FIRST DIVISION
June 12, 2017

No. 1-16-2733

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

PROGRESSIVE UNIVERSAL INSURANCE CO. a/s/o KATHRYN DOHERTY, Plaintiff-Appellant, v. BRIANA WILSON, JUDY THALMANN and NEIL HAOLHU[1], Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 M1 13308 Honorable Sheryl A. Pethers, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's order granting summary judgment in favor of defendant Thalmann, and granting defendant Naolhu's motion to dismiss, pursuant to the amended arbitration decision and the arbitration agreement signed by Progressive and State Farm. However, we reverse the judgment granting defendant Wilson's motion to dismiss because we find that arbitration lacked jurisdiction over the claim against Wilson.

[1] Progressive as appellant filed their briefs listing defendant Neil's last name as Haolhu in the caption, but in the record (and in the body of the briefs) it is spelled Naolhu. We keep the spelling in the caption as recorded on Progressive's briefs, but in the body of the order he will be referred to as Naolhu.

¶ 2 Plaintiff, Progressive Universal Insurance Company ("Progressive"), appeals the order of the circuit court granting summary judgment in favor of defendant Judy Thalmann, and granting defendants Briana Wilson and Neil Naolhu's motions to dismiss Progressive's subrogation action. On appeal, Progressive argues that the trial court erred because the amended arbitration award published on January 15, 2015, was a determination that the arbitrator lacked jurisdiction over the matter and therefore, it did not preclude Progressive from litigating its claims in court. For the following reasons, we affirm the judgment as to defendants Thalmann and Naolhu, but reverse as to defendant Wilson and remand for further proceedings.

¶ 3 JURISDICTION

¶ 4 The trial court granted summary judgment in favor of Thalmann, and granted Wilson's and Naolhu's motions to dismiss, on June 13, 2016. Following mandatory arbitration, the trial court entered judgment on the arbitration award in favor of remaining defendant Michael Snow, and in favor of Doherty on a third-party complaint by Snow's insurance company, on October 4, 2016. Progressive filed a notice of appeal on October 6, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008), governing appeals from final judgments entered below.

¶ 5 BACKGROUND

¶ 6 Progressive's insured, Kathryn Doherty, was involved in a 16-vehicle collision on November 19, 2010. As a result of the collision, Progressive paid $4,242.05 to Gregory Klups for damages sustained to his vehicle pursuant to the deductible collision clause of Doherty's policy. Progressive's policy also provided that in the event Progressive made any payment under the deductible collision clause, it would be subrogated to all rights of its insured against third parties on damages for which payments were made.

¶ 7 Progressive, as Doherty's subrogee, sought to recover from defendants Wilson, Thalmann, and Naolhu, who were also involved in the 16-vehicle collision. Progressive and State Farm Mutual Automobile Insurance Company ("State Farm"), the insurer of the defendants, are signatories to an arbitration agreement that required submission of property subrogation claims to arbitration through Arbitration Forums, Inc. The respective agreements signed by Progressive and State Farm both required that signatories "forego litigation" and submit property subrogation claims to arbitration. Both agreements also stated that signatories authorize Arbitration Forums, Inc. to "make appropriate Rules and Regulations for the presentation and determination of controversies under this Agreement."

¶ 8 The agreement signed by Progressive provided that no company shall be required to arbitrate, without written consent, if "any payment which such signatory company may be required to make under this Agreement is or may be in excess of its policy limits." Furthermore, the arbitrator's decision "is final and binding without the right of rehearing or appeal," although Arbitration Forums, Inc. can correct "a clerical or **jurisdictional error** of an arbitrator(s) or AF staff." [Emphasis in the original.] However, the arbitrator's decision "is conclusive only of the issues in the matter submitted to the panel and only as to the parties to the arbitration. The admissibility of the decision in any other proceeding is not intended, nor should be inferred from this Agreement."

¶ 9 Progressive submitted its claims arising from the November 19, 2010, collision to arbitration with Arbitration Forums, Inc. The arbitrator's original decision, published on November 14, 2014, is not part of the record on appeal. An amended decision was published on January 15, 2015. The amended decision named two respondent insureds of State Farm: Wilson as Respondent 1 and Thalmann as Respondent 2.

