2017 IL App (1st) 161498-U
No. 1-16-1498

SECOND DIVISION
September 5, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD CHANEY,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13 CH 26227
	)	
ALLSTATE INDEMNITY COMPANY,	)	
	)	The Honorable
Defendant-Appellee.	)	Raymond W. Mitchell,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Where an endorsement to the insurance policy provided the plaintiff with a "reasonable time" from the date of loss to make repairs or replace damaged property in order to recover the full replacement cost of the damaged property, and where the insurer waived any requirement that the plaintiff make repairs or replace damaged property within 180 days of the insurer's actual cash value payment, the trial court erred in granting the defendant's motion *in limine* precluding the plaintiff from presenting any evidence at trial of the full replacement cost of the damaged property.

¶ 2 In this appeal, the plaintiff, Edward Chaney, argues that the trial court erred in granting the motion *in limine* of defendant, Allstate Indemnity Company, to preclude the plaintiff from

seeking recovery for the replacement cost of the plaintiff's real and personal property that was damaged in a fire. For the reasons that follow, we reverse.

¶ 3 BACKGROUND

¶ 4 The pleadings and documents in the record reveal the following. On May 28, 2012, the premises of 6018 S. Michigan Avenue and personal property therein were damaged by a fire (collectively, "Property"). At the time of the fire, the plaintiff held a "Deluxe" insurance policy number 902429247 04/17 ("Policy") issued by the defendant, with a face value for policy coverage limits of $340,000 for the dwelling, which purported to insure the Property. The plaintiff notified the defendant of the loss caused by the fire on the same day as the fire.

¶ 5 With respect to payment for such losses under the Policy, the Policy provided in relevant part:

> "Under **Coverage A—Dwelling Protection, Coverage B—Other Structures protection** and **Coverage C—Personal Property Protection**, payment for covered loss will be by one or more of the following methods:
>
> ***
>
> b) Actual Cash Value. If **you** do not repair or replace the damaged, destroyed or stolen property, payment will be on an actual cash value basis. This means there may be a deduction for depreciation. Payment will not exceed the limit of liability shown on the Policy Declarations for the coverage that applies to the damaged, destroyed or stolen property, regardless of the number of items involved in the loss.
>
> You may make claim for additional payment as described in paragraph 'c', and paragraph 'd' below if applicable, if **you** repair or replace the damaged, destroyed or stolen covered property within 180 days of the actual cash value payment.

c) Building Structure Reimbursement. Under **Coverage A—Dwelling Protection** and **Coverage B—Other Structures Protection**, **we** will make additional payment to reimburse **you** for cost in excess of actual cash value if **you** repair, rebuild or replace damaged, destroyed or stolen covered property within 180 days of the actual cash value payment. ***

***

d) Personal Property Reimbursement. When the Policy Declarations shows that the Personal Property Reimbursement provision applies under **Coverage C—Personal Property Prtoection**, **we** will make additional payment to reimburse **you** for cost in excess of actual cash value if **you** repair, rebuild or replace damaged, destroyed or stolen covered personal property or wall-to-wall carpeting within 180 days of the actual cash value payment." [Emphasis in original.]

¶ 6 The Policy also included Endorsement AU277-2, which provided in relevant part as follows:

"This form contains the provisions of the Standard Fire Policy. Whenever the terms and provisions of Section I can be construed to perform a liberalization of the provisions found in the Standard Fire Policy, the terms and provisions of Section I shall apply.

In consideration of the Provisions and Stipulations Herein or Added Hereto and of the Premium Specified in the Declarations (or specified in endorsement attached thereto), **Allstate, for the term shown in the Declarations from inception date shown in the Declarations until cancelled or expiration** at location of property involved, to an amount not exceeding the limit of liability specified, does insure **the Insured named in the Declarations** and legal representatives, to the extent of the actual cash value of the

> property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance of any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the Insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED AGAINST IN THIS POLICY INCLUDING REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere." [Emphasis in original.]

¶ 7 On September 6, 2012, the defendant informed the plaintiff that it had determined the undisputed cash value of the loss was $40,028.37. Thereafter, the plaintiff claims that he obtained an estimate of the loss from Nationwide Adjusting Company in the amount of $135,993.68 and provided a copy of that estimate to the defendant.

