2019 IL App (1st) 181075-U

FOURTH DIVISION
September 19, 2019

No. 1-18-1075

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
TURMUSAYA JEWELRY, INC.,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee/Cross-Appellant,	)	
	)	
v.	)	No. 15 CH 02425
	)	
CERTAIN UNDERWRITERS AT LLOYD'S OF	)	
LONDON, INC.,	)	Honorable
	)	Sanjay Tailor,
Defendant-Appellant/Cross-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County (i) granting summary judgment in favor of the insured where the jewelers block policy was ambiguous; and (ii) denying the insured's claim for damages under section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)).

¶ 2 Certain Underwriters at Lloyd's of London, Inc. (the Insurer) issued a jewelers block insurance policy to Turmusaya Jewelry, Inc. (Turmusaya), which operates a jewelry store in Burbank, Illinois. As discussed herein, jewelers block insurance typically covers a broad range

of dangers and risks faced by jewelers.[1] After an armed robbery at the store, the Insurer claimed it was not responsible for the loss because Turmusaya had not complied with a "Two Person Warranty" in the policy, which required two individuals to be present while the store was open or in the process of opening or closing. Turmusaya subsequently filed an action against the Insurer in the circuit court of Cook County. The circuit court ultimately ruled in favor of Turmusaya and against the Insurer on their cross-motions for summary judgment, finding that the policy language was ambiguous and must be construed in favor of Turmusaya, as the insured. Specifically, the circuit court concluded that a policy provision indicating that there were no express warranties was inconsistent with the two person warranty and other provisions.

¶ 3 On appeal, the Insurer argues that the circuit court erred in not finding that the deposition testimony of Turmusaya's corporate representative regarding the applicability of the two person warranty constituted a judicial admission. The Insurer further contends that the circuit court erred in its determination that the policy language was ambiguous. In the alternative, if the policy language was ambiguous, the Insurer maintains that the circuit court should have permitted the use of extrinsic evidence to determine its meaning. Finally, the Insurer asserts that it properly denied coverage under the two person warranty or other policy provisions. Turmusaya challenges the foregoing contentions and also argues in its cross-appeal that the circuit court erred in not granting summary judgment on its claim for fees and costs under section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)) based on the Insurer's "vexatious and unreasonable" conduct. Turmusaya further contends that the Insurer has essentially defaulted by failing to comply with a requirement in the Insurance Code (215 ILCS 5/121-10 (West 2014)) that as an "unauthorized insurer" under Illinois law, the Insurer could not file pleadings in the action without first depositing cash, securities, or a bond with the circuit

[1] See *Jewelers Mutual Insurance Co. v. N. Barquet, Inc.*, 410 F.3d 2, 7 (1st Cir. 2005).

court clerk. For the reasons discussed below, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 The Policy

¶ 6 The Insurer issued a one-year jewelers block insurance policy to Turmusaya, effective June 28, 2013, with a $300,000 policy limit and a $2,500 deductible. The policy provided a 12-month period for the filing of any action for the recovery of a claim.

¶ 7 The schedule to the policy included a section captioned "Conditions," which included the following provisions. A "Two Person Warranty" provided that a minimum of two individuals were required to be present during the opening and closing of the premises and during all hours when the premises were open for business. A "Safe Warranty" provided that 100% of the stock needed to be secured in locked safes when Turmusaya's premises were closed for business. A "Buzzer Entry Exit Clause" required the use of a buzzer mechanism when the premises were open for business. A "Locked Door, Show Window & Showcase Clause" set forth various requirements for locking the store and the merchandise. The "Conditions" section further stated the insurance excluded all risks of loss or damage occurring at Turmusaya's premises "unless the above conditions are complied with in full."

¶ 8 The schedule also provided "Express Warranties: None."

¶ 9 The Robbery and the Claim

¶ 10 Shortly after 5:00 p.m.[2] on Saturday, December 21, 2013, an armed robbery occurred at the store, resulting in the loss of stock purportedly valued at $293,874. The security video footage reflects that the sole employee in the store was physically restrained by one intruder while another intruder broke some of the display cases with a bat and placed the merchandise

[2] Although the time-stamp on the security video footage reflects that the intruders entered the store at approximately 6:02 p.m., the record indicates that the robbery actually occurred one hour earlier.

into a sack. Rahef Awadallah (Awadallah), Turmusaya's owner, had left the store at 5:00 p.m. to drive two blocks to a restaurant he owned to pick up a sandwich. Following the robbery, Burbank police officers arrived at the scene and conducted an investigation.

