

No. 1-13-2029

**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  
FIRST JUDICIAL DISTRICT

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JOHN SMOLINSKI, )  
 ) Appeal from  
 ) the Circuit Court  
 Plaintiff-Appellant, ) of Cook County  
 )  
 v. ) 12 M2 2145  
 )  
 ALLMERICA FINANCIAL ALLIANCE INSURANCE ) Honorable  
 COMPANY, ) Roger Fein,  
 ) Judge Presiding.  
 Defendant-Appellee. )

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PRESIDING JUSTICE CONNORS delivered the judgment of the court.  
Justices Hoffman and Delort concurred in the judgment.

**ORDER**

**Held:** Allmerica's section 2-619 motion to dismiss should not have been granted where there existed a genuine issue of material fact regarding plaintiff's receipt of correspondence advising him of his examination under oath.

¶ 1 This appeal arises out of a breach of contract claim filed by plaintiff John Smolinski

against defendant Allmerica Financial Alliance Insurance Company (Allmerica). Plaintiff claimed in the trial court that Allmerica failed to pay him for damages sustained to a rental car vehicle. Allmerica filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), alleging plaintiff's failure to cooperate with Allmerica's investigation of the insurance claim. The trial court granted Allmerica's motion to dismiss, and plaintiff now appeals. For the following reasons, we reverse and remand.

¶ 2

#### I. BACKGROUND

¶ 3 On March 3, 2012, plaintiff was involved in an accident while driving a vehicle rented at Evanston Rent-a-Car. Plaintiff had entered into a "Personal Auto Policy" with Allmerica. On September 27, 2012, plaintiff filed a *pro se* complaint against Allmerica alleging breach of contract and seeking damages in the amount of \$9,800. No documents were attached to the complaint. Plaintiff contended that Allmerica violated the insurance contract by refusing to pay for damages to a covered vehicle. On October 30, 2012, Allmerica filed its appearance in the trial court. On December 17, 2012, counsel for Allmerica appeared for a case status hearing, but plaintiff was not present. The trial court dismissed the case for want of prosecution.

¶ 4 On December 24, 2012, plaintiff filed a motion to vacate the dismissal order. On February 4, 2013, the trial court reinstated the cause, granting plaintiff leave to file an appearance by counsel. A status hearing was set for March 5, 2013. On March 5, 2013, plaintiff failed to appear and the case was again dismissed for want of prosecution.

¶ 5 On March 28, 2013, an attorney filed an appearance on behalf of plaintiff, as well as a motion to vacate the dismissal order. The trial court granted plaintiff's motion to vacate and

granted plaintiff's counsel leave to file an appearance. On April 17, 2013, Allmerica filed a motion to dismiss pursuant to section 2-619 of the Code, alleging a failure to cooperate.

Allmerica attached a certified copy of the insurance policy to the motion. Page 10 of the main form of the policy provides:

"We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

3. Submit as often as we reasonably require:

a. To physical exams by physicians we select. We will pay for these exams.

b. To examination under oath and subscribe the same."

¶ 6 Allmerica alleged that on May 4, 2012, attorney Heather Nelson spoke to plaintiff to advise him that examination under oath was going to be requested. During that conversation,

Nelson asked plaintiff if he was refusing to sit for an examination and he replied that he was not saying that yet. On May 8, 2012, Allmerica sent a letter to plaintiff requesting an examination under oath concerning the alleged accident for which plaintiff claimed coverage. The letter was sent via both certified mail and regular mail, to plaintiff's home address in Wood Dale, Illinois. A copy of the letter requesting examination, and setting the examination date for May 17, 2012, at 2 p.m., was attached to defendant's motion to dismiss. A copy of the certified mail receipt was also attached.

¶ 7 Allmerica further alleged in its motion that plaintiff failed to appear for his examination under oath on May 17, 2012, and that another letter was then sent to plaintiff via certified and regular mail, noting that he had failed to appear and requesting that contact be made so another examination could be scheduled. A copy of that letter was attached to the motion to dismiss. The letter was addressed to plaintiff's home address in Wood Dale, Illinois. Also attached to the motion was an affidavit of Nelson attesting to the phone conversation she had with plaintiff. Allmerica argued that plaintiff's claim for breach of contract was barred by his failure to cooperate with Allmerica's attempts to investigate the insurance claim.

¶ 8 Plaintiff responded to Allmerica's motion to dismiss stating that he never received the May 8, 2012, request to sit for examination under oath. Plaintiff noted that according to the certified mail receipt, the parcel was not delivered until June 1, 2012. Plaintiff attached an affidavit stating that he never received correspondence from Allmerica requesting an examination under oath. Also attached to the response was a printout from USPS's website, which stated that the parcel, with the same tracking number as that stated on the certified mail

receipt of the letter sent requesting plaintiff's examination under oath, was delivered at 11:50 a.m. on June 1, 2012 in Chicago, IL 60602, not Wood Dale, Illinois.

