2015 IL App (1st) 141228-U

No. 1-14-1228

SIXTH DIVISION
May 29, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAND and GAYLE ROBERTS, Plaintiffs-Appellees-Cross-Appellants, v. BRADFORD VICTOR-ADAMS MUTUAL INSURANCE COMPANY, Defendant-Appellant-Cross-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 07 L 000645 The Honorable John C. Griffin and Brigid M. McGrath, Judges Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: Summary judgment was properly entered on plaintiffs' breach of contract claim where they notified defendant insurer of their claim for additional coverage within the terms of the policy language and defendant failed to provide that coverage. Plaintiffs' claim for insurer bad faith and breach of the duty of good faith and fair dealing was properly dismissed where no such cause of action is recognized in Illinois. The trial court properly entered judgment in favor of defendant on plaintiffs' claim for deceptive

practices in violation of the Consumer Fraud Act where the manifest weight of the evidence did not support the claim. Plaintiffs were not entitled to prejudgment interest on their breach of contract award.

¶2 This case involves claims related to an insurance policy under which defendant, Bradford Victor-Adams Mutual Insurance Company, insured plaintiffs, Rand and Gayle Roberts, for covered losses of their home and personal property. As a result of a fire that damaged their home and personal property, plaintiffs submitted a claim to defendant. The parties, thereafter, engaged in a dispute regarding whether the claim would be paid. Ultimately, the trial court entered judgment in favor of plaintiffs on their breach of contract claim with damages in the amount of $76,006.62 and entered judgment in favor of defendant against plaintiffs on their Consumer Fraud Act and Deceptive Businesses Practices Act claim. The parties have cross-appealed.

¶3 Defendant contends the trial court erred in granting partial summary judgment in favor of plaintiffs on their breach of contract claim and for later awarding plaintiffs replacement costs. In their cross-appeal, plaintiffs contend the trial court erred: (1) in striking their claim for insurer bad faith and breach of the duty to act in good faith and fair dealing; (2) in entering judgment in favor of defendant and against plaintiffs on their Consumer Fraud and Deceptive Businesses Practices Act claim; and (3) in refusing to grant prejudgment interest. Based on the following, we affirm.

¶4 FACTS

¶5 On January 20, 2006, plaintiffs suffered damage to their home and personal property as a result of a fire. Plaintiffs notified defendant by submitting a claim for the loss. Defendant is a farm mutual insurer organized under the Farm Mutual Insurance

Company Act of 1986 (Farm Insurance Act) (215 ILCS 120/1 *et seq*. (West 2004)).[1] The parties entered into an appraisal process pursuant to the terms of the insurance policy, wherein each party appointed a representative to determine a cash value figure for the sustained loss. On May 10, 2006, the parties' appraisers agreed that the replacement cost of plaintiffs' home was $173,000 and the actual cash value of the home was $122,377.71 ($173,000 minus $50,622.29 for depreciation).

¶6 On May 15, 2006, defendant remitted a check to plaintiffs for the remainder of the agreed actual cash value of the home (pursuant to an April 6, 2006, letter from defendant's appraiser a check for $114,416.87 had already been issued). In its May 15, 2006, letter defendant notified plaintiffs that "[n]o further Actual Cash Value payments are due and the maximum pending Dwelling retention claim totals $50,622.29 [the depreciation amount]." In the May 15, 2006, letter, defendant also advised plaintiffs that:

> "[t]he time period for filing the supplemental claim expires 180 days from the date of loss. The insured must advise our office or insurance carrier of their intention to make a claim for the withheld depreciation within 180 days of the date of loss. No extension of time will be granted unless requested in writing and approved by the insurance company.
>
> The instructions for submitting the supplemental Dwelling claim are as follows:
>
> *** Identify the repair or replacement on the final contractor invoice or receipt. The invoice should identify the repair contractor and

[1] According to defendant, it is a company that provides insurance in central and northern rural regions of Illinois.

> the total incurred repair amount. Please forward the repair invoice to our office for review. The insurance carrier may require a re-inspection during the review of the pending supplemental claim. The Dwelling retention period expires on July 19, 2006."

