2018 IL App (1st) 172526-U

FOURTH DIVISION
December 20, 2018

No. 1-17-2526

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
ORCHARD PARK PLAZA, LLC,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2014 CH 017836
	)	
CHUBB CUSTOM INSURANCE COMPANY,	)	
	)	Honorable
Defendant-Appellee.	)	Diane J. Larsen,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County (i) dismissing plaintiff-insured's claims for breach of contract, bad faith under section 155 of the Insurance Code, and negligent misrepresentation, and (ii) granting summary judgment in favor of the defendant-insurer on reformation and declaratory judgment counts.

¶ 2 Plaintiff-insured Orchard Park Plaza, LLC (Orchard) filed an action in the circuit court of Cook County after defendant-insurer Chubb Custom Insurance Company (Chubb) denied a property damage claim submitted by Orchard. The circuit court granted Chubb's motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West

2014)) with prejudice Orchard's claims for breach of contract, bad faith under section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)), and negligent misrepresentation. The parties subsequently filed cross-motions for summary judgment, and the circuit court granted summary judgment in favor of Chubb on Orchard's claims for reformation and declaratory judgment. On appeal, Orchard challenges the dismissal and summary judgment rulings. For the reasons discussed below, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Orchard owns commercial property located on Orchard Drive in Park Forest, Illinois (property). Matanky Realty Group is the leasing agent and management agent for Orchard. Attorney Robert Matanky (Robert) is one of the four members of Orchard. Robert's mother, Gertrude Matanky (Trude), is responsible for the procurement of insurance policies for the properties managed by Matanky Realty Group.

¶ 5 When Orchard sought to obtain new insurance coverage for the property in March 2012, Orchard and Chubb negotiated through intermediaries. During the negotiations, the Matanky Realty Group was represented by Euclid Insurance Agency, a/k/a USI Company (Euclid), a retail insurance broker. Kevin Walker (Walker) from Euclid coordinated with Theodore Cornell (Cornell) at R-T Specialty of Illinois (RTS), a wholesale broker. Cornell contacted WKF&C Agency, Inc. (WKF&C), an underwriter for Chubb and other insurers.

¶ 6 On March 14, 2012, Roberta Kipp (Kipp) of WKF&C submitted a new business quote for a Chubb policy to Cornell at RTS. As noted in Kipp's cover email, the proposed policy excluded theft coverage. On March 20, 2012, Cornell responded, in part, "we need the following to bind: *** [c]onfirm theft will be included with a CS Alarm (they are putting one in)." A "CS Alarm" refers to a central station alarm, discussed further below. Shortly thereafter, Kipp transmitted a

revised quote to Cornell. Her cover email stated, in part, that "we can include theft once a central station alarm has been installed and confirmed active either with service contract or inspection." Cornell then forwarded the revised quote to Walker at Euclid. Cornell's cover email stated, in part: "Theft will be added with confirmation of an active Central Station alarm. ([N]ote that the theft deductible may be slightly higher when added. Likely $10,000)." When Walker sent the revised quote to Trude, he copied the foregoing language from Cornell's cover email.

¶ 7 After successfully requesting a reduction in the premium, Cornell directed Kipp to bind the Chubb policy on March 23, 2012. The one-year policy was issued with a theft exclusion. During the negotiations of the insurance contract Chubb and Orchard never directly communicated.

¶ 8 The property was damaged and substantial amounts of copper cables and tubing were cut out of the walls during a break-in on October 15, 2012. Although Robert did not know the exact installation date, he testified during his deposition that an alarm system was operational at the property before September 27, 2012. According to Robert, the alarm system was set up with an automatic dialer. If the alarm was triggered, it would automatically dial the property manager, Gary Miller (Miller), as well as Matanky Realty Group and the Park Forest police department. Robert testified that the alarm was not functioning at the time of the burglary because the electric utility company had caused a power outage and the backup battery was drained.

