2023 IL App (5th) 220357-U

NO. 5-22-0357

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JUDY DARDAR and IVAN DARDAR, Plaintiffs-Appellants, v. FARMERS AUTOMOBILE INSURANCE ASSOCIATION and JASON STICKLEN, Defendants (Farmers Automobile Insurance Association, Defendant-Appellee).	)	Appeal from the Circuit Court of Champaign County. No. 19-L-136 Honorable Jason M. Bohm, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Cates and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of the plaintiffs' claim against Farmers Automobile Insurance Association by the Champaign County circuit court pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2020)) is affirmed where the term "reside" as used in the policy contract language was not ambiguous.

¶ 2 This is an appeal from the circuit court of Champaign County. The plaintiffs, Judy and Ivan Dardar, appeal the dismissal of their cause of action against Farmers Automobile Insurance Association (Farmers). The plaintiffs were insured by Farmers for a St. Joseph residence that the plaintiff Judy had inherited from her deceased brother. The plaintiffs filed a claim with the company following a fire that destroyed the residence. Farmers denied the claim as the plaintiffs

were not occupying the property at the time of the fire and were therefore not covered under the terms of the policy. The plaintiffs filed suit against Farmers and insurance agent Jason Sticklen for money damages. Farmers filed a motion to dismiss the claims pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)), which the trial court granted. On appeal, the plaintiffs allege that the trial court erred in doing so where it found that the policy contract term "reside" was not ambiguous and therefore granted Farmers' motion to dismiss. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 29, 2019, Judy filed a complaint against Farmers[1] and insurance agent Jason Sticklen.[2] The complaint contained four counts: count I for breach of contract against Farmers, count II for negligence against Farmers, count III for negligence against Sticklen, and count IV for consumer fraud against Sticklen. Count I alleged that, prior to his death on January 25, 2016, David Jones, Judy's brother, purchased an insurance policy from Farmers through Sticklen for property and liability insurance coverage for his residence located at 2241 County Road 1700 N., St. Joseph, Champaign County. After David's death, a petition for letters testamentary was filed, and Judy was appointed the legal independent representative of his estate.

¶ 5 On October 1, 2016, Farmers issued a homeowner's policy amending declarations, which added the decedent's estate and Judy as additional insureds as well as a nonoccupancy permit endorsement. Judy continued to pay the policy premiums for the policy effective from October 1, 2016, through October 1, 2017. On August 25, 2017, the policy was renewed for the term of October 1, 2017, through October 1, 2018. This policy likewise contained the nonoccupancy

[1]Pekin Insurance Company was a misnamed party. The complaint was later amended to name Farmers as the defendant. We will refer to Pekin Insurance Company as Farmers.

[2]Jason Sticklen is not a part of this appeal.

permit. These policies are referred to as the "TH" policies as those were the first two letters of the policy number.

¶ 6 Count II alleged that, on June 8, 2018, Sticklen notified Judy that a new policy needed to be issued because the estate had been closed. Judy advised Sticklen that the new policy's terms would need to reflect the exact same coverage for the property as the previous policies, including the nonoccupancy permit. Farmers prepared a homeowner's policy for the plaintiffs effective from May 24, 2018, through May 24, 2019. This policy was referred to as the "EH" policy. However, Farmers did not provide the plaintiffs with a copy of this proposed policy prior to the event resulting in the claim at issue.

¶ 7 Once the estate was closed, and the house was transferred to Judy, she began making renovations to the residence. The plaintiffs were undecided as to whether they were going to live in the house after the renovations were complete or sell it. Then, on July 4, 2018, firework embers from an unidentified source caught the house on fire, and it was destroyed. The plaintiffs never lived in or occupied the home. Judy had no knowledge that the policy was issued without the nonoccupancy permit endorsement.

¶ 8 Following the fire, the plaintiffs filed a claim for their loss with Farmers. Farmers denied the claim on the basis that the policy covered their "residence premises," which was defined as: (1) the one-family dwelling where you reside; (2) the two, three, or four-family dwelling where you reside in at least one of the units; or (3) that part of any other building in which you reside. Farmers determined that the plaintiffs did not reside at the St. Joseph property and therefore were not covered under the policy terms.

¶ 9 The complaint alleged that Farmers was negligent where it failed to issue a policy consistent with Sticklen's instructions, prepare a policy including the nonoccupancy permit

endorsement, and send a copy of the policy and endorsements to Judy prior to the total loss of property from the fire. Counts III and IV were against Sticklen, and therefore not relevant to this appeal.

