2014 IL App (2d) 140118-U
Nos. 2-14-0118 & 2-14-0119 cons.
Order filed September 8, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

EAN SERVICES LLC, d/b/a Enterprise Rent A Car, Plaintiff-Appellant, v. SHELLY BRUNSON, Defendant (Progressive Universal Insurance Company, Citation Respondent-Appellee).	)	Appeal from the Circuit Court of Lake County. No. 12-SC-4197 Honorable Michael B. Betar, Judge, Presiding.

PROGRESSIVE UNIVERSAL INSURANCE COMPANY, Plaintiff-Appellee, v. EAN SERVICES LLC, d/b/a Enterprise Rent A Car, Defendant-Appellant (Shelly S. Brunson and Pervis Brunson, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 13-MR-1097 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order dismissing a citation to discover assets against an insurer was affirmed where the appellant forfeited any argument as to the propriety of that order (No. 2-14-0118). Neither the appellant nor the insurer was entitled to judgment as a matter of law in a declaratory judgment action where: 1) the complaint in the underlying action pleaded facts within or potentially within the scope of the insurance policy; 2) the insurer did not defend the insured in the underlying action under a reservation of rights or file a timely declaratory judgment action; and 3) there was a genuine issue of material fact as to whether the insurer had actual notice of the underlying lawsuit sufficient to trigger its duty to defend; it could not be determined as a matter of law whether the insurer either waived its policy defenses or is estopped from relying on them (No. 2-14-0119).

¶ 2 EAN Services LLC, d/b/a Enterprise Rent A Car (Enterprise)[1] appeals from orders of the circuit court of Lake County in two separate cases. In the first case, Enterprise filed a lawsuit against Shelly Brunson for damages caused to its rental vehicle. In a related declaratory judgment action, Progressive Universal Insurance Company, Brunson's automobile insurer, sought a declaration that it did not owe a duty to defend or indemnify with respect to the underlying action. We consolidated the appeals. In the case docketed in this court as No. 2-14-0118, Enterprise appeals from the dismissal of its citation to discover assets against Progressive. We affirm that order. In the case docketed as No. 2-14-0119, Enterprise appeals from two separate orders: one denying its motion to dismiss Progressive's complaint for declaratory judgment and another granting summary judgment in favor of Progressive and denying Enterprise's cross-motion for summary judgment. For the reasons that follow, we affirm the denial of Enterprise's motion to dismiss and its cross-motion for summary judgment. However, we reverse the order granting summary judgment in favor of Progressive, and we remand for

[1] Some of the pleadings refer to EAN Services LLC and Enterprise Rent A Car as separate entities. However, the parties' briefs on appeal indicate that EAN Services LLC does business as Enterprise Rent A Car.

further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The Bailment Action (No. 12-SC-4197)

¶ 5 On July 27, 2012, Enterprise filed a complaint against Brunson asserting a cause of action under a bailment theory. The complaint alleged as follows. Enterprise and Brunson entered a contract whereby Brunson rented an automobile from Enterprise. Brunson declined the optional collision damage waiver. Enterprise alleged that Brunson breached the contract in the following manner:

> "(a) Defendant Brunson failed to make payments in a timely manner for damages to said auto and appurtenant damages herein described;
>
> (b) Said damages were occasioned by Defendant Brunson's use of said auto (or by the use of said auto by Defendant's authorized agent for whom Defendant Brunson is responsible both in tort and contract); [and]
>
> (c) Said damages include the total value of the auto and/or repairs to same and rental charges, loss of use, tow charges, and appurtenant charges and fees."

The contract provided that Brunson would be responsible for damage to the vehicle regardless of her fault or negligence. Enterprise alleged that Brunson's breach of the contract proximately caused $2,154.90 in damages, plus court costs and attorney fees pursuant to the contract.

