2017 IL App (5th) 160055-U

NO. 5-16-0055

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FOUNDERS INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 09-MR-88
	)	
KELLY GORETZKE and ANTHONY ASHBROOK,	)	
	)	
Defendants	)	Honorable
	)	Christopher T. Kolker,
(Anthony Ashbrook, Defendant-Appellee).	)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's ruling that granted summary judgment to the defendants is affirmed because the plaintiff had actual notice of the underlying lawsuit in question prior to the entry of final judgment in that lawsuit and because circuit court did not err in concluding that the plaintiff did not meet its burden of demonstrating that its insured breached the assistance and cooperation provisions of her insurance contract with the plaintiff.

¶ 2 The plaintiff, Founders Insurance Company, appeals the ruling of the circuit court of St. Clair County that granted summary judgment to the defendants, Kelly Goretzke and Anthony Ashbrook, in the plaintiff's declaratory judgment action. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. On April 6, 2009, the plaintiff filed, in the circuit court of St. Clair County, a complaint for declaratory judgment (complaint), wherein the plaintiff alleged, *inter alia*, that defendant Goretzke was the plaintiff's insured and was involved in an auto accident on April 7, 2006, with defendant Ashbrook. The complaint further alleged that Ashbrook filed suit against Goretzke on February 25, 2008, served her with a summons on March 21, 2008, and obtained a default judgment against her in the amount of $35,226 on May 26, 2008. Thereafter, according to the complaint, Goretzke on February 17, 2009, transferred to Ashbrook all rights she possessed against the plaintiff. The complaint alleged that at no time did Goretzke, or Ashbrook, notify the plaintiff of the lawsuit. According to the complaint, the plaintiff first learned of the lawsuit when Ashbrook attempted to collect from the plaintiff on the default judgment on January 20, 2009.

¶ 5 The complaint alleged that Goretzke materially breached her policy with the plaintiff by failing to notify the plaintiff of the lawsuit and by assigning her rights against the plaintiff to Ashbrook without first notifying the plaintiff of the lawsuit. The complaint alleged that the plaintiff had been prejudiced by the entry of the default judgment and by Goretzke's subsequent actions. With regard to the relief requested, the complaint asked the circuit court to find that the plaintiff was "not bound by the default judgment taken against [Goretzke]," that the plaintiff had no duty to pay or indemnify either defendant, and that the plaintiff had no further duty to defend Goretzke.

¶ 6 On April 14, 2009, Ashbrook answered the complaint, admitting that a "default" was obtained against Goretzke on May 26, 2008, but denying that the default judgment was final at that time. Ashbrook alleged that the judgment did not become final until February 17, 2009, which was after Ashbrook had notified the plaintiff, in writing on January 12, 2009, of the default. Ashbrook alleged that despite having notice, the plaintiff did not defend Goretzke, and that Goretzke did not assign her rights to Ashbrook until after the plaintiff received actual notice of the lawsuit and failed to defend Goretzke. Ashbrook attached to his answer, as Exhibit A, a copy of the February 17, 2009, written judgment order signed by the Honorable Vincent J. Lopinot, which entered judgment in favor of Ashbrook and against Goretzke, in the amount of $35,226, and which transferred Goretzke's rights against the plaintiff to Ashbrook.

¶ 7 Discovery followed, and ultimately, on May 12, 2011, Ashbrook filed a motion for summary judgment. Thereto, he attached, as Exhibit 2, a copy of the May 6[1], 2008, default order. Because it is of relevance to this appeal, we describe the order in some detail. The order is found on what appears to be a pre-printed and/or computer-generated form, captioned as occurring in the circuit court of St. Clair County and entitled "MANDATORY ARBITRATION STATUS/RETURN DATE ORDER." The names of the parties−Ashbrook and Goretzke−are listed in typescript in a header on the form, as is

[1]Although both parties at times−in the circuit court and on appeal−refer to the date of the default judgment as "May 26, 2008," it is clear from the record that it was actually signed and filed on May 6, 2008.

the arbitration case number. Goretzke's name and address are listed in typescript after the word "TO:" and the date of the scheduled appearance, time, and room number are listed in typescript as well, directly beneath her name and address. Following the typescript text "COURT HEREBY FINDS AND ORDERS:" there are nine statements, each of which is preceded by a check-box formed by using an opening bracket, a space, and a closing bracket. The third statement, which reads "Defendant served, does not appear, and is in default," has a handwritten checkmark in the check-box preceding it. The sixth statement, which reads "Judgment is entered for plaintiff and against defendant in the sum of $35,000.00 *** plus $226.00 costs, for a total of $35,226.00" has a handwritten checkmark in the check-box preceding it. The dollar amounts "$35,000.00," "$226.00," and "$35,226.00" are written by hand on blank spaces allowed for them on the form. Following the sixth statement, there is a sub-statement, which also is preceded by a check-box. The sub-statement, which reads "Attorney for plaintiff shall submit judgment order within 14 days," has a handwritten checkmark in the check-box preceding it. None of the check-boxes preceding the remaining seven statements have checkmarks within them. The order is signed by Ashbrook's attorney and by Judge Lopinot, with the date "5/6/08" handwritten below the judge's signature. With the exception of the checkmarks, dollar amounts, signatures, and date, the form is, as explained above, pre-printed and/or computer-generated, set in typescript and not handwritten.

¶ 8 As Exhibit 3 to his motion for summary judgment, Ashbrook attached a copy of the correspondence from him to the plaintiff, dated January 12, 2009, in which he notified the plaintiff of the judgment. As Exhibit 4, Ashbrook attached a copy of the

correspondence from the plaintiff to him, dated January 22, 2009, in which the plaintiff stated that because it was not notified of the lawsuit until after judgment had been entered, the plaintiff was denying coverage, as per the plaintiff's policy with Goretzke.

¶ 9 On April 16, 2015, the plaintiff filed a cross-motion for summary judgment, along with a memorandum thereto. Included therewith, as Exhibit C, was the March 11, 2015, affidavit of Jason Jaramillo, a senior claims analyst employed by the plaintiff, which stated, *inter alia*, that Goretzke "never notified [the plaintiff] of the pending lawsuit or any of the pending hearing dates at any time." Jaramillo also averred that on January 22, 2009, the plaintiff had notified Goretzke "that there was no coverage" for the default obtained by Ashbrook, and that Goretzke "should retain legal counsel to have judgment vacated. Thereafter, [the plaintiff] would retain counsel to defend the lawