2017 IL App (1st) 163311-U

No. 1-16-3311

Third Division
November 29, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CENTURY INDEMNITY COMPANY, Plaintiff-Appellant, v. AMERICAN HOME ASSURANCE COMPANY *et al.*, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 13 CH 26486 Honorable Anna Helen Demacopoulos, Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not err in dismissing counterclaim for declaratory judgment because the well-pled facts did not state a cause of action.

¶ 2 Century Indemnity Company (Century) filed a counterclaim for a declaratory judgment (735 ILCS 5/2-701 (West 2016)) against Avocet Enterprises, Inc. (Avocet), and Avocet's insurers in the circuit court of Cook County. Century sought recovery of money that it paid, allegedly by mistake, in settlement of asbestos-related personal injury lawsuits against Avocet. Century appeals from the trial court's dismissal of its counterclaim for failure to

state a cause of action pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 On a motion to dismiss for failure to state a cause of action, a court must take as true all well-pled facts. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 464 (1991). Century brought the instant declaratory judgment action in a counterclaim. Before reciting the specific facts alleged in Century's counterclaim, we deem it helpful to first briefly summarize the factual background as alleged in the initial pleadings. See, *e.g.*, *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 151 (1989).

¶ 5 In November 2013, the original plaintiff in this lawsuit, American Home Assurance Company (American Home), filed a complaint for a declaratory judgment. American Home alleged as follows. Avocet, formerly known as Ventfabrics, Inc., manufactured products containing asbestos, which it distributed, marketed, and sold throughout the United States. Personal injury suits were brought against Avocet nationwide arising out of exposure to those products. Avocet demanded coverage under various primary, umbrella, and/or excess liability insurance policies issued by American Home and several additional insurance companies. In its complaint, American Home sought a declaration of its rights and obligations under its insurance policies with respect to Avocet's asbestos claims. American Home named as defendants Avocet, and several known and unknown insurance companies that issued liability insurance policies to Avocet. Included among those defendant insurers was Century, as successor to CCI Insurance Company, as successor to Insurance Company of North America.

¶ 6 In January 2014, Century filed an answer, affirmative defenses, and a counterclaim for a declaratory judgment. In March 2014, American Home moved for a stay of all claims and counterclaims among defendant insurers to allow them to exchange information in an attempt to resolve Avocet's demands for coverage. The trial court granted the motion and, in a series of orders, extended the stay through August 2014. On August 29, 2014, the court entered an agreed order dismissing American Home's complaint without prejudice. In September 2014, Century filed an amended counterclaim. In November 2014, the trial court entered an agreed order realigning the parties to designate Century as plaintiff and American Home as a defendant. In March 2015, the trial court granted American Home's section 2-615 motion to dismiss Century's amended counterclaim.

¶ 7 In April 2015, Century filed its second amended counterclaim, the dismissal of which is before us for review. We take as true the well-pled allegations of fact contained in the instant counterclaim and exhibits attached thereto. *Bearinger v. Page*, 204 Ill. 2d 363, 365 (2003); *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 284 (1980). Century alleged that it issued four primary insurance policies to Avocet as the named insured or an additional insured, with policy periods running collectively from March 1985 to March 1993. None of those policies covered the personal injury asbestos lawsuits against Avocet. However, when Avocet's primary insurers announced the exhaustion of their limits, Avocet's excess insurers "encouraged" Century to pay, "insisted" that Century pay, or "acquiesced in" Century paying Avocet's asbestos claim settlements. Century mistakenly paid $730,953.42 in claim settlements, under a full reservation of its rights. Century sought a declaration determining which of Avocet's insurers is obligated to reimburse Century for the settlement money that it paid.

¶ 8 Century named as defendants Avocet and several of Avocet's primary and excess insurers. Century sought recovery from Avocet based on contractual indemnification (count I). Century sought recovery from Avocet's primary and excess insurers based on unjust enrichment (count II) and contractual subrogation (count III). Lastly, Century sought recovery specifically from the primary insurers based on equitable contribution (count IV).

¶ 9 After Century filed the instant complaint, several of the primary insurers and Century stipulated that the aggregate limits of the primary insurers' respective policies had been exhausted. Based on this stipulation, the trial court dismissed without prejudice all claims against several primary insurers.[1] Accordingly, the sole remaining defendant primary insurer was Continental Casualty Company. Century also named as defendants the following excess insurers of Avocet: American Home; Clearwater Insurance Company, as successor by merger to Mt. McKinley Insurance Company and for itself as successor in interest to Gibralter Insurance Company; National Surety Corporation; and TIG Insurance Company with respect to its excess insurance policies.

