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IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

Page
FILED
JUN 26 2017

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ORIGINAL

PULERA COLLISION, INC., a)
Wisconsin Corporation;)
ARMANDO'S COLLISION CENTER,)
INC., a Wisconsin)
Corporation; JAY-BEE)
COLLISION REPAIR CENTER,)
INC., a Wisconsin)
Corporation,)

Plaintiffs,)

vs.)

No. 16 CH 821)

STATE FARM MUTUAL)
AUTOMOBILE INSURANCE)
COMPANY, an Illinois Mutual)
Insurance Company,)

Defendant.)

REPORT OF PROCEEDINGS at the hearing of
the above-entitled cause before the Honorable
Luis Berrones, Judge of said Court, on the 9th
day of June, 2017, at the hour of 9:42 a.m.

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1 APPEARANCES:

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10 MR. MICHAEL L. McCLUGGAGE,

11 On behalf of the Defendant.

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1 THE COURT: Pulera vs. State Farm. I
2 have a motion to dismiss.

3 MR. McCLUGGAGE: Good morning, your
4 Honor, Mike McCluggage for the defendant, State
5 Farm.

6 MR. NOVOSELSKY: David Novoselsky for
7 the plaintiffs, your Honor, good morning.

8 THE COURT: Good morning. Go ahead,
9 it's your motion.

10 MR. McCLUGGAGE: Your Honor, when we
11 were last here, the Court dismissed plaintiff's
12 complaint, the tortious interference, breach of
13 contract, common law fraud claims because none
14 of the three plaintiffs had set out facts to
15 support the elements of those cause of action,
16 as each of them is required to do under Illinois
17 fact pleading standards. And I don't think
18 there's any dispute that fact pleading standards
19 apply. If you look at the cases cited by the
20 plaintiffs, Grund, Schuster, Feigner (phonetic),
21 clear fact pleading is the standard.

22 I'll try to be brief, avoid
23 repeating a lot of what's in our papers, but the
24 bottom line is that the first amended complaint

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1 doesn't cure the legal insufficiency in the
2 claims made by these individual plaintiffs.

3 We submitted a red line that
4 attempts to show the ways in which the first
5 amended complaint differs from the prior
6 complaint.

7 I think it's fair to say there are
8 no changes that overcome the insufficiencies, so
9 I'll address each of these counts, contract,
10 fraud, and tortious interference; but there's
11 one overarching shortcoming, and that's that the
12 facts are absent. The facts still aren't there.

13 Each of these plaintiffs as the
14 Court may recall -- and I know you've looked at
15 the papers -- is a body shop which formerly had
16 a Select Service contract with State Farm; and
17 according to these allegations they had these
18 contracts for a number of years.

19 First amended complaint alleges
20 that they were no longer participants in the
21 Select Service program as of sometime in 2015,
22 but there aren't any allegations as to how the
23 Select Service contracts ended.

24 Under the agreements, they agreed

1 to a number of provisions including provisions
2 as to how the rates and pricing for paints and
3 materials would be set in return for being
4 identified as a State Farm Select Service
5 facility.

6 An example of the Select Service
7 contract is an exhibit to their complaint; and
8 as such, it's part of the pleadings, and we've
9 agreed with Mr. Novoselsky that that particular
10 Select Service contract can be representative of
11 the contracts of all three.

12 MR. NOVOSELSKY: That's correct, your
13 Honor.

14 THE COURT: Okay. That was one of my
15 questions. I only had one contract.

16 MR. NOVOSELSKY: That's correct. We've
17 stipulated to kind of reduce the paperwork. We
18 apologize for that.

19 THE COURT: No, that's fine. I assume
20 they were all the same.

21 MR. NOVOSELSKY: Pretty much the same
22 all over the country.

23 MR. McCLUGGAGE: There may be some minor
24 differences, but I think for the purposes for

1 what we're talking about they're the same.

2 MR. NOVOSELSKY: We can so stipulate,
3 your Honor.

4 MR. McCLUGGAGE: And it's notable, by
5 the way, these agreements are terminable at any
6 time by either party, and also there's no
7 allegation here that a body shop has to be in
8 the Select Service program to do business with
9 people insured by State Farm.

10 Let me return to the contract
11 claim. Basics, to state a claim for breach of
12 contract, they have to identify a provision of
13 the contract that was breached and the facts
14 that show the breach.