¶ 6 An affidavit of service indicates that Brunson was served with the complaint and summons on August 6, 2012, by leaving a copy of the documents at her usual place of abode with her mother. Another copy of the summons and complaint was mailed in a sealed envelope with postage prepaid to Brunson on August 9, 2012. Brunson did not file an appearance by the return date of September 5, 2012, so the court continued the matter to October 5, 2012, for

prove-up and entry of judgment.

¶ 7 The record on appeal contains a letter dated September 11, 2012, which purportedly was sent by Enterprise's counsel to Progressive, Brunson's automobile insurer. In that letter, Enterprise informed Progressive of the following:

> "Your insureds [*sic*] has been served and is in default for want of appearance. Demand is hereby made that you appear and defend your insured. **Your failure to appear may result in the entry of a Judgment against your insured and may constitute a waiver of any policy defense you may wish to assert.** This is set for default 10/5/12. Complaint enclosed." (Emphasis in original.)

The record does not indicate whether or when Progressive received this letter.

¶ 8 Neither Brunson nor any counsel on her behalf appeared in court on October 5, 2012. The court order entered that day was filled out by Enterprise's counsel on a pre-printed form. Where the form indicated "THE COURT FINDING ISSUES IN FAVOR OF:," counsel wrote "Shelly Brunson." The line was left blank where counsel was prompted to indicate against whom the judgment was entered. Despite the irregularities of this order, the parties do not dispute that the order entered a default judgment against Brunson in the amount of $2,263.00, which included the filing fee of $109.

¶ 9 On April 12, 2013, Enterprise filed a citation to discover assets directed to Progressive. On May 29, 2013, Progressive filed its appearance and affirmative defense to the citation. In its prayer for relief, Progressive asked the court to strike the citation to discover assets and/or stay the citation pending the outcome of the simultaneously filed declaratory judgment action. No further substantial rulings were made in the bailment action until the declaratory judgment action had been resolved.

¶ 10 The Declaratory Judgment Action (No. 13-MR-1097)

¶ 11 On May 29, 2013, Progressive filed a complaint for declaratory judgment against Enterprise, Brunson, and Pervis Brunson alleging the following. Progressive issued automobile insurance policy number 12337129-1 (the policy) to Brunson effective June 28, 2011, through December 28, 2011. Pervis was designated as an excluded driver under the policy. Progressive believed that the damage to Enterprise's vehicle "was the direct result of the driving of [Pervis]." Additionally, Brunson had "provided no cooperation or information in respect to the suit, despite numerous requests for such information" by Progressive. A copy of the policy was attached to the complaint, and Progressive highlighted several provisions. Progressive first noted a provision entitled "OTHER INSURANCE," which stated:

> "If there is any other applicable liability insurance or bond, we will pay only our share of the damages. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle or trailer, other than a covered auto, will be excess over any other collectible insurance, self-insurance, or bond."

Progressive also quoted a portion of the policy entitled "DUTIES IN CASE OF AN ACCIDENT OR LOSS," which provided, in relevant part:

> "For coverage to apply under this policy, you or the person seeking coverage must promptly report each accident or loss even if you or the person seeking coverage is not at fault. You or the person seeking coverage must provide us with all accident or loss information including time, place, and how the accident or loss happened. You or the person seeking coverage must also obtain and provide us the names and addresses of all

persons involved in the accident or loss, the names and addresses of any witnesses, and the license plate numbers of the vehicles involved.

***

A person seeking coverage must:

1. cooperate with us in any matter concerning a claim or lawsuit;

2. provide any written proof of loss we may reasonably require;

3. allow us to take signed and recorded statements, including sworn statements and examinations under oath, which we may conduct outside the presence of you or any other person seeking coverage, and answer all reasonable questions we may ask as often as we may reasonably require;

4. promptly call to notify us about any claim or lawsuit and send us any and all legal papers relating to the claim or suit; ***."

The third provision cited by Progressive in its complaint for declaratory judgment was entitled "FRAUD OR MISREPRESENTATION":

"We may deny coverage for an accident or loss if you or a person seeking coverage has knowingly concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim."