¶ 10 Under "Liability Decision," it states that Progressive "proved 0% liability against Respondent #01 *** based on: following too closely and traveling at an unsafe speed for conditions." It notes that "Decision amended under Rule 3-9. State Farm (Wilson) has submitted documentation supporting policy limits of $15,000. Not all parties have agreed to accept a pro-rata share of the limits." The arbitrator also found that Progressive "proved 0% liability against Respondent #02 *** based on: State Farm/Thalmann is an innocent party in this matter."

¶ 11 In making its determination, the arbitrator considered a police report that Wilson "was cited for travelling too fast for conditions and was following too closely. The officer's investigation revealed that State Farm/Wilson struck the Country Financial vehicle and pushed all vehicles forward, causing the entire chain reaction of rear-end collisions in the left lane." The arbitrator also considered statements by those involved in the collision, and photographs of the scene. The arbitrator found that:

> "The scene photographs show a long line of vehicles, all in contact with one another post-collision. The State Farm/Doyle vehicle was up on top of Country Financial's hood, supporting a significant rear impact to their vehicle. There is also shown to be significant damage to the rear of the Country Financial vehicle and to the front of the State Farm/Wilson vehicle. None of the parties provided particularly compelling statements as to the sequence of events in this situation. The only party who admits to being unable to stop timely is the State Farm/Wilson driver, which is also consistent with the police report that State Farm/Wilson caused the chain reaction of collisions to the 13 involved vehicles in the left lane. *** State Farm/Wilson is found to be negligent in this case for following too closely, travelling at an unsafe speed for conditions, and lack of lookout."

The decision showed the damages award against Respondent 1 as "$0.00" and the damages award against Respondent 2 also as "$0.00"

¶ 12 Correspondence from Arbitration Forums, Inc. concerning its decision, sent on the same day as publication of the amended decision, stated that "[t]he decision has now been amended to reflect an award of $0 against State Farm (Wilson) as all parties did not agree to accept a pro-rata share of limits. All of the related dockets with an award against State Farm (Wilson) have been amended accordingly."

¶ 13 On June 24, 2015, Progressive filed a four-count complaint to recover payments made on behalf of Doherty for damages that resulted from defendants' negligence in the accident. The complaint alleged negligence in the operation of a motor vehicle against Wilson (count I), Thalmann (count II), Michael Snow (count III), and Naolhu (Count IV). Wilson filed a motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)), arguing that the issue was already decided by binding arbitration and an amended decision published on January 15, 2015, reflected an award against Wilson of $0. Thalmann filed a motion for summary judgment, arguing that Progressive already submitted the claim to binding arbitration and lost the decision. Therefore, Progressive's complaint is barred by *res judicata* as well as the arbitration agreement signed by Progressive and State Farm. Naolhu filed a 2-619 motion to dismiss arguing that the matter was submitted to binding arbitration, and thus Progressive's suit is barred by *res judicata* and the arbitration agreement.

¶ 14 Progressive filed a response to the motions to dismiss and summary judgment motion, arguing that the award of $0 against Wilson reflected an amendment to the original decision based on State Farm's post-decision submission of documents indicating that Wilson's policy limit was $15,000, and not all parties agreed to accept a pro rata share of limits. As support for

its position, Progressive referred to Arbitration Forums, Inc.'s January 15, 2015, correspondence and attached an affidavit from Timothy McKernan, the quality, training and forum rules manager for Arbitration Forums, Inc. In his affidavit, McKernan stated that he was "familiar with the rules and procedures regarding arbitration between our signatory companies" and that the January 15, 2015, amended decision stated an award of $0 "due to the fact that State Farm asserted it had a $15,000 policy limit, the aggregate of all claims against State Farm exceeded $15,000 and all parties did not agree to accept a pro rata share of the policy limit as final settlement of the claims. As such, arbitration lacked jurisdiction over the claim. This award does not prevent a party from filing litigation stemming from the accident in question after this award result."

¶ 15 Following a hearing, the trial court granted Thalmann's motion for summary judgment, and Wilson's and Naolhu's motions to dismiss. The claim against Snow was set for mandatory arbitration and following arbitration, the trial court entered a judgment on an arbitration award in favor of Snow and in favor of Doherty on the third-party complaint filed against her by Snow's insurer. Progressive filed a timely appeal, challenging only the trial court's judgments as to Wilson, Thalmann, and Naolhu.