¶ 9 After Orchard submitted a claim for the loss, Chubb requested information regarding which company monitored the alarm system at the property. In an email to Walker, Robert stated that the alarm was not monitored "since it was set up with a direct dialer to property management and the police." Robert provided, among other things, a proposal from Electrical

Voice Data & Fire Alarm Systems Industries (EVDFI), dated December 5, 2011, which Robert had signed and accepted as Orchard's agent. Under the proposal, EVDFI was to provide all labor and materials to install a wireless alarm system at the property at a cost of $1,800. Robert also provided Walker with a copy of the cancelled check to an EVDFI affiliate and a copy of an AT&T bill for the cellular telephone chip for the automatic dialer.

¶ 10 Chubb denied Orchard's claim based on the theft exclusion in the policy, and Orchard subsequently filed an action in the circuit court of Cook County against Chubb. The operative complaint for purposes of this appeal – the second amended complaint filed on July 16, 2015 – alleged that Orchard was damaged by Chubb's refusal to provide coverage for the theft loss at the property, as it had purportedly promised to do if Orchard installed a central station alarm system. The second amended complaint included seven counts: breach of contract (count I); bad faith under section 155 of the Insurance Code (count II); negligent misrepresentation (count III); fraud (count IV); violation of the Illinois Consumer Fraud Act (count V); reformation (count VI); and declaratory judgment (count VII). In the declaratory judgment count, Orchard sought an order declaring that the alarm system installed at the property is a central station alarm system or, alternatively, that the term central station alarm system is ambiguous and should be interpreted in favor of Orchard, as the insured.

¶ 11 Chubb filed a combined motion to dismiss counts I through V of the second amended complaint pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619(a)(9) (West 2014)). The circuit court in an order entered on December 2, 2015, dismissed counts I, II and III with prejudice. The order further stated that Orchard voluntarily dismissed counts IV and V.

¶ 12 Orchard and Chubb each filed motions for summary judgment on the remaining counts of

the second amended complaint, *i.e.*, the reformation and declaratory judgment counts (counts VI and VII). Orchard contended, in part, that the Chubb policy as issued did not reflect the parties' agreement that the policy would provide theft coverage to Orchard upon confirmation that an active central station alarm had been installed in the property. Orchard submitted, among other things, the affidavit of Kipp dated April 28, 2017. She averred, in part, that she had "agreed that, if and when [Orchard] could confirm that a working central station alarm system for the property insured had been obtained and installed, the endorsement containing the exclusion for theft would be deleted from the policy and coverage for theft provided." Chubb moved to strike portions of Kipp's affidavit, arguing that certain statements were not based on Kipp's personal knowledge and that other statements contained therein consisted of conclusions rather than fact, in violation of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). Chubb subsequently obtained a supplemental affidavit from Kipp, wherein she stated, in part: "Based on the March 20 email, I intended to convey to [RTS] that the theft exclusion could only be removed if [WKF&C] agreed to remove the theft exclusion, it issued an endorsement to that effect, and transmitted the endorsement to [Euclid] and then to [Orchard] if inspection or alarm certificate proofed [*sic*] adequate." The circuit court ultimately struck certain statements in Kipp's initial affidavit which were not based on her personal knowledge and denied the remainder of Chubb's motion to strike. Kipp's supplemental affidavit was appended to Chubb's memorandum in response to Orchard's motion for summary judgment.

¶ 13 After briefing on the parties' cross-motions, the circuit court granted Chubb's motion for summary judgment in an order entered on September 28, 2017. The circuit court found that the policy could only be amended by endorsement and that there was no request to remove the theft exclusion by endorsement. Orchard timely appealed.

¶ 14 ANALYSIS

¶ 15 Orchard challenges the denial of its motion for summary judgment and the grant of Chubb's motion for summary judgment on the reformation and declaratory judgment counts (counts VI and VII) of its second amended complaint. Orchard also challenges the dismissal with prejudice of its claims for breach of contract, bad faith under section 155 of the Insurance Code, and negligent misrepresentation (counts I, II, and III). We address its arguments in turn.