15 They didn't satisfy those elements
16 in their original complaint, and they haven't
17 done so here. They don't identify any
18 particular provision of the contracts that State
19 Farm supposedly breached, and that in and of
20 itself makes their contract claims insufficient.

21 And when they start talking about
22 the conduct that they contend was a breach of
23 the complaint, reduction of rates for labor,
24 reduction of prices for paint and materials,

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1 lowering of the rating on the State Farm
2 website, discouraging State Farm from using
3 their services, they don't cite any provision of
4 the contract that was violated by this conduct.

5 And it's pretty clear from the
6 contract itself that the conduct they allege is
7 either explicitly permitted under the contract
8 or it's not even addressed under the contract;
9 and, of course, if it's not addressed under the
10 contract, it can't be the basis for a contract
11 claim.

12 And under Illinois law, the
13 language of the contract takes precedence over
14 the allegations of the complaint based on the
15 contract.

16 Here, the contract explicitly
17 provides that the plaintiffs agree to accept the
18 labor rates and paint and materials pricing
19 identified through a State Farm survey. That's
20 in Section 4.

21 There was no contractual obligation
22 for State Farm to consult with the plaintiffs to
23 conduct a survey in a particular way. Of
24 course, they could depart the arrangement if

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1 they found the rates unacceptable.

2 The agreement also allows -- and
3 this is Section 5(c), allows State Farm to
4 evaluate the performance, communicate
5 performance rankings in advertising,
6 publications, or other media for customers.

7 So as to those --

8 MR. NOVOSELSKY: Would you repeat that
9 again? I apologize.

10 MR. McCLUGGAGE: Yes. What I was
11 saying, David, is that Section 5(c) allows State
12 Farm to evaluate the performance of shops and to
13 communicate the performance rankings in
14 advertising, publications, and otherwise to
15 customers and others.

16 So those provisions of the contract
17 clearly provide that these allegations of
18 misconduct are, in fact, not inconsistent with
19 the language of the contract and permitted by
20 the contract.

21 They also allege State Farm
22 encouraged vehicle owners to use the services of
23 other State Farm Select Service shops after they
24 left the Select Service program. None of these

1 plaintiffs has identified a single customer who
2 was steered away, and I'll come back to that in
3 connection with the tortious interference claim.

4 And perhaps more importantly for
5 purposes of the contract claim, there isn't any
6 provision that obligated State Farm to direct
7 customers to plaintiffs' shops. In fact, the
8 very first line of the agreement tells a shop
9 that signs up into the Select Service program
10 that vehicle owners have the right to determine
11 which shop they want to use.

12 And then the other point is, once
13 the contracts were over, the plaintiffs didn't
14 have contract rights. So to the extent they're
15 focusing their contract claim on State Farm's
16 conduct after the contracts ended, it can't form
17 a basis for a breach of contract claim.

18 MR. NOVOSELSKY: Do you want to do this
19 count by count?

20 THE COURT: No. We'll go through the
21 whole thing.

22 MR. NOVOSELSKY: Because I get confused
23 sometimes. I'm getting older.

24 THE COURT: We're all getting older, but

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1 go ahead and finish your argument.

2 MR. NOVOSELSKY: Some of us are. Other
3 people just die and they don't get old.

4 MR. McCLUGGAGE: Moving on to the fraud
5 claim, fraud claim is related to and dependent
6 on the breach of contract.

7 If you look at paragraph 75, they
8 base their fraud claim on an allegation that
9 State Farm fraudulently represented to the
10 plaintiffs that it would abide by the terms of
11 the Select Service agreement. They don't
12 specify any provision of the contract that was
13 the subject of the representation. So you don't
14 have a specific allegation of a
15 misrepresentation.

16 And then, of course, to state a
17 legally adequate fraud claim, they have to plead
18 specifics. They have to plead the specific
19 facts of the misrepresentation, why it was
20 false, who made it, when it was made, to whom it
21 was made; and none of the plaintiffs have
22 supplied any fact allegations to satisfy those
23 elements.

24 In the original complaint, they

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1 allege that State Farm, the corporation, had
2 made a representation that it would abide by
3 some provisions of the contract without
4 specificity. That obviously wasn't a
5 particularized allegation that somebody had made
6 a misrepresentation.

7 I think their only attempt to
8 improve the fraud allegation was to add the
9 words "through its agents and employees." In
10 other words, State Farm through its agents and
11 employees had made the representation, but that
12 doesn't identify any person who made a relevant
13 statement to any plaintiff, nor are there any
14 allegations when these misrepresentations were
15 made or to whom they were made.

