2016 IL App (1st) 160562-U

THIRD DIVISION
November 30, 2016

No. 1-16-0562

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

AMCO INSURANCE COMPANY,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois,
Plaintiff-Appellant,	)	County Department,
	)	Chancery Division.
v.	)	
	)	No. 14 CH 20258
CINCINNATI INSURANCE COMPANY,	)	
	)	
Defendant-Appellee.	)	The Honorable
	)	David B. Atkins,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing the plaintiff's complaint on the basis of *res judicata* where the operative facts underlying the first and second lawsuits were identical, and the appellate court had already ruled on the same issue in the first proceeding.

¶ 2 In this appeal, the plaintiff, AMCO Insurance Company (hereinafter AMCO) appeals from the circuit court's order granting the defendant, Cincinnati Insurance Company's (hereinafter Cincinnati) motion to dismiss (735 ILCS 5/2-619 (West 2012)). On appeal, AMCO contends

that the circuit court erred when it found that its declaratory judgment action was barred by its prior lawsuit with AMCO wherein that prior action was once already dismissed by the circuit court and that decision was affirmed by this appellate court. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 This cause of action arises from a personal injury action (case No. 07 L 2729) filed by a construction worker, Kevin Smith (hereinafter Smith) against several contractors involved in the construction project (hereinafter project) at Manchester Cove Subdivision in Mokena, Illinois. At that time, Smith was employed by one of the subcontractors, Edward Allen Construction (hereinafter Edward Allen). He suffered injuries after tripping over an anchor bolt installed in a concrete foundation (hereinafter the Smith lawsuit) at the construction site. Smith filed his personal injury complaint alleging negligence against the general contractor, Hartz Construction Company (hereinafter Hartz), the concrete subcontractor Van Der Laan Brothers, Inc. (hereinafter Van Der Laan), and the carpenter subcontractor Cimarron Construction (hereinafter Cimarron).

¶ 5 At the time of Smith's injury, each of the contractors was insured by a different insurance company. Hartz was insured under a general liability insurance policy with the defendant, Cincinnati. Van Der Laan was insured under a general liability insurance policy with Erie Insurance Company (hereinafter Erie). Finally, Cimarron was insured under two separate policies with AMCO: (1) a primary policy of general liability that covered up to $1 million and (2) an umbrella policy to cover excess liability.

¶ 6 Hartz, claiming additional insured status, target tendered its defense of the Smith lawsuit to AMCO. AMCO accepted Hartz's tender of defense, subject to a reservation of rights. Hartz

subsequently made a second targeted tender to Erie, again claiming additional insured status. insured status. That tender letter stated, in pertinent part:

> "Hartz is currently being defended under a reservation of rights by [AMCO], [Cimarron's] carrier. The purpose of this letter is to obtain the additional benefits of a defense and indemnity from Erie in addition to the defense and indemnity being provided by [AMCO]. This request/tender is made to [Erie] without recourse to [Hartz's] own policy of insurance with [Cincinnati] except as standby coverage should [Van Der Laan] or [Cimarron] not fulfill their obligations pursuant to its insurance coverage."

Erie also accepted Hartz's tender of defense, subject to a reservation of rights.

¶ 7 The parties subsequently attempted to settle the Smith lawsuit. After mediation, the mediator expressed that he believed the matter could be settled for $1.5 million. Soon thereafter, AMCO stated that it would contribute $500,000 toward the settlement provided that Cincinnati and Erie agreed to contribute equal amounts. Cincinnati refused to contribute any money toward the settlement arguing that Hartz had made a "targeted tender" to AMCO and Erie, and AMCO's and Erie's primary policy limits had to be exhausted before Cincinnati would be required to respond. Erie stated that it would be willing to contribute $50,000.

¶ 8 The parties ultimately settled the lawsuit by executing a settlement agreement under which AMCO paid Smith $1.45 million on behalf of Hartz and Cimarron. AMCO allocated $450,000 to the settlement on behalf of Cimarron under the primary policy, and $550,000 on behalf of Hartz under the primary policy. The remaining $450,000 that AMCO allocated for the settlement was done under its umbrella policy. The settlement agreement between the parties also contained a clause under which Hartz and Cimarron agreed to assign any and all rights,

claims and causes of action they had against Cincinnati and Erie in connection with the Smith lawsuit to AMCO.

¶ 9 On December 2, 2011, AMCO filed a declaratory judgment action (case No. 11 CH 41151) against the defendants Erie and Cincinnati (hereinafter AMCO's first lawsuit). In its complaint, AMCO sought, *inter alia*, equitable subrogation, equitable contribution and "other insurance" against each of the defendants.

