2013 IL App (1st) 122728-U

FOURTH DIVISION
August 1, 2013

No. 1-12-2728

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STEVEN ORNOFF and NEIL ORNOFF,	)	
	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
	)	Cook County
v.	)	
	)	No. 12 L 003266
WESTFIELD NATIONAL INSURANCE	)	
COMPANY, an Illinois Corporation,	)	Hon. Raymond W. Mitchell,
	)	Judge Presiding
Defendant-Appellee	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The submission of a signed sworn proof of loss by the insureds, not the earlier submission of repair estimates by the building contractor, triggered the commencement of the tolling period for purposes of determining the time period for filing suit against the insurer; the circuit court therefore did not err in granting insurer's motion to dismiss insureds' complaint as time-barred.

¶ 2 Appellants Steven Ornoff and Neil Ornoff (the Ornoffs) filed a complaint in the circuit court of Cook county against Westfield National Insurance Company (Westfield), alleging that Westfield breached the parties' insurance contract and violated the Illinois Insurance Code (215

ILCS 5/1, *et seq.* (West 2010) (the Insurance Code)) by denying coverage for the loss of property destroyed by a fire. Westfield filed a motion to dismiss under section 2-619(a)(5) of the Illinois Code of Civil Procedure (735 ILCS 5/1-101, *et seq.* (West 2012) (the Code of Civil Procedure)), claiming the lawsuit was untimely. The circuit court granted Westfield's motion and dismissed the two counts of the complaint with prejudice. The Ornoffs filed this appeal.

¶ 3 For the reasons stated herein, we affirm the decision of the circuit court.

¶ 4 BACKGROUND

¶ 5 The insurance policy at issue listed Neil as the named insured and Steven as an additional insured; the policy period extended from June 6, 2008 to June 6, 2009. The policy covered, among other things, the property located at 2225 West Charleston in Chicago, Illinois (the Property). Neil has represented that he and Steven owned the Property.

¶ 6 The complaint provides, in part, as follows. On February 25, 2009, "a fire at the Property resulted in significant damage and destruction to the Property, including the structure thereon and Neil's possessions therein." At the time of the fire, Neil was on an airplane traveling for business. Upon landing and learning of the fire, Neil returned to Chicago to view the damage, and he "immediately reported the loss to Westfield."

¶ 7 Neil attested in an affidavit as follows:

> "For the following next few months, I regularly corresponded with Westfield's adjuster to provide information regarding the Loss. In particular, on or about April 6, 2009, a representative of Westfield met with a contractor, E Four Construction, hired by Steven and I to do the repair work. The contractor submitted to the Westfield representative a

computation of the cost to repair the structure damaged by the fire, which included an itemized estimate of the cost of the work needed to return the Property to habitability." Appended to Neil's affidavit is an email dated April 7, 2009, from Scott Whaley, a general adjuster for Westfield. The email was directed to "Mr. Epstein" – apparently from E Four Construction – and also was sent to Neil. In the email, Mr. Whaley stated that he met with Mr. Epstein on the previous day "for the review of the estimate [Epstein] prepared relating to the repairs to Mr. Ornoff's home." The email provides, in part, "I agree with the scope of the loss you estimated with exception to the washer and dryer (these are contents items to be considered on the contents claim) and some overlap labor items for removal of plumbing items that were in the plumbing sub-contractors bid." Included in the email is a "spreadsheet outlining the price changes." The email concludes with "Our investigation of this loss continues at this time. We are not in a position at this time to issue further payments."

¶ 8 Neil completed and signed a document dated June 3, 2009, captioned "Sworn Statement in Proof of Loss"; the document was notarized. The document includes nine numbered paragraphs wherein Neil supplied information relating to, among other things, the time and origin of the loss, the nature of his interest in the Property, and the amount of the "whole loss and damage." In "Schedule B," Neil listed the "Dwelling Repair (Agreed Value)" as $368,353.11 and the "Personal Property (Total Loss Items)" as $166,279.50.

¶ 9 Included in the record on appeal is an undated document signed by Neil captioned "Conditional Payment Receipt and Reservation of Rights," wherein he acknowledged receipt of a conditional payment of $19,935.81, subject to Westfield's continuing investigation of the claim.

