SECOND DIVISION
June 20, 2017

No. 1-16-0612

SCOTT JENKINS, Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellant/Cross-Appellee, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellee/Cross-Appellant.	)	Appeal from the Circuit Court of Cook County No. 15 CH 8242 The Honorable Kathleen G. Kennedy, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of the plaintiff's complaint as barred by the insurance policy's one-year suit-limitation provision affirmed. Defendant's cross-appeal is dismissed as moot.

¶ 2 A fire damaged plaintiff's building and related structures that were insured under a homeowner's insurance policy issued by defendant. Defendant investigated the loss, determined that it was covered under the policy, and provided plaintiff with an estimate and check for the actual cash value of the loss. Nearly fourteen months later, plaintiff filed a class action complaint against defendant for breach of contract and declaratory judgment, alleging that defendant improperly depreciates labor costs in calculating the actual cash value of a loss, a practice which it did not disclose to its policy holders. Defendant moved to dismiss the complaint as barred by

the policy's one-year suit-limitation and for failure to state a claim. The circuit court denied defendant's motion to dismiss for failure to state a claim, but dismissed the complaint as time-barred. Plaintiff filed a timely notice of appeal and defendant filed a timely notice of cross-appeal. For the following reasons, we affirm the circuit court's dismissal of plaintiff's complaint as time-barred and dismiss defendant's cross-appeal.

¶ 3 BACKGROUND

¶ 4 State Farm Fire and Casualty Company issued Scott Jenkins a homeowner's indemnity policy that provided insurance coverage for Jenkins's dwelling and related structures. The policy contains a two-step loss-settlement provision for covered losses. First, "until actual repair or replacement is completed," State Farm would "pay the cost to repair or replace with similar construction and for the same use on the premises" by paying the actual cash value of the damaged property at the time of the loss up to the applicable limit of liability. Then, if and when repairs or replacement were completed, State Farm would "pay the covered additional amount you actually and necessarily spend to repair or replace the damaged part of the property" up to the applicable limit of liability, provided that the repair or replacement was completed within two years of the date of the loss and that the insured notified State Farm within 30 days of completion of the work.

¶ 5 The policy's "Conditions" provision set forth the "[Insured's] Duties After Loss," which required the insured to (1) give immediate notice of the loss to a State Farm agent, (2) protect the property from further loss, (3) prepare an inventory of damaged or stolen property, (4) make available for inspection the property, records, documents, and persons as requested, and

(5) submit a sworn proof-of-loss within 60 days of the loss.[1] The policy's Conditions also included the following provision:

> "Suit Against Us: No action shall be brought unless there has been compliance with the policy provisions. The action must be started within one year after the day of loss or damage. This one year period is extended by the number of days between the date that proof-of-loss was filed and the date the claim is denied in whole or in part."

¶ 6 On March 26, 2014, Jenkins's dwelling and related structures were damaged in a fire, and he promptly notified State Farm of his loss. State Farm inspected the premises three days later and determined that Jenkins's loss was covered by the policy. Within a matter of days, State Farm provided Jenkins with an estimate for the covered loss, along with an explanation of benefits (EOB). The EOB explained that the estimated cost to repair or replace the damaged property (the replacement cost value, or RCV) was $17,225.75. The RCV is the sum of the costs to repair and replace as reflected on an itemized list quantifying and pricing the necessary materials and labor, inclusive of sales tax and other applicable costs. The EOB shows whether a line-item was depreciated, and not all line-items were depreciated. The EOB included a summary guide that defined "depreciation" as "[t]he decrease in the value of property over a period of time due to wear, tear, condition, and obsolescence. A portion or all of this amount may be eligible for replacement cost benefits." State Farm calculated the actual cash value (ACV) of Jenkins's loss to be $13,569.06 by subtracting a total depreciation amount ($2656.69) and a deductible ($1000) from the RCV ($17,225.75). The estimate further reflects that the replacement cost benefit was equal to the depreciation amount less an "amount over limit" of $226.90. As a result, the total