¶ 9 In reply to plaintiff's response to the motion to dismiss, Allmerica claimed that Illinois adheres to the "mailbox rule" whereby the law presumes that a letter which was properly addressed, stamped, and mailed, was received by the addressee. Allmerica did not cite to any case law for that proposition. Allmerica claimed that despite the certified copy of the letter being returned to sender, the letter sent by regular mail was still operative.

¶ 10 Arguments were heard by the court on Allmerica's motion to dismiss, but the transcripts from that hearing are not in the record. The trial court's written order, dated June 19, 2013, notes that many Illinois decisions have enforced compliance with a cooperation clause as a condition precedent to recovery under an insurance policy. It further states that Allmerica satisfactorily showed that plaintiff breached the cooperation clause in the insurance policy, and that plaintiff failed to present credible evidence of his efforts to cooperate with the request for examination under oath.

¶ 11 The court found that an attorney representing Allmerica had a telephone conversation with plaintiff on May 4, 2012, advising plaintiff of Allmerica's request for examination, and that plaintiff never denied this fact. The trial court further noted that on May 8, 2012, Allmerica sent a letter to plaintiff formally requesting that the examination be held on May 17, 2012. The letter was sent by both certified and regular mail to plaintiff's regular address.

¶ 12 The trial court stated that the U.S. Postal Service tracking printout:

"states that the May 8, 2012 certified letter was delivered on June 1, 2012.

Plaintiff has submitted an affidavit stating, among other things, that he never received any written correspondence from [Allmerica] requesting an examination under oath or that an examination was scheduled for May 17, 2012. Plaintiff's affidavit is clearly inconsistent with the U.S. Postal Service tracking printout relied on by Plaintiff to show that the certified letter was not delivered until after the scheduled May 17, 2012 examination." (Emphasis in original).

¶ 13 The trial court granted Allmerica's section 2-619 motion to dismiss, and plaintiff now appeals.

¶ 14 II. ANALYSIS

¶ 15 On appeal, plaintiff contends that the trial court erred in granting Allmerica's section 2-619 motion to dismiss because, when viewing the record in a light most favorable to plaintiff, there was a genuine issue of material fact regarding whether plaintiff received the May 8, 2012, correspondence requesting an examination under oath. Allmerica maintains that plaintiff failed to cooperate with its investigation and thus the trial court properly dismissed plaintiff's complaint for breach of contract.

¶ 16 The purpose of a motion to dismiss under section 2-619 of the Code is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for a jury trial. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Section 2-619 allows dismissal when the claim asserted is barred by other affirmative matters avoiding the legal effect or defeating the claim. *Id.* In ruling on a motion to dismiss

under section 2-619, the trial court may consider pleadings, depositions, and affidavits. *Id.* When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted. *Id.* The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal." *Id.* at 185-86. In ruling on a section 2-619 motion to dismiss, the court must "construe all of the pleadings and supporting documents in the light most favorable to the nonmoving party." *Musicus v. First Equity Group, LLC*, 2012 IL App (3d) 120068, ¶ 9. We review a dismissal pursuant to section 2-619 *de novo*. *Id.*

¶ 17 Here, when we construe all of the pleadings and supporting documents in a light most favorable to plaintiff, we find that there was an issue of fact regarding plaintiff's receipt of the May 8, 2012, correspondence. Plaintiff's affidavit stated that he never received a letter advising him of his examination under oath. The certified mail receipt shows that the parcel was delivered to an address in Chicago on June 1, 2012, not plaintiff's address in Wood Dale, Illinois. Allmerica admitted in its reply to its motion to dismiss that the letter had been returned to sender, which was the attorney's address in Chicago, Illinois. Accordingly, construing the record in plaintiff's favor, we find that there is at least a question of fact regarding whether plaintiff received the letter. The trial court mistakenly interpreted the pleadings when it found that plaintiff's affidavit stating that he never received the certified letter was "clearly inconsistent" with the USPS tracking printout which showed that the certified letter was delivered on June 1, 2012. As stated above, the USPS tracking printout indicates that it was delivered to a Chicago address, while plaintiff lived in Wood Dale, and Allmerica admitted in its reply to its motion to

dismiss that the letter had been returned to sender. While Allmerica maintains that the letter sent by regular mail is still operative, plaintiff claimed in his affidavit that he never received the letter sent by regular mail either. We find that because there is conflicting evidence regarding both the certified letter and the letter sent via regular mail, there is at least a genuine issue of material fact as to whether plaintiff received correspondence regarding his examination under oath. If plaintiff never received the correspondence advising him of his examination under oath, then Allmerica's claim that plaintiff failed to cooperate with its investigation would fail. Accordingly, Allmerica's section 2-619 motion to dismiss plaintiff's breach of contract claim should not have been dismissed at this stage.

¶ 18 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County.

¶ 19 Reversed and remanded.