Neil also acknowledged in the receipt that Westfield "will require full compliance with all conditions of the policy including, but not limited to, my submission of a properly Sworn Statement in Proof of Loss, my submission of adequate proof documenting the loss, and my submission to an examination under oath, if deemed necessary by [Westfield]." The affidavit of general adjustor Richard Kozimor, filed in support of Westfield's motion to dismiss, suggests that the receipt may have been a part of the Sworn Statement in Proof of Loss.[1]

¶ 10 In a letter to Neil dated July 1, 2010, Westfield rejected and returned "an instrument purported to be a Sworn Statement in Proof of Loss" and denied "any and all liability" in connection with the loss caused by the fire. The denial letter stated, among other things, that Westfield's investigation determined the fire was intentionally set and that Neil "intentionally misrepresented and/or concealed material facts and circumstances concerning [his] prior criminal history, [his] financial condition at the time of the loss, and other matters material to the denial of the claim." The letter also references a provision of the policy captioned "Suit Against Us." The policy provides, in pertinent part:

> "**O. Suit Against Us.** No legal action shall be brought against us unless there has been compliance with all the provisions of the policy. In addition, no legal action shall be brought against us:
>
> * * *
>
> 2. Under Section **II**, unless the action is started within two years after the date of

[1]Our analysis herein is not affected by the timing of the execution of the Conditional Payment Receipt and Reservation of Rights.

> loss or damage.
>
> However, this two year period is extended by the number of days between the date proof of loss is submitted and the date the claim is denied in whole or in part." (Emphasis in original.)

The letter then states, "You are hereby notified that the above mentioned time period has been extended from June 3, 2009 until the date of this correspondence. You have until March 24, 2012 to comply with this condition." Steven was mailed a copy of this letter.

¶ 11 On March 27, 2012, the Ornoffs filed a two-count complaint against Westfield alleging breach of contract and violation of the Insurance Code. On April 27, 2012, Westfield filed a motion to dismiss the complaint pursuant to section 2-619(a)(5) of the Code of Civil Procedure. In the motion to dismiss, Westfield argued that the two-year period for the Ornoffs to file any suit was "extended from June 3, 2009, when the Plaintiff submitted the Proof of Loss claim, until July 1, 2010, when the denial letter was issued by Westfield." Westfield thus contended that the Ornoffs had the "original two years plus 393 days (the number of days in which the limitation period was extended), making March 24, 2012 the last day in which [the Ornoffs] could file suit against Westfield." Because March 24, 2012 fell on a Saturday, the last date to file a suit was Monday, March 26, 2012. See 5 ILCS 70/1.11 (West 2012). Because the Ornoffs' suit was filed on March 27, 2012, Westfield argued that it was time-barred.

¶ 12 After briefing and a hearing, the circuit court entered a written order on August 13, 2012 granting Westfield's motion to dismiss and dismissing the two counts of the complaint "with prejudice because it is clear that no set of facts can be proven to entitle recovery." In so holding,

the court rejected the Ornoffs' contention that the tolling period began on April 6, 2009, when they submitted a "detailed, itemized account of their loss." The court instead concluded that the policy "unambiguously states that a sworn, signed proof of loss is required" in the policy's "Duties After Loss" section – discussed below – and thus the tolling period began on the date the required proof of loss was submitted, *i.e.*, June 3, 2009.

¶ 13 ANALYSIS

¶ 14 Section 2-619 of the Code of Civil Procedure provides, in part, that a defendant may file a motion for dismissal based on the fact that the "action was not commenced within the time limited by law." A motion to dismiss under section 2-619 "admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). When ruling on a 2-619 motion, all well-pleaded facts and the reasonable inferences drawn therefrom are accepted as true; conclusions of law, however, are not accepted as true. *Hermitage Corporation v. Contractors Adjustment Company*, 166 Ill. 2d 72, 85 (1995). We review the trial court's dismissal of a complaint pursuant to section 2-619 *de novo*. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008).

¶ 15 *Policy Language and Section 143.1 of the Insurance Code*

¶ 16 On appeal, the Ornoffs contend that the policy is ambiguous regarding the submission that triggers the tolling period; in light of the alleged ambiguity, the Ornoffs assert that the policy must be construed against Westfield. A section of the policy entitled "Suit Against Us," excerpted above, provides that the two year period to file an action is "extended by the number of

days between the date proof of loss is submitted and the date the claim is denied in whole or in part." In the policy section entitled "Duties After Loss," one of the enumerated duties is:

> "7. Send to us, within 60 days after our request, your signed sworn proof of loss which sets forth, to the best of your knowledge and belief:
>
> a. The time and cause of loss;
>
> b. The interest of the ***insured*** and all others in the property involved and all liens on the property;
>
> c. Other insurance which may cover the loss;
>
> d. Changes in title or occupancy of the property during the term of the policy;
>
> e. Specifications of damaged buildings and detailed repair estimates;
>
> f. The inventory of damaged personal property described in **A.5** above;
>
> g. Receipts for additional living expenses incurred and records that support the fair rental value loss ***" (Emphasis in original.)