[1]The proof of loss needed to set forth, to the best of the insured's knowledge, (1) the time and cause of the loss, (2) identify the interests of the insured and all others in the property, (3) any other insurance on the property, (4) any changes in title during the policy period, (5) specifications of the damaged structures and estimates for repair, (6) an inventory of damaged property, (7) receipts for any living expenses incurred, and (8) evidence or an affidavit stating the amount and cause of the loss

remaining amount that Jenkins could seek to recover was $2429.79 if he completed the second step of the loss-settlement process by either repairing or replacing the damaged property within two years of the date of the loss. A check for $13,569.06 was included with State Farm's estimate. Jenkins accepted the check. There is no dispute that Jenkins never filed a sworn proof-of-loss, and State Farm never requested that Jenkins file a sworn proof-of-loss.

¶ 7 On May 21, 2015, Jenkins filed a class action complaint against State Farm. He alleged that State Farm does not separate out labor charges from material charges on its estimates in an effort to conceal the fact that when it calculates ACV, it depreciates both the material costs and labor costs. He alleged that State Farm had a duty to disclose the manner in which it calculates ACV payments, yet it took "affirmative steps" to prevent policy holders from learning that it would depreciate labor costs. Count I of Jenkins's complaint asserted that State Farm breached the insurance policy by "unlawfully depreciating labor costs." Count II sought a declaratory judgment that the policy prohibited deductions for depreciation of labor costs, and requested an injunction requiring State Farm to notify policy holders that it depreciated labor costs and to remedy any losses, and prohibiting State Farm from depreciating labor costs in the future.

¶ 8 State Farm filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). State Farm moved to dismiss count I of the complaint for failing to state a claim (735 ILCS 5/2-615 (West 2014)), contending that it properly calculated the ACV payment in accord with section 919.80(d)(8)(A)) of the Illinois Administrative Code (Administrative Code) (50 Ill. Admin. Code § 919.80(d)(8)(A) (2014)), which states that ACV is to be calculated by determining the "replacement cost of the property at the time of loss less depreciation," and includes no provision that any component of the ACV should be excluded. State Farm further argued that Jenkins alleged no injury. State Farm moved

to dismiss count II of the complaint for failing to state any actual controversy because State Farm properly calculated the ACV payment and Jenkins failed to allege that he was paid less than the amount to which he was entitled.

¶ 9 State Farm also sought dismissal of the complaint pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2014)), because Jenkins failed to file his complaint within one year of his loss as required by the policy's suit-limitation provision, and none of the allegations in the complaint warranted tolling the time in which to file his complaint.

¶ 10 After briefing and argument, the circuit court issued an oral ruling denying State Farm's section 2-615 motion, finding that Jenkins stated claims for both breach of contract and declaratory judgment. However, the circuit court granted State Farm's section 2-619 motion, finding Jenkins's complaint was not filed within one year of the loss as required under the policy. The circuit court entered a written order denying the section 2-615 motion and granting the section 2-619 motion with prejudice. Jenkins filed a timely notice of appeal, and State Farm filed a timely notice of cross-appeal.

¶ 11 After this matter had been fully briefed in this court, State Farm filed a motion to cite an unpublished federal decision as additional authority in support of its argument that it could depreciate labor costs, which we ordered taken with the case.

¶ 12 ANALYSIS

¶ 13 Jenkins advances three main arguments on appeal. First, he argues that the policy's one-year suit-limitation provision is ambiguous because it conflicts with the policy's loss-settlement provision, which provides an insured two years in which to submit a claim. He contends that because the suit-limitation provision is ambiguous, it should not apply to his claim. Next, Jenkins argues that even if the suit-limitation provision applies to his claim, State Farm waived its right

to rely on the suit-limitation provision because State Farm partially denied his claim by withholding the alleged improperly depreciated labor charges from his ACV payment and failing to advise him of the number of days the period for bringing suit was tolled, as required by section 919.80(d)(8)(C) of the Administrative Code (50 Ill. Admin. Code § 919.80(d)(8)(C) (2014)). Finally, Jenkins argues that the suit-limitation provision was tolled by the doctrines of fraudulent concealment and equitable estoppel. We address his arguments in turn.

