2013 IL App (2d) 120556-U
No. 2-12-0556
Order filed April 25, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellees,	)	
v.	)	No. 11-MR-3
BLAKE WOODS and PEGGY WOODS,	)	Honorable Thomas A. Meyer,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justice Hutchinson concurred in the judgment.
Justice Jorgensen dissented.

ORDER

¶ 1 *Held*: The affidavit that plaintiffs relied on in support of their motion for summary judgment was sufficient under Illinois Supreme Court Rule 191 (eff. July 1, 2002). Therefore, the trial court did not err in granting summary judgment for plaintiffs.

¶ 2 Plaintiffs, State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively State Farm) filed a declaratory judgment action against defendants, Blake and Peggy Woods. State Farm sought declarations that policies it had issued to defendants did not provide coverage for an accident for which defendants had received payments from other

insurance carriers. The trial court granted summary judgment for State Farm. Defendants appeal, arguing that an affidavit that State Farm relied on in support of its motion for summary judgment was insufficient to sustain the motion because the affidavit did not meet the requirements of Illinois Supreme Court Rule 191 (eff. July 1, 2002). Defendants also argue that the affidavit's assertions were directly contradicted by attached exhibits. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 2, 2006, Blake and Peggy Woods and their son, Chase, were visiting Peggy's parents in Florida. Blake was driving a 1999 Mercury owned by Peggy's father, Richard Virzi. Peggy and Chase were passengers in the car. A car driven by Elizabeth Leonardi crossed the center line and struck the Mercury head-on. All three occupants of the Mercury were injured.

¶ 5 Leonardi's car was insured by Met Life and had liability limits of $25,000 per person and $50,000 per occurrence. Virzi's car was insured by Allstate and had underinsured motorist limits of either $250,000 or $500,000 per person[1] and $500,000 per occurrence.

¶ 6 Defendants settled with Met Life and Allstate, receiving a total of $50,000 from Met Life and $450,000 from Allstate. Of those amounts, Blake was allocated $162,500, consisting of $12,500 from Met Life and $150,000 from Allstate.

¶ 7 Defendants additionally had insurance policies with State Farm. State Farm issued defendants an automobile insurance policy for a 2001 Dodge Caravan (policy no. 981 8998-B14-13F) and a personal liability umbrella policy (policy no. 13-VB-4928-1). State Farm also issued a

[1]State Farm asserts that the policy limit per person was $250,000, while defendants state that it was $500,000. Resolution of this fact is not pertinent to this appeal.

policy to a corporation, The Blake Lathom Woods Group, Inc., for a 1999 Saab 9-S (policy no. 779 7541-B21-13Q). In August 2010, Blake asserted underinsured motorist claims under these policies.

¶ 8 State Farm filed a complaint for a declaratory judgment on January 3, 2011. State Farm alleged that the three policies were in effect on "September 2, 2008," and that certified copies of the policies were attached as exhibits. State Farm represented that it was including Peggy Woods as a defendant because she could have a loss of consortium claim as a result of injury to Blake Woods.

¶ 9 In count I, State Farm sought a declaration that there was no underinsured motorist coverage available to defendants under the Dodge Caravan policy for the accident of September 2, 2006. State Farm argued that: the policy had underinsured motorist coverage limits of $250,000 and $500,000; under the policy's language, the most payable to all insureds was $450,000, being the $500,000 per accident limit minus the $50,000 paid by Met Life; and because Allstate, the primary insurer, had already paid $450,000 pursuant to the underinsured motorist coverage in Virzi's policy, State Farm owed nothing under the Dodge Caravan policy.

¶ 10 In count II, State Farm sought a declaration that there was no underinsured motorist coverage available to defendants under the Saab policy for the September 2006 accident.

¶ 11 In count III, State Farm sought a declaration that there was no underinsured motorist coverage under the umbrella policy for the accident.

¶ 12 State Farm attached to its complaint notarized "certificates"[2] signed by Gwen Wood[3], "Underwriting Team Manager." The affidavit relating to the Dodge Caravan policy stated:

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[2]We refer to the "certificates" as affidavits in this disposition.

[3]The signature on the certificates appears to state "Glen Wood." However, as the parties refer to the signatory as "Gwen Wood," we likewise use that name in our disposition.

"I, the undersigned, do hereby certify that I am custodian of the records pertaining to the issuance of policies by the Fox Division of State Farm Mutual Automobile Insurance Company of Bloomington, Illinois.

I further certify that the attached policy, number 981 8998-B14-13F, is a copy of the policy issued to BLAKE & PEGGY WOODS of 635 OAKVIEW DR ALGONQUIN IL 60102-2048 together with endorsements issued subsequently and effective as follows based on our available records:

6127JJ AMENDATORY ENDORSEMENT - EFFECTIVE DATE 02-12-06. INSERT: 15214IL

The policy was in effect on the loss date of September 02, 2006."

¶ 13 On May 20, 2011, defendants filed a motion to strike the declaratory judgment action. They stated that State Farm correctly alleged the date of the underlying automobile collision, September 2, 2006, but erroneously attached purported certified copies of defendants' three insurance policies in effect on September 2, 2008.

¶ 14 On May 23, 2011, the trial court entered an order stating that the second and third paragraph of the complaint were therein "amended on the face of the complaint to reflect the correct date of the occurrence at issue, September 2, 2006, and to comport with the balance of the document."

¶ 15 Defendants filed an answer to the complaint on June 6, 2011. They admitted the allegation in State Farm's complaint that a certified copy of the policy for the Dodge Caravan was attached as Exhibit A to State Farm's complaint. However, they stated later in their answer that they did "not have sufficient knowledge as to whether in fact the Dodge policy in effect on September 2, 2008,

[*sic*] actually contained–said [*sic*] endorsement 6127JJ." Defendants agreed in their answer that the umbrella policy did not provide coverage for the accident.

¶ 16 On July 5, 2011, State Farm filed a motion for summary judgment. Regarding the Dodge Caravan policy, State Farm quoted policy language from endorsement 6127JJ. State Farm argued that the policy exhibits were certified by Wood, an underwriting team manager at State Farm, and that the certification satisfied Rule 191's requirements.

¶ 17 On August 24, 2011, the trial court granted defendants leave to conduct limited discovery. Specifically, State Farm was ordered to produce the claims files for the two automobile policies and to produce for a deposition the individual with the most knowledge regarding the files.

¶ 18 Defendants filed a response to State Farm's motion for summary judgment on March 2, 2012. They argued that State Farm's complaint was riddled with errors, ambiguities, and inconsistencies, prohibiting the entry of summary judgment in its favor. Defendants argued that: State Farm alleged that the policy was in effect on September 2, 2008, whereas the accident took place on September 2, 2006; the "Declarations Page" attached to the complaint contained a list of exceptions and endorsements, which did not include endorsement 6127JJ; Wood's affidavit did not comply with Rule 191 because it did not state that, or in what manner, the policy and endorsement were proffered to defendants; and the affidavit contained the language "Insert: 153-52141L" without explanation.

¶ 19 The trial court granted summary judgment for State Farm on April 18, 2012. It declared that there was no underinsured motorist coverage available to defendants under the State Farm policies.

¶ 20 On May 16, 2012, defendants filed a motion to amend their answer to deny State Farm's allegation that a certified copy of the Dodge Caravan policy was attached as exhibit A. The trial court granted the motion on the same day. Defendants thereafter timely appealed.

¶ 21 II. ANALYSIS

¶ 22 We initially address State Farm's argument that defendants' brief fails to comply with Illinois Supreme Court Rule 341(h) (eff. Sept. 1, 2006). State Farm alleges various violations of the rule and asks that we strike or disregard portions of the brief that violate the rule. We agree that defendants' brief contains minor violations of the rule, such as including argument within the statement of facts, and we will disregard any nonconforming portions of the brief.

¶ 23 Turning to the merits, defendants argue that the trial court erred in granting summary judgment for State Farm on count I of the declaratory judgment action, regarding coverage for the September 2006 accident under the Dodge Caravan policy. Defendants do not contest the grant of summary judgment on the remaining counts, which dealt with coverage under the Saab policy and the umbrella policy.

¶ 24 Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). We review *de novo* a grant of summary judgment. *Id.*

¶ 25 Defendants argue that the affidavit State Farm relied on in support of its motion for summary judgment was insufficient because it did not comply with Rule 191's requirements. Defendants maintain that Gwen Wood made a legal conclusion unsupported by facts in stating that the attached policy and amendatory endorsement 6127JJ were in effect on September 2, 2006. Defendants argue that Wood did not describe her duties or responsibilities with State Farm to show that she was competent to make this statement. Defendants note that the declarations page states that it applies

to the policy period August 13, 2005, to February 14, 2006, and they argue that Wood's affidavit has no explanation for why this policy would still be in effect on September 2, 2006. Defendants maintain that the relevant policy would logically have a policy period of August 13, 2006, to February 14, 2007. Defendants further question the lack of a declarations page stating that amendatory endorsement 6127JJ was in full force and effect on September 2, 2006, as the attached declarations page does not list the endorsement and the endorsement itself does not state a date of issuance or an effective date. Defendants also argue that Wood did not describe the methodology or manner and timing of any proffer of that endorsement to them.

¶ 26 Defendants additionally argue that Wood's affidavit contains assertions that are directly contradicted and inapposite to the language contained in the attached exhibits, and that the exhibits are controlling and take precedence over Wood's unfounded assertions. See *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18 (where an exhibit contradicts the complaint's allegations, the exhibit controls). Defendants again point to the declarations pages, which list an effective period of August 13, 2005, to February 14, 2006, as compared to the September 2, 2006, accident date. Defendants maintain that the affidavit is therefore insufficient to sustain the motion for summary judgment.

¶ 27 State Farm argues that there is no issue of material fact that the certified policy for the Dodge Caravan was the policy in effect on September 2, 2006. State Farm notes that, as amended, its complaint alleged that it issued an automobile policy to defendants for the Dodge Caravan "which policy was periodically renewed and which policy was in effect on September 2, 2006." State Farm notes that the certification for the policy was made by an underwriting team manager of State Farm, Gwen Wood, and that Wood stated that she was the custodian of records pertaining to the issuance of policies for the Fox Division of State Farm. State Farm argues that Wood's statements were facts

that she swore to, rather than conclusions. State Farm maintains that these facts show that the attached policy was the certified policy in effect on the loss date of September 2, 2006, with amendatory endorsement 612JJ having been added on February 14, 2006.

¶ 28 State Farm further cites policy provisions. Under the heading, "When Coverage Applies," the policy states:

> "The coverages you chose apply to accidents and losses that take place during the policy period.
>
> The policy period is shown under "Policy Period" on the declarations page and is for successive periods of six months each for which you pay the renewal premium. Payments must be made on or before the end of the current policy period. The policy period begins and ends at 12:01 A.M. Standard Time at the address shown on the declarations page." (Emphases omitted.)

¶ 29 State Farm maintains that the policy, once issued, renewed automatically for the next policy term upon payment of the renewal premium. State Farm cites a policy provision under the heading "Renewal," which states:

> "Unless we mail to you a notice of cancellation or a written notice of our intention not to renew the policy, we agree to renew the policy for the next policy period upon your payment of the renewal premium when due. It is agreed that the renewal premium will be based upon the rates in effect, the coverages carried, the applicable limits of liability, deductibles and other elements that affect the premium that apply at the time of renewal." (Emphases omitted.)

State Farm further cites a policy provision stating that the policy's terms may be changed by endorsement.

¶ 30 State Farm argues that Wood's affidavit shows that amendatory endorsement 6127JJ was added to the policy with an effective date of February 14, 2006, which explains why it was not reflected on the declarations page for the initial policy period of August 13, 2005, to February 14, 2006. State Farm maintains that no Illinois law requires an insurance company to issue a new declarations page more than once or each time a car insurance policy is renewed.

¶ 31 State Farm cites *Seegers Grain Co v. Kansas City Millwright Co.*, 230 Ill. App. 3d 565 (1992). There, the plaintiff argued that there was a presumption that the insurer fabricated new policies with terms favorable to itself, and the testimony of the insurer's employees was not sufficient to establish that the policies were applicable. *Id.* at 569. The appellate court disagreed, stating that allegations unsupported by the record do not create a question of fact where affidavits and depositions in support of a summary judgment motion contain facts to the contrary. *Id.* The court stated that the plaintiff had not presented any evidence to contradict testimony that the certified copies of the policy were what they purported to be, and there was no evidence in the record to refute that the endorsements at issue were a part of the policy file. *Id.* The court concluded that the plaintiff's allegations were unsupported by the record and therefore insufficient to establish a material issue of fact. *Id.*

¶ 32 State Farm argues that, as in *Seegers*, defendants have not put forth any evidence to contradict that the certified policy was what it purported to be.

