No. 1-11-0326

FIRST DIVISION
FILED: May 9, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACUITY, Plaintiff/Counter Defendant-Appellee, v. OSLER INDUSTRIES, INC., JOSEPH SELLIKEN, and JOHN BURNS, Defendants/Counter Plaintiffs-Appellants, and EDMUND B. FROST and DEBORAH McINTOSH, Defendants/Counter Plaintiffs.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 07 CH 3908 HONORABLE KATHLEEN M. PANTLE, JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court. Presiding Justice Hall and Justice Rochford concurred in the judgment.

O R D E R

Held: Circuit court correctly held that insured breached notice provisions of its insurance policy and that insurance company was not estopped from asserting a notice defense to its obligations under the policy.

The defendants and counter-plaintiffs, Osler Industries, Inc. (Osler), Joseph Selliken, and John Burns (collectively, the appellants) appeal from an order of the circuit court that 1)

granted summary judgment in favor of the plaintiff and counter-defendant, Acuity, on its first amended complaint for declaratory relief, praying for a judicial declaration that it had no duty under the terms of a commercial general liability insurance policy to defend or indemnify the appellants and Edmund Frost in regard to an action filed against them by Deborah McIntosh; and 2) denied their cross-motion for summary judgment on their first amended counterclaim, seeking declaratory relief on Acuity's duty to provide a defense to, and indemnify them from, the claims in McIntosh's underlying litigation, damages for breach of contract, and additional damages by reason of Acuity's alleged vexatious behavior. For the reasons that follow, we affirm the judgment of the circuit court.

The following facts relevant to our disposition of this appeal are taken from the pleadings, summary judgment motions, and evidentiary material presented to the trial court.

At all times relevant to this suit, Osler was the named insured in a commercial general liability insurance policy issued by Acuity. On October 17, 2005, McIntosh filed an action in the Circuit Court of Cook County, seeking damages from the appellants and Frost based on theories of false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy.

In his deposition testimony, Selliken explained that he believed McIntosh's lawsuit to be an "utter farce" that was not

"worth bothering an insurance company about" because the insurance company might use the incident as "an excuse to raise [his] insurance." Selliken agreed that he began discussing the McIntosh suit with his attorney very soon after it was filed, but he stated that he never read Osler's Acuity insurance policy at any time before he learned that Acuity did not plan to defend Osler in the McIntosh suit. Neither he, nor anyone else associated with Osler, informed Acuity of the McIntosh litigation.

Acuity nonetheless received notice of the McIntosh suit on July 3, 2006, when McIntosh's attorney sent it a letter advising of the pendency of the action against the appellants and Frost and containing an opinion that the allegations in McIntosh's complaint fell within the coverage afforded under Acuity's policy. In his deposition testimony, Timothy McCracken, Osler's chief operating officer, recalled that Jeffrey Nimmo, an Acuity claims adjuster, contacted him on July 5, 2006, before the two finally spoke the next day. Although McCracken could not recall the conversation, he did not dispute the accuracy of Nimmo's call log, which stated that McCracken told Nimmo that Osler did not expect coverage and had retained its own attorney. According to Nimmo's log and testimony, he contacted Osler's defense counsel on July 10 and learned that discovery on the case had just begun and that counsel believed that McIntosh's complaint had no merit. At that point, Nimmo testified, he began consulting Acuity's own outside counsel to help determine whether Acuity should participate in the McIntosh litigation.

On July 13, 2006, McIntosh's attorney sent a second letter to Acuity outlining the basis for his opinion that the allegations in McIntosh's complaint fell within the coverage afforded under the policy. On August 21, Nimmo's supervisor entered a note in Acuity's computer system indicating that Acuity needed a coverage analysis to determine whether it would defend Osler. An August 29 note from the same log indicates that Nimmo planned to contact Osler's counsel to determine if Osler sought coverage under the Acuity policy. If so, the August 29 note said, Acuity would file a lawsuit to obtain a declaration that it owed no duty to defend; if not, then Acuity would close its file on the case. Nimmo's note for his conversation with Osler's counsel indicates that counsel planned to ask her client if it sought coverage and then inform Nimmo.