¶ 14 When deciding a section 2-619 motion, a court accepts all well-pleaded facts in the complaint as true and will grant the motion when it appears that no set of facts can be proved that would allow the plaintiff to recover. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003). Under section 2-619(a)(5) of the Code, dismissal is warranted if the "action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). Our review of an order granting a section 2-619 motion is *de novo*. *Moon v. Rhode*, 2016 IL 119572, ¶ 15.

¶ 15 Jenkins argues that the policy is ambiguous because there are two policy provisions that conflict with the one-year suit-limitation provision. First, Jenkins argues that he "maintained the right to enhance his then-existing ACV claim for any portion of his damaged property by incurring construction costs and submitting additional claim paperwork to support an RCV claim up through and until March 26, 2016." Second, he relies on a policy provision that governs additional dwelling-related expenses incurred up to 24 months after the date of loss. He asserts that applying the one-year suit-limitation provision leads to the "improper result that [Jenkins's] right to sue terminated before his claim was even ripe."

¶ 16 In Illinois, a suit-limitation provision in an insurance contract is generally enforceable. See *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 529 (1996) ("Compliance with the suit-limitation provision of the policy is a condition precedent to recovery under the policy.");

see also *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 35 (same). When interpreting an insurance contract, our primary objective is to ascertain and give effect to the intention of the parties as expressed in the policy language. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). Where the policy language is unambiguous, the policy will be applied as written. *Id.* "Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation." *Id.* We will not strain to find an ambiguity where one does not exist. *Id.*

¶ 17 Here, we find that the suit-limitation provision does apply to Jenkins's claim because there is no ambiguity when the suit-limitation provision is applied to claims related strictly to ACV payments. The basis of Jenkins's lawsuit is that State Farm underpaid the ACV by allegedly deducting depreciation from labor costs and withholding those depreciated amounts. His suit includes no claim that State Farm breached the policy with respect to the remaining replacement cost benefit or to any dwelling-related expenses. Whether the suit-limitation provision is ambiguous when applied to those two-year coverage periods has no bearing on whether the suit-limitation provision is ambiguous when applied to Jenkins's claim as pleaded. As applied to his complaint, Jenkins cannot rely on policy language unrelated to his claim to create an ambiguity in the suit-limitation provision. See *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 978 (2008) (finding that policy language "completely unrelated to the present claim" cannot be used to create an ambiguity in the claim at issue). Therefore, the circuit court did not err in finding that the one-year suit-limitation is applicable to Jenkins's claim that State Farm breached the insurance policy by withholding depreciated labor costs from his ACV payment.

¶ 18 Next, Jenkins argues that State Farm waived its right to rely on the suit-limitation provision. He contends that State Farm waived the policy's proof-of-loss requirement by tendering an ACV payment before the proof-of-loss deadline and then never requesting that Jenkins submit a proof-of-loss. Jenkins argues that State Farm's underpayment of the ACV amounted to a partial denial of his claim, which triggered State Farm's obligation to comply with section 919.80(d)(8)(C) of the Administrative Code (50 Ill. Admin. Code § 919.80(d)(8)(C) (2014)) (requiring an insurer that denies a claim in whole or in part to advise the insured that the time in which to bring a suit based on the denial of the claim was tolled by the number of days between the submission of the proof-of-loss and the denial of the claim). Finally, he contends that State Farm is estopped from relying on the policy's non-waiver provision, which requires any waiver by State Farm to be in writing, because State Farm's conduct was contrary to an intention to strictly enforce a policy provision, resulting in waiver of the right to enforce the terms of the policy.

