2014 IL App (2d) 140020-U
No. 2-14-0020
Order filed November 13, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEKIN INSURANCE COMPANY as Subrogee of MAUREEN GIRKINS, Plaintiff-Appellant/Cross-Appellee, v. CHRISTOPHER and PAULA MURPHY, Defendants-Appellees/Cross-Appellants.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-L-401 Honorable Ronald D. Sutter, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Because the lease between Girkins and defendants reflected that they intended to place the responsibility for water damage on defendants, Girkins and defendants were not coinsureds. Thus, the trial court erred in dismissing plaintiff's subrogation action pursuant to section 2-615 of the Code. Further, because the mutual waiver of subrogation provision contained within the lease was ambiguous, the construction of that provision presented a question of fact and the trial court properly denied defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code. Therefore, we reversed and remanded.

¶ 2 Plaintiff, Pekin Insurance Company, appeals the trial court's order dismissing its property damage subrogation action against defendants, Christopher and Paula Murphy, pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2012)). The

dispute stems from defendants, who were renting a single-family house from Maureen Girkins, allegedly causing severe water damage to the property. Plaintiff, as Girkins' subrogee, is seeking to recover approximately $134,000 in alleged damages resulting from the water damage. Plaintiff contends that the trial court erred in finding that defendants were additional insureds under the insurance policy and that plaintiff could not bring a subrogation action against them. Defendants cross-appeal, arguing that the trial court erred when it denied its dismissal motion pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)). We reverse the trial court's decision granting defendants' motion to dismiss pursuant to section 2-615 and affirm its decision to deny defendants' motion to dismiss pursuant to section 2-619.

¶ 3 On May 1, 2013, plaintiff filed a complaint in the trial court, which alleged that Girkins was the owner of a residential structure located at 322 Harris Avenue in Clarendon Hills. Girkins purchased an insurance policy from plaintiff covering damage to the property. On September 16, 2009, Girkins leased the property to defendants pursuant to a two-year lease agreement with an option to purchase. Under the terms of the lease, defendants were required to purchase an insurance policy providing coverage in the amount of one million dollars, "protecting the structure and naming Girkins as an additional insured."

¶ 4 The lease contained a mutual waiver of subrogation rights which stated:

> "Whenever any loss, cost, damage or expense resulting from fire, explosion or other casualty or occurrence is incurred by either of the parties to this Lease in connection with the [p]remises, and such party is covered in whole or in part by insurance with respect to such loss, cost, damage or expense or such loss, cost damage or expense in insurable under a Special Cause of Loss form of property insurance, then the party so insured or insurable hereby releases the other party from any liability it may have on account

> thereof, provided that such release of liability and waiver of right of subrogation shall not be operative in any case where the effect thereof is to invalidate such insurance coverage or increase the cost thereof."

¶ 5 Plaintiff's complaint alleged that the property came equipped with an alarm system and the lease allocated payment of the alarm system to defendants. The alarm system package included notification to Girkins in the event of trouble or an emergency on the property. Unknown to Girkins, defendants removed Girkin's contact information from the account because they were responsible for the alarm bill.

¶ 6 According to the complaint, defendants left the property for a two-week vacation in California. Prior to leaving, defendants "stuffed an inordinate amount of toilet paper down a toilet on the second floor of the home, causing it to overflow and resulting in significant and severe damage to the property." The alarm company contacted defendants six times. Defendants initially ignored the calls and then instructed the alarm company to stop contacting them. Plaintiff alleged that defendants' act of overstuffing the toilet and their refusal to do anything to mitigate the damages subsequently caused $134,346.94 in damage to Girkin's property.

¶ 7 Defendants moved to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619(a) of the Code. As amended, defendants' motion argued that plaintiff's complaint should be dismissed pursuant to section 2-615 due to the mutual-waiver-of-subrogation-rights provision contained in the lease. Further, defendants argued, plaintiff could not overcome the "general rule" of tenant-non-liability that "reached its 'culmination' " in *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314 (1992). Defendants argued that, pursuant to *Dix* and its progeny, a tenant is not liable for damages to the leased property unless the lease's terms, construed as a

whole, clearly indicated that the parties intended for the tenant to be liable for such damages. With respect to section 2-619(a)(9), defendants argued that the lease's mutual waiver of subrogation provision is an affirmative matter that negates plaintiff's cause of action. Specifically, defendants argued that the waiver contained only two exceptions to being enforceable: (1) the waiver invalidates the insurance policy, or (2) the waiver itself makes the insurance policy more expensive. Defendants argued that neither of those exceptions applied.

