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SECOND DIVISION
JUNE 14, 2011

No. 1-10-2459

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MEGAN KLEHR,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 09 CH 1545
	)	
ILLINOIS FARMERS INSURANCE COMPANY,	)	Honorable
	)	Sophia H. Hall,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis concurred in the judgment.
Justice Harris specially concurred in the judgment.

ORDER

> *Held* : Where plaintiff sought declaratory judgment on discovery procedures that should apply during arbitration of her insurance claim, cause of action was not ripe for adjudication because plaintiff's claim that defendant had no right to propound discovery under the rules of the American Arbitration Association did not constitute an actual controversy.

Plaintiff Megan Klehr appeals from an order of the circuit court dismissing her declaratory judgment action pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), in which she sought a judicial determination regarding the discovery procedures that should apply during arbitration of her insurance claim against defendant Illinois

Farmers Insurance Company. We affirm.

BACKGROUND

The following alleged facts are drawn from plaintiff's third amended complaint, which is the version at issue in this appeal. In July 2007, plaintiff was a passenger in a vehicle that was involved in a hit-and-run accident. Plaintiff was injured in the accident, and the other driver fled the scene and was never located. Plaintiff filed an uninsured motorist claim with the insurance carrier of the driver of the vehicle she was riding in. The insurance carrier paid out the limits of the policy, but this was insufficient to cover plaintiff's medical bills. Plaintiff then filed a claim[1] with defendant, who is her own insurance carrier.

Shortly after filing her claim with defendant, plaintiff formally demanded that her claim be arbitrated pursuant to the arbitration provision in her insurance policy in order to determine the proper amount of recovery. As required by the arbitration provision, the matter was referred to the American Arbitration Association (AAA), which docketed the case and assigned an arbitrator to hear the claim.

It is at this point that the dispute that is the subject of this case arose. After the case was referred to arbitration, defendant sent plaintiff a request for discovery. In these discovery requests, which were purportedly propounded pursuant to Illinois Supreme Court discovery rules, defendant asked plaintiff to answer interrogatories, produce documents, and to appear for a sworn statement. Plaintiff, however, refused to comply with defendant's discovery requests, contending that discovery in AAA proceedings can only be ordered by the arbitrator. Because

[1] Whether plaintiff's claim is under the uninsured or underinsured motorist provisions of her policy is somewhat unclear from the record and is in dispute. Either way, it is irrelevant to our disposition of this case.

the arbitrator had not ordered discovery, plaintiff contended, she was not obligated to comply with defendant's requests. Although defendant pointed to a provision in the insurance policy that purportedly authorized each party to engage in discovery under Illinois state rules during arbitration, plaintiff contended that this provision was void because it is contrary to both AAA rules and the Illinois Insurance Code (215 ILCS 5/143a (West 2008)).

The parties could not come to an agreement about this matter, so plaintiff filed the instant declaratory judgment action against defendant. In her complaint for declaratory relief, plaintiff sought a judicial declaration that discovery such as that defendant sought is not permissible during arbitration of plaintiff's claim. Plaintiff also sought a declaration that discovery is closed because more than 180 days have passed since plaintiff filed her claim, pursuant to plaintiff's interpretation of AAA rules governing discovery in arbitration.

The circuit court dismissed plaintiff's complaint pursuant to section 2-615 of the Code of Criminal Procedure (735 ILCS 5/2-615 (West 2008)) for failure to state a claim. After giving plaintiff several opportunities to amend her complaint in order to state a cognizable claim, the circuit court dismissed plaintiff's third amended complaint with prejudice. Plaintiff timely appealed, and this case is now before us.

ANALYSIS

We initially note that there is some ambiguity in older case law regarding whether the proper standard of review for dismissal of a declaratory judgment action is *de novo* or for abuse of discretion. However, the relatively recent and well-reasoned opinion in *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 274-75 (2004), persuasively harmonizes the issue. We agree with that case that the *de novo* standard applies when a declaratory judgment action is dismissed on the pleadings and the abuse-of-discretion standard applies when the action is resolved on the merits after the pleading stage.

With that said, we review dismissal of plaintiff's complaint under section 2-615 *de novo*, and the "question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). The essential elements of a cause of action for a declaratory judgment are "(1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests." *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003).

It is undisputed that both the plaintiff and the defendant have legitimate interests in this case, and therefore the sole question is whether there is an actual controversy between the parties. As the supreme court has explained:

> " 'Actual' in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or *premature*, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Citation.]" (Internal quotation marks omitted.) (Emphasis in original.) *Id.* at 374-75.

