2017 IL App (2d) 160488-U
No. 2-16-0488
Order filed April 11, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OLD REPUBLIC INSURANCE COMPANY, Plaintiff-Appellee, v. JOSEPH F. LEAHY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 14-MR-1062 Honorable David R. Akemann, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted plaintiff a declaratory judgment that, under the parties' policy, defendant had to repay plaintiff underinsured motorist benefits that duplicated worker's compensation benefits; neither the policy's exception for "settlement agreements" nor a separate release entitled defendant to a double recovery.

¶ 2 Defendant, Joseph F. Leahy, appeals the trial court's order finding that he must reimburse plaintiff, Old Republic Insurance Company, for underinsured motorist (UIM) benefits it paid him. He contends that the court erred in concluding that he could not recover both UIM and worker's compensation benefits. We affirm.

¶ 3 On June 17, 2010, defendant was involved in an automobile accident. The other driver, Brian Chandler, was killed, and Leahy was seriously injured. At the time of the accident, defendant was employed by Admiral Mechanical Services (Admiral).

¶ 4 Admiral had both a business automobile policy and a worker's compensation policy issued by plaintiff. Defendant filed a worker's compensation claim. Admiral contested the claim, arguing that defendant was not acting within the scope of his employment when the accident occurred. Defendant also sued Chandler's estate. Chandler's insurer, Allstate, tendered the policy's liability limit of $100,000. Defendant then sought UIM coverage from plaintiff, whose policy covering Admiral had a UIM limit of $1 million. That policy contained the following provisions:

> "Except in the event of a 'settlement agreement', the Limit of Insurance for this coverage shall be reduced by all sums paid or payable:
>
> ***
>
> "b. Under any workers' compensation *** or similar law. ***
>
> ***
>
> 3. In the event of a 'settlement agreement', the maximum Limit of Insurance for this coverage shall be the amount by which the limit of insurance for this coverage exceeds the limits of bodily injury liability bonds or policies applicable to the owner or operator of the '[UIM] vehicle.'
>
> 4. No one will be entitled to receive duplicate payments for the same elements of 'loss' under this Coverage Form and any Liability Coverage Form."

¶ 5 While defendant's worker's compensation claim was being litigated, his union, Pipe Fitter's Local 597, paid his medical bills totaling $310,442.81, through its welfare fund. The union's welfare fund plan included the following provision:

> "The Fund's right of subrogation and reimbursement arises when benefits are paid on behalf of [Leahy] *** as a result of an injury or illness for which another party may be responsible. If the Fund pays any benefits that arise out of the injury or illness which results or could result in a claim against a Third Party, acceptance of these benefits under the Plan means you agree to reimburse the Fund for all expenses paid on your *** behalf."

The plan defined third parties as including an insurance company such as the at-fault party's insurer, and a worker's compensation insurer.

¶ 6 Defendant eventually succeeded on his claim before the Illinois Workers' Compensation Commission, which decided that he was within the scope of his employment at the time of the accident. Plaintiff, pursuant to its worker's compensation policy, reimbursed the union welfare fund and began paying defendant worker's compensation benefits. At oral argument, plaintiff asserted that it has paid more than $900,000 in worker's compensation benefits to date.

¶ 7 Plaintiff and defendant subsequently settled defendant's claim to UIM benefits, with plaintiff paying $900,000 (the policy limit minus the $100,000 received from Chandler's insurer). Defendant signed a release that, *inter alia*, required him to hold the $900,000 in a trust account, "pending final judgment and/or settlement of the workers compensation claim currently pending." The release also provided as follows:

> "Mr. Leahy holds harmless and will indemnify Gallagher Bassett Services, Inc., and Old Republic Insurance Company for any and all valid liens/subrogation, including, any

workers compensation lien, all of which will be satisfied pursuant to Illinois law upon final resolution and any payments made pursuant to the workers compensation case."

¶ 8 Plaintiff then filed suit, seeking a declaration that defendant was required to reimburse it from the $900,000 in UIM benefits for the approximately $310,000 it paid to the union and for the worker's compensation benefits it had paid and would pay in the future. Plaintiff moved for judgment on the pleadings. Defendant objected that the policy did not require reimbursement in the event of a settlement agreement and that the above-quoted language from the release did not apply in this situation, where there was neither a right to indemnity, a lien, or a subrogation right. The trial court granted the motion, agreeing with plaintiff that the policy and release required defendant to reimburse plaintiff. Defendant timely appeals.

¶ 9 Defendant contends that the trial court erred by ordering him to reimburse plaintiff. He argues that the policy's plain language, while generally prohibiting duplicate benefits, contained an exception for "settlement agreements," and, at least by negative implication, did not require reimbursement where the parties had reached a settlement. He further argues that the release did not "reinvest" plaintiff with a right to reimbursement, because none of the specific situations envisioned by the release is present here.

¶ 10 Judgment on the pleadings is proper if the pleadings alone disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Illinois Emcasco Insurance Co. v. Tufano*, 2016 IL App (1st) 151196, ¶ 17. We review *de novo* the trial court's rulings on a motion for judgment on the pleadings. *Id*.