¶ 8 In response, plaintiff directed the court to three separate lease provisions. The first provision provided:

> "6. The Lessee covenants and agrees with the Lessor to take good care of and keep in clean and healthy condition, the Premises and its fixtures *** that Lessee will make all repairs required to walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the premises, whenever such damage or injury to the same shall have resulted from Lessee's misuse or neglect; and Lessee agrees to pay for any and all repairs that shall be necessary to put the premises in the same condition as when Lessee entered therein, reasonable wear, acts of God, and loss by fire excepted; and Lessor shall have the right to make said repairs and recover the cost of the same from Lessee as rent."

The second provision, contained in paragraph 11 of the rider to the lease, provided:

> "11. Lessee, at its expense, shall maintain at all times during the term of the Lease commercial general liability insurance on an occurrence basis with limits of liability in an amount not less than $1,000,000 *** Such policy shall include coverage for bodily injury and property damage occurring in, on or about the Premises."

The third provision, contained in paragraph 12 of the rider, provided:

> "12. Lessee shall indemnify, defend and hold harmless Lessor and her agents, heirs and legal representatives from and against all losses, costs, expenses, claims, actions, lawsuits and damages (including attorneys' fees and disbursements) asserted against or sustained by any such indemnitee for bodily injury or property damage arising from, related to, or in connection with the use or occupancy of the Premises by, or any act or omission of, Lessee, their agents, contractors, invitee, which indemnity extends to any and all such claims arising from any breach or default in the performance of any obligation on Lessee's part to be performed under the terms of the Lease."

A further clause in the lease, contained in paragraph 7 of the lease and discussed by the parties when the trial court entertained oral arguments on the motion, provided:

> "7. In the event repairs are necessary as a result of normal wear and tear or acts of God, Lessor shall make them within a reasonable time. Lessee shall not, without consent of the Lessor, have the right to make repairs to the premises and charge against the rent due or withhold rent. In case the Premises shall be rendered untenable by fire or other casualty, Lessor may at Lessor's option terminate this lease or repair the premises within thirty days, and if Lessor fails to do so, the lease is terminated."

Plaintiff argued that, when taken together, the provisions indicated that Girkins and defendants agreed that defendants would be responsible for repairing any damage that resulted from their misuse or neglect.

¶ 9 On December 10, 2013, following arguments, the trial court denied defendants' motion under section 2-619(a)(9) but granted their motion under section 2-615. In reaching its determination, the trial court stated "I believe that there would be an issue of fact that would preclude me granting the 619 motion to dismiss on *** on the [mutual waiver of subrogation

provision]." Regarding defendants' section 2-615 motion to dismiss, the trial court determined that our supreme court's holding in *Dix* controlled. The trial court, therefore, held that by paying rent, defendants were considered co-insured under Girkin's insurance policy. In so holding, the trial court, citing the dissent in *Dix*, noted that the effect of the *Dix* holding has been to "make all tenants at any time and at any place co-insureds with their landlord" with the "only exception being if the parties had a clear agreement to the contrary." Plaintiff timely appealed the trial court's dismissal pursuant to section 2-615. Defendants timely cross-appealed the trial court's denial of their motion to dismiss pursuant to section 2-619.

¶ 10 We first consider plaintiff's appeal. Plaintiff contends that the trial court erred in dismissing its complaint pursuant to section 2-615 of the Code. Specifically, plaintiff argues that *Dix* does not stand for the proposition that all tenants are considered coinsureds and that, here, the lease allocated the risk of the alleged water damage to defendants. We agree.

