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2014 IL App (3d) 130690-U

Order filed November 19, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

LOWELL A. ELY, as executor of the)	Appeal from the Circuit Court
ESTATE OF DONALD ELY, for the benefit)	of the 10th Judicial Circuit,
of LOWELL A. ELY and DELORES ELY,)	Tazewell County, Illinois,
)	
Plaintiff-Appellant,)	
)	Appeal No. 3-13-0690
v.)	Circuit No. 11-L-15
)	
COUNTRY MUTUAL INSURANCE)	
COMPANY,)	Honorable
)	Paul Gilfillan,
Defendant-Appellee.)	Judge, Presiding

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The one-year time limitation in plaintiff's home insurance contract was enforceable and applicable to bar plaintiff's suit.
- ¶ 2 The decedent of plaintiff, Lowell A. Ely, and defendant, Country Mutual Insurance Company, entered into a home insurance contract that contained a one-year time limitation on suits brought by plaintiff on the contract. The insured home was destroyed by fire on June 5, 2008. Plaintiff filed suit under the policy in February 2011. Defendant filed a motion for

summary judgment (735 ILCS 5/2-1005(b) (West 2010)), arguing that plaintiff's suit was filed outside the applicable one-year time limit. The trial court granted defendant's motion. Plaintiff appeals, arguing that the one-year limitation did not bar plaintiff's suit, for various reasons. We affirm.

¶ 3

FACTS

¶ 4

Plaintiff's decedent, Donald F. Ely, and defendant entered into a home insurance contract with a \$228,000 limit on liability for Donald's dwelling. In a section of the policy labeled "Conditions—SECTIONS 2 through 6," the policy required Donald to "Send to 'us', within 60 days after 'our' request, 'your' signed, sworn proof of loss." That section also stated, "In case of a loss, 'we' have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to 'us'." The policy further stated, "No action can be brought against 'us' unless there has been full compliance with all of the terms under SECTIONS 2 through 6 of this policy and the action is started within one year after the date of the 'occurrence'." The policy also mandated a one-year time limit for filing claims, which would begin to run at the time a loss occurred.

¶ 5

On June 5, 2008, the dwelling was destroyed by fire. That day, Donald notified defendant of the fire and submitted to defendant an appraisal of the home. On June 16, 2008, adjuster Charles Warren sent plaintiff a letter stating in part:

"This letter will serve as a reminder of the one-year limit contained in your insurance policy. The reminder will come to you every 30 day[s] until the claim is concluded. You have one year from the date of loss to make a claim with regard to the above-mentioned claim. Your one-year anniversary would be June 5, 2009."

On December 11, 2008, Warren sent Donald a letter and a draft for \$65,000, which defendant calculated was the market value of the home just prior to the fire. The letter explained that if Donald chose to replace or repair the house, he had one year from the time of the fire in which to complete the repairs and notify defendant of the repair costs. Also included with the December 11 letter was a statement of proof of loss; the letter requested that Donald complete the proof of loss form and return it to defendant by February 11, 2009. The letter also reminded Donald that the one-year time period for filing a claim would end on June 5, 2009.

¶ 6 On March 1, 2009, Donald died. Plaintiff was appointed executor of Donald's estate on June 11, 2009. On September 28, 2009, plaintiff submitted an appraisal, showing the replacement value of the house was \$284,948. On November 5, 2009, defendant responded, quoting the policy and explaining that the time for addressing claims had already ended. Plaintiff filed suit in February 2011.

¶ 7 Plaintiff's third amended complaint alleged breach of the insurance contract. Defendant served upon plaintiff a request for admission of facts. Plaintiff failed to respond, and the court admitted all the facts contained in defendant's request under Illinois Supreme Court Rule 216 (eff. Jan. 1, 2011).

¶ 8 Defendant filed a motion for summary judgment, arguing that plaintiff's suit was filed after the one-year time limitation established by the policy. After a short hearing, the court granted defendant's motion. Plaintiff appeals.

¶ 9 ANALYSIS

¶ 10 Plaintiff challenges on several grounds the trial court's decision to grant defendant's motion for summary judgment. Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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." 735 ILCS 5/2-1005(c) (West 2010). When determining whether a genuine issue of material fact exists, the court must construe all pleadings and attachments strictly against the movant and liberally in favor of the nonmovant. *Hilgart v. 210 Mittel Drive Partnership*, 2012 IL App (2d) 110943. We review *de novo* the trial court's grant of summary judgment. *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318 (2006). We address plaintiff's arguments in turn.

