SIXTH DIVISION
JUNE 30, 2011

No. 1-10-2768

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAMBRIDGE MUTUAL FIRE INSURANCE CO.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
vs.	)	
GREATER NEW YORK MUTUAL INSURANCE CO.,	)	
Defendant-Appellee,	)	No. 09 CH 48521
and	)	
SOUTHPORT PROPERTIES, L.L.C., ICM PROPERTIES, INC., and PETER STASIULIS,	)	Honorable William O. Maki,
Defendants.	)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Presiding Justice Garcia and Justice McBride concurred in the judgment.

ORDER

Held: Where a plaintiff has failed to allege any facts in its complaint to support its claim that the effective date on a contract was not genuine, the trial court did not err by granting defendant's section 2-619 motion to dismiss the complaint.

The trial court granted a section 2-619 motion dismissing defendant Greater New York Mutual Insurance Company (GNY) from the case. 735 ILCS 5/2-619(a) (West 2008). Plaintiff Cambridge Mutual Fire Insurance Company (Cambridge) appeals. For the reasons discussed below, we affirm.

BACKGROUND

On August 23, 2008, Peter Stasulius, allegedly fell from a building located at 2318 North Southport Avenue, Chicago. The building was allegedly owned, managed or maintained by Southport Properties, L.L.C. (Southport) and ICM Properties, Inc. (ICM). These allegations were contained in a complaint that Stasulius subsequently filed against Southport and ICM.

On September 1, 2007, Cambridge had issued a policy of insurance to ICM and Southport, which expired on September 1, 2008, a few days after the alleged fall.

On July 17, 2008, GNY had also issued a policy of insurance to ICM and Southport. The policy insured certain properties owned or managed by ICM and Southport, but it did not include 2318 North Southport. The policy contained a six-page list of covered properties, including "2319 N. Southport," but this list did not mention 2318 North Southport Avenue.

An endorsement added 2318 North Southport to the GNY policy, effective on August 29, 2008, just a few days after the alleged fall. "Endorsement Number 005," which was dated August 29, 2008, provided that:

> "If this endorsement is listed in the policy declarations, it is in effect from the time coverage under this policy commences. Otherwise, the effective date of this endorsement is as shown above at the same time or hour of the day as the policy became effective."

Since the endorsement was not listed in the original policy, its effective date was the date "as shown above" on the endorsement itself, or August 29, 2008.

On December 4, 2009, Cambridge filed a complaint naming Southport, ICM and Stasiulis as defendants, and naming GNY as a "Respondent in Discovery." On January 5, 2010, the trial court granted GNY's motion to dismiss the discovery

petition and granted Cambridge leave to amend its complaint to add an additional party. The trial court's January 5th order also set the matter for status on February 10, 2010.

On January 14, 2010, Cambridge amended the complaint to seek equitable contribution from GNY. On February 8, 2010, both Southport and ICM filed answers. On February 10, 2010, the trial court issued an order merely setting the matter for status on March 4, 2010. The order did not grant GNY an extension of its time to file an answer or otherwise respond.

On February 26, 2010, which was more than 30 days after the filing of plaintiff's amendment to its complaint, GNY filed a section 2-619 motion to dismiss. The motion claimed that there were affirmative matters that defeated Cambridge's claim. The motion was supported by the affidavit of Brett Utter, from the "Liability Claims Department" of GNY, which swore to the authenticity of the endorsement at issue in the action.

On March 4, 2010, the trial court entered an order granting plaintiff leave to conduct discovery "as necessary but not limited to the deposition of the Affiant within 60 days." GNY's section 2-619 motion was set for status on May 4, 2010

After the deposition of Utter and other discovery, the trial court entered an

order on September 1, 2010, granting GNY's section 2-619 motion to dismiss. The order also stated that there was "no just reason for delyaing either enforcement or appeal or both." Plaintiff then filed a notice of appeal on September 15, 2010, and this appeal followed.

ANALYSIS

1. Standard of Review

On appeal, plaintiff asks us to reverse the trial court's partial dismissal order, issued pursuant to section 2-619 of the Code of Civil Procedure. (Code). 735 ILCS 5/2-619 (West 2008). "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga,* 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.,* 221 Ill. 2d 558, 579 (2006). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology*, 221 Ill. 2d at 579; *Morr-Fitz, Inc. v. Blagojevich,* 231 Ill. 2d 474, 488 (2008).