¶ 10 On November 5, 2019, Farmers filed a motion to dismiss counts I and II pursuant to section 2-619.1 of the Code (*id.* § 2-619.1) and a memorandum of law in support.[3] As to count I, Farmers claimed that the TH policies were cancelled before the fire, and the company was therefore not liable under either policy. As to count II, which is the subject of this appeal, Farmers alleged that dismissal was appropriate because they owed no duty to Judy beyond the terms of the policy contract language.

¶ 11 On February 11, 2020, Judy filed a memorandum in opposition to Farmers' motion to dismiss counts I and II of the complaint. As to count II, she stated that after her brother's estate was closed, she was told by Sticklen that she would need a new insurance policy in her own name. She agreed, but only on the condition that the new policy be exactly the same and provide the same coverage as the TH policies. However, Sticklen failed to properly inform Farmers of her condition, and Farmers issued a new policy without the nonoccupancy permit endorsement. Due to this oversight, Judy's claim following the fire was denied because the home was not considered a residential premises. On February 26, 2020, Farmers filed a reply asserting the same substantial claims raised in the motion to dismiss.

¶ 12 On May 14, 2020, Farmers filed an answer to Judy's complaint. On November 6, 2020, Farmers filed a motion for summary judgment as to count I of the complaint, which was later granted on agreement of the parties.

[3]Sticklen likewise filed a motion pursuant to section 2-615 to dismiss the two counts brought against him; however, his filings are not relevant to this appeal.

¶ 13 On February 25, 2021, Judy filed a motion for leave to add an additional plaintiff, Ivan, and to file an amended count II of the complaint that would allege a breach of contract action against Farmers regarding the EH policy instead of a negligence claim, which was the original cause of action. The motion was granted, Ivan was added as a party, and on April 5, 2021, the plaintiffs filed an amended count II for breach of contract against Farmers. The factual claims regarding the dates the policies were purchased and the date of the fire were the same. However, the amended complaint further alleged that Farmers had an internal company policy that allowed homeowners 90 days to move into and occupy a residence when the homeowners were in the process of renovating the residence. The plaintiffs acknowledged that they had never lived at the residence and were unsure whether they were going to move into it after the renovations were complete. However, the plaintiffs reasoned that, because their insurance policy became effective on May 24, 2018, and the fire occurred on July 4, 2018, less than 90 days after the policy was issued, Farmers breached its contract with them when it denied the plaintiffs' claim as they were within the 90-day grace period.

¶ 14 On May 18, 2021, Farmers filed a motion to dismiss count II pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2020)). Farmers alleged that the amended count II alleged a breach of contract claim against Farmers where it failed to follow an "internal company policy" that "homeowners have 90 days to move into and occupy a residence when the homeowners are in the process of renovating the house." However, Farmers pointed to the fact that no such cause of action was available in Illinois. Even assuming that the plaintiffs were correct in their assertion that an internal policy regarding a 90-day grace period existed, no such policy would give rise to an independent legal duty under which the plaintiffs would have had standing to sue Farmers.

Additionally, Farmers noted that the plaintiffs never alleged that it was their intention to move into the home within 90 days but rather that they were undecided.

¶ 15 On September 14, 2021, the plaintiffs filed a response to Farmers' motion to dismiss. They alleged that Farmers misconstrued the allegation in count II and asserted that count II alleged that Farmers breached its contract with the plaintiffs where they denied plainitffs' claim based on a faulty interpretation of their own ambiguous policy. Therefore, the plaintiffs asserted that the motion to dismiss should be denied. On September 16, 2021, Farmers filed its reply.

¶ 16 On September 17, 2021, the trial court held a hearing on Farmers' motion to dismiss. After hearing arguments from both sides, the court iterated that its view of the policy contract language was that it was intended to insure the one family dwelling where the insured resided. While the court acknowledged that there were facts to support the notion that the plaintiffs may have resided at the residence in the future, there were no facts to suggest that they had resided in the residence at any point prior to the fire. The court stated that the substance of the plaintiffs' case was whether there was negligence by Sticklen in obtaining this contract rather than one that had a nonoccupancy permit. The court found that, based on the facts alleged, there was not a sufficient basis for a breach of contract claim against Farmers. The court then granted Farmers' motion to dismiss count II.