¶ 19 Section 143.1 of the Insurance Code (215 ILCS 5/143.1 (West 2014)) requires that a proof-of-loss be filed, in the form required by the policy, before the limitation period in the policy can be tolled. *Vala v. Pacific Insurance Co.*, 296 Ill. App. 3d 968, 971 (1998). The failure to file a timely proof-of-loss may be invoked by an insurer as a basis for denying coverage under the policy. See *Tarzian v. West Bend Mutual Fire Insurance Co.*, 74 Ill. App. 2d 314, 326 (1966). However, an insurer may waive the proof-of-loss requirement through conduct that is inconsistent with an intention to strictly enforce the conditions of the policy. *Id.* In general, " '[w]aiver' means the voluntary relinquishment of a known right" and arises from an affirmative, consensual act consisting of an intentional relinquishment of a known right." *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 113107, ¶ 67 (quoting *Maniez v. Citibank, F.S.B.*,

404 Ill. App. 3d 941, 947 (2010)). Estoppel, on the other hand, "is based on an insurer's conduct that misleads the insured to his detriment." *Mathis v. Lumberman's Mutual Casualty Insurance Co.*, 354 Ill. App. 3d 854, 858 (2004). An implied waiver can be based on waiver or estoppel, and exists where there is an unexpressed intention to waive that can be inferred from the circumstances, or the insurer's conduct misleads the insured into acting on a reasonable belief that the insurer waived some provision of the policy. *Id.*

¶ 20 Here, Jenkins argues that State Farm waived the proof-of-loss requirement by paying his claim and not requesting a proof-of-loss, and that by waiving the proof-of-loss requirement and partially denying his claim, State Farm also waived the suit-limitation provision by failing to comply with section 919.80(d)(8)(C) of the Administrative Code. We disagree. It is undisputed that Jenkins notified State Farm of his loss, State Farm investigated the loss and accepted that the loss was covered by the policy, and made an initial ACV payment without requiring a proof-of-loss from Jenkins. In doing so, State Farm unquestionably demonstrated that it did not intend to enforce the proof-of-loss requirement, since it made a coverage decision prior to the proof-of-loss deadline, and never subsequently requested a sworn proof-of-loss. But Jenkins points to nothing in State Farm's conduct that would suggest an intention to waive the suit-limitation provision, or any conduct of State Farm that would suggest that State Farm misled Jenkins to believe that the suit-limitation provision had been waived.

¶ 21 Jenkins relies on *Mathis* to support his claim that State Farm's waiver of the proof-of-loss requirement results in waiver of the suit-limitation provision. *Mathis* is distinguishable. There, the appellate court allowed a petition for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 1, 1994) to answer the following question of law:

> "Where a homeowner's insurance policy contains a one[-]year suit[-]filing limitation, can a Department of Insurance administrative regulation, that requires an insurer to advise [the insured] of the number of days the limitations period was tolled under 50 [Ill. Admin. Code] Section 919.80 ([d]) (8)([C]), form the basis of an insurer's alleged waiver of the extended contractual limitation suit[-]filing time period?" *Mathis*, 354 Ill. App. 3d at 855.

Mathis reported a loss to her insurer, and after conducting an investigation, the insurer denied coverage because it suspected the fire was caused by arson. *Id.* Eighteen months after her claim was denied, she sued for breach of contract. *Id.* The policy contained a one-year suit-limitation provision. *Id.* at 855-56. The insurer moved to dismiss based on the policy's one-year suit-limitation provision, but the circuit court denied the motion, finding that the insurer's denial letter did not set forth the number of days the insured's claim was tolled or how many days remained to bring a lawsuit, resulting in a waiver of the suit-limitation provision by the insurer. *Id.* at 856.