¶ 33 Rule 191(a) provides the requirements of affidavits in support of or in opposition to a motion for summary judgment. Specifically, such affidavits must be made on the personal knowledge of

the affiant; set forth the facts upon which the claim, counterclaim, or defense is based; shall have attached sworn or certified copies of all papers on which the affiant relies; shall consist of facts admissible in evidence rather than conclusions; and shall affirmatively show that the affiant could testify competently thereto. Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 34 A party opposing a motion for summary judgment must bring to the trial court's attention any objections the party has to the sufficiency of an affidavit filed by the moving party. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 15. While defendants here did not move to strike Wood's affidavit in relation to State Farm's motion for summary judgment, they did discuss the affidavit's alleged deficiencies in their response to the motion, thereby preserving the issue for review. *Cf. Soderlund Brothers, Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 623 (1995) (where the plaintiff did not object to an affidavit by motion to strike "or otherwise," it forfeited any error).

¶ 35 Appellate courts have reviewed the decision of whether to strike a Rule 191 affidavit under both an abuse of discretion standard (see *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 33) and a *de novo* standard (see *Madden v. Paschen*, 395 Ill. App. 3d 362, 386 (2009)). We do not resolve which is the proper standard to apply, as our result would be the same under either standard here.

¶ 36 We conclude that the trial court did not err in allowing Wood's affidavit to stand in support of State Farm's motion for summary judgment and in relying on the affidavit to grant summary judgment for State Farm. Contrary to defendants' argument, the basic question of what policy is in effect on a given date is generally a factual issue rather than a legal conclusion. See *Redmon v. Society & Corp. of Lloyds*, 434 F. Supp. 2d 1211, 1220-21 (M.D. Ala. 2006) (referring to issue of

whether the plaintiff's insurance policies were in effect at the time he filed a claim as a factual question). Regarding Wood's competency to make that statement, Rule 191 is satisfied if, looking at the affidavit as a whole, it appears that the affidavit is based on the affiant's personal knowledge and there is a reasonable inference that the affiant could competently testify to its contents at trial. *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009). Here, while the affidavit is somewhat bare-bones, Wood's statement that she was a custodian of records pertaining to the issuance of policies at State Farm's "Fox Division," along with her title of "Underwriting Team Manager," provided sufficient support to show that she was competent to make the statement that the attached policy and endorsement were in effect on September 2, 2006. *Cf. F.H. Paschen/S.N. Nielsen, Inc. v. Burnham Station, LLC*, 372 Ill. App. 3d 89, 93 (2007) (where the affiant stated that he was the president of a company, it was a reasonable inference that as president, he had knowledge of his company's transactions, which supported his statements regarding with which parties the company had contracted).

¶ 37 Defendants correctly point out that the attached declarations page lists various endorsements but not amendatory endorsement 6127JJ. However, this is consistent with the affidavit and declarations page; Wood stated that the endorsement became effective on February 14, 2006, whereas the policy period listed on the declarations page is August 13, 2005, to February 14, 2006. While defendants argue that the relevant declarations page would logically have a policy period of August 13, 2006, to February 14, 2007, there is no evidence that State Farm issued a new declarations page every six months. As State Farm points out, the policy language states that the policy period is shown on the declarations page "and is for successive periods of six months each

for which you pay the renewal premium." The policy also includes language automatically renewing the policy for the next policy period when the renewal premium is paid.

¶ 38 Defendants point to evidence in the record that State Farm issued "renewal certificates" at the renewal period of its policies. However, even if, *arguendo*, there was such a certificate for the policy period here or a subsequent declarations page, there is no evidence to counter State Farm's evidence, through Wood's affidavit, that the attached policy and amendatory endorsement 6127JJ were in effect on September 2, 2006. Defendants clearly had the opportunity to obtain such evidence, as in August 2011 State Farm was ordered to produce claims files and allow the employee with the most knowledge regarding the files to be deposed. Defendants also argue that Wood did not describe how the endorsement was proffered. However, such a description was not necessary to support Wood's statement regarding the effective date of the endorsement. If defendants wished to counter the statement that the endorsement was in effect with the assertion that it could not have been, as applied to their policy, because they did not receive it, they could have done so through a counter-affidavit. "If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opposing party cannot rest on its pleadings to create a genuine issue of material fact." *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257 (2004). As in *Seegers*, defendants did not present any evidence to contradict Wood's statement that the attached policy and amendatory endorsement 6127JJ were in effect on September 2, 2006.