¶7 Plaintiffs accepted the check for the remaining actual cash value of their home. However, in a letter dated July 5, 2006, plaintiffs notified defendant that "[i]n order to meet the requirements of our policy we are notifying you that we are making claim for all dollars above 'Actual Cash Value' that is owed to us on both personal property and the structure." Plaintiffs further stated "[w]e will not have our personal property or our dwelling cost completed within 180 days of our loss, therefore we will need an open ended extension for our final payouts." On July 31, 2006, defendant sent plaintiffs a facsimile cover sheet containing a memorandum, which referenced an "extended retention period" wherein plaintiffs had until October 1, 2006 to "make further claim."

¶8 On September 8, 2006, plaintiffs notified defendant by letter that they expected the construction of their replacement home to be completed by December 30, 2006. In a letter dated November 6, 2006, defendant responded that it "elected not to further extend the retention claim periods." Defendant's letter referred to the previously designated date of October 1, 2006, as set by defendant for the completion of construction on plaintiffs' home. The November 6, 2006, letter notified plaintiffs that "in order to pursue supplemental payment by [defendant] of retention (depreciation) hold back, [plaintiffs] must provide detailed verification and documentation of actual costs incurred prior to October 1, 2006."

¶9 In relevant part, the insurance policy at issue provided:

"Loss Settlement Clause 2-80 percent Replacement Cost Coverage

Loss to covered property will be settled as follows:

We pay for insured loss to buildings at replacement cost without deduction for depreciation, subject to the following conditions:

(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80 percent or more of the full replacement cost of the building immediately prior to the loss, we will pay the costs of repair or replacement without deduction for depreciation. Payment will not exceed the smallest of the following amounts:

a. the limit of liability under this policy applying to the building;

b. the replacement cost of that part of the building damaged for equivalent construction and use on the same location; or

c. the amount actually and necessarily spent to repair or replace the damaged building.

(2) If, at the time of the loss, the amount of insurance in this policy on the damaged building is less than 80 percent of the full replacement cost of the building immediately prior to the loss, we will pay the larger of the following amounts, but not exceeding the limit of liability under this policy applying to the building:

a. the actual cash value of that part of the building damages; or

b. that proportion of the cost to repair or replace, without deduction for depreciation, of that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80 percent of the replacement cost of the building.

Loss Settlement Clause 3-Special Replacement Cost Coverage

We pay for insured loss to buildings at replacement cost without deduction for depreciation, subject to the following:

The damaged property will be repaired or replaced with commonly used building materials to place the property in a habitable condition. The type of materials will be agreed upon by you and us. If you and us [*sic*] cannot agree, settlement will be on an actual cash value basis with deduction for depreciation.

Payment will not exceed the smallest of the following amounts:

(1) the limit of liability under this policy applying to the building;

(2) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises; or

(3) the amount actually and necessarily spent to repair or replace the damaged building.

Loss Settlement Clauses 2 and 3

Loss to covered property will be settled as follows:

(1) We pay actual cash value of the property at the time of loss for: personal property, structures that are not buildings, carpeting, domestic appliances, awnings, outdoor equipment and outdoor antennas, whether or not attached to buildings.

(2) When the cost to repair or replace the damage is more than $1,000 or more than 5 percent of the amount of insurance in this policy of the building, whichever is less, we will pay no more than the actual cash value of the damage until actual repair or replacement is completed.

(3) In making claim under Loss Settlement Clauses 2 or 3, you may elect to disregard the condition requiring actual replacement or repair of the property, and to accept actual cash value for the loss, but such election shall not prejudice your right to make further claim within 180 days after loss for any additional coverage under Loss Settlement Clause 2 or 3, subject to all conditions."

