2013 IL App (3d) 120917-U

Order filed October 18, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

NATIONAL FARMERS UNION PROPERTY & CASUALTY COMPANY, Plaintiff, v. DEGROATE PETROLEUM SERVICE, INC., FIRST MIDWEST BANK, as Successor Trustee to NATIONAL BANK OF JOLIET under Trust #376, and PEOPLE OF THE STATE OF ILLINOIS, *ex rel*. LISA MADIGAN, Attorney General of the State of Illinois, Defendants. _____ DEGROATE PETROLEUM SERVICE, INC., JOHN D. DEGROATE, individually and d/b/a STANDARD AUTOMATIC HEATING & COOLING SERVICE, INC., Plaintiffs-Appellants, v. NATIONAL FARMERS UNION PROPERTY & CASUALTY COMPANY,	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-12-0917 Circuit No. 11-MR-876

Counter-Defendants,	)	
	)	
and	)	
	)	
THE TRAVELERS INDEMNITY COMPANY, THE TRAVELERS PROPERTY & CASUALTY COMPANY OF AMERICA, f/k/a THE TRAVELERS INDEMNITY COMPANY OF ILLINOIS, and THE TRAVELERS INDEMNITY COMPANY OF AMERICA,	)	
	)	Honorable Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting summary judgment in favor of insurer where there was no coverage under the insurer's policies for insured's property damage, which occurred outside the policy periods and was excluded under the policy's provisions.

¶ 2 Appellant DeGroate Petroleum Service, Inc., John D. DeGroate, individually and d/b/a Standard Automatic Heating and Cooling Service, Inc. (collectively DeGroate), filed a motion for declaratory judgment, seeking a determination of coverage by appellee, The Traveler's Indemnity Company, The Travelers Property and Casualty Company of America, f/k/a The Travelers Indemnity Company of Illinois, and The Travelers Indemnity Company of America (collectively Travelers), for an underlying lawsuit filed against DeGroate (collectively) and John DeGroate and Violet DeGroate, by the State of Illinois alleging environmental contamination at DeGroate's property. Both parties filed motions for summary judgment and the trial court granted summary judgment in favor of Travelers and against DeGroate. It found there was no coverage for DeGroate under the policies, no duty to defend, and no duty to indemnify. DeGroate appealed. We affirm.

¶ 3 FACTS

¶ 4 Plaintiff/counter-defendant National Farmers Union Property and Casualty Company brought a declaratory judgment action seeking a determination that it did not owe defendant/counter-plaintiff DeGroate a duty to defend or indemnify. National Farmers has settled with DeGroate and is not a party to this appeal. Plaintiff/counter-defendant/appellee Travelers also filed a motion for a declaratory judgment regarding its duties under the DeGroate policies. DeGroate filed a counterclaim against Travelers, seeking a declaration of coverage under policies issued by Travelers from 1976 to 1980.

¶ 5 DeGroate, a supplier and distributor of fuel, gasoline and other petroleum products, owned and operated a petroleum distribution facility in New Lenox since 1976. Travelers issued four general liability policies to DeGroate for policy periods June 21, 1976, to June 21, 1980. The 1977-1978 policy was issued to DeGroate Petroleum Service and John DeGroate. The policies for 1978-1980 also included Violet DeGroate. Two policies covering 1977 to 1979 were issued to John DeGroate, d/b/a Standard Automatic Heating and Cooling Service, Inc. Standard is not a named defendant in the underlying action and these policies are not at issue. Travelers also issued DeGroate a catastrophe umbrella policy for one period from June 1976 to June 1977, which provided excess coverage.

¶ 6 The general liability policies contain the same language, and cover claims for property damage. Property damage is defined as "physical injury to or destruction of tangible property which occurs during the policy period." The policies provide, in pertinent part:

> "The Travelers will pay on behalf of the *Insured* all sums which the *Insured* shall become obligated to pay by reason of the liability imposed by law upon the *Insured*, or assumed by the *Insured*

under any oral or written contract or agreement, as damages because of: *** (b) *property damage*; to which this insurance applies, caused by an *occurrence*.