During his deposition, Selliken could not recall the date on which an Acuity representative first informed him of Acuity's reluctance to assume Osler's defense, other than that he believed that it was a summer day in July, August, or September 2006. Selliken did recall, however, that he was "shocked" by his conversations with Nimmo, who "jerked [Selliken] around *** for months with his promises of, Oh, well, our lawyers are looking at this and we're going to do something ***. I can't tell you yet whether we're going to represent you ***."

A November 16, 2006, log entry created by Nimmo's supervisor states that Acuity should inform Osler in writing of its intent to

file a declaratory judgment action. On December 8, 2006, Nimmo sent Selliken a letter stating that Acuity's policy did not provide coverage for the claims made in McIntosh's complaint and that, as a consequence, Acuity had no obligation to defend or indemnify the appellants or Frost. The letter requested that the tender of the defense of the McIntosh suit be withdrawn and stated that, if the tender was not withdrawn, Acuity would file a declaratory judgment action.

When the tender of the defense of McIntosh's suit was not withdrawn, Acuity filed the instant declaratory judgment action on February 9, 2007. Named as defendants in Acuity's complaint were the appellants, Frost, and McIntosh. In its first amended complaint, Acuity prayed for a judicial declaration that it had no duty under the terms of its insurance policy to defend or indemnify the appellants or Frost in regard to the action filed against them by McIntosh.

The appellants filed their answer to Acuity's complaint, affirmative defenses, and a counterclaim which was later amended, seeking a judicial declaration that Acuity had a duty to provide a defense to, and indemnify them from, the claims in McIntosh's underlying litigation, damages for breach of contract, and additional damages by reason of Acuity's alleged vexatious behavior. Following discovery, cross-motions for summary judgment were filed. The appellants filed a motion for summary judgment on Acuity's first amended complaint and the counts for declaratory

relief and breach of contract contained in their first amended counter claim. Thereafter, Acuity filed its motion for summary judgment on its first amended complaint, seeking a judicial declaration that it had no duty under the terms of its insurance policy to defend or indemnify the appellants or Frost in regard to the action filed against them by McIntosh.

The circuit court entered a written order on February 25, 2010, finding, *inter alia*, that, although the claims made in the McIntosh suit fell within the coverage afforded in the Acuity policy, Acuity had no duty to defend that suit as the notice provision of the policy had been breached. As a consequence, the circuit court granted Acuity's motion for summary judgment and denied the cross-motion filed by the appellants.

On March 23, 2010, the appellants filed a notice of appeal from the circuit court's February 25 order, and their appeal became our case number 1-10-0814. We dismissed that appeal for lack of jurisdiction, because the record contained neither a Rule 304(a) finding nor a final resolution of the pending claims against Frost. *Acuity v. Osler Institute, Inc.*, No. 1-10-0816 (2010) (unpublished order under Supreme Court Rule 23). The parties thereafter agreed to dismiss Frost from the lawsuit, and the appellants filed another notice of appeal. With the jurisdictional issue resolved, we now reach the merits of this appeal.

On appeal, the appellants assert that the circuit court erred in entering summary judgment against them. Summary judgment is

proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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 2006). "The function of a reviewing court on appeal from a grant of summary judgment is limited to determining whether the trial court correctly concluded that no genuine issue of material fact was raised and, if none was raised, whether judgment as a matter of law was correctly entered." *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115, 852 N.E.2d 874 (2006). "The propriety of a trial court's decision to grant summary judgment presents a question of law, which we review de novo." *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 168, 877 N.E.2d 1171 (2007).

