2019 IL App (5th) 180210-U

NO. 5-18-0210

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PREMCOR REFINING GROUP INC. (f/k/a Clark Refining & Marketing Inc. and as assignee under certain insurance policies originally issued to Clark Oil and Refining Corporation, Clark Oil & Refining Corporation, Apex Oil Company, and Apex Oil Company, Inc.),	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellant,	)	
v.	)	No. 16-MR-78
ACE INSURANCE COMPANY OF ILLINOIS (as successor in interest of INA Insurance Company of Illinois), AIG DOMESTIC CLAIMS, INC., AIG TECHNICAL SERVICES, AIOI INSURANCE COMPANY OF AMERICA, ALLSTATE INSURANCE COMPANY (as successor to Chiyoda Fire & Marine Ins. Co.), AIU INSURANCE COMPANY, ALEXANDER & ALEXANDER, INC., ALLSTATE INSURANCE COMPANY (as successor in interest to Northbrook Excess and Surplus Insurance Company, f/k/a Northbrook Insurance Company), APEX OIL COMPANY, INC., A.R.I.G., ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE, ARROWPOINT CAPITAL CORPORATION (f/k/a Royal & SunAlliance), ARROWOOD INDEMNITY COMPANY (f/k/a Royal Indemnity Company), ASSICURAZIONI GENERALI S.P.A., ATLANTIC MUTUAL INSURANCE COMPANY, BALTICA NORDISK RE, CAVEL USA, INC., CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA, CENTURY INDEMNITY	)	

COMPANY, CHANCELLOR INSURANCE COM-)
PANY LTD. PER CHANCELLOR INSURANCE)
COMPANY LTD., CHICAGO INSURANCE COM-)
PANY, CHRISTIANSSANDS, EMPLOYERS IN-)
SURANCE OF WAUSAU, EMPLOYERS MUTUAL)
CASUALTY COMPANY, FIREMAN'S FUND IN-)
SURANCE COMPANY, FIRST STATE INSUR-)
ANCE COMPANY, GENERAL REINSURANCE)
CORPORATION, GJENSIDIGE FORSIKRING,)
GRANITE STATE INSURANCE COMPANY, HAR-)
BOR INSURANCE COMPANY, HARTFORD IN-)
SURANCE COMPANY, HIGHLANDS INSURANCE)
COMPANY, I.L.U. COMPANIES, INSURANCE)
COMPANY OF THE STATE OF PENNSYLVANIA,)
INTERSTATE INSURANCE GROUP, JOHNSON &)
HIGGINS OF MISSOURI, INC., LEXINGTON)
INSURANCE COMPANY, LIBERTY INSURANCE)
UNDERWRITERS, INC. (f/k/a Albany Insurance Co.),)
LONDON & HULL MARITIME INS. CO. LTD.,)
MALVERN INSURANCE COMPANY LTD., MID-)
LAND INSURANCE COMPANY, MUNICH REIN-)
SURANCE AMERICA, NATIONAL UNION FIRE)
INSURANCE COMPANY OF PITTSBURGH, PA,)
NATIONWIDE INDEMNITY COMPANY (as)
successor to certain liabilities of Employers Insurance)
of Wasau), NAVIGATORS MANAGEMENT COM-)
PANY, INC. (f/k/a New York Marine Managers, Inc.),)
NJORD INSURANCE COMPANY, NORSKE TRI-)
TON FORSIKRING A/A, NORTH STAR REINSUR-)
ANCE CORPORATION, NORTHEASTERN IN-)
SURANCE COMPANY, NORTHERN ASSURANCE)
COMPANY LTD. PER NORTHERN U'WTG)
AGENCY NO. 6 A/C., NORTHLAND CASUALTY)
COMPANY, NORTHWESTERN NATIONAL IN-)
SURANCE COMPANY, PENNSYLVANIA LUM-)
BERMENS MUTUAL INSURANCE COMPANY,)
POLARIS ASSURANCE A/S NT A/C, PRUDEN-)
TIAL TRUST NO. 2 A/C, R.A.S. (MILAN), REIN-)
SURANCE CORPORATION OF NEW YORK, RE-)
PUBLIC INSURANCE COMPANY, RESOLUTE)
MANAGEMENT, INC., ROCHDALE INSURANCE)
COMPANY, ROYAL INSURANCE COMPANY)
LTD., SAMVIRKE FORSIDRING, SOUTHERN)