¶ 11 A motion to dismiss under section 2-615 of the Code attacks the sufficiency of the complaint on the basis that, even assuming the truth of the complaint's allegations, the complaint does not state a cause of action entitling the plaintiff to relief. 735 ILCS 5/2-615 (West 2012); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). In ruling on a section 2-615 motion, the trial court must accept as true all well-pleaded facts in the complaint and all reasonable inferences therefrom. *McGrath v. Fahey*, 126 Ill. 2d 78, 90 (1988). In addition, the court interprets the complaint's allegations in the light most favorable to the plaintiff. *Id.* A claim should not be dismissed on the pleadings unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recover. *Heinrich v. White*, 2012 IL App (2d) 110564 at ¶ 9. We review *de novo* the trial court's ruling on a motion to dismiss. *Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010).

¶ 12 Both parties rely on *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314 (1992). In *Dix*, the plaintiff, an insurance company, as subrogee of the property owner, paid its insured, $40,579 for a fire loss on the property *Id.* at 317. The insurance company sought to recover its payment from the property's tenant because the tenant allegedly caused the fire loss by his negligence. *Id.* The trial court dismissed the insurance company's complaint for failing to state a cause of action after finding that the parties did not intend for the tenant to be liable for fire damage to the property and that the tenant was co-insured under the insurance company's policy, but the appellate court reversed. *Id.*

¶ 13 On review to the supreme court, the insurance company argued that the tenant was liable for the negligently caused fire damage because the lease did not contain a provision expressly relieving the tenant of liability. *Id.* at 320. Our supreme court rejected this argument. It began its analysis by noting that the appellate court erred in concluding that the tenant could only be relieved of being liable for the fire damages by an express provision in the lease, which was "not the law in Illinois." *Id.* Rather, courts must look to the lease "as a whole" and the spirit of the agreement, as opposed to searching for an express provision. *Id.* The supreme court concluded that the lease did not reflect an intent that, during the one-year lease term, the tenant would be responsible for fire damage to the property. *Id.* at 321. The supreme court noted that the only paragraph which "purportedly address[ed] the risk borne by either party" provided:

> "(E) The [t]enant will assume and their [*sic*] own risk for their [*sic*] personal property and [l]andlord *** will not be responsible for fire, wind or water damage." *Id.*

The supreme court rejected the insurance company's argument that the last clause of that paragraph revealed that the parties intended to place responsibility for fire damage to the property on the tenant. The supreme court concluded that, to do so, the court would have to

improperly read that last clause in isolation from the beginning of the sentence. "When read as a complete sentence," the supreme court opined, "it is obvious to us that the parties intended to expressly place responsibility for his own personal property on the tenant and to exempt the landlord from liability or damage to the *tenant's personal property*." (Emphasis in original). *Id.* at 321-22. The supreme court found significant that the lease expressly provided for the tenant's personal property, but failed to do so with respect to the leased premises. *Id.* at 322.

¶ 14 The supreme court further noted that it was "well settled" that an insurer may not subrogate against its own insured or any entity that has co-insured status under the policy. *Id.* at 323. The court concluded that, "under the particular facts of this case," the tenant, by payment of rent, has contributed toward to the payment of the insurance premium. Therefore, the tenant had gained the status of being coinsured. *Id.*

¶ 15 Pursuant to *Dix*, we must look to the lease as a whole to determine the "spirit of the agreement" between the parties. After doing so, we believe that the circumstances in *Dix* are distinct from the circumstances here. In this case, the lease expressly provides:

> "[Defendants] will make all repairs required to walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the premises, whenever such damage or injury to the same shall have resulted from [defendants'] misuse or neglect; and [defendants] agree[] to pay for any and all repairs that shall be necessary to put the premises in the same condition as when Lessee entered therein, reasonable wear, acts of God, and loss by fire excepted; and [Girkins] shall have the right to make said repairs and recover the cost of same from Lessee as rent."

We find this provision to be unambiguous and reflect an unmistakable intent that defendants would be responsible for all repairs that resulted from their "misuse or neglect," except for

reasonable wear, acts of God, and loss by fire. Unlike the lease in *Dix*, which only made a cursory reference to tenant risk by specifying that the tenant would assume the risk for his own property, the lease here clearly and unequivocally provided that, with limited exceptions, defendants would be responsible for "any and all repairs" that resulted from their misuse or neglect. Thus, we conclude that Girkins and defendants clearly allocated the risk of water damage caused by defendants' misuse and neglect to defendants.