As grounds for declaratory judgment, the complaint asserted that if Pervis had been the driver of the damaged vehicle, then the policy did not obligate Progressive to defend or indemnify him. Additionally, if there was other insurance available to Enterprise, then Progressive's policy would be *pro rata* or excess insurance. The complaint alleged that even if Brunson had been driving the vehicle, Progressive owed no duty to indemnify her because of her failure to

cooperate as required by the policy. Finally, the complaint alleged that if Brunson had concealed information or misrepresented any material fact as to who was driving the vehicle at the time it was damaged, then Progressive owed no duty to indemnify her for the damages claimed by Enterprise. Progressive accordingly requested that the court determine the rights and obligations of the parties with respect to the policy and declare that Progressive was not obligated to "provide indemnification to [Enterprise] for any claimed conduct of [Brunson] or [Pervis]."

¶ 12 Enterprise filed a motion to dismiss the declaratory judgment action pursuant to section 2-619(a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(9) (West 2012)). In its motion, Enterprise asserted that Progressive "was well aware of the claim and suit" filed against Brunson in the bailment action, representing that Enterprise sent Progressive both a pre-suit demand letter and the September 11, 2012, letter described above. However, the copy of the pre-suit demand letter attached to the motion was undated. Enterprise moved to dismiss the declaratory judgment action on two bases: 1) Progressive owed coverage for all permissive drivers of the rental vehicle; and 2) Progressive waived its rights by failing to either defend under a reservation of rights or file a declaratory judgment action prior to the entry of a money judgment against Brunson. Enterprise admitted in its motion that Progressive sent out a "vague" reservation of rights, but noted that Progressive did not defend the suit under a reservation of rights. To that end, attached to the motion was a letter purportedly sent by Progressive to Brunson on March 2, 2012. Although the record on appeal contains only the first page of what appears to have been a multiple-page document, the March 2, 2012, letter stated:

> "Dear Shelly Brunson,
>
> We wish to inform you that we've completed our investigation into the above-captioned loss. To date, numerous attempts were made to contact you and unfortunately,

> our contact attempts by phone and mail were not returned. This lack of response has hindered our ability to complete our investigation. Therefore, we must conditionally deny payment for any damages that resulted from this loss due to lack of cooperation on your part.
>
> Please refer to your Illinois Auto Policy Form 9610 (03/07), under Part VI—Duties in Case of an Accident or Loss."

The March 2, 2012, letter then quoted that provision of the policy.

¶ 13 In response to Enterprise's motion to dismiss the declaratory judgment complaint, Progressive disputed its notice of the bailment action and argued that Pervis was an excluded driver under the policy. As to its notice of the bailment action, Progressive argued that "the only evidence offered by [Enterprise] is an undated letter from the [Enterprise] attorney allegedly mailed to [Progressive]." Progressive then claimed that the September 11, 2012, letter from Enterprise did not "reference anything other than a default judgment having been entered against [Brunson]." Additionally, Progressive argued that Enterprise had "offered no evidence to show that the driver behind the wheel of an Enterprise rental car was insured by the [Progressive] policy." Finally, Progressive contended that the documents attached to the motion to dismiss indicated that "there was a timely issuance of a Reservation of Rights upon receipt of information about the suit." Presumably, Progressive was referring to its March 2, 2012, letter to Brunson.

¶ 14 On October 4, 2013, the trial court denied Enterprise's motion to dismiss. The order indicated that the ruling was "based on Progressive[']s letter dated 3/2/12 which states 'we must conditionally deny payment,' " but was otherwise silent as to the court's reasoning.

¶ 15 Progressive thereafter filed a motion for summary judgment. Progressive argued: 1) the complaint in the bailment action did not allege who was driving at the time the rental vehicle was damaged, so Progressive did not have a duty to defend Brunson; 2) the policy provided only *pro rata* or excess coverage to rental vehicles; and 3) Progressive owed no duty to indemnify due to Brunson's failure to cooperate.

