18 Milwaukee's final contention on appeal is that Discover should be required to reimburse it for the money it paid to Braun on the basis of equitable contribution. Equitable contribution is a principle permitting one co-insurer who has paid the total loss or greater than its share of the loss to be reimbursed from other insurers who are also liable for the same loss. *Home Insurance v. Cincinnati Insurance*, 213 Ill. 2d 307, 316 (2004). Contribution applies to multiple, concurrent insurance situations and is only available where the concurrent policies ensure the same entities, the same interests, and the same risks. *Id.* Excess carriers cannot seek equitable contribution from a primary carrier because excess carriers and primary carriers insure different risks. *Schal Bovis v. Casualty Insurance Co.*, 315 Ill. App. 3d 353, 363 (2000).

¶ 19 Here, the trial court properly dismissed Milwaukee's claim for equitable contribution. First, Milwaukee did not properly plead a claim for equitable contribution. In count I of its third amended complaint, Milwaukee asserted that it should not have had to pay for the restoration of the Villa Park Hardware store because the damage at issue fell under the "property not covered" provisions of Milwaukee's policy. Milwaukee also explained that its policy did not cover property which was "more specifically described" in Discover's policy. Milwaukee therefore alleged that Discover should be solely responsible for those damages for which it was the "primary" insurer.

¶ 20 As set forth above, equitable contribution is only available where there is concurrent coverage. See *Home Insurance*, 213 Ill. 2d at 315. As Milwaukee is alleging that it paid for "property not covered" under its policy but that was covered under the Discover policy, it is essentially alleging that

it and Discover did not provide concurrent coverage. Thus, Milwaukee did not properly plead a claim for equitable contribution. See *id.*

¶ 21 Further, a review of Milwaukee's and Discover's policies indicates that Milwaukee could not have pled an action for equitable contribution. This is because Milwaukee's and Discover's policies did not insure the same interests. Milwaukee's policy covered the "Building" on a replacement cost basis for fire and extended coverage with limits of approximately $2.3 million. The Discover policy provided $824,000 in coverage for betterments and improvements, the loss of business personal property, and business interruption. Moreover, the Milwaukee and Discover policies did not ensure the same entities. The only named insured on the Milwaukee policy was Villa Park Plaza, Inc. (which is different than Villa Park Plaza, LLC, the other named plaintiff in this case). Conversely, the named insureds on the Discover policy were Amber Management, Inc. and Villa Park Hardware. Accordingly, Milwaukee could not seek equitable contribution from Discover. See *Home Insurance*, 213 Ill. 2d at 316.

¶ 22 CONCLUSION

¶ 23 For the reasons stated, we affirm the decision of the circuit court of Du Page County.

¶ 24 Affirmed.