¶ 11 Turmusaya made a claim under the policy and filed a sworn proof of loss. In a letter dated April 11, 2014, an independent adjuster retained by the Insurer, O'Connell International Arts, Inc. (O'Connell), informed Turmusaya that the Insurer's position was that it was not responsible for the loss because the two person warranty provision was not complied with at the time of the loss.

¶ 12 The Lawsuit

¶ 13 Turmusaya filed a verified complaint for declaratory judgment against the Insurer and O'Connell on February 11, 2015, alleging $300,000 in damages based on the denial of its claim. Turmusaya subsequently was granted leave to add two additional defendants: its insurance producer, National Insurance Group, Inc. (National) and National's president, Mohammed Falah (Falah). Turmusaya filed a six-count amended complaint.

¶ 14 O'Connell, National and Falah filed motions to dismiss the amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), and the Insurer filed an answer and affirmative defenses. Turmusaya subsequently moved for leave to file a second amended complaint against the Insurer and O'Connell, and to voluntarily dismiss National and Falah without prejudice. Turmusaya filed the second amended complaint – the operative complaint for purposes of this appeal – on November 13, 2015.

¶ 15 The Operative Complaint

¶ 16 In count I of the second amended complaint, Turmusaya alleged that the Insurer breached their contract. In count II, Turmusaya alternatively alleged, in part, that the Insurer was estopped

from asserting that O'Connell's letter dated April 11, 2014, was a denial of the claim – because the words "deny," "denial," "decline," or "declination" were not used – or that the limitations period for filing the lawsuit had run. In count III against the Insurer, Turmusaya alleged that the Insurer's delay in payment was vexatious and unreasonable under section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)). In counts IV, V, and VI against O'Connell, Turmusaya alleged in the alternative that O'Connell had committed negligence, common law fraud, and/or a violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1, *et seq.* (West 2014)) based on purported misstatements in the April 11 correspondence. The circuit court ultimately dismissed with prejudice the claims against O'Connell.

¶ 17 The Insurer filed an answer to the second amended complaint and affirmative defenses. In its first affirmative defense, the Insurer alleged there was no coverage based on the two person warranty, because Turmusaya was either open for business or in the process of closing at the time of the robbery. In its second affirmative defense, the Insurer asserted that if Turmusaya was not open for business or in the process of closing at the time of the robbery, it was required to keep 100% of its stock in a locked safe, which it failed to do. In its third affirmative defense, the Insurer claimed that Turmusaya's action was untimely based on the 12-month limitations period in the policy.[3] In its fourth and fifth affirmative defenses, the Insurer asserted that there could not be section 155 damages without coverage and that there was a bona fide coverage dispute. Turmusaya replied, in part, that its Saturday hours of operation during its winter schedule were 9:30 a.m. to 5:00 p.m. Turmusaya denied that it was either open for business or in the process of closing at the time of the robbery. The Insurer was subsequently granted leave to file a sixth affirmative defense, based on the locked door, show window, and showcase clause in the policy.

¶ 18 On October 5, 2017, Turmusaya filed a motion to strike the Insurer's answer and

[3] The Insurer subsequently withdrew this affirmative defense.

affirmative defenses, or in the alternative, to require that the Insurer deposit cash, securities, or a bond with the court clerk to secure the payment of any final judgment in the matter. Turmusaya asserted that the Insurer – as an "unauthorized insurer" under Illinois law – had failed to comply with the Insurance Code, including: (i) section 445(10.5), which requires certain language to be imprinted on the first page of the policy (215 ILCS 5/445(10.5) (West 2014)); (ii) section 445(5), which requires that policies issued by unauthorized insurers be submitted to the Surplus Line Association of Illinois for recording and countersignature (215 ILCS 5/445(5) (West 2014)); and (iii) section 121-10, which provides that no pleadings may be filed by an unauthorized insurer in a court action without first depositing cash, securities or a bond with the court clerk in any amount sufficient to secure the payment of any final judgment in the action (215 ILCS 5/121-10 (West 2014)). According to Turmusaya, without such deposit, the Insurer was barred from filing any pleadings. The Insurer responded, in part, that Turmusaya's prior reply to the Insurer's answer resulted in a waiver of Turmusaya's right to challenge the sufficiency of its pleadings.