¶ 16 Enterprise filed its response and cross-motion for summary judgment. Enterprise argued that Progressive was estopped from asserting policy defenses because it did not defend the bailment action under a reservation of rights or file a timely declaratory judgment action. Addressing Progressive's argument that the bailment complaint did not identify the driver, Enterprise noted that the complaint alleged that the damages were caused either by Brunson herself or by her authorized agent. Enterprise also argued that Progressive owed a duty to defend all permissive drivers. Furthermore, Enterprise explained that the policy provision regarding Progressive being an excess insurer was irrelevant because Enterprise carried no insurance for damages to its own vehicles. Enterprise finally asserted that Progressive's argument about Brunson's non-cooperation was a "non-starter" because Progressive needed to show more than letters or requests for cooperation in order to sustain the burden of non-cooperation. Enterprise thus requested judgment in its favor and asked the court to "reserve the issue" of whether Progressive's conduct was "vexatious and unreasonable" within the meaning of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)). Among the exhibits to its cross-motion, Enterprise attached several of the documents that it had previously presented to the court with its motion to dismiss, including: the undated pre-suit demand letter from Enterprise to Progressive; the September 11, 2012, letter from Enterprise to Progressive; and the first page of

what appears to have been a multiple-page letter from Progressive to Brunson dated March 2, 2012.

¶ 17 On January 22, 2014, the trial court granted Progressive's motion for summary judgment. The order indicates that the court also denied Enterprise's "motion to dismiss," but this is likely an error because the court had denied the motion to dismiss on October 4, 2013. It is apparent from both the record on appeal and the parties' briefs that the trial court denied Enterprise's cross-motion for summary judgment. As to the court's reasoning, the order indicated only that Progressive "owed no duty to defend [Brunson] and [Pervis] as to the underlying suit." Enterprise timely appeals from this order (No. 2-14-0119).

¶ 18 In light of the January 22, 2014, order in the declaratory judgment action, the trial court in the bailment action on January 27, 2014, dismissed Enterprise's citation to discover assets against Progressive. Enterprise timely appeals from this order (No. 2-14-0118).

¶ 19 II. ANALYSIS

¶ 20 Enterprise appeals from final orders in two separate cases: the bailment action (No. 2-14-0118) and the declaratory judgment action (No. 2-14-0119). We address each appeal in turn.

¶ 21 Appeal No. 2-14-0118: Citation to Discover Assets in the Bailment Action

¶ 22 Enterprise appeals from the trial court's order of January 27, 2014, which dismissed the citation to discover assets in the bailment action based on the January 22, 2014, order in the declaratory judgment action. However, Enterprise has forfeited any arguments it may have regarding the propriety of that order by failing to address such issues in its brief on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (the appellant's brief must include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *Cundiff v. Patel*, 2012 IL App (4th) 120031, ¶

22 ("[A] party's failure to argue a point in his brief will result in forfeiture of the issue on appeal."). In the "issues presented" section of its brief, Enterprise limits the issues on appeal to whether the court's rulings in the declaratory judgment action were erroneous. Enterprise having provided no argument as to the appeal in case no. 2-14-0118, we affirm the trial court's order dismissing the citation to discover assets.

¶ 23 Appeal No. 2-14-0119: Declaratory Judgment Action

¶ 24 Enterprise also appeals from the denial of its motion to dismiss the declaratory judgment action, the denial of its cross-motion for summary judgment, and the grant of summary judgment in favor of Progressive. Enterprise raises two primary issues common to the trial court's rulings on each of these motions: 1) Progressive waived its policy defenses, or is estopped from relying on them, because it failed to either defend the bailment action under a reservation of rights or file a timely declaratory judgment action; and 2) the court erred in not finding that Progressive's conduct was "vexatious and unreasonable" under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)).[2] Progressive's principal arguments in response are: 1) it owed no duty to defend either Brunson or Pervis in the bailment action under an "eight corners" analysis; 2) Brunson breached the policy by failing to cooperate, and Progressive sent her a properly executed conditional denial letter; and 3) it is not estopped from asserting policy defenses because it filed a timely declaratory judgment action.