16 And since the plaintiffs have not
17 stated facts to establish a breach of contract
18 claim, keeping in mind the fraud claim was
19 focused on contract, they can't assert with
20 facts how a misrepresentation concerning the
21 contract was false.

22 Then apart from the lack of
23 particular facts, the lack of specificity, the
24 fraud claim also should fail because they're

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1 basically trying to disguise a contract claim in
2 the language of fraud, and under Illinois law
3 that doesn't work. Smith vs. Prime Cable case
4 so holds.

5 The cases the plaintiffs cite in
6 their arguments on tortious interference make it
7 very clear that a tortious interference
8 complaint fails if it doesn't contain factual
9 allegations in support of each element of the
10 claim, and I'm referring to the Grund case and
11 the Schuster case.

12 The first element of the tortious
13 interference claim is the plaintiff had a
14 reasonable expectation of a valid business
15 relationship; and in Illinois, a valid business
16 expectancy involves an allegation of
17 relationships with specific third parties. The
18 DuPage Aviation Corps case makes that clear, but
19 there are also others.

20 None of the plaintiffs has
21 identified a single party with which it had a
22 business relationship, much less a reasonable
23 expectation that it would have more business
24 from that specific third party in the future.

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1 In the context of the collision
2 repair business, I would suggest that given
3 vehicle accidents are infrequent, it's
4 implausible to believe that there's going to be
5 any reasonable business expectation as to any
6 particular vehicle owner.

7 Even if they had identified
8 specific customers, they would also have to
9 state facts to support intentional interference
10 with their relationships on the part of State
11 Farm.

12 In the language of the Schuster
13 case, the plaintiff would have to allege that
14 the defendant acted toward a third party.
15 There's none of that here. No plaintiff has
16 alleged State Farm conduct that would satisfy
17 this Shepherd intentional interference
18 allegation claim.

19 One of the benefits of the Select
20 Service participation is that vehicle owners
21 could view the names of these Select Service
22 shops on State Farm's website, and that's an
23 advantage to the shop. Once those names
24 disappear from the website, it's entirely

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1 possible that the vehicle owner will go
2 elsewhere, but that's not tortious interference.
3 That's not even interference.

4 That leads to the additional reason
5 why the tortious interference claim fails, and
6 that is that you can't bring tortious
7 interference claims against parties like State
8 Farm in this instance that have a financial
9 interest in the transaction.

10 Under the insurance policy State
11 Farm is responsible to reimburse the repairs,
12 has an interest in the insured's selection of
13 the repair facility.

14 THE COURT: Is that a 2-615 argument or
15 an affirmative matter that's under 2-619?

16 MR. McCLUGGAGE: I think it's a 2-615
17 argument as well; but even if it isn't, that's
18 one of multiple reasons why the tortious
19 interference claim should fail.

20 THE COURT: But that would come at a
21 later point in time because, if it's a 2-619
22 argument, I can't discern that from the
23 complaint itself. You're telling me that's the
24 situation, so really it's not before me.

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1 MR. McCLUGGAGE: I don't think there's
2 any doubt that State Farm has a financial
3 interest in the relationships with its insureds
4 and in the rates, for example, it has to pay
5 body shops for repairs. I don't know that
6 there's any -- I don't know that we need to go
7 outside the pleadings for that.

8 I think the Select Service in
9 itself basically brings those facts; but short
10 of that, we don't have any identification of
11 third parties; and we don't have any
12 identification by any individual plaintiff,
13 keeping in mind that they all have to satisfy
14 these elements here, of conduct by State Farm
15 that would constitute intentional interference.

16 Finally, the declaratory count,
17 this is similar to the permanent -- or
18 preliminary and permanent injunction counts that
19 the Court dismissed first time around, and they
20 have not come back.

21 But declaratory relief is a remedy.
22 It's not a substantive cause of action. It has
23 to be based on a substantive cause of action,
24 and here they don't have legally sufficient

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1 causes of action, so it would fall for that
2 reason alone, but the point is it's not a
3 separate stand-alone cause of action.

4 The other point is that to the
5 extent they're seeking declaratory relief based
6 on rate issues for which they are seeking
7 damages -- they're seeking declaratory relief
8 for a complaint that's based on an action for
9 damages that's already accrued, declaratory
10 relief is appropriate to address threats of
11 future harm.

