2022 IL App (2d) 210394
No. 2-21-0394
Opinion filed May 23, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GREATER NEW YORK MUTUAL INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellee, v. GALENA AT WILDSPRING CONDOMINIUM ASSOCIATION, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Du Page County. No. 18-MR-474 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Schostok and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 This insurance coverage case originated in April 2018 when plaintiff, Greater New York Mutual Insurance Company (GNY), sought a declaration as to its liability under an insurance policy issued to defendant, Galena at Wildspring Condominium Association (Galena). Galena filed a counterclaim for declaratory judgment, and, in February 2021, it filed a motion for summary judgment on its counterclaim. On June 15, 2021, the trial court entered judgment in favor of Galena, detailing the amounts due Galena under the policy. In addition, the court determined that Galena was not entitled to prejudgment interest. Galena timely appealed. The sole issue on appeal

is whether the trial court abused its discretion in determining that Galena was not entitled to interest. We find no abuse of discretion. Thus, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On April 5, 2018, GNY filed a declaratory-judgment complaint (735 ILCS 5/2-701 (West 2018)) against Galena.

¶ 4 According to the complaint, GNY issued a property insurance policy (the policy) to Galena, insuring a condominium complex consisting of 33 two-story condominium buildings (the property). On July 24, 2017, Galena notified GNY that certain components of the property had been damaged by a storm on July 21, 2017. After an investigation, "GNY determined that some siding, window screens, gutters, vents, and fascia had plausibly sustained direct physical loss or damage due to hail, but not wind." GNY further determined that, based on an estimate prepared by its consultant, it would cost $730,396.30 to repair or replace those hail-damaged items. GNY determined that the asphalt shingle roofs were not damaged by hail or wind. On October 4, 2017, GNY issued Galena an actual cash value (ACV) payment of $527,879.68, which reflected the cost to repair or replace, less prior payments and recoverable depreciation. On January 26, 2018, Galena submitted to GNY a signed sworn statement in proof of loss, valuing the loss and damage at $5,020,438.90, based on an estimate for replacement of all roofs, siding, window screens, vents, fascia, outlets, light fixtures, and other facets of the exterior on all 33 buildings. On March 16, 2018, Galena demanded an appraisal under the terms of the policy, which was rejected by GNY.

¶ 5 GNY's complaint sought a declaration that (1) the policy's appraisal provision was inapplicable to the coverage dispute; (2) it was not obligated to pay Galena (a) the amount claimed in the proof of loss, (b) the replacement cost for any loss until the damaged property was repaired

or replaced, or (c) the increased cost of construction; and (3) it had no further liability under the policy.

¶ 6 On May 21, 2018, Galena filed an answer to the declaratory-judgment complaint. In addition, Galena asserted a counterclaim for a declaratory judgment that (1) there was coverage under the policy, (2) Galena was entitled to an appraisal by an appraisal panel, (3) GNY should be held liable for the amount determined by the appraisal panel, and (4) judgment should be entered for Galena on the appraisal amount. Galena also brought a counterclaim for breach of contract.

¶ 7 During the ensuing litigation, Galena and GNY agreed to submit the dispute to appraisal and, in July 2020, executed a stipulation governing the scope of the appraisal. The stipulation provided:

> "1. All issues of fact relevant to the scope and amount of loss will be resolved with finality through an appraisal. ***
>
> 2. The appraisal panel will value [(a)] the Actual Cash Value ('ACV'), [(b)] the Replacement Cost Value ('RCV') on the date of the loss, and [(c)] the RCV as of the date of appraisal.
>
> * * *
>
> 5. GNY will, within 30 days of the appraisal award, pay the ACV awarded by the appraisal panel minus, deductibles and prior payments deposited or cashed by Galena. Both parties recognize the panel may or may not award the full amount of Galena's claim. If, within one year of the appraisal award, Galena performs the repairs that are the subject of the ACV awarded by the panel, Galena may then make claim to GNY for the RCV of the award ***.

6. GNY maintains its objection to valuing RCV as of the date of the appraisal as well as payment of interest. These two disputes between the parties will be submitted to the Court for resolution after receipt of the appraisal award, and after Galena's performance of the repairs that are the subject of the ACV award.

7. Any disputes concerning the conduct of the appraisal or the appointment of the appraisal panel will be submitted to this Court for resolution."

