2014 IL App (1st) 130606-U

No. 1-13-0606

Order filed March 21, 2014

Fifth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LITTON LOAN SERVICING, L.P., as Servicer for the Bank of New York, Plaintiff-Appellant, v. ALLSTATE INDEMNITY COMPANY, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 09 CH 35155 The Honorable Raymond W. Mitchell, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's grant of summary judgment in defendant's favor is affirmed where: (1) although the insurance policy's limitations period was tolled with respect to the mortgagee, defendant's failure to notify the mortgagee of the time remaining to file suit did not waive defendant's ability to rely on the limitations period as a defense to coverage; and (2) the trial court did not abuse its discretion in denying leave to add a new cause of action to plaintiff's complaint after discovery had closed and shortly before trial.

¶ 2 Plaintiff Litton Loan Servicing, L.P., is the servicer of a mortgage issued on a house that was damaged in a fire. After the fire, the homeowner submitted an insurance claim with

defendant Allstate Indemnity Company, which was denied. Subsequently, plaintiff submitted its own insurance claim to defendant, and defendant also denied that claim, stating that the claim was untimely filed based on a one-year limitations period contained in the insurance policy. Plaintiff filed suit in the circuit court of Cook County and the trial court granted defendant's motion for summary judgment, agreeing that the claim was untimely. On appeal, plaintiff claims: (1) that defendant was barred from asserting the limitation provision because it did not provide plaintiff written notice when it denied the homeowner's insurance claim; and (2) that the trial court abused its discretion in denying plaintiff leave to amend its complaint to add a count of bad faith. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Factual Background

¶ 5 In order to more easily understand the issues underlying the instant appeal, a chronology of the events at issue is helpful. The following facts are taken from the parties' pleadings, motions, and exhibits, and are provided in the light most favorable to plaintiff as the nonmovant. See *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004) ("Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file 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.").

¶ 6 On August 31, 2005, Dion Cheronis borrowed $576,000 from 21st Century Mortgage Bankers; the loan was secured by a mortgage on a house in Chicago. 21st Century Mortgage

Bankers subsequently assigned the note and mortgage to the Bank of New York, for which plaintiff acted as servicer.[1]

¶ 7 Cheronis obtained an insurance policy on the property through defendant, which covered the property for loss due to fire and other hazards. 21st Century Mortgage Bankers, its successors and assigns, were disclosed and added to the policy as mortgagee and loss payee. The provisions of the policy are set forth in further detail below, but included a one-year limitations period for filing suit against defendant, which began running on the date of the loss. The policy further provided that the running of the one-year limitations period would be tolled "from the date proof of loss was received until the date the claim [wa]s denied."

¶ 8 On October 29, 2006, the house sustained severe fire damage and Cheronis informed defendant of the loss and made a claim against the insurance policy. Cheronis filed a sworn statement of proof of loss with defendant on December 5, 2006.

¶ 9 In August 2007, Dimont & Associates (Dimont), a representative of plaintiff, [2] discovered that the property was damaged and contacted defendant regarding filing a claim. Defendant informed Dimont that Cheronis had filed a claim and instructed Dimont to "monitor the claim."

¶ 10 On October 5, 2007, Jennifer Junker, a Dimont employee, contacted defendant to follow up on the claim and was informed that the claim was still under investigation. Junker was provided with the contact information of Kevin McMahon, a staff claims service representative in defendant's special investigations unit, and McMahon confirmed that the claim was still under investigation and requested the production of several loan documents;

[1] The record indicates that the note and mortgage were first assigned to Popular Financial Services LLC (Popular FS), and Popular FS subsequently assigned the note and mortgage to Bank of New York as trustee for Equity One Inc. mortgage pass-through certificate series 2005-5 (Bank of New York). While Popular FS held the note and mortgage, the servicer for the loan was Popular Mortgage Servicing Inc. (PMSI).

[2] Dimont acted as an insurance claim representative both for plaintiff and for its predecessor servicer, PMSI.

Junker informed McMahon that she could provide him with the loan payoff information but could not provide the other requested documents.

¶ 11 On October 8, 2007, defendant issued a letter denying Cheronis' claim. The letter stated that defendant "denie[d] any and all liability to you" based on "among other reasons, your breach of policy conditions requiring you to cooperate in the Company's investigation by producing all documents and records requested by the Allstate Indemnity Company necessary for it to complete that investigation; your lack of an insurable interest in the insured property; and material misrepresentations made by you and/or your agents in the presentation of the claim concerning the status, use and occupancy of the property at and prior to the time of the loss." The letter concluded by stating that "[t]he Allstate Indemnity Company held your Sworn Statement in Proof of Loss for 306 days before declining this claim. The one year contractual period within which you will be required to file suit against the Allstate Indemnity Company will expire on August 31, 2008." This letter was not sent to Dimont or to PMSI, but was solely sent to Cheronis.

¶ 12 On October 9, 2007, Junker was informed by PMSI that Dimont could close its claim file because Cheronis' loan was current, and Junker did so. Dimont's business records at that time reflected an expiration of the limitations period on October 29, 2007.