¶ 19 The Cross-Motions for Summary Judgment

¶ 20 On November 7, 2017, Turmusaya filed a motion for summary judgment. Among other things, Turmusaya argued that the two person warranty and safe warranty were express warranties, whereas the policy stated that there were no express warranties. Turmusaya noted that James Side, the head of specialty claims for one of the Insurer's syndicates that were underwriters of the policy, testified during his deposition that there were no express warranties on the policy. According to Turmusaya, since the two person warranty and safe warranty are express warranties, "there can be no other conclusion other than that the Policy, by its very terms, has deemed those express warranties to be void." Turmusaya thus asserted that the two person warranty and the safe warranty were unenforceable. In the alternative, Turmusaya argued

that the two person warranty was inapplicable because the premises were not open for business.

¶ 21 The Insurer filed a combined motion for summary judgment and response to Turmusaya's motion for summary judgment, arguing that the store was open at the time of the robbery. First, during the claims investigation process, Turmusaya admitted to O'Connell and another representative of the Insurer that the robbery occurred "near closing," not after closing or while the store was closed. Second, Turmusaya's stock was on display in showcases and cabinets; if the store was closed, the stock was required to be in the safe. Third, the Turmusaya employee first "buzzed" in a prospective customer, and then opened the door – allowing the robbers to enter – which suggests the store was open and he was admitting a customer. Fourth, the police photographs demonstrate that the "open" sign was illuminated at the time of the robbery. Fifth, Turmusaya's insurance application listed the closing time on Saturdays at 6:00 p.m. Sixth, during its pre-risk security survey of the premises, O'Connell noted that the hours of operation were until 6:00 p.m. Seventh, Turmusaya's alarm activity on the Saturdays before and after the robbery indicated that the alarm was typically activated well after 6:00 p.m.

¶ 22 In the alternative, the Insurer contended that the safe warranty barred coverage, *i.e.*, if Turmusaya's business was closed, then it violated the safe warranty when its stock remained in the showcases and cabinets at the time of the robbery. The Insurer also argued, in the alternative, that the locked door, show window and showcase clause prohibited Turmusaya from unlocking after the close of business and before the stock was transferred to its safe.

¶ 23 The Insurer further asserted that Turmusaya's understanding of the meaning of an "express warranty" was incorrect. According to the Insurer, an express warranty is "one that effects whether the insurance remains in effect." Conversely, the policy contained conditions with which Turmusaya had to comply for a claim to be covered. The Insurer argued that, when

viewed in the context of a jewelers block policy, it was "obvious" that the policy would include such conditions to safeguard against a loss.

¶ 24 The attachments to the Insurer's summary judgment motion included the deposition testimony of multiple individuals. Awadallah, both on his own behalf and as Turmusaya's corporate representative, testified in part that he understood that the policy contained a two person warranty and that someone had explained to him what the provision required. Stephen J. Boss, a property adjuster, testified Awadallah and his employee had indicated during an interview that the store was "near closing" when robbed. O'Connell's president, Robert O'Connell, testified that during an interview on February 18, 2014, Awadallah told him that the store's hours of operation for Saturdays were 9:15 a.m. to 6:00 p.m. and that the business was open at the time of the robbery. In an affidavit, Detective Michael Rice of the Burbank police department averred that neon "open" sign was illuminated when he arrived at the store.

¶ 25 The Circuit Court's Orders

¶ 26 During a hearing on the cross-motions for summary judgment, the circuit court determined that there was an ambiguity in the insurance policy because the two person and safe warranties were inconsistent with the policy provision that there were no express warranties. The circuit court found that the ambiguity must be construed in favor of Turmusaya, as the insured, and that the court could not examine parol evidence to determine the parties' intent. In a written order entered on March 8, 2018, the circuit court granted Turmusaya's motion for summary judgment and denied the Insurer's motion for summary judgment. Judgment was entered in favor of Turmusaya and against the Insurer in the amount of $291,374, and the circuit denied sanctions under section 155 of the Insurance Code. The circuit court also entered and continued Turmusaya's motion to strike (based on the Insurer's purported non-compliance with

section 121-10 of the Insurance Code) and directed the Insurer to inform Turmusaya within 14 days whether it intended to appeal from the ruling on summary judgment. The order included a finding under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delay of the enforcement or appeal of the order.

¶ 27 On March 29, 2018, Turmusaya filed three motions: a motion for prejudgment interest and costs, seeking a total judgment of $349,506.83; a motion to call up the motion to strike, arguing that the Insurer lacked capacity to file any pleading or a notice of appeal until it complied with section 121-10 of the Insurance Code; and a motion to vacate the Rule 304(a) finding in the March 8, 2018 order.

¶ 28 On April 5, 2018, the circuit court vacated the Rule 304(a) finding by agreement. On April 24, 2018, the circuit court denied as moot Turmusaya's (i) motion to strike and (ii) motion to call up the motion to strike. The circuit court then entered an order on May 24, 2018, granting Turmusaya's motion for prejudgment interest. After the circuit court entered an amended judgment in the amount of $349,506.83, the Insurer appealed and Turmusaya filed a cross-appeal. The Insurer posted a $600,000 appeal bond, and the execution or enforcement of the judgment has been stayed.

¶ 29 ANALYSIS

¶ 30 We will address the claims of error raised by both Turmusaya and the Insurer. We will first address whether this Court has jurisdiction over the instant cross-appeals. Next we will examine whether Awadallah's deposition testimony regarding the two person warranty constitutes a judicial admission. We will then consider whether the policy language is ambiguous and whether summary judgment is proper. Finally, we will address Turmusaya's claim for damages under section 155 of the Insurance Code.

¶ 31 As a threshold matter, we note two issues with Turmusaya's briefs. First, its statement of facts contains argument and commentary, in violation of Illinois Supreme Court Rule 341. Ill. S. Ct. R. 341(h)(6), (i) (eff. May 25, 2018). The parties are cautioned that compliance with our procedural rules is mandatory. *E.g.*, *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. Second, Turmusaya contends that the Insurer cited an unpublished decision. We note, however, that the original unpublished order was withdrawn and an opinion was later published. *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037. We now turn to the merits.

¶ 32 Jurisdiction

¶ 33 Although neither party raises the issue of jurisdiction, a reviewing court has an independent duty to consider whether it has jurisdiction to hear an appeal. *A.M. Realty Western, L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67. In the instant case, the final order for purposes of the appeal was entered on May 24, 2018, which amended the original award to include prejudgment interest. *E.g.*, *Rago Machine Products, Inc. v. Shields Technologies, Inc.*, 233 Ill. App. 3d 140, 145 (1992) (noting that "the judgments entered by the trial court denying plaintiff's breach of contract claim and granting judgment in favor of defendant on its counterclaim were not appealable until disposition of defendant's claim for prejudgment interest"). The Insurer filed its notice of appeal on the following day, May 25, 2018, and Turmusaya filed its notice of cross-appeal on June 22, 2018. As the appeal and cross-appeal were filed within 30 days of the final order being appealed, jurisdiction is proper herein. See Ill. S. Ct. R. 303(a)(3) (eff. July 1, 2017) (providing that a cross-appeal may be filed within 10 days after service of the notice of appeal or within 30 days after the entry of the judgment or order being appealed).

¶ 34 Judicial Admissions

¶ 35 Awadallah, as Turmusaya's corporate representative, testified during his deposition regarding the existence of the two person warranty and his understanding of its requirements. Among other things, he testified that his understanding of the provision was that two people had to be present in the store any time the store was open to the public. The Insurer argues that the circuit court should have held that Awadallah's deposition testimony was a judicial admission which precluded Turmusaya from subsequently asserting that the policy was ambiguous as to the existence of the two person warranty.

¶ 36 Turmusaya responds, in part, that the Insurer forfeited this argument by not raising it in the circuit court. We disagree. We find that the Insurer adequately preserved this issue for appeal during oral arguments before the circuit court and in its cross-motion for summary judgment. *E.g.*, *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 (finding that the insurer raised a particular argument "albeit vaguely" and thus the argument was preserved for appeal).