¶ 16 Summary Judgment for Chubb on Counts VI and VII

¶ 17 Orchard and Chubb filed cross-motions for summary judgment on the reformation and declaratory judgment counts of the second amended complaint. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of such cross-motions, however, does not establish that there is no genuine issue of material fact, nor does it obligate a court to render summary judgment. *Id.*

¶ 18 Section 2-1005 of the Code of Civil Procedure governs summary judgment motions. *Id.* ¶ 29; 735 ILCS 5/2-1005 (West 2016). Pursuant to section 2-1005, summary judgment should be granted only where the depositions, pleadings, admissions, and affidavits on file, when viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue of material fact and that the movant is clearly entitled to judgment as a matter of law. *Pielet*, 2012 IL 112064, ¶ 29. "Where a case is decided through summary judgment, our review is *de novo*." *Id.* ¶ 30.

¶ 19 Orchard seeks reformation of its insurance contract with Chubb. A court may reform a contract when the written agreement does not reflect the intent of the parties. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 29. To state a claim for reformation, a plaintiff must

allege: (1) the existence and substance of an agreement between the parties and the identity of the parties to the agreement; (2) that the parties agreed to reduce their agreement to writing; (3) the substance of the written agreement; (4) that a variance exists between the original agreement of the parties and the writing; and (5) the basis for reformation. *Id*. The reformation action is "to change the written instrument by inserting the omitted provision so that the instrument conforms to the original agreement between the parties." *Briarcliffe Lakeside Townhouse Owners Ass'n v. Wheaton*, 170 Ill. App. 3d 244, 251 (1988). The law of reformation applies to insurance policies. *Zannini v. Reliance Insurance Co. of Illinois*, 147 Ill. 2d 437, 450 (1992).

¶ 20 "The underlying basis for a reformation action is the existence of a mutual understanding between the parties which the parties agreed to reduce to writing, but in doing so, either through mutual mistake or mistake on one side coupled with fraud on the other, omitted some material provision." *Briarcliffe*, 170 Ill. App. 3d at 251. Although not entirely clear from its briefs, Orchard appears to contend that there was a mutual mistake in the instant case.

¶ 21 A mutual mistake is a "mistake common to both contracting parties wherein each labors under the same misconception; thus, when there is a mutual mistake, the parties are in actual agreement but the agreement in its written form does not express the parties' real intent." *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 391 (1992). "Before a court may reform a contract on the grounds of mutual mistake, the party seeking reformation must *prove* by clear and convincing evidence that (1) there was an agreement between the parties; (2) the parties agreed to put their agreement into writing; and (3) a variance exists between the parties' original agreement and the writing." (Emphasis in original.) *Briarcliffe*, 170 Ill. App. 3d at 251. See also *CitiMortgage*, 2016 IL App (2d) 150286, ¶ 32 (noting that a party must satisfy the elements

of a reformation claim by strong, clear, and convincing evidence). See also *National Ben Franklin Insurance Co. v. Davidovitch*, 123 Ill. App. 3d 88, 91 (1984) (providing that a mutual mistake must be clearly and convincingly proven because "[e]quity cautions *** that reformation if misapplied can lead to more damage than that caused by its denial"). When a mutual mistake is alleged, parol evidence is admissible to demonstrate the parties' true intent and understanding. *Johnson*, 237 Ill. App. 3d at 391.

¶ 22 The circuit court properly granted summary judgment in favor of Chubb because among other things, there was no meeting of the minds between Chubb and Orchard, *i.e.*, no agreement between the parties. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 872 (2008) (noting that when "there has been no meeting of the minds, there can be no reformation"). In her March 20, 2012, email to Ted Cornell at RTS, WKF&C employee Kipp wrote that "we can include theft once a central station alarm has been installed and confirmed active either with service contract or inspection." When Ted Cornell forwarded the revised quote from WKF&C to Euclid, he wrote, in part: "Theft will be added with confirmation of an active Central Station alarm. ([N]ote that the theft deductible may be slightly higher when added. Likely $10,000)." The Euclid employee copied Cornell's language when transmitting the revised quote to Trude.

