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2015 IL App (3d) 140524-U

Order filed July 10, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

TRINITY DINKINS,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellant,)	Kankakee County, Illinois.
)	
v.)	Appeal No. 3-14-0524
)	Circuit No. 12-SC-2187
DIRECT AUTO INSURANCE COMPANY,)	
)	Honorable
Defendant-Appellee)	Kenneth Leshen
)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in granting defendant insurance company's motion to dismiss complaint for breach of contract and declaratory judgment.

¶ 2 Plaintiff Trinity Dinkins brought an amended complaint against defendant Direct Auto Insurance Company, alleging breach of contract and seeking a declaration that she had coverage under a Direct Auto automobile policy for an October 2012 accident. Direct Auto moved to

dismiss, arguing that Dinkins made material misrepresentations on her application for insurance, which caused the policy to be null and void. She appealed. We affirm.

¶ 3

FACTS

¶ 4

On October 3, 2012, plaintiff Trinity Dinkins was involved in a motor vehicle accident. At that time, Dinkins had an automobile insurance policy issued by defendant Direct Auto Insurance Company. On October 15, 2012, Direct Auto informed Dinkins by mail that it rescinded her policy and that her loss was not covered. Direct Auto refunded Dinkins's premium payments. The reason Direct Auto provided for the rescission was an alleged material misrepresentation on the application for insurance. Dinkins filed a complaint against Direct Auto, alleging breach of the contract of insurance. Attached to the complaint were a copy of the insurance policy and letters from Direct Auto denying Dinkins's claim and rescinding her policy.

¶ 5

Direct Auto filed a motion to dismiss. It argued that Dinkins failed to disclose on her application for insurance that James Wilcox lived in the residence; he was over 15 years of age; he had revoked license and was an unacceptable risk. On the application, Dinkins answered that she had listed "all residents of household 15 years and older and all permit or other operators" listed on the application. The only person she listed was herself. Following a hearing, the trial court denied Direct Auto's motion to dismiss without prejudice.

¶ 6

Dinkins filed an amended complaint, asserting breach of contract and adding a declaratory judgment count. She attached the insurance policy and the letters denying coverage and rescinding the policy. Direct Auto again responded with a motion to dismiss, to which it attached Dinkins's application for insurance and the insurance policy. Also attached was the affidavit of Direct Auto claims manager Michael Torello. He averred that Dinkins failed to disclose that Wilcox was a resident of the household over age 15; that Wilcox had a revoked

driver's license and was an unacceptable risk at the time Dinkins applied for the policy; and that Dinkins's omission of Wilcox on the policy application caused the policy to be rescinded and the premiums returned. A claims notification dated November 2, 2012, was also attached to the motion to dismiss and provided that the policy was null and void as a result of Dinkins's material misrepresentation in failing to disclose James Wilcox, a household member over the age of 15 with a revoked driver's license. It further stated that any misrepresentation on the application caused the policy to be null and void, and negated coverage for any loss.

¶ 7 Dinkins did not file a response to the motion to dismiss. A hearing took place on the motion. The trial court emphasized Dinkins had not responded to the motion and that Direct Auto's supporting affidavit remained unconverted by Dinkins. The trial court dismissed Dinkins's complaint with prejudice. She appealed.

¶ 8 ANALYSIS

¶ 9 The issue on appeal is whether the trial court erred when it granted Direct Auto's motion to dismiss Dinkins's complaint. She argues dismissal was in error because Direct Auto's supporting affidavit was insufficient and failed to comply with Illinois Supreme Court Rule 191. Although Direct Auto did not file a response brief on appeal, the record is simple, the issue on appeal is such that we can decide it without the aid of the appellee's brief, and we will determine the merits of the appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 10 A motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)) admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Where the affirmative matter is not clear on the face of the complaint, the

motion to dismiss must be support by affidavit. *Harris v. Vitale*, 2014 IL App (1st) 123514, § 23. If the defendant satisfies the initial burden of proof on the motion to dismiss, the burden shifts to the plaintiff to show the defense is unfounded or requires an essential element of material fact be resolved before it is proven. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 353 (2010). In order to refute evidentiary facts in a defendant's affidavit, the plaintiff must file a counteraffidavit. *Piser*, 405 Ill. App. 3d at 353. Where the supporting affidavit is not challenged or contradicted by counteraffidavit or other means, the facts in the affidavit are deemed admitted. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). In a non-jury case, the trial court may determine the facts based on the uncontroverted affidavit. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892 (2005).

¶ 11 Affidavits filed in support of a section 2-619 motion must comply with the affidavit requirements in Illinois Supreme Court Rule 191. *Piser*, 405 Ill. App. 3d at 349. A failure to comply with Supreme Court Rule 191 requirements is not necessarily fatal to a motion to dismiss where the plaintiff has not contradicted anything in the affidavit. *Beattie v. Lindelof*, 262 Ill. App. 3d 372, 382 (1994). However, a plaintiff's failure to challenge a defendant's affidavit is fatal to the complaint. *Piser*, 405 Ill. App. 3d at 352. A trial court's grant of a motion to dismiss is proper where the plaintiff did not refute the affidavit. *Hollingshead v. A.G. Edwards & Son, Inc.*, 396 Ill. App. 3d 1095, 1101-02 (2009). We review a section 2-619 dismissal *de novo*. *DeLuna*, 223 Ill. 2d at 59.

¶ 12 On appeal, Dinkins maintains the affidavit in support of Direct Auto's motion to dismiss was insufficient in that it did not comply with Rule 191 and the trial court improperly accepted it. The affidavit filed by Direct Auto was uncontradicted by Dinkins. The trial court was therefore

required to accept the statements in the affidavit as true. In the affidavit, Direct Auto claims manager Torello averred that Dinkins failed to disclose on the application for insurance that James Wilcox was a resident of the household over the age of 15; that he had a revoked driver's license and was an unacceptable risk; and that the omission of Wilcox on the application caused the policy to be rescinded and the premiums returned to Dinkins. The trial court granted Direct Auto's motion to dismiss due, in part, to Dinkins's failure to file either a response opposing the motion to dismiss, a counteraffidavit refuting Direct Auto's claims in the affidavit, or a motion to strike the affidavit. Because the affidavit remained uncontroverted, the trial court was required to take its allegations as true, whether or not the affidavit complied with the rule requirements.

¶ 13 We find that the trial court's grant of Direct Auto's motion to dismiss Dinkins's complaint was not error. The automobile policy provided that misrepresentations in the application for insurance negates coverage and serves to make the policy "null and void and or no benefit whatsoever from the effective date of change." Torello's affidavit asserted that Dinkins made a material misrepresentation on her insurance application, which is grounds for rescission under the policy. The facts in the affidavit were unrefuted. Because the motion to dismiss and the documents in support of it set forth affirmative matter defeating Dinkins's complaint for breach of contract and for a declaratory judgment, the trial court properly dismissed the complaint.

¶ 14 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 15 Affirmed.