¶ 10 Cincinnati filed a joint section 2-615 and 2-619 motion to dismiss (735 ILCS 5/2-615, 2-619 (West 2012)). In that motion, Cincinnati first noted that AMCO's complaint did not comply with the requirements of section 2-601 of the Code of Civil Procedure (735 ILCS 5/2-610 (West 2012)) because it lumped AMCO's claims brought pursuant to its primary and umbrella policies together, even though the causes of action under the primary policy differed significantly from those pleaded under the umbrella policy. Cincinnati further argued that AMCO could not maintain causes of action under either policy because those claims were barred under the Illinois "targeted tender" doctrine, and it was undisputable that AMCO had accepted Cincinnati's targeted tender. Specifically, with respect to AMCO's umbrella policy, Cincinnati asserted that both the Erie policy and the AMCO umbrella policy, had to be exhausted before Cincinnati (as a "de-selected insurer") was required to respond. Cincinnati also argued for dismissal of the equitable contribution claim because AMCO's and Cincinnati's policies did not cover concurrent risks.

¶ 11 In response to Cincinnati's motion to dismiss, AMCO argued that as part of the settlement of the Smith lawsuit, Hartz had assigned to AMCO all its rights under the Cincinnati policy, including Hartz's right to deactivate any previous targeted tender.

¶ 12 On April 24, 2012, the circuit court granted Cincinnati's motion to dismiss with prejudice. In

response to AMCO's request, the circuit court added to its dismissal order Illinois Supreme Court Rule 304(a) language so as to permit AMCO to appeal its decision without further delay.

¶ 13 AMCO appealed, contending that dismissal was improper because Hartz had relinquished its right to make a targeted tender when it entered the settlement agreement assigning all of its rights to AMCO, including its right to deactivate any previous targeted tenders. See *AMCO Ins. Co. v. Cincinnati Ins. Co.*, 2014 IL App (1st) 122856, ¶ 16 (hereinafter *AMCO I*). In the alternative, AMCO argued that even if the targeted tender was upheld, it should be allowed to pursue its claims against Cincinnati. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 18. In support of this argument, AMCO pointed out that its settlement payment of $1.45 million exceeded its policy limit of $1 million. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 18. AMCO further argued that according to our supreme court's decision in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 107 (2007), to the extent that defense and indemnity costs exceeded the primary limits of the targeted insurer, the deselected insurer or the insurer's primary policy were responsible for the loss before the insured could seek coverage under an excess policy. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 18 (citing *Kajima*, 227 Ill. 2d at 117). AMCO therefore argued that assuming the Cincinnati policy provided primary insurance to Hartz, both the Cincinnati and Erie policies were responsible for payment before any excess coverage (*i.e.*, AMCO's umbrella policy) could be triggered. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 18. AMCO asserted that the priority of coverage between the Cincinnati policy and the Erie policy had yet to be determined and contended that the court had to permit Cincinnati to proceed with its claims so that the priority of coverage between the two insurers could be determined. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 18.

¶ 14 In response to the argument that AMCO's claims should be permitted to proceed in order to

determine the priority of coverage between Cincinnati and Erie, on appeal to this court, Cincinnati argued that AMCO overlooked the fact that in addition to AMCO, Hartz had specifically targeted Erie for coverage and Erie had accepted that tender. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 23. Cincinnati argued that *Kajima* only required that primary policies had to be exhausted before excess policies. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 23. However, according to Cincinnati under the targeted tender doctrine, "the *targeted* insurers (in this case, AMCO and Erie)" were responsible for any costs associated with the insured's underlying lawsuit. *AMCO I*, 2014 IL App (1st) 122856, ¶ 23. Cincinnati pointed out that the limit of the Erie policy was $1 million, and since AMCO sought contribution for the $450,000, it paid in excess of its policy limit, then Erie (as the targeted insurer, regardless of priority) was required to pay (and could easily) cover this amount. See *AMCO I*, 2014 IL App (1st) 122856, ¶ 23.