When reviewing "a motion to dismiss under section 2-619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz*, 231 Ill. 2d at 488. "In

ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal, if the record supports a proper ground for dismissal. *Raintree*, 209 Ill. 2d at 261 (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary,* 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

2. Timeliness of Section 2-619 Motion

"For a motion to be properly brought under section 2-619, the motion (1) must be filed 'within the time for pleading,' and (2) must concern one of nine listed grounds." *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 275

(2009), quoting 735 ILCS 5/2-619(a) (West 2006).

We cannot determine from the appellate record whether the first requirement of a timely filing was met. Cambridge amended the complaint to seek equitable contribution from GNY on January 14, 2010. On February 8, 2010, both

Southport and ICM filed answers. The trial court's order on February 10, 2010 merely set the matter for status on March 4, 2010. It did not state anything about granting GNY an extension of time to file an answer or otherwise respond. GNY did not file its section 2-619 motion to dismiss until February 26, 2010, which was more than 30 days after the filing of plaintiff's amendment to its complaint.

However, we do not find GNY's motion defective on this ground for two reasons. First, plaintiff did not claim either at the trial level or on this appeal that GNY failed to file its section 2-619 motion "within the time for pleading." 735 ILCS 5/2-619(a) (West 2008). "Issues not raised are waived." *River Plaza*, 389 Ill. App. 3d at 275 (appellate court found that plaintiff had waived the issue of whether certain defendants had filed a timely section 2-619 motion). See also *Wilson v. Molda*, 396 Ill. App. 3d 100, 105 (2009) (although the appellate court could not determine from the appellate record whether defendant's section 2-619 motion was timely, it held that plaintiff had waived this issue). Second, if there was something necessary and material that was missing from the appellate record, it was the appellant's burden to provide it. *Wilson*, 396 Ill. App. 3d at 105 (citing *Luss v. Village of Forest Park*, 337 Ill. App. 3d 318, 331 (2007); *Pelleton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222 (2007); *Smolinski v. Vojta*, 363 Ill. App. 3d

752, 757 (2006). For these reasons, we do not find GNY's motion defective on timeliness grounds.

3. Subject Matter of Section 2-619 Motion

The second requirement for a section 2-619 motion is that it must concern one of the nine grounds listed in section 2-619. *River Plaza*, 389 Ill. App. 3d at 275. A section 2-619 motion is permitted only on the following grounds:

> "(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.
>
> (2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.
>
> (3) That there is another action pending between the same parties for the same cause.
>
> (4) That the cause of action is barred by a prior judgment.
>
> (5) That the action was not commenced within the

time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a) (West 2008).

In the case at bar, the section 2-619 dismissal was granted on ground nine: some "other affirmative matter" defeating the legal effect of the claim.

" ' Affirmative matter,' in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from

the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). Section 2-619(a) provides that, "[i]f the grounds do not appear on the face of the pleading," the motion must be "supported by affidavit." 735 ILCS 5/2-619(a) (West 2008). However, our supreme court has observed that, although the letter of the law appears to require an affidavit to show an affirmative matter, "in practice," courts have considered some affirmative matters "to be apparent on the face of the pleading." *Illinois Graphics*, 159 Ill. 2d at 486.

The affirmative matter in the case at bar was the very insurance policy and endorsement upon which plaintiff was suing for relief. On its face, the policy and endorsement did not cover the building on the date in question. If the policy was not in effect on the date of the alleged accident, then this fact would completely defeat plaintiff's claim for relief. As a complete bar to plaintiff's claim, it qualifies as an "affirmative matter" within the meaning of section 2-619(a)(9). *Illinois Graphics*, 159 Ill. 2d at 486. Having determined that, procedurally, this motion was properly brought under section 2-619, we must next determine whether, substantively, it was properly granted.

4. Substance of Section 2-619 Motion

On appeal, plaintiff Cambridge asks us to reverse so that it can obtain

further discovery to show that the date on the endorsement is not genuine. Plaintiff Cambridge claims that Utter's affidavit was not sufficient to authenticate the date. Plaintiff Cambridge also claims that defendant GNY's motion was not a valid section 2-619 motion because it contradicted a fact alleged in the complaint, and well-pled facts alleged in the complaint must be accepted as true.

With respect to discovery, plaintiff Cambridge had to allege something to show that it was on more than just a fishing expedition. Plaintiff never alleged any basis for its suspected fraud other than the fact that GNY had investigated the claim and tried to negotiate a settlement. However, a precautionary litigation strategy is not evidence of fraud or document alteration. A trial court's discovery order is reviewed only for an abuse of discretion. *Montes v. Mai*, 398 Ill. App. 3d 424, 430 (2010); *Wisniewski v. Kownacki*, 221 Ill. 2d 453, 457 (2006). We cannot find an abuse of discretion on the record before us.

