

2012 IL App (2d) 120203-U  
No. 2-12-0203  
Order filed September 26, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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PAMELA J. FUREY,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-13
	)	
CHICAGO TITLE INSURANCE COMPANY	)	
and BARRINGTON ENGINEERING	)	
CONSULTANTS, LTD.,	)	Honorable
	)	Christopher C. Starck,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Zenoff and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed, with prejudice, all counts of plaintiff's amended complaint and properly denied plaintiff's motion for leave to amend her complaint based upon the doctrines of the law-of-the-case and collateral estoppel.

¶ 2 Plaintiff, Pamela J. Furey, appeals the trial court's denial of her motion to file a second amended complaint and the dismissal, with prejudice, of counts II and III of her amended complaint against defendants, Chicago Title Insurance Company and Barrington Engineering Consultants, Ltd. ("CTI" and "BEC"). We affirm.

¶ 3

## I. BACKGROUND

¶ 4 Plaintiff originally filed her complaint on January 8, 2009, alleging the following facts. Plaintiff purchased her home at 728 Cutter Lane in Lake Barrington on March 21, 2005, for \$660,000. At the time of the purchase, plaintiff's title insurance was provided by CTI, and BEC performed a survey of the property.

¶ 5 On August 24, 2007, the property experienced severe flooding, resulting in damages of approximately \$188,000. On June 11, 2008, the property experienced more flooding, causing damages of approximately \$131,000. After the second flood, plaintiff hired a construction specialist, James B. Clarage & Associates, to review the property to determine the cause of the flooding. According to plaintiff's complaint, the Clarage report stated the flooding was caused by hydrostatic water pressure caused by the drainage easement located along the north side of the property. Plaintiff alleged that neither her title insurance nor survey at the time of purchase identified or disclosed the existence of the drainage easement.

¶ 6 Count I alleged breach of contract against CTI, claiming that the existence of the drainage easement damaged plaintiff by causing her to incur flood damages and causing the home to be unmarketable. CTI denied her claim was covered by the title insurance policy, and plaintiff claimed its failure to pay under the policy was a breach of contract.

¶ 7 Count II alleged negligent misrepresentation against BEC, alleging that plaintiff reasonably relied upon BEC's survey when she purchased the property, but the survey negligently failed to disclose the existence of the drainage easement on the north side of the property.

¶ 8 The Clarage report was attached to the complaint. The report stated that the likely cause of the flooding was the hydrostatic pressure resulting from the drainage ditch's flow-line and profile

for the transport of the storm water at an elevation that was higher than the floor elevation of the lower level of plaintiff's home.

¶ 9 On November 10, 2009, BEC filed a motion for summary judgment on count II, arguing among other reasons, that plaintiff was damaged by a flood caused by the Fox River flooding and not by the failure of BEC to list the easement on its survey. On December 14, 2009, CTI filed a motion for summary judgment on count I of the complaint, arguing among other reasons that damage caused by flooding was not a loss covered under its title insurance policy.

¶ 10 Plaintiff filed an amended complaint on December 28, 2009, correcting a typographical error pertaining to the closing date of the property and adding count III against CTI. Count III alleged that CTI failed to pay plaintiff's claim in bad faith, violating section 155 of the Insurance Code (215 ILCS 5/155 (West 2010)).

¶ 11 On February 16, 2010, the trial court granted CTI's motion for summary judgment as to count I of plaintiff's complaint. The court's order contained language pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006)). Plaintiff appealed the judgment, and this court affirmed in *Furey v. Chicago Title Insurance Company*, No. 2-10-0182 (2011) (unpublished under Supreme Court Rule 23). In our decision, we held that the trial court properly granted summary judgment in CTI's favor where plaintiff's damages resulted from a flood, not from CTI's alleged failure to disclose a drainage easement on the property. We pointed out that an easement is an intangible property interest in property, which by its nature cannot cause a flood. *Furey*, slip order at 5. Plaintiff's expert, James B. Clarage & Associates, opined that plaintiff's home flooded because of water discharged from the ditch, not because of the existence of the easement. *Id.*

¶ 12 Following our order, plaintiff moved to file a second amended complaint on November 9, 2011. In her motion, plaintiff stated that count I of the amended complaint had been dismissed, with prejudice, and counts II and III had not been adjudicated. According to the motion, because of the dismissal of count I, she exhausted her remedies at law regarding her claim under the title policy issued by CTI. Plaintiff stated in the motion that she now was seeking equitable relief under the doctrine of specific performance. The second amended complaint contained the following new allegations: count I alleged that the existence of the easement was a defect in title that damaged plaintiff and to which she had no remedy at law for monetary damages. Plaintiff requested that CTI therefore fulfill its contractual obligation to plaintiff and vest her with fee simple title to the property. Plaintiff claimed that in order to do so, CTI must remove the easement from the title. Counts II and III remained unchanged.