¶ 11 Defendant first contends that the policy bars plaintiff from seeking reimbursement, because there was a settlement agreement. We thus construe the policy. A court's primary objective in construing an insurance policy is to ascertain and give effect to the parties'

intentions. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc*., 223 Ill. 2d 352, 362 (2006). Like any contract, an insurance policy must be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. *Id.* "If the words used in the policy, given their plain and ordinary meaning, are unambiguous, they must be applied as written." *Id.* at 363. However, if the words are ambiguous, they will be strictly construed against the drafter. *Id.* Words are ambiguous if they are reasonably susceptible to more than one interpretation, not simply because the parties can suggest creative possibilities for their meaning, and a court will not search for ambiguity where there is none. *Id.*

¶ 12 Here, the policy clearly states that the limit of insurance shall be reduced by any amount payable "[u]nder any workers' compensation *** or similar law." The exception for settlement agreements does not clearly prohibit the insurer from seeking reimbursement. Rather, as plaintiff points out, it merely means that the parties are free to negotiate and agree to a different option. In summary, the policy prohibits a double recovery unless a settlement agreement provides otherwise. We thus turn to the release, which the parties agree was executed as part of a settlement agreement.

¶ 13 Defendant contends that, even if the policy allows plaintiff to seek a setoff, the release does not preserve its right to do so. We disagree. A release, too, is a contract, the interpretation of which is governed by the rules of contract construction. *Touhy v. Twentieth Century-Fox Film Corp*., 69 Ill. App. 3d 508, 512 (1979). Here, the pertinent language from the release provides that defendant will "indemnify [plaintiff] for any and all valid liens/subrogation, including any workers compensation lien."

¶ 14 Defendant argues that plaintiff is actually seeking a setoff, but that the release does not mention a setoff. He contends that his obligation to "indemnify," *i.e.*, provide indemnity, to plaintiff is not the same thing as a setoff, because "[i]n the context of this case, that means [defendant] agreed to indemnify [plaintiff] if it paid money to a *third-party* for a debt that [defendant] was obligated to pay. (Emphasis in original.) He never agreed to return any of the underinsured motorist benefits he received" to plaintiff. Defendant does not cite any authority for this statement or explain why "indemnity" is so limited in this context.

¶ 15 "Indemnity" is defined as a "duty to make good *any* loss, damage, or liability incurred by another." (Emphasis added.) Black's Law Dictionary 784 (8th ed. 2004). Another listed definition is "Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty." *Id.* Thus, defendant's definition is only one of several possible definitions of "indemnity." We note that, even by defendant's definition, the duty to indemnify plaintiff would be broad enough to cover its payment to the union, a third party.

¶ 16 At oral argument, defendant conceded that, had Chandler had $1 million in liability coverage, he would have had to "indemnify," *i.e.*, reimburse, plaintiff for the full amount of worker's compensation benefits. Essentially, then, defendant seizes on the fortuitous fact that plaintiff provided both worker's compensation insurance and UIM coverage to argue that he should not have to indemnify plaintiff for payments it made itself. We note, however, that such an argument is at odds with the policy behind UIM coverage.

¶ 17 The legislature's intent in providing UIM coverage was to place the insured in substantially the same position he would occupy if the tortfeasor were adequately insured.

Sulser v. Country Mutual Insurance Co., 147 Ill. 2d 548, 555 (1992). In light of that intent and the language of the policy, the court held that the defendant could reduce the plaintiff's UIM benefits by the amount of worker's compensation received. *Id.* at 551, 559. Contrary to defendant's contention, *Sulser* did not merely follow the policy's plain language. The court also decided that that result was consistent with the policy behind providing UIM coverage: to place the victim in the same position he or she would have been in had the tortfeasor been adequately insured. Here, defendant seeks to place himself in a much better position than he would have been in had Chandler had more coverage.

¶ 18 In his reply brief, defendant insists that this is not so, because the release requires him to indemnify plaintiff only for any valid "liens/subrogation" and, under Illinois law, a worker's compensation lien may not attach to UIM benefits.[1] See *Terry v. State Farm Mutual Automobile Insurance Co.*, 287 Ill. App. 3d 8, 12-13 (1997) (citing 820 ILCS 305/5(b) (West 1994)). In *Terry*, however, the court held that the employer and its worker's compensation carrier could not assert a lien against the UIM benefits paid by a third-party insurer. Here, because of its dual role of providing both UIM and worker's compensation coverage, plaintiff seeks only to recover benefits that it paid.

¶ 19 In any event, defendant's argument ignores the word "subrogation" in the release. "Subrogation" is the "substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Black's Law Dictionary 1467 (8th ed. 2004). Defendant fails to explain why, even if plaintiff may not assert a lien against the UIM proceeds, it does not have a right of subrogation.

[1] At oral argument, defendant essentially conceded that the union has a "lien," although he maintained that he may be able to challenge the amount of reimbursement due.

¶ 20 Moreover, the release requires that the funds be held in trust pending resolution of the worker's compensation case and expressly refers to "liens/subrogation, *** all of which will be satisfied pursuant to Illinois law upon final resolution and any payments made pursuant to the workers compensation case." Defendant's proposed construction of the release would render these references to the worker's compensation case superfluous, and we must construe a contract such that none of its terms is rendered meaningless or superfluous. See *Salce v. Saracco*, 409 Ill. App. 3d 977, 982 (2011); *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510-11 (2005).

¶ 21 The judgment of the circuit court of Kane County is affirmed.

¶ 22 Affirmed.