¶ 13 On July 22, 2008, Dimont was notified that the property was still not occupied and that the fire damage to the property had not been repaired. On the same day, Junker called McMahon, who orally informed Junker that Cheronis' claim had been denied; Dimont's business records at that point state that there was no recovery possible for the loss because the limitations period had expired. Junker sent an email to McMahon requesting a copy of the denial letter; Junker followed up with McMahon on July 28 and August 20, 2008, concerning

the request for a copy of the denial letter. On September 2, 2008, Junker received a voicemail from McMahon stating that he was "still working on getting a denial."

¶ 14 On September 23, 2008, McMahon sent a letter to Junker formally notifying Dimont of defendant's denial of Cheronis' claim. However, the letter stated that, "due to privacy and other considerations, the Allstate Indemnity Company cannot and will not provide an actual copy of the denial letter," but did provide the basis for the denial of Cheronis' claim. The letter concluded that, "[g]iven the fact that the loss out of which this matter arose occurred on October 29, 2006, the Allstate Indemnity Company now considers this matter closed." Once it received written notice of Cheronis' denial on September 23, 2008, Dimont's business records reflected that it would investigate whether the limitations period had expired and, on October 1, 2008, the file was closed again with a notation that the limitations period had expired.

¶ 15 On November 1, 2008, plaintiff was designated as a servicer by the Bank of New York and on April 15, 2009, plaintiff filed an insurance claim with defendant.

¶ 16 On June 9, 2009, defendant denied plaintiff's claim, contending that the claim was untimely and the property was subject to a foreclosure.[3] A letter from defendant to Dimont, dated June 9, 2009, stated that "given the amount of time which has elapsed since the date of loss, your late attempt to submit a claim as well as completion of the foreclosure action, the Allstate Indemnity Company will not entertain a claim on behalf of your principal at this point in time." The letter pointed to the fact that the fire occurred on October 29, 2006, but that "[t]he first contact which the Allstate Indemnity Company received from Litton Loan Service concerning the mortgagee's intention of pursuing a claim occurred in April, 2009."

[3] The property was ultimately foreclosed upon and judgment entered in favor of Bank of New York; the property was sold at a sheriff's sale for $80,001 on November 13, 2008.

Additionally, the letter pointed to a document submitted by Dimont dated October 21, 2008, "indicating that Litton Loan Services may have been involved in this matter as early as October, 2008, but failed to contact the Allstate Indemnity Company to express its intention of pursuing a claim until April 2009." Finally, the letter noted that defendant had previously sent a letter to Dimont dated September 23, 2008, outlining the basis for the denial of Cheronis' claim and advising that defendant considered the matter closed.

¶ 17 II. Complaint

¶ 18 On September 23, 2009, plaintiff filed a complaint for declaratory judgment against defendant in the chancery division of the circuit court of Cook County. In its complaint, plaintiff disputes defendant's conclusion that the claim was untimely and that the pending foreclosure would bar a claim under the policy. Thus, plaintiff requests a declaration that defendant furnish insurance coverage to plaintiff for losses it sustained as a result of the fire.

¶ 19 Attached to the complaint is a copy of Cheronis' "landlords package" insurance policy for the period of September 1, 2006, to September 1, 2007. Cheronis is the named insured, and there are two mortgagees: "Equity One Inc its successors &/or assigns" and "21st Century Mortgage Bankers its successors &/or assigns." In the definitions section, "Insured person(s)" is defined as: "If you are shown on the Policy Declarations as an individual and you are a sole proprietor, you and your resident spouse." "You or your" is further defined as "the person(s), partnership, joint venture, or organization specifically named on the Policy Declarations as the insured." The policy also includes a "Conformity to State Statutes" provision, which provides that "[w]hen a policy provision conflicts with the statutes of the state in which the residence premises is located, the provision is amended to conform to such statutes."

¶ 20 In the "Section I Conditions" section, condition 3 is entitled "What You Must Do After a Loss" and provides in relevant part:

> "In the event of a loss to any property that may be covered by this policy, you must:
>
> * * *
>
> g) within 60 days after the loss, give us a signed, sworn proof of the loss."

Condition 9 is entitled "Mortgagee" and provides: "A covered loss will be payable to the mortgagees named on the Policy Declarations to the extent of their interest and in the order of precedence. All provisions of Section I of this policy apply to these mortgagees." Condition 9 further provides:

> "The mortgagee will:
>
> a) furnish proof of loss within 60 days after notice of the loss if an insured person fails to do so[.]"

Finally, condition 13 is entitled "Action Against Us" and provides:

> "No one may bring an action against us in any way related to the existence or amount of coverage, or the amount of loss for which coverage is sought, under a coverage to which Section I Conditions applies, unless:
>
> a) there has been full compliance with all policy terms; and
>
> b) the action is commenced within one year after the inception of loss or damage.
>
> The running of such one year period will be tolled from the date proof of loss was received until the date the claim is denied in whole or in part."

¶ 21 III. Motions to Dismiss and Answer

¶ 22 On October 22, 2009, defendant filed a motion to dismiss the complaint[4] or to transfer it to the law division. The motion claimed that the complaint was essentially a breach of contract claim, for which an adequate legal remedy was available, and that plaintiff had not pleaded any claims that would require a declaration of the meaning of any provision in the insurance policy. Accordingly, the motion requested that either the case be transferred to the law division or dismissed.