¶ 37 A judicial admission is a clear, deliberate, and unequivocal statement by a party regarding a concrete *fact* within the party's knowledge. *Sperl v. Henry*, 2018 IL 123132, ¶ 36; *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998). "When a party makes admissions which are so 'deliberate and unequivocal as to matters within its knowledge,' those admissions will conclusively bind that party who cannot later contradict those admissions." *Gleicher, Friberg & Associates, M.D., S.C. v. University of Health Sciences, The Chicago Medical School*, 224 Ill. App. 3d 77, 86 (1991), quoting *Commonwealth Eastern Mortgage Co. v. Williams*, 163 Ill. App. 3d 103, 108 (1987). A party is not bound by admissions regarding conclusions of law, however, because courts determine the legal effect of the facts adduced. *Sperl*, 2018 IL 123132, ¶ 36.

¶ 38 In the instant case, we do not view Awadallah's testimony as a clear and unequivocal

statement regarding a concrete fact. Stated differently, Awadallah's testimony regarding his potentially mistaken understanding of the two person warranty and other policy provisions is not dispositive as to their existence and/or meaning as a matter of law. See, *e.g., Equity Diamond Brokers, Inc. v. Transnational Insurance Co.*, 785 N.E.2d 816, 821 (Ohio Ct. App. 2003) (noting that a party's "misapprehension" about the meaning of certain policy language could not change the language). We thus reject the Insurer's argument that Awadallah's deposition testimony constitutes a judicial admission as to the existence of the two person warranty and other policy conditions. We now turn to the cross-motions for summary judgment.

¶ 39 Interpreting the Policy and Summary Judgment

¶ 40 The parties filed cross-motions for summary judgment. Turmusaya argued, in part, that the two person warranty and the safe warranty were unenforceable because the policy also provided that there were no express warranties. The Insurer asserted that the fact that there were no express warranties in the policy could be reconciled with the existence of the two person warranty. The circuit court found that (i) the policy was ambiguous because the two person and safe warranties were inconsistent with the policy provision that there were no express warranties, and (ii) the ambiguity must be construed in favor of the insured, Turmusaya.

¶ 41 *Summary Judgment Standards*

¶ 42 Summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmovant, demonstrate that there is no genuine issue as to any material fact and that the movant is clearly entitled to judgment as a matter of law. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399 (2010); 735 ILCS 5/2-1005(c) (West 2016). "Unsupported assertions, opinions, and self-serving or conclusory statements made in deposition testimony are not admissible evidence upon review

of a summary judgment motion." *Perfection Corp. v. Lochinvar Corp.*, 349 Ill. App. 3d 738, 744-45 (2004). Summary judgment is intended not to try an issue of fact but to determine whether a triable issue of fact exists. *Weisberger v. Weisberger*, 2011 IL App (1st) 101557, ¶ 42.

¶ 43 "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment, however, does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id*.

¶ 44 We review an order granting summary judgment *de novo*. *Schultz*, 237 Ill. 2d at 399-400. The question of whether a contract is ambiguous is also a question of law which we review *de novo*. *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 151 (2007). Accord *Schultz*, 237 Ill. 2d at 399 (noting that the construction of an insurance policy's terms is a question of law properly decided on a motion for summary judgment). "*De novo* consideration means we perform the same analysis that a trial judge would perform." *Radiant Star Enterprises, L.L.C. v. Metropolis Condominium Association*, 2018 IL App (1st) 171844, ¶ 49.

¶ 45 *Interpretation of an Insurance Policy*

¶ 46 Because an insurance policy is a contract, the rules which apply to contract interpretation govern the interpretation of an insurance policy. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). A court's primary objective in construing an insurance policy is to ascertain and give effect to the parties' intention as expressed in the agreement. *Schultz*, 237 Ill. 2d at 400. Accord *Founders Insurance*, 237 Ill. 2d at 433. We interpret an insurance policy by examining the complete document. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 23 (2005). "To ascertain the meaning of the policy's words and the intent of the parties, the court

must construe the policy as a whole [citations], with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Accord *Aetna Casualty & Surety Co. of Illinois v. Allsteel, Inc.*, 304 Ill. App. 3d 34, 40 (1999).

