2016 IL App (1st) 133918-U

SIXTH DIVISION
May 6, 2016

No. 1-13-3918

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HOME-OWNERS INSURANCE COMPANY,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 12 CH 29887
v.	)	
MICHAEL B. ZENN,	)	
	)	
Defendant-Appellant,	)	Honorable
	)	Kathleen G. Kennedy,
(Ian Hammersmith,	)	Judge Presiding.
	)	
Defendant).	)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford and Justice Delort concurred in the judgment.

O R D E R

¶ 1 *Held*: This court affirmed the grant of summary judgment to the plaintiff; the insurance policy was not ambiguous, and the defendant failed to establish the existence of a genuine issue of material fact.

¶ 2 Defendant Michael B. Zenn appeals from an order of the circuit court of Cook County granting summary judgment to the plaintiff, Home-Owners Insurance Company (Home-Owners). The sole issue on appeal is whether the circuit court erred in awarding summary judgment to Home-Owners. For reasons set forth below, we affirm the grant of summary judgment to Home-Owners.

¶ 3 BACKGROUND

¶ 4 I. Facts

¶ 5 Ian Hammersmith filed a personal injury complaint against defendant Zenn, alleging that he was injured in an automobile accident caused by defendant Zenn's negligence. Upon being served with the Hammersmith complaint, defendant Zenn tendered it to his insurer, Home-Owners, for defense and indemnification.

¶ 6 At the time of the accident, Home-Owners insured defendant Zenn under its "Executive Umbrella Liability Insurance Policy" (umbrella policy). As a condition of the umbrella coverage, defendant Zenn was to maintain $500,000 in primary (also referred to as underlying) automobile liability coverage. The umbrella policy was issued to defendant Zenn by Hub International Midwest Limited (Hub).

¶ 7 II. Declaratory Judgment Proceedings

¶ 8 Home-Owners filed a declaratory judgment complaint against defendant Zenn and Mr. Hammersmith. In paragraph 11 of the complaint, Home-Owners alleged that defendant Zenn did not maintain primary automobile coverage with limits of $500,000 as required by section 5 of the conditions of coverage set forth in the umbrella policy. The only primary

automobile liability insurance available to defendant Zenn on the date of the accident was a MetLife automobile liability policy with a single limit of $100,000. Home-Owners sought a declaration that it had no liability beneath the $500,000 minimum that defendant Zenn was required to maintain in primary automobile liability coverage.

¶ 9 Defendant Zenn filed an answer to the complaint. In response to paragraph 11 of the complaint, defendant Zenn stated that he was without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11. Mr. Hammersmith appeared and filed an answer to the complaint, likewise stating that he lacked knowledge as to the truth of the allegations of paragraph 11 of the complaint.

¶ 10 Home-Owners filed a motion for summary judgment against defendant Zenn and Mr. Hammersmith. In support of its motion, Home-Owners maintained that since defendant Zenn failed to maintain $500,000 in primary automobile liability coverage, the excess coverage under the umbrella policy did not apply until the claim against defendant Zenn exceeded $500,000.

¶ 11 In his response to Home-Owners' motion for summary judgment, defendant Zenn did not dispute that he failed to have primary automobile liability coverage of $500,000. Instead, he maintained that, in order to deny his claim, Home-Owners singled out the requirement that he maintain $500,000 in primary coverage and ignored the other relevant provisions of the umbrella policy. Defendant Zenn further argued that there were questions of fact as to who was responsible for his lack of sufficient primary coverage and whether Hub was acting as an agent for Home-Owners or defendant Zenn or both. Mr. Hammersmith adopted the response of defendant Zenn.

¶ 12 On November 18, 2013, the circuit court granted summary judgment to Home-Owners. The court found that Home-Owners had no obligation to provide coverage to defendant Zenn in the Hammersmith litigation until defendant Zenn incurred a loss exceeding $500,000. The court further found that because defendant Zenn failed to provide any factual support for his agency argument, there was no genuine issue of fact precluding summary judgment to Home-Owners.

¶ 13 On December 17, 2013, defendant Zenn filed a notice of appeal from the circuit court's order granting summary judgment to Home-Owners.[1]

¶ 14 ANALYSIS

¶ 15 I. Standard of Review

¶ 16 The *de novo* standard is applicable to the review of a grant of summary judgment. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 48. The construction of the provisions of an insurance policy presents a question of law to which the *de novo* standard of review is also applicable. See *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005).