¶ 16 Our decision today is not incongruous with *Nationwide Mutual Fire Insurance Co. v. T&N Master Builder & Renovators*, 2011 IL App (2d) 101143. In *Nationwide*, the plaintiff insurance company issued an insurance policy covering a building. *Id.* ¶ 1. The landlord had entered into a commercial lease with the defendants. *Id.* ¶ 4. A fire occurred that caused approximately $140,000 in damages to the property. *Id.* ¶ 3. The plaintiff, as subrogee, sued the tenants to recover the damages. The plaintiff relied on a lease provision that is nearly verbatim to lease's paragraph 6 here. We held that the plain language of that section concerned damages resulting from the tenants' negligence and that it "expressly imposed[d]" a duty upon the tenants to "make all repairs required to the walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures" when the "damage or injury to the same shall have resulted from misuse or neglect." *Id.* ¶ 18. However, we noted that the lease expressly excluded "[l]oss by fire" and that exclusion was broad enough to encompass the tenants' negligence. *Id.*

¶ 17 We agree with the court in *Nationwide* and conclude that paragraph 6 of the lease here, which contained substantially similar language, expressly imposes a duty on defendants to repair "walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures" that were damaged due to defendants' misuse or neglect. However, unlike *Nationwide*, the alleged

damages here resulted from an overflowing toilet, not a fire. Defendants have not pointed to any lease provision that excludes flooding damage from the obligations imposed in paragraph 6.

¶ 18 We further reject defendants' argument that "[i]t's economically irrational for multiple parties to insure the same property when they can allocate the cost of insurance among them by raising or lowering the price of renting the property." We believe that the spirit of the lease, when construed as a whole, reflects that the parties intended for defendants to be responsible for damages to the property that resulted from their misuse or neglect. This is evidenced by (1) paragraph six, which specified that defendants will make all repairs for damages to the "walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures" that resulted from their "misuse or neglect"; and (2) paragraph 11 of the rider, which specified that defendants were required to maintain general liability insurance for bodily injury and property occurring in the property. If the parties had not intended for defendants' to be liable for damage to the property caused by their own negligence, we believe that paragraph 11 of the rider would be rendered superfluous. See *J&G Restaurant v. Regas*, 156 Ill. App. 3d 834, 839 (1987) (noting that a court should give effect to a lease as a whole without disregarding any one provision.) If, as defendants maintain, the parties intended that defendants only responsibility was to obtain a commercial general liability insurance policy to cover the risk that third parties might suffer bodily or property damage at the leased property, the parties could have added a provision to paragraph 11 of the rider to reflect that intent See *Lee v. Allstate Life Insurance Co.*, 361 Ill. App. 3d 970, 979 (2005) (noting that a presumption exists against provisions that easily could have been included in a contract but were not).

¶ 19 As a result of the unambiguous lease provisions, and that defendants were in a two-year lease with an option to purchase, having them obtain insurance to cover damage to the property

that resulted from their own negligence was not economically irrational. On the contrary, we believe that our holding today is consistent with the notion that subrogation is an action in chancery and that it is " 'designed to place ultimate responsibility for the loss upon the one on whom in good conscience it ought to fall and to reimburse the innocent party who is compelled to pay.' " See *Nationwide*, 2011 IL App (2d) 101143, ¶ 9 (quoting *Reich v. Tharp*, 167 Ill. App. 3d 496, 500-01 (1987)). Based on the allegations in the complaint, which we must construe as being true (*McGrath*, 126 Ill. 2d at 90 (1988)), and combined with the Girkins' and defendants' intent as reflected in the lease, we believe that defendants' being ultimately responsible for the alleged damages would prevent an injustice and an unjust enrichment. See *Nationwide*, 2011 IL App (2d) 101143, ¶ 9 (noting that, as an action in equity, a claim may only be subrogated to prevent an injustice or unjust enrichment).

