2016 IL App (1st) 151329-U

SIXTH DIVISION
June 24, 2016

Nos. 1-15-1329 and 1-15-1238, cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD M. CAULFIELD, Plaintiff-Appellee, v. PACKER ENGINEERING, INC., an Illinois corporation, and THE PACKER GROUP, INC., an Illinois corporation, Defendants-Appellants, FEDERAL INSURANCE COMPANY, Respondent-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 12474 Honorable Alexander White, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶1 ***Held:*** We affirm the trial court's order directing the respondent insurance company to turn over the proceeds of its insurance policy to the plaintiff.

¶2 Respondent Federal Insurance Company (Federal) appeals an order of the circuit court of Cook County directing it to turn over proceeds from an insurance policy to the plaintiff, Dr. Edward M. Caulfield. We affirm.

¶3 BACKGROUND

¶4 On March 1, 2011, defendants, Packer Engineering, Inc. and The Packer Group, obtained an insurance policy from Federal (the Policy). The Policy excluded coverage for losses attributable to "severance payments pursuant to an express written obligation in the event of a termination of employment" and claims "based upon, arising from, or in consequence of any actual or alleged breach of any written employment contract."

¶5 On April 1, 2011, Dr. Caulfield filed this lawsuit against defendants, which contained claims for declaratory judgment and breach of contract. In his complaint, Dr. Caulfield alleged that he entered into a written contract with defendants, that the contract was subsequently orally modified, and that defendants breached both the written contract and the oral modification. On April 11, defendants tendered Dr. Caulfield's lawsuit to Federal for defense and indemnification.

¶6 On April 21, Dr. Caulfield amended his complaint to add a claim for retaliatory discharge. On May 20, 2011, the law firm of Tressler LLP (Tressler), which was already representing defendants in a shareholder derivative lawsuit in the circuit court of Cook County (See *Caulfield v. Packer*, 2016 IL App (1st) 151558), appeared on behalf of defendants in this case.

¶7 On August 18, 2011, Dr. Caulfield moved for partial summary judgment with respect to his breach of contract claim. The court granted the motion on April 5, 2012, ruling that Dr. Caulfield's employment contract had been orally modified and breached. The court reserved the issue of damages for trial. The parties then undertook discovery with respect to damages and Dr.

Caulfield's retaliatory discharge claim, which had remained pending after the grant of partial summary judgment.

¶8 During discovery, Dr. Caulfield propounded interrogatories and requests to produce on defendants. As relevant to this appeal, Dr. Caulfield inquired whether: (1) defendants "[w]ere *** insured under any policy of insurance affording coverage for the allegations" contained in his complaint; and (2) assuming defendants were insured, whether their insurer was "providing [their] defense under a reservation of rights." Dr. Caulfield also asked defendants to produce "[a]ny and all reservation of rights letter(s) identified in Insurance Interrogatory #2 served on March 1, 2012 in connection with this lawsuit."

¶9 On May 3, 2012, defendants, through their counsel at Tressler, responded to Dr. Caulfield's interrogatories and requests to produce. Defendants acknowledged that they were insured under an insurance policy, but stated that they were "not aware" of any reservation of rights letter. In response to Dr. Caulfield's request that defendants produce any reservation of rights letters, defendants stated "[n]one."

¶10 On July 12, 2012, over a year after Federal first became aware of the claim, it issued a reservation of rights letter to defendants (Reservation Letter One). Federal agreed to provide defendants with a defense, but it reserved its rights under the exclusions pertaining to losses attributable to severance payments and breaches of written contracts. Reservation Letter One further stated that "Federal has, at your request, consented to defense by Tressler LLP in this matter."

¶11 For reasons unknown, defendants did not notify Dr. Caulfield about Reservation Letter One until September 11, 2013—nearly 14 months after Federal issued it and 12 days before the September 23, 2013, trial date for Dr. Caulfield's remaining claims. On September 19, 2013,

Federal issued a second reservation of rights letter to defendants (Reservation Letter Two), reiterating the coverage position it articulated in Reservation Letter One. Defendants did not notify Dr. Caulfield about Reservation Letter Two until October 7, 2013, after the trial had concluded.

¶12 On February 6, 2014, the circuit court issued a memorandum opinion and judgment finding in favor of Dr. Caulfield and awarding him $988,777.00 on his breach of contract and retaliatory discharge claims. Defendants filed a notice of appeal on February 7, but they did not post an appeal bond, so Dr. Caulfield began efforts to collect the judgment. He served a citation to discover assets on Federal, listing the defendants as the judgment debtor thereon. The citation was accompanied by a rider "command[ing]" Federal to produce: (1) the Policy; (2) "any and all documents" relating to Dr. Caulfield's claims against defendants; and (3) "any and all documents" relating to Dr. Caulfield's claims "falling within the purview" of the Policy.