¶ 23 As an initial matter, we note that Chubb does not challenge that it may be bound by the words of its underwriter, WKF&C. An insurer can speak only through its representatives. *Zannini*, 147 Ill. 2d at 456. The words of a representative who communicates with a potential insured are those of the insurer, and the insurer is bound by the representative's words. *Id.*

¶ 24 The language in Kipp's and Cornell's respective communications, however, reflects a fundamental disparity in their understandings, *i.e.*, no meeting of the minds. While Kipp stated that WKF&C "can" include theft coverage – suggesting discretion on the part the underwriter –

Cornell wrote that WKF&C "will" include such coverage – suggesting no discretion. Kipp indicated that coverage would require that a "central station alarm has been installed and confirmed active either with service contract or inspection." Cornell did not reference the service contract or inspection requirements. While Cornell stated that the theft deductible may be slightly higher "when added," there was no definitive consensus regarding the amount of any adjustment to the deductible (or presumably to the insurance premium). "In cases where reformation is appropriate, the mistake involved is in the expression of an agreement between parties whose minds have met." *Wheeler-Dealer*, 379 Ill. App. 3d at 872. The evidence herein is "far less than the clear and convincing evidence necessary to compel the determination that the policy did not properly reflect the true intention of the parties." *LaSalle National Bank of Chicago v. American Insurance Co.*, 14 Ill. App. 3d 1027, 1033 (1973). *E.g., Marriage of Johnson*, 237 Ill. App 3d at 392 (reformation of a marital settlement agreement was proper where the former husband testified that he had realized that the agreement read differently than what had been previously agreed upon but he chose to remain silent about the difference). See also *CitiMortgage*, 2016 IL App (2d) 150286, ¶ 32 (noting that there is a presumption that a written instrument conforms to the parties' intentions). Based on the communications between the parties, Orchard cannot prove an agreement by clear and convincing evidence and thus the elements of a reformation claim cannot be met. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005) (explaining that a "proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true," while clear and convincing evidence is a "higher standard of proof"); *Estate of Blakely v. Federal Kemper Life Assurance Co.*, 267 Ill. App. 3d 100, 107 (1994) (stating that "the standard of proof for a party seeking reformation of an insurance policy is one of clear and convincing

evidence, not a mere preponderance of the evidence").

¶ 25 Even assuming *arguendo* that the parties' intent was to remove the theft exclusion upon the fulfillment of certain conditions, Orchard nevertheless failed to satisfy what those conditions were and whether they were met. Although Orchard suggests in its opening brief that the policy should be reformed to state that "theft is excluded unless [Orchard] installs a central station alarm that is confirmed active," Orchard argues in its reply brief that the circuit court "should have reformed the policy to add the wording of Ms. Kipp's proposal to the policy's theft exclusion so as to have the policy reflect the parties' true agreement." As noted above, Kipp wrote that "we can include theft once a central station alarm has been installed and confirmed active either with service contract or inspection."

¶ 26 We initially observe that the alarm system installed at the property does not appear to have been a central station alarm because the hazard-detecting device installed at the property did not transmit a signal to a "central station." See *United States v. Grinnell Corp.*, 384 U.S. 563, 566-67 (1966). See also *Yerardi v. Pacific Indemnity Co.*, 436 F. Supp. 2d 223, 228 (D. Mass. 2006) (defining a central station alarm system as a "burglar or fire alarm system that is connected to a central station, which is alerted of a fire or break-in and notifies the proper authorities"); *American District Telegraph Co. v. Porterfield*, 283 N.E.2d 782, 782-83 (Ohio 1968) (distinguishing between ADT's three basics types of detection systems: (a) a local alarm, in which an alarm bell on the premises signals an intrusion; (b) a direct connect alarm, in which the alarm bell or signal device is located in a police or fire station; and (c) a central station alarm, in which the signal device is located in an ADT station and ADT continually checks the signal system and either contacts the authorities or sends out its own armed guards when an emergency signal is received). See also Michael H. Boyer & Barry Zalma, *Property Investigation*

Checklists: Uncovering Insurance Fraud, § 2:55 (May 2018 update) (distinguishing between local, police station monitored, proprietary and central station alarm systems; central station alarm systems are "monitored off premises by an alarm company"). The EVDFI proposal for the installation of a "wireless alarm system," which was accepted by Robert on behalf of Orchard, made no reference to a central station alarm. Robert acknowledged that the alarm at the property was "not monitored since it was set up with a direct dialer to property management and police." During his deposition, Miller – Orchard's property manager who was involved in the process of selecting the alarm system – testified that he had never heard of a central station alarm.

