

2016 IL App (1st) 152202-U
No. 1-15-2202
September 30, 2016

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NAVIGATORS SPECIALTY INSURANCE,)	Appeal from the Circuit Court
COMPANY,)	Of Cook County.
)	
Plaintiff-Appellee,)	
)	Nos. 14 CH 7899
v.)	
)	The Honorable
POWER CONSTRUCTION COMPANY,)	Kathleen G. Kennedy,
LLC and MICHAEL KERR, as the Special)	Judge Presiding.
Administrator for the Estate of Mike Kerr,)	
Deceased, and WAUKEGAN STEEL,)	
)	
Defendants-Appellants.)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* In an insurer's suit for a judgment declaring that it has no duty to defend a party in an underlying action, the trial court must not resolve any factual issue that might determine the liability of a party to the underlying action. When a contractor sued a subcontractor, alleging that the subcontractor breached a contractual duty to add it as an insured under the subcontractor's liability insurance policy, the court hearing the case between the contractors, and not a court deciding an insurer's declaratory judgment action, should resolve the factual issue of whether the subcontractor effectively made the contractor an additional insured

under the subcontractor's liability insurance policy by agreeing in writing to add the contractor to its policy.

¶ 2 The estate of Mike Kerr filed a complaint against Power Construction Company, alleging that Power negligently caused Mike's death. Power filed a third party complaint against two subcontractors, Waukegan Steel and Chicago Steel Construction LLC, and Waukegan Steel filed a cross-claim against Chicago Steel, alleging that Chicago Steel breached its contractual duty to provide insurance covering Waukegan Steel for liability arising from Chicago Steel's operations. Chicago Steel's insurer, Navigators Specialty Insurance Company, filed a separate lawsuit against Waukegan Steel, seeking a judgment declaring that Navigators had no duty to defend or indemnify Waukegan Steel, because Waukegan Steel did not qualify as an additional insured under the policy Navigators issued to Chicago Steel. Waukegan Steel filed a motion to stay proceedings on Navigators's suit for a declaratory judgment. The circuit court denied Waukegan Steel's motion and granted summary judgment in favor of Navigators.

¶ 3 In this appeal, we hold that the circuit court should not have resolved the factual question of whether Chicago Steel had effectively made Waukegan Steel an additional insured under the policy from Navigators, because that factual question remained at issue in the underlying case of *Kerr v. Power*. We reverse the circuit court's judgment and remand for further proceedings in accord with this order.

¶ 4 BACKGROUND

¶ 5 In May 2013, Michael Kerr, as special administrator of the estate of Mike Kerr, filed a complaint against Power, charging Power with negligently causing Mike's death. Power

filed a third-party complaint against Waukegan Steel and Chicago Steel, alleging that Northwestern University hired Power to serve as general contractor on a construction project, Power hired Waukegan Steel as a subcontractor, Waukegan Steel hired Chicago Steel as a second tier subcontractor, and Mike was working for Chicago Steel when he suffered the injuries that led to his death. Power alleged that Waukegan Steel and Chicago Steel committed negligent acts that caused Mike's death.

¶ 6 Power tendered its defense in *Kerr v. Power* to Waukegan Steel, and in accord with the terms of the contract between Power and Waukegan Steel, Waukegan Steel accepted the tender. On November 4, 2013, Waukegan Steel, claiming a right under its contract with Chicago Steel, tendered the defense of both Power and Waukegan Steel in *Kerr v. Power* to Chicago Steel's insurer, Navigators.

¶ 7 On May 8, 2014, Navigators filed the complaint against Power that initiated the lawsuit now on appeal. Navigators later added Waukegan Steel as a defendant, and sought a judgment declaring that it had no duty to defend Power or Waukegan Steel in *Kerr v. Power*. In December 2014, Waukegan Steel filed a cross-claim against Chicago Steel in *Kerr v. Power*. Waukegan Steel alleged that Chicago Steel had agreed, as part of its contract with Waukegan Steel, to maintain insurance to cover claims against Waukegan Steel for any injuries arising from Chicago Steel's operations as a subcontractor, and Waukegan Steel alleged that Chicago Steel breached that part of the contract.

¶ 8 Navigators filed a motion for summary judgment on its complaint against Waukegan Steel. Navigators's policy made an organization an "additional insured" only if Chicago Steel "agreed in writing in a contract or agreement that such *** organization be added as an

additional insured." Navigators argued that Chicago Steel never signed any contract with Waukegan Steel, and therefore it never "agreed in writing" to make Waukegan Steel an additional insured under Navigators's policy.

¶ 9 Waukegan Steel presented a certificate of insurance that listed Navigators as the insurer, Chicago Steel as the insured, and Waukegan Steel as one of several additional insureds. Waukegan Steel claimed that the certificate showed that Chicago Steel told Waukegan Steel that Chicago Steel had provided the insurance coverage Waukegan Steel had requested.