¶ 23 On December 16, 2009, the trial court denied defendant's motion to dismiss but granted its motion to transfer the case to the law division and also entered an order stating that the reason for the transfer was that "the action is for monetary damages arising out of alleged breach of contract and is thus not suited to declaratory judgment."

¶ 24 On February 16, 2010, defendant filed a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2008)), claiming that plaintiff had failed to comply with the express contractual language which provided that any suit must be filed within one year after the inception of loss or damage. Defendant further claimed that the running of the contractual suit limitations period was not tolled because "the Defendant neither solicited nor received a sworn statement in proof of loss from Plaintiff."

¶ 25 With its response to the motion to dismiss, plaintiff attached an affidavit from John Crandall, plaintiff's vice president. In the affidavit, Crandall stated that when PMSI, the servicer of the mortgage prior to plaintiff, became aware of the fire, it retained Dimont to process an insurance claim. However, "Dimont & Associates contacted Allstate Indemnity

[4] The motion does not specify the section of the Code of Civil Procedure under which dismissal was sought.

Company *** regarding the filing of a claim and was informed that the borrower, Dion Cheronis, already made a claim and that the mortgagee therefore did not need to make a claim."

¶ 26 On July 12, 2010, the trial court denied defendant's motion to dismiss and, on September 29, 2010, defendant filed an answer and affirmative defense to the complaint. The sole affirmative defense alleged by defendant was that the claim was contractually time-barred as a matter of law since the loss was sustained in October 2006, the claim was denied by correspondence dated October 8, 2007, and the suit was not filed until September 23, 2009.

¶ 27 On August 15, 2011, defendant filed an amended answer and affirmative defenses. The amended answer added two affirmative defenses: that plaintiff had not promptly provided notice of the loss and that plaintiff had not provided written notice of the change of occupancy after learning that the property was vacant, as required by the policy.

¶ 28 IV. Motion for Leave to Amend Complaint

¶ 29 On December 7, 2012, plaintiff filed an emergency motion for leave to amend its complaint to add a bad-faith claim pursuant to section 155 of the Insurance Code (215 ILCS 5/155 (West 2004)). According to the motion, "Plaintiff in the course of discovery, after compelling information from Defendant and oral deposition of employee of Defendant conducted October 24, 2012, discovered facts relevant to state the additional cause of action for the amendment of the Complaint requested herein. These facts and evidence were not known to the Plaintiff at the time it filed its complaint." The proposed amended complaint alleged that defendant failed to provide a copy of Cheronis' denial letter to PMSI or Dimont and did not inform PMSI or Dimont of the denial, the number of days that the limitations period had been tolled, or how many days were remaining before the expiration of time to

file suit. The proposed amended complaint further alleged that defendant knowingly withheld information from Dimont regarding the time to file a claim and knowingly delayed responding to Dimont concerning the outcome of Cheronis' claim. Plaintiff requested penalties under section 155 of the Insurance Code, as well as attorney fees and costs.

¶ 30 The parties came before the trial court on plaintiff's motion on December 10, 2012. The court noted that "I have a problem with you seeking leave to amend to add a new count, a new claim, in a case where discovery is closed and the case is set for trial in January. I mean it seems to me manifestly unfair to the Defendant." The court further noted that "[i]t's the type of claim that would almost, by necessity, require an expert. So we'd have to now set an expert discovery schedule, making the January trial date on a 2009 case almost impossible to accommodate." On December 10, 2012, the trial court denied plaintiff's motion.

¶ 31 V. Motion for Summary Judgment

¶ 32 On December 14, 2012, defendant filed a motion for summary judgment. First, defendant claimed that plaintiff had no standing to pursue its claim, because plaintiff had not provided any documents showing a transfer from 21st Century Mortgage Bankers, the mortgagee on the insurance policy, to the Bank of New York, nor had it provided any documents supporting the transfer of servicing rights to plaintiff. Additionally, defendant claimed that it was entitled to summary judgment because plaintiff had not complied with the terms of the insurance policy by providing prompt notice of the claim and because plaintiff had not filed its suit within one year after inception of the loss.

¶ 33 Attached to the motion for summary judgment was the deposition transcript of Kevin Flannigan, a loan analyst for Ocwen Financial Corp., the company that purchased plaintiff in September 2011; Flannigan had previously worked for plaintiff before its purchase by Ocwen

Financial. Flannigan testified that Dimont & Associates was the agent for the mortgage servicer with regard to the loan to Cheronis and had been hired by PMSI prior to plaintiff's involvement with the loan.

¶ 34 Also attached to the motion for summary judgment was the deposition transcript of Kevin McMahon, a staff claims service representative in defendant's special investigations unit; McMahon explained that his position was comparable to a claims investigator and that he was assigned claims from the claims department when there was the possibility of fraud.