¶ 17 On October 18, 2021, the plaintiffs filed a motion to reconsider the order dismissing amended count II. The plaintiffs argued that the trial court erred in dismissing count II with prejudice where it failed to make a finding as to whether the policy contract language was ambiguous. Farmers filed a response, and, on June 3, 2022, a hearing was held on the matter. After hearing counsels' arguments, the court denied the motion. In so finding, the court stated that, although the term "reside" can be ambiguous in certain circumstances, that was not the case

here. Based on the relevant facts, the plaintiffs could never plead that they ever resided on the St. Joseph property. The court also entered a written order *nunc pro tunc* as to June 3, 2022. The plaintiffs appeal.

¶ 18 II. ANALYSIS

¶ 19 The issue on appeal is whether the trial court erred in granting Farmers' 2-615 motion to dismiss amended count II for breach of contract. The plaintiffs argue that the court erred where it determined that the term "reside" in the policy contract language was not ambiguous.

¶ 20 When reviewing a trial court's dismissal pursuant to section 2-615, "[w]e accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). However, plaintiff "may not rely on mere conclusions of law or fact unsupported by specific factual allegations" to state a cause of action. *Id*. The complaint must set forth a legally and factually sufficient cause of action. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006). A complaint should only be dismissed under section 2-615 if it is clearly apparent that no set of facts can be proven that would entitle plaintiff to recovery. *In re Estate of Powell*, 2014 IL 115997, ¶ 12. We review *de novo* an order granting a section 2-615 motion to dismiss. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14. We also review *de novo* the construction of the provisions of an insurance policy as that is a question of law. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). In interpreting an insurance policy contract:

> "A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. [Citation.] If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning. [Citation.] Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. [Citation.] In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. [Citation.] A court must construe the policy as a whole and take into account the type of

> insurance purchased, the nature of the risks involved, and the overall purpose of the contract. [Citation.]" *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997).

¶ 21 Here, the plaintiffs argue that the term "reside" in the policy contract language is ambiguous, and therefore, dismissal was not appropriate. The plaintiffs rely on *Lundquist v. Allstate Insurance Co.*, 314 Ill. App. 3d 240, 248 (2000), in making this argument. In *Lundquist*, plaintiffs brought a declaratory judgment action seeking a determination of whether their insurance policy with Allstate covered their loss from a fire set by vandals. *Id.* at 241-42. Originally, Allstate refused to provide coverage for the loss of a home owned by the plaintiffs because it was "unoccupied" or "vacant," and the trial court agreed. *Id.* at 242-43. However, the appellate court, after reviewing plaintiffs' policy, found that the term "reside" was ambiguous as used in Allstate's policy. *Id.* at 248. The *Lundquist* court relied on *FBS Mortgage Corp. v. State Farm Fire & Casualty Co.*, 833 F. Supp. 688, *et seq*. (N.D. Ill. 1993). The *Lundquist* court found the following:

> "We agree that the term 'reside' as used in Allstate's policy is ambiguous. As the court said in *FBS*, while it is clear that physical presence is a necessary component of residence, it is unclear what degree of physical presence is necessary before someone is deemed to reside in a particular location. We believe this provision is subject to more than one reasonable interpretation and, therefore, is ambiguous. *Employers Insurance v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 141 (1999). 'Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. [Citation.] Rather, in such circumstances, the court must construe the policy in favor of the insured and against the insurer that drafted the policy.' [Citation.] Accordingly, we hold that Allstate cannot deny coverage based upon its definition of 'reside.' " *Id.*

¶ 22 The plaintiffs argue that these cases are dispositive of the issue before us. Both cases determined coverage under the policies required the court to consider the definition of "reside," and both courts found the term to be ambiguous. However, the plaintiffs fail to recognize that each court found the term to be ambiguous as used in that individual policy and applied to that specific plaintiff. Here, "reside" is not ambiguous as it is used in the policy contract language

between Farmers and the plaintiffs. Both *Lundquist* and *FBS* involved plaintiffs that, at some point, lived in the residence, and were either still occupying it in some capacity, or were incarcerated.

¶ 23 Here, the record establishes that the plaintiffs never lived on the property, were not occupying it in any way, and had not decided whether they would move into the home once the renovations were done. The facts establish that there was no evidence that the plaintiffs ever did "reside" at the home in any capacity. We find unpersuasive the argument that the mere fact that because "reside" has more than one definition that makes it ambiguous when, as here, there is no definition of the word that would apply to the plaintiffs. Therefore, we find the term "reside" as used in Farmers' policy not to be ambiguous. Because we find that the policy contract language was not ambiguous, we need not discuss the parol evidence regarding the internal policy of Farmers.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the order of the trial court dismissing count II of the plaintiffs' complaint against Farmers where the term "reside" in the policy contract language was not ambiguous.

¶ 26 Affirmed.