¶ 16 ANALYSIS

¶ 17 The trial court granted Thalmann's motion for summary judgment against Progressive. Summary judgment is proper where the pleadings, affidavits, depositions, and admissions on file, viewed in the light most favorable to the nonmoving party, present no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). Naolhu and Wilson filed section 2-619 motions to dismiss, which the trial court also granted. A section 2-619 motion to dismiss admits the legal sufficiency of the claim but asserts affirmative matter that avoids the legal effect of, or defeats, the claim.

Travis v. American Manufacturers Mutual Insurance Co., 335 Ill. App. 3d 1171, 1174 (2002). Affirmative matter "encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Id*. We review the trial court's grant of summary judgment, and its grant of a 2-619 motion to dismiss, under the *de novo* standard. *Home Insurance Co. v. Cincinnati Insurance Co*., 213 Ill. 2d 307, 315 (2004) (summary judgment); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993) (2-619 motion to dismiss).

¶ 18 As stated above, Progressive and defendants' insurer, State Farm, are signatories to an agreement that required submission of property subrogation claims to arbitration. Accordingly, Progressive filed its subrogation claim with Arbitration Forums, Inc. and the arbitrator rendered a decision. Illinois public policy favors the resolution of disputes through arbitration. *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 59 (2011). Courts give deference to arbitration awards "because the parties have chosen in their contract how their dispute is to be decided, and judicial modification of an arbitrator's decision deprives the party of that choice." *Tim Huey Corp. v. Global Boiler & Mechanical, Inc.*, 272 Ill. App. 3d 100, 106 (1995). Thus, courts will construe arbitration awards, whenever possible, so as to uphold their validity and thereby give effect to the parties' intent to arbitrate their disputes. *City of Chicago v. Chicago Loop Parking LLC*, 2014 IL App (1st) 133020, ¶ 42.

¶ 19 Furthermore, review of an arbitration award is more limited than review of a trial court's judgment. See *Galasso v. KNS Companies, Inc.*, 364 Ill. App. 3d 124, 130 (2006). We note that none of the parties on appeal seek to modify or vacate the arbitrator's decision. Rather, this appeal concerns the effect of the arbitrator's January 15, 2015 amended decision on the subsequent claim for damages Progressive filed in court against Thalmann, Wilson, and Naolhu. Therefore, in order to make our determination, we must construe the arbitration decision.

¶ 20 The amended decision entered on January 15, 2015, found that Progressive "proved 0% liability against" Thalmann, and that Thalmann stated she had stopped behind Doherty's vehicle and did not strike the vehicle, nor did any vehicle strike Thalmann's vehicle. Photographic evidence of Thalmann's vehicle could not confirm or deny her statement. The decision further noted that "[n]one of the parties provided particularly compelling statements as to the sequence of events in this situation." The decision listed the total award against Thalmann as $0.00. An arbitration award is final and binding, and has the same *res judicata* effect as a court judgment. *Peregrine Financial Group, Inc. v. Martinez*, 305 Ill. App. 3d 571, 578-79 (1999). "Under the doctrine of *res judicata* or estoppel by judgment, a final judgment may be asserted in bar of a second action where the parties and causes of action are identical." *Id.* at 579. Here, Progressive's claim against Thalmann alleging her liability in the accident involves the same parties and cause of action encompassed by the arbitrator's final and binding decision. Therefore, Progressive's claim is barred as *res judicata* and the trial court properly granted summary judgment in favor of Thalmann.

¶ 21 Defendant Wilson, like Thalmann, was named as a respondent in the amended arbitration decision. The decision also stated that Progressive proved 0% liability as to Wilson and awarded damages of $0.00. However, for Wilson, the "[d]ecision [was] amended under Rule 3-9. State Farm (Wilson) has submitted documentation supporting policy limits of $15,000. Not all parties have agreed to accept a pro-rata share of the limits." The arbitrator also found that regarding the multi-vehicle collision, "[t]he only party who admits to being unable to stop timely is the State Farm/Wilson driver, which is also consistent with the police report that State Farm/Wilson caused the chain reaction of collisions." The arbitrator's decision concluded that "State

Farm/Wilson is found to be negligent in this case for following too closely, travelling at an unsafe speed for conditions, and lack of lookout."

