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2012 IL App (3d) 110587-U

Order filed October 11, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

CHARLOTTE MORRIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellant,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-11-0587
	)	Circuit No. 07-LM-581
SCOTTSDALE INSURANCE CO.,	)	
	)	Honorable
Defendant-Appellee.	)	Kendall O. Wenzelman,
	)	Judge, Presiding

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Trial court properly granted summary judgment in favor of insurer where there were no questions of material fact that insured did not timely file her complaint and that she executed a settlement check submitted by insurer in accord and satisfaction of her claim.
- ¶ 2 Plaintiff Charlotte Morris filed a two-count complaint against defendant Scottsdale Insurance Co., alleging breach of contract and vexatious delay in settling Morris's claim for a fire loss. The trial court granted Scottsdale's motion for summary judgment. Morris appealed. We affirm.

¶ 3

## FACTS

¶ 4 On December 23, 1999, defendant Scottsdale Insurance Co. issued a dwelling policy to plaintiff Charlotte Morris for the residence located at 16220 E. 2000 S. Road, in St. Anne, with a \$49,500 liability limit. Morris was the sole named insured on the policy, which covered the dwelling and personal property within it. The policy terms stated as follows. The policy would be voided if before or after a loss, the insured “intentionally concealed or misrepresented a material fact or circumstance \*\*\* or made false statements.” After a loss, an insured was required to send a signed, sworn proof of loss to Scottsdale within 60 days of Scottsdale’s request, setting forth the insured’s interest and the interest of any others in the property and any changes in title or occupancy during the terms of the policy. Property losses were to be settled at actual cash value at the time of the loss. In the event there was no agreement on the amount of loss, either party could demand an appraisal of the loss. The appraisal provision required the party to choose an appraiser within 20 days after requesting an appraisal. The limitations period to bring a lawsuit after denial of a claim was one year after the date of loss and only if all policy requirements had been met. Payment for losses would be made to the named insured unless another was named in the policy or was legally entitled to payment. Scottsdale must pay the loss 60 days after it received proof of loss and it reached an agreement with the insured, a final judgment was entered, or an appraisal award was filed with the insurer. Any waiver or change of policy provisions had to be made in writing by Scottsdale to be valid and any request it made for an appraisal or examination would not waive its rights.

¶ 5 On May 3, 2000, the insured dwelling was destroyed by a fire. On April 24, 2001, Morris signed an unsworn statement and proof of loss, which was calculated at \$41,338.70. Scottsdale responded by letter dated May 1, 2001, informing that it had received Morris's "sworn statement in

proof of loss," that it reserved its right to continue its investigation of Morris's claim, and that it was not waiving any policy term or condition. Scottsdale sent correspondence to Morris on May 11, 2001, scheduling her examination under oath and requesting multiple documents to substantiate Morris's claim of loss. An August 2, 2001, letter from Scottsdale to Morris documented that Morris may amend the sworn statement in proof of loss and requested documentation to support Morris's claim of loss. The letter also stated that Morris's sworn proof of loss was submitted to Scottsdale, which was awaiting documentation for her additional claims for damages. On August 14, 2001, Scottsdale sent a letter to Morris, which stated that Scottsdale had agreed to honor Morris's claim, that Scottsdale's appraisal valued the dwelling at \$16,786, and that the damages exceeded that figure. The letter acknowledged Morris's appraisal valuing the property at \$42,000, but noted that the figure included the land, which was excluded under the policy. The letter stated that Scottsdale would issue a check in the amount of \$16,786, less the deductible, and that if the figure was unacceptable, Morris should invoke the policy's appraisal clause.

¶ 6 On August 22, 2001, Scottsdale issued a check to Morris in the amount of \$16,536, and sent a follow-up letter in September 2001, stating that its agency had not heard from Morris and would assume that she accepted the settlement draft in full in the amount of \$16,536. A copy of the cashed check shows that on the bottom left hand corner of the check, an unidentified individual had handwritten the following: "Partial Payment, 16220 E. 2000 South Road, St. Anne, IL." In October 2001, Morris sent a letter to Scottsdale rejecting the \$16,536 amount as sufficient to cover her losses and requesting an appraisal under the policy's appraisal provision. The letter also stated that Morris would notify Scottsdale regarding the name of its appraiser within 20 days. On January 3, 2002, Scottsdale informed Morris of the identity of its appraiser, and on January 25, 2002, Scottsdale sent

a second request for an appraisal from Morris.

¶ 7 Nearly five years later, on December 28, 2006, Morris contacted the agency where she procured the policy, restating the issues, seeking a case status, and threatening litigation. The agency replied on January 3, 2007, informing Morris that Scottsdale had closed the case due to lack of response to a March 2002 letter the agency had sent her. The March 2002 letter provided that the agency had sent several letters attempting to ascertain the identity of Morris's appraiser and had not received a reply; that Scottsdale had agreed to keep the file open for an additional 30 days; and that if Morris did not contact the agency or identify an appraiser within the 30 days, the file will be closed "with no payment forthcoming." On January 9, 2007, Scottsdale informed Morris by certified mail that it was denying any further payments since the time to file a lawsuit under the policy terms had expired.

¶ 8 In August 2007, Morris filed a two-count complaint against Scottsdale, alleging breach of contract and vexatious delay in settling her claim. Scottsdale answered and asserted affirmative defenses to both counts. As to count one, Scottsdale argued that Morris did not comply with the policy terms in that she failed to submit a sworn proof of loss, her complaint was time-barred by the policy's one-year statute of limitations, she accepted the \$16,536 check in accord and satisfaction of Scottsdale's obligation, and Morris received the check in full and final resolution of her claim. Pertaining to count II, Scottsdale asserted as affirmative defenses that Morris received full payment of her claim and that any delay for additional benefits was attributable to her inaction; and that Scottsdale's "*bona fide* defenses," including full and complete payment, failure to submit a sworn proof of loss, expiration of the policy's limitations period, and Morris's request for payment in an amount that exceeded the value of the covered dwelling and included the value of the land, defeated

Morris's statutory claim.

¶ 9 Scottsdale filed a motion for joinder or to dismiss for lack of all necessary parties, in which it asserted that Richard Jordan was a necessary party as he was listed on the deed as co-owner of the property and thus had an insurable interest in the premises and a claim for one-half the value of the property destroyed by fire. Scottsdale also filed a motion to bar evidence in which it argued that counsel for Morris should be barred from testifying regarding his dealings with Scottsdale due to his refusal to be deposed and that because Morris did not disclose any witnesses pursuant to supreme court rule 213(f)(1), (2), (3), she should be barred from calling any opinion witnesses or presenting opinion evidence. The trial court denied Scottsdale's motion for joinder or to dismiss and barred any testimony regarding Scottsdale's conduct except for that about which Morris testified in her deposition. Scottsdale also filed, among other motions, two motions for summary judgment, each directed at one count of Morris's complaint. Following arguments, the trial court granted summary judgment in favor of Scottsdale. It found there were no questions of fact that the complaint was not timely filed and that there was an accord and satisfaction based on Morris's acceptance and execution of the settlement check. Morris appealed.

¶ 10

#### ANALYSIS

¶ 11 The issue on appeal is whether the trial court erred when it granted summary judgment in favor of Scottsdale. Morris complains that summary judgment was inappropriate because Scottsdale failed to present facts to refute the allegations in her complaint; a factual dispute existed regarding whether the check was negotiated in a manner adequate to constitute an accord and satisfaction; and facts indicated Scottsdale waived the policy's limitations period.

¶ 12 Summary judgment is proper where the pleadings, depositions, admissions on file and

affidavits, if any, establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005( c) (West 2010). The purpose of summary judgment is not to try a question of fact but to determine whether a triable question of fact exists. *The Cincinnati Cos. v. West American Insurance Co.*, 287 Ill. App. 3d 505, 509 (1997). In determining a summary judgment motion, the court must construe the pleadings, depositions, admissions and affidavits against the movant and liberally in favor of the nonmovant. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 131-32 (1992). We review *de novo* a trial court's grant of a summary judgment motion. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶ 13 We first address Morris's allegation that summary judgment was improperly granted because Scottsdale failed to present facts to overcome the allegations in her complaint. She points to the lack of affidavits or deposition testimony filed by Scottsdale to counter her allegations and argues that the trial court ruled on the basis of argument unsupported by facts.

¶ 14 A defendant who moves for summary judgment bears the initial burden of proof that no genuine issues of material fact exist. *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010). The movant may satisfy the burden by establishing an absence of evidence to support the plaintiff's case or by introducing evidence which would entitle it to judgment as a matter of law if not controverted. *General Auto Service Station v. Maniatis*, 328 Ill. App. 3d 537, 543 (2002). In order to withstand a motion for summary judgment, a plaintiff must present a factual basis arguably entitling her to judgment at trial but need not prove her case at the summary judgment stage. *Benson*, 407 Ill. App. 3d at 912 (quoting *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002)).

¶ 15 In support of its motion for summary judgment, Scottsdale included as attachments a variety of documents, including a copy of Morris's unsworn proof of loss statement and a copy of her

deposition testimony and exhibits used at the deposition. The trial court stated at the conclusion of the hearing on Scottsdale's summary judgment motions that it found Morris had "failed to present sufficient admissible evidence to refute all of the arguments" Scottsdale presented in support of its motions. Morris appears to focus on the word "argument" as indicative that the trial court failed to consider the facts presented by the parties. There is no support in the record for her claim and we find it to be without merit. *In re Alexander*, 377 Ill. App. 3d 553, 556 (2007) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996)) ("Normally, we 'presume that the trial judge knows and follows the law unless the record indicates otherwise.' ").

¶ 16 Morris next argues that summary judgment was improper because the facts were in dispute as to whether the settlement check constituted an accord and satisfaction. She claims it was not negotiated with notice of the conditions on which it was tendered.

¶ 17 An accord and satisfaction by use of an instrument occurs when "a person against whom a claim is asserted proves that (I) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim; (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument." 810 ILCS 5/3-311(a) (West 2000). A claim is proven as discharged when "the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim." 810 ILCS 5/3-311(b) (West 2000). "An accord and satisfaction is an agreement between the parties which settles a *bona fide* dispute over an unliquidated claim." *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 911 (1993).

¶ 18 Scottsdale informed Morris by letter dated August 14, 2001, that it agreed to honor her claim, that the dwelling was appraised at \$16,786, and that Morris valued the dwelling and land at \$42,000.

Morris was further informed that Scottsdale would issue a check for \$16,786, less the deductible, and that Morris should invoke the policy's appraisal provision if the check amount was unacceptable. Scottsdale issued Morris a check for \$16,536 on August 22, 2001. In September, Scottsdale followed up with a letter to Morris stating that because it had not heard from her, it would consider that she accepted the "settlement draft in full." We note that the record includes a copy of the cashed check that shows on the bottom left hand corner, "Partial Payment, 16220 E. 2000 South Road, St. Anne, IL", handwritten by an unidentified individual. Although the following month Morris rejected the amount and requested an appraisal, she did not thereafter inform Scottsdale of the identity of her appraiser. More importantly, Morris cashed the check. Like the trial court, we find that there was an accord and satisfaction and hold that summary judgment was properly granted on that basis.

¶ 19 Lastly, Morris argues that the facts indicated Scottsdale waived the policy's limitations period and thus summary judgment was granted in error. According to Morris, she submitted a proof of loss statement, was questioned about it under oath at her deposition, and thereafter was issued payment by Scottsdale. Morris asserts that the policy's sworn proof of loss requirement was either satisfied by the deposition or waived by Scottsdale's subsequent payment. She maintains the proof of loss statement served to toll the policy's one-year limitations period. Morris additionally asserts that Scottsdale waived the limitations period requirement by failing to comply with section 143.1 of the Illinois Insurance Code (215 ILCS 5/143.1 (West 2000)) and section 919.80(d)(8)(C) of the Illinois Administrative Code (50 Ill. Adm. Code 919.80(d)(8)(C) (2000)).

¶ 20 Section 143.1 of the Insurance Code provides:

"Periods of limitation tolled. Whenever any policy or contract for insurance \*\*\* contains a provision limiting the period within which

the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, in whatever form is required by the policy, until the date the claim is denied in whole or in part.” 215 ILCS 5/143.1 (West 2000).

¶ 21 Section 919.80(d)(8)( C) of the Administrative Code provides:

“When the period within which the insured may bring suit under a residential fire and extended coverage policy is tolled in accordance with section 143.1 of the Code [215 ILCS 5/143.1], the company at the time it denies the claim, in whole or in part, shall advise the insured in writing of the number of days the period was tolled, and how many days are left before the expiration of the time to bring suit. 50 Ill. Adm. Code 919.80(d)(8)( C).

¶ 22 Section 143.1 of the Insurance Code is designed to prevent an insurance company from delaying a claim and allowing the limitation period to run in order to deprive an insured of the opportunity to bring an action against the insurer. *Mathis v. Lumbermen’s Mutual Casualty Insurance Co.*, 354 Ill. App. 3d 854, 857 (2004). Section 143.1 requires that in order to toll the limitations period, proof of loss must be filed in accord with the policy’s requirements. *Vala v. Pacific Insurance Co.*, 296 Ill. App. 3d 968, 971 (1998). The filing of other information does not start the tolling period if the policy requires a sworn proof of loss statement. *Vala*, 296 Ill. App. 3d at 971. As a general rule, when the insurer denies liability on grounds unrelated to proof of loss *during* the time period when the filing of proof of loss is required, the denial is considered an implied waiver of the proof of loss requirement. (Emphasis in original.) *Tibbs v. Great Central Insurance Co.*, 57 Ill. App. 3d

866, 868-69 (1978). The general rule does not apply, however, when the denial occurs *after* the period to submit proof of loss. (Emphasis in original.) *Tibbs*, 57 Ill. App. 3d at 869. Section 919.80(d)(8)(C) does not provide the basis for a private cause of action but an insurer's failure to comply with its requirements may be considered by the court in determining if the insured waived the time limitation. *Mathis*, 354 Ill. App. 3d at 860. Like section 143.1 of the Insurance Code, section 919.80(d)(8)(C) is designed to protect an insured and requires that the insurer provide actual notice to the insured of the time remaining to file an action against the insurer once a claim is denied. *Mathis*, 354 Ill. App. 3d at 860.

¶ 23 We reject Morris's argument that Scottsdale waived or is estopped from asserting the policy's limitations period. Morris does not maintain that she filed a sworn proof of loss as required by the policy provisions. At her deposition, she testified that she did not remember whether she signed the proof of loss statement under oath and the statement itself does not include an attestation that it was signed under oath. Moreover, there is no evidence in the record as to when Morris filed the loss statement with Scottsdale. We reject Morris's contention that discussion of her loss statement under oath at her deposition satisfies the policy requirements. Because Morris failed to comply with the policy requirements that she file a sworn proof of loss, section 143.1 of the Insurance Code, and subsequently section 919.80 (d)(8)(C) of the Administrative Code, were not implicated. Accordingly, her argument that Scottsdale has waived the policy's limitations period cannot stand. The fire loss occurred on May 3, 2000. Morris filed her complaint on August 8, 2007. Because the filing took place more than one year after the fire loss, it was untimely and not in compliance with the policy's limitations period. We find that summary judgment was properly granted to Scottsdale on this basis as well.

¶ 24 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed.

¶ 25 Affirmed.