2013 IL App (2d) 120443-U
No. 2-12-0443
Order filed April 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellant, v. ROXANNE LeBEAU and DANIEL OTTERBACHER, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 11-MR-2038 Honorable Christopher C. Starck, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* (1) We vacated the dismissal of plaintiff's complaint, as the dismissal was based exclusively on an appellate court opinion that was subsequently reversed; (2) we refused to affirm on the alternative basis that another action was pending between the same parties for the same cause, as whether to dismiss on that ground was within the trial court's discretion; accordingly, we remanded for the trial court to resolve that issue.

¶ 2 Plaintiff, State Farm Mutual Automobile Insurance Company, sought a declaratory judgment (see 735 ILCS 5/2-701 (West 2010)) against defendants, Roxanne LeBeau and her husband, Daniel Otterbacher. Plaintiff's complaint alleged that defendants could not recover uninsured motorist

(UM) coverage under their policy with plaintiff, because they did not demand payment within the policy's two-year time limit. Defendants moved to dismiss the complaint for failure to state a cause of action (see 735 ILCS 5/2-615 (West 2010)); as barred by affirmative matter (see 735 ILCS 5/2-619(a)(9) (West 2010)); and because the same issues were already being litigated by the parties in a different action (see 735 ILCS 5/2-619(a)(3) (West 2010)). The trial court granted the motion on the first two grounds, both of which were based on the appellate court's opinion in *Country Preferred Insurance Co. v. Whitehead*, 2011 IL App (3d) 110096, *rev'd*, 2012 IL 113365. Plaintiff appeals. We vacate and remand with directions.

¶ 3 Plaintiff's complaint alleged as follows. At all pertinent times, defendants resided in Zion, Illinois. Plaintiff issued a motor-vehicle insurance policy, from its office in Bloomington, Illinois, to LeBeau for a 2001 Oldsmobile Intrigue that was licensed and titled in Illinois. The policy included UM coverage. On September 29, 2008, LeBeau was driving the Oldsmobile Intrigue in Milwaukee, Wisconsin, when she collided with an uninsured vehicle driven by Eric Brewer, a Wisconsin native, and owned by Manuel Gaona, also a Wisconsin native.[1]

¶ 4 By a letter dated September 14, 2011, defendants demanded UM benefits under the policy, LeBeau for her injuries and Otterbacher for loss of consortium. On September 14, 2011, defendants filed suit against plaintiff and Brewer in the circuit court of Milwaukee County, Wisconsin. Their complaint alleged that Brewer had negligently caused the accident, and it sought damages for LeBeau's injuries and for Otterbacher's loss of consortium.

[1]Plaintiff's complaint alleged that Gaona had been driving the uninsured vehicle, but plaintiff later acknowledged that this was erroneous.

¶ 5 The policy's limitation clause stated, "Under the uninsured motor vehicle coverages, any arbitration or suit against us will be barred unless commenced within two years after the date of the accident." Plaintiff's complaint alleged that defendants were not entitled to UM coverage, because they had waited more than two years after the accident to commence arbitration or a lawsuit. Plaintiff also alleged that defendants had violated a clause requiring any arbitration to take place in their state of residence, Illinois. Plaintiff requested declarations that no UM coverage was available to defendants for the accident; that plaintiff had no duty to arbitrate; and that plaintiff had no duty to defend in the Wisconsin suit. Plaintiff also requested that any arbitration started by or on behalf of defendants be stayed pending the resolution of plaintiff's complaint.

¶ 6 Defendants moved to dismiss the complaint under both sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2010)). Under section 2-615 of the Code, defendants contended that the complaint failed to state a cause of action, because, taking the allegations of the complaint as true, the relief that plaintiff sought was barred by *Whitehead*. At the time, our supreme court had not decided the appeal in *Whitehead*. There, the insured, an Illinois resident who was injured in an accident in Wisconsin, sought UM coverage under a policy similar to the one here. She made her demand approximately 26 months after the accident. The insurer invoked the policy's two-year limitations period and filed an action for a declaratory judgment. The appellate court held that the policy's two-year limitation was void as against Illinois public policy. The court observed that Wisconsin law gave the insured three years to file suit against the tortfeasor, so that applying the two-year limitation would "effectively shorten the applicable Wisconsin statute of limitations from three years to two years" (*Whitehead*, 2011 IL App (3d) 110096, ¶ 12). Thus, the court concluded, applying the policy's limitation would violate public policy, because the insured

would not be in "substantially the same position she would have been in if the uninsured driver had been insured" (*id.* ¶ 14).

¶ 7 Under section 2-619, defendants advanced two contentions. The first was that *Whitehead* was "affirmative matter" that defeated plaintiff's claim (see 735 ILCS 5/2-619(a)(9) (West 2010)) (essentially duplicating the section 2-615 contention). The second was that the Wisconsin suit already addressed the issues that the complaint raised. Defendants relied on section 2-619(a)(3) of the Code, under which a party may move to dismiss an action on the ground that "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2010).

¶ 8 Plaintiff responded that (1) *Whitehead* had been wrongly decided; and (2) its action did not duplicate the Wisconsin action, which was primarily one for negligence and thus raised factual and legal issues not present here. Also, plaintiff noted that, in the Wisconsin action, it had moved to bifurcate the proceedings by separating the claim against Brewer from the claim against plaintiff and staying proceedings on the latter until the court in this action decided the coverage issue.