AMERICAN INSURANCE COMPANY, SPARTA INSURANCE COMPANY (as successor to American Employers' Insurance Company), ST. PAUL EXCESS SURPLUS, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ST. PAUL SURPLUS LINES INSURANCE COMPANY, STARR INDEMNITY AND LIABILITY COMPANY (f/k/a Ranger Insurance Co.), STEAMSHIP MUTUAL, STOREBRAND RE, SWISS RE AMERICA (as successor to Colonial Penn Insurance Co.), THE LUMBERMENS MUTUAL INSURANCE COMPANY, THE TRAVELERS COMPANIES, INC., TRANSIT CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY, TRINITY INSURANCE COMPANY, UNDERWRITERS MARINE SERVICES, INC., UNI MUTUAL GENERAL INSURANCE CO., UNIONE ITALIANA REINSURANCE COMPANY OF AMERICA, INC., VESTA INSURANCE CO. LTD., WEST OF ENGLAND, and JOHN DOE INSURANCE COMPANIES (the number and names of these defendants being currently unknown to Plaintiff, but which are intended to designate entities obligated to provide insurance coverage to Plaintiff),	)	
Defendants-Appellees.	)	Honorable Clarence W. Harrison II, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in dismissing plaintiff's complaint for a declaratory judgment against various insurance companies based on insurance policies plaintiff claimed were assigned to it via an asset purchase agreement because a review of the asset purchase agreement shows there was no valid assignment of insurance policies with the exception of those listed in an exhibit to the asset purchase agreement. The circuit court's order dismissing the plaintiff's complaint is modified to provide for a dismissal without prejudice to the plaintiff's right to amend its complaint to limit its scope to those insurance policies listed in the exhibit.

¶ 2 The plaintiff, The Premcor Refining Group Inc. (Premcor), appeals the March 5, 2018, order of the circuit court of Madison County, which dismissed, with prejudice, Premcor's second amended complaint (complaint) for a declaratory judgment. Premcor's complaint requested a declaration of its defense and indemnity rights under liability insurance policies issued by a myriad of insurance companies[1] (insurers) to the defendant, Apex Oil Company, Inc. (Apex),[2] between 1966 and 1987. For the following reasons, we affirm the circuit court's order but modify the order as set forth herein and remand for further proceedings consistent with this order.

¶ 3 FACTS

¶ 4 The following background facts are taken from Premcor's brief and are not disputed. Apex and its corporate predecessors owned and operated an oil refinery in the Village of Hartford (Refinery) from 1967 to 1988. In approximately 1987, Apex and certain subsidiaries of Apex filed for bankruptcy under Chapter 11 of the Bankruptcy Code (11 U.S.C.A. § 101 *et seq.* (1985)). In 1988, under the direction of the bankruptcy court's authority, Apex, through an asset purchase agreement (APA), sold the Refinery to Premcor. The bankruptcy court's approval of the APA enabled Apex to emerge from the bankruptcy through a plan of reorganization, which was confirmed by the bankruptcy court in 1990.

[1]For a complete list of insurance companies who were defendants in Premcor's declaratory judgment action, refer to the caption of this order.

[2]Apex was not named in the original complaint as a defendant, but rather was granted leave to intervene. However, the operative complaint at the time of the appeal, which is the second amended complaint, named Apex as a direct defendant.

¶ 5 Premcor initiated the instant lawsuit against the insurers in the circuit court of Madison County on March 21, 2016. The complaint[3] sought a declaration that the insurers are obligated to defend and indemnify Premcor in connection with seven underlying lawsuits, state and federal administrative orders, and other liability that has arisen or may arise in connection with alleged contamination arising out of, related to, and/or concerning the Refinery. The complaint alleged that Apex, through the APA, assigned to Premcor its rights under liability insurance policies issued to Apex by the insurers. These insurance policies were dated between 1967 and 1989.

¶ 6 On September 5, 2017, Apex filed its motion to dismiss the complaint[4] pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Apex argued, *inter alia*, that the APA did not assign rights to the policies at issue to Premcor, with the exception of any insurance policies that were listed in Exhibit N to Schedule 4.11 of the APA.[5] After briefing and hearings on the motion to dismiss, the circuit court entered a detailed order on March 5, 2018, granting the motion and dismissing Premcor's complaint with prejudice.[6] Premcor filed a timely notice of appeal.

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[3]Premcor filed a first amended complaint and a second amended complaint over the course of this litigation, adding additional insurers as defendants. When we refer to the complaint throughout this order, we are referring to the second amended complaint, which was the operative complaint at the time the circuit court entered the order on appeal.

[4]Apex previously filed a motion to dismiss the original complaint as well as the first amended complaint.