¶13 Federal responded to the citation on March 5, 2014. It answered "no" in response to a question inquiring whether it had in its "possession, custody or control any personal property or monies belonging to the judgment debtor." In response to the rider requests, Federal asserted that certain communications between it and Tressler were subject to attorney-client privilege because they contained "draft pleadings," "correspondence re litigation strategy," and "communications from defense counsel re litigation strategy."

¶14 After Federal answered the citation, the parties agreed that Federal would submit an affidavit providing an explanation for its answer to the citation. On July 24, 2014, Federal submitted an affidavit from Martha Eberhardt, a Chubb & Sons claims adjuster. Eberhardt explained that Federal responded to the citation by stating that it did not have property or money belonging to defendants because it did not believe, based on the two reservation letters it sent to

defendants, that it was obligated to indemnify defendants for the damages assessed following the trial.

¶15 On August 19, 2014, Dr. Caulfield filed a motion for turnover, arguing that the policy exclusions Federal cited in the reservation letters did not apply, and that in any event, Federal had waived its right to avail itself of the exclusions by failing to cause defendants to timely amend their answers to Dr. Caulfield's discovery requests. The circuit court granted the motion on January 12, 2015. On February 10, 2015, defendants filed a motion to reconsider, which Federal subsequently joined.

¶16 On March 30, 2015—while the motion to reconsider was still pending—we issued our decision in defendant's appeal of the trial court's February 6, 2014 adverse judgment. See *Caulfield v. Packer Engineering, Inc.*, 2015 IL App (1st) 140463-U (unpublished order under Supreme Court Rule 23) (*Caulfield I*). We affirmed the trial court's grant of summary judgment to Dr. Caulfield on his breach of contract claim. We held, however, that Dr. Caulfield was not an at-will employee and therefore reversed the court's judgment in favor of Dr. Caulfield on his retaliatory discharge claim.

¶17 On April 1, 2015, the trial court heard defendants and Federal's joint motion to reconsider. At that time, Dr. Caulfield's counsel orally informed the court that we had issued our decision in *Caulfield I*. At the conclusion of the hearing, the court denied the motion. This appeal followed.

¶18 ANALYSIS

¶19 On appeal, Federal seeks to reverse the order directing it to turn over the proceeds of the Policy to Dr. Caulfield. Because the trial court did not conduct an evidentiary hearing, we review this issue *de novo*. *Dowling v. Chicago Options Associates*, 226 Ill. 2d 277, 285 (2007).

Federal argues that it was not obligated to indemnify defendants for the judgment in *Caulfield I* because, in its view, Dr. Caulfield's claims were based on the breach of a written agreement and Dr. Caulfield received damages constituting severance pay, both of which were subject to exclusions under the Policy.

¶20 In the court below, Dr. Caulfield preemptively argued in his motion for turnover that Federal waived its right to avail itself of the policy exclusions by failing to tender its reservation letters to defendants in a timely manner. On appeal, Dr. Caulfield again claims that Federal's untimely reservation of rights had the effect of waiving the Policy exclusions. Because we find that it is dispositive of Federal's appeal, we limit our analysis to the waiver issue.

¶21 Dr. Caulfield, as the prevailing plaintiff in the court below, is a judgment creditor. Defendants—losers in the court below—are judgment debtors. To collect on his judgment, Dr. Caulfield caused a third-party citation to discover assets to be served on Federal, and later a motion seeking a court order directing Federal to remit the proceeds of the Policy to him. These proceedings were supplementary in nature and therefore indistinct from the underlying case. See 735 ILCS 5/2-1402 (West 2014); Ill. Sup. Ct. R. 277(c)(1) (eff. Jan. 4, 2013) ("The citation by which a supplementary proceeding is commenced *** shall be captioned in the cause in which the judgment was entered.").