12 So, your Honor, we think that this
13 complaint once again fails. Plaintiff's
14 principal argument that the complaint is
15 sufficient is that they're not required to plead
16 evidence.

17 We might agree with that depending
18 on what they're talking about, but they do have
19 to plead facts. In the Feighner case on which
20 they principally rely makes it clear that
21 factual allegations are necessary.

22 They haven't gotten it down this
23 time, and so this complaint should also be
24 dismissed.

1 They seek further right to amend.
2 I think the Court gave pretty clear direction
3 the last time dismissing the original complaint
4 and allowing leave to amend. This was an
5 opportunity for them to satisfy the
6 shortcomings, and they haven't done it.

7 THE COURT: Mr. Novoselsky?

8 MR. NOVOSELSKY: Judge, thank you; and,
9 again, if I'm losing track, it's because of the
10 age, not the ability to reason.

11 I listen today, and this is frankly
12 where I think this has always been going. If
13 you listen to the argument, the issue on
14 pleading ultimate facts in both the Feighner
15 case and the Scott case that came up in the
16 antitrust context which we actually discussed in
17 the other earlier cases about insufficiency, it
18 says that the purpose of a complaint is to
19 identify the cause of action in such a manner
20 that the party responding, frankly to coin a
21 phrase, knows what they're being asked to
22 respond to.

23 What we've heard now -- let me go
24 through the first part of what was argued. You

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1 had a lengthy discussion this morning -- and, if
2 necessary, I suggest the Court order the
3 transcripts and the Court can read while you're
4 taking notes.

5 Well, the contract says we can do
6 this. Basically what their defense is under
7 6-15, we complied with the contract. State Farm
8 complied with the contract; therefore, it
9 doesn't state a cause of action.

10 That may be true under 6-19 or a
11 summary judgment. They clearly understand where
12 in their own contract this is based on,
13 primarily the question of they concede -- and
14 it's in the contract -- that labor rates can be
15 changed by appropriate criteria.

16 Counsel says, well, we have the
17 right to change these rates and it's in the
18 contract. That begs the question they obviously
19 know exactly what this complaint focuses on and
20 their position is -- and I listened to it
21 carefully this morning -- Judge, look at the
22 contract, we can -- I think his phrase is we can
23 do every one of these things.

24 So, in other words, we know exactly

1 what you're saying. We have satisfied --
2 whether it's Carriageway West or the Scott case,
3 but you haven't given us evidence to show that
4 you can prevail on our breach of contract.

5 I paint your car. We agree that
6 they paint your car you give me \$100. We come
7 in and say, Judge, they didn't paint our car
8 properly. They say, well, Judge, look at the
9 contract. It says if we did it right we get our
10 money, so where is the cause of action? Judge,
11 it's very eloquently dressed up, but that's
12 basically what it is.

13 And, again, I invite the Court, if
14 I'm misstating this, to go back, take a look at
15 what you just heard. It's exactly what was
16 heard.

17 So State Farm knows precisely using
18 the Carriageway West argument the allegations as
19 to what they're being charged with breaching in
20 this contract.

21 They respond by acknowledging that
22 they know it, which is far different from all
23 the other cases on a 6-15, but they say to you
24 explicitly and in their pleadings we have a

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1 right to change the rate; therefore, you can't
2 sue us for it.

3 That may be possible if they did it
4 the correct way. The contract, I point out,
5 doesn't say we can arbitrarily or on our own
6 volition change the rate. It says based on
7 certain criteria.

8 Our position is -- and it's in the
9 complaint very detailed -- the criteria they use
10 was inappropriate. They used a demographic
11 survey basically saying Kenosha is similar to
12 Lake County, which is similar to Chicago, which
13 I think would surprise a lot of people who live
14 in those three areas. And, therefore, since the
15 demographics are similar, the rates should be
16 similar because body work in those areas should
17 be treated the same way. That's an issue of
18 fact.

19 I want to focus on the fact that
20 they've identified it in their own motions to
21 dismiss. They don't say we don't know what
22 you're talking about, which in theory is what a
23 6-15 says, because the other thing they ignore
24 if it isn't specific enough, the same thing with

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1 who are the identity of each customer. That is
2 a request to admit or a motion for more
3 definitive pleading.

4 We keep coming back -- everything
5 I've heard today is lack of evidence. Every
6 single allegation they know exactly what they're
7 charged with, so that's as to the contract.