¶ 17 II. Discussion

¶ 18 It is well-settled that summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48. A triable issue of material fact precluding summary judgment exists where the material facts are disputed or, where the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). Summary judgment should only be allowed when the right of the moving party is clear and free from doubt. *Gilbert*, 156 Ill. 2d at 518.

[1]Mr. Hammersmith is not a party to this appeal.

An insurance policy is to be construed as a whole, giving effect to each provision. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007). The words used in an insurance policy are considered ambiguous when they are reasonably susceptible to more than one meaning. *Rich*, 226 Ill. 2d at 371. However, an insurance contract is not rendered ambiguous because the parties disagree on its meaning. *Rich*, 226 Ill. 2d at 372. We consider only reasonable interpretations of the policy language and will not strain to find an ambiguity where none exists. *Rich*, 226 Ill. 2d at 372.

¶ 19 Defendant Zenn maintains that the circuit court granted summary judgment solely on the basis that he did not comply with the maintenance provision requiring him to carry $500,000 in primary automobile liability coverage. Defendant Zenn argues that in doing so, the court failed to consider the limits of liability provision that Home-Owners was "liable for the ultimate net loss in excess of the insurer's retained limit." Defendant's argument ignores the umbrella policy's definition of "retained limit" which is referenced in the limits of liability provision. Under the umbrella policy, retained limit "means the greater of: (a) the sum of the limits of liability: (1) stated for each policy listed or insurance described in Schedule A; and (2) applying to any other underlying insurance; or (b) $250 with respect to any one occurrence not covered by other insurance." Far from creating an ambiguity when the maintenance provision and the limits of liability provision are construed together, the umbrella policy clearly provides that Home-Owners agreed to be liable only for defendant Zenn's ultimate net loss in excess of $500,000, Home-Owners' retained limit as defined by the umbrella policy.

¶ 20 Numerous cases have held that such retained-limit language is not ambiguous. See *Premcor USA Inc. v. American Home Insurance Co.*, 400 F.3d 523 (7th Cir. 2005) (applying

Illinois law to the interpretation of the insurance contracts and holding that a retained limit provision, similar to the one in the present case, was not ambiguous); *Garmany v. Mission Insurance Co.*, 785 F.2d 941, 946 (11th Cir. 1986) (read in tandem, the policy provision setting the excess carrier's threshold point of liability for loss " 'in excess of***the limits of the underlying insurances set out in the attached schedule' " and the schedule, which set the limit at $500,000 in primary coverage, unambiguously set forth a fixed point, *i.e.*, $500,000, at which the excess insurer's liability arose).

¶ 21 Defendant Zenn points that Home-Owners also agreed that "[i]f any underlying insurance is exhausted by any occurrence, we will assume charge of the settlement or defense of any claim against the insured resulting from the same occurrence." Defendant Zenn argues that the $100,000 MetLife policy is "any underlying insurance." Therefore, he maintains the umbrella policy can be interpreted in two ways: (1) the excess coverage drops down once the $100,000 is reached; or (2) the excess coverage does not drop down until the $500,000 has been incurred by the insured. Since there are two interpretations, defendant Zenn asserts that an ambiguity exists which must be construed in his favor. *Rich*, 226 Ill. 2d at 371-72.

¶ 22 Defendant Zenn's reliance on *Alabama Insurance Guaranty Ass'n v. Magic City Trucking Service, Inc.*, 547 So.2d 849 (Ala. 1989) is misplaced. In that case, the definition of underlying retained limit referred to "collectible by the insured." The issue before the Alabama supreme court was whether the insolvency of the primary insurer rendered its insurance coverage "uncollectible" and required the excess carrier to provide primary coverage. The court held that the term "collectible by the insured" was ambiguous as to the duty of the excess insurer when the primary insurer was insolvent. Since Alabama law required where the terms of the policy were ambiguous, the policy was to be construed

liberally in favor of the insured, the court held that excess coverage dropped down to provide primary coverage. *Magic City*, 547 So.2d at 856.