The Ornoffs assert that the policy references a "proof of loss", a "sworn proof of loss", and a "sworn statement of loss", but does not provide a definition of any of the terms. According to the Ornoffs, "[l]ogic dictates that if these terms were intended to be interchangeable, Westfield would have consistently used the same term throughout the Policy rather than using different terms, none of which are defined." Westfield responds that the Ornoffs' "attempt at convincing this Court that the policy is ambiguous is based on an unreasonable and wholly out of context reading of the pertinent policy provisions." Specifically, Westfield asserts it is "nonsensical" to construe the policy as requiring a signed sworn proof of loss in one provision "while relaxing that

requirement and referring to a completely different proof of loss as it pertains to triggering the tolling period."

¶ 17 The construction of the provisions of an insurance policy is a question of law. *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 154 Ill. 2d 90, 108 (1992). In construing a policy, the court must "ascertain the intent of the parties to the contract." *Id.* "To ascertain the meaning of the policy's words and the intent of the parties, the court must construe the policy as a whole [citations omitted] with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract." *Id.* If the policy's words are unambiguous, the court must afford them their "*plain*, *ordinary*, *and popular meaning*." *Id.* (Emphasis in original.)

¶ 18 After reviewing the policy as a whole, we conclude that the "proof of loss" referenced in the "Suit Against Us" section (the Suit section) of the policy is the same "signed sworn proof of loss" described in the "Duties After Loss" section[2] (the Duties section) of the policy. Under the Duties section, the Ornoffs were required to submit their "signed sworn proof of loss" which set forth, to the best of their knowledge and belief, enumerated categories of information, including but not limited to the "time and cause of the loss," "the interest of the ***insured*** and all others in the property involved and all liens on the property" and "[c]hanges in title or occupancy of the property during the term of the policy." (Emphasis in original.) We read the Duties section as

[2]The provision setting forth the proof of loss requirements, as described herein, is in the policy provision captioned "Duties Applicable to Section II," which is included within the broader "Duties After Loss" section of the policy. Section II of the policy addresses coverage of property other than automobiles.

requiring a proof of loss to be "signed" by the insured[3] and "sworn," *i.e.*, notarized, and to contain the specified types of information. Although not formally defined within the policy, the nature and requirements of the "proof of loss" are described in detail in the Duties section. "That a term is not defined by the policy does not render it ambiguous, nor is a policy term considered ambiguous merely because the parties can suggest creative possibilities for its meaning." *Nicor, Inc. v. Associated Electric and Gas Insurance Services Limited*, 223 Ill. 2d 407, 417 (2006). We disagree with the Ornoffs' contention that the policy does not specify the particular form of the proof of loss required.

¶ 19 The Suit section of the policy provides that the two-year period for suit is extended by the "number of days between the date proof of loss is submitted and the date the claim is denied in whole or in part." Westfield contends that the triggering of the tolling period is not dictated by this tolling provision in the policy, but instead by section 143.1 of the Insurance Code, which provides, in pertinent part:

> "§ 143.1. Periods of limitation tolled. Whenever any policy or contract for insurance, except life, accident and health, fidelity and surety, and ocean marine policies, contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, in whatever form is required by the policy, until the date the claim is denied in whole or in part." 215 ILCS 5/143-1 (West

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[3]The section refers to "*your* signed sworn proof of loss ***". (Emphasis added.) Although the Duties section generally provides that duties may be performed "by you, an ***insured*** seeking coverage or a representative of either" (emphasis in original), the terms "you" and "your" are defined as the named insured and, under certain circumstances, his or her spouse.

2012).

Westfield asserts that "[t]he case law makes clear that section 143.1, not the policy language, controls the tolling of an insurance policy's suit limitations provision." Indeed, Westfield refers to a phrase in the policy's tolling provision – "the date proof of loss is submitted" – as "both dispensable and inconsequential" language. Westfield alternatively contends that "[e]ven considering section 143.1's tolling provision *and* the policy's tolling provision, the two provisions compel the same conclusion because their language is virtually identical." (Emphasis in original.)