¶ 35 McMahon testified that he was assigned to investigate Cheronis' claim because the property appeared to be vacant and the fire was deliberately set; during the course of the investigation, questions arose as to the ownership of the property, so McMahon requested information, including a mortgage payoff statement, from plaintiff. On October 8, 2007, defendant issued Cheronis a letter denying his claim. However, McMahon did not give a formal notification to Dimont that Cheronis' claim was denied because "we don't notify the mortgage company of the denial of an insured's first party claim."

¶ 36 McMahon testified that, with regard to mortgagees, "in general, typically mortgage companies may contact us and advise us of their intent to file [a] claim, and then we would advise them what they would need to do to file a claim. There is other instances where mortgage companies decide that they don't want to file a claim, whether it's in foreclosure, and they don't want the claim filing to interrupt the foreclosure, or if the mortgage is current and there is nothing to make them decide that they want to file a claim. So each claim is different when it comes to the mortgage company. Sometimes they want to file a claim, sometimes they don't." He further testified that sometimes mortgage companies called to inquire about the status of a claim without intending to make a claim themselves. In

plaintiff's case, "[t]here was no indication that a claim was being filed or requested during any of my conversations with them. They had called regarding the status of my investigation, and then in return I said can you send me these documents regarding the loan."

¶ 37 McMahon testified that on July 22, 2008, he received an email from Dimont requesting a copy of the letter denying Cheronis' claim. On September 23, 2008, he sent a letter to Dimont advising them of the denial of Cheronis' claim. The letter did not state the date of the denial or that Cheronis had until August 31, 2008, to file suit based on the denial. McMahon did not send Dimont a copy of Cheronis' denial letter based on "privacy and other considerations."

¶ 38 On December 21, 2012, plaintiff filed a response to defendant's motion for summary judgment, claiming that defendant had no defense to plaintiff's claim. First, plaintiff claimed that defendant had forfeited the defense of standing by not pleading it as an affirmative defense, and further claimed that the defense was meritless. Plaintiff also claimed that it had timely filed suit within one year of the date that defendant formally notified it of the denial of Cheronis' claim and that, notwithstanding the merits of the defense, defendant had waived its contractual limitation provision under the policy because it failed to comply with the policy and the Insurance Code (215 ILCS 5/1 *et seq.* (West 2004)).

¶ 39 Attached to its response was the affidavit of Kevin Flannigan, which expanded on Flannigan's deposition testimony concerning plaintiff's interest in the property. The affidavit stated that plaintiff began servicing the loan on November 1, 2008, after it acquired the servicing rights from PMSI, the predecessor servicer of the loan, and included as exhibits copies of servicing transfer notifications sent to Cheronis by plaintiff and by PMSI.

¶ 40 Also attached to the response was a copy of the assignment of mortgage, recorded on August 21, 2008, transferring Cheronis' mortgage from Popular Financial Services, LLC, to "The Bank of New York as Trustee for Equity One Inc. Mortgage/pass through Certificate Series #2005-5."

¶ 41 On January 14, 2013, the trial court entered a written order on defendant's motion for summary judgment. First, the trial court denied defendant's motion on the basis of standing, finding that defendant had not pleaded or proved lack of standing and that there was evidence in the record of assignments indicating that servicing of the loan was transferred to plaintiff. However, the trial court granted defendant's motion because plaintiff's suit was untimely. The court noted that the limitations period began running from the date of the loss, not the date of the denial, so over a month of the period had run as of the date that Cheronis filed his proof of loss and tolled the limitations period. Thus, even if the limitations period was tolled until the time that plaintiff received notice of the denial of the claim, the trial court noted that the filing of a suit one year after the notice of denial would still be time-barred.

¶ 42 Additionally, the trial court found that the limitations period was only tolled until the denial of Cheronis' claim, two years before plaintiff's suit was filed. The court found that "[n]owhere in the contract or in the statutes or regulations cited by [plaintiff] is there any support for the idea that there is a requirement that a mortgagee receive notice of the denial," and so "[t]he fact that [plaintiff] did not acquire written documentation of the denial [of Cheronis' claim] is irrelevant." The trial court rejected plaintiff's argument that it was an "insured" for purposes of receiving notice, noting that the policy treated insureds and mortgagees differently. Finally, the court noted that plaintiff had received actual notice,

albeit oral, on September 8, 2008, that defendant had denied Cheronis' claim, but did not file suit until September 23, 2009, over one year later.

¶ 43 Accordingly, the trial court granted defendant's motion for summary judgment and this appeal follows.

¶ 44 ANALYSIS

¶ 45 On appeal, plaintiff claims: (1) that defendant was barred from asserting the limitation provision because it did not provide the mortgagee written notice when it denied the homeowner's insurance claim; and (2) that the trial court abused its discretion in denying plaintiff leave to amend its complaint to add a count of bad faith. Additionally, defendant argues that the trial court erred in finding that plaintiff had standing.

