2014 IL App (2d) 131276-U
No. 2-13-1276
Order filed July 29, 2014

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 Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in dismissing plaintiff's suit on the ground that another action was pending between the same parties for the same cause, as the sole issue in plaintiff's suit was wholly subsumed within a Wisconsin suit.

¶ 2 Plaintiff, State Farm Mutual Automobile Insurance Company (State Farm), filed a complaint for a declaratory judgment (735 ILCS 5/2-701 (West 2010)) against defendants, Roxanne LeBeau and Daniel Otterbacher. The trial court dismissed the complaint under section

2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2012)), on the ground that there was another action pending between the same parties for the same cause. We affirm.

¶ 3 At all pertinent times, defendants, husband and wife, resided in Zion, Illinois. State Farm issued a policy from its office in Illinois to LeBeau for a 2001 Oldsmobile Intrigue that was titled and licensed in Illinois. On September 29, 2008, while the policy was in effect, LeBeau was driving the Intrigue in Milwaukee, Wisconsin, when she collided with an uninsured car driven by Eric Brewer and owned by Manuel Ganoa, both Wisconsin residents.

¶ 4 By a letter dated September 14, 2011, defendants demanded uninsured motorist (UM) benefits under the policy, LeBeau for her injuries and Otterbacher for loss of consortium. Also on September 14, 2011, defendants and two insurance companies that had reimbursed LeBeau and her employer for certain expenses filed a two-count complaint, sounding in negligence, in the circuit court of Milwaukee County, Wisconsin, against Brewer and State Farm. Count I sought damages from Brewer and State Farm for LeBeau's injuries, and count II sought damages from Brewer and State Farm for Otterbacher's loss of consortium.

¶ 5 On November 17, 2011, State Farm filed the complaint here, seeking a declaratory judgment that defendants could not recover UM benefits. State Farm relied on a policy provision reading, "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." Because defendants had not demanded arbitration or sued within two years after September 29, 2008, State Farm contended that they could not recover UM benefits; that State Farm had no duty to arbitrate; and that State Farm had no duty to defend in the Wisconsin suit.

¶ 6 On November 23, 2011, in the Wisconsin suit, State Farm filed an answer, affirmative defenses, and a "cross-complaint." In the answer, State Farm "denie[d] the plaintiffs would have

a viable uninsured motorist claim in this case, because the policy provided that any such claim must be arbitrated or suit filed against State Farm within two years of the date of the subject accident and, therefore, the action against State Farm is time-barred ***." The answer also requested that the Wisconsin court stay the action against State Farm until the declaratory judgment action in Illinois decided State Farm's "coverage obligations" to defendants. The "cross-complaint" sought recovery from Brewer in the event that State Farm was held liable to defendants.

¶ 7 On December 13, 2011, defendants moved to dismiss the declaratory judgment complaint for failure to state a cause of action (see 735 ILCS 5/2-615 (West 2010)) and as barred by affirmative matter (see 735 ILCS 5/2-619(a)(9) (West 2010)). Both grounds relied on the appellate court's opinion in *Country Preferred Insurance Co. v. Whitehead*, 2011 IL App (3d) 110096, *rev'd*, 2012 IL 113365. *Whitehead* also involved an Illinois insured who had been injured by an uninsured motorist in Wisconsin and sought UM benefits from an Illinois insurer. The insured did not sue or demand arbitration until 26 months after the accident. The insurer invoked a two-year policy limitations period similar to the one here. The appellate court held that the limitations period was void as against Illinois public policy, because it "effectively shorten[ed] the applicable Wisconsin statute of limitations from three years to two years." *Id.* ¶ 12.

¶ 8 Defendants also moved to dismiss the declaratory judgment action on the ground that their Wisconsin suit against Brewer and State Farm was "another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2010). On March 14, 2012, the trial court dismissed the complaint solely on the basis of *Whitehead*. State Farm appealed.