¶ 25 The record is silent as to the trial court's basis for concluding that Progressive did not owe a duty to defend. However, we discern three possible bases for the trial court's rulings: 1) the bailment complaint failed to allege facts within or potentially within the scope of the policy;

[2] Enterprise does not dispute the merits of Progressive's policy defenses in this appeal. We express no opinion regarding the merit of any policy defense.

2) Progressive did not waive its policy defenses, and was not estopped from asserting them, because it either defended the bailment action under a reservation of rights or filed a timely declaratory judgment action; or 3) Progressive's duty to defend was never triggered because it did not have actual notice of the bailment action. "We review the trial court's decision, not its reasoning, and, if the decision is correct, we may affirm the trial court on any basis in the record." *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 31. Therefore, we must determine whether Progressive was entitled to judgment as a matter of law on any one of these grounds.

¶ 26 We hold that the trial court properly denied Enterprise's motion to dismiss and its cross-motion for summary judgment. However, the court erred in granting summary judgment in favor of Progressive. Specifically, the bailment complaint alleged facts within or potentially within the scope of the policy, and it is clear that Progressive did not defend Brunson in the bailment action under a reservation of rights or file a timely declaratory judgment action. Therefore, the trial court could not have properly relied on either of those grounds. Finally, there is a genuine issue of material fact as to whether Progressive's duty to defend was triggered by actual notice of the bailment action. This precludes us from determining at this stage of the proceedings whether Progressive is barred by waiver or estoppel from relying on its policy defenses. Accordingly, we reverse and remand for further proceedings.

¶ 27 Standard of Review

¶ 28 Section 2-619(a)(9) of the Code provides for involuntary dismissal of a complaint when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). "When reviewing a dismissal under section 2-619, a court must accept as true all well-pleaded facts in the plaintiff's

complaint and all inferences that can reasonably be drawn in the plaintiff's favor." *McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ 14. A reviewing court considers *de novo* "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 29 Similarly, summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). We review the trial court's decision on a motion for summary judgment *de novo. Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1059 (2010). "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." (Internal quotation marks omitted.) *Roszak/ADC, LLC*, 402 Ill. App. 3d at 1059. "When parties file cross-motions for summary judgment, the court is invited to decide the issue on summary judgment as a matter of law; however, summary judgment is nevertheless inappropriate if factual questions regarding a material issue exist." (Internal quotation marks omitted.) *Feliciano v. Geneva Terrace Estates Homeowners Ass'n*, 2014 IL App (1st) 130269, ¶ 30.

¶ 30 The Allegations in the Bailment Complaint Potentially Fell Within the Scope of the Policy under the "Eight Corners" Analysis

¶ 31 "An insurer's duty to defend its insured is much broader than its duty to indemnify." *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 951 (2006). Generally, to determine whether an insurer has a duty to defend an action filed against its insured, the court compares the allegations of the underlying complaint to the

language of the policy, liberally construing both in favor of the insured. *Kingsport Development, LLC*, 364 Ill. App. 3d at 951. If the allegations in the complaint fall within, or potentially within, the coverage of the policy, the insurer has a duty to defend the insured. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). This has been referred to as the "eight corners" analysis. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). "[I]f the underlying complaint[] allege[s] several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy." *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). This is so "even if the allegations are groundless, false, or fraudulent." (Internal quotation marks omitted.) *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 153 (1999).