¶ 8 On November 21, 2012, the defendant sent the plaintiff a letter denying a portion of the claimed loss on the basis that it was not covered by various provisions of the Policy. The November 21, 2012, letter also advised the plaintiff that, pursuant to the terms of the Policy, he had only until November 23, 2013, to file suit against the defendant. The plaintiff alleged that in response to this partial denial, his attorney drafted a letter to the defendant, objecting to the denial and requesting an explanation of the defendant's lower estimate of the damages. The plaintiff further alleged that the defendant responded on February 5, 2013, stating that a senior

adjuster would re-evaluate the damages and would "secure an agreed price for the covered portion of the damage with an Allstate recommended vendor," but the defendant did not provide the plaintiff with a recommended vendor. Copies of the letter from the plaintiff's counsel to the defendant and the February 5, 2013, letter from the defendant to the plaintiff's counsel do not appear in the record. However, the defendant admitted having sent the letter but denied the plaintiff's interpretation of it.

¶ 9 On March 22, 2013, an adjuster of the defendant sent correspondence to the plaintiff's counsel, stating that the defendant had adjusted the dwelling repair estimate from a replacement cost of $71,220.67 to $91,974.58 and that a preferred contractor of the defendant agreed that the new estimate would restore the plaintiff's property to its pre-loss condition. This letter does not state that plaintiff agreed to the new estimate. The plaintiff alleges that he then provided the defendant with a repair estimate from H&R Johnson, which calculated the repair damages to be $170,655.00.

¶ 10 In correspondence dated May 7, 2013, the defendant persisted in its valuation of the replacement cost of the loss at $91,974.58. However, that same letter clearly states that any "unresolved issues regarding scope, or damages will continue to be reviewed until resolved." After subtracting depreciation, the defendant concluded that the actual cash value of the plaintiff's loss was $68,603.94. According to the May 7, 2013, correspondence, the defendant had already advanced $19,028.37 of that to the plaintiff, leaving an outstanding settlement offer of $49,575.57.

¶ 11 On November 5, 2013, the defendant issued the plaintiff two checks—one in the amount of $19,028.37 and one in the amount of $49,575.57 (collectively, "actual cash value

payment")—representing the defendant's assessment of the actual cash value of the plaintiff's loss.

¶ 12 The defendant continued to deny coverage for any damage not caused by the fire, damage caused by the plaintiff's failure to properly secure the premises, or for any increased repair or reconstruction costs necessitated by any law, ordinance or regulation, as those were clearly not covered in the Policy. The defendant alleged that the plaintiff's estimate for repair and reconstruction included items therefore outside the Policy's coverage, but no specific itemized list of those items or their cost is included in the record.

¶ 13 On November 22, 2013, the plaintiff instituted suit against the defendant. Thereafter, the defendant made two supplemental payments to the plaintiff: one on December 9, 2013, in the amount of $5,230.00 for architectural drawings, and one on December 12, 2013, in the amount of $7,056.75 for an outstanding bill from a remediation vendor.

¶ 14 On March 17, 2015, the plaintiff filed his Amended Complaint for Damages ("Amended Complaint"). In Count I of the Amended Complaint, the plaintiff alleged that the defendant breached its contract with the plaintiff when it refused to pay the plaintiff the full amount of his loss under the Policy. In Count II of the Amended Complaint, the plaintiff alleged that the defendant breached its contract with the plaintiff when it failed to acknowledge the plaintiff's timely proof of loss for his personal property and therefore denied further liability on the plaintiff's claimed loss of personal property.

¶ 15 Shortly before the scheduled trial, the defendant filed motions *in limine* to preclude the plaintiff from recovering the full replacement cost of the Property. According to the defendant's motions, the plaintiff should be precluded from recovering the full replacement cost of the Property because the Policy provides that the plaintiff was entitled to recover the replacement

cost of the Property only if the plaintiff made repairs or replaced the Property within 180 days of the defendant's actual cash value payment to the plaintiff. According to the defendant, because the plaintiff had made no such repairs or replacement, he was not entitled to replacement costs under the Policy.

¶ 16 During arguments on the motions *in limine*, the plaintiff did not dispute that he had not made any repairs within 180 days of the defendant's November 5, 2013, actual cash value payment. Instead, the plaintiff argued that the 180 days had not started to run, because he and the defendant had not yet reached an agreement on the actual cash value of the loss. According to the plaintiff, once the trier of fact (the jury, in this case) made a determination of the appropriate actual cash value, the 180 days in which the plaintiff could make repairs would begin to run. The trial court took the matter under advisement and on April 19, 2016, issued an order granting, without explanation, the defendant's motions *in limine*.