¶ 20 We do not view the policy's tolling provision and section 143.1 as inconsistent. The intent of section 143.1 is "to prevent an insurance company from sitting on a claim, allowing the limitation period to run and depriving an insured of the opportunity to litigate her claim in court." *American Access Casualty Company v. Tutson*, 409 Ill. App. 3d 233, 237 (2011); see also *Mathis v. Lumbermen's Mutual Casualty Insurance Company*, 354 Ill. App. 3d 854, 857 (2004) (noting that section 143.1 is "designed to provide consumer protection to an insured when an insurance policy contains a time limitation clause"). In this case, the policy contains a tolling provision which largely parallels – and has the same effect as – the tolling established by section 143.1. In light of our conclusion that the "proof of loss" in the Suit section of the policy is the same proof of loss described in the policy's Duties section, we view the omission of certain of section 143.1's language – *i.e.*, "in whatever form required by the policy" – from the policy's tolling provision as unsurprising, if not logical. Furthermore, even assuming hypothetically that the Ornoffs' policy did not contain any tolling language, we interpret section 143.1 as requiring the tolling to

commence on the date the proof of loss – as described in the Duties section – was submitted. We are reluctant to effectively penalize Westfield for the inclusion of tolling language in its policy – language that presumably protects an insured – when the exclusion of such provision, and the resulting application of section 143.1, would obviate the alleged ambiguity in the policy, by the Ornoffs' own admission.

¶ 21 Courts considering section 143.1 have viewed the submission of the sworn statement in proof of loss – the document required by the Ornoffs' policy – as the trigger for the commencement of the tolling period. For example, in *Davis v. Allstate Insurance Company*, 147 Ill. App. 3d 581 (1986), the insurance policy at issue required a "proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to ***" specified information. *Id.* at 584. The homeowner-insured notified the insurer of the loss of her property two days after a fire. *Id.* at 582. The insurer subsequently confirmed receipt of plaintiff's notice and directed her to comply with the terms and conditions of the policy. *Id.* The insured submitted a sworn statement in proof of loss approximately six weeks later. *Id.* Approximately eleven months after the fire, the insurer denied the claim and returned the sworn statement in proof of loss to the insured. *Id.* at 583. The policy required that any suit be filed within one year after the loss; the insured filed suit approximately twenty months after the fire. *Id.* at 582. The circuit court dismissed the complaint under section 2-619. *Id*. On appeal, the insured argued that the tolling period under section 143.1 should commence on the date the insured provided the insurer with notice of the loss or from the date of defendant's written acknowledgment of receipt of the insured's notice, not from the date of submission of the sworn statement in proof of loss.

Id. at 583. The court rejected the insured's argument, concluding that the insured's sworn statement, the "format of which was in satisfaction of the policy's requirements," triggered the commencement of the tolling period. *Id.* at 584.

¶ 22 In *Harvey Fruit Market, Inc. v. Hartford Insurance Company of Illinois,* 294 Ill. App. 3d 668 (1998), the court considered whether an insurance policy's time limitation on lawsuits was tolled when the insureds provided the insurer notice of loss of their business on the day of the fire. *Id.* at 668-69. The section of the policy entitled "Duties of the Named Insured After a Loss" included two duties: "a. give immediate notice of such loss to the Company" and "e. submit to the Company within 60 days after requested a signed, sworn statement of loss ***." *Id.* at 669. Another policy section entitled "Suit" provided, in part, that no suit "shall be brought on this policy unless the insured has complied with all the policy provisions and has commenced the suit within one year after the loss occurs." *Id.* Discussing section 143.1 of the Insurance Code, the court noted that the policy required the insureds to provide both immediate notice of the loss and a signed, sworn statement of loss; the court thus concluded that the tolling of the limitations period commenced on the date on which the insureds filed their sworn statement of loss and the suit was thus untimely. *Id.* at 671-72.

¶ 23 In *Vole v. Atlanta International Insurance Company*, 172 Ill. App. 3d 480 (1988), the insured purchased a policy for his show horse; the policy provided coverage in the event that the horse died or was stolen. *Id.* at 481. During the policy period, the horse went missing and was presumed stolen. *Id.* The insured reported this to his insurance agent; the insurer's agent contacted the insured by letter and asked for information, including the horse's registration