The appellants first argue that the circuit court's entry of summary judgment was improper because it was based on the erroneous conclusion that Osler's breach of the policy's notice provision relieved Acuity of its duty to defend as a matter of law. The relevant policy provision provides that the insured had a duty to notify Acuity "as soon as practicable" of any claims or suits that might be covered by the policy. "A policy condition requiring notice '[a]s soon as practicable' is interpreted to mean 'within a reasonable time.' " *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 311, 856 N.E.2d 338 (2006). Whether reasonable notice was given depends on the facts and circumstances

of the particular case. *IMC Global v. Continental Insurance Co.*, 378 Ill. App. 3d 797, 807, 883 N.E.2d 68 (2007). In determining whether reasonable notice was provided, courts consider several factors, including the language of the policy, the sophistication of the insured, the insured's awareness that a suit was pending, and the insured's diligence in ascertaining whether policy coverage was available. *IMC Global*, 378 Ill. App. 3d at 807. Courts may also consider the prejudice the lack of notice caused the insurer, but notice may be deemed unreasonable even in the absence of prejudice. *IMC Global*, 378 Ill. App. 3d at 807-08.

Here, McIntosh filed suit against Osler on October 17, 2005, and Acuity did not receive notice of the suit until July of the next year. The only justification the appellants offer for what they admit was a 262-day delay in notification is their assertion that they lacked knowledge of the insurance policy's notice provision. "To operate as an effective excuse for delay, however, lack of knowledge must be without negligence or fault on the part of the person seeking to be excused." *International Harvester Co. v. Continental Casualty Co.*, 33 Ill. App. 2d 467, 472, 179 N.E.2d 833 (1962) (assessing significance of the insured's lack of knowledge that a policy existed). Because an insured is generally expected to read its insurance policy, and is bound by the policy regardless (*eg.*, *Small v. Prudential Life Insurance Co.*, 246 Ill. App. 3d 893, 896, 617 N.E.2d 80 (1993)), Osler's purported lack of knowledge of its own insurance policy is not by itself a valid

excuse for not following it. That absence of knowledge of the contents of the policy is less a justification for Osler's failure to notify than an illustration of its lack of diligence, an important factor in determining whether it acted reasonably.

The remaining factors also emphatically support Acuity's position that Osler's delay in providing notice was not reasonable. As the circuit court noted, Osler was a sophisticated business entity that was actually represented by counsel at the time the complaint was filed, and Osler was unquestionably aware that a suit was pending against it. Under these circumstances, we agree with the circuit court that the appellants have provided no convincing justification for the delay in notifying Acuity of the McIntosh suit, and that their 262-day delay cannot be considered reasonable. Accordingly, we agree with the circuit court that the 262-day delay constituted a breach that precluded Osler's right to enforce the insurance policy. See *IMC Global*, 378 Ill. App. 3d at 808 (otherwise unjustified 13- or 6-month delays were unreasonable and thus constituted breaches of insurance policy notification provisions).

The appellants next argue that, even if the circuit court was correct that Osler breached the notice provisions of the insurance policy, Acuity should be estopped from relying on that breach due to its own delay in filing the instant declaratory judgment action. The appellants argue that Acuity received notice of the McIntosh litigation on June 3, 2006, yet did not file a declaratory judgment

action until February 8, 2007, a 219-day delay that nearly matches Osler's 262-day delay. Accordingly, the appellants argue that, if Osler should be faulted for its 262-day delay in providing notice to Acuity, Acuity should be similarly faulted for its ensuing 219-day delay in filing an action for a declaration that it owed no duty to defend.

As Acuity points out in its brief on appeal, the flaw in the appellants' position is that it relies on a false equivalence between their breach of the policy's notice provision and Acuity's delay in commencing a declaratory judgment action.

The estoppel rule on which the appellants rely provides that an insurer that owes a duty to defend will be estopped from asserting policy defenses to coverage if it fails to defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150-51, 708 N.E.2d 1122 (1999). This theory of estoppel, which arises out of "the recognition that an insurer's duty to defend *** is so fundamental *** that a breach of that duty constitutes a repudiation of the contract," applies only where an insurer has breached its duty to defend. *Employers Insurance of Wausau*, 186 Ill. 2d at 151.

Although an insurer may generally delay providing a defense and instead file an action seeking a declaration that it owes no duty to defend, an insurer's undue delay in filing such an action will be considered a breach of its duty to defend. See *L.A.*

Connection v. Penn-America Insurance Co, 363 Ill. App. 3d 259, 264-66, 843 N.E.2d 427 (2006). This rule works to prevent insurers from abandoning their insureds while the cases against the insureds are litigated (*State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 960, 846 N.E.2d 974 (2006)) or from "[sitting] on the sidelines *** while the case against [their insureds] [is] played" (*Central Mutual Insurance Co. v. Kammerling*, 212 Ill. App. 3d 744, 749, 671 N.E.2d 806 (1991)).