[5]Exhibit N to Schedule 4.11 of the APA is a two-page exhibit listing various insurance policies owned by Apex at the time the APA was executed. All of these policies specify a term of coverage between 1987 and 1989.

[6]The circuit court previously entered an order on May 15, 2017, in response to a previous motion to dismiss filed by Apex. In its May 15, 2017, order, the circuit court found that no section of the APA constituted an assignment of the insurance policies at issue other than, potentially, section 10.5. The circuit court invited supplemental briefing on the issue of whether section 10.5 constituted a valid

¶ 7 On May 24, 2019, this court entered an order affirming the circuit court's order dismissing Premcor's complaint. On June 14, 2019, Premcor filed a petition for rehearing. This court entered an order requiring Apex to answer the petition for rehearing and providing Premcor an opportunity to reply. After considering this briefing, this court hereby grants the petition for rehearing and issues this order. Additional facts, including the exact portions of the APA at issue, will be set forth below.[7]

¶ 8 ANALYSIS

¶ 9 The standards governing our review of the circuit court's order in this case are stated as follows:

> "Our standard of review of a motion to dismiss under section 2-619 of the Code is *de novo*. [Citation.] A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. [Citation.]
>
> A section 2-619 proceeding permits a dismissal after the trial court considers issues of law or easily proved issues of fact. [Citation.] Section 2-619(a)(9), in particular, allows dismissal when 'the claim asserted *** is barred by other affirmative matter avoiding the effect of or defeating the claim.' [Citation.] The term 'affirmative matter' as used in section 2-619(a)(9) has been defined as a

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assignment of the policies. The circuit court's March 5, 2018, order determined that 10.5 of the APA did not constitute such an assignment, and as such, culminated in the dismissal of Premcor's complaint with prejudice.

[7]Unless otherwise noted, all documents pertinent to our analysis, including the APA and all attachments thereto, were appended to the complaint, the motions to dismiss, or both.

type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. [Citation.]

In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits. [Citation.] The question on appeal is ' "whether the existence of a genuine material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." ' " *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002) (quoting *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995), quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)).

¶ 10 Premcor argues on appeal that the circuit court erred in dismissing its complaint because it incorrectly concluded the APA did not assign rights under the insurance policies at issue to Premcor. An assignment is simply a contract by which an assignor vests ownership in an assignee of the " ' "whole or a part of some particular thing, debt, or chose in action" ' that is described with ' "sufficient particularity to render it capable of contract" ' " to the assignee. *Illinois Tool Works, Inc. v. Commerce & Industry Insurance Co.*, 2011 IL App (1st) 093084, ¶ 20 (quoting *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n*, 387 Ill. App. 3d 85, 100 (2008) (quoting *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610, 616 (1987)). Accordingly, a resolution of the issue on appeal requires us to apply contract law to the APA to

determine whether it describes the policies at issue or the rights thereunder with sufficient particularity to vest ownership in Premcor. See *id.* ¶¶ 27-30.

¶ 11 Premcor argues the APA "gave Premcor broad rights to all insurance policy proceeds." First, Premcor points to sections 2.1(v) and 2.1(l) of the APA, which state, in relevant part, as follows:[8]

"ARTICLE II

PURCHASE AND SALE OF PURCHASED ASSETS

2.1 Sale of Business, Properties and Purchased Assets. Subject to the terms and conditions contained herein, Sellers agree to sell, convey, transfer, assign, and deliver to Purchaser, and Purchaser agrees to purchase, accept and acquire, or cause to be acquired, from Sellers, *** all right, title and interest of Sellers in and to the following properties and assets used in or otherwise relating to Sellers' Business Sold ('Purchased Assets') ***:

* * *

(v) except where the affected property has been repaired or replaced by Seller[ ]s in accordance herewith, all proceeds payable under any insurance policy covering the Purchased Assets by reason of any and all occurrences occurring prior to the Closing Date;"

[8]It is not disputed that Apex is a "Seller" or, specifically, a "Debtor Seller," Premcor is the "Purchaser," and the Refinery is a "Purchased Asset" under the APA.