certificate, the horse's show record, the police report, and a story of the occurrence from the person who had control of the horse at the time of the theft. *Id.* Approximately six months after providing the documents, the insured filed a sworn proof of loss statement with the insurer's attorneys and later complied with the insurer's request for a sworn examination. *Id.* The insurer subsequently denied the claim, stating that the insured had not cooperated in the investigation or provided information required by the policy. *Id.* at 482. The insured sued; the insurer moved to dismiss the complaint as time barred under the policy. *Id.* The court denied the motion, and, after a trial, the insured was awarded damages. *Id.* On appeal, the insurer argued that the complaint had to be filed within one year plus the number of days between the filing of the proof of loss form and the rejection of the claim, based on the twelve month limitation period for suits provided in the policy and section 143.1 of the Insurance Code. *Id.* The insured responded that the proof of loss was filed before the insurer claimed it was. *Id.* Citing section 143.1, the appellate court observed that the "issue in this case revolves around when [the insured] filed a proof of loss in the 'form required by the policy.' " *Id.* The insured argued that he filed his proof of loss when he notified the insurer of the theft, or at the very least, when he submitted the information requested by the insurer's adjuster. *Id.* at 482-83. The insurer argued that the filing of the sworn proof of loss statement was the relevant trigger. *Id.* at 482. The court concluded that the policy clearly required the insured to file a sworn proof of loss statement; the submission of other documentation did not commence the tolling period. *Id.* at 483. The court thus reversed the decision of the trial court. *Id.*

¶ 24 In *Vala v. Pacific Insurance Company, Ltd.*, 296 Ill. App. 3d 968 (1998), the policy at

issue required the insured to give immediate notice of the loss to the insurer and, within sixty days after the loss, unless extended in writing by the insurer, to "render *** a proof of loss, signed to and sworn by the insured, stating the knowledge and belief of the insured as to the following: ***." *Id.* at 969. Shortly after the damage occurred, the insured made a claim against the policy and provided the insurer with "some information concerning his loss." *Id.* The insured argued, among other things, that by providing information to the insurer pertinent to his loss, he triggered the tolling of the limitations period provided in section 143.1 of the Insurance Code. *Id.* at 971. Noting that section 143.1 requires a proof of loss to be filed in the form provided by the policy, the court, citing *Vole*, stated that "[f]iling of other information with an insurance company does not start the running of a policy's one-year limitations period if sworn proof of loss is required by the policy." *Id.* The court concluded that it could not "infer that [the insured] fulfilled the policy requirements of proof of loss necessary to toll the policy's limitations period." Noting that it was "not convinced" that the insured complied with the policy requirements for proof of loss, the court affirmed the circuit court's dismissal of the suit as time-barred. *Id.*

¶ 25 The Ornoffs cite *Hines v. Allstate Insurance Company*, 298 Ill. App. 3d 585 (1998) for the proposition that "[w]hen an insurance policy does not specify the particular form of a proof of loss to start the tolling period, the filing of information with an insurance company can start the tolling period." In *Hines*, the homeowners-insureds suffered a fire loss at their home. *Id.* at 586. Their policy covered: (1) loss of contents; (2) repair costs on the structure up to $68,000; and (3) additional living expenses during the time needed to repair or replace the structure using due

diligence and dispatch. *Id.* The insurer paid out the maximum amount for the loss of contents. *Id.* The negotiation of the claim for the structural loss took approximately fifteen months. *Id.* at 587. Shortly before resolution of their structural claim for approximately $63,000, the insureds signed a proof of loss on the structural claim. *Id.* During the negotiations regarding the structural claim, the insurer advised the insureds that reimbursement for their living expenses would be terminated due to the insureds' failure to exercise due diligence and dispatch in resolving the structural claim. *Id.* However, the insurer continued to make partial payments on living expenses at different times. *Id.* at 586-87. Approximately one year after resolution of the structural claim, the insured filed suit seeking additional living expenses. *Id.* at 587. The trial court awarded the insureds living expenses, calculated through the date repairs apparently could have been completed. *Id.* Citing section 143.1, the appellate court rejected the insurer's argument that the suit was time-barred, concluding that "we cannot say the trial court erred in determining that a proof of loss 'in whatever form is required by the policy' was filed immediately after the fire." *Id.* at 589. The court stated that "[i]t is possible for the filing of information with a insurance company to constitute a proof of loss and to start the tolling period, if the policy does not require a particular form of proof of loss." *Id.*

¶ 26 The *Hines* case is distinguishable from the instant case. Most significantly, as noted above, we do not read the Ornoffs' policy as silent regarding the particular form of proof of loss. As in *Davis*, *Harvey, Vole*, and *Vala*, the Ornoffs' policy includes requirements for the form of the proof of loss; the policy expressly requires that the proof of loss be signed and sworn and contain specified information. In addition, the *Hines* insurer set up a method for the insureds to

submit receipts for their additional living expenses and apparently referred to certain such receipts as "proofs of loss" in its appellate briefs. Based on our review of the briefs and record, Westfield's position consistently has been that the June 3, 2009 signed, sworn document is "proof of loss" for tolling purposes.