The Travelers shall have the right and duty to defend any *suit* against the *Insured* seeking damages on account of such *** *property damage*, even if any of the allegations of the *suit* are groundless, false or fraudulent, and may make such investigation and settlement of any claim or *suit* as it deems expedient." (*Emphasis in original*).

¶ 7 The policies include pollution exclusions which state coverage does not apply:

"(p) to *** *property damage* arising out of any emission, discharge, seepage, release or escape of any liquid, solid, gaseous or thermal waste or pollutant: (1) if such emission, discharge, seepage, release or escape is either expected or intended from the standpoint of any *Insured* or any person or organization for whose acts or omissions any *Insured* is liable; or (2) resulting from or contributed to by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto; but this exclusion does not apply to *property damage* arising out of any omission, discharge, seepage, release or escape of petroleum or petroleum derivatives into any body of water;

(q) to *property damage* arising out of any emission, discharge, seepage, release or escape of petroleum or petroleum derivatives into

> any body of water, but this exclusion does not apply to *property damage* resulting from fire or explosion arising out of any emission, discharge, seepage, release or escape which neither: (1) is expected or intended from the standpoint of any *Insured* or any person or organization for whose acts or omissions any *Insured* is liable, nor (2) results from or is contributed to by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto." (*Emphasis in original*).

¶ 8 On April 24, 2009, Klemm Tank Lines, a bulk petroleum transportation corporation, overfilled a storage tank holding diesel fuel at the site. Approximately 900 gallons of fuel was spilled on the property. Klemm reported the spill to the Illinois Environmental Protection Agency (IEPA) and agreed to remediate the spill. In May 2011, the State filed an environmental liability action against DeGroate. It filed an amended complaint in April 2013, adding John DeGroate and Violet DeGroate as individual defendants. The amended complaint alleged DeGroate violated various provisions of the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (West 2010)). Count I, "Water Pollution," alleged a violation of section 12(a); Count II, "Creating a Water Pollution Hazard," alleged a violation of section 12(d); Count III, "Open Dumping of Waste," alleged a violation of section 21(a); Count IV, "Conducting a Waste-Disposal Operation Without a Permit," alleged a violation of section 21(d)(1); Count V, "Conducting a Waste-Disposal Operation in Violation of Board Regulations," alleged a violation of section 21(d)(2) and a violation of § 812.101(a) of the Illinois Administrative Code (35 Ill. Admin. Code § 812.101(a) (West 2008)); Count VI, "Disposing of Waste at the [*sic*] a Site Not Meeting the Requirements of the Act and Regulations," alleged a

violation of section 21(e); and Count VII, "Open Dumping of Waste Resulting in Litter," alleged a violation of section 21(p)(1). 415 ILCS 5/12(a), (d), 21(a), (d)(1), (2), (e), (p)(1) (West 2010)).

¶ 9 In September 2011, plaintiff National Farmers filed a declaratory judgment action. DeGroate filed a counterclaim against Travelers and sought a declaration that Travelers owed it a duty to defend and indemnify in the underlying action and that it breached its duty. Travelers responded with a counterclaim seeking a declaration it owed no duty to defend or indemnify DeGroate. In February 2012, DeGroate sought an early hearing and expedited discovery schedule, in response to negotiations in which it was engaged with the State that would require DeGroate to remediate the contamination on the site and any impacted off-site areas. The trial court held a hearing on DeGroate's motion and determined that it would initially decide the duty to defend issue and continue the motion to expedite as to the duty to indemnify. Travelers and DeGroate filed cross-motions for summary judgment, and the trial court entered an agreed order that the motions would be filed under seal. Attached as exhibits to DeGroate's summary judgment motion were the affidavits of a DeGroate and a witness to a 1971 spill on the property. Following a hearing, the trial issued an oral ruling on October 9, 2012, granting National Farmers' summary judgment motion and Travelers' partial summary judgment motion. It denied DeGroate's motion for summary judgment, finding the 2009 spill was outside the Travelers policy periods and not covered under the policies' exclusions. The trial court stated, "there is no coverage, no duty to defend, and no duty to indemnify under the insurers' policies." DeGroate appealed.