¶ 13 On December 13, 2011, BEC filed a response, opposing plaintiff's motion for leave to file the second amended complaint against CTI. BEC argued that plaintiff's motion ignored the effect this court's Rule 23 order had on the remaining claims. Plaintiff's claims against CTI were the same as the ones against BEC. Accordingly, BEC argued that because we held the existence of the easement was not the cause of plaintiff's damages, the pending claim against BEC must be dismissed, with prejudice, on the basis of collateral estoppel and the law-of-the-case doctrine. Further, BEC argued that plaintiff did not have an absolute right to file an amended complaint. Therefore, BEC requested that the court deny the motion for leave to file the second complaint and dismiss count II of the amended complaint, with prejudice.

¶ 14 CTI also filed a response in opposition to plaintiff's motion. CTI argued that plaintiff's new claim was barred by *res judicata* because she failed to raise the claim in the first proceeding.

Further, CTI argued that section 616 of the Code of Civil Procedure (735 ILCS 5/2-616 (West 2010)) only allowed amendments to pleadings prior to final judgments, and this court's Rule 23 order disposed of plaintiff's entire claim against CTI. Regardless, CTI argued that the title insurance policy did not allow for specific performance, but limited liability to the policy amount, the insured's out-of-pocket losses, or a reduction in the value of an insured property due to a covered matter. Therefore, CTI requested that the trial court deny plaintiff's motion for leave to file the second amended complaint, with prejudice.

¶ 15 On January 18, 2012, the trial court denied plaintiff's motion for leave to file the second amended complaint and granted CTI's oral motion to dismiss count III of the amended complaint, with prejudice. The trial court further stated that it reviewed this court's Rule 23 order and the pleadings pertaining to BEC's motion for summary judgment, and it dismissed count II of the amended complaint, with prejudice. Plaintiff timely appealed.

¶ 16

## II. ANALYSIS

¶ 17 We first consider plaintiff's argument that the trial court erred in denying her motion for leave to file the second amended complaint. The decision not to grant leave to amend a complaint rests within the sound discretion of the trial court, and we will not reverse such a decision absent an abuse of that discretion. *I.C.S. Illinois v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). Under section 2-616(a) of the Code of Civil Procedure (735 ILCS 5/2-616(a) (West 2010)), the trial court may grant the plaintiff leave to amend its complaint on just and reasonable terms at any time prior to final judgment. *Id.* The right to amend, however, is neither absolute nor unlimited. *Id.* In determining whether the trial court abused its discretion in granting or denying such leave, this court must consider: (1) whether the proposed amendment would cure the defective

pleading; (2) whether the other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified. *Id.* at 219-20. The plaintiff must meet all four factors, and if the proposed amendment does state a cognizable claim, we need not consider the remaining factors. *Id.* at 220. When ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in the proposed amended pleading, and it is not necessary for the plaintiff to file an amended complaint and the defendant to test the sufficiency of that complaint through a motion to dismiss. *Id.*

¶ 18 In this case, plaintiff sought to amend her complaint after a final judgment. Generally, courts shall permit pleadings to be amended upon just and reasonable terms before a summary judgment order becomes final. *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012, 1020 (1988). After an order granting or denying summary judgment becomes final, the only amendments which may be allowed are ones to conform the pleadings to the proofs pursuant to section 2-616(c). *Id.* “To hold otherwise would strip summary judgment of finality and would frustrate the purpose of the summary judgment procedure.” *Id.* Here, plaintiff sought not only to amend her complaint after the trial court’s grant of summary judgment became final but *after* she appealed that decision and this court’s order became final. Contrary to plaintiff’s argument, section 2-1005 of the Code does not lead to a different result. Section 2-1005(g) allows for amendments upon “just and reasonable terms” (735 ILCS 5/2-1006(g) (West 2010)), meaning a trial court is not required to grant every request by a plaintiff to file an amended complaint. See *Mason v. American National Fire Insurance Co.*, 295 Ill. App. 3d 199, 203 (1998) (finding trial court did not abuse its discretion when it denied the plaintiff’s motion to file an amended complaint 33 months after summary judgment was granted

and where the plaintiff had numerous opportunities to amend the complaint). Accordingly, we cannot agree that the trial court abused its discretion in denying plaintiff's motion for leave to file a second amended complaint.