¶ 27 In sum, we read the policy such that the "proof of loss" in the Suit section of the policy is the same "signed sworn proof of loss" detailed in the Duties section; we do not view the relevant policy language as ambiguous. Furthermore, we do not consider the policy's tolling language and section 143.1 of the Insurance Code to be inconsistent. Finally, the case law makes clear that the Ornoffs' filing of the June 3, 2009 signed, sworn document in the form established by the policy triggered the commencement of the tolling period.

¶ 28 *Insurers "Waiting Out" Insureds*

¶ 29 The Ornoffs' policy provides, in part, that one of the duties of the insured is to "[s]end to [Westfield], within 60 days after [Westfield's] request," the signed, sworn proof of claim described above. The Ornoffs argue that "[r]eading into the Policy a requirement that the limitations period starts tolling upon the filing of a 'sworn proof of loss' as Westfield contends has the unintended effect of failing to toll the limitations period in instances where Westfield does not request the submission of a 'sworn proof of loss.' " The Ornoffs contend that, if Westfield does not request a "sworn proof of loss", it could "simply wait out an insured, and deny a claim submitted two years after the loss, thereby avoiding paying a claim and barring a suit by an insured to recover on the claim."

¶ 30 Westfield responds that the court in *Trinity Bible Baptist Church v. Federal Kemper*

Insurance Company, 219 Ill. App. 3d 156 (1991) considered and rejected the "identical argument." Westfield instead contends that an insurer's request for a sworn proof of loss "has no effect on the form of proof of loss required by the policy needed to trigger the tolling period." In *Trinity*, the policies at issue included limitations provisions stating in part: "No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss." *Id.* at 158. The court noted that this provision is "further limited by section 143.1" of the Insurance Code. *Id.* In the section of the policies entitled "*Your Duties After Loss*," the insured was directed to "send to us, within 60 days *after our request*, your signed, sworn proof of loss which sets forth to the best of your knowledge and belief" certain enumerated categories of information. (Emphasis in original.) The insurers never requested a proof of loss. *Id.* at 159. The trial court ruled that "(1) the policy requires the plaintiff to file a proof of loss *only if so requested*, (2) the statute provides that tolling of the one year period of limitation occurs from the date the proof of loss is filed *in whatever form required by the policy*, (3) no proof of loss was requested, therefore, no tolling occurred and the claim was time-barred." *Id.* (Emphasis in original.)

¶ 31 The *Trinity* appellate court disagreed, noting that section 143.1 is not concerned with the timing of the request, but is instead "intended to allow the insurers to elicit certain information in a certain form." *Id.* The phrase in the proof of loss provision "send to us within 60 days after our *request*," did not "dictate the *form* of the proof of loss," but rather operated as a "condition precedent to the companies' requirement that a proof of loss be filed." *Id.* at 159-60. (Emphasis in original.) The insurers' admission that they never requested a proof of loss was "irrelevant to

the form which the proof is to take." The proof of loss provision in *Trinity* "clearly outlines the form in which the proof is to be submitted: it must be a signed and sworn proof of loss setting forth particular information regarding the claim." *Id.* The question, then, was "not whether a proof of loss was requested but whether it was filed in the form required. If it was filed the tolling occurs whether the company requested it or not." *Id.* The court observed:

> "To hold that the tolling provision does not apply where the insurance company does not specifically request a proof of loss could lead to absurd results. For instance, assume an insurance policy which is completely devoid of a proof of loss provision, but with an insured who, on his own initiative, files a thorough proof of loss three months after the date of loss. Further assume that the insurance company maintains contact with the insured, conducts an investigation of the claim, and one day after the one year anniversary of the loss denies the claim. If we adopt the defendants' interpretation of section 143.1, the insured would not be allowed the benefit of the statutory tolling provision, even though he diligently filed a thorough proof of loss and the insurance company continued to process his claim. The deprivation of the tolling provision would occur simply because the company did not 'request' the proof of loss, but the statute does not limit its tolling provision to cases in which the insurance company requested a proof of loss. The tolling provisions are available whenever the proof of loss has been filed whether requested or not. Applying

> section 143.1 as we have done affords the insured the 'consumer protection' which the legislature intended when it passed section 143.1." *Id.* at 161.