¶ 17 On April 29, 2016, by agreement of the parties, the trial court entered judgment on both counts of the Amended Complaint in favor of the defendant. The plaintiff then brought this timely appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, the plaintiff argues that the trial court erred in granting the defendant's motions *in limine* because (1) the 180 days in which the plaintiff was to make repairs did not begin to run until there was a final determination of the plaintiff's loss by either the parties or the jury, and (2) in granting the motions *in limine*, the trial court effectively ruled on a dispositive issue in the case. We do not address either of these contentions, as we conclude that Endorsement AU277-2 provides the plaintiff with a "reasonable time" after the loss in which to make repairs or replace damaged property while still recovering the full replacement cost of the

Property. Even if Endorsement AU277-2 did not expand the 180 days provided to the plaintiff to make repairs, we conclude that the defendant waived the 180-day time limit.

¶ 20 A motion *in limine* is a pre-trial motion that seeks a ruling on the admissibility of evidence, the purpose of which is "to promote a trial free of prejudicial material and to avoid highlighting the evidence to the jury through objection." *Konieczny v. Kamin Builders, Inc.*, 304 Ill. App. 3d 131, 136 (1999). A motion *in limine* is not, however, designed to obtain rulings on dispositive matters. *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (2003). Generally, the decision of whether to deny or grant a motion *in limine* falls within the discretion of the trial court, and we will not disturb that decision absent a clear abuse of that discretion. *Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994, 1005 (2003).

¶ 21 The plaintiff first argues that the trial court should not have limited his recovery to the actual cash value of his loss, because the damages assessment was not finalized on the date of the actual cash value payment and, therefore, the 180 days in which he had to make repairs and recover the full replacement costs of his loss had not yet begun to run. Although not entirely clear, it appears that it is the plaintiff's position that had the Policy not required him to file suit so soon, he and the defendant would have continued negotiating over the amount of his total loss (despite the fact that neither the timeline given by the plaintiff or the defendant indicates that the plaintiff made any further contact with the defendant after providing the defendant with the estimate from H&R Johnson). Because, however, he was required to file suit when he did, the determination of the amount of his total loss belonged to the jury, and according to the plaintiff, "i[f] a jury were to find that the actual cash payment determined by defendant did not cover the

entire insurable loss,[1] then it would determine a new 'actual cash value payment,' and that would restart the 180 day clock for plaintiff to effect repairs."

¶ 22 We note that the plaintiff does not cite any language in the Policy (or any case law interpreting similar policies) that suggests that the 180 days in which the plaintiff could make repairs and therefore recover full replacement costs begins only when the parties come to an agreement on the amount of the plaintiff's loss (or the jury determines the amount of the loss in the case of litigation). Instead, the plaintiff simply assumes, without any developed argument or citation to any authority, that the 180 days would not start to run until he approved of the actual cash value payment. This failure to cite any authority or to fully develop his argument is alone grounds to find this contention waived. See *Mack v. Viking Ski Shop, Inc.*, 2014 IL App (1st) 130768, ¶ 17 (concluding that the plaintiff forfeited his contention where he failed to cite relevant authority or develop his argument in violation of Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013)).

¶ 23 Nevertheless, our review of the Policy revealed the existence of Endorsement AU277-2, which we conclude eliminates the 180-day time limit and permits the plaintiff a "reasonable time" following the loss to repair or replace the Property and recover the full replacement value. Although we typically apply an abuse-of-discretion standard of review to the review of a trial court's grant of a motion *in limine*, resolution of this case requires us to interpret the language of the Policy, a legal question that we review *de novo*. *Whiting v. Prestige Casualty Co.*, 238 Ill. App. 3d 376, 377 (1992). The interpretation of insurance policies is subject to the rules governing the construction of contracts. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433

[1] The plaintiff does not explain what he means by "entire insurable loss." To the extent that he refers to the full replacement cost of the Property, it should be noted that the actual cash value payment for the loss generally will not cover the "entire insurable loss," because it reflects a deduction for depreciation. Thus, it would be the rare situation where a jury would find that the actual cash value payment by an insurer covered the "entire insurable loss" of an insured.

(2010). Accordingly, our principal goal is to give effect to the intention of the parties as expressed in the language of the Policy. *Id.* If the language is unambiguous, it will be given its plain and ordinary meaning and will be applied as written, unless it is against public policy. *Id.* We must interpret the Policy as a whole, including attached endorsements, taking into consideration the type of insurance and nature of the risks involved and the general purpose of the Policy. *Pekin Insurance Co. v. Recurrent Training Center, Inc.*, 409 Ill. App. 3d 114, 117-18 (2011). Where the provisions of the Policy conflict with an attached endorsement, "the terms and conditions of the endorsement control and supersede the conflicting policy provisions." *Id.* at 118.