¶ 10 ANALYSIS

¶ 11 The issue on appeal is whether the trial court erred when it granted summary judgment in Travelers' favor, finding it did not have a duty to defend or indemnify DeGroate, its insured.

DeGroate argues that the trial court erred in granting Travelers' summary judgment motion and denying its motion for summary judgment on the duty to defend. It maintains that Travelers has a duty to defend it because the allegations in the underlying complaint potentially or possibly fall within policy coverage. It argues the trial court erred in looking for contamination specifically alleged to have occurred during the policy periods. DeGroate further maintains it is afforded coverage under the policies because the underlying action alleges environmental liability for property damage during the policy periods and that the petroleum and pollution exclusions do not apply.

¶ 12 Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2008); *DeSaga v. West Bend Mutual Insurance Co.*, 391 Ill. App. 3d 1062, 1066 (2009). The interpretation of an insurance policy is a question of law that may be decided on a motion for summary judgment. *DeSaga*, 391 Ill. App. 3d at 1066. To determine an insurer's duty to defend, the court must look to the allegations of the underlying complaint and if it alleges facts within or potentially within policy coverage, the insurer is obligated to defend the insured, even if the allegations are groundless, false or fraudulent. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991).

¶ 13 The threshold for pleading a duty to defend is minimal so any doubt should be resolved in favor of the insured. *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1023 (2008) (citing *United Services Automobile Ass'n v. Dare*, 357 Ill. App. 3d 955, 963 (2005)). If the underlying complaint alleges multiple theories of recovery, the duty to defend arises even if only one theory is within the policy's potential coverage. *Wilkin Insulation Co.*, 144 Ill. 2d at 73. Policy

provisions that limit or exclude coverage are construed liberally in favor of the insured and against the insurer. *Dare*, 357 Ill. App. 3d at 964. To determine a duty to defend, a trial court may consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action. *Holabird*, 382 Ill. App. 3d at 1031. The trial court's grant of summary judgment and its interpretation of a insurance policy are reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992); *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479-80 (1997).

¶ 14 The underlying complaint alleges in Count I that DeGroate "caused, threatened, or allowed the discharge of diesel fuel on and into the land on the Site, and into the groundwater flowing underneath the Site[,]" which "caused or tended to cause water pollution." Count II alleges DeGroate "caused or allowed diesel fuel to be released onto the ground at the Site, and into the groundwater flowing underneath the Site[,]" creating a continuing water pollution hazard. Count III alleges open dumping, the result of DeGroate "causing or allowing diesel fuel to be released into the ground at the Site." Count IV alleges that DeGroate conducted a waste-disposal operation without a permit by "dispos[ing] of waste on the ground in the form of diesel fuel." Count V alleges that DeGroate conducted a waste-disposal operation without a permit when it "placed and accumulated waste on the ground in the form of diesel fuel at the Site over time for disposal." Count VI alleges that DeGroate disposed of diesel fuel waste at a non-compliant site. Count VII alleges open dumping of waste resulting in litter, i.e., "[t]he solid, liquid, and/or semi-solid substances in the form of diesel fuel, numerous floating petroleum sheens, dead vegetation, and stained soil" that DeGroate discarded.

¶ 15 The policies at issue provide that Travelers defend any suit against DeGroate seeking damages on account of property damage, which is defined as "physical injury to or destruction of tangible

property which occurs during the policy period." The underlying complaint alleges, in part, that DeGroate discharged diesel fuel on and into the land and the groundwater under the property, and "caused, threatened or allowed the discharge, deposit, dumping, spilling, leaking or placing of diesel fuel at the Site into or on land in a manner that exposed the waste to air, water, and to the environment." The underlying action thus asserts property damage under the policies. However, the underlying complaint does not assert that any property damage occurred prior to the 2009 Klemm spill and during the relevant Travelers' policy periods. It expressly states that a diesel fuel spill occurred on April 24, 2009. It cites to inspections undertaken at the site by the IEPA in September 2009 and March 2011 in response to the April 2009 spill. At these inspections, contaminated conditions were observed, including "numerous floating petroleum sheens, dead vegetation and stained soil," "diesel fuel-stained soil and gravel," and "brown petroleum [ ] floating atop of pooled water." The Travelers' policies at issue covered property damage "which occurs during the policy period[s]" from June 1976 to June 1980.