¶ 23 *Magic City* is distinguishable from the present case. The umbrella policy does not use either collectible or recoverable by the insured in its provisions. Compare *Donald B. MacNeal, Inc. v. Interstate Fire & Casualty Co.*, 132 Ill. App. 3d 564, 567-68 (1985) (a policy term limiting liability in excess of "an amount recoverable" under the primary insurance was subject to two interpretations and therefore ambiguous). The umbrella policy provided that Home-Owners would pay for losses in excess of a fixed amount, *i.e.*, the primary policy limits. See *Donald B. MacNeal, Inc.*, 132 Ill. App. 3d at 568 (distinguishing *Molina v. United Fire Insurance Co.*, 574 F.2d 1176, 1178 (4th Cir. 1978) on the basis that there the excess policy indemnified the insured for " 'the ultimate net loss in excess of the retained limit,' and the retained limit was the total of the applicable limits of the underlying policies ***)); see also *Hudson Insurance Co. v. Gelman Sciences, Inc.*, 921 F.2d 92, 95 (1990) (distinguishing the policy in *Donald B. MacNeal, Inc.* referring to "amount recoverable" from policies where the references to underlying insurance related only to the stated limits of the underlying insurance and the excess coverage began at the level of the underlying insurance).

¶ 24 Moreover, in the present case, the failure to maintain sufficient primary coverage was not due to the insolvency of the primary insurer. In *Reserve Insurance Co. v. Pisciotta*, 30 Cal.3d 800 (1982), the California supreme court held that the gap between the primary coverage and the excess coverage was created by the insured's breach of the maintenance provision by obtaining a replacement policy with a lower limit than the original primary policy. *Pisciotta*, 30 Cal.3d at 813. Therefore, the excess carrier was not responsible for any

liability incurred by the insured between $100,000 and the $300,000 the insured was required to maintain. *Pisciotta*, 30 Cal.3d at 813. The court noted that the maintenance clause was inserted to limit the insurer's liability in case the insured replaced the primary policy with one affording narrower coverage. *Pisciotta*, 30 Cal.3d at 816.

¶ 25 We conclude that the provisions of the umbrella policy are not ambiguous. In the present case, the only reasonable interpretation is that, regardless of the amount of underlying insurance, the umbrella policy clearly provided that the excess coverage defendant Zenn purchased did not apply until the claims against him exceeded $500,000. Therefore, the rule of construction which requires us to liberally construe the policy in favor of coverage does not apply. *Rich*, 226 Ill. 2d at 372. In the absence of any public policy argument, the circuit court was required to apply the policy as written. *Rich*, 226 Ill. 2d at 371.

¶ 26 Defendant Zenn argues that genuine issues of material fact exist as to who was responsible for his lack of sufficient primary insurance coverage in this case. Once a party moving for summary judgment satisfies its initial burden of production by an affirmative showing that some element of the case must be resolved in the movant's favor or by establishing that there is no evidence to support the nonmovant's case, the burden of proof shifts to the nonmovant. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 604 (2009). Defendant Zenn, the nonmovant here, was required to present a factual basis entitling him to a favorable judgment. *Brouillette*, 389 Ill. App. 3d at 605.

¶ 27 While his citations to authority are extensive, defendant Zenn failed to provide a factual basis excusing his failure to comply with the primary insurance requirement of $500,000 and entitling him to a favorable judgment in the declaratory judgment action. Defendant Zenn alleged that he purchased the Home-Owner's umbrella policy from Hub, which he asserts

raises a question of fact as to which entity was his agent and responsible for his breach of the primary coverage requirement. Lacking are any allegations providing a factual basis for concluding that Home-Owners and/or Hub was responsible for defendant Zenn's failure to comply with the primary coverage requirement.

¶ 28 Finally, we do not consider defendant Zen's contentions that Home-Owners' cases are not dispositive because they are decisions from our federal courts and our sister states, and that a question of fact as to whether Home-Owners' position in this case breaches its duty of good faith and fair dealing to him. These contentions have not been developed sufficiently for our review, lacking either authoritative or factual support. They are waived. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 29 We conclude that the provisions of Home-Owners' umbrella policy were not ambiguous and that no genuine issue of material fact existed to preclude the enforcement of the provisions of the umbrella policy as stated in the policy. The grant of summary judgment to Home-Owners was proper.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court is affirmed.

¶ 32 Affirmed.