¶ 32 The parties disagree as to whether the allegations in the bailment complaint fell within or potentially within the scope of the policy. However, Progressive does not dispute on appeal that, policy defenses aside, it would be required to defend the action under the eight corners analysis if the complaint could fairly be interpreted as alleging that Brunson was driving the vehicle when it was damaged. Nevertheless, Progressive argues that the complaint "fail[ed] the eight corner test" because Enterprise "fail[ed] to allege who was driving the vehicle at the time of the incident and fail[ed] to allege who even caused the damage at issue."

¶ 33 Contrary to Progressive's interpretation of the complaint, it plainly alleged that Brunson breached the rental contract, that the vehicle was damaged, and that "[s]aid damages were occasioned by *Defendant Brunson's use of said auto* (or by the use of said auto by Defendant's authorized agent for whom Defendant Brunson is responsible both in tort and contract)." (Emphasis added.) The complaint thus alleged alternative legal theories: either Brunson caused

the damage to the vehicle herself or somebody for whom she was legally responsible caused the damage. The allegation that the damage was occasioned by Brunson's use of the auto fell within or potentially within the scope of the policy.[3] Accordingly, the trial court could not have properly granted summary judgment in favor of Progressive on the basis that the bailment complaint did not allege facts within or potentially within the scope of the policy.

¶ 34 Progressive Did Not Defend Brunson Under a Reservation of Rights or File a Timely Declaratory Judgment Action

¶ 35 In light of our holding that the bailment complaint alleged facts within or potentially within the scope of the policy, the trial court's rulings on the various motions were appropriate only if Progressive was entitled to invoke its policy defenses and if those defenses were indeed meritorious. The supreme court has explained:

> "The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insurer has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is

[3] Progressive believes (although it does not articulate the basis for its belief) that Pervis, who was an excluded driver under the policy, was driving the vehicle at the time that it was damaged. Although the parties have not raised the issue on appeal, they disputed in the trial court whether Progressive might have owed a duty to defend Pervis as a permissive driver of the rental vehicle. We need not address this issue because the complaint alleged alternative theories, one of which potentially fell within the scope of the policy.

> later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage." *Ehlco Liquidating Trust*, 186 Ill. 2d at 150-51.

Enterprise insists that Progressive waived its policy defenses, or is otherwise estopped from asserting them, because it failed to take either of these steps. If Progressive's duty to defend was triggered (a question to which we will return later in the disposition), then the trial court could have properly granted summary judgment in favor of Progressive if Progressive exercised one of the above options so as to preserve its right to rely on meritorious policy defenses.[4]

¶ 36 As to the first option, Progressive unquestionably did not defend Brunson in the bailment action under a reservation of rights. Progressive nevertheless suggests that "there was a timely reservation of rights letter issued upon receive [*sic*] of information about the suit." As there is no other correspondence in the record between Progressive and its insured, Progressive presumably is referring to the March 2, 2012, letter that it sent to Brunson. In that letter, Progressive "conditionally den[ied] payment for any damages" because of Brunson's non-cooperation—specifically, her failure to respond to Progressive's attempts to contact her.

¶ 37 The court in *Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill. App. 3d 966 (1991), explained an insurer's reservation of rights as follows:

> "The reservation of rights is a means by which the insurer seeks to suspend the operation of estoppel doctrines; when an insurer defends a claim against its insured under a proper reservation of rights, the insured cannot then so easily claim that it was prejudiced by the insurer's conflict of interest. [Citations.]

[4] Enterprise's waiver argument mirrors its estoppel argument, so our analysis of the issues is the same.

> Such a reservation of rights must, therefore, adequately inform the insured of the rights which the insurer intends to reserve, for it is only when the insured is adequately informed of the potential policy defense that he can intelligently choose between retaining his own counsel or accepting the tender of defense counsel from the insurer. [Citation.] Accordingly, bare notice of a reservation of rights is insufficient; the notice must make specific reference to the policy defense which ultimately may be asserted and to the potential conflict of interest. [Citations.] If the insurer has adequately informed the insured of its election to proceed under a reservation of rights, and the insured accepts the insurer's tender of defense counsel, the insurer has not breached its duty of loyalty and is not estopped from asserting policy defenses." (Internal quotation marks omitted.) *Royal Insurance Co.*, 221 Ill. App. 3d at 973-74.