¶ 22 On appeal, the insurer argued that because the plaintiff failed to file a sworn proof-of-loss, section 919.80(d)(8)(C) of the Administrative Code (50 Ill. Admin. Code § 919.80(d)(8)(C) (2002)) did not apply since the limitation period was not tolled under section 143.1 of the Insurance Code (215 ILCS 5/143.1 (West 2002)). *Mathis*, 354 Ill. App. 3d at 857. We found that the insurer's denial of the plaintiff's claim on grounds other than the failure to file a sworn proof-of-loss resulted in the insurer waiving compliance with the proof-of-loss requirement. *Id.* at 858. We then found that the insurer's waiver of the proof-of-loss requirement was inconsistent with the insurer's intention to rely on all of the policy's provisions, and therefore the insurer waived the suit-limitation provision as well. *Id.* at 858-59. With those findings in mind, we turned to the

certified question, and found "section 919.80(d)(8)(C) can provide a basis for the insurer's waiver of a time limitation provision contained in the policy and that, under the facts of this case, Lumbermen's waived the contractual time limitation provision." *Id.* at 861.

¶ 23 Here, State Farm accepted coverage of Jenkins's claim and made a payment under its two-step loss settlement provision without a sworn proof-of-loss statement. The insurer in *Mathis* denied the insured's claim after an investigation, then did not advise the insured as to the number of days the suit-limitation provision was tolled, and did not advise the insured as to how much time remained in which to bring suit, and thus failed to comply with section 919.80(d)(8)(C) of the Administrative Code, thereby waiving compliance with the suit-limitation provision. Here, Jenkins points to nothing in State Farm's conduct that would suggest an intention to waive the suit-limitation provision, or any State Farm conduct that would suggest that State Farm misled Jenkins to believe that the suit-limitation provision had been waived.

¶ 24 Furthermore, we are not persuaded by Jenkins's argument that State Farm partially denied his claim for the purposes of section 143.1 of the Insurance Code or section 919.80(d)(8)(C) of the Administrative Code. Jenkins's complaint does not allege that State Farm denied coverage for any claim, but instead alleges that State Farm breached the policy by depreciating labor costs when calculating the ACV for covered losses, and thus underpaid its insureds for covered claims. As outlined above, State Farm first calculates the RCV of a claim and then calculates an ACV payment. The total amount of coverage under the policy, however, is the replacement cost of the loss up to the limit of coverage, which an insured can recover by going forward with repairing or replacing the loss. An insured is entitled to the total replacement cost of a loss if it undertakes efforts to repair or replace the loss. But until an insured goes forward with repairs or replacement, the insured is only entitled to the ACV of the loss. Jenkins's

characterization that State Farm "partially denied" his claim by depreciating labor costs in calculating the ACV payment misses the mark, since even if State Farm underpaid the initial ACV payment by applying depreciation to labor costs, an insured can still recover the alleged depreciated labor costs ("a portion or all of this amount [depreciation] may be eligible for replacement cost benefits") by going forward with repairs or replacement of the loss and recover "the covered additional amount [he] actually and necessarily spen[t] to repair or replace the damaged part of the property" up to the applicable limit of liability. No part of Jenkins's claim was actually denied. Jenkins does not contend that State Farm underestimated the RCV of his loss or that he was denied his cost of repair or replacement, and that is what he insured against, not the initial payment represented by the ACV payment.

¶ 25 Furthermore, Jenkins cites no authority to support his contention that an insurer's alleged underpayment of a covered claim constitutes a partial denial of the claim for the purposes of section 143.1 of the Insurance Code or section 919.80(d)(8)(C) of the Administrative Code, or that the computation of an initial payment constitutes a partial denial of a claim when additional steps can be taken by the insured to recover the full value of the loss under the terms of the policy. We find that, under the circumstances of this case, neither section 143.1 of the Insurance Code nor section 919.80(d)(8)(C) of the Administrative Code is inapplicable, and further find that State Farm's conduct did not waive the suit-limitation provision.

¶ 26 Finally, Jenkins argues that the suit-limitation provision was tolled by the doctrines of fraudulent concealment and equitable estoppel. He contends that State Farm's policy, estimate, and EOB did not mention depreciation of labor costs, and that the EOB suggests that depreciation only applies to materials. He argues that the estimate does not apply depreciation to any line-item that contains a labor charge on its own, and for the one line-item containing both

labor and material costs, he asserts that it was reasonable to believe that only material costs were depreciated. He claims that the only way to determine that State Farm depreciated labor costs was by having a knowledgeable claims consultant "reverse engineer" the estimate.