¶ 15 On May 5, 2014, we affirmed the dismissal of AMCO's claim. In doing so, we held that the targeted tender doctrine did not permit AMCO to deselect itself as the insurer, even though Hartz had assigned all its rights to it after the settlement of the Smith lawsuit. *AMCO I*, 2014 IL App (1st) 122856, ¶¶ 24-25. We further found that the entire purpose of the targeted tender doctrine would be eviscerated if a targeted insurer could simply settle underlying lawsuits contingent on the assignment of the insured's rights, and then seek contribution from every other insurer that was not originally targeted. *AMCO I.*, 2014 IL App (1st) 122856 at ¶¶ 24-25. In addition, we held, albeit in a footnote that:

> "[w]e [were] likewise unpersuaded by AMCO's argument that its claims against Cincinnati should proceed in order to determine the priority of coverage between Cincinnati and Erie. Hartz clearly tendered its defense of the Smith lawsuit to AMCO and Erie. Thus, applying the targeted tender doctrine, Erie would be required to pay any

costs of the settlement to the fullest extent of its policy before the Cincinnati policy could be triggered." *AMCO I,* 2014 IL App (1st) 122856, ¶ 25, footnote 1.

¶ 16 After the appeal, AMCO proceeded with its first cause of action against Erie. On August 4, 2014, the trial court granted summary judgment in that action in favor of Erie and against AMCO on the basis that Erie was not provided sufficient notice. That decision was subsequently affirmed on appeal. *AMCO Ins. Co. v. Erie Ins. Exchange*, 2015 IL App (1st) 142660-U, *withdrawn and replaced by AMCO Ins. Co. v. Erie Ins. Exchange*, 2016 IL App (1st) 142660.

¶ 17 On December 18, 2014, AMCO filed the current action against Cincinnati, seeking a declaratory judgment that Cincinnati was liable to it for $450,000 under the rule set forth in *Kajima*. Cincinnati filed a section 2-619(a)(4) motion to dismiss (735 ILCS 5/2-619(4) (West 2012)) arguing that AMCO was barred from pursuing its claim under the doctrine of *res judicata*. The trial court heard arguments on May 21, 2015, after which it granted Cincinnati's motion. AMCO filed a motion to reconsider, which was denied. AMCO now appeals.

¶ 18 II. ANALYSIS

¶ 19 Section 2-619(a)(4) of the Civil Code of Procedure incorporates the doctrine of *res judicata* and permits the involuntary dismissal of a cause of action on the basis that it "is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2012); see also *Marvel of Illinois v. Marvel Containment Control Industries, Inc.,* 318 Ill. App. 3d 856, 863 (2001) (citing *People ex rel. Burris v. Progressive Land Developers, Inc.,* 151 Ill. 2d 285, 294 (1992)). We review a trial court's application of *res judicata* under section 2-619 under a *de novo* standard of review. See *Marvel*, 318 Ill. App. 3d at 863; *Snyder v. Heidelberger,* 2011 IL 111052, ¶ 8.

¶ 20 "Under the doctrine of *res judicata* a final judgment rendered on the merits by a court of

competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." *Torcasso v. Standard Outdoor Sales, Inc*., 157 Ill. 2d 484, 490 (1993); see also *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18; see also *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008); *Marvel*, 318 Ill. App. 3d at 863. In order for *res judicata* to bar a subsequent action, three requirements must be met: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. See *Cooney*, 2012 IL 113227, ¶ 18; *Hudson*, 228 Ill. 2d at 467.

¶ 21 On appeal, AMCO does not dispute that the first and third requirements are met. Instead, it contends that *res judicata* is inapplicable here because the causes of action in its first lawsuit are not identical to the one it presently raises. For the reasons that follow, we disagree.

¶ 22 We begin by noting that *res judicata* extends not only to those issues that were actually decided in the original lawsuit but also to those matters that could have been decided in that first suit. See *Cooney*, 2012 IL 113227, ¶ 18; see also *Hudson*, 228 Ill. 2d at 467. In Illinois, we apply the "transactional test" to determine the identity of actions. *Cooney*, 2012 IL 113227, ¶ 21. Under that test separate claims are considered the same cause of action for purpose of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Cooney*, 2012 IL 113227, ¶ 22; see also *Torcasso*, 157 Ill. 2d at 490-91 ("Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery, assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action."). The test generally employed is whether the evidence needed to sustain the second action would

have sustained the first. *Torcasso*, 157 Ill. 2d at 490. If the same facts are essential to maintain both proceedings, or the same evidence is necessary to sustain the two, there is identity between the causes of action asserted, and *res judicata* bars the latter one. *Torcasso*, 157 Ill. 2d at 490. Claims are generally considered "part of the same cause of action 'even if there is not a substantial overlap of evidence, so long as they arise from the same transaction.' " *Cooney*, 2012 IL 113227, ¶ 22 (quoting *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 129, 311 (1998)).