With this in mind, Progressive's March 2, 2012, letter to Brunson cannot be construed as an offer to defend her in the bailment action under a reservation of rights. As an initial matter, the letter was purportedly sent several months before the bailment complaint was filed. Nor did Progressive offer to defend or actually defend Brunson in any action. Additionally, Progressive even admits elsewhere in its brief that the March 2, 2012, correspondence was "a properly executed conditional denial letter." Therefore, Progressive did not defend Brunson under a reservation of rights.

¶ 38 The question then becomes whether Progressive filed its declaratory judgment action in a timely manner. Although "[o]ur supreme court has not created a definitive framework for determining what constitutes a timely filed action" (*Kingsport Development, LLC*, 364 Ill. App. 3d at 959), it has held that "[w]here an insurer waits to bring its declaratory judgment action until after the underlying action has been resolved by a judgment or a settlement, the insurer's

declaratory judgment action is untimely as a matter of law." *Ehlco Liquidating Trust*, 186 Ill. 2d at 157. Surprisingly, the parties have at all times in this litigation operated under the assumption that the October 5, 2012, order in the bailment action properly defaulted Brunson. This is so despite the fact that the order did not indicate against whom the judgment was entered. The order even indicated that the court "f[ound] issues in favor of" Brunson. Nevertheless, because the parties have not questioned whether the October 5, 2012, order properly entered a default judgment against Brunson—the only defendant in the bailment action—we must conclude that the declaratory judgment action, which was not filed until May 29, 2013, was untimely as a matter of law. *Ehlco Liquidating Trust*, 186 Ill. 2d at 157; *Kingsport Development, LLC*, 364 Ill. App. 3d at 959.

¶ 39 Therefore, the trial court's rulings on the motion to dismiss and the cross-motions for summary judgment cannot be affirmed on the basis that Progressive defended the bailment action under a reservation of rights or filed a timely declaratory judgment action.

¶ 40 Genuine Issue of Material Fact as to Actual Notice of the Bailment Action

¶ 41 The final potential basis for the trial court's rulings is that Progressive's duty to defend was never triggered by actual notice of the bailment action. The supreme court has recognized that "[a]pplication of the estoppel doctrine is not appropriate if the *** insurer's duty to defend was not properly triggered," such as "where the insurer was given no opportunity to defend" the underlying lawsuit. *Ehlco Liquidating Trust*, 186 Ill. 2d at 151. Where the insurer has "actual notice" of the underlying suit, its duty to defend is triggered even if the insured does not formally tender the defense. *Ehlco Liquidating Trust*, 186 Ill. 2d at 143. "Actual notice" has been defined as "notice sufficient to permit the insurer to locate and defend the lawsuit." (Internal quotation marks omitted.) *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 329 (1998).

"[I]n order to have actual notice sufficient to locate and defend a suit, the insurer must know both that a cause of action has been filed and that the complaint falls within or potentially within the scope of the coverage of one of its policies." *Cincinnati Cos.*, 183 Ill. 2d at 329-30.

¶ 42 According to Enterprise, Progressive "simply dropped the ball" and "abandoned their [*sic*] own insured" by not filing the declaratory judgment action until 8 months and 18 days after it received notice of the bailment action and 7 months and 24 days after judgment was entered against Brunson. Progressive, on the other hand, blames the timing of its declaratory judgment action on Brunson's non-cooperation and failure to tender the defense of the suit. As noted above, the record on appeal contains both an undated pre-suit demand letter from Enterprise to Progressive as well as a September 11, 2012, letter requesting that Progressive defend Brunson in the bailment action. Progressive has not questioned the foundation for considering these exhibits as evidence,[5] even though the letters—and, indeed, Progressive's March 2, 2012, conditional denial letter to Brunson—have not been properly authenticated.[6] Nor has

[5] Regarding the undated letter, Progressive notes that there was "no proof of mailing or any evidence other than the word of [Enterprise's] counsel." However, Progressive does not actually dispute the foundation for considering this, or any other letter, as evidence.