¶10 On January 18, 2007, plaintiffs filed a complaint alleging a claim for breach of contract against defendant for failing to pay them $50,622.29 representing the withheld depreciation funds for the dwelling claim, $11,383.96 representing the withheld amount for the personal property claim, and the additional living expense claim. In addition,

plaintiffs presented claims for a violation of section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2004)), a violation of the Consumer Fraud and Deceptive Businesses Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2004)), estoppel, and a request for prejudgment interest. Defendant filed a motion to dismiss the complaint. On May 9, 2007, the trial court dismissed plaintiffs' complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2004)), specifically dismissing all counts without prejudice except the Consumer Fraud Act count, which was dismissed with prejudice.

¶11 In their first amended complaint, plaintiffs realleged claims for breach of contract and for a violation of section 155 of the Insurance Code. In response, defendant filed a motion to strike plaintiffs' first amended complaint. Plaintiffs were granted leave to file a second amended complaint.

¶12 In their second amended complaint, plaintiffs again alleged claims for breach of contract and for a violation of section 155 of the Insurance Code. Defendant filed an answer and affirmative defenses, citing the language of the insurance policy, as well as a counterclaim for declaratory judgment, requesting a declaration that, in order to be eligible for the additional coverage, plaintiffs were required to complete repairs or replacement of their home within 180 days of the loss. Thereafter, defendant filed a motion to strike plaintiffs' section 155 of the Insurance Code claim.

¶13 Plaintiffs then requested leave to file a third amended complaint. Although we were unable to locate the trial court's order, leave was granted and plaintiffs filed a third amended complaint realleging claims for breach of contract and for a violation of section 155 of the Insurance Code and alleging, for the first time, a claim for breach of good faith

and fair dealing. Defendant responded by filing an answer and affirmative defense with regard to the breach of contract claim, stood on its previously filed and briefed motion to strike the Insurance Code claim, and moved to strike the breach of good faith and fair dealing claim. On April 28, 2010, the trial court entered an order striking the Insurance Code claim with prejudice and striking the breach of good faith and fair dealing claim without prejudice. The trial court granted plaintiffs leave to file their fourth amended complaint.

¶14 In their fourth amended complaint, plaintiffs realleged their breach of contract claim and, without leave, resurrected claims for a violation of the Consumer Fraud Act and for prejudgment interest. Defendant filed an answer and a motion to strike portions of the fourth amended complaint. Specifically, defendant moved to strike plaintiffs' Consumer Fraud Act claim and request for prejudgment interest. On October 19, 2010, the trial court entered an order denying defendant's motion to strike the Consumer Fraud Act claim as alleged in plaintiffs' fourth amended complaint, but granted defendant's motion to strike the request for prejudgment interest and dismissed the claim as alleged in plaintiffs' fourth amended complaint. Plaintiffs were granted leave to file a fifth amended complaint.

¶15 On December 13, 2010, plaintiffs filed their fifth amended complaint, alleging claims for breach of contract and a violation of the Consumer Fraud Act. The parties filed cross motions for summary judgment. On May 4, 2012, the trial court denied defendant's motion for summary judgment in its entirety and granted plaintiffs' motion for summary judgment in part and denied it in part. More specifically, the trial court granted plaintiffs' motion insofar as the court found defendant breached the insurance

contract by refusing to reimburse plaintiffs for replacement of their home. The trial court's written order provided:

> "the Court *** grants the Plaintiff's Motion for Summary Judgment on Count I [breach of contract], insofar as it holds that the terms of Loss Settlement 2 and 3 are clear and unambiguous, that the 180 day period refers to the time within which the Plaintiffs must notify Bradford that they intend to make a claim for the replacement value, not the time within which the actual repair and replacement must be completed. However, the Court also holds that Plaintiffs are not entitled to payment of the replacement value until they have undertaken the repairs or replacement, and since there was no evidence submitted to the Court on what work was performed subsequent to Bradford's payment of the Actual Cash Value, there remain genuine issues of material fact as to what amounts if any are due the Plaintiffs under the Policy."

On May 30, 2012, defendant filed an emergency motion for extension of time to file its motion to reconsider the May 4, 2012, order. The motion was granted and the trial court gave defendant a 45 day extension to file its motion to reconsider. On July 18, 2012, the trial court granted defendant until July 25, 2012, to file its motion to reconsider. Defendant did not file a motion to reconsider by the required date.

