2018 IL App (1st) 17-1301-U

THIRD DIVISION
March 28, 2018

No. 1-17-1301

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOHN PATRICK, JR.,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	County Department, Chancery
v.	)	Division.
	)	
ALLSTATE INSURANCE CO.,	)	No. 16 CH 10755
	)	
Defendant-Appellee.	)	The Honorable
	)	Thomas R. Allen,
	)	Judge Presiding.
	)	
	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted the defendant's section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2016)) on the basis of the forum selection clause in the parties' contract, which unambiguously required the plaintiff to bring his cause of action either in Michigan or Indiana.

¶ 2 This cause of action arises from an automobile accident that occurred in Indiana. At the time of the accident, the vehicle driven by the plaintiff, John Patrick Jr., was covered by an insurance policy issued by the defendant insurer, Allstate Insurance Company (Allstate), to the plaintiff's

grandmother in Michigan. After the accident, the plaintiff filed a complaint in Illinois seeking a declaration that the defendant was responsible for all of his medical bills arising from the accident and for alleged breach of contract and extra-contractual damages pursuant to section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2016)). The defendant filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code of Civil Procedure) (735 ILCS 5/2-619 (West 2016)), contending that the circuit court lacked jurisdiction to consider the complaint because under the forum-selection clause of the subject insurance policy the action could be brought only in Michigan or Indiana. The trial court agreed and granted the defendant's motion. The plaintiff now appeals contending that the forum selection clause should not have been enforced because: (1) all of his medical providers were located in Illinois and their inability to travel to Michigan effectively denied him his day in court and (2) because the clause was ambiguous, and therefore should have been construed against the defendant. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following relevant facts and procedural history. The defendant insurer is in the business of selling, *inter alia*, automobile insurance policies, and maintains its "home office" in Northbrook, Illinois.

¶ 5 On March 9, 2014, the defendant issued an automobile insurance policy (policy) to the plaintiff's grandmother, Marjorie Cybart (Cybart). The policy was issued in the state of Michigan to Cybart, who resided there, by a Michigan-based agent of the defendant. The policy covered Cybart's 2005 Buick Century (insured vehicle) for the period between March 9, 2014, through March 9, 2015, and listed Cybart as the sole "named insured." The policy named both

Cybart and the plaintiff as permissive "drivers." On appeal, the plaintiff concedes that he is a resident of Wisconsin.

¶ 6 The policy itself, is divided into nine sections: (1) a "General" section defining the parties' obligations and responsibilities to each other and with respect to the entire policy; and (2) eight sections detailing specific types of coverage (including, "Automobile Liability Insurance," "Property Protection Coverage," "Personal Protection Insurance Benefits," "Motorcycle Medical Payments," "Automobile Death Indemnity Insurance," "Uninsured Motorists Insurance," "Underinsured Motorists Insurance," and "Protections Against Loss to the Auto."). Relevant to this appeal, the "General" section contains two provisions, which explicitly address where lawsuits arising from disagreements about the policy may be brought and what law will apply in such circumstances. Specifically, those sections state:

"**What Law Will Apply**

This policy is issued in accordance with the laws of Michigan and covers property or risks principally located in Michigan. Subject to the following paragraph, any and all claims or disputes in any way related to this policy shall be governed by the laws of Michigan.

If a covered loss to the auto, a covered auto accident, or any other occurrence for which coverage applies under this policy happens outside Michigan, claims or disputes regarding that covered loss to the auto, covered auto accident, or other covered occurrence may be governed by the laws of the jurisdiction in which that covered loss to the auto, covered auto accident, or other covered occurrence happened.

Where Lawsuits May be Brought

Subject to the following two paragraphs, any and all lawsuits in any way related to this policy, shall be brought, heard, and decided only in a state or federal court located in

Michigan. Any and all lawsuits against persons not parties to this policy but involved in the sale, administration, performance, or alleged breach of this policy, or involved in any other way with this policy, shall be brought, heard, and decided only in a state or federal court located in Michigan, provided that such persons are subject to or consent to suit in the courts specified in this paragraph.

If a covered loss to the auto, a covered auto accident, or any other occurrence for which coverage applies under this policy happens outside Michigan, lawsuits regarding that covered loss to the auto, covered auto accident, or other covered occurrence may also be brought in the judicial district where that covered loss to the auto, covered auto accident, or other covered occurrence happened.

Nothing in this provision, Where Lawsuits May be Brought, shall impair any party's right to remove a state court lawsuit to a federal court."