¶ 11 I. Waiver of the Time Limitation Clause

¶ 12 First, plaintiff argues that defendant waived the policy's time limitation clause by failing to comply with section 919.80(d)(8)(C) of title 50 of the Administrative Code (50 Ill. Adm. Code 919.80(d)(8)(C) (2002)). Plaintiff contends that in lieu of the policy's one-year time limitation for filing suit, the general 10-year statute of limitation for contracts should apply (735 ILCS 5/13-206 (West 2008)). Under that provision, the present action was timely filed and should not have been dismissed.

¶ 13 Section 143.1 of the Illinois Insurance Code states that where an insurance policy limits the time period for bringing 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 2008). When such tolling is triggered, section 919.80(d)(8)(C) of title 50 of the Administrative Code requires that the insurance 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) (2002). Plaintiff claims that defendant failed to advise plaintiff as required by section 919.80(d)(8)(C) and thereby waived its right to assert the policy's time limitation clause.

¶ 14 We disagree. In the present case, section 143.1 was not triggered. Tolling under section 143.1 does not begin until a plaintiff files proof of loss "in whatever form is required by the policy[.]" 215 ILCS 5/143.1 (West 2008). In the present case, defendant's Rule 216 admissions included an admission that plaintiff failed to provide proof of loss as required by the policy. Therefore the tolling under section 143.1 never began, and defendant had no corresponding duty to advise plaintiff under section 919.80(d)(8)(C). We need not address plaintiff's argument that a failure to comply with section 919.80(d)(8)(C) waives a policy's time limitation clause.

¶ 15 II. Unconscionability of the Time Limitation Clause

¶ 16 Plaintiff argues that the time limitation clause is both procedurally and substantively unconscionable. He argues it is procedurally unconscionable because it is "buried" on page 31 of a 40-page policy in an inconspicuous font. He argues that the limitation is substantively unconscionable because it shortens the statute of limitations provided for by statute. 735 ILCS 5/13-206 (West 2008).

¶ 17 "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it." *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 100 (2006). "To be a part of the bargain, a provision limiting the defendant's liability must *** have been bargained for, brought to the purchaser's attention or be conspicuous." *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 990 (1980). In the present case, the time limitation clause was not procedurally unconscionable. The clause is written in normal-sized font under a title that reads "Suit Against Us" in bold. Plaintiff either read the clause or could have read it if he had chosen to. See *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 26 (2006) (noting that contracts of adhesion are "a fact of modern life").

¶ 18 Nor was the clause substantively unconscionable. Parties to a contract may agree to a shortened limitation period to replace a statute of limitations, so long as it is reasonable. *Country Preferred Insurance Co. v. Whitehead*, 2012 IL 113365. Here, the one-year limitation was reasonable and commonplace. We do not find it " 'so one-sided as to oppress or unfairly surprise an innocent party.' " *Hutcherson v. Sears Roebuck & Co.*, 342 Ill. App. 3d 109, 121 (2003) (quoting *Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 89 (1995)).

¶ 19 III. Estoppel

¶ 20 Plaintiff argues that defendant should be estopped from asserting the time limitation clause because defendant "repeatedly misrepresented and concealed the time within which plaintiff may initiate a lawsuit." Plaintiff argues that the several letters he received from defendant notified him of the one-year time limitation for filing *claims* but not the one-year time limitation for filing *suit*.

¶ 21 The doctrine of estoppel provides that a party whose conduct has delayed another party from filing suit until after the conclusion of the limitation period may be estopped from asserting the limitation period as a bar to the action. *Weatherly v. Illinois Human Rights Comm'n*, 338 Ill. App. 3d 433 (2003). The party asserting estoppel must establish that she reasonably relied on the other party's conduct or representations in forbearing suit. *Id.*

¶ 22 In the present case, plaintiff makes no specific allegation of misrepresentation on the part of defendant. Indeed, none occurred. To the contrary, defendant sent several notices warning plaintiff of the one-year time limitation for filing claims. Those notices' lack of specific warning about the one-year limitation for filing *suit* does not constitute a misrepresentation justifying estoppel. Plaintiff cites no case law establishing how defendant's conduct would justify estoppel.

¶ 23 IV. Equitable Tolling

¶ 24 Plaintiff argues that equitable tolling should apply to toll the policy's time limitation period from the time Donald died until the time plaintiff's estate was opened.

¶ 25 Plaintiff's loss occurred in June 2008; Donald died in March 2009; the estate was opened in June 2009; and the suit was filed in February 2011. Even if equitable tolling were to apply between March 2009 and June 2010, 17 months still elapsed between plaintiff's loss and the filing of his suit, in excess of the policy's 12-month time limitation. Equitable tolling would have no effect on the application of the policy's time limitation.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Tazewell County is affirmed.

¶ 28 Affirmed.