¶ 10 American Home filed a section 2-615 motion to dismiss Century's counterclaim, which the other excess insurers joined. On September 29, 2016, at the close of a hearing on the motion, the trial court dismissed counts II and III of the instant counterclaim. On November 29, 2016, the trial court dismissed Century's claim specifically against Continental Casualty, which was pled in count IV. On December 7, 2016, the trial court entered a final, default judgment in favor of Century and against Avocet on count I of Century's counterclaim.[2] The

[1] Allstate Insurance Company, as successor in interest to Northbrook Insurance Company; American Guarantee Liability Insurance Company; Central National Insurance Company of Omaha; and TIG Insurance Company, formerly known as Transamerica Insurance Group, individually and as successor in interest to International Insurance Company, with respect to its primary insurance policies.

[2] TIG and National Surety had each filed its own counterclaim seeking a declaratory judgment. However, prior to final judgment, they voluntarily dismissed their counterclaims without prejudice.

court entered judgment in the amount of $730,953.42, with interest, for a total judgment amount of $828,480.42. On December 20, 2016, within 30 days of the final judgment, Century filed its notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 Century assigns error to the trial court's dismissal of counts II and III of its second amended counterclaim. A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016) attacks the legal sufficiency of a complaint by alleging defects on its face. The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. Moreover, Illinois is a fact-pleading jurisdiction. A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. Our standard of review is *de novo*. *Beahringer*, 204 Ill. 2d at 369; *Hough v. Kalousek*, 279 Ill. App. 3d 855, 859, 862-63 (1996).

¶ 13 At the outset, we observe that our analysis implicates the voluntary payment doctrine. Money voluntarily paid under a claim of right to the payment, with full knowledge of the underlying facts by the person making the payment, cannot be recovered solely on the ground that the claim was illegal. *King v. First Financial Services Corp.*, 215 Ill. 2d 1, 27-28 (2005); *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 541 (1908). Such voluntary payments cannot be recovered absent fraud, coercion, or mistake of fact. *Commercial National Bank of Peoria v. Bruno*, 75 Ill. 2d 343, 350-51 (1979); *Smith v. Prime Cable of Chicago*, 276 Ill. App. 3d 843, 847-48 (1995). The payor must show not only that

the claim asserted was unlawful, but also that the payment was not voluntary, *i.e.*, there was some necessity amounting to compulsion and payment was made under the influence of such compulsion. *King*, 215 Ill. 2d at 28; *Illinois Glass Co.*, 234 Ill. 2d at 541; *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 675 (2003). The doctrine applies to any cause of action that seeks to recover a payment under a claim of right (*Jenkins*, 345 Ill. App. 3d at 675 n.1), and can constitute an element of a plaintiff's *prima facie* case (*Russell v. Hertz Corp.*, 139 Ill. App. 3d 11, 15-16 (1985)) as well as a defendant's affirmative defense (*Jenkins*, 345 Ill. App. 3d at 674). We now turn to the dismissed counts.

¶ 14 A. Contractual Subrogation (Count III)

¶ 15 Century contends that the instant counterclaim sufficiently states a cause of action for contractual subrogation. In count III, Century sought contractual subrogation based on a policy provision titled "Transfer of Rights of Recovery Against Others To Us." That clause provided in relevant part: "If the insured has rights to recover all or part of *any payment we have made under this Coverage Part*, those rights are transferred to us (emphasis added)." Century alleged that it was entitled to recover from the primary or the excess insurers "where it subsequently learn[ed] that the claim was not within the coverage." Additionally, we observe Century's argument that the voluntary payment doctrine does not apply to contractual subrogation.

¶ 16 Pursuant to the doctrine of subrogation, one who *has involuntarily paid* a debt or claim of another succeeds to the rights of the other with respect to the debt or claim so paid. *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1049 (2000); *Bernot v. Pirmus Corp.*, 278 Ill. App. 3d 751, 753 (1996); *Bost v. Paulson's Enterprises, Inc.*, 36 Ill. App. 3d 135, 139 (1976). The doctrine of subrogation is sufficiently broad to include every instance in which

one person, *not a mere volunteer*, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *Bost*, 36 Ill. App. 3d at 139; *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 146 (1961). Subrogation may arise as a matter of law or equity, or subrogation can be founded upon an express or implied contract. *Benge v. State Farm Mutual Automobile Insurance Co.*, 297 Ill. App. 3d 1062, 1071 (1998); *Bost*, 36 Ill. App. 3d at 139; *Remsen*, 30 Ill. App. 2d at 143. Where subrogation is created by an enforceable contract, the contract terms, rather than common law or equitable principles, control. *Benge*, 297 Ill. App. 3d at 1071.

¶ 17 These principles make clear that recovery by way of subrogation is available only where the plaintiff is under a legal obligation to pay the debt of another. *A.J. Maggio Co.*, 316 Ill. App. 3d at 1049; *Bernot*, 278 Ill. App. 3d at 753. "Clearly, an insurance carrier may not exercise its right to subrogation until it has paid the insured's damages *under the policy giving rise to the subrogation rights*." (Emphasis added.) *Benge*, 297 Ill. App. 3d at 1072. "Accordingly, an insurer which pays a loss for which it was not reasonably liable thereby becomes a mere volunteer, and is not entitled to subrogation." 16 Couch on Insurance §223:25, at 223-43 (3d ed. 2000); see *Mayfair Construction Co., Inc. v. Security Insurance Co. of Hartford*, 51 Ill. App. 3d 588, 596 (1977) ("A volunteer *** cannot be viewed as a subrogee").