¶ 7 Also relevant to this appeal, part III of the policy, titled "Personal Protection Insurance Benefits," which details the defendant's responsibilities for medical expenses incurred by eligible "injured person[s]," states in pertinent part that any such benefits and payments are governed by "Chapter 31 of the Michigan Insurance Code." Part III further contains a provision titled "If We Cannot Agree," which provides that if the injured person and the defendant cannot agree on that person's right to receive allowable expenses for medical expenses, the matter may be submitted to arbitration, at the written request of the insured. It further provides that "[u]nless it is agreed otherwise, arbitration will be conducted *in the county in which the injured person resides*." (Emphasis added.)

¶ 8 On July 15, 2014, the plaintiff, who was driving the insured vehicle was involved in a

collision with a semi-truck in Chesterton, Indiana, and incurred serious injuries, which required medical care.

¶ 9 On August 16, 2016, the plaintiff filed the instant three-count action against the defendant alleging that under the insurance policy, the defendant was responsible for, but refused to pay, the medical expenses he incurred as a result of the automobile crash. The plaintiff alleged that shortly after the accident he began submitting his medical bills to the defendant, totaling $41,705.47, but that the defendant failed to pay them or provide any reason for non-payment. The plaintiff therefore alleged: (1) breach of contract; and (2) bad faith by the defendant in violation of section 155 of the Insurance Code (215 ILCS 5/155 (West 2016)). In addition, he sought a declaration that the defendant was responsible for his medical bills.

¶ 10 On November 2, 2016, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to section 2-619(a) of the Code of Civil Procedure (735 ILCS 5/2-619(a) (West 2016)) arguing that the trial court lacked jurisdiction to hear the cause because under the plain language of the policy's forum selection clause, the plaintiff could not bring his lawsuit in Illinois, but rather had to file either in Michigan or Indiana. In support, the defendant attached one of its sample automobile insurance policies, containing the aforementioned forum selection and choice-of-law provisions.

¶ 11 On November 3, 2016, the plaintiff filed his response to the motion to dismiss arguing that because he is not a "party" to the policy, but merely a permissive driver of the insured vehicle, under the policy's forum selection clause he would need to provide consent to have his case heard in Michigan. The plaintiff contended that he never provided such consent and in support attached a declaration dated November 2, 2016, stating that he does not consent to having the complaint's allegations heard in Michigan or any state other than Illinois.

¶ 12 The plaintiff subsequently filed a supplemental response to the motion to dismiss, further arguing that in its motion to dismiss the defendant had relied upon a "sample policy," rather than an actual certified copy of the policy in question, and that the trial court should therefore not consider that document.

¶ 13 On November 14, 2016, the defendant filed a reply in support of its motion to dismiss and attached a certified copy of the actual insurance policy issued to Cybart.

¶ 14 On November 17, 2016, the trial court held a hearing on the motion to dismiss, after which it granted the defendant's motion with prejudice, "on jurisdictional grounds, as more fully explained in the court reported record." In its order, the court explicitly noted the name and contact phone number of the court reporter, who made the transcript of the proceedings. That transcript, however, is not part of the record on appeal.

¶ 15 On December 16, 2016, the plaintiff filed a motion to reconsider, for the first time arguing that the forum selection clause is ambiguous and unenforceable under both Illinois and Michigan laws. The trial court denied the plaintiff's motion to reconsider. A transcript of the motion to reconsider hearing is also not part of the record on appeal. The plaintiff now appeals from the dismissal of his complaint.

¶ 16 II. ANALYSIS

¶ 17 At the outset, we note that a section 2-619 motion to dismiss admits the legal sufficiency of the claim but asserts certain defects or defenses outside the pleading that defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31; 735 ILCS 5/2-619 (West 2016). Specifically, section 2–619(a)(9) permits involuntary dismissal where the claim is barred by "other affirmative matter." 735 ILCS 5/2–619(a)(9) (West 2016). When ruling on such a motion, a court must accept as true all well-pleaded facts, as well as any reasonable inferences

that may arise therefrom, and view all pleadings and supporting documents in the light most favorable to the nonmoving party. *Patrick Engineering*, 2012 IL 113148, ¶ 31. The court need not, however, admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts. *Better Government Association v. Illinois High School Association*, 2017 IL 121124, ¶ 21; see also *Patrick Engineering*, 2012 IL 113148, ¶ 31. Our review of the trial court's ruling on a section 2-619 motion to dismiss is *de novo*. *Patrick Engineering*, 2012 IL 113148, ¶ 31.

¶ 18 On appeal, the plaintiff contends that the trial court erred in dismissing his cause of action on the basis of the forum selection clause in the insurance policy, without weighing the appropriate factors required both under Michigan and Illinois law to determine the reasonableness of such a clause. Alternatively, the plaintiff contends that the forum selection clause is ambiguous and should have been construed against the defendant.

