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2011 IL App (4th) 110190-U

Filed 10/3/11

NO. 4-11-0190

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GIRALDO ROSALES and MELODYE ROSALES,	)	Appeal from
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Champaign County
COUNTRY MUTUAL INSURANCE COMPANY,	)	No. 07L257
Defendant-Appellee.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where this court had already held plaintiffs' first-amended complaint alleged sufficient facts to support waiver and estoppel claims, the trial court erred by missing plaintiffs' third-amended complaint that contained even more factual allegations.

¶ 2 Plaintiffs, Giraldo and Melodye Rosales, appeal the Champaign County circuit court's dismissal with prejudice of their third-amended complaint against defendant, Country Mutual Insurance Company. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 Under policy No. AK2927269, defendant insured plaintiffs' principal residence located in Champaign, Illinois. Paragraph 10 of section A of the conditions portion of the policy stated that, "[n]otwithstanding any other provisions in this policy, all claims under or suits on this policy must be brought within one year of the date of 'occurrence.'" On January 7, 2005,

plaintiffs discovered a pipe had burst in their principal residence, causing extensive damage to the residence and their personal property. In December 2006, the parties entered into a settlement agreement for the dwelling damages related to the January 2005 loss. The agreement expressly stated it did not include or contemplate any claims for personal-property damage arising out of the January 2005 incident. In early 2007, plaintiffs filed two proof-of-loss statements related to the January 2005 personal-property damage. In July 2007, defendant denied all liability for plaintiffs' personal-property-damage claim related to the January 2005 loss.

¶ 5 In December 2007, plaintiffs filed a complaint against defendant, seeking to recover the money related to the January 2005 personal-property damage. In June 2008, plaintiffs filed their first-amended complaint. In November 2008, the trial court held a hearing on defendant's motion to dismiss plaintiffs' first-amended complaint. During the hearing, plaintiffs requested leave to file a second-amended complaint to address waiver and estoppel. The court denied the request and dismissed plaintiffs' first-amended complaint, finding it time barred. Plaintiffs appealed.

¶ 6 On appeal, this court concluded the contractual limitations period for filing suit expired on January 7, 2006. *Rosales v. Country Mutual Insurance Co.*, No. 4-08-0964, slip order at 9 (September 24, 2009) (unpublished order under Supreme Court Rule 23). However, we found "plaintiffs' first-amended complaint contains factual allegations raising questions of fact regarding whether defendant waived or is estopped from raising the one-year limitations period for filing suit." *Rosales*, slip order at 15. Thus, we reversed the trial court's dismissal and remanded the cause for further proceedings, noting plaintiffs should be allowed to file the

second-amended complaint that they had earlier requested.

¶ 7 On remand, the trial court granted plaintiffs leave to file a second-amended complaint. In March 2010, plaintiffs filed their second-amended complaint, which the court dismissed because plaintiffs failed to plead facts demonstrating waiver and estoppel. In September 2010, plaintiffs filed their third-amended complaint. Defendant filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619.1 (West 2010)), asserting plaintiffs failed to properly plead facts sufficient to support a claim of estoppel or waiver. On February 1, 2011, the court dismissed plaintiffs' third-amended complaint with prejudice, finding, in pertinent part, the following:

"I believe the original complaint was time barred. I believe the appellate court ruled that the original complaint was time barred, and that but for a conclusory allegation of waiver and estoppel in the original complaint that would have been the end of it. The appellate court believed that I dismissed this case with prejudice hastily and that I should have permitted you the opportunity to amend. That's my reading. I understand you respectfully disagree with that.

I believe that even now after I dismiss [*sic*] the second amended complaint the third amended complaint is in the same posture, which is that the allegations regarding waiver and estoppel are conclusory."

¶ 8 On February 28, 2011, plaintiffs filed a notice of appeal in sufficient compliance

with Illinois Supreme Court Rule 303 (eff. May 30, 2008), and thus we have jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 9

## II. ANALYSIS

¶ 10 Plaintiffs assert the trial court erred by granting defendant's dismissal motion because (1) the trial court misinterpreted this court's Rule 23 order and (2) the third-amended complaint sufficiently pleaded facts showing both estoppel and waiver.

¶ 11

### A. Standard of Review

¶ 12 Here, defendant filed a combined motion to dismiss under section 2-619.1 of the Procedure Code. Defendant did not state under what section it sought dismissal related to the waiver and estoppel claims, and the trial court did not state under what section it was granting the dismissal. We note defendant argued plaintiffs failed to properly plead facts sufficient to support waiver and estoppel claims, and that is what the court found. "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 160-61, 920 N.E.2d 220, 223 (2009). Accordingly, we find the dismissal was under section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2010)).

¶ 13 We review *de novo* an order granting a section 2-615 motion. *Tedrick*, 235 Ill. 2d at 161, 920 N.E.2d at 223. Our supreme court has explained the review of a dismissal under section 2-615 as follows:

"In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. [Citation.] We also construe the allegations in

the complaint in the light most favorable to the plaintiff. [Citation.] Given these standards, a cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. [Citation.] However, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Tedrick*, 235 Ill. 2d at 161, 920 N.E.2d at 223.