With respect to the dismissal, a court is required to accept only well-pled facts. Our supreme court has held that, on a motion to dismiss under section 2-619, a court must accept as true only the "well-pleaded facts in plaintiffs' complaint." *Morr-Fitz*, 231 Ill. 2d at 488.

Plaintiff never alleged in its pleadings that the date on the endorsement was

not genuine. In its amendment to its complaint, plaintiff alleged only "on information and belief" that the policy issued by GNY was in effect for the building in question on the date in question. Cambridge's pleading alleged:

> "3. ICM and SOUTHPORT also have multiple properties insured with Defendant [GNY] pursuant to a master policy *** effective July 17, 2008. ***
>
> 10. Between July 7 and October 15, 2009, GNY investigated the STASILIS claim, engaged counsel to defend the STASIULIS suit, and otherwise acted in a manner consistent with the conclusion that GNY provided liablity coverage for SOUTHPORT and ICM under GNY policy referred to above.
>
> 11. On information and belief, GNY provided liability insurance for 2318 N. Southport on August 23, 2008, when STASIULIS alleges that he was injured."

In its brief to this court, plaintiff Cambridge stated that GNY took acts which were "consistent with the conclusion that GNY provided liability coverage" and "[i]t was from these facts that Plaintiff asserted that [GNY] also had a policy in force

covering [the subject building] as of the date of Stasiulis' fall."[1] Merely taking the precaution to investigate is not the same as hard and fast proof of liability.

Plaintiff Cambridge is alleging that every part of the endorsement is valid but only the date on it is false, which is an allegation that it did not make in its pleading. In its brief to this court, plaintiff Cambridge stated:

> "Specifically, the issue here is whether Endorsement No. 5, which adds the 2318 N. Southport property as an insured location on the GNY policy, is in fact genuine, or whether the effective date on the endorsement might have been altered from some date *before* the August 23, 2008, incident involving Peter Stasiulis (*August 22, perhaps?*), to August 29, 2008, the date that appears on the document produced by GNY in this case."
> (Emphasis in original.)

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[1]In its reply brief, plaintiff Cambridge argued that, from the facts that GNY investigated the claim, hired counsel to defend it and attempted to negotiate a settlement, the trial court should have become "suspicious" that "someone at GNY may have tried to rewrite history (or at least Endorsement Number 5)."

To rebut defendant GNY's motion, plaintiff Cambridge could have submitted an affidavit of an expert or some other individual to challenge the authenticity of just the date. Section 2-619(c) provides that "[i]f, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion." 735 ILCS 5/2-619(c) (West 2008). However, Cambridge chose to neither amend its pleading to add allegations about the alleged falsity of just the date, nor submit affidavits in support of this claim. *Barber-Colman Co. v. A &K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1078 (1992) ("When facts alleged in an affidavit are not contradicted, those facts are taken as true.").

Plaintiff Cambridge claims that the sole support for defendant GNY's motion was Utter's affidavit. This is simply not true. The support for defendant's motion is the face of the very endorsement upon which plaintiff is basing its claim, and which shows that the policy was not in effect on the date of the accident. It is plaintiff who is claiming that a portion, and only a portion, of the amendment is not genuine, and who has failed to offer any allegations or affidavits to support this claim.

Plaintiff Cambridge asserts that Utter's affidavit failed to satisfy Supreme Court Rule 191, which requires that an affiant have "personal knowledge" of the matters to which he swears. Ill. Sup. Ct. R. 191(a) (eff. July 1, 2002). Utter's affidavit swore that he was employed by GNY's liability claims department, that he was familiar with GNY's records, and that the documents attached to his affidavit were true and correct copies of the policy and endorsement at issue. In essence, plaintiff's Rule 191 claim is that GNY should have produced someone who would have had evidence of the alteration which plaintiff claims happened. However, without either a countering affidavit or specific countering allegations to show some substantiation of plaintiff's claim, there is no basis to strike Utter's affidavit on this ground.

Revieiwing *de novo* the record before us, we cannot find that the trial court erred by granting defendant GNY's section 2-619 motion to dismiss.

CONCLUSION

For the foregoing reasons, we affirm the trial court's partial dismissal order, granting defendant GNY's section 2-619 motion and dismissing defendant GNY as a defendant from this action. We remand for further proceedings consistent with this order.

Affirmed.