"(l) ***[9] in the case of any contract, agreement, instrument and other document (including such contracts, agreements, instruments and other documents, if any, identified on or by reference in Schedules 2.1(b), 2.1(c), 2.1(d), 2.1(e), 2.1(f), 2.1(i) and 4.11) to which any Seller is a party or by which any Seller or the property thereof is bound or affected and which constitutes an executory contract or unexpired lease of Debtor Sellers within the meaning of Section 365 of the Bankruptcy Code ('Executory Contract'), each such Executory Contract assumed by Debtor Sellers and assigned to Purchaser pursuant to Section 365 of the Bankruptcy Code with the prior consent of Purchaser thereto after all costs to cure any defaults thereunder ('Cure Costs') have been paid by or become the responsibility of Purchaser pursuant to Section 365 of the Bankruptcy Code ('Acquired Contracts'); provided that Purchaser in its sole discretion may include or exclude any such contract, agreement, instrument or other document or such Executory Contract from the Purchased Assets;"

¶ 12 Finally, Premcor points to section 10.5 of the APA, which states as follows:

"ARTICLE X

ACTIONS BY THE SELLERS AND PURCHASER AFTER THE CLOSING

[9]Contrary to a statement in Premcor's brief, which attempts to paraphrase the first portion of this subsection in a way that represents to this court that this first portion applies to contracts owned by Apex, the first portion of this subsection refers to documents pertaining to "Non-Debtor Sellers." Page 1 of the APA makes clear that Apex is a "Debtor Seller," and article I of the APA defines "Non-Debtor Sellers" as "each seller other than Debtor Sellers." Accordingly, we reject this statement in Premcor's brief and have omitted the first portion of this subsection for the purposes of clarity.

* * *

10.5 INSURANCE. Any rights which any Seller may have against their insurers with regard to the Purchased Assets arising on or after the Closing Date shall at the Closing be assigned by each of them to Purchaser without any further act on their part. The Sellers agree that Purchaser may make and pursue such claims in their names as necessary, and to execute and deliver such documents as Purchaser may reasonably request with respect thereto."

¶ 13 In response to Premcor's assertions regarding the assignment of the insurance policies at issue, Apex urges this court to consider the contract as a whole. First, Apex points to the language in section 2.1(l) of the APA, quoted above, in which executory contracts assumed by Debtor Sellers such as Apex are assigned to Premcor under the condition that they comply with section 365 of the Bankruptcy Code (11 U.S.C.A. § 365 (1985)). Directing this court to Schedule 4.11 to the APA, which is also mentioned in section 2.1(l), and pointing specifically to Exhibit N to Schedule 4.11, Apex argues all insurance policies which were intended to be assigned are listed on that exhibit. Indeed, Exhibit N bears the title "APEX OIL COMPANY, et al. POLICY REGISTER OF CURRENT COVERAGE," and contains a list of insurance policies by type, limit of liability, term, underwriter, and policy number. Apex argues, and Premcor does not dispute that, despite this and a myriad of other exhibits to Schedule 4.11, specifically listing hundreds of contracts to which section 2.1(l) applies, there was no schedule listing all of the liability insurance policies owned by Apex between 1969 and 1989, as alleged

in the complaint.[10] Premcor does not dispute that these insurance policies are not listed anywhere in this comprehensive APA, aside from those listed in Exhibit N.

¶ 14 We find the reading Apex ascribes to section 2.1(l) of the APA to be persuasive. We find further support for this reading in section 8.13(b) of the APA, which specifies the following to be included with the documents that were to be delivered to Premcor at closing:

> "(b) Assignments and assumptions of the Acquired Contracts, and any other contracts, agreements, instruments[,] and other documents relating to the Assumed Liabilities, and leases, licenses in the case of leasehold properties, franchises, rights and commitments related to the Purchased Assets, together with the written consent of each contract party under such or any other contract being assigned hereunder (if such consent is required under Applicable Law, including Section 365 of the Bankruptcy Code). Each such contract shall be assigned intact and without any Encumbrances of any kind resulting from their assignment to Purchaser hereunder."

¶ 15 According to the record on appeal, Apex filed, as support for its motion to dismiss, the assignment and assumption agreement (AAA) referred to in section 8.13(b) of the APA, as well as Exhibits A and B thereto. The AAA and its exhibits were submitted to the circuit court on a compact disc and under seal pursuant to the circuit court's March 20, 2017, order granting Apex's motion for leave to do so. At a hearing on Apex's

[10]The exhibits to Schedule 4.11 contain specific and seemingly exhaustive lists of assigned contracts including, in addition to the then-current insurance policies and by way of example, supply contracts, vehicle lease agreements, and vending contracts.

motion to dismiss before the circuit court, counsel represented to the circuit court that the AAA and its exhibits listed any additional agreements that were not already referenced in the schedules to the APA that were being assigned to Premcor. Counsel further represented to the circuit court that none of the liability insurance policies at issue were listed. Premcor did not refute those representations at the hearing, and makes no mention of them on appeal. In addition, "[i]t is the appellant's burden to provide a complete record on appeal in order to facilitate a meaningful review." *In re Estate of Jackson*, 354 Ill. App. 3d 616, 620 (2004) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). "We resolve all doubts arising from the incompleteness of the record against the appellant." *Id.* For all of these reasons, we agree with Apex that section 2.1(l) of the APA does not constitute a valid assignment of the liability insurance policies at issue to Premcor.