¶ 27 Even assuming that the alarm system qualified as a central station alarm, the other requirements articulated in the Kipp email were not satisfied. Kipp wrote that theft coverage could be included "once a central station alarm has been installed and confirmed active either with service contract or inspection." There is no indication in the record that there was any inspection of the alarm system. While the second amended complaint repeatedly alleged that Orchard "obtained a service contract," Robert testified during his deposition that neither Matanky Realty Group nor Orchard had any service contract related to the alarm system.

¶ 28 As to the requirement that the alarm system be "confirmed active," Robert testified that "confirmation" referred to "the plain meaning." He stated, "I made sure that I confirmed that the alarm system was, in fact, installed and active." Orchard argues on appeal that "[t]o the extent the word 'confirmed' does not have a commonly understood meaning, then any ambiguity in the term must be resolved against Chubb, both as the author of the language and as an insurer." We reject this contention. "While ambiguities in an insurance policy will be construed in favor of the insured, the mere absence of a definition does not necessarily render a policy term ambiguous, nor is an ambiguity created simply because the parties disagree about the meaning of

the policy language." *Milwaukee Guardian Insurance, Inc. v. Taraska*, 236 Ill. App. 3d 973, 974 (1992).

¶ 29 Simply put, Robert's interpretation of the confirmation requirement is unreasonable. Robert testified that Chubb was not informed that the alarm system had been installed prior to the loss. The notion that WKF&C and/or Chubb would provide additional coverage based on Robert's (or Miller's) independent knowledge and unilateral "confirmation" of the installation of the alarm system is neither a natural nor reasonable interpretation of the "confirmation" requirement. *Id.* at 975 (rejecting the defendant's "clearly unreasonable" interpretation of the territorial limitation provision in his automobile policy); *Benassi v. Cincinnati Insurance Co.*, 70 Ill. App. 3d 13, 15 (1979) (noting that the rule that insurance contracts are construed in favor of the insured "should not degenerate into a perversion of plain language to create an ambiguity where none exists or to father a contract obligation where none is stated or reasonably implied"). See also *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005) (providing that we will not "strain to find an ambiguity where none exists"). In the context of the policy and the parties' relationship herein, Kipp's statement regarding confirmation with a service contract or inspection implicitly required confirmation by or to Chubb and/or WKF&C, which was not done.

¶ 30 We also reject Orchard's contention that Kipp's "inconsistent" affidavits create a genuine issue of material fact, precluding summary judgment. Among other things, while Orchard contends that Kipp's initial affidavit was contradicted by her subsequent affidavit, Orchard did not even comply with the requirements as described in the initial affidavit, *e.g.*, the confirmation of a working central station alarm.

¶ 31 Orchard further asserts that the trial court granted Chubb's motion for summary judgment

"for one reason," *i.e.*, the court concluded that the policy could only be amended by endorsement and there was no request to remove the theft exclusion by endorsement.[1] Asserting that insurance policies are "classic" adhesion contracts, Orchard suggests that the language in the Chubb policy providing for amendment solely by endorsement "was part of the boilerplate language provided by Chubb over which [Orchard] had no say." Our supreme court has held, however, that the mere fact that an insurance policy may be a contract of adhesion does not render its provisions unenforceable. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 72-75 (2011).

¶ 32 Orchard also contends that, under Illinois law, parties to a written contract may alter or modify its terms by a subsequent oral agreement even if the contract itself precludes oral modification. *E.g.*, *Falcon, Ltd. v. Corr's Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 821 (1987). Accord *Tadros v. Kuzmak*, 277 Ill. App. 3d 301, 312 (1995). Orchard thus reasons that "it was possible for the Policy to be amended, even though the Policy stated that any changes needed to be in writing." We view this contention as conflating two different topics: the parameters for modification of an existing written agreement versus the fundamental issue in a reformation claim, *i.e.*, whether the written agreement reflected the parties' agreement in the first place. In any event, even if the circuit court's finding regarding modification solely by endorsement was the sole basis for its decision, we may affirm a circuit court's grant of summary judgment "on any basis apparent in the record, regardless of whether the circuit court relied on that basis or whether the court's reasoning was correct." *AMCO Insurance Co. v. Erie Insurance Exchange*, 2016 IL App (1st) 142660, ¶ 19. Accord *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 30. For the various reasons discussed above, we affirm the grant of Chubb's