8 Now as to this tortious
9 interference, it's interesting. I just heard
10 today given the fact that vehicle collisions
11 occur only spasmodically we really can't be sued
12 for interference because you would have to
13 identify a person who is going to have another
14 accident. I listened very carefully to that.

15 In other words, no insurance
16 company could ever be sued for interference.
17 Why? Because in order to do that, you would
18 have to establish that Person X who you fixed
19 his car once before will never have another
20 accident.

21 That comes back to the Oakleaf case
22 which your Honor read which is pretty
23 interesting in Illinois. Sometimes I put my own
24 failures, where a franchisee, the person who

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1 gets the franchise, the franchisee sued the
2 franchiser who never allowed them to complete
3 their franchise. In other words, so they sued
4 them for loss of business.

5 And the franchiser successfully
6 argued, well, wait a minute, you didn't have any
7 business. You only have to prove that John
8 Smith would have come in and hired you -- they
9 were a computer company -- to set up their
10 computer network; and since you never got
11 started in your business, you cannot prove
12 damages. It's a spin on this.

13 The Appellate Court said that's
14 like saying the wrongdoer by committing the
15 wrongful act, i.e., canceling contract or not
16 supplying another contract, can obviate any
17 claim for damages even though if the
18 relationship had gone ahead they would have had
19 damages or at least a cause of action and profit
20 from their own conduct. That's just a variation
21 on this.

22 And I didn't cite, and I apologize.
23 When I was listening to the argument, it came to
24 my mind. It's called Oakleaf of Illinois vs.

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1 Oakleaf. It's a First District --

2 THE COURT: But isn't there a difference
3 between a startup who is trying -- I mean, isn't
4 the distinction a business that's trying to get
5 started as opposed to an ongoing business who
6 has regular customers and has contracts?

7 I mean, that's what his argument is
8 is that you're an ongoing business and you're
9 saying we tortiously interfered with your
10 customers, but you haven't identified what
11 customers you've lost because of it. I don't
12 know what your client does other than body shop
13 repair. He may have other automotive
14 services --

15 MR. NOVOSELSKY: These are all body
16 shops.

17 THE COURT: If he has other automotive
18 services or whatever. But he says Mr. John Doe
19 used to come in here for oil changes all the
20 time but since he saw the rating on State Farm I
21 don't even have him.

22 MR. NOVOSELSKY: Here's the problem with
23 that, your Honor. I agree there's a
24 distinction. I think in our case it's even

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1 clear.

2 I just heard the argument that you
3 can't tell if any particular person will ever
4 have another accident. Therefore, there can't
5 be tortious interference because it doesn't make
6 any difference if John Smith came in to me and
7 said, you know, I'm not going to bring my car
8 back to you if there's another accident because
9 State Farm has dropped you.

10 Let's say I say that, which is what
11 they say we have to say. The response would be,
12 well, Mr. Smith isn't going to bring his car in
13 because it never got injured -- didn't get
14 damaged, pardon me, damaged. I'm thinking of
15 people, not cars, although a lot of people love
16 their cars.

17 And that's really the problem with
18 this argument. They're saying frankly -- and
19 it's right in the record; counsel said it --
20 well, given the service this insurance company
21 provides for its insureds, unless a specific
22 insured would have gone to that body shop and
23 you can prove that they didn't, there's no cause
24 of action. But it's even better than that

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1 because then you only have a cause of action as
2 to the loss of business of that one consumer out
3 of hundreds of thousands.

4 So it's kind of a circular argument
5 which says basically there is an immunity for a
6 particular cause of action in the State of
7 Illinois based on -- and it's the same thing as
8 Oakleaf. You have to show us the actual loss;
9 but since no one came to you with the damage, no
10 one came to you to buy the computer, you have no
11 damage.

12 So I think the fact that they're an
13 existing business makes it even less
14 questionable than in Oakleaf because in Oakleaf
15 the Court said I don't know if you would have
16 stayed in business, how do you know you would
17 have succeeded.

18 And the Appellate Court said that's
19 the problem here. You cut somebody's water off,
20 and then you say prove to me that you would have
21 had the opportunity to cook with it, and that's
22 what they're saying to you right now: Unless
23 there has been a specific customer that comes in
24 saying I just had another accident, Steve or

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1 Bob, and I would love to bring it to you because
2 you do good work but State Farm says they won't
3 pay for it here, you charge the wrong labor
4 rates, that is in essence what they're saying.