The appellate court reversed for a determination of the adequacy of the information furnished to comply with the proof of loss provision. *Id.*

¶ 32 We agree with the principle set forth in *Trinity* that an insurer's request for – or failure to request – a proof of loss does not affect the form of proof of loss required by a policy to trigger the commencement of the tolling period. Furthermore, we note that the concerns raised by the Ornoffs regarding insurers "waiting out" insureds not only fail to create ambiguity in this policy but also are merely hypothetical in this case. Although the record does not specify the timing of a request from Westfield's for the proof of loss, we know that, at a minimum, Neil signed the Conditional Payment Receipt and Reservation of Rights, wherein he agreed, among other things, to submission of a "properly Sworn Statement in Proof of Loss". Neil did, in fact, submit a signed, sworn proof of loss less than four months after the fire. Simply put, Westfield did not "wait out" the Ornoffs, and the Ornoffs were afforded the opportunity to litigate their claim.

¶ 33 *The Ornoffs' Alleged "Proof of Loss" on April 6, 2009*

¶ 34 The Ornoffs further assert that a "reasonable interpretation" is that a "sworn proof of loss" is only required to be submitted after the request of Westfield, "and subsequent to the submission of 'proof of loss.' " They contend that the "information submitted by Neil Ornoff on April 6, 2009 was itemized and sufficiently more detailed than the Sworn Proof of Loss subsequently submitted to Westfield." Westfield challenges this contention and argues that the Ornoffs'

position reflects their "failure to appreciate that a signed sworn proof of loss serves a purpose unable to be fulfilled by any amount of claim information, no matter how itemized or detailed," *i.e.*, fraud prevention. Westfield also points out that the April 6, 2009 submission was never before the trial court and, consequently, is not part of the record on appeal.

¶ 35 We disagree with the Ornoffs' contention that "a reasonable interpretation is that a 'sworn proof of loss' is only required to be submitted after the request of Westfield, and subsequent to the submission of 'proof of loss'." The Ornoffs cite no cases for this proposition, and we have not located any Illinois case supporting this argument.

¶ 36 We further note that the policy imposes various "duties after loss" in addition to the submission of the signed, sworn proof of loss, including but not limited to: (a) giving prompt notice to the insurer; (b) making reasonable and necessary repairs to protect the property and keeping an accurate record of repair expenses; (c) preparing an inventory of damaged personal property and attaching all bills, receipts and related documentation justifying the inventory; (d) as often as the insurer reasonably requires, showing the damaged property and providing the insurer with requested records and documents; and (e) cooperating with the insurer in the investigation or settlement of the claim. The April 6, 2009 meeting and apparent exchange of information between Westfield's adjuster and the contractor – assuming *arguendo* that the contractor was the Ornoffs' representative – arguably relates the Ornoffs' other duties imposed by the policy, not the "proof of loss" requirement.

¶ 37 We also are unpersuaded by the Ornoffs' assertion that the April 6, 2009 submission was "itemized and sufficiently more detailed" than the June 3, 2009 submission. As a preliminary

matter, there is no document in the record dated April 6, 2009. The only reference to that date in the record is in the Scott Whaley email sent on April 7, 2009, in which Mr. Whaley wrote to Mr. Epstein: "It was a pleasure meeting with you yesterday for the review of the estimate you prepared relating to the repairs to Mr. Ornoff's home." Even assuming *arguendo* that there is ambiguity in the policy and that the policy "simply does not specify the form of the proof of loss required for purposes of starting the limitations period," as the Ornoffs contend, there is nothing in the record that shows what was provided to Mr. Whaley on April 6, 2009. This court cannot consider documents that were not included in the record. *Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 430 (2007). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). The Ornoffs' assertions regarding the allegedly "itemized" and "sufficiently more detailed" information provided on April 6, 2009 are wholly unsupported by the record on appeal. Moreover, even if we attempted to deduce from Mr. Whaley's email the substance of the contractor's submission on April 6, it appears that, at most, the contractor provided repair estimates, and not the other categories of information required in the Duties section of the policy, *e.g.,* information regarding the interest of the insured and other liens and changes in title and occupancy.

¶ 38 Furthermore, the Ornoffs' assertion that the only difference between the April 6, 2009 and June 3, 2009 submissions, "[a]side from the less specific information" submitted on June 3, was the "swearing under oath by Neil Ornoff." The requirement that the insured swear under oath for a proof of loss is a significant one. "One purpose of the proof of loss is to obtain a statement of

the loss from the insured under oath such as will subsequently bind the insured and protect against the imposition of fraud." *Barnes v. State Farm Fire and Casualty Company*, 623 F. Supp. 538, 540 (E.D. Mich. 1985); see also *New Appleman on Insurance Law Library Edition*, § 53.01[9][d][I] (2012) ("The proof of loss is a legal document whereby the insured swears under penalty of perjury that the claim it is submitting to the insurer is accurate and proper"). Regardless of what documentation may have been submitted to Westfield on April 6, it appears not to have been sworn and to have been submitted by E Four Construction, not the Ornoffs.