¶ 46 " 'The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment.' " *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005) (quoting *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993)). A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo*

consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 47 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). A defendant moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). In other words, there is no evidence to support the plaintiff's complaint. " 'The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable issue of fact exists.' " *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 48 I. Written Notice

¶ 49 Plaintiff first argues that defendant is barred from raising the suit limitations provision as a basis for denial of plaintiff's claim because defendant did not provide PMSI, the mortgagee at the time, or Dimont with written notice of the denial of Cheronis' claim. Plaintiff claims that such notice was required under Illinois law and a failure to provide the notice results in a breach of the insurance policy and the waiver of the suit limitation provision. We note that a

waiver of the suit limitation provision is the only way that plaintiff would be able to prevail in the case at bar, as its suit would otherwise be time-barred, even if tolled.[5]

¶ 50 Plaintiff's argument relies on the applicability of section 919.80(d)(8)(C) of the Administrative Code to mortgagees. Section 919.80(d)(8)(C), a regulation promulgated pursuant to the Insurance Code, provides:

> "When the period within which the insured may bring suit under a residential fire and extended coverage policy is tolled in accordance with Section 143.1 of the Code [(215 ILCS 5/143.1 (West 2004))[6]], the company, at the time it denies the claim, in whole or in part, shall advise the insured in writing of the number of days the period was tolled, and how many days are left before the expiration of the time to bring suit." 50 Ill. Adm. Code 919.80(d)(8)(C) (2002).

Plaintiff claims that mortgagees are "insured[s]" as contemplated by section 919.80(d)(8)(C), and that, since the suit limitations period was tolled by Cheronis' filing of a sworn statement of proof of loss, the mortgagee was required to be notified in writing as to the length of the tolling and the time remaining to file suit. Thus, we must consider (1) whether the suit limitations period was tolled as to the mortgagee and, if so, (2) whether it was entitled to written notice as provided as section 919.80(d)(8)(C).

---

[5] As the trial court noted, the loss occurred on October 29, 2006, and Cheronis filed his sworn statement of proof of loss with defendant on December 5, 2006, over a month later. Thus, approximately a month of the one-year limitations period had run at the time the limitations period was tolled. Even if the period was tolled for the maximum length of time---from the date of Cheronis' proof of loss until plaintiff received a formal notice of the denial of Cheronis' claim on September 23, 2008---plaintiff would have had approximately 11 months from that date to file suit, making its complaint, filed on September 23, 2009, untimely.

[6] Section 143.1 of the Insurance Code provides for a tolling period similar to the tolling period contained in the insurance policy at issue in the case at bar. See 215 ILCS 5/143.1 (West 2004).

¶ 51 A. Tolling

We first consider whether the insurance policy's suit limitations period was tolled as to the mortgagee. Under the policy:

> "No one may bring an action against us in any way related to the existence or amount of coverage, or the amount of loss for which coverage is sought, under a coverage to which Section I Conditions applies, unless:
>
> a) there has been full compliance with all policy terms; and
>
> b) the action is commenced within one year after the inception of loss or damage.
>
> The running of such one year period will be tolled from the date proof of loss was received until the date the claim is denied in whole or in part."

The policy requires the insured, "within 60 days after the loss, [to] give [defendant] a signed, sworn proof of the loss." Additionally, the policy provides that a mortgagee must "furnish proof of loss within 60 days after notice of the loss if an insured person fails to do so[.]"

¶ 52 In the case at bar, there is no dispute that Cheronis filed a proof of loss on December 5, 2006, and the mortgagee did not file a proof of loss. The question is whether Cheronis' filing of the proof of loss tolled the running of the limitations period as to the mortgagee as well. We agree with plaintiff that it did.

¶ 53 In construing an insurance policy, a court must ascertain the intent of the parties to the contract. *Outboard Marine*, 154 Ill. 2d at 108. To do so, "the court must construe the policy as a whole ***, with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract." *Outboard Marine*, 154 Ill. 2d at 108. If the policy's terms are unambiguous, the court must afford them their plain, ordinary, and proper meaning.

Outboard Marine, 154 Ill. 2d at 108. "However, if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous [citation] and will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine*, 154 Ill. 2d at 108-09.

¶ 54 In the case at bar, under the clear terms of the policy, the mortagee was not required to file a proof of loss with defendant, since Cheronis did so. This point is undisputed by the parties. Defendant, however, argues that despite this fact, the mortgagee was not entitled to rely on the benefit provided by filing a proof of loss, namely, the tolling of the limitations period. In defendant's own words: "the 'right' conferred by the policy is simply that the mortgagee is not obligated to furnish a proof of loss if the named insured does. This 'right' remains intact regardless of whether the suit limitation provision is tolled. Quite simply, if the mortgagee exercises its 'right' to not furnish a Sworn Statement in Proof of Loss, the suit limitation provision is not tolled. The mortgagee certainly could file a Sworn Statement in Proof of Loss, even if it is not required to do so. In short, a mortgagee may decide to file a Sworn Statement in Proof of Loss regardless of whether it was ***required*** to do so." (Emphasis in original.) We do not find this argument persuasive.