¶ 9 On April 22, 2013, this court reversed the judgment. We noted that, since the appeal, the supreme court had reversed *Whitehead* and held that the type of two-year limitations clause present there and here is valid and enforceable. *State Farm Mutual Automobile Insurance Co. v. LeBeau*, 2013 IL App (2d) 120443-U, ¶ 14. We specifically declined to decide whether the dismissal could be affirmed on the ground that there was another action pending between the same parties for the same cause. The trial court had not decided this issue, and we would not usurp its "discretionary prerogative." *Id.* ¶ 16. Further, we observed that the record was limited and that the passage of time since the judgment made it unwise for us to decide the issue. *Id.* ¶ 18.

¶ 10 On January 2, 2013, while the initial appeal in this case was pending, the Wisconsin trial court stayed defendants' motion (as the plaintiffs in that action) for partial summary judgment against State Farm "until final adjudication of the coverage issue in Illinois." The court noted that our supreme court had reversed the appellate court's judgment in *Whitehead.* The court stated that it would be bound by our judgment in the initial appeal. It reasoned that, in the interest of comity, "Illinois courts should be allowed to conclude the appeals process without a Wisconsin court muddying the waters by making its own coverage ruling."

¶ 11 On remand from this court, defendants submitted a memorandum in support of their motion to dismiss the complaint under section 2-619(a)(3). Defendants contended that the statutory prerequisites for dismissal existed, in that the parties here—defendants and State Farm—were also parties to the Wisconsin suit; both cases arose out of the same facts (the accident between LeBeau and Brewer); the issue in both cases was whether defendants could recover UM benefits from State Farm; and, in the Wisconsin case, State Farm had invoked the

same policy limitations period on which its declaratory judgment complaint was based. Defendants also noted that they had filed their action first.

¶ 12 In response, State Farm contended that the timing of the actions was legally insignificant. Moreover, State Farm continued, the issues in the two cases were not the same: the Wisconsin suit involved a negligence claim against Brewer, while State Farm's complaint involved only whether defendants could recover UM benefits from State Farm. Responding to defendant's contention that it had raised the policy's limitations period as a defense in the Wisconsin case, State Farm argued that, in fact, it had requested that the Wisconsin court bifurcate the proceedings and stay the claims against State Farm until the Illinois court had decided the coverage issue. Finally, State Farm maintained, dismissing its declaratory-judgment complaint because the Wisconsin court faced a similar issue did not make sense, because the Wisconsin court had itself deferred to the Illinois court's prerogative to decide the coverage issue.

¶ 13 In reply, defendants argued in part that dismissal was permissible and appropriate because State Farm's action did not involve any operative facts that were not present in plaintiffs' action in Wisconsin. Further, they maintained, State Farm could have, and still could, file in the Wisconsin case the "very same declaratory judgment motion" that it had filed here. Thus, defendants reasoned, the trial court should exercise its discretion by dismissing State Farm's duplicative action in Illinois. Although the Wisconsin court had previously stated that it would wait for Illinois's courts to adjudicate finally the coverage issue, defendants noted that our courts had now decided the *Whitehead* issue and that the Wisconsin court had not suggested that, should the trial court here dismiss State Farm's complaint, it would refuse to decide whether the policy's limitations clause applied to defendants' claim for UM coverage.

¶ 14 After hearing arguments, the trial court dismissed the action. The court noted that State Farm is already a defendant in the Wisconsin suit, as Wisconsin law allows a tort plaintiff to sue her insurer directly along with the tortfeasor. Also, both suits resulted from the accident in Wisconsin between LeBeau and a Wisconsin resident. Thus, "[t]his entire thing is a Wisconsin case," and the Wisconsin court would be deciding matters such as liability and damages that the trial court here could not. State Farm timely appealed.