Consequently, we must examine whether the controversy that plaintiff has alleged is one that is ripe for adjudication. The supreme court has adopted a two-pronged test for determining ripeness in declaratory judgment actions: (1) whether the issues presented are "fit for judicial decision", and (2) whether "any hardship to the parties [] would result from withholding judicial consideration." *Morr-Fitz v. Blagojevich*, 231 Ill. 2d 474, 490 (2008) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

We first consider the issue presented by plaintiff's complaint. The discovery disagreement that plaintiff alleges concerns the interpretation and construction of provisions in the insurance policy, AAA rules, and the Illinois Insurance Code. The insurance policy's arbitration clause contains a provision that states, "Both the Insured person [plaintiff] and we [defendant] are allowed to engage in discovery. All state and local rules governing discovery, procedure and evidence will apply." Defendant relied on this clause when it propounded discovery under Illinois Supreme Court Rules to plaintiff after plaintiff initiated the arbitration proceedings.

Plaintiff, however, contends that this provision is contrary to the Illinois Insurance Code and AAA rules. In support, plaintiff points to section 143a of the Illinois Insurance Code (215 ILCS 5/143a (West 2008)), which states in pertinent part:

> "No [insurance] policy shall be renewed, delivered, or issued for delivery in this State unless it is provided therein that any dispute with respect to the coverage and the amount of damages shall be submitted for arbitration to the American Arbitration Association and be subject to its rules for the conduct of arbitration hearings as to all matters except medical opinions."

Plaintiff further points to Rule 6 of the AAA's Illinois Unisured/Underinsured Motorist Arbitration and Mediation Rules (eff. Jan. 1, 2002), which states:

> "The arbitrator(s) shall have discretion to order pre-hearing exchange of

> information by the parties including, but not limited to, the production of requested documents, reports and records, as well as the attendance of any party for the purpose of conducting any independent medical examination(s) and sworn statement(s).
>
> *** Unless otherwise limited by order of the court, parties shall complete all discovery no later than 180 days from the date the AAA forwards notification to the respondent advising that a claim has been initiated."

Reading all of these provisions together, plaintiff's argument is essentially that (1) the Illinois Insurance Code mandates that AAA rules apply to arbitration, (2) AAA rules vest control over discovery solely with the arbitrator rather than the parties, and therefore (3) any provision to the contrary in the insurance policy is void. Alternatively, plaintiff's position is that the insurance policy provision refers to state and local rules of the AAA, not the Illinois Supreme Court Rules.

Based on the allegations in the complaint, the issue that plaintiff has alleged in this case is a legal one, which is ordinarily one that courts are well suited to decide. See *Morr-Fitz*, 231 Ill. 2d at 491-92 (citing *Minnesota Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997) ("Fitness for judicial decision means, most often, that the issue is legal rather than factual.")). What plaintiff is seeking in her declaratory judgment action is the opinion of the circuit court on the legal construction of the insurance policy, the AAA rules, and the Illinois Insurance Code. This is not an area that courts are incapable of deciding in a declaratory judgment, and therefore the complaint meets the first prong of the ripeness test.

We now examine the second prong, that is, whether any prejudice would result if we withhold judicial consideration at this time. Plaintiff's argument on this point, articulated in her supplemental brief on appeal, is that she

> "is interested in having her underinsured claim adjudicated in the AAA according to the rules of the AAA and the Illinois Insurance Code. This means that the AAA would have an arbitration to determine her damages after she submits herself for her sworn statement. If otherwise, she would have to spend additional time and funds to issue and answer formal discovery."

Plaintiff essentially states that she is not required to submit to discovery of the kind that defendant seeks and would be prejudiced if we were to allow the arbitration proceedings to continue without ruling on this matter.

The problem with this argument is that plaintiff's position presumes that there can *never* be discovery of the kind that defendant seeks in a AAA arbitration proceeding. Plaintiff insists that she wants the arbitration to proceed according to AAA arbitration rules, but plaintiff ignores several relevant and important rules that govern AAA arbitration proceedings. In particular, Rule 1 provides that "[t]hese rules and any amendment thereof shall apply in the form in existence at the time the arbitration is initiated, *except for* any such provision that may be inconsistent with the arbitration agreement or with applicable law." While plaintiff's position is that Rule 6 preempts any conflicting provision in the insurance agreement, Rule 1 appears to stand for the opposite proposition. The plain language of Rule 1 indicates that the AAA rules are merely default rules that can be modified by the arbitration agreement or state law, which indicates that the insurance policy's discovery provision would take precedence over Rule 6. If so, then plaintiff could not be prejudiced by answering discovery because she would be bound to do so anyway by the controlling terms of the insurance policy.

Rule 1 seems to beg the question presented by plaintiff because her complaint essentially asks the courts to determine what discovery rules should apply in this particular arbitration. However, the AAA rules contain guidance for handling uncertainty about the rules for arbitration. Rule 37 empowers the arbitrator to "interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. *** All other rules shall be interpreted and applied by the AAA."