¶ 19 Moreover, even if plaintiff's proposed second amended complaint were made prior to a final judgment, all four factors are not met. The proposed amended complaint merely added a request for specific performance whereby CTI would have to remove the easement from her title and deliver her a fee simple title. Considering the first of the four factors, this new claim for relief does not cure the defective pleading because, as we decided in our earlier order, the existence of the easement did not cause any of the damages claimed by plaintiff. Rather, the flooding caused her damages and the alleged decrease in the value of her property. Second, the proposed amendment was not timely. Plaintiff could have included a request for specific performance in the original or amended complaint as the facts were known to plaintiff all along. The fact that plaintiff pressed forward with her amended complaint through an appeal just demonstrates that she seeks to circumvent this court's decision and attempts to take a second bite of the apple by pleading under an alternative equitable theory at this time. Plaintiff fails to recognize that alternative pleadings are allowed. The Code clearly authorizes alternative pleading, and plaintiff could have pleaded alternative legal and factual theories at the time of the original or amended complaint. 735 ILCS 5/2-613 (West 2010); *Bureau Service Co. v. King*, 308 Ill. App. 3d 835, 841 (1999).

¶ 20 Contrary to plaintiff's argument that the easement caused her home value to decrease, plaintiff's proposed second amended complaint stated that "the existence of the Easement is the cause of the flooding and the Easement itself is a defect in Plaintiff's title to the Property." The complaint further stated that the "existence of the Easement, and the fact that it will flood the

premises, renders the home non-marketable, as the flooding conditions would have to be disclosed during any sale of the property.” As we stated in *Furey*, an easement is an intangible interest in property, which by its nature cannot cause a flood. *Furey*, slip order at 5. Further, plaintiff made no allegation, other than conclusory ones, that the existence of the easement alone devalued her property. Her complaint does not indicate that she ever attempted to sell her property or how any attempt to sell was affected by the existence of the easement. Rather, plaintiff only points to the flood damage and potential for future flooding. See *Shah v. Chicago Title and Trust Co.*, 119 Ill. App. 3d 658, 662 (1983) (court rejected the plaintiffs’ claim for damages in fraud claim against title insurer where record showed that the plaintiffs never attempted to sell their property and damages for fraud could not be predicated on mere speculation, and must be a proximate, not remote, consequence of fraud; court deemed the plaintiffs’ hypothetical difficulty in selling their property a purely speculative loss).

¶ 21 Additionally, as CTI argues, its policy only provided for monetary damages, and while the contract allows the option to remove a title defect, the court cannot obligate it to remove a title defect as the proposed complaint requests. To state a claim for specific performance, plaintiff must allege facts establishing that money damages are not a sufficient remedy for the harm alleged. See *Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 784 (2000) (“the party seeking the application of equitable principles \*\*\* must establish that the [plaintiff] cannot be made whole by damages or by another adequate remedy at law”). Here, we agree with CTI that plaintiff never alleged that money damages were incapable of calculation or were not adequate compensation for a unique loss for CTI’s alleged failure to identify the drainage easement. We note that the appraisal submitted by plaintiff did not quantify the alleged devaluation of the property caused by the existence of the

drainage easement. Rather, the appraisal specifically stated that “no adverse easements or encroachments were evident. The lack of off-site improvements, as well as private well/septic systems are typical of the area and do not adversely affect marketability or market value.” The appraisal further stated that the value was based on the value of the property less the value of the estimate of a water removal system that was recommended by Clarage to prevent future flooding.