¶ 8 In addition to the payment provision contained in paragraph 5 of the stipulation, the policy contained a loss payment provision, which provided:

"4. Loss Payment

* * *

g. We will pay for covered loss or damage to Covered Property within 30 days after we receive the sworn proof of loss, if you have complied with all the terms of this Coverage Part and:

(1) We have reached agreement with you on the amount of loss; or

(2) An appraisal award has been made."

¶ 9 The appraisal panel issued an initial award on February 9, 2021. However, because the appraisal panel incorrectly used 2021 pricing to calculate the ACV, rather than date-of-loss pricing, a revised award was issued on February 16, 2021 (the final award). In the final award, the appraisal panel concluded that, based on the July 2017 date of loss, the ACV was $1,676,304.46 and the RCV was $2,184,771.03. The appraisal panel further concluded that, based on the February 2021 date of the appraisal, the RCV was $2,634,946.98.

¶ 10 On February 16, 2021, Galena filed a motion for summary judgment on its counterclaim for declaratory judgment. Galena asked for a declaration that (1) the ACV awarded in the appraisal

be immediately payable, (2) it should be awarded the RCV based on February 2021 pricing when repairs are performed, and (3) it was entitled to 5% interest effective as of February 25, 2018—30 days after it filed its proof of loss.

¶ 11 On March 1, 2021, GNY filed its response. GNY argued that Galena was not entitled to prejudgment interest on the appraisal award accruing as of 30 days after the filing of the proof of loss. According to GNY, interest would begin to accrue 30 days from February 16, 2021—the date of the final appraisal. Citing paragraph 5 of the stipulation and the policy's loss payment provision, GNY argued that the due date was, therefore, March 18, 2021. GNY further asserted that Galena's claim regarding the RCV was premature because Galena had not yet completed the repairs.

¶ 12 On March 5, 2021, Galena filed its reply. Galena clarified that it was not asserting that the RCV proceeds were due before it completed repairs; instead, it was asking the trial court to declare that, should Galena perform the repairs, the RCV amount due would be the amount based on the 2021 valuation. In addition, Galena reiterated its claim that 5% interest was due on the RCV starting at 30 days from Galena's filing of the proof of loss.

¶ 13 A hearing took place on March 8, 2021, and, following a motion for clarification, a second hearing took place on April 26, 2021. The trial court ultimately determined that the operative ACV award due Galena was the ACV award that was calculated based on the July 2017 date of loss. The parties agreed that, as of the hearing on April 26, 2021, GNY had paid Galena the amount due. The parties also agreed that, should Galena make the repairs, it would be entitled to the RCV, calculated based on the 2021 final appraisal date. On the issue of interest, the court found that no interest was due because "the loss suffered by [Galena] was not readily ascertainable and, in fact, was not ascertained at all until February of 2021." At the hearing on April 26, 2021, the court stated:

> "I think the terms of the policy have to prevail. And the interest would not run until after the appraisal has been done so that the claimant would not be entitled to any interest until that appraisal 30 days after the appraisal was made. So I think the interest is a moot point right now because the payment was made within 30 days of the appraisal."

¶ 14 On June 15, 2021, a written order followed. Galena timely appealed.

¶ 15 II. ANALYSIS

¶ 16 Galena challenges the trial court's judgment concerning only its finding that Galena was not entitled to interest. According to Galena, it is entitled to interest at a rate of 5% accruing as of February 25, 2018 (30 days after it filed its proof of loss) on the appraisal panel's award for the roof, replacement siding, and general conditions.

¶ 17 Whether in a declaratory judgment action or otherwise, summary judgment is proper only where the pleadings and evidence on file show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2020); *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006). The parties agree that a trial court's decision to grant summary judgment presents a question of law, which is reviewed *de novo. Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009). We note, however, that whether to award prejudgment interest is a matter within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 71; see also *Liberty Mutual Insurance Co. v. Westfield Insurance Co.*, 301 Ill. App. 3d 49, 55-56 (1998). Accordingly, we review for an abuse of discretion the court's ruling on the issue of interest. An abuse of discretion occurs where the trial court's ruling is arbitrary, fanciful, or unreasonable,

or where no reasonable person would adopt the court's view. *Certain Underwriters at Lloyd's, London*, 2014 IL App (1st) 132020, ¶ 71.