¶ 55 Defendant correctly states that, under the standard mortgage clause included in the policy here, there was an independent contract between defendant and the mortgagee. See *Chrysler First Commercial Corp v. State Farm Insurance Co.*, 269 Ill. App. 3d 318, 321 (1995) (under this type of clause, " 'an independent or separate contract of insurance exists between the lienholder and the insurer. In other words, there are two contracts of insurance within the policy—one with the lienholder and the insurer and the other with the insured and the insurer.' " (quoting *Foremost Insurance Co. v. Allstate Insurance Co.*, 486 N.W.2d 600, 602-

03 (Mich. Ct. App. 1992))). However, the policy, by its express terms, permitted the mortgagee to rely on Cheronis' proof of loss. Thus, to claim that the contract between the mortgagee and defendant is entirely independent of the contract between Cheronis and defendant would be disingenuous, as those two contracts are related in at least some respects.

¶ 56 We agree with plaintiff that the tolling of the limitations based on Cheronis' filing of the proof of loss applied to the mortgagee as well as to Cheronis. The language of the tolling provision in the insurance policy is broad, providing: "The running of [the] one year [limitations] period will be tolled from the date proof of loss was received until the date the claim is denied in whole or in part." The tolling provision does not indicate that it only applies to the party who actually filed the proof of loss. Given that the policy expressly permits the mortgagee to forgo filing a proof of loss when the named insured has filed one, a natural reading of the tolling provision would extend that benefit to the tolling provision, as well. If, as defendant contends, the mortgagee was not entitled to the benefit of the tolling provision, we would expect the policy to somehow specify that it was the only the party who filed the proof of loss whose limitations period was tolled. Additionally, as noted, "if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous [citation] and will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine*, 154 Ill. 2d at 108-09. Thus, to the extent that there is any ambiguity as to whether the tolling provision applies to the mortgagee, we must construe the policy against defendant, who drafted the policy, and in favor of the mortgagee. Accordingly, we find that Cheronis' filing of the proof of loss operated to toll the limitations period as to the mortgagee.[7]

[7] While the trial court did not explicitly address it, its analysis is consistent with our conclusion. The trial court granted summary judgment on the basis that the limitations period had expired even taking into account the tolling.

¶ 57 Our conclusion is supported by the language of section 143.1 of the Insurance Code, on which the tolling provision in the policy is modeled. Under section 143.1:

> "Whenever any policy or contract for insurance, *** contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, *in whatever form is required by the policy*, until the date the claim is denied in whole or in part." (Emphasis added.) 215 ILCS 5/143.1 (West 2004).

In the case at bar, the "form" of proof of loss "required by the policy" in the case of the mortgagee includes permitting the proof of loss filed by Cheronis to satisfy the proof of loss requirement for the mortgagee. Thus, it would follow that, upon the filing of the proof of loss in this form, the limitations period would be tolled for the mortgagee as well as for Cheronis.

¶ 58 B. Notice

¶ 59 Plaintiff next argues that, since the proof of loss filed by Cheronis operated to toll the limitations period for the mortgagee, the mortgagee was entitled to written notice under section 919.80(d)(8)(C) when Cheronis' claim was denied and its failure to provide such notice results in the waiver of the suit limitations provision. However, despite our conclusion that the tolling period applied to the mortgagee, we cannot find that defendant waived the suit limitation provision by failing to provide the mortgagee with notice of the denial of Cheronis' claim, regardless of whether such notice was required. In its argument on appeal, plaintiff presupposes that if we find that section 919.80(d)(8)(C) applies to the mortgagee, then defendant's failure to provide such notice automatically results a waiver of the limitations provision. However, that is not the case.

¶ 60 *Mathis v. Lumberman's Mutual Casualty Insurance Co.*, 354 Ill. App. 3d 854 (2004), which plaintiff relies on to argue that defendant's failure to provide notice results in waiver of the suit limitation provision, does not support plaintiff's argument in the way that plaintiff argues. Instead, *Mathis* provides that a violation of section 919.80(d)(8)(C), while not providing the basis for a private cause of action, "is a fact that a court can consider in determining whether an insurer waived a time limitation provision when enforcement of the provision would be unjust, inequitable, and unconscionable." *Mathis*, 354 Ill. App. 3d at 860. See also *Burress-Taylor v. American Security Insurance Co.*, 2012 IL App (1st) 110554, ¶ 23 (finding a question of fact as to whether the insurer's failure to comply with section 919.80(d)(8)(C) estopped the defendant from relying on the limitation period as a defense). In the case at bar, however, regardless of whether the mortgagee was entitled to notice or not, we cannot find that enforcement of the limitation provision would be unjust, inequitable, or unconscionable so as to lead us to find the provision waived.[8]

¶ 61 "The purpose of section 143.1 [the Insurance Code's tolling provision] is to prevent an insurance company from sitting on a claim, allowing the limitation period to run and depriving the plaintiff of the opportunity to litigate her claim in court." *Burress-Taylor*, 2012 IL App (1st) 110554, ¶ 18 (citing *American Access Casualty Co. v. Tutson*, 409 Ill. App. 3d 233, 237 (2011)). Here, to the extent that any party was "sitting on a claim," it was the mortgagee, not defendant. Dimont was aware that the property had been damaged and that Cheronis had filed a claim with defendant as of August 2007. Dimont remained in contact with defendant, monitoring the claim, through October 5, 2007, when defendant informed

[8] We note that plaintiff argues only waiver, not estoppel. "Although the terms 'waiver' and 'estoppel' are sometimes conflated, particularly in the insurance context, they are actually distinct legal doctrines." *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 218 (2008) (citing *Twin City Fire Insurance Co. v. Old World Trading Co.*, 266 Ill. App. 3d 1, 12 (1993)).