5 Now they may be in a position of
6 providing evidence on a 6-19 or a summary
7 judgment showing based on their own statistics
8 because they're the ones that have it that the
9 flow of business to the other shops in the area,
10 which would be an indication of people are going
11 elsewhere because of this, has not increased
12 and, therefore, it's not caused by it. That's
13 the way to do it. I've found another case
14 dealing with --

15 THE COURT: Just a drop in accidents,
16 people not having accidents.

17 MR. NOVOSELSKY: That's my point.
18 People have accidents every day but not the same
19 people because, candidly, I used to have State
20 Farm and somebody hit me and they dropped me
21 because the other guy had State Farm and I had a
22 bigger policy. I'm sorry, but that's typical of
23 insurance companies. It's not State Farm.
24 They're actually a pretty good carrier.

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1 THE COURT: I don't think he took
2 offense.

3 MR. NOVOSELSKY: No, I didn't think he
4 did, as long as they pay his bill.

5 But the point is, your Honor, it's
6 an argument that basically says -- and I'm not
7 trying to beat this to death -- we can never be
8 sued because of the nature of our business.

9 A body shop, we can cut them off,
10 put them out of business in essence but since
11 they can't show that their business is based on
12 repeat customers by specific customer -- and I
13 assure the Court we can go back and show that we
14 had a steady stream of business. Were some of
15 them repeat customers? Yes. Can I say that
16 Customer Smith -- and that's the problem.
17 That's what they said last time, and your Honor
18 said why don't you take a crack at it. We did.
19 But if you listen to the argument today, that's
20 the flaw in this argument.

21 We have a wonderful type of
22 business that we can do something no other
23 business -- most other businesses can't by the
24 nature of our business.

1 I guess it was a doctor who said --
2 if your Honor remembers the NorthShore case
3 which you ruled against me on. The issue there
4 was, well, Dr. Smith, who has an independent
5 practice, would have to show that Mr. Allen who
6 came to him before went to NorthShore and it's
7 only the specific person, then your damages are
8 limited to losing Mr. Allen. That's contrary to
9 the entire antitrust concept. Your Honor didn't
10 say that, by the way, but that would be --

11 THE COURT: I don't remember saying
12 that, but go on.

13 MR. NOVOSELSKY: You didn't. No, you
14 didn't. We have a disagreement on other issues,
15 and we'll see what the Appellate Court says, but
16 that's neither here nor there. But that's my
17 point, your Honor. We're creating arguments
18 which, if you look at them, at best they're
19 factual.

20 The contract argument is clearly
21 facts, we didn't breach the contract. And your
22 Honor very candidly admits a 6-15 on that basis.
23 6-19, yes. Summary judgment, yes. That's the
24 contract.

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1 The tortious interference we just
2 walked through. We've said everything we can
3 say factually, so the issue is not do they
4 understand the cause. The issue is how much
5 proof do we have, i.e., evidence. That is
6 something that, if they're asked for specifics,
7 you can get that in a request to admit or you
8 can get it in a motion for more definite
9 statement.

10 Again, they're saying as a matter
11 of law -- and I hate to keep going back -- we
12 don't understand the cause of action. That's
13 what Carriageway West does, that -- or there is
14 no recognized cause of action. Those are the
15 two things under 6-15.

16 They're saying something completely
17 different. You haven't given us names of
18 specific people, which also they're saying very
19 candidly is you really can't because you would
20 to have a person who was a repeat person who
21 went to a different body shop which would then
22 limit damages to one person and, I guess, would
23 open the gates to conducting discovery to see
24 how many other State Farm insureds went to his

1 body shop. Again, that's a fact issue.

2 Now the declaratory judgment, I
3 think, is pretty straight forward, your Honor,
4 and I know you've got questions for me, so I'll
5 finish it up.

6 The case they cite simply doesn't
7 say what they say. It's in our response at
8 Page 3 and 4. Barringer simply says that a
9 declaratory judgment is remedial in nature.
10 Agreed. That doesn't mean a cause of action
11 doesn't exist.

12 The complaint requests declaratory
13 relief based on our belief that the contract was
14 violated. I agree they say, well, it's based on
15 the assumption that there's a valid contract.
16 Well, if there's no valid contract, your Honor,
17 you're not going to get declaratory rights in
18 any situation. So I think that argument is not
19 well taken. I know the Court was writing down
20 some questions, and I'm happy to listen to the
21 Court.