¶ 16 The IEPA complaint also cites to a remedial action completion report (RAC Report), prepared by Poracky & Associates, documenting the 2009 Klemm spill, its effects on the soil and water at the site, and remediation efforts it undertook on behalf of Klemm. The complaint further alleges that "Poracky reported that because of the presence of historical contamination at the Site, no confirmatory samples were taken to ensure all impacted water and soils were removed." DeGroate maintains that this allegation, along with what it describes as the State's use of "broad language," in the complaint, i.e., discharge of diesel fuel "[f]rom at least April 24, 2009," indicate the State's complaint was intended to cover historical contamination at the site. DeGroate's assertion is misplaced. The reference to the Poracky report was in the context of discussing the inadequate remediation of the

2009 Klemm spill. It does not constitute an allegation that there was historical contamination present or place the supposed contamination during the Travelers' policy periods.

¶ 17 Similarly, the phrase, "[f]rom at least April 24, 2009," does not incorporate any historical contamination but rather modifies the Klemm spill and its aftereffects. *Lorenzo v. Capitol Indemnity Corp*., 401 Ill. App. 3d 616, 620-21 (2010) (reviewing court refused to expand complaint alleging wrongful conduct " 'on and prior' " to a specific date to include location not covered under policy). Nothing in the allegations suggest they were meant to include any portion of the property other than that affected by the Klemm spill or any periods of time other than that of the Klemm spill in 2009 and its aftermath. The IEPA could have added allegations regarding ongoing contamination prior to the 2009 spill if it had intended the complaint to include historical contamination. Had the State meant to allege contamination resulting from the 1971 spill, it would have expressly done so. Under these facts, we do not read the complaint to incorporate historical contamination.

¶ 18 In addition to the allegations in the complaint, DeGroate also relies on statements in a September 2009 meeting summary prepared by an IEPA participant and a fire department report as support that historical contamination is at issue in the underlying complaint, thus implicating the Travelers' policy periods. The summary statements do not constitute evidence that historical contamination was present. DeGroate presents as further evidence a record from the New Lenox volunteer fire department regarding a supposed gasoline release on the property in 1971 and his affidavit regarding his recollection of the incident. The fire department records lacks a foundation, as DeGroate did not account for how he received it and requests to the fire department for records regarding the 1971 spill indicated that there were no records in custody of the fire department. We consider the record is without verification and inadmissible. *CCP Limited Partnership v. First Source*

Financial, Inc., 368 Ill. App. 3d 476, 484 (2006) (document without proper authentication is inadmissible and a court cannot consider inadmissible evidence as support for a summary judgment motion). The claims about the 1971 spill as set forth in the two supporting affidavits are also unsubstantiated and do not provide a basis for expanding the underlying complaint to include historical contamination. We thus conclude that the 2009 spill occurred outside the Travelers' policy periods and DeGroate is not afforded coverage for it. We hold that, as determined by the trial court, without coverage, Travelers does not owe DeGroate a duty to defend. .

¶ 19 The trial court also found that coverage is precluded under the policies' pollution exclusions. Exclusion (p) excludes coverage for "property damage arising out of any emission, discharge, seepage, release, or escape of any *** pollutant: ***(2) "resulting from or contributed to by any condition in violation of or non-compliance with any governmental rule, regulation or law applicable thereto; but this exclusion does not apply to property damage arising out of any emission, discharge, seepage, release or escape of petroleum or petroleum derivatives into any body of water."