¶ 39 *The Denial Letter*

¶ 40 We conclude by observing that the letter from Westfield dated July 1, 2010 denying coverage referenced the policy language regarding the two-year limitations period for filing suit and explicitly provided that the time period for filing a legal action against Westfield was extended from June 3, 2009 until the "date of this correspondence," July 1, 2010. The letter then stated, "You have until March 24, 2012 to comply with this condition." Although not dispositive of the issue, we note that the Ornoffs had notice of the March 24, 2012 deadline for suit commencement over twenty months in advance of such date.

¶ 41 In *Mathis v. Lumbermen's Mutual Casualty Insurance Company*, 354 Ill. App. 3d 854 (2004), the insured's home was destroyed by fire and the insurer denied her claim, finding misrepresentation and arson. *Id.* at 855. Approximately fourteen months after the denial of coverage under her homeowner's insurance policy, the insured filed suit against the insurer, and the insurer moved for dismissal of the action as time-barred. *Id.* The policy at issue provided that the one-year period for filing suit "is extended by the number of days between the date proof

of loss is submitted and the date the claim is denied in whole or in part." *Id.* at 856. The insured argued that the insurer waived or was estopped from asserting the contractual one-year time limitation because the insurer failed to comply with the Illinois Department of Insurance's rules and regulations. *Id.* Specifically, the insured claimed, among other things, that the insurer fails to comply with section 919.80(d)(8)(C) of Title 50 of the Illinois Administrative Code, which provides:

> "When the period within which the insured may bring suit under a residential fire and extended coverage policy is tolled in accordance with Section 143.1 of the [Illinois Insurance] Code ***, the company, at the time it denies the claim, in whole or in part, shall advise the insured in writing of the number of days the period was tolled, and how many days are left before the expiration of the time to bring suit." 50 Ill. Adm. Code, § 919.80(d)(8)(C) (eff. July 22, 2002).

The denial letter in *Mathis* did not advise the insured of the number of days the limitation period was tolled or how many days remained before her time to file suit expired. *Id.* at 856. On appeal, the court considered, among other things, the certified question of whether an insurer's failure to comply with section 919.80(d)(8)(C) can form the basis for the insurer's waiver of the time limitation provision in the policy. *Id.* at 859. The court observed that "[s]ection 919.80(d)(8)(C) of the insurance regulations implies that the mere existence of the policy time limitation provision is not enough notice to an insured of the running of a limitation period and that, in fairness to the insured, actual notice, rather than constructive notice, to an insured of the time remaining to file suit is necessary." *Id.* at 860. The court further noted that while the

violation of section 919.80(d)(8)(C) did not provide the basis for a private cause of action, the "violation of the regulation is a fact that a court can consider in determining whether an insurer waived a time limitation provision when enforcement of the provision would be unjust, inequitable, and unconscionable." *Id.* Answering the certified question in the affirmative, the court concluded that an insurer's violation of section 919.80(d)(8)(C) can provide a basis for the insurer's waiver of a time limitation provision contained in a policy. *Id.* at 861.

¶ 42 Unlike the *Mathis* insurer, Westfield provided express notice of the dates the tolling period commenced and terminated and of the last date for the insureds to file suit. Although Westfield's compliance with section 919.80(d)(8)(C), if required, does not in itself resolve this case, the result herein appears neither unjust nor inequitable when the Ornoffs had over twenty months to bring suit in accordance with the letter.

¶ 43 CONCLUSION

¶ 44 As discussed herein, we conclude that the relevant policy language is unambiguous. We view the proof of loss described in the Duties section of the policy as the same "proof of loss" referenced in the Suit section of the policy. We reject the Ornoffs' contention that the policy language "[s]end to us, within 60 days after our request, your signed sworn proof of loss" creates or evidences any ambiguity in the policy. We also reject the Ornoffs' contention that the contractor's April 6, 2009 submission should be construed to be "proof of loss" for purposes of the commencement of the tolling period because, among other things, such submission is not included in the record on appeal. Finally, we note the express language in Westfield's denial letter regarding the deadline for filing suit and the substantial length of time the Ornoffs had to

commence their action.

¶ 45 The circuit court did not err in granting Westfield's motion to dismiss pursuant to section 2-619. The judgment of the circuit court is affirmed.

¶ 46 Affirmed.