¶ 47 If the terms of an insurance policy are clear and unambiguous, they must be enforced as written unless doing so would violate public policy. *Schultz*, 237 Ill. 2d at 400. Accord *Founders Insurance*, 237 Ill. 2d at 433. An insurance policy is not rendered ambiguous simply because the parties disagree regarding its meaning. *Id.* Accord *Atwood v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 861, 863 (2006). Rather, an ambiguity will be found when the language of the policy is susceptible to more than one reasonable interpretation. *Founders Insurance*, 237 Ill. 2d at 433. A policy term is not ambiguous because it is not defined in the policy or because the parties can suggest creative possibilities for its meaning. *Stark v. Illinois Emcasco Insurance Co.*, 373 Ill. App. 3d 804, 807 (2007). Accord *Hobbs*, 214 Ill. 2d at 17. We will not strain to find an ambiguity in a policy where none exists. *Id.*

¶ 48 *The Jewelers Block Policy*

¶ 49 The instant cross-appeals require us to interpret language within a jewelers block policy. A jewelers block policy is "a special type of insurance designed to offer a single policy with adequate coverage for the risks inherent in the jewelry business." *Equity Diamond Brokers*, 785 N.E.2d at 820. Accord *A.M.I. Diamonds Co. v. Hanover Insurance Co.*, 397 F.3d 528, 529 (7th Cir. 2005). The idea of a jewelers block policy was actually conceived by an underwriter for the Insured (or its predecessor) in the late 1800s or early 1900s. *Woods Patchogue Corp. v. Franklin National Insurance Co. of New York*, 158 N.E.2d 710, 712 (N.Y. 1959). "Many American jewelers availed themselves of this policy since it provided them with the only adequate

coverage for the various risks inherent in their businesses." *Id*. Most traditional forms of property insurance are "named-peril" insurance policies, in which an insurer agrees to indemnify the insured for losses resulting from certain risks of loss or damage which are specifically enumerated within the policy provisions, *e.g.*, fire. See *E.M.M.I. Inc. v. Zurich American Insurance Co.*, 84 P.3d 385, 388 (Cal. 2004). In contrast, under a jewelers block policy, *all* risks of damage or loss may be insured, subject to certain exceptions. *Id.* at 388-89.

¶ 50 The policy at issue contains a provision stating "Express Warranties: None." Turmusaya contends that the policy language is ambiguous because (a) the policy contains the two person warranty and the safe warranty, which are express warranties (as opposed to implied warranties), but (b) the policy also states that there are no express warranties. The Insurer asserts that the policy is unambiguous because an express warranty means something other than what Turmusaya suggests: "An express warranty is a particular written statement or stipulation inserted on the face of the policy itself, or clearly embodied in the policy as a part of the policy by proper words of reference, whereby the insured expressly agrees that certain facts are, or shall be, true, or that certain acts have been, or shall be, done, and upon the literal truth or exact fulfillment of which the validity of the contract of insurance depends, it being permissible that the warranty relates to the past, present, or future, or each, or all." 6 Couch on Insurance § 81:11 (June 2019 Update). The Insurer argues that failure to comply with a *condition* may result in the denial of coverage, but the violation of an *express warranty* voids the policy. According to the Insurer, the two person warranty and the safe warranty are conditions, not express warranties, so those provisions are not inconsistent with the policy provision regarding no express warranties.

¶ 51 The cases cited by the Insurer regarding the meaning of an "express warranty" mostly involve the interpretation of marine insurance policies by foreign courts. *E.g.*, *Acadia Insurance*

Co. v. Allied Marine Transport LLC, 151 F. Supp. 2d 107, 118 (D. Me. 2001) (stating "[t]he violation of an express warranty will void a policy in its entirety").[4] Courts outside of Illinois have sometimes characterized jewelers block policies as marine insurance contracts. *E.g.*, *Great American Insurance Co v. Wexler Insurance Agency, Inc.*, 2000 WL 290380, *16 (C.D. Ca. Feb. 18, 2000) (applying California law); *Jackson v. Leads Diamond Corp.*, 767 F. Supp. 268, 271 (S.D. Fla. 1991) (applying Florida law).

¶ 52 As an "express warranty" has a generally-understood meaning under Illinois law, however, we need not rely on decisions from foreign jurisdictions. *In re A.C.*, 2016 IL App (1st) 153047, ¶ 47. See also 215 ILCS 5/4 (West 2014) (expressly excluding jewelers block policies from a statutory definition of "marine and transportation" insurance). An express warranty is one imposed by the parties to a contract, whereas an implied warranty is not one of the contractual elements of the agreement but is instead imposed by law. *Beckett v. F.W. Woolworth Co.*, 376 Ill. 470, 473 (1941). See also Black's Law Dictionary (11th ed. 2019) (defining an express warranty as a "warranty created by the overt words or actions of the seller," whereas an implied warranty is "[a]n obligation imposed by the law when there has been no representation or promise").[5]