¶ 20 Each count in the underlying complaint is based on a statutory violation resulting from the 2009 Klemm spill and DeGroate's subsequent failure to clean it up. Counts I and II allege water pollution and Counts III to VI concern DeGroate's disposal of waste from the 2009 Klemm spill. DeGroate presents an argument to negate application exclusion (p) that distinguishes between property damage "resulting from" and "resulting in," maintaining that exclusion (p) applies only when the release of a pollutant results from a condition violating the law. It submits that where, like here, the release of diesel fuel resulted in a condition violating the statute, the exclusion does not apply. DeGroate relies on *The Travelers Indemnity Co. v. Dingwell*, 414 A.2d 220, 223 (Me. 1980), in which the reviewing court construed an identical pollution exclusion. At issue was whether a duty to defend

could arise from a broad and conclusory allegation, "such as negligence" without specific factual allegations. *Dingwell*, 414 A.2d at 226.

¶ 21 In addition to considering a different issue, *Dingwell* is also distinguished because Maine is a notice-pleading state as opposed to Illinois, which requires fact pleading. *Dingwell*, 414 A.2d at 225; *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451 (2004) (quoting *Beahringer v. Page*, 204 Ill. 2d 363, 369 (2003)). The allegations sufficient to preclude application of the pollution exclusion under Maine law may not satisfy Illinois' more exacting standards. Moreover, in *Dingwell*, the underlying complaint did not allege that the operations had been found to violate any state statutes or regulations. *Dingwell*, 414 A.2d at 228. This fact makes the "resulting in" and "resulting from" distinction relevant in *Dingwell*, but not in the instant case, as exclusion (p) requires a statutory violation, which were alleged in every count of the IEPA complaint.

¶ 22 The reviewing court in *Fruit of the Loom, Inc. v. The Travelers Indemnity Co.*, 284 Ill. App. 3d 485, 499 (1996) considered the same pollution exclusion at issue here and the insured there relied on *Dingwell* as DeGroate does. The court rejected the *Dingwell* cause and effect argument, finding that pollution exclusions in the Travelers' policies "merely require[ ] a violation of state statute or regulation" to trigger the exclusion. *Fruit of the Loom,* 284 Ill. App. 3d at 499. The underlying complaint there alleged statutory violations and the court found that coverage was precluded under the pollution exclusion. *Fruit of the Loom,* 284 Ill. App. 3d at 499. *Fruit of the Loom* is on point and instructs that the allegations in the underlying complaint are sufficient to trigger exclusion (p) for those allegations that do not assert discharge of diesel fuel into a body of water (counts I and II).

¶ 23 Coverage for counts I and II is precluded under exclusion (q), which excludes coverage for "property damage arising out of any emission, discharge, seepage, release or escape of petroleum or

petroleum derivatives into any body of water." DeGroate argues that the underlying complaint does not allege that a "body of water" was contaminated and, thus, the exclusion does not preclude coverage. Contrary to DeGroate's argument, the underlying complaint alleges that DeGroate discharged and/or released diesel fuel "into the groundwater flowing underneath the Site" causing water pollution (count I) and creating a water pollution hazard (count II). DeGroate's attempts to distinguish between surface water and groundwater are misguided. There are no limiting definitions in the Travelers' policies that suggest "body of water" describes only water contained above ground. The Act defines "waters" as "all accumulations of water, surface and underground *** or parts thereof, which are wholly or partially within [or] flow through *** this State." 415 ILCS 5/3.550 (West 2008). See *Central Illinois Public Service Co. v. Pollution Control Board*, 36 Ill. App. 3d 397, 404 (1976) (noting broad interpretation of "waters" under the Act). Because the underlying complaint alleges DeGroate contaminated the waters with petroleum on and under the site, exclusion (q) applies and precludes coverage.

¶ 24 Lastly, DeGroate asserts that even if Travelers did not owe it a duty to defend, it may still owe a duty to indemnify and the trial court erred in granting summary judgment for Travelers. The duty to indemnify arises only when the allegations in the underlying complaint assert facts that actually fall under the policies. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993). Here, the policies provide indemnity for claim to which the insurance applies. Per the policies' language, if there is no coverage and no duty to defend, there can be no duty to indemnify. Because there is no coverage or duty to defend under the policies, there is no duty to indemnify. The trial court did not err in finding Travelers did not owe a duty to indemnify. According, the trial court properly granted Travelers' motion for summary judgment and denied DeGroate's summary judgment

motion.

¶ 25 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.