¶ 18 Section 2 of the Interest Act (815 ILCS 205/2 (West 2018)) provides that "[c]reditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." An insurance policy is an instrument of writing covered by the Interest Act. *New Hampshire Insurance Co. v. Hanover Insurance Co.*, 296 Ill. App. 3d 701, 708 (1998); *Couch v. State Farm Insurance Co.*, 279 Ill. App. 3d 1050, 1054 (1996). Thus, the prejudgment interest may be recovered from the time that money becomes due under the insurance policy. *Couch*, 279 Ill. App. 3d at 1054. "The existence of a goodfaith defense does *not* preclude recovery of interest." (Emphasis in original.) *Id.*

¶ 19 "[I]f the amount [due] is determinable, interest can be awarded on money payable even when the claimed right and the amount due require legal ascertainment." *New Hampshire Insurance Co.*, 296 Ill. App. 3d at 709. "However, for recovery of prejudgment interest, the sum due must be liquidated or subject to an easy determination by calculation or computation." *Couch*, 279 Ill. App. 3d at 1054.; see also *Spagat v. Schak*, 130 Ill. App. 3d 130, 137 (1985) ("the amount due [must] be a fixed or easily ascertainable amount"); *Cushman v. Wakefield of Illinois, Inc. v. Northbrook 500 Limited Partnership*, 112 Ill. App. 3d 951, 963 (1983) (amount due must be a "fixed amount or easily computed"). " '[I]f judgment, discretion, or opinion, as distinguished from calculation or computation is required to determine the amount of the claim, it is unliquidated.' (Internal quotation marks omitted.) [Citation.]" *Certain Underwriters at Lloyd's, London*, 2014 IL App (1st) 132020, ¶ 71.

¶ 20 The dispute here concerns the point at which the sums at issue became "due" for purposes of the Interest Act. Galena argues that it was 30 days after it filed its proof of loss. According to

Galena, the proof of loss supplied GNY with all the information necessary to determine the amount due and, thus, the amount due was determinable at that time. GNY counters that the sums at issue became due 30 days after the final appraisal award was issued. GNY argues that the amount due was not "easily ascertainable" and points to the policy's loss payment provision.

¶ 21 We agree with GNY. To be sure, although the proof of loss may have provided GNY with the information it needed to determine the amount due, that does not necessarily establish that the amount due was *easily* determinable. See *Spagat*, 130 Ill. App. 3d at 138 (in reversing the trial court's order for prejudgment interest, the reviewing court found that "the amount of damages required expert testimony as to the value of the property at the time of the breach" and was, therefore, not "fixed or easily ascertainable"). Here, the trial court found that the amount due was not "readily ascertainable." The record supports this determination. GNY initially determined, based on an estimate prepared by its consultant, that the amount due Galena was $730,396.30, whereas Galena's proof of loss, based on an estimate performed by its contractor, determined that the amount due was $5,020,438.90. The appraisal panel concluded that, based on the July 2017 date of loss, the ACV was $1,676,304.46 and the RCV was $2,184,771.03. The appraisal panel concluded that, based on the February 2021 date of the appraisal, the RCV was $2,634,946.98. Given the great disparity between the amounts claimed due by the parties, as well as the disparity between those amounts and the final amounts determined to be due by the appraisal panel, we cannot say that the court's conclusion that the amount due was not "readily ascertainable" was an abuse of discretion. See *Couch*, 279 Ill. App. 3d at 1055 (finding that the fact that the plaintiff claimed $270,670 in his proof of loss but the jury awarded $35,000 "serves as a strong indication that the amount of damages was not readily ascertainable").

¶ 22 This conclusion is also consistent with terms of the policy's loss payment provision, which provided for payment within 30 days of the parties' agreement as to the amount due or an appraisal award. See *Trzcinski v. American Casualty Co.*, 953 F.2d 307, 316 (7th Cir. 1992) (finding that the terms of a similar loss payment provision determined when money was "due" under the policy and precluded an award of interest under the Interest Act). Here, under the terms of the policy, the payment became due 30 days after the appraisal award. Because GNY timely paid the sums due, no interest is owed.