¶ 15 On appeal, State Farm contends that the trial court erred in dismissing its complaint for a declaratory judgment that it owes defendants no UM coverage. State Farm asserts that defendants' complaint in the Wisconsin action does not raise the issue of whether the policy's two-year limitations period bars them from recovering UM benefits from State Farm, and it asserts further that the trial court here improperly forced it to file a "counterclaim" in a foreign jurisdiction. State Farm also argues that, because it and defendants are all residents of Illinois and the insurance policy is an Illinois contract, an Illinois court should decide whether the policy's two-year limitations period applies here. Defendants counter that, under the factors that the supreme court has set out in *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill. 2d 235 (1996), and *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428 (1986), the trial court did not abuse its discretion in dismissing an action that raised issues that have already been raised in the more comprehensive Wisconsin action. For the following reasons, we affirm.

¶ 16 Section 2-619(a)(3) of the Code of Civil Procedure allows a trial court to dismiss an action if there is another action pending between the same parties for the same cause. 735 ILCS 5/2-619(a)(3) (West 2012). Even if these requirements are met, the trial court retains discretion to grant the motion or to allow multiple actions to proceed. *Zurich Insurance Co.*, 173 Ill. 2d at 243-44; *Kellerman*, 112 Ill. 2d at 447. Among the factors to consider are comity; the prevention

of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. *Zurich Insurance Co.*, 173 Ill. 2d at 244; *Kellerman*, 112 Ill. 2d at 447-48.

¶ 17 In the first appeal in this case, we noted that it did appear that State Farm's suit arose out of the same operative facts as did the Wisconsin action, although that action involved additional facts not present here. *State Farm*, 2013 IL App (2d) 120443-U, ¶ 17. We now state definitively that defendants have met section 2-619(a)(3)'s threshold requirement by demonstrating that the Wisconsin action involves the same parties and the same cause of action.

¶ 18 In this suit, the parties are State Farm and defendants, and the sole issue is whether defendants may recover UM benefits. State Farm's complaint contends that defendants may not, because they failed to demand arbitration or sue State Farm within two years after the accident, as the policy required them to do. In the Wisconsin action, defendants sued State Farm directly for UM benefits. In its answer, State Farm explicitly raised the defense that UM benefits were barred because "the policy provided that any such claim must be arbitrated or suit filed against State Farm within two years of the date of the subject accident and, therefore, the action against State Farm is time-barred ***." State Farm's complaint raises one issue, and that exact issue has been raised in the Wisconsin action. The only difference is that State Farm is the plaintiff here and a defendant in the Wisconsin action, a matter of no practical import.

¶ 19 Of course, it is true that the Wisconsin action involves parties and issues that are not present in this suit. That might be a problem were the Wisconsin court faced with a motion to dismiss that action on the ground that State Farm's action was a pending suit between the same parties on the same issue. However, because the sole issue in this case is wholly subsumed within the Wisconsin action, the existence of other issues and parties in that case does not

militate against the dismissal of this case. Indeed, requiring one forum to resolve State Farm's liability to defendants, Brewer's liability to defendants, and Brewer's liability, if any, to State Farm accords well with section 2-619(a)(3)'s fundamental purpose of avoiding duplicative litigation. See *Zurich Insurance Co.*, 173 Ill. 2d at 243.

¶ 20 We cannot say that the trial court abused its discretion in granting defendants' motion to dismiss State Farm's complaint under section 2-619(a)(3). A trial court abuses its discretion when no reasonable person would have adopted its ruling. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). The trial court's decision here is not unreasonable. The relevant factors do not militate against dismissing this action. These factors include "the prevention of multiplicity, vexation, and harassment." *Kellerman*, 112 Ill. 2d at 447. Although we cannot characterize State Farm's complaint as either vexatious or harassing, it does, as we explained, create a "multiplicity" of actions. Moreover, because the Wisconsin action incorporates the issue raised in the complaint, along with all of the other issues among the three parties (State Farm, defendant, and Brewer), it appears likely that complete relief on State Farm's complaint can be had in the foreign action. See *id.*