¶ 14 B. Sufficiency of the Third-Amended Complaint

¶ 15 In our previous decision that addressed plaintiffs' first-amended complaint, we addressed the law regarding estoppel and waiver. In setting forth the applicable law, we cited both *Mathis v. Lumbermen's Mutual Casualty Insurance Co.*, 354 Ill. App. 3d 854, 858, 822 N.E.2d 543, 548 (2004) (quoting *Tibbs v. Great Central Insurance Co.*, 57 Ill. App. 3d 866, 868, 373 N.E.2d 492, 493 (1978) (quoting 43 Am. Jur. 2d *Insurance* § 1054, at 978 (1969) (language now contained in 44 Am. Jur. 2d *Insurance* § 1544, at 32 (2003)))) and *Williams v. Prudential Property & Casualty Insurance Co.*, 223 Ill. App. 3d 654, 661, 585 N.E.2d 1110, 1115 (1992) (quoting *Village of Lake in the Hills v. Illinois Emcasco Insurance Co.*, 153 Ill. App. 3d 815, 817, 506 N.E.2d 681, 683 (1987)). *Rosales*, slip order at 11-12. After applying the law in those cases to plaintiffs' first-amended complaint, we conclude that, despite the failure to use the term "waiver" or "estoppel," plaintiffs sufficiently pleaded facts establishing waiver and estoppel claims in paragraph 32 of the first-amended complaint. *Rosales*, slip order at 15. Since the trial court had denied plaintiffs' request to file a second-amended complaint to address waiver and estoppel during the hearing on the motion to dismiss the first-amended complaint, we noted the

trial court should allow defendant to file the requested second-amended complaint. *Rosales*, slip order at 16. Our decision did not require defendant to file a second-amended complaint to survive a motion to dismiss under section 2-615 as we had already found defendant's first-amended complaint alleged sufficient facts to state waiver and estoppel claims.

¶ 16 In their third-amended complaint, plaintiffs pleaded even more specific facts detailing the actions of defendant's agents that (1) encouraged plaintiffs not to act on their rights to file a sworn statement in proof of loss and/or a suit during the limitations period and (2) show the enforcement of the limitations period would be unjust under the circumstances. For example, paragraph 30 states that, from September 2005 through February 2006, when plaintiffs asked about the status of the remainder of their claim, defendant's claims agent, Roger Lloyd, assured them the check was on the way, everything would work out, and not to worry. In paragraphs 33-35, plaintiffs set forth the various agents of defendant that informed them their personal-property claim would be addressed after the dwelling claim, which we note was not resolved until the limitations period had expired.

¶ 17 Defendant does not cite any authority for its assertion the facts establishing waiver and estoppel had to take place before the limitations period expired. Defendant's actions after the expiration of the limitations show the continued pattern of "stringing the plaintiffs along," thinking they would get their money for the personal-property damage. The facts after the expiration of the limitations period also suggest the enforcement of the limitations period would be unjust under the circumstances. In *dicta* in *Hines v. Allstate Insurance Co.*, 298 Ill. App. 3d 585, 589-90, 698 N.E.2d 1120, 1124 (1998), this court recognized the insurer's actions after the limitations period supported a claim of estoppel. The *Hines* court stated the following:

"Why did Allstate pay the structural claim on August 18, 1993, which was more than a year after the fire on May 23, 1992? A proof of loss was submitted on the structural claim on August 9, 1993, but that was also more than a year after the fire. During oral argument Allstate conceded that it was estopped by its conduct to assert the policy period of limitations as to the structural claim." *Hines*, 298 Ill. App. 3d at 589-90, 698 N.E.2d at 1124.

¶ 18 Defendant also argues the third-amended complaint is fatally defective because plaintiffs did not allege they relied on defendant's conduct in not filing suit within the limitations period. First, we note "waiver of an insurer's rights occurs unilaterally and does not require any prejudice to or detrimental reliance by the insured." *Liberty Mutual Fire Insurance Co. v. Woodfield Mall, L.L.C.*, 407 Ill. App. 3d 372, 393, 941 N.E.2d 209, 226 (2010). As to estoppel, we agree with plaintiffs it is implicit in the facts they alleged in the third-amended complaint they followed the advice and reassurances of defendant's agents which led them not to even address the personal-property damage until after the dwelling damage was settled, which was almost a year after the expiration of the limitations period. We again find the facts contained in plaintiffs' latest complaint are sufficient to state waiver and estoppel claims to defendant's limitations-period defense.

¶ 19 Accordingly, we find the trial court erred by dismissing plaintiffs' third-amended complaint. On appeal, plaintiffs request we reassign the case to another judge on remand. We decline to do so as it appears the court simply misunderstood our prior order. Plaintiffs also ask us to remand with directions to order defendant to answer the complaint. We agree with

plaintiffs that defendant now needs to answer their third-amended complaint.

¶ 20

### III. CONCLUSION

¶ 21 For the reasons stated, we reverse the Champaign County circuit court's dismissal of plaintiffs' third-amended complaint and remand this cause to the circuit court with directions that defendant must answer the complaint within 30 days.

¶ 22

Reversed and remanded with directions.