¶16 On March 5, 2013, plaintiffs requested leave to file an "amended" fifth amended complaint, alleging breach of contract, violation of the Consumer Fraud Act, and insurer bad faith and breach of the duty to act in good faith and fair dealing. The claim for

insurer bad faith and breach of the duty to act in good faith and fair dealing originally appeared in plaintiffs' third amended complaint, but was struck in the trial court's April 28, 2010, order. The trial court granted plaintiffs leave to file the "amended" fifth amended complaint. On March 13, 2013, defendant filed a motion to dismiss plaintiff's Consumer Fraud Act claim as untimely. On April 11, 2013, defendant filed a motion requesting that its answer and affirmative defenses filed in response to plaintiffs' breach of contract claim in their fifth amended complaint stand and notifying the court that plaintiffs' good faith and fair dealing claim had previously been stricken on April 28, 2010. On September 25, 2013, in a written order, the trial court again struck, with prejudice, the good faith and fair dealing claim. The September 25, 2013, order also denied defendant's motion to dismiss plaintiffs' Consumer Fraud Act claim as untimely, finding it related back to the original complaint, and denied plaintiffs' motion for pretrial discovery of defendant's financial records. Plaintiffs filed a motion to reconsider the dismissal of their insurer bad faith and breach of the duty to act in good faith and fair dealing claim, which the trial court denied in a written order on December 4, 2013. The trial court also denied plaintiffs' request for 304(a) language related to the dismissal of the good faith and fair dealing claim.

¶17 On January 10, 2014, defendant filed a motion for summary judgment as to the Consumer Fraud Act claim. On February 18, 2014, the trial court denied defendant's motion for summary judgment as to plaintiffs' Consumer Fraud Act claim.

¶18 At some point, defendant filed a motion to vacate or reconsider the trial court's May 4, 2012, order finding it breached the parties' contract.[2] On March 24, 2014, the

[2] We were unable to locate the motion in the record.

trial court denied the motion to reconsider, finding the motion was untimely, in that it was filed "on the eve" of trial, and failed to meet the requirements of a motion to reconsider. In addition, the trial court expressly stated that it agreed with the May 4, 2012, holdings, namely, that "plaintiffs were not obligated to complete the repair or replacement within 180 days of loss, but had to notify Bradford of their intent to claim those amounts within that time period."

¶19 The case proceeded to a five-day bench trial at the end of March through the beginning of April 2014. At the conclusion of trial, on April 2, 2014, the trial court found, with regard to the breach of contract claim "which was a matter of damages" since liability was already determined, that plaintiffs "met their burden with regard to the dwelling costs of repairs, personal property and additional living expenses[,] which were $50,622.66, $11,383.96, and $14,000." With regard to the Consumer Fraud Act claim, the trial court found plaintiffs did not produce evidence to sustain their burden. The trial court further found that plaintiffs were not entitled to prejudgment interest under the Interest Act (815 ILCS 205/2 (West 2004)) because "the sum must be liquidated or subject to easy determination, calculation, or compilation" and it "did not raise to that level" in this case. The trial court noted that it "didn't even see [prejudgment interest] being requested in the complaint." On April 2, 2014, the trial court entered a written order entering judgment in favor of plaintiffs and against defendant on the breach of contract claim in the amount of $76,006.62 and entering judgment in favor of defendant against plaintiffs on the Consumer Fraud Act claim.

¶20 ANALYSIS

¶21 I. Appeal

¶22 Defendant contends the trial court erred in granting summary judgment in favor of plaintiffs on their breach of contract claim. In particular, defendant challenges the trial court's interpretation of the contested insurance policy language.

¶23 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2010). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). However, if the plaintiff fails to establish any element of his claim, summary judgment is deemed appropriate. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review a trial court's decision granting summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

> "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. [Citations.] Accordingly, our primary objective is to ascertain and give effect to the intention of the parties, as expressed in the policy language. [Citation.] Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation. ***. We will not strain to find an ambiguity where none

exists. Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous." *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005).