Dimont that Cheronis' claim was still under investigation. Four days later, on October 9, 2007, PMSI informed Dimont it could close its file; Dimont's business records at that time reflected an expiration of the limitations period on October 29, 2007. Once Dimont's file was reopened in July 2008, Dimont contacted defendant and was orally informed that Cheronis' claim had been denied; Dimont's business records at that point state that there was no recovery possible for the loss because the limitations period had expired. Once it received written notice of Cheronis' denial on September 23, 2008, Dimont's business records reflected that it would investigate whether the limitations period had expired and, on October 1, 2008, the file was closed again with a notation that the limitations period had expired. Finally, on January 28, 2009, Dimont's business records reflect that the loan was transferred to plaintiff and that Dimont advised plaintiff that the limitations period was expired. Thus, plaintiff was aware of the limitations period from, at the latest, early October 2007, and was aware, albeit through a phone call, that Cheronis' claim had been denied as of July 2008.

¶ 62 Additionally, defendant made its position that the claim was untimely clear. In its September 23, 2008, letter formally notifying Dimont of the denial of Cheronis' claim, defendant included a statement that, "[g]iven the fact that the loss out of which this matter arose occurred on October 29, 2006, the Allstate Indemnity Company now considers this matter closed." Additionally, the mortgagee's insurance claim was denied on timeliness grounds on June 9, 2009, and a letter from defendant to Dimont, dated the same day, stated that "given the amount of time which has elapsed since the date of loss, your late attempt to submit a claim as well as completion of the foreclosure action, the Allstate Indemnity Company will not entertain a claim on behalf of your principal at this point in time." The letter pointed to the fact that the fire occurred on October 29, 2006, but that "[t]he first

contact which the Allstate Indemnity Company received from Litton Loan Service concerning the mortgagee's intention of pursuing a claim occurred in April, 2009." Additionally, the letter pointed to a document submitted by Dimont dated October 21, 2008, "indicating that Litton Loan Services may have been involved in this matter as early as October, 2008, but failed to contact the Allstate Indemnity Company to express its intention of pursuing a claim until April 2009." Finally, the letter noted that defendant had previously sent a letter dated September 23, 2008, outlining the basis for the denial of Cheronis' claim and advising that defendant considered the matter closed. Thus, plaintiff cannot argue that there was any sort of indication that defendant would not be relying on the limitations period.

¶ 63 "Cases in which an insurer's conduct is found to amount to estoppel typically involve a concession of liability by the insurer, advance payments by the insurer to the plaintiff in contemplation of eventual settlement, and statements by the insurer which encourage the plaintiff to delay filing his action." *Foamcraft, Inc., v. First State Insurance Co.*, 238 Ill. App. 3d 791, 795 (1992). This is not that type of case. Additionally, this is not the type of case in which an individual is sent a letter that is not clearly a denial letter (see *Burress-Taylor*, 2012 IL App (1st) 110554, ¶¶ 20-22), or where the insurance company has already waived other policy requirements (see *Mathis*, 354 Ill. App. 3d at 858-59). In those cases, equitable considerations could lead to a finding of waiver or estoppel. Here, by contrast, every entity involved with the interests of the mortgagee is a sophisticated party that has extensive experience in the mortgage and insurance industries. There was no indication that defendant would not be relying on the limitations provision and, in fact, Dimont's business records indicate that the mortgagee was constantly aware of the limitations period. Furthermore, even providing the mortgagee with the maximum tolling period---from the time

Cheronis filed his proof of loss until the time the mortgagee was notified in writing that Cheronis' claim had been denied---plaintiff waited a full year before filing suit, despite the fact that the limitations period would have run after approximately 11 months and despite the fact that plaintiff had actual notice of the denial approximately two months before receiving the written notice. Accordingly, regardless of whether notice was required, we will not find the limitations period waived and affirm the trial court's grant of summary judgment in defendant's favor.

¶ 64 As a final matter, we note that the mortgagee seems to have been unaware that the limitations period was tolled at all. From Dimont's business records, the mortgagee was operating under the assumption that the limitations period expired in October 2007, one year after the date of the fire. Despite this fact, the mortgagee chose not to file a claim or to file suit once it learned of the fire in August 2007; in fact, PMSI informed Dimont that it could close the file in early October 2007, despite knowing that the limitations period would expire later that month and knowing that Cheronis' claim was still being investigated. This seems to indicate a conscious decision on the part of the former mortgagee not to file a claim or file a suit. This is supported by the fact that the former mortgagee still held the mortgage at the time that Dimont was orally informed that Cheronis' claim had been denied and still chose not to file a claim or file suit. It is simply a fortuitous circumstance from plaintiff's perspective that, in actuality, the limitations period was tolled, so that plaintiff, on behalf of the new mortgagee, had an argument as to why its suit was not time-barred. Unfortunately for plaintiff, we do not find its argument persuasive and affirm the trial court's grant of summary judgment in defendant's favor.