¶ 23 Galena's reliance on *Old Second National Bank v. Indiana Insurance Co.*, 2015 IL App (1st) 140265, does not warrant a different conclusion. In that case, vandals broke into the insured's property and stole copper pipes and other personal property. *Id.* ¶ 9. The insurer denied coverage, reasoning that the policy precluded coverage for a loss occurring when the property is vacant. *Id.* The trial court granted summary judgment to the insured on its claim for breach of an insurance contract, finding that the loss was a covered loss, and it granted the insured prejudgment interest from the date that the insurer denied coverage. *Id.* ¶ 1.

¶ 24 On appeal, the insurer argued that the trial court erred by fixing July 15, 2010—the date that the coverage was denied—as the accrual date for prejudgment interest. *Id.* ¶ 36. The insurer argued that the money did not become due until December 16, 2013—the date that the final judgment resolving the claims was entered. *Id.* In support, it relied on the language of the policy (similar to the loss payment provision in the present case), which provided "that it will pay a covered loss within 30 days after receiving a sworn proof of loss, provided all of the terms of the policy have been complied with and an agreement as to the amount of the loss has been reached or an appraisal award has been made." *Id.*

¶ 25 The reviewing court rejected the insurer's arguments for several reasons, none of which is applicable here. Concerning the insurer's reliance on the loss payment provision, the court found that the insurer forfeited any argument as to the provision because it failed to raise it below. *Id.* ¶ 37. Notwithstanding forfeiture, the court further found that the provision had no relevance to the issue of when the money owed became due, because the insurer "completely denied coverage." *Id.* ¶ 40. Regarding the issue of whether the amount due was "determinable," the court found that the issue was forfeited because the insurer "made no argument in its opening brief [on appeal] that the amount due *** was not easily computed." *Id.* ¶ 39. Finally, the court found that any error in the court's fixing of July 15, 2010, as the accrual date for prejudgment interest was invited by the insurer, because the insurer asserted, in response to a motion below, that July 15, 2010, was the appropriate date. *Id.* ¶ 41.

¶ 26 Here, unlike in *Old Second*, GNY did not forfeit the critical issue, *i.e.*, whether the amount due under the policy was easily determinable. (Indeed, in *Old Second*, there was no dispute over the amount due under the policy; instead, the dispute was over whether coverage was completely barred under the policy. *Id.* ¶¶ 1, 31.) And, unlike in *Old Second*, GNY did not invite the precise error of which it now complains.

¶ 27 We note that, at oral argument, counsel for Galena suggested that the appraisal should have taken place sooner. To be sure, according to GNY's declaratory-judgment complaint, Galena made a demand for an appraisal on March 16, 2018, which GNY rejected. The stipulation as to the appraisal was not executed until July 2020. Counsel seemed to be suggesting that any delay in the appraisal should be attributed to GNY. However, counsel conceded that Galena was making no argument that the delay was "unreasonable and vexatious." See 815 ILCS 205/2 (West 2018) (allowing for interest "on money withheld by an unreasonable and vexatious delay of payment").

Moreover, Galena did not raise this argument below or in its brief before this court. Thus, it is forfeited. See *Fauley v. Metropolitan Life Insurance Co.*, 2016 IL App (2d) 150236, ¶ 55 (issues not raised in the trial court are forfeited and may not be raised for the first time on appeal); Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (arguments not raised in an opening brief are "forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). We note further, and as both parties also seemed to concede, that the better approach here would have been to resolve the issue of interest in the stipulation.

¶ 28 Based on the foregoing, we affirm the trial court's order denying an award of interest.

¶ 29 III. CONCLUSION

¶ 30 We affirm the judgment of the circuit court of Du Page County.

¶ 31 Affirmed.

No. 2-21-0394

Cite as:	*Greater New York Mutual Insurance Co. v. Galena at Wildspring Condominium Ass'n*, 2022 IL App (2d) 210394
Decision Under Review:	Appeal from the Circuit Court of Du Page County, No. 18-MR-474; the Hon. Bonnie M. Wheaton, Judge, presiding.
Attorneys for Appellant:	Edward E. Beckmann, Beckmann Law Firm, LLC, of Bloomington, Minnesota, for appellant.
Attorneys for Appellee:	Thomas B. Orlando, Matthew S. Ponzi, and Brian E. Devilling, of Foran Glennon Palandech Ponzi & Rudloff PC, of Chicago, for appellee.