¶24 Defendant argues that the plain language of the insurance policy provided that plaintiffs were entitled only to the actual cash value for their loss because they failed to complete the replacement of their home within 180 days of the fire.

¶25 The disputed policy language provided:

"Loss Settlement Clause 3-Special Replacement Cost Coverage

We pay for insured loss to buildings at replacement cost without deduction for depreciation, subject to the following:

The damaged property will be repaired or replaced with commonly used building materials to place the property in a habitable condition. The type of materials will be agreed upon by you and us. If you and us [*sic*] cannot agree, settlement will be on an actual cash value basis with deduction for depreciation.

Payment will not exceed the smallest of the following amounts:

(1) the limit of liability under this policy applying to the building;

(2) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises; or

(3) the amount actually and necessarily spent to repair or replace the damaged building.

> Loss Settlement Clauses 2 and 3
>
> Loss to covered property will be settled as follows:
>
> (1) We pay actual cash value of the property at the time of loss for: personal property, structures that are not buildings, carpeting, domestic appliances, awnings, outdoor equipment and outdoor antennas, whether or not attached to buildings.
>
> (2) When the cost to repair or replace the damage is more than $1,000 or more than 5 percent of the amount of insurance in this policy of the building, whichever is less, we will pay no more than the actual cash value of the damage until actual repair or replacement is completed.
>
> (3) In making claim under Loss Settlement Clauses 2 or 3, you may elect to disregard the condition requiring actual replacement or repair of the property, and to accept actual cash value for the loss, but such election shall not prejudice your right to make further claim within 180 days after loss for any additional coverage under Loss Settlement Clause 2 or 3, subject to all conditions."

¶26 Based on the language of the insurance policy, we conclude that the trial court properly granted summary judgment in favor of plaintiffs on their breach of contract claim. The relevant language provided that plaintiffs were entitled to "make further claim" for the replacement cost above the actual cash value (*i.e.,* "any additional coverage,") "within 180 days after the loss." Applying the plain and ordinary meaning to

"make further claim," we conclude that plaintiffs were required to notify defendant of their intent to draw on their "additional coverage" for the cost of replacing the home within 180 days of the fire. In effect, plaintiff had 180 days to decide whether they were satisfied with compensation for the actual cash value of the home or whether they were going to commence repairs or replacement of the home costing more than the actual cash value immediately provided by defendant. The fire, or "loss," occurred on January 20, 2006, and plaintiffs sent defendant a letter dated July 5, 2006, providing that "[i]n order to meet the requirements of our policy we are notifying you that we are making claim for all dollars above 'Actual Cash Value' that is owed to us on both personal property and the structure." There is no dispute that defendant received the letter prior to July 19, 2006, which was 180 days after the loss. We, therefore, conclude that plaintiffs provided proper notice of their claim for additional coverage and defendant breached the parties' contract in failing to provide the additional coverage.

¶27 Contrary to defendant's argument, the insurance policy did not contain language requiring that the repairs or, in this case, replacement of the home be completed within 180 days of the loss in order to be entitled to the additional coverage provided by the policy. The 180 day time constraint limited plaintiffs' time frame for making a claim only. Defendant's interpretation adds limiting language not provided by the policy itself. In fact, the insurance policy provided that "no more than the actual cash value of the damage [will be paid] until actual repair or replacement is completed." Plaintiffs do not contest that the home replacement had to be completed prior to recovering the additional coverage. The only other limiting language in the challenged clause is that the "further claim" was "subject to all conditions." Defendant has not provided conditional language

within the policy subjecting plaintiffs to a 180-day time period in which to complete the replacement of the home.

¶28 We conclude that summary judgment was proper.

¶29 II. Cross-Appeal

¶30 A. Insurer Bad Faith and Breach of Duty of Good Faith and Fair Dealing Claim

¶31 In their cross-appeal, plaintiffs contend the trial court erred in dismissing their claim for insurer bad faith and breach of defendant's duty to act in good faith and fair dealing. Defendant responds that the claim was dismissed properly where there is no tort for bad faith recognized in Illinois.