¶ 27 State Farm responds that "the [e]stimate does not constitute a representation that estimated costs for labor were exempted from depreciation," and therefore falls short of an affirmative representation that is necessary for tolling based on fraudulent concealment. Furthermore, State Farm contends that Jenkins had the estimate which disclosed "all depreciation applied for his claim payment," and therefore had sufficient information to prompt him to consult with counsel. State Farm argues that there is nothing in the record to show why Jenkins waited until May 2015 (after the expiration of the one-year suit limitation) to consult with an attorney, and further points out that counsel investigated Jenkins's claim and filed suit two weeks after being retained.

¶ 28 Section 13-215 of the Code tolls a cause of action where "a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto ***." 735 ILCS 5/13-215 (West 2014). "The concealment contemplated in section 13-215 must consist of affirmative acts or representations which are calculated to lull or induce a claimant into delaying filing of his claim, or to prevent a claimant from discovering his claim." *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857, 862 (1987). "Mere silence on the part of the defendant and failure by the claimant to learn of the cause of action are not enough." *Id.* "A plaintiff must plead and prove that the defendant made misrepresentations or performed acts which were known to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied." *Orlak v. Loyola University Health System*, 228 Ill. 2d 1, 18 (2007). Tolling will not apply where "the claimant discovers the fraudulent concealment, or

should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period." *Smith*, 164 Ill. App. 3d at 862.

¶ 29 Here, Jenkins's complaint alleges that in 2013, State Farm admitted in federal court that it had been depreciating labor costs in ACV property estimates, although Jenkins's complaint offers no citation to support that claim. Jenkins further alleges that State Farm "does not separate the labor charges from materials in the estimates provided to insureds, therefore making it impossible for a policyholder to know that State Farm depreciated labor, and not merely materials." But aside from asserting that Jenkins's estimate does not mention labor depreciation and asserting that State Farm depreciates labor costs without disclosing that to policy holders, Jenkins does not allege which representations in the estimate are false. Jenkins is the party seeking to invoke fraudulent concealment as a basis for tolling the suit-limitation provision, so it is Jenkins's burden to allege sufficient facts that could support such a finding. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (2006). Here, Jenkins generally contends that depreciation of labor costs is not discernible from the face of the estimate, but he does not identify with any specificity a single line item in the estimate that is false or that misrepresents whether labor costs were depreciated. Jenkins arguably alleges facts that might support a finding that State Farm engaged in misconduct, but that is insufficient for purposes of tolling a suit-limitation provision on the basis of fraudulent concealment. To establish fraudulent concealment, Jenkins must allege facts showing that State Farm affirmatively said or did something to lull or induce Jenkins to delay filing his claim until after the limitations period ran. *Smith*, 164 Ill. App. 3d at 862. We find that Jenkins has failed to sufficiently allege an act or statement by State Farm of fraudulent concealment for the purposes of section 13-215 of the

Code. Therefore, we find that the suit-limitation provision in the policy was not tolled by section 13-215 of the Code.

¶ 30 Finally, Jenkins nominally claims that equitable tolling applies, and that State Farm should be equitably estopped from enforcing the suit-limitation provision. He develops no separate argument in support of these points other than asserting that enforcement of suit-limitation provision would be unjust and unconscionable. Jenkins's argument on this point is not well-developed, and we decline to address it. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 31 Finally, State Farm's cross-appeal and its motion to cite additional authority in support of its argument in the cross-appeal are moot, since we have affirmed the circuit court's judgment dismissing Jenkins's complaint as time-barred. We therefore dismiss State Farm's cross-appeal and deny the motion to cite additional authority.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court is affirmed, and State Farm's cross-appeal is dismissed.

¶ 34 Affirmed; cross-appeal dismissed.