[1] The policy provides that its terms can be amended or waived "only by endorsement issued by us and made a part of this policy."

motion for summary judgment and the denial of Orchard's motion with respect to Count VI (reformation) and Count VII (declaratory judgment) of the second amended complaint.

¶ 33 Dismissal of Counts I, II, and III

¶ 34 The circuit court granted Chubb's motion to dismiss Count I (breach of contract), Count II (bad faith under section 155 of the Insurance Code), and Count III (negligent misrepresentation) pursuant to section 2-619(a)(9) of the Code. Section 2-619(a)(9) allows for the dismissal of a claim on the ground that it "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). A motion to dismiss pursuant to section 2-619 "admits well-pleaded facts, but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts." *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 21. "In considering the dismissal under section 2-619(a)(9), our task is ultimately to consider whether 'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id.*, quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). We review a section 2-619 dismissal *de novo*. *Id.*

¶ 35 The Chubb policy, as written, included a theft exclusion. In its breach of contract count, Orchard did not allege a breach of the written policy. Orchard instead defined the "Agreement" which was allegedly breached as follows: "Based upon Chubb's agent's agreement that theft coverage would be provided by the policy and that the standard form policy with a theft exclusion would be modified so as to remove the theft exclusion if [Orchard] installed a central station alarm system (the 'Agreement'), [Orchard] agreed to purchase a policy on the Property from Chubb." The "Agreement" which was the subject of the breach of contract count was thus

the purported agreement of the parties *preceding* the written policy.

¶ 36 The written policy, however, included the following language: "This policy contains all the agreements between you and us concerning the insurance afforded." Orchard contends that this language – commonly referred to as an "integration" or "merger" provision – is unenforceable. The authority on which Orchard relies, however, is inapposite. For example, in *Colsant v. Goldschmidt*, 97 Ill. App. 3d 53 (1981), the court did not discuss any merger provision; rather, the *Colsant* court noted that a "purported waiver that is overbroad, too general and unspecific will not adequately put the buyer on notice that he is waiving his warranty of habitability." *Id.* at 56. Orchard also cites multiple federal cases interpreting Texas law, wherein the courts did not enforce merger clauses. *NetKnowledge Technologies, L.L.C. v. Rapid Transmit Technologies*, 2007 WL 518548 (N.D. Tex. Feb. 20, 2007); *Escopeta Oil & Gas Corp. v. Songa Management, Inc.*, 2007 WL 171721 (E.D. Tex. Jan. 17, 2007), *Nutrasep, LLC v. TOPC Texas LLC*, 2006 WL 3063432 (W.D. Tex. Oct. 27, 2006). Not only are these cases factually dissimilar and non-binding (see *Roby v. Illinois Founders Insurance Co.*, 57 Ill. App. 3d 89, 95 (1978)), but the Illinois Supreme Court has expressly upheld the validity of integration or merger provisions. *E.g.*, *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999) (providing that an "integration clause makes clear that the negotiations leading to the written contract *are not* the agreement" (emphasis in original)).

¶ 37 Orchard also contends on appeal that "[a]ssuming that [Orchard] prevails on its reformation claim, it should have a mechanism to enforce the contract as reformed." However, for the reasons discussed above, Orchard's reformation claim must fail. Furthermore, given that our appellate review is *de novo*, we are unpersuaded by Orchard's contention that it was improper for the circuit court to dismiss the breach of contract count while the reformation count

was pending. In sum, we affirm the dismissal of the breach of contract count (Count I) in Orchard's second amended complaint.