¶32 Defendant briefly argues that plaintiffs failed to file a timely notice of appeal of the trial court's dismissal of this claim. On September 25, 2013, the trial court dismissed with prejudice plaintiffs' claim for insurer bad faith and breach of the duty of good faith and fair dealing. On December 4, 2013, the trial court denied plaintiffs' request for an Illinois Supreme Court Rule 304(a) finding. IL S. Ct. R. 304(a) (eff. Feb. 26, 2010). Because no final judgment had been entered at the time, plaintiffs could not appeal the finding related to the insurer bad faith claim absent a Rule 304(a) finding. Therefore, plaintiffs' notice of appeal at the conclusion of trial was timely. See IL S. Ct. R. 303(a) (eff. June 4, 2008).

¶33 Turning to the substance of the contention, in *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996), our supreme court provided a thorough analysis of the contractual covenant of good faith and fair dealing and the attempt to use it to establish an independent tort. The contractual covenant of good faith and fair dealing generally is not recognized as an independent source of duties giving rise to a tort action. *Id*. at 524.

However, its use to establish an independent tort has arisen from cases involving the "duty to settle," wherein a liability insurer has assumed a policyholder's defense under the policy and is negotiating a settlement with a third party. *Id.* Typically, the circumstances involve a lawsuit from a third party against the policyholder for an amount in excess of the policy limits and the insurer ignores the policyholder's interest by declining a settlement below the policy limits offered by the third party. *Id*. at 524-25. "This court has recognized that the insurer has a duty to act in good faith in responding to settlement offers." *Id*. at 525. In such a case, the policyholder with excess liability as a result of his insurer's wrongful refusal to settle with the third party has no contractual or statutory remedy. As a result, when an insurer breaches its duty by refusing to settle, the insurer may be liable for the full amount of judgment against the policyholder, regardless of policy limits. *Id*. at 526. Those facts do not apply to the case before us.

¶34 Here, the circumstances involve a first-party insurance benefit denial case between the insurer, defendant, and the insured, plaintiffs. The supreme court expressly has stated that the reasoning supporting an insurer's duty to act in good faith does not apply to first party claims where the insurer does not need a new cause action to protect him from insurer misconduct when an insurer refuses to pay because the insured has an explicit contractual remedy. *Id*. at 525. That said, the legislature has recognized the need for an extracontractual remedy and enacted section 155 of the Insurance Code, which provides a remedy to insureds for insurer misconduct that does not rise to the level of a well-established tort. *Id*. at 526. We recognize that section 155 does not apply in this case because defendant is a farm mutual company. In fact, pursuant to section 15 of the Farm Insurance Act, "[c]ompanies subject to this Act shall be subject to the provisions of

Article X (Merger) and Article XXV of the Illinois Insurance Code but shall not be subject to any other provisions of the Illinois Insurance Code unless specifically enumerated therein." 215 ILCS 120/15 (West 2004).

¶35 Plaintiffs, therefore, argue that they have no extracontractual remedy if this court does not recognize a bad-faith tort action. "It is plaintiff's burden, in urging this court to create new right of action or expand existing ones, to persuade the court of the need for such new or expanded rights." *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 39 (1994). We are not persuaded. We find the reasoning provided in *Cramer* to be sound. The supreme court stated:

> "To allow a bad-faith action would transform many breach of contract actions into independent tort actions. [Citation.] A duty of good faith and fair dealing would be tortiously violated whenever one party takes an action designed to deprive the other of the benefits of the agreement. A bad-faith action would encourage plaintiffs to sue in tort, and not breach of contract, to avoid suit limitation clauses ***." *Cramer*, 174 Ill. 2d at 527.

We decline to recognize a new common law tort even in the circumstances presented here.

¶36 Relying on *Cramer*, the supreme court has further found "irrespective of a statutory remedy, the existence of a contractual remedy would have made the tort theory unnecessary." *Voyles v. Sandia Mortgage Corp.*, 196 Ill. 2d 288, 297 (2001). In this case, a separate tort claim is not necessary and is inapplicable because plaintiffs pursued

a contractual remedy. See *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 169 (2004).