[6] "In civil cases in Illinois, the basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence. (Citation.) Evidence must be presented to demonstrate that the document is what its proponent claims it to be. (Citation.) Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence." (Internal quotation marks omitted.) *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 108 (2009).

Progressive specifically admitted or denied receiving the pre-suit correspondence or the September 11, 2012, letter. It is also readily apparent from the parties' briefs both in the trial court and on appeal that they disagree about the critical issue of when Progressive became aware of the bailment action.

¶ 43 Whether an insurer received actual notice of an underlying action sufficient to trigger its duty to defend is a question of fact. See *Ehlco Liquidating Trust*, 186 Ill. 2d at 143 ("The pleadings, however, are silent on the factual issue of whether Wausau had actual notice that the Arkansas suit had been filed."); *Home Insurance Co. v. United States Fidelity & Guaranty Co.*, 324 Ill. App. 3d 981, 995 (2001) ("Whether the doctrine of estoppel applies on the basis that [the insurer] had no opportunity to defend is a question of fact to be resolved by the trial court."). The record is insufficient for us to determine as a matter of law whether Progressive had actual notice of the bailment action sufficient to trigger its duty to defend. Without resolution of this factual issue, we cannot evaluate whether Progressive is estopped from asserting its policy defenses. *Home Insurance Co.*, 324 Ill. App. 3d at 996.

¶ 44 For the same reasons, we cannot determine whether Progressive waived its policy defenses through its actions or inactions. "Waiver consists of the intentional relinquishment of a known right and may be express or implied from the insurer's acts, words, conduct, or knowledge." (Internal quotation marks omitted). *American States Insurance Co. v. National Cycle, Inc.*, 260 Ill. App. 3d 299, 305-06 (1994). However, "as a general rule, a waiver of rights will not be found when a party is ignorant of the existence of such rights." (Internal citations omitted.) *National Cycle, Inc.*, 260 Ill. App. 3d at 306. If Progressive was not aware of the lawsuit filed against Brunson, then it could not have intentionally relinquished its right to assert policy defenses.

¶ 45 Summary of Holdings

¶ 46 The trial court's conclusion that Progressive owed no duty to defend with respect to the bailment action could have rested on one or more of three bases. However, Progressive is not entitled to summary judgment on any of those grounds. First, the bailment complaint alleged facts within or potentially within the scope of the policy. Additionally, Progressive did not defend Brunson in the bailment action under a reservation of rights and did not file a timely declaratory judgment action. Finally, there is a genuine issue of material fact as to whether Progressive had actual notice of the bailment action sufficient to trigger its duty to defend, which precludes us from determining whether Progressive waived its policy defenses or is estopped from asserting them. At this stage of the proceedings, neither party is entitled to judgment as a matter of law. Accordingly, the trial court properly denied Enterprise's motion to dismiss and cross-motion for summary judgment, but improperly granted summary judgment in favor of Progressive.

¶ 47 On remand, if the trial court finds that Progressive's duty to defend was not triggered by actual notice of the lawsuit, it should enter judgment in Progressive's favor. However, if the court finds that Progressive had actual notice of the bailment action such that it waived its policy defenses or is estopped from asserting them, or if the asserted policy defenses have no merit, then the court should enter judgment in Enterprise's favor and address the arguments as to damages under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)).

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the dismissal of the citation to discover assets in the bailment action (No. 2-14-0118), and we affirm in part, reverse in part, and remand for further proceedings in the declaratory judgment action (No. 2-14-0119).

¶ 50 No. 2-14-0118, Affirmed

¶ 51 No. 2-14-0119, Affirmed in part and reversed in part.

Cause remanded.