¶ 19 The defendant, on the other hand, asserts that the plaintiff has forfeited this issue for purposes of appeal, because he never made this argument at the motion to dismiss stage, but waited until his motion to reconsider to raise this argument. The defendant further contends that because the plaintiff has failed to attach a transcript of the hearing on either the motion to dismiss or the motion to reconsider, under our supreme court's decision in *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), we must presume that the trial court's decision was proper.

¶ 20 In the alternative, the defendant contends that the plaintiff's claims are without merit because the plain language of the insurance policy is clear and unambiguous and was properly enforced. For the reasons that follow, we agree.

¶ 21 While the defendant is correct that generally " 'arguments raised for the first time in a motion

for reconsideration in the circuit court are waived on appeal' " (*Bank of America N.A. v. Ebro Foods Inc.*, 409 Ill. App. 3d 704, 709 (2011) (quoting *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008); see also *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 13)), waiver, is an admonition on the parties and not a limitation on the jurisdiction of this court. *Erbo Court*, 409 Ill. App. 3d at 709 (quoting *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 152 (2004).

¶ 22 Turning to the merits of the plaintiff's claim, at the outset we note that both Michigan, where the contract was entered into, and Illinois, where the plaintiff has filed his claim, generally enforce forum selection clauses, in recognition of the parties' freedom to contract. See *Hansen Family Trust v. FGH Indus., LLC*, 279 Mich. App. 468 479 (2008); see also *Fabian v. BGC Holdings LP*, 2014 IL App (1st) 141576, ¶ 16.

¶ 23 Under Michigan law, courts will enforce contractual forum-selection clauses as written, unless one of a number of statutorily enumerated exceptions applies. See *Hansen Family Trust*, 279 Mich. App. at 479. These exceptions include:

"(a) The court is required by statute to entertain the action;

(b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action;

(c) The other state would be a substantially less convenient place for the trial of the action than this state;

(d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means;

(e) It would for some other reason be unfair or unreasonable to enforce the agreement."

MCL 600.745(3)(a)-(e) (West 2014).

In Michigan, the party seeking to avoid a contractual forum-selection clause bears a "heavy burden" of showing that the clause should not be enforced by proving that one of the aforementioned statutory exceptions applies. *Hansen Family Trust*, 279 Mich. App. at 479-80.

¶ 24 In Illinois, the standard for enforcing forum-selection clauses is similar. In our state, a a forum-selection clause in a contract is *prima facie* valid, and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances such that the selected forum " 'will be so gravely difficult and inconvenient that [the opposing party] will for all practical purposes be deprived of [its] day in court.' " *Calanca v. D & S Manufacturing Co*., 157 Ill. App. 3d 85, 87–88 (1987) (quoting *M.S. Bremen v. Zapata Off–Shore Co*., 407 U.S. 1, 18, (1972)); see also *Fabian*, 2014 IL App (1st) 141576, ¶ 16 (citing *Yamada Corp. v. Yasuda Fire & Marine Insurance Co*., 305 Ill. App. 3d 362, 367 (1999)). In determining reasonableness, Illinois courts consider the following factors: (1) the law governing the formation and construction of the contract; (2) residency of the parties; (3) location of execution/performance of the contract; (4) location of the parties and witnesses; (5) the inconvenience to the parties of any particular location; and (6) whether the parties bargained for the clause. *Calanca*, 157 Ill. App. 3d at 88.

¶ 25 In the present case, the plaintiff argues that under exceptions (c) and (e) of the Michigan statute (MCL 600.745(3)(a)-(e) (West 2014), and the *Calanca* factors adopted by Illinois courts, it is clear that reasonableness is at the center of determining whether a forum selection clause is valid. The plaintiff asserts that the trial court erred in not weighing the *Calanca* factors, because if it had, it would necessarily have determined that Illinois was the proper forum. We disagree.

¶ 26 We initially note that we do not know whether the trial court considered the *Calanca* factors

in determining that the cause could not proceed in Illinois, because we are without the benefit of transcripts from either the hearing on the motion to dismiss or the motion to reconsider. See *Foutch*, 99 Ill. 2d at 391 (As the appellant, the plaintiff has the burden of presenting this court with a record sufficient to support his claims of error, and any doubts arising from an incomplete record must be construed against him). In its written order dismissing the plaintiff's complaint, the court justified the dismissal on "jurisdictional grounds, as more fully explained in the court reported record." Without a transcript of the proceedings below, or alternatively an agreed statement of facts (see Illinois Supreme Court Rule 323(d) (eff. Dec. 13, 2005), or a bystander's report, certified by the trial court (Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005), we are not at liberty to guess whether the trial court considered the *Calanca* factors, but must presume that it did.