¶ 38 We reach the same conclusion with respect to Count II, which alleged bad faith by Chubb pursuant to section 155 of the Insurance Code. Section 155 "provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520 (1996). The section created a limited statutory exception to the rule that attorney fees and punitive damages are generally unavailable in breach of contract actions.[2]

¶ 39 Dismissal of Orchard's section 155 claim was proper because an insurer cannot be held liable for damages under section 155 if no coverage is owed under the policy. *E.g., Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 815 (2010) (stating that "[w]here the policy is not triggered, there can be no finding that the insurer acted vexatiously or unreasonably in denying the claim"); *American Family Mutual Insurance Co. v. Fisher Development, Inc.*, 391 Ill. App. 3d 521, 533 (2009) (same). As there is no coverage in the instant case for the reasons discussed herein, no section 155 claim can exist. *E.g., DeVore v. American Family Mutual Insurance Co.*, 383 Ill. App. 3d 266, 270 (2008) (concluding that "[b]ecause we have already determined that the trial court properly found that the loss caused by the mold was not covered by the American Family policy, we need not address the trial court's finding that American Family's refusal to pay for the mold remediation was not vexatious and unreasonable under

[2] Section 155(1) provides: "In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000; (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155(1) (West 2014).

section 155 of the Illinois Insurance Code").

¶ 40 The circuit court also granted Chubb's motion to dismiss the negligent misrepresentation count (Count III). "To state a claim for negligent misrepresentation, a plaintiff must allege: (1) a false statement of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage to the other party resulting from such reliance; and (6) a duty on the party making the statement to communicate accurate information." *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 334-35 (2006). Chubb contends that the economic loss doctrine articulated in *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982) – barring recovery in tort for purely contractual losses or frustrated economic expectations between contracting parties – precludes Orchard's recovery for any alleged negligent misrepresentation by Chubb. We agree.

¶ 41 Our supreme court in *Moorman* set forth three exceptions to the economic loss rule. *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 165 (1997). One of the exceptions applies "where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions." *Id*. As stated in *First Midwest Bank*, 218 Ill. 2d at 335, "[w]here, as here, purely economic damages are sought, this court has imposed a duty on a party to avoid negligently conveying false information only if the party is in the business of supplying information for the guidance of others in their business transactions."

¶ 42 The negligent misrepresentation exception to the *Moorman* doctrine is not applicable if the information supplied is merely ancillary to the sale of a product or service. See *id.* at 339. "[W]hen the information offered by the defendant relates to the defendant's tangible goods

and/or noninformational goods or services, the information is considered merely ancillary or incidental, and the defendant is not deemed to be in the business of providing information and is not liable for negligent misrepresentation." *Fox Associates, Inc. v. Robert Half International, Inc.*, 334 Ill. App. 3d 90, 95 (2002).

¶ 43 The Illinois Supreme Court in *First Midwest Bank* concluded that a title insurer is not in the business of supplying information when it issues a title commitment or a title insurance policy. *First Midwest Bank*, 218 Ill. 2d at 341. We similarly conclude that, for purposes of the instant appeal, Chubb was not in the business of providing information, and the information it provided (through intermediaries) to Orchard was merely ancillary or incidental to the sale of insurance policies. We note that a federal district court applying Illinois law – *International Surplus Lines Insurance Co. v. Fireman's Fund Insurance Co.*, 1989 WL 99771, at *2 (N.D. Ill. Aug. 17, 1989) – held that the business of an insurance company is "accepting a risk in return for money" and that the insurance company was not in the business of supplying information. Although we are generally not bound by decisions by lower federal courts, such decisions may be considered persuasive authority. *Pielet*, 2012 IL 112064, ¶ 39. We conclude that the commercial information supplier exception does not apply and the *Moorman* doctrine bars Orchard's negligent misrepresentation claim against Chubb.

¶ 44 Finally, Orchard states that Chubb argued in the circuit court proceedings that Orchard was not given leave to file the second amended complaint, containing new counts. Because we may affirm a circuit court's judgment on any grounds which the record supports (*Developers Surety & Indemnity Co. v. Lipinski*, 2017 IL App (1st) 152658, ¶ 27), we need not address this contention for the reasons stated above. The dismissal with prejudice of Counts I, II, and III is affirmed.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 47 Affirmed.