¶ 24 Although the parties spend their time debating over when the 180-day repair period begins to run (neither party argues that the 180-day time limit does not apply), the plain language of Endorsement AU277-2 eliminates the 180-day repair period, instead giving the plaintiff a "reasonable time" from the date of loss to make repairs or replace the Property. The relevant language of Endorsement AU277-2 provides that the defendant agreed to insure the plaintiff for fire loss "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality *within a reasonable time after such loss* ***." (Emphasis added.) Because the italicized language modifies "repair or replace the property," it clearly eliminates the 180-day time limit and replaces it with a "reasonable time" standard. In other words, under Endorsement AU277-2, the plaintiff is no longer required to make repairs or replace damaged property within 180 days of the actual cash value payment in order to recover the full replacement cost of the Property; instead, he is entitled to make repairs or replace damaged property within a "reasonable time" of the fire without forfeiting his right to recover the full replacement cost of

the Property. See *Pekin Insurance Co.*, 409 Ill. App. 3d at 118 (terms and conditions of endorsement trump policy provisions).

¶ 25 Because Endorsement AU277-2 trumped the 180-day time limit and provides the plaintiff with a "reasonable time" to make repairs or replace damaged property in order to recover the full replacement cost, and because there has been no determination that the plaintiff has failed to make repairs to or replace the Property within a reasonable time (or that a reasonable time has already elapsed), the trial court erred in granting the defendant's motion *in limine*. Accordingly, the trial court's judgment must be reversed on this basis.

¶ 26 In addition, even if we did not conclude that Endorsement AU277-2 changed the time for repairs from 180 days from the actual cash value payment to a "reasonable time" from the date of loss, we conclude that the defendant waived the 180-day time limit in its February 5, 2013, letter to the plaintiff's counsel. Although that letter does not appear in the record, the plaintiff alleges in several of his pleadings and attests in his affidavit attached to his "Motion for Summary Determination" that in the February 5, 2013, letter, the defendant agreed to assign a senior adjuster to "re-evaluate the estimated damages and secure an agreed price for the covered portion of the damage with an Allstate recommended vendor." The defendant admits it sent a letter on February 5, 2013, but denies the plaintiff's interpretation of it. However, even without the February 5, 2013, letter, the defendant's May 7, 2013 letter specifically states that "unresolved issues will continue to be reviewed until resolved"—a clear indication that the defendant anticipated further negotiations.

¶ 27 Waiver, in the insurance context, refers to the intentional relinquishment of a right, typically implied from the acts, words, or deeds of the insurer or the insurer's agents. *Swader v. Golden Rule Insurance Co.*, 203 Ill. App. 3d 697, 705 (1990). Whether express or implied,

waiver is "essentially unilateral in character, focusing on an insurer's conduct, and requiring no prejudice to, nor detrimental reliance by, an insured. [Citation.] To constitute a waiver, the words or conduct of an insurer must be inconsistent with the intention to rely on the requirements of the policy." *Ames v. Crown Life Insurance Co. of Toronto, Canada*, 85 Ill. App. 3d 203, 204 (1980). Here, by agreeing to have the estimated damages re-evaluated to secure "an agreed price for the covered portion of damage with an Allstate recommended vendor," the defendant expressed an intention to reach an agreement with the plaintiff on the estimated damages before requiring the plaintiff to make any repairs. Such an intent is inconsistent with the defendant's claimed interpretation of the Policy that would require the plaintiff to make repairs or replace damaged property within 180 days of the actual cash value payment—regardless of whether the parties agreed that the amount of the payment was an accurate reflect of the actual cash value—in order to recover the full replacement cost of the Property. Accordingly, we conclude that regardless of one's interpretation of the Policy or Endorsement AU277-2, the defendant has waived any requirement that the plaintiff make repairs or replace damaged property within 180 days of the defendant's November 5, 2013, actual cash value payment in order to recover the full replacement cost of the Property. For this additional reason, the trial court erred in granting the defendant's motion *in limine*.

¶ 28 Although we conclude that the plaintiff is entitled to seek recovery for the full replacement cost of the Property, so long as he makes repairs or replaces the damaged property within a reasonable time of the loss, we pass no judgment on whether the defendant has other viable defenses to coverage in this matter, as those issues remain to be litigated in the trial court.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the Circuit Court of Cook County is reversed.

¶ 31 Reversed.