¶ 10 Waukegan Steel filed a motion for a stay of proceedings on Navigators's motion for summary judgment, arguing that "Navigators seeks a determination *** on the same issues that are currently at issue (and that are currently the subject of discovery) in the Underlying Case." Waukegan Steel supported the motion with a form subcontract it used for subcontractors, which required subcontractors to obtain insurance to cover Waukegan Steel for liability arising from the subcontractors' operations. Waukegan Steel alleged that it sent the form subcontract to Chicago Steel, and Chicago Steel performed in all other respects according to the terms of the form subcontract. Waukegan Steel also presented the affidavit of one of the attorneys working on *Kerr v. Power*, who swore that Chicago Steel had not yet produced all jobsite documents, and Chicago Steel had delayed depositions related to the issue of whether it obtained insurance coverage for claims against Waukegan Steel for injuries arising from Chicago Steel's operations as a subcontractor. Waukegan Steel did not present a signed copy of the form subcontract.

¶ 11 Navigators opposed the delay, and to expedite the ruling on its motion for summary judgment, it wrote that it "assume[d] for the purpose of this motion that Chicago Steel

received the form subcontract and performed according to its terms." Neither party presented Chicago Steel's answer to Waukegan Steel's complaint. In particular, Navigators presented no evidence that Chicago Steel admitted that it did not obtain insurance coverage for Waukegan Steel.

¶ 12 The circuit court denied Waukegan Steel's motion for a stay and granted Navigators's motion for summary judgment, finding that Waukegan Steel did not qualify as an additional insured under the policy Navigators issued to Chicago Steel. Waukegan Steel now appeals.

¶ 13 ANALYSIS

¶ 14 We review *de novo* the order for summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review the decision to deny the motion for a stay for abuse of discretion. *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 372 (2009). When an insurer seeks a judgment declaring that it has no duty to defend or indemnify a party in an underlying case, the declaratory judgment court must not determine disputed factual issues that may determine a party's liability in the underlying case. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 197 (1976).

¶ 15 Here, in the underlying case, Waukegan Steel filed a claim against Chicago Steel, alleging that Chicago Steel breached its contractual obligation to provide coverage for Waukegan Steel for any injuries arising from Chicago Steel's operations. The documents in the record for the declaratory judgment action Navigators filed do not disclose Chicago Steel's response to Waukegan Steel's allegations. The evidence does not show whether Chicago Steel claimed that it provided the allegedly required insurance by making Waukegan Steel an additional insured under the Navigators policy. The circuit court's judgment in favor

of Navigators answered the question of whether Chicago Steel effectively made Waukegan Steel an additional insured under the Navigators policy, even though the question remained at issue in the underlying case.

¶ 16 In its brief on appeal, Navigators makes several assertions about Chicago Steel's arguments and evidence in *Kerr v. Power*, especially about Chicago Steel's response to the charge that it breached its contract with Waukegan Steel by failing to make Waukegan Steel an additional insured under the Navigators policy. Navigators candidly admits that the factual assertions it makes about Chicago Steel's arguments and evidence find no support in the record before us. We must disregard the assertions that have no support in the record. *Allstate Insurance Co. v. Kovar*, 363 Ill. App. 3d 493, 499 (2006).

¶ 17 To defend against Waukegan Steel's claim, Chicago Steel could argue that it fulfilled its contractual duty by making Waukegan an additional insured under Navigators's policy. Navigators argues that this possible defense in the underlying case makes no difference to Navigators's declaratory judgment action, because the decision in the declaratory judgment action has no *res judicata* effect against Chicago Steel in the underlying case. See *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶¶ 35-37. That is, even though the circuit court here held that Navigators had no duty to defend Waukegan Steel because Waukegan Steel does not qualify as an additional insured under the policy Navigators issued to Chicago Steel, the trial court in the underlying case could find that Chicago Steel met its contractual obligations – by making Waukegan Steel an additional insured under the liability policy Navigators issued to Chicago Steel. Thus, the circuit court's ruling here allows the two courts to reach "inconsistent results which are always a blemish on a judicial system." *Finley*

v. Kesling, 105 Ill. App. 3d 1, 8 (1982) (quoting *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 74 (1969)). "This potential for factual *** 'whipsaw' argues strongly in favor of having one court adjudicate the entire matter with all the parties before it." *Schlumberger Industries, Inc. v. National Surety Corp.*, 36 F. 3d 1274, 1287 (4th Cir. 1994).

¶ 18 Although Navigators asserts that Chicago Steel conceded that it failed to obtain insurance covering Waukegan Steel, Navigators has presented no evidence to support its assertion. The evidence in the record does not show whether Chicago Steel claimed that it provided the allegedly required insurance by making Waukegan Steel an additional insured under the policy Navigators issued to Chicago Steel. Until the court in *Kerr v. Power* resolves at least the issue of whether Chicago Steel made Waukegan Steel an additional insured under its policy from Navigators, the declaratory judgment court should not prematurely resolve that issue, because resolution of the issue in the declaratory judgment action unfairly creates the possibility of inconsistency between the result of the declaratory judgment action and the result of Waukegan Steel's claim against Chicago Steel for breach of contract. Accordingly, we reverse the circuit court's judgment and remand for proceedings consistent with this order.

¶ 19 CONCLUSION

¶ 20 Because the circuit court's award of summary judgment in favor of Navigators resolves a factual matter still at issue in the underlying case, we reverse the judgment and remand for the court to stay proceedings pending resolution in the *Kerr v. Power* court of the issue of

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whether Chicago Steel effectively made Waukegan Steel an additional insured under the liability insurance Chicago Steel obtained from Navigators.

¶ 21 Reversed and remanded.