¶ 65 II. Standing

¶ 66 Since we have determined that the trial court correctly granted defendant's motion for summary judgment on limitations grounds, we have no need to consider defendant's alternate basis for summary judgment on standing grounds.

¶ 67 III. Leave to Amend Complaint

¶ 68 Finally, plaintiff argues that the trial court erred in denying plaintiff leave to file an amended complaint to add a count of bad faith against defendant pursuant to section 155 of the Insurance Code. "The decision to grant a motion to amend pleadings is within the discretion of the circuit court, and a reviewing court will not reverse the circuit court's decision absent an abuse of discretion." *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69 (citing *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill. 2d 419, 432 (1999).

¶ 69 Our supreme court has set forth four factors to determine whether a trial court has abused its discretion in denying leave to amend a complaint: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). In the case at bar, we cannot find that the trial court abused its discretion in denying plaintiff's motion to amend its complaint.

¶ 70 In its motion for leave to amend its complaint, filed on December 7, 2012, plaintiff claimed that, "[p]laintiff in the course of discovery, after compelling information from Defendant and oral deposition of employee of Defendant conducted October 24, 2012,

discovered facts relevant to state the additional cause of action for the amendment of the Complaint requested herein. These facts and evidence were not known to the Plaintiff at the time it filed its complaint." The proposed amended complaint alleged that defendant failed to provide a copy of Cheronis' denial letter to PMSI or Dimont and did not inform PMSI or Dimont of the denial, the number of days that the limitations period had been tolled, or how many days were remaining before the expiration of time to file suit. The proposed amended complaint further alleged that defendant knowingly withheld information from Dimont regarding the time to file a claim and knowingly delayed responding to Dimont concerning the outcome of Cheronis' claim.

¶ 71 The trial court denied plaintiff's motion, noting that "I have a problem with you seeking leave to amend to add a new count, a new claim, in a case where discovery is closed and the case is set for trial in January. I mean it seems to me manifestly unfair to the Defendant." The court further noted that "[i]t's the type of claim that would almost, by necessity, require an expert. So we'd have to now set an expert discovery schedule, making the January trial date on a 2009 case almost impossible to accommodate." We cannot find that the trial court abused its discretion in reaching this conclusion.

¶ 72 On appeal, plaintiff argues that it did not know the information relevant to its bad-faith claim until it compelled discovery of the records of Cheronis' claim from defendant and did not have the opportunity to "verify" the information until the deposition of McMahon on October 24, 2012. Plaintiff further argues that its proposed amendment was timely, since it notified the trial court and defendant at a hearing on November 7, 2012, before discovery was closed, that it intended to amend its complaint. Plaintiff also claims that, despite the trial court's conclusion otherwise, its bad-faith claim would not require expert testimony and that

"[t]here can be no serious claim of prejudice when the only surprise is that Allstate did not realize the legal significance of its actions." We do not find plaintiff's arguments persuasive.

¶ 73 Considering the four factors, the first does not apply, as plaintiff was not seeking to cure a defective pleading but was seeking to add a new cause of action. See *Jones v. O'Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 937 (2007) (first factor was "inapplicable" since the proposed amendment added a cause of action rather than curing a defect in the pleadings). With regard to the second factor, we agree with the trial court that permitting the amendment would have prejudiced defendant. The question of whether any given behavior is vexatious and unreasonable such that relief under section 155 is appropriate is a question of fact. *Buckner v. Causey*, 311 Ill. App. 3d 139, 150 (1999). The parties would have been required to produce evidence concerning the disclosure of an insured's policy information to the insured's mortgagee, which would likely involve the use of expert testimony as to the common practice in the insurance industry. Additionally, one of the sanctions plaintiff seeks is the payment of attorney fees, which can involve the use of expert testimony. See, *e.g.*, *Verbaere v. Life Investors Insurance Co. of America*, 226 Ill. App. 3d 289, 299 (1992) (discussing the use of expert testimony in considering the reasonableness of a requested fee under section 155). Thus, the second factor weighs against permitting amendment. With regard to the third factor, concerning timeliness, the documents underlying the new cause of action were disclosed to plaintiff on November 10, 2011, over a year before plaintiff sought to amend the complaint. While plaintiff claims that McMahon's deposition was needed to "verify" the information prior to amending the complaint, we cannot find that this factor weighs in favor of allowing the amendment. Finally, with regard to the fourth factor, while this was the first time plaintiff had attempted to amend its complaint, we agree

with defendant that this fact does not equate it to being the first *opportunity* to amend the complaint. Considering all four factors, and giving the most weight to the possibility of prejudice, we cannot find that the trial court's denial of the amendment was an abuse of discretion.

¶ 74 CONCLUSION

¶ 75 Although the insurance policy's limitations period was tolled with respect to the mortgagee, defendant's failure to notify the mortgagee of the time remaining to file suit did not waive defendant's ability to rely on the limitations period as a defense to coverage. Additionally, the trial court did not abuse its discretion in denying leave to add a new cause of action to plaintiff's complaint after discovery had closed and shortly before trial.

¶ 76 Affirmed.