¶ 39 Accordingly, the trial court could properly consider amendatory endorsement 6127JJ as part of the policy on the relevant date. Defendants do not argue that summary judgment was improper under the language of the endorsement. Therefore, we affirm the trial court's grant of summary judgment in State Farm's favor. Based on this resolution, we do not address State Farm's alternative

argument that the trial court abused it discretion in allowing defendants to amend their answer to deny that the exhibit attached to the complaint was a certified copy of the Dodge Caravan policy.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the judgment of the McHenry County circuit court.

¶ 42 Affirmed.

¶ 43 JUSTICE JORGENSEN, dissenting:

¶ 44 I respectfully disagree that affidavit relied on in support of State Farm's motion for summary judgment was sufficient under Rule 191. For the reasons that follow, I believe the affidavit contains merely unsupported assertions of an ultimate fact. Therefore, I would reverse the trial court's grant of summary judgment.

¶ 45 Ultimate facts are those essential to the right of action or matter of defense. *Black's Law Dictionary*, 1522 (6th ed. 1990). Ultimate facts are those necessary to determine issues in case, as distinguished from the evidentiary facts supporting them. *Id*. To survive dismissal, a plaintiff need allege only the ultimate facts to be proved, not the evidentiary facts tending to prove such ultimate facts. *Chandler v. Illinois Central R.R.*, 207 Ill. 2d 331, 348 (2003). However, to obtain summary judgment, more is required. Under Rule 191, summary judgment affidavits must contain not conclusions but *evidentiary* facts to which the affiant is capable of testifying. *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1005 (2011); *Jones v. Dettro*, 308 Ill. App. 3d 494, 499 (1999). Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the rule governing summary judgment affidavits. *Id*. A particular fact may be an evidentiary fact in certain circumstances and an ultimate conclusion of fact in others. See, *e.g.*, *State Board of Medical examiners v. McCroskey*, 880 P. 2d 1188 (1994).

¶ 46 Here, to obtain summary judgment, State Farm needed to establish, without question, that amendatory endorsement 612JJ was in effect on the date of the accident, September 2, 2006. The parties agree that a finding on this fact controls the outcome in this case. Therefore, the effective date of endorsement 612JJ is an ultimate fact.

¶ 47 In an effort to establish the effective date of endorsement 612JJ, State Farm submitted the affidavit of Gwen Wood, wherein Wood attested that: (1) she is the custodian of the records pertaining to the issuance of policies; and (2) the attached insurance policy and subsequently issued endorsement 612JJ were in effect September 2, 2006. The problem, however, is that neither of the attached documents state on their face that they were in effect September 2, 2006.

¶ 48 For example, the insurance policy's declarations page sets forth the policy period of August 13, 2005 to February 14, 2006. Contrary to State Farm's implicit argument, we do not see evidence that the policy automatically renewed. The "policy period" provision states that the policy term is for successive six-month periods for which the renewal premium is paid. The premium must be made on or before the end of the current policy period. Upon receipt of timely payment, and unless State Farm sends notice of an intention not to renew, State Farm agrees to renew the policy. Therefore, renewal does not appear to be automatic, but, rather, renewal depends upon timely payment.

¶ 49 Endorsement 612JJ sets forth an issuance date of February 12, 2006. Therefore, arguably, endorsement 612JJ's issuance date was sufficient to establish the policy's renewal for another six months following the August 13, 2005 to February 14, 2006, term. Still, that six month period would have expired on August 14, 2006. There is nothing further on the face of the submitted

documents to show that endorsement 612JJ was in effect September 2, 2006. Something more is needed to establish that fact, such as a renewal payment receipt.

¶ 50 All that remains to support the motion for summary judgment is Wood's statement in the affidavit that, "based on our available records, *** the policy [and endorsement 612JJ] w[ere] in effect on the loss date of September 2, 2006." This leaves us with questions. Which records? Why not submit them? Even if Wood's position as "underwriting team manager" establishes that she is competent to know which policies are in effect, her unsupported assertion that endorsement 612JJ was, indeed, in effect is insufficient to conclusively establish as much when the face of that document indicates a different effective period. Wood's assertion juxtaposed against the policy period listed on the face of the document creates a question of fact.

¶ 51 For these reasons, I do not believe the affidavit complies with the requirements of Rule 191. I would reverse the trial court's grant of summary judgment and remand the case for further proceedings.