¶ 22 Moving on, we next consider whether the trial court erred in dismissing, with prejudice, counts II and III of the amended complaint based upon the pending motion for summary judgment by BEC and the oral motion for summary judgment by CTI. We review *de novo* a trial court’s grant of summary judgment. *Bank of America National Ass’n v. Bassman FBT, LLC*, 2012 IL App (2d) 110729, ¶ 3. Summary judgment should be granted only if the moving party’s right to prevail is clear and free from doubt. *Id.* A grant of summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits, 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. *Id.* A material fact is one that might affect the outcome of a case. *Id.* When considering a motion for summary judgment, a court must construe the record strictly against the movant and liberally in favor of the opposing party. *Id.* All reasonable inferences are to be drawn in favor of the opponent of the motion. *Id.*

¶ 23 In this case, BEC’s motion for summary judgment was pending at the time plaintiff appealed the court’s decision to grant summary judgment in favor of CTI as to count I of the amended complaint. BEC had argued that it was entitled to summary judgment as to plaintiff’s claim of negligent misrepresentation because plaintiff could not have relied upon BEC’s survey when she did

not have possession of the survey prior to closing on the property. Further, BEC argued that the survey's omission of the drainage easement did not cause plaintiff's damages as plaintiff's own documents concede that her damages were the result of the Fox River exceeding flood levels.

¶ 24 Following this court's decision in *Furey*, the case resumed in the trial court, and BEC additionally argued that our decision that the omission of the drainage easement from CTI's title insurance policy did not proximately cause plaintiff's alleged injuries was now the law of the case. Thus, BEC argued that plaintiff was collaterally estopped from proceeding with her negligence claim against it, which was similarly premised upon the alleged omission of the easement from the survey.

¶ 25 The law-of-the-case doctrine generally bars relitigation of an issue previously decided in the same case. *People ex rel. Madigan v. Illinois Commerce Comm.*, 2012 IL App (2d) 100024, ¶ 31. The doctrine provides that questions of law decided in a previous appeal are binding upon the trial court on remand as well as upon the appellate court in a subsequent appeal. *Id.* The purpose of the doctrine is to protect settled expectations of the parties, ensure uniformity of decisions, maintain consistency during the course of a single case, effect proper administration of justice, and bring litigation to an end. *Id.* ¶ 32. Here, we concluded in *Furey* that plaintiff's damages were caused by flooding, not the exclusion of the easement in CTI's title insurance policy. We cannot now conclude that something other than flooding, like BEC's failure to include an easement on its survey, caused plaintiff's damages. See *Commonwealth Edison Co. v. Illinois Commerce Comm.*, 368 Ill. App. 3d 734, 742 (2006) ("The doctrine encompasses both a court's explicit decisions and those made by necessary implication.").

¶ 26 Whether the doctrine of collateral estoppel applies in this case presents a question of law, which we review *de novo*. *Illinois Commerce Comm.*, 2012 IL App (2d) 100024, ¶ 23. The doctrine

of collateral estoppel bars relitigation of an issue that was already decided in a prior case. *Id.* Three requirements are necessary for the application of collateral estoppel: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Id.* Collateral estoppel applies to both legal and factual issues determined in a prior proceeding. *Id.* We agree with BEC that these elements, like the elements in the law-of-the-case doctrine, are met. Plaintiff alleged in her complaint that she relied upon BEC's survey and because the survey failed to document the existence of the drainage easement, she suffered damages. However, as in plaintiff's claim against CTI, we agree with the trial court that plaintiff's damages were the result of massive flooding caused by the Fox River exceeding flood levels. Accordingly, we agree with the trial court's subsequent grant of summary judgment for BEC on count II of the amended complaint on the bases that the doctrines of the law-of-the-case and collateral estoppel bar relitigation of the causation issue.

¶ 27 Finally, we consider plaintiff's argument that the trial court improperly granted *sua sponte* summary judgment in favor of CTI on count III of the amended complaint, which claimed CTI denied paying on its insurance policy in bad faith. The trial court order states it granted "Defendant Chicago Title's oral motion to dismiss Count III of Plaintiffs first amended complaint." Thus, plaintiff's argument that the trial court granted *sua sponte* summary judgment in favor of CTI is contradicted by the record, which shows CTI made an oral motion before the court.

¶ 28 Regarding the merits of plaintiff's argument, we cannot agree that, given our decision as to count I of the complaint, the trial court's decision on count III was improper. Count III was based on the allegation that CTI refused to pay plaintiff's claim in bad faith. However, the trial court and

our decision in *Furey* determined that plaintiff's alleged damages were not covered under CTI's title insurance policy. Plaintiff could not show that CTI acted in bad faith where the claim was not covered by the policy. Therefore, CTI was entitled to summary judgment on count III.

¶ 29

### III. CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 31 Affirmed.