¶ 21 State Farm argues in part that, because the Wisconsin court originally deferred to our state's courts' prerogative to decide the "coverage issue," the trial court here should have refused to dismiss the action, so that an Illinois court could decide Illinois "public policy." We note, however, that, when the Wisconsin court expressed its deference to Illinois courts, the issue of whether the two-year limitations period violated Illinois public policy was still unresolved and pending before this court. The issue has now been definitively resolved, and the Wisconsin court no longer need be concerned about the awkward possibility of having to ascertain Illinois's public policy. Therefore, the concerns that motivated the Wisconsin court to defer to Illinois

courts earlier have dissipated. That court will still need to construe and apply the insurance policy itself, but State Farm has not explained why this raises matters of Illinois "public policy."

¶ 22 State Farm cites *A. E. Staley Manufacturing Co. v. Swift & Co.*, 84 Ill. 2d 245 (1980), and *Combined Insurance Co. of America v. Certain Underwriters at Lloyd's London*, 356 Ill. App. 3d 749 (2005). Both of those cases, however, are distinguishable.

¶ 23 In *A. E. Staley*, Swift & Co. (Swift), an Illinois corporation, sued A. E. Staley Manufacturing Co. (Staley), an Illinois corporation, in an Iowa court to recover money allegedly due for a soybean-processing plant to be built in Iowa. Staley immediately after sued Swift in Illinois for breach of the contract to build the plant. Swift added a claim in the Iowa suit against its alleged guarantor. Swift then moved to dismiss the Illinois suit under the predecessor to section 2-619(a)(3). The trial court granted the motion, under the erroneous assumption that dismissal was required because Swift had filed its suit first. *A. E. Staley*, 84 Ill. 2d at 249-50.

¶ 24 The supreme court reversed, holding that trial courts have discretion to decide whether to allow multiple actions arising out of the same operative facts to proceed. *Id.* at 253. However, the court continued, dismissal was improper there. The court emphasized that the Illinois lawsuit had a substantial relation to Illinois and that the dismissal of Staley's action would force Staley to file a counterclaim in the Iowa action. *Id.* Further, resolving Staley's suit in Illinois could expedite or moot the resolution of Swift's claim against the guarantor. *Id.* at 254.

¶ 25 In *Combined Insurance*, the defendant, a British reinsurance company, filed suit in the United Kingdom for a declaration that it did not have to indemnify the plaintiff, an insurance company, for any liability to its insured based on the September 11, 2001, attacks. The plaintiff filed a complaint in Illinois to declare the parties' rights under the reinsurance contract and to recover damages for the defendant's alleged breach of the contract. The trial court granted the

defendant's section 2-619(a)(3) motion to dismiss the action. The appellate court reversed. Citing *Staley*, the court explained that the trial court abused its discretion because, in order to obtain full relief in the United Kingdom action, the plaintiff would have to file a counterclaim. *Combined Insurance*, 356 Ill. App. 3d at 757. A dissent noted that a counterclaim would be necessary only if the reinsurer lost its action and also that the dismissal of one action averted the danger of inconsistent judgments. *Id.* at 758-59 (Quinn, J., dissenting).

¶ 26 *A. E. Staley* and *Combined Insurance* are distinguishable. Here, State Farm need not file a counterclaim in the Wisconsin action in order to prevail on the issue that its action in Illinois raises. State Farm need only raise the policy's two-year limitations provision as a defense, *which it has already done*. Limiting the litigation of this issue to one forum works no hardship on State Farm and enables the Wisconsin court to proceed with the more comprehensive action without having to stay the proceedings pending a decision (and a possible appeal) in the Illinois court.

¶ 27 In sum, we hold that the trial court did not abuse its discretion in dismissing State Farm's complaint. Therefore, we affirm the judgment of the circuit court of Lake County.

¶ 28 Affirmed.