The predominant test for determining whether an insurer's declaratory judgment action was timely, or whether it was so untimely as to constitute a breach of the insurer's duty to defend, asks whether the insurer filed the action within a reasonable time of its being notified of the potential claim. *L.A. Connection*, 363 Ill. App. 3d at 264-66; *State Automobile Mutual Insurance Co.*, 364 Ill. App. 3d at 960. This "reasonable time" test considers the unique circumstances of each case, including the length of the insurer's delay and the status of the underlying suit at the time the insurer filed the declaratory judgment action. *Employers Reinsurance Corp. v. E. Miller Insurance Agency, Inc.*, 332 Ill. App. 3d 326, 341, 773 N.E.2d 707 (2002) (citing *Employers Insurance of Wausau*, 186 Ill. 2d at 157); see *State Automobile Mutual Insurance Co.*, 364 Ill. App. 3d at 961 ("the status of the underlying suit can still be *a* factor in determining whether the insurer timely filed the declaratory judgment action").

Because this reasonable time test has different purposes from,

and uses different timing guideposts than, the test for determining whether an insured provided timely notice, we cannot accept the appellants' assumption that an insurer's delay in filing a declaratory judgment action must be unreasonable if the same delay would violate an insured's duty to notify. As noted above, an insured's delay in providing notice is evaluated in reference to the length of the delay, the insured's sophistication, the insured's awareness of the suit, and the insured's diligence. Courts have found unreasonable unexplained delays as short as five months. See *IMC Global*, 378 Ill. App. 3d at 808 (collecting cases). Delays in declaratory judgment actions, on the other hand, are evaluated largely in reference to the progress of the underlying suit, an approach that makes sense in light of the estoppel rule's aim of preventing insurers from sitting out litigation in which they should defend their insureds. Thus, our supreme court has held that a declaratory judgment action filed after the resolution of the underlying lawsuit is untimely as a matter of law, regardless of the actual length of the delay (see *Employers Insurance of Wausau*, 186 Ill. 2d at 157)), but courts have condoned delays of even seven months where the underlying action was not near resolution (*State Automobile Mutual Insurance Co.*, 364 Ill. App. 3d at 961).

In short, even though both tests employ concepts of "reasonableness," the test for measuring the permissible delays for notice to an insurer, and the test for an insurer's delay in filing

a declaratory judgment, are not comparable. Accordingly, the fact that Acuity's delay in filing its declaratory judgment action was roughly equal to Osler's delay in notifying Acuity does not affect our analysis. To determine whether the estoppel rule should apply to Acuity here, we evaluate Acuity's delay under the above-described reasonableness test, without regard to the length of Osler's delay in notifying Acuity of the potential claim in the first place.

We agree with the circuit court that, under that reasonableness test, Acuity did not unduly delay its filing of the instant declaratory judgment action. As Acuity observes in its brief, no party to this appeal contends that the underlying case was near resolution when Acuity filed its declaratory judgment action in February 2007. With no indication or argument that the underlying lawsuit neared resolution while Acuity delayed filing its declaratory judgment action, we cannot say that Acuity's delay, standing alone, constituted a repudiation of its duties under the insurance policy. Indeed, as Acuity points out, the 219-day delay at issue here is similar to delays that have been deemed reasonable in other cases. See *State Automobile Mutual Insurance Co.*, 364 Ill. App. 3d at 961 (condoning a seven-month delay). Because we have no reason to say that Acuity abandoned its insured by unreasonably delaying the filing of a declaratory judgment action, we agree with the circuit court that the estoppel rule the appellants seek to invoke does not apply in this case.

Because we agree with the circuit court that Osler's breach of the notice provisions of its policy with Acuity deprived it of its right to demand a defense from Acuity, we do not reach the appellants' arguments regarding whether the scope of the Acuity policy encompassed McIntosh's claims.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.