¶ 23 In the present case, a review of the record reveals that AMCO's first and second lawsuits arise from the same set of operative facts. The factual allegations in the two cases are virtually identical except that the first lawsuit also included Erie as the defendant. Both causes of action arise from the underlying Smith lawsuit which was completely resolved by the settlement before AMCO filed its first lawsuit. Both lawsuits were based upon the facts of the Smith case, Hartz's targeted tenders and the settlement of the Smith lawsuit. The policies at issue in both cases are also the same. So are the remedies sought by AMCO. In the first lawsuit, AMCO sued Cincinnati for equitable subrogation so as to recoup the $450,000 it spent from its umbrella policy, and it is seeking the same remedy now. In addition, it is clear that the issue of priority of coverage among primary insurers has been a central argument in both lawsuits. Accordingly, under this record, we are compelled to conclude that the operative facts of the two suits are the same.

¶ 24 Nevertheless, on appeal AMCO argues that the August 4, 2014, granting summary judgment to Erie, was a fundamental change in the operative facts of the cause at hand, because it removed Erie from the potential pool of insurers from which AMCO could recover. AMCO therefore asserts that this order changed the legal relationship between the parties, thereby precluding *res judicata*. We disagree.

¶ 25 The operative facts establishing Erie's potential liability to AMCO were present all along in the first lawsuit. It was always possible that the circuit court would find Erie did not have to contribute to the Smith settlement. There were only four possible outcomes to the first lawsuit: (1) neither Erie nor Cincinnati were liable; (2) both Erie and Cincinnati were liable; (3) only Erie was liable; or (3) only Cincinnati was liable. In order to reach any one of these four potential outcomes, it was imperative to determine Erie's potential liability as the tendered insurer to AMCO first. Therefore, the circuit court's subsequent decision granting summary judgment in favor of Erie was not a fundamental change in the underlying facts, but rather an expected and necessary part of it.

¶ 26 What is more, Erie was subsequently dismissed from the action purely on a legal basis, *i.e.*, insufficient notice, so that there are no facts that AMCO can now point to that were not available to it at the time of the first lawsuit, by which it would not have been able foresee the potential liability of either Erie or Cincinnati.

¶ 27 Moreover, we find it disingenuous for AMCO to now argue that Cincinnati's and Erie's potential liability to AMCO was not present in the first lawsuit where that first lawsuit specifically addressed the question of priority of coverage between Cincinnati and Erie, pursuant to *Kajima*. The record reveals that AMCO's first lawsuit sought a judgment against Cincinnati under both the primary and the umbrella insurance policies, the latter explicitly implicating the holding of *Kajima*. What is more, in affirming the dismissal of the first lawsuit, we explicitly addressed AMCO's priority of coverage argument, albeit in a footnote, finding that it had no merit because Hartz had target tendered its defense of the Smith lawsuit to both AMCO and Erie, and therefore regardless of the priority of coverage, Erie (as the targeted primary insurer) had to

pay any costs of the settlement to the fullest extent of its policy first, before the Cincinnati policy could be triggered. See *AMCO*, 2014 IL App (1st) 122856.

¶ 28 AMCO asserts, however, that by the aforementioned language, this court did not rule on the *Kajima* issue, but rather merely indicated that it would not make a determination as to that issue until it became ripe. AMCO asserts, without citation to any authority, that the issue did not become ripe until August 4, 2014, when the trial court granted summary judgment in favor of Erie. We disagree.

¶ 29 AMCO nowhere argued ripeness as part of its first lawsuit either in the trial court the appellate court, and we never held that the issue of priority of coverage was not ripe for review. See *AMCO*, 2014 IL App (1st) 122856. AMCO has only itself to blame for the fact that Cincinnati was dismissed with prejudice from the first lawsuit before Erie's late notice defense was decided. AMCO never argued that the trial court should stay its first lawsuit with respect to AMCO's umbrella policy as against Cincinnati, until its dispute with Erie was resolved. In fact, it was AMCO that requested that the circuit court put Illinois Supreme Court Rule 304(a) language in its order granting Cincinnati's motion to dismiss, so that the issue could proceed on appeal. Accordingly, AMCO cannot now complain about Cincinnati having been dismissed from this cause prior to Erie, where it personally precipitated that outcome.

¶ 30 III. CONCLUSION

¶ 31 Accordingly, for the reasons articulated above, we find that the trial court properly dismissed AMCO's second lawsuit as barred by the doctrine of *res judicata*.

¶ 32 Affirmed.