¶ 53 We find that a reasonable interpretation of the policy provision herein regarding no express warranties is that there are no warranties "created by the overt words" of the policy. *Id*. We further find that an insured such as Turmusaya could not be expected to understand the

[4] See also *Thanh Long Partnership v. Highlands Insurance Co.*, 32 F.3d 189, 194 (5th Cir. 1994); *Port Lynch, Inc. v. New England International Assurety of America, Inc.*, 754 F. Supp. 816, 819 (W.D. Wa. 1991); *Aguirre v. Citizens Casualty Co. of New York*, 441 F.2d 141, 145 (5th Cir. 1971).

[5] We recognize that the concepts of express and implied warranties appear to arise most frequently in the context of sale contracts. *E.g.*, *Collins Co. v. Carboline Co.*, 125 Ill. 2d 498, 508 (1988) (providing that "an express warranty is imposed by the parties to a contract and is part of the sale contract" whereas an "implied warranty is derived from the interplay of the transaction's factual circumstances with the foreseeable expectations of a buyer or other person protected by law").

policy provision regarding the absence of express warranties in the manner suggested by the Insurer. Specifically, a jewelry store owner in Illinois should not be required to assume that a provision in its insurance policy is governed by marine insurance law principles. As recognized by our supreme court, we will not "adopt an interpretation which rests on 'gossamer distinctions' that the average person, for whom the policy is written, cannot be expected to understand." *Founders Insurance*, 237 Ill. 2d at 433.

¶ 54 Based on the foregoing, we find that the language in the policy providing that there are no express warranties is inconsistent with the two person warranty and other policy provisions, and the policy language is thus ambiguous. *E.g.*, *Bowers v. General Casualty Insurance Co.*, 2014 IL App (3d) 130655, ¶ 14 (finding that inconsistent provisions created an ambiguity).

¶ 55 *The Effect of Ambiguity in the Policy*

¶ 56 Turmusaya contends that where the policy language is ambiguous, we are required to construe the policy liberally in favor of coverage and strictly against the Insurer as the drafter. Conversely, the Insurer contends that the parties should be permitted to use parol or extrinsic evidence to determine their intent. As discussed below, we share Turmusaya's view.

¶ 57 When interpreting contracts other than insurance policies, Illinois courts have consistently held that extrinsic evidence may be introduced to resolve an ambiguity. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) (noting that when a contract is ambiguous, "a court may consider extrinsic evidence to ascertain the parties' intent"); *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991) (providing that "[w]here a court determines that a contract is ambiguous, its construction is then a question of fact, and parol evidence is admissible to explain and ascertain what the parties intended"). In the insurance context, however, the Illinois Appellate Court has *not* consistently applied this principle. Compare *Westfield Insurance Co. v.*

FCL Builders, Inc., 407 Ill. App. 3d 730, 736 (2011) (concluding that the policy provision at issue was not ambiguous, "and it is therefore inappropriate to consider extrinsic evidence such as deposition testimony when interpreting it"), and *Cherry v. Elephant Insurance Co.*, 2018 IL App (5th) 170072, ¶ 27 (concluding that an ambiguity "must be construed against the insurer and in favor of the insured"). This Court has stated that the reason for construing an ambiguous insurance policy provision against the insurer and in favor of the insured is twofold: "(1) an insured's intent in obtaining insurance is to have coverage, and thus, any ambiguity jeopardizing coverage should be construed consistent with the insured's intent, and (2) it is the insurer who is the drafter of the policy, and the insurer could have drafted the ambiguous provision clearly and specifically." *Id.* ¶ 12.

¶ 58 Although the Illinois Supreme Court does not appear to have explicitly stated whether an insurer is allowed to offer extrinsic evidence to interpret an ambiguity in an insurance contract, its decisions strongly suggest that a court should resolve the ambiguity in favor of the insured without allowing the submission of extrinsic evidence. *E.g.*, *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 184-85 (2010). As one author has explained, our supreme court's implicit rejection of the "general contract law approach," *i.e.*, allowing the submission of extrinsic evidence, is supported by three facts. Stanley C. Nardoni, *A Study of Ambiguity: Does Illinois Law Permit Insurers to Submit Extrinsic Evidence to Resolve Insurance Policy Ambiguities?* 25 Loy. Consumer L. Rev. 378 (2013) (Nardoni). First, as noted above, our supreme court has repeatedly articulated the rule for resolving ambiguities without referencing the possible introduction of extrinsic evidence. *Id.* at 395.[6] Second, "[i]n contrast with its