¶ 16 In addition, we agree with Apex that the contract language contained within sections 2.1(v) and 10.5 do not constitute a valid assignment of the rights of Apex under the liability insurance policies at issue. In fact, sections 2.1(v) and 10.5 do not mention liability insurance rights at all. Rather, the plain language of section 2.1(v) promises to convey to Premcor any proceeds from pending claims covering the assets that Premcor is purchasing from Apex. Section 10.5 assigns rights Apex has against its insurers "with regard to the Purchased Assets" arising on or after the closing date. As set forth above, a valid assignment must describe the subject of the assignment with sufficient particularity. See *Illinois Tool Works, Inc.*, 2011 IL App (1st) 093084, ¶ 20. Where a purported assignment does not specifically identify an insurance policy, and does not mention

liability coverage at all, we find the subject of the assignment is not described with sufficient particularity to be a valid assignment of all of the assignor's rights under all of its past liability insurance policies.

¶ 17 The distinction made by our holding can be illustrated by contrasting the language in the APA in this case with that found to be a valid assignment of liability insurance policy rights in *Illinois Tool Works*. In the purchase agreement in that case, the plaintiff was assigned:

> " 'The benefits, including all rights to defense and indemnity coverage, under any and all policies of liability insurance issued to [Seller] prior to the Closing Date *** with respect to insurance coverage for accidents, occurrences, claim, suits, actions or proceedings arising from the operations, activities[,] or conduct of the [Seller's] Business prior to the Closing Date; provided, however, that such benefits shall transfer to [plaintiff] to the extent liabilities for such accidents, occurrences, claims, suits, actions[,] or proceedings are threatened against, transferred to[,] or otherwise imposed upon [plaintiff].' " *Id.* ¶ 21.

¶ 18 The assignment in *Illinois Tool Works* was found to be a valid assignment because it clearly referenced the subject of that which was to be assigned—liability insurance benefits, including defense and indemnity coverage. The APA at issue in this case simply contains no such language, despite carefully listing every contract to be assigned, including those subject to special rules of identification due to the status of Apex as a seller in bankruptcy or "Debtor Seller." See 11 U.S.C.A. § 365 (1985). Accordingly, after

considering the APA as a whole, we find there was no valid assignment of all of the liability insurance policies at issue to Premcor.

¶ 19 On rehearing, Premcor argues for the first time that because all parties have agreed that those policies listed in Exhibit N were validly assigned to Premcor in the APA, this court should not affirm the circuit court's order in its entirety. Apex argues that Premcor did not make this argument in its briefs before this court, and as such, has forfeited the right to raise the issue on rehearing. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). However, forfeiture is a limitation on the parties and not on the courts, and despite forfeiture, this court may address an issue in order to carry out its responsibility to reach a result that is in accordance with law. *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1048 (2000). Because of the magnitude of the parties' potential liability in the underlying matters, and the fact that the parties have agreed that the policies listed in Exhibit N were validly assigned to Premcor, we will overlook Premcor's forfeiture of this issue and will consider the argument raised in Premcor's petition for rehearing on its merits.

¶ 20 Having considered the petition for rehearing on its merits, we find that the circuit court did not err in dismissing the complaint, because it contained broad and sweeping allegations regarding Apex's assignment of rights under liability insurance policies Apex owned dating back to 1969. However, because the parties agree that the insurance policies listed in Exhibit N were validly assigned to Premcor, whether Premcor is entitled to any proceeds under these policies remains to be seen. Accordingly, we modify the

circuit court's order to specify that the dismissal of the complaint is without prejudice to Premcor's right to amend the complaint to seek a declaration of its rights under any potentially applicable policies listed in Exhibit N.[11] We remand for further proceedings consistent with this order.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the March 5, 2018, order of the circuit court of Madison County, which dismissed Premcor's complaint, is affirmed, but the order is modified to specify that the dismissal of the complaint is without prejudice to Premcor's right to amend the complaint to seek a declaration of its rights under any potentially applicable policies listed in Exhibit N. We remand for further proceedings consistent with this order.

¶ 23 Affirmed as modified; cause remanded.

[11]Of course, any remaining defendants will have the opportunity to file any appropriate pleadings directed against the amended complaint, as this court makes no ruling as to the merit of any such amended claim beyond the fact that there was a valid assignment.