Rule 37 mandates that questions regarding the rules that apply to the arbitration be referred to either the arbitrator or AAA, but rather than doing so plaintiff has asked the courts to become involved. Plaintiff's complaint does not contain any allegation that either the arbitrator or AAA is incompetent to rule on the question presented in this case, and plaintiff has not explained to us what prejudice she would suffer by following the AAA rules that she herself insists should apply to this case.

Moreover, plaintiff has bound herself to following all AAA rules, not merely Rule 6, because she initiated arbitration proceedings. Rule 2 states:

> "When arbitration is initiated under these rules, either by agreement or by operation of law, the parties thereby authorize the AAA to administer the arbitration in accordance with these rules. The duties of the AAA under these rules may be carried out through such representatives as the AAA may direct."

This provision indicates that any dispute over what rules of discovery might apply during arbitration must be resolved by the arbitrator or AAA pursuant to Rule 37 and Rule 1.

Finally, even under Rule 6 itself, which plaintiff argues controls this issue, the arbitrator has discretion to order the same types of discovery that defendant has propounded. Based on the plain language of the rule, absent abuse of discretion there does not appear to be any limitation on the amount of discovery that the arbitrator can order plaintiff to respond to. It is therefore not a foregone conclusion that plaintiff will not need to respond to formal discovery even under the arbitration procedures as she would have them.

Of course, we do not presume to interpret or construe the AAA rules or the arbitration agreement on the merits because plaintiff's complaint was dismissed at the pleading stage for failure to allege an actual controversy. The fatal flaw in plaintiff's complaint and what makes it legally insufficient is that, based on the allegations in the complaint, we cannot know what discovery procedures, if any, the arbitrator or AAA will impose in this particular case.[2] "A declaratory judgment action is not intended to permit moot or hypothetical cases, or to enable parties to secure advisory opinions or legal advice from the court with respect to future difficulties." *Weber v. St. Paul Fire & Marine Insurance Co.*, 251 Ill. App. 3d 371, 373 (1993). It is possible that the arbitrator may employ limited procedures along the lines that plaintiff would like, which would make any declaratory judgment that the circuit court might issue in favor of plaintiff merely advisory. It is equally possible that the arbitrator might order the same discovery procedures as defendant has requested, or even decline to order any discovery at all. We cannot know, and that is the problem. All that plaintiff's complaint has alleged is that defendant has propounded discovery, which may or may not be permissible under AAA

[2] The record and arguments of the parties indicate that this issue has in fact been presented to the arbitrator and has been resolved adversely to plaintiff. However, plaintiff has not included that alleged fact in her third amended complaint. In reviewing a motion to dismiss under section 2-615, we are bound to consider only the legal sufficiency of the complaint based on the facts alleged on its face, and we cannot consider any other facts from the record. See *Turner*, 233 Ill. 2d at 499.

arbitration rules as applied to the facts of this case. Without more, this issue is not ripe for adjudication. See *Stokes v. Pekin Insurance Co.*, 298 Ill. App. 3d 278, 284 (1998) ("This court may not issue advisory opinions that are contingent upon the possible happening of some future event.").

To the extent that plaintiff's complaint also sought a declaration that all discovery is closed because more than 180 days have elapsed since she filed her claim, this issue is unripe for the same reasons already discussed. Rule 6 of the AAA rules explicitly gives the arbitrator authority to determine the extent of discovery, and there is no indication in plaintiff's complaint that she would be prejudiced by bringing this issue to the arbitrator in accordance with the rules that she herself wants to govern this action.

Because the dispute alleged in plaintiff's complaint is not ripe for adjudication, plaintiff has not alleged an actual controversy. The third amended complaint therefore fails to state a cause of action for declaratory judgment, and the circuit court correctly dismissed the complaint.

CONCLUSION

For the reasons stated above, we affirm the circuit court's order dismissing plaintiff's complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)).

Affirmed.

JUSTICE HARRIS, specially concurring.

I concur with the outcome of this case. However, it is my opinion plaintiff's third amended complaint sets out an actual controversy ripe for adjudication. A cause of action is well stated for declaratory judgment as to whether the plaintiff is required to comply with the defendant's discovery requests provided for in its policy but under AAA rules can only be ordered by the arbitrator. Accordingly on that basis the complaint should not have been dismissed.

However, I specially concur with my colleagues in affirming the circuit court's dismissal of the plaintiff's complaint. "An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." *Dixon v. Chicago and North Western Transportation Co.*, 151 Ill. 2d 108, 116 (1992). The parties proceeded before the arbitrator. They do not dispute the fact that the discovery issue has been presented before the arbitrator and per AAA rules, the arbitrator ordered discovery. Therefore, I would dismiss the complaint because under the circumstances, no actual controversy exists and this court cannot provide plaintiff with any effectual relief.