¶37 We conclude that plaintiffs' claim was dismissed properly.

¶38 B. Consumer Fraud Act Claim

¶39 In their cross-appeal, plaintiffs additionally contend the trial court erred in entering judgment against them and in favor of defendant on their claim alleging deceptive practices in violation of the Consumer Fraud Act.

¶40 To successfully present a deceptive practices claim under the Consumer Fraud Act, a plaintiff must prove: (1) a deceptive act or practice by the defendant; (2) the defendant intended that the plaintiff rely on the deception; (3) the occurrence of the deception in a course of conduct involving trade or commerce; and (4) actual damage to the plaintiff resulting from the deception. *Nava v. Sears, Roebuck and Co.*, 2013 IL App (1st) 122063, ¶ 20. Because the trial court determined that plaintiffs failed to sustain their burden in establishing a deceptive practices claim following trial, we will not disturb the trial court's finding unless it is manifestly erroneous. See *Breckenridge v. Cambridge Homes, Inc.*, 246 Ill. App. 3d 810, 822 (1993).

¶41 Plaintiffs argue that defendant failed to disclose to its insureds and prospective insureds that it is organized as a farm mutual insurance company and, therefore, is not subject to the Insurance Act. In fact, plaintiffs argue that defendant deliberately misled insureds by notifying them that it complied with portions of the Insurance Act and that it was subject to the oversight of the Illinois Department of Insurance when defendant was not subject to either.

¶42 Even assuming, *arguendo*, plaintiffs can establish the other elements of a deceptive practices claim under the Consumer Fraud Act, we conclude that plaintiffs failed to establish damages caused by the alleged deception. "In order to establish this causative link, a plaintiff must show that he was actually deceived by the defendant's deception and that the deception proximately caused his damages." *Nava*, 2013 IL App (1st) 122063, ¶ 21. In this case, plaintiffs failed to demonstrate they were actually deceived by defendant's misleading information regarding the Insurance Act and the Illinois Department of Insurance and failed to demonstrate that the deception proximately caused their damages. We, therefore, do not find the trial court committed manifest error in entering judgment against plaintiffs and in favor of defendant on their deceptive practices claim.

¶43 C. Prejudgment Interest

¶44 Finally, in their cross-appeal, plaintiffs contend the trial court erred in refusing to grant prejudgment interest for their breach of contract award.

¶45 Whether an award of prejudgment interest is appropriate is a decision within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Lyon Metal Products, L.L.C. v. Protection Mutual Insurance Co.*, 321 Ill. App. 3d 330, 348 (2001).

¶46 Section 2 of the Interest Act provides, in relevant part, that "[c]reditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any *** instrument of writing." 815 ILCS 205/2 (West 2004). An insurance policy qualifies as an instrument of writing within the statute. *Lyon Metal Products, L.L.C.*, 321 Ill. App. 3d at 348. To recover prejudgment interest, "the sum due

must be liquidated or subject to an easy determination by calculation or computation." *Id.*

¶47 We conclude that the trial court did not abuse its discretion in denying prejudgment interest in this case, especially where plaintiffs had abandoned their claim for prejudgment interest. As noted by the trial court, plaintiffs' fifth amended complaint and "amended" fifth amended complaint did not contain requests for prejudgment interest. The record reveals that plaintiffs last requested prejudgment interest in their fourth amended complaint. The claim for prejudgment interest was struck and dismissed, and plaintiff was granted leave to file a fifth amended complaint. "When certain of plaintiff's claims are dismissed, and plaintiff subsequently files an amended complaint that does not refer to or incorporate those claims, plaintiff has abandoned those claims and may not raise them on appeal." *Folta v. Ferro Engineering*, 2014 IL App (1st) 123219, ¶ 17. Plaintiff cannot raise his abandoned claim here.

¶48 CONCLUSION

¶49 We affirm the judgment of the trial court.

¶50 Affirmed.