¶22 When a plaintiff obtains a judgment against a defendant who is insured, the plaintiff has rights against the defendant's insurer, but those rights are "wholly derivative" of the defendant/insured's "contractual right to indemnity." *American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 392 (2000). In such cases, we have explained, "judgment creditors have no greater rights than the insured but stand in the shoes of the insured." *AAA Disposal Systems, Inc. v. Aetna Casualty and Surety Co.*, 355 Ill. App. 3d 275, 284 (2005). In more robust

terms, the supreme court has explained, "a judgment creditor is in no better position in a suit [against an insurance company] than the insured, and any defense which the insurer may assert against the insured may be asserted as a defense against the injured party". *Savickas*, 193 Ill. 2d at 392 (quoting *Meyer v. Aetna Casualty Insurance Co.*, 46 Ill. App. 2d 184, 190 (1964)). In the related area of garnishment, this court has similarly stated that "the judgment creditor stands in the shoes of the judgment debtor," (*Buckner v. Causey*, 311 Ill. App. 3d 139, 149 (1999)), and that a judgment creditor correspondingly "has no greater right to property in the hands of the garnishee than the judgment debtor" (*Marcheschi v. P. I. Corp.*, 84 Ill. App. 3d 873, 879 (1980)).

¶23 Accordingly, Federal may assert against Dr. Caulfield any defenses to payment that it may have asserted against defendants. But the law does not say that a judgment creditor must stand in a *worse* footing than the judgment debtor. Rather, as explained above, a judgment creditor cannot stand in a *better* position than the judgment debtor *vis-à-vis* an insurer. Thus, a judgment creditor may assert any counterargument to an insurer's indemnity defense that the judgment debtor could have asserted.

¶24 In this case, Federal disclaimed indemnity coverage for Dr. Caulfield's claims, but did so by tendering reservation of rights letters invoking various policy exclusions to defendants more than 14 months after defendants tendered the case to Federal for defense and indemnity. "Generally, where a complaint against an insured alleges facts within or potentially within the coverage of the insurance policy, and when the insurer takes the position that the policy does not cover the complaint, the insurer must: (1) defend the suit under a reservation of rights; or (2) seek a declaratory judgment that there is no coverage." *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 19. If the insurer does neither, "it will be estopped from later raising policy defenses to coverage." *Id.* Moreover, when an insurer intends to disclaim coverage, the law is

clear that the insurer "must notify the insured *without delay*." (Emphasis added.) *Apex Mutual Insurance Co. v. Christner*, 99 Ill. App. 2d 153, 169 (1968); see generally 14 Couch on Insurance, § 202.46 ("When an insurer obtains knowledge *** that the allegations of the complaint may not be covered under the policy, *** the insurer must promptly provide notice of its reservation of rights on peril of estoppel to assert such policy defenses.").

¶25 Standing in defendants' shoes, Dr. Caulfield has consistently argued throughout the post-judgment proceedings that Federal waived its right to invoke the policy exclusions because the reservation of rights letters it tendered to defendants were untimely. We agree.

¶26 As stated, defendants tendered Dr. Caulfield's claim to Federal on April 11, 2011—a mere 10 days after it was filed. Federal did not tender its reservation of rights letter to defendants until July 12, 2012—well over a year later. During the interim 14 months between defendant's tender of claim and Federal's tender of the July 12 reservation letter, defendants retained Tressler to defend them in the underlying case. Importantly, Federal expressly stated in the July 12 letter that it was "consenting" to Tressler's representation of defendants. By approving of Tressler's prior involvement in the case, Federal tacitly conceded that for the previous 14 months it had neither "defend[ed] [Dr. Caulfield's] suit under a reservation of rights; or (2) [sought] a declaratory judgment that there is no coverage." *Lay*, 2013 IL 114617, ¶ 19. By the time Federal sent the July 12 reservation letter, the case was already well underway. The parties had taken discovery, including depositions, and Dr. Caulfield had even obtained summary judgment on his breach of contract claim. Under these facts, Federal cannot seriously claim that the July 12, 2012 reservation letter was tendered to defendants "without delay." *Apex*, 99 Ill. App. 2d at 169; see *Gibraltar Insurance Co. v. Varkalis*, 46 Ill. 2d 481, 486-87 (1970) (holding that insurer waived policy defenses where insurer waited 15 months before sending reservation

of rights letter to its insured); see also 14 Couch on Insurance § 202:46 (citing *Meirthew v. Last*, 376 Mich. 33 (1965)) (noting that courts have found reservation untimely where the reservation of rights was tendered one year into the case and after the parties had filed responsive pleadings and taken depositions).

¶27 We thus find that Federal's July 12 reservation of rights letter was untimely. Accordingly, we hold that Federal waived its right to invoke the Policy exclusions as set forth in its July 12 reservation letter.

¶28 Because Federal cannot invoke any of the Policy exclusions to disclaim indemnity coverage, it has no valid coverage defenses.

¶29 CONCLUSION

¶30 Therefore, we affirm the trial court's order directing Federal to turn over the Policy proceeds to Dr. Caulfield.

¶31 Affirmed.