22 THE COURT: No, go ahead, finish.

23 MR. NOVOSELSKY: I think, your Honor,
24 we're dealing really with a motion to dismiss

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1 which illustrates that under Illinois law there
2 are more than sufficient facts to allow this
3 defendant to know precisely what the cause of
4 action is.

5 Let me point this out: Unlike most
6 6-15 motions that say no such cause of action
7 exists based on these facts, the motion here
8 says we don't think there's enough facts to
9 prove that we violated, particularly in the
10 contract count.

11 You know, if they talk specific --
12 they don't say the allegations as to how it was
13 violated are unclear. They deal specifically
14 with the changes in the labor rate based on the
15 contractual clause that that change in rating is
16 supposed to be key to a certain way of doing
17 things.

18 Counsel said, well, we can do this
19 under the contract; therefore, it's a dismissal.
20 And, again, I would like the record to reflect
21 that I think what we're dealing with here may be
22 a case that will be tough for me to prove
23 eventually but a case that has been set forth in
24 sufficiency that the Court should allow the

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1 matter to go ahead.

2 If I was defense counsel, I would
3 be in here on a summary judgment or a motion
4 under 6-19, as your Honor pointed out on that
5 issue, which is clearly a 6-19 issue and not a
6 6-15, and ask the Court to deny the motion to
7 dismiss and let the case proceed.

8 THE COURT: Go ahead.

9 MR. McCLUGGAGE: Mr. Novoselsky is
10 essentially making an argument that Illinois
11 pleading standards are notice pleading
12 standards, much as the federal standards are
13 notice pleading standards.

14 But our contract argument is clearly a
15 2-615 argument because, number one, they haven't
16 specifically identified a provision of the
17 contract that was violated. Even if he gets
18 beyond that, they attach the contract to the
19 complaint. It becomes part of the complaint and
20 thereby controls --

21 THE COURT: But then he said that you
22 basically violate the rate provision of the
23 contract because you changed it and you
24 inappropriately, improperly changed it. That

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1 may or may not be true.

2 Saying that I have a right to
3 change it doesn't address the issue that these
4 allegations said that you improperly changed it,
5 that you used criteria you shouldn't use, and it
6 was wrong and you breached the contract. How
7 can I resolve that issue at this point?

8 MR. McCLUGGAGE: Well, the provision
9 simply says that the shop agrees to the rates
10 that will be determined in accordance with the
11 survey. There's nothing in the contract
12 concerning --

13 THE COURT: He said your survey was
14 wrong. You could take a survey and say, you
15 know what, the rates down in southern Illinois
16 are "x," which is not a large metropolitan area,
17 and that's what we're going to base the rates
18 on.

19 Isn't that an issue, a factual
20 issue, whether, in fact, what you did was
21 appropriate? And he's saying what you did isn't
22 appropriate because you put his client into a
23 certain geographic area that he shouldn't be
24 placed in to determine the rates.

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1 MR. McCLUGGAGE: Well, number one --

2 THE COURT: And ultimately you may be
3 right to say, you know what, I can use whatever
4 survey I want. I don't know if you can or not,
5 but at this point it's a 2-615.

6 MR. McCLUGGAGE: Well, I understand, but
7 Lake County and Kenosha County are pretty close
8 together --

9 THE COURT: I don't know if I can take
10 judicial notice of that.

11 MR. McCLUGGAGE: Just on the face of it,
12 there's nothing inappropriate, and there's
13 nothing in the contract that requires that the
14 survey be conducted in a particular way. I
15 think his argument is really an argument that
16 there is some obligation of good faith and fair
17 dealing.

18 THE COURT: Well, that's what I was
19 going to say. This is probably a true good
20 faith and fair dealing with one another because
21 it is within your discretion as to how you're
22 going to do the survey.

23 MR. McCLUGGAGE: I don't think this
24 would fit into the narrow category of complaints

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1 that would fit into the good faith and fair
2 dealing concept in Illinois. It's been limited.
3 But in any event, he hasn't pleaded that. He's
4 pleaded breach of contract.

5 THE COURT: But that is a breach of
6 contract. The violation of the doctrine of good
7 faith and fair dealing is a breach of contract
8 claim.

9 MR. McCLUGGAGE: Well, you have to have
10 that as well, but it's only recognized in
11 certain circumstances that aren't really in
12 play. We haven't briefed that issue
13 specifically because they haven't made that
14 claim in their amended complaint.