¶ 9 The trial court granted defendants' motion to dismiss. The court's written order stated, in pertinent part, that the complaint was "dismissed with prejudice on both 2-615 and 2-619 [*sic*]. The court finds that [*Whitehead*] *** is controlling Illinois law and the defendant [*sic*] uninsured claim brought in the State of Wisconsin is not time barred under the provision of State Farm's policy." The order added, "This cause shall proceed in Wisconsin." There is no record of any hearing on the motion. Plaintiff timely appealed.

¶ 10 After the trial court entered its judgment in this case, the supreme court reversed the appellate court in *Whitehead*, holding that, under the facts of the case, the application of the policy's two-year limitation did not violate Illinois public policy. The supreme court reasoned that the mere fortuity

that Wisconsin's limitations period is longer than that of Illinois did not make the policy's time limit unreasonable; the two-year period to which the insured had agreed was consistent with Illinois's two-year statute of limitations, and the insured had had what our legislature deemed sufficient time to ascertain the basis for her UM claim and to take steps to initiate dispute-resolution procedures. *Country Preferred Insurance Co. v. Whitehead*, 2012 IL 113365, ¶ 39.

¶ 11 On appeal, plaintiff contends that the dismissal of the complaint must be reversed because the supreme court has reversed the appellate court's opinion in *Whitehead*. Defendants essentially concede that we may not affirm based on the appellate court's opinion in *Whitehead*, but they argue that we may do so under section 2-619(a)(3) of the Code, because the Wisconsin suit addressed the same issues as does plaintiff's complaint.

¶ 12 We hold that (1) the dismissal must be reversed, because it was based solely on the appellate court's opinion in *Whitehead*, which is no longer good law; and (2) because the trial court did not decide whether dismissal would be proper under section 2-619(a)(3) of the Code, we must remand the cause to allow the trial court to exercise its discretion and decide that pending issue.

¶ 13 Whether the trial court erred in dismissing a complaint for failure to state a cause of action (735 ILCS 5/2-615 (West 2010)) and whether the trial court erred in dismissing the complaint as barred by affirmative matter (735 ILCS 5/2-619(a)(9) (West 2010)) are questions of law that we review *de novo*. *Kelley v. Carbone*, 361 Ill. App. 3d 477, 480 (2005) (section 2-615); *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 116 (1993) (section 2-619(a)(9)).

¶ 14 Here, there is no serious issue that the supreme court's opinion in *Whitehead* requires reversal of the dismissal of plaintiff's complaint. There is simply no basis to distinguish the cases. We note that the trial court's dismissal order relies solely on the appellate court's decision in *Whitehead*.

Thus, the dismissal of the complaint cannot be supported by the supreme court's decision in *Whitehead*.

¶ 15 Defendants maintain that the judgment may still be affirmed under section 2-619(a)(3) of the Code, because the dispute over whether they may recover UM benefits under the policy is already being litigated in the Wisconsin suit. We disagree. We note that nothing in the judgment mentions section 2-619(a)(3) or implies that the action was dismissed because the Wisconsin suit was pending. We do not read the mere statement that the Wisconsin action will continue (a matter obviously beyond the trial court's jurisdiction) as implying that the existence of that action was a basis for the judgment. The trial court did not decide the section 2-619(a)(3) issue. As we explain, doing so on this appeal would be both outside our prerogative and unwise.

¶ 16 Defendants concede that, under section 2-619(a)(3), dismissal is not required even if the moving party meets the threshold requirement of showing that the two actions involve the "same cause" and the "same parties" (735 ILCS 5/2-619(a)(3) (West 2010)). *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill. 2d 235, 243 (1996); *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 853 (2010). "Multiple actions in different jurisdictions arising out of the same operative facts *may* be maintained where the circuit court, *in a sound exercise of its discretion*, determines that both actions should proceed." (Emphases added.) *Zurich Insurance Co.*, 173 Ill. 2d at 243-44. Thus, we shall not usurp the trial court's discretionary prerogative to balance the pertinent factors in deciding whether the present action should be dismissed in favor of the Wisconsin action. See *id.* at 244 (nonexclusive list of considerations trial court should consider on section 2-619(a)(3) motion).

¶ 17 It does appear to us that the present cause arises out of the same operative facts as the Wisconsin action. Although the Wisconsin action involves additional facts not present here—those relating to Brewer's alleged negligence—this action does not appear to involve any operative facts not present in the Wisconsin action. The coverage dispute at issue in this case is the same as that between the same parties in the Wisconsin action—with LeBeau and Otterbacher as plaintiffs, and plaintiff as a defendant, in that case. Thus, we cannot agree with plaintiff that defendants' section 2-619(a)(3) argument is erroneous as a matter of law. Neither, however, can we agree with defendants that their motion must be granted. The dispute is for the trial court to rule on first.

¶ 18 Moreover, addressing the section 2-619(a)(3) issue in this court would not only be improper; it would be unwise and needlessly risk an unfair result. The trial court is where any additional evidence pertinent to the issue must be introduced; we are limited to the record on appeal. What makes this consideration especially crucial is that it is now more than one year since the trial court dismissed plaintiff's complaint. To decide whether plaintiff's complaint should be dismissed under section 2-619(a)(3), we would have to rely on a record that is more than a year out of date. For all that we know, the Wisconsin action may have been resolved in some manner in the interim. The trial court can easily take evidence on this matter. Therefore, we would not decide the issue on our own even were it not a usurpation of the trial court's prerogative to do so.

¶ 19 We vacate the judgment of the circuit court of Lake County, and we remand the cause. On remand, the trial court is to consider whether to dismiss the complaint under section 2-619(a)(3) of the Code.

¶ 20 Vacated and remanded with directions.