¶ 18 This court has noted that "the courts are sympathetic to excess insurers in determining whether payments made were under sufficient obligation to allow the insurer to seek subrogation, as excess insurers are often potentially liable on a claim, while unable to determine their actual liability until later in a dispute." *Progressive Insurance Co. v. Universal Casualty Co.*, 347 Ill. App. 3d 10, 25 (2004). However, in the case at bar, we are

not inclined to extend this sentiment to Century, which was one of Avocet's *primary* insurers. Century did not pay Avocet's asbestos settlement claims pursuant to the policy's coverage provision. Rather, Century candidly alleged that it made the payments as a result of its mistake concerning the scope of its coverage. Century, having drafted its insurance contract, and having been requested to act under its terms, is deemed to have knowledge of its terms. See *The Hartford v. Doubler*, 105 Ill. App. 3d 999, 1002 (1982). Thus, Century was not at liberty to rely on representations of other contracting parties respecting the effect of its policy, or accept an allegedly false construction of the policy's terms. See *Jursich*, 110 Ill. App. 3d at 852-53. Because Century did not pay Avocet's settlement claims pursuant to a legal obligation under the policy, but rather volunteered its payments, Century cannot state a claim for contractual subrogation.

¶ 19 B. Unjust Enrichment (Count II)

¶ 20 Century next contends that the instant counterclaim sufficiently states a cause of action for unjust enrichment. In count II, Century alleged: "Despite having the legal obligation to fund settlements, the Excess Insurers acquiesced in Century's funding settlements under a full reservation of rights ***." Century alleged that Avocet's excess insurers were unjustly enriched as the result of Century's mistaken payment of Avocet's asbestos claim settlements.

¶ 21 The doctrine of unjust enrichment, standing alone, does not justify an action for recovery. Rather, unjust enrichment is a condition that may be caused by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence. Thus, when an underlying claim of unlawful or improper conduct is deficient, then a claim for unjust enrichment should also be dismissed. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024-25 (2009); *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 631 (2008). For a cause of action for

unjust enrichment to exist, there must be some independent basis that establishes a duty on the part of defendant, and that the defendant failed to abide by that duty. *Martis*, 388 Ill. App. 3d at 1025; *Lewis v. Lead Industries Ass'n, Inc.*, 342 Ill. App. 3d 95, 105 (2003).

¶ 22 In count II, Century alleged only that it mistook the scope of its coverage, which was the gist of its contractual subrogation claim in count III. Century did not allege any independent improper or unlawful conduct directed at it by the excess insurers. Since we held that count III was deficient, then Century's claim for unjust enrichment was merely derivative and properly dismissed.

¶ 23 In any event, even if Century could bring an unjust enrichment claim on an independent basis, Century's payment of Avocet's asbestos settlement claims remains voluntary for two reasons. In count II, although Century expressly alleged: "Century's payment of the settlements was not a voluntary payment." It additionally alleged that "Instead, the payments were made due to a mistake in fact" regarding the scope of its coverage. However, the erroneous construction of a contract is a mistake of law, and money paid thereunder is not recoverable. *Groves v. Farmers State Bank of Woodlawn*, 368 Ill. 35, 47 (1938); *Jursich v. Arlington Heights Federal Savings & Loan Ass'n*, 110 Ill. App. 3d 847, 853 (1982).

¶ 24 Additionally, in count II, Century alleged that the excess insurers "acquiesced in" Century's allegedly mistaken payments, and elsewhere in the instant pleading, Century alleged that the excess insurers "encouraged" or "insisted" that Century pay. These facts do not come close to demonstrating that Century was compelled to pay Avocet's settlement claims. See *King*, 215 Ill. 2d at 33; *Smith*, 276 Ill. App. 3d at 848-49 (and authorities cited therein). Further, Century's "reservation of rights" did not preclude application of the voluntary payment doctrine. See *Smith*, 276 Ill. App. 3d at 848 (quoting 66 Am. Jur. 2d

Restitution & Implied Contracts §94, at 1035-36 (1973)). While the issue of duress and compulsory payment is generally an issue of fact, where the facts are undisputed and only one valid inference concerning the existence of duress can be drawn from the facts, the issue can be decided as a matter of law on a motion to dismiss. *Smith*, 276 Ill. App. 3d at 850. We conclude that Century cannot state a claim for unjust enrichment.

¶ 25 Century pled itself out of court. We uphold the trial court's dismissal of counts II and III of Century's second amended counterclaim.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 28 Affirmed.