15 So in any event, the contract
16 doesn't require that the survey be conducted in
17 any particular way; and, of course, the shop has
18 the option to get out of the contract if they
19 don't like the rates that they're able to charge
20 State Farm, terminable at will.

21 As to the tortious interference
22 claim, Illinois law is clear. You have to
23 identify specific third parties with which there
24 was interference.

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1 The argument he's making, as I
2 understand it, is at any time a buyer of a
3 service doesn't come back to the seller of the
4 services that seller can pursue a tortious
5 interference claim. I'm not sure what the
6 boundaries of his argument would be.

7 THE COURT: But he alleges in
8 paragraph 57 a loss of approximately 80 percent
9 of their State Farm business. Isn't the
10 inference that there was something -- again, the
11 issue is, based on the face of the complaint,
12 has he alleged sufficient facts or has he
13 alleged enough to get past this point.

14 Ultimately he's right. You may
15 succeed because he can't prove it, but right now
16 I'm really restricted with what's in the
17 complaint; and when he says 80 percent of our
18 State Farm clientele business is no longer there
19 since State Farm did this, giving him the
20 benefit of all the inferences, doesn't that
21 raise an inference that maybe there's some
22 connection between what you did and his loss of
23 business and that you tortiously interfered with
24 it?

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1 MR. McCLUGGAGE: I don't think that
2 satisfies the necessity of identifying specific
3 persons with whom there's been interference.
4 But I would also say -- and I think the
5 requirement is pretty clear -- they haven't
6 alleged any acts by State Farm to intentionally
7 interfere with those relationships. That's just
8 not there.

9 THE COURT: Anything else?

10 MR. McCLUGGAGE: No, I think that's it,
11 your Honor.

12 THE COURT: All right. I've reviewed
13 the briefs. I read the complaint. With respect
14 to counts -- well, Count I, the declaratory
15 judgment claim, that count is dismissed with
16 prejudice. I don't think you have a declaratory
17 judgment claim. I think at this point the claim
18 is ripe, and it's accrued. You have a breach of
19 contract, and the Declaratory Judgment Act is
20 meant to have the parties come into court the
21 step right before your cause of action has
22 accrued, and I think at this point we're way
23 past that status. So the Count I, which is the
24 declaratory judgment action, is dismissed with

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1 prejudice.

2 Count II, which is the tortious
3 interference, I think at this stage he's alleged
4 sufficient facts to state a cause of action. I
5 think ultimately it sounds like a difficult case
6 to prove, but I don't know how the evidence is
7 going to come out; but at this point I think the
8 allegations are sufficient to state a cause of
9 action.

10 With respect to Count III, the
11 contract claim, again, I think that the fact
12 that the contract says that these rates can be
13 changed pursuant to survey, I don't think that
14 addresses the issues that he's raised in the
15 allegations in the complaint. So I think he's
16 stated a cause of action with respect to breach
17 of contract.

18 I agree with you that I think
19 Count IV, the fraud claim, is a breach of
20 contract claim disguised as a fraud claim. I
21 don't think there's sufficient allegations that
22 show that there was a fraud claim based on
23 what's in the complaint, so that count is
24 dismissed with prejudice, too.

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1 You have 28 days to file an answer.

2 MR. NOVOSELSKY: I assume the Court is
3 not going to put the magic words -- or maybe the
4 Court was --

5 THE COURT: No, I'm not going to put in
6 the 304(a) language.

7 MR. NOVOSELSKY: I don't want to agree
8 with it on the record, but I understand.

9 THE COURT: So you have 28 days to
10 answer Count III and Count II, it looks like,
11 the tortious interference and breach of
12 contract.

13 MR. NOVOSELSKY: Thank you very much for
14 your time, your Honor.

15 MR. McCLUGGAGE: Thank you, your Honor.

16 (Which were all proceedings had
17 in the above-entitled cause at
18 this time.)

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1 STATE OF ILLINOIS)

) SS:

2 COUNTY OF COOK)

3 I, ANGELA M. INGHAM, a Notary Public
4 within and for the county of Cook, State of
5 Illinois, and a Certified Shorthand Reporter of
6 said state, do hereby certify that I reported in
7 shorthand the proceedings had at the taking of
8 said hearing and that the foregoing is a true,
9 complete, and correct transcript of my shorthand
10 notes as taken as aforesaid, and contains all
11 the proceedings given at said hearing.

12 In witness whereof, I have hereunto set my
13 hand and affixed my notarial seal this 25th day
14 of June, 2017.

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