¶ 27 Regardless, after applying those factors on appeal, and contrary to the plaintiff's position, we find that the record before us demonstrates that the forum selection clause was reasonable and therefore properly enforced. Aside from the sixth factor, which weighs in favor of the plaintiff since the insurance policy is a form contract, the remaining factors weigh heavily in favor of enforcing the forum selection clause.

¶ 28 With respect to the first and third factors, the insurance policy was executed in Michigan between Cybart, a Michigan resident, and a Michigan-based agent of the defendant. The insurance policy itself clearly states that it was "issued in accordance with" and is "governed by" Michigan law. In addition, part III of the policy, which governs medical payment benefits at issue in the plaintiff's underlying complaint, specifically states that such benefits are governed by "Chapter 31 of the Michigan Insurance Code."

¶ 29 The second factor similarly weighs against the plaintiff. The automobile collision that is the

subject of the plaintiff's complaint occurred in Indiana, and the plaintiff himself admits that he is a resident of Wisconsin. The only tie the plaintiff has to Illinois is that he allegedly received medical treatment in Illinois at some point after the collision.

¶ 30 With respect to the fourth and fifth factors, the plaintiff argues that the medical providers that treated him after the crash, all reside and are employed in Illinois. In making this argument, however, the plaintiff merely provides a bullet-pointed list of names for treatment facilities and the last names of purported treating physicians. He does not provide addresses, or affidavits of himself or any of these witnesses explaining or attesting to the fact that Michigan and/or Indiana would somehow be inconvenient forums. As such the plaintiff's argument is devoid of any details necessary to meet his heavy burden of overcoming the presumption of the clause's validity. *Better Government Association v. Illinois High School Association*, 2017 IL 121124, ¶ 21 ("A motion to dismiss under 2-619 admits well-pleaded facts, but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts."); see also *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 31 Accordingly, we find no error in the trial court's decision to enforce the policy's forum selection clause. That clause clearly and plainly provides that any lawsuits arising from the policy must be brought either in Michigan, the state where the policy was issued and the insurance contract entered into, or in Indiana, where the subject auto collision occurred.

¶ 32 In a last ditch attempt to circumvent the forum selection clause, the plaintiff, nonetheless, argues that the forum selection clause is ambiguous, because it conflicts with a separate and distinct provision in another section of the policy. Specifically, the plaintiff cites to provision "If We Cannot Agree" in part VI of the policy, titled "Uninsured Motorists Insurance" coverage, which states that if the parties cannot agree on the right to receive damages or the amount of

damages, then "the disagreement will be resolved in a court of competent jurisdiction." The plaintiff contends that this section conflicts with the forum selection clause and that the policy should therefore be construed against the defendant and in favor of Illinois as the proper forum.

¶ 33 The plaintiff's argument, however, fails to appreciate that apart from the general provisions, which apply to the entirety of the policy and contain the forum selection clause, the policy is divided into eight sections which are limited in application to the various types of coverage an insured may need. Each of these eight sections is separate and distinct from another and contains the terms and conditions which are applicable only to the specific type of coverage contained in that section, and that section alone. Here, the clause cited to by the plaintiff is in a section clearly marked "Uninsured Motorists Insurance," which has no relation, much less any relevance and or application, to the plaintiff's complaint regarding medical expenses incurred while driving the fully insured automobile. See *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005) (An insurance policy is a contract governed by the general rules of contract interpretation); *Rich v. Principal Life Ins. Co.*, 226 Ill. 2d 359, 371 (2007) ("Because the court must assume that every provision was intended to serve a purpose, an insurance policy is to be construed as a whole, giving effect to every provision [citation] and taking into account the type of insurance provided, the nature of the risks involved, and the overall purpose of the contract.") In fact, part III of the insurance policy, titled "Personal Protection Insurance Benefits," which governs the payment of medical expenses for an injured person using an insured automobile, contains its own "If We Cannot Agree" provision, which explicitly permits the parties to avoid litigation in the chosen forum, by participating in arbitration, but only "in the county in which the insured person resides." Since the plaintiff resides in Wisconsin, the plain language of the forum selection clause unambiguously required that the plaintiff file his cause of action either in

Michigan, where the contract was made, or in Indiana, where the collision occurred, or alternatively that he request arbitration in the Wisconsin county in which he resides. As such, the trial court properly enforced the forum selection clause and dismissed the plaintiff's complaint. *Piser v. State Farm Mut. Auto Ins., Co*. 405 Ill. App. 3d 341, 346 (2010) (Where the policy provisions are clear and unambiguous we will enforce them according to their plain meaning.).

¶ 34 III. CONCLUSION

¶ 35 For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 36 Affirmed.