[6] *E.g.*, *West American Insurance*, 238 Ill. 2d at 184-85 (noting that "[w]here the policy language is ambiguous, courts are to construe the policy liberally in favor of coverage"); *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007) (stating that ambiguous words in an insurance policy will be construed strictly against the insurer who drafted the policy); *Valley Forge Insurance Co. v. Swiderski*

approach for other types of contracts, the Illinois Supreme Court has consistently identified insurance policy interpretation as solely a question of law." *Id.* at 397; *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010) (stating that "the construction of the provisions of an insurance policy is a question of law for which our review is *de novo*"). Third, our supreme court has itself resolved ambiguities in insurance policies without directing the submission of extrinsic evidence. Nardoni at 398; *Gillen*, 215 Ill. 2d at 395-96. Based on the foregoing, we conclude that extrinsic evidence need not be considered in this case.

¶ 59 In sum, we conclude that the circuit court correctly granted summary judgment in favor of Turmusaya and against the Insurer with respect to the coverage dispute. We turn to Turmusaya's arguments regarding the circuit court's denial of extracontractual relief.

¶ 60 Section 155

¶ 61 Turmusaya contends that the circuit court erred in not awarding it damages, including reasonable attorney fees and costs, under section 155 of the Insurance Code. 215 ILCS 5/155 (West 2014). Section 155 provides a remedy to insureds when an insurer's action in handling a claim is vexatious and unreasonable. *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 25. "This extracontractual remedy is intended to make suits by policyholders economically feasible and to punish insurance companies for misconduct." *Id.*

¶ 62 During oral argument before this Court, both Turmusaya and the Insurer asserted that an abuse of discretion standard applies to our review of the denial of section 155 damages. We observe that courts have employed both an abuse of discretion standard and a *de novo* standard

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Electronics, Inc., 223 Ill. 2d 352, 363 (2006) (providing that "if the words used in the policy are ambiguous, they will be strictly construed against the drafter"); *Illinois Farmers Insurance Co. v. Marchwiany*, 222 Ill. 2d 472, 479 (2006) (holding that the policy ambiguity "must be resolved in favor of coverage"); *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 (2005) (noting that "[i]f the policy language is suspectible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer").

when considering this issue. Compare, *e.g.*, *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶¶ 29, 30 (providing that we generally employ an abuse of discretion standard of review when evaluating a circuit court's decision under section 155, but we apply a *de novo* standard where the circuit court denies section 155 relief via summary judgment), and *John T. Doyle Trust v. Country Mutual Insurance Co.*, 2014 IL App (2d) 121238, ¶ 30 (applying an abuse of discretion standard for a trial court's ruling on section 155 sanctions at summary judgment; noting that "the trial court drew on its knowledge of the proceedings in deciding that the facts presented did not warrant sanctions"). Under either standard, our result is the same.

¶ 63 According to Turmusaya, the Insurer engaged in an improper claims practice by not timely affirming or denying liability on its claim. See, *e.g.*, 215 ILCS 5/154.6 (West 2014); 50 Ill. Admin. Code 919.50 (eff. July 1, 2004). We note, however, that O'Connell informed Turmusaya in April 2014 that the Insurer's position was that it was not responsible for the loss because the two person warranty provision was not complied with at the time of the loss. While Turmusaya contends that the Insurer "has acted unreasonably by failing to deny or pay the Claim at any time" during the ensuing five years, the record is clear that the Insurer has denied the claim. In any event, where there is a *bona fide* dispute regarding whether coverage exists – as is the case herein – costs and sanctions under section 155 are not appropriate. *State Farm Mutual Automobile Insurance Co. v. Smith*, 197 Ill. 2d 369, 380 (2001).

¶ 64 In light of our affirmance, we need not consider Turmusaya's arguments based on section 121-10 of the Insurance Code regarding the Insurer's purported failure to deposit cash, securities, or a bond with the circuit court clerk prior to filing pleadings in the underlying action.

¶ 65 CONCLUSION

¶ 66 For the reasons discussed herein, we affirm the judgment of the circuit court in its entirety.

¶ 67 Affirmed.