¶ 22 Wilson filed a 2-619 motion to dismiss Progressive's complaint, arguing that the amended decision was binding on the parties. Section 2-619(a)(9) of the Code provides for the involuntary dismissal of a claim based on "affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). As the movant, Wilson initially bears the burden of proving the affirmative matter. *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive At Oakwood, LLC*, 387 Ill. App. 3d 906, 909 (2009). If satisfied, the burden shifts to Progressive to show that "the defense is unfounded or requires the resolution of an essential element of material fact before it is proven." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Dismissal under section 2-619(a)(9) resembles a grant of summary judgment; therefore, a reviewing court must consider whether a genuine issue of material fact exists precluding dismissal, or whether dismissal is proper as a matter of law. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003).

¶ 23 Wilson alleged that the amended decision finding her 0% liable, and reflecting an award of $0 against her, was affirmative matter defeating Progressive's claim. In response, Progressive attached the affidavit of McKernan stating that the award of $0 was actually "due to the fact that State Farm asserted it had a $15,000 policy limit, the aggregate of all claims against State Farm exceeded $15,000 and all parties did not agree to accept a pro rata share of the policy limit as final settlement of the claims. As such, arbitration lacked jurisdiction over the claim. This award does not prevent a party from filing litigation stemming from the accident in question after this award result." On appeal, Wilson challenges the admissibility of McKernan's affidavit, arguing that it violates Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). There is no indication in the

record that Wilson raised this issue below or moved to strike the affidavit. "The sufficiency of an affidavit in support of or in opposition to a motion for summary judgment cannot be challenged for the first time on appeal." *Korogluyan v. Chicago Title and Trust Co.*, 213 Ill. App. 3d 622, 628 (1991).

¶ 24 Additionally, Wilson did not provide a counteraffidavit contradicting the facts contained in McKernan's affidavit. McKernan stated that the $0 award against Wilson reflected the fact that arbitration lacked jurisdiction over the claim rather than a decision on the merits. When supporting affidavits on a section 2-619 motion to dismiss have not been contradicted by counteraffidavits, "the facts stated therein are deemed admitted." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Since arbitration lacked jurisdiction over Progressive's claim against Wilson, the amended decision is not enforceable as to Wilson and Progressive is free to file its claim in court. We therefore reverse the dismissal of Progressive's complaint against Wilson. See *Van Meter*, 207 Ill. 2d at 377.

¶ 25 Defendant Naolhu also filed a 2-619 motion to dismiss. However, the amended decision does not refer to him at all and the case information filed for Progressive's claim with Arbitration Forums, Inc. only lists Thalmann and Wilson as respondents. The amended decision contained no findings on the liability of Naolhu. The arbitration agreement explicitly states that the decision is conclusive only on issues submitted to the panel. Therefore, the amended decision is not final and binding as to Naolhu's liability, and *res judicata* does not apply to bar Progressive's claim.

¶ 26 The arbitration agreement signed by Progressive and State Farm, though, required signatories to "forego litigation" and submit subrogation claims to arbitration. The record does not show that Progressive submitted its claim against Naolhu to arbitration, and its failure to

submit this claim would be grounds for dismissal. See *Travis*, 335 Ill. App. 3d at 1174 (a 2-619 motion to dismiss the lawsuit and compel arbitration is proper based on the exclusive remedy of arbitration). The record contains only the trial court's order granting Naolhu's motion to dismiss with prejudice, with no explanation. Progressive, as appellant, has the burden to present a sufficiently complete record of the proceedings below to support its claims of error, and any doubts arising from the incompleteness of the record will be resolved against Progressive. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Where the record is incomplete, a reviewing court must presume that the trial court's order had a sufficient factual basis and conformed with the law. *Id*. Therefore, we affirm the trial court's grant of Naolhu's motion to dismiss.

¶ 27 For the foregoing reasons, the judgment of the circuit court is affirmed as to defendants Thalmann and Naolhu, and reversed as to defendant Wilson and remanded for further proceedings.

¶ 28 Affirmed in part and reversed in part; remanded for further proceedings.