¶ 20 We next address defendants' cross-appeal. Defendants contend that the trial court erred when it denied their motion to dismiss pursuant to section 2-619(a)(9) of the Code. According to defendants, the mutual waiver of subrogation precludes recovery from plaintiff. In support of this contention, defendants argue that, because Girkins did not have to pay more for the mutual waiver of subrogation provision when she purchased the insurance policy, the limited exceptions contained within that waiver do not apply. Further, defendants argue that any reading that the waiver would not be applicable if the cost of insurance increased in the future would lead to an "untenable result."

¶ 21 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or established by external submissions that defeat the action. 735 ILCS 5/2-619 (West 2012); *Zahl v. Kruppa*, 365 Ill. App. 3d 653, 657-58 (2006). A motion pursuant to section 2-619

admits all well-pleaded facts and reasonable inferences therefrom, and the motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). When ruling on a motion pursuant to section 2-619, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A party may raise lack of standing as an affirmative matter under section 2-619(a). *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 739 (2008). A motion pursuant to section 2-619(a)(9) of the Code asserts the claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). Our supreme court has explained the phrase " 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). This court reviews *de novo* a section 2-619 order of dismissal. *Id.* at 116.

¶ 22 In this case, we believe that the mutual waiver of subrogation provision, and specifically, the exception contained within that provision, is nonspecific and ambiguous. That exception provides: "the party so insured or insurable hereby releases the other party from any liability it may have on account thereof, *provided that such release of liability and waiver of right of subrogation shall not be operative in any case where the effect thereof is to [1] invalidate such insurance coverage or [2] increase the cost thereof."* (Emphasis added.). We believe that the second part of that provision is susceptible to more than one reasonable interpretation. As defendants argue, "increase the cost therefore" could refer to increasing the cost of insurance coverage when Girkins purchased the insurance the policy. Pursuant to this interpretation, defendants argue that plaintiff did not charge Girkins more to include the mutual waiver of

subrogation provision, and therefore, the provision did not "increase the cost" of insurance coverage.

¶ 23 However, "increase the cost thereof" could also be reasonably interpreted to mean that the mutual waiver of subrogation provision is not applicable if enforcing that provision would "increase the cost" of insurance coverage prospectively. In other words, if plaintiff increases the cost of Girkins' policy in the future as a result of having to pay approximately $134,000 in water damage, then the "increase the cost thereof" exception to the waiver provision would come into effect. If the parties wanted the "increase the cost therefore" exception to apply only when Girkins had purchased the policy, and not apply if the cost of Girkins' insurance policy increased in the future, then they could have reflected that intent within the mutual waiver of subrogation provision. See *Lee*, 361 Ill. App. 3d at 979 (noting that a presumption exists against provisions that easily could have been included in a contract but were not). In finding this provision ambiguous, we reject defendants' argument that this interpretation would lead to an absurd reading. Defendants' argument is speculative and presumes that plaintiff will raise the cost of insurance after a claim merely to subrogate. However, based on the lease's language, we believe that the "increase the cost thereof" exception could be, at minimum, reasonably read to reflect an intent that the mutual waiver of subrogation provision was intended to apply to modest damages (which would not prospectively increase the cost of insurance), but not major damages (which would increase the cost of insurance).

¶ 24 Therefore, because the mutual waiver of subrogation provision is susceptible to more than one reasonable interpretation, it is ambiguous. As a result, the construction of that lease provision presents a question of fact that cannot be discerned as a matter of law, and resultantly, cannot be dismissed pursuant to section 2-619 of the Code. See *Fuller Family Holdings, LLC v.*

Northern Trust Co., 371 Ill. App. 3d 605, 623 (2007) (holding that, because the terms contained within lease amendments were ambiguous, their meaning presented a question of fact and a dismissal pursuant to section 2-619 was improper). Thus, the trial court did not err in denying defendants' motion to dismiss.

¶ 25 For the forgoing reasons we reverse the judgment of the circuit court of Du Page County regarding its dismissal of plaintiff's complaint pursuant to section 2-615 of the Code and affirm its judgment denying defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code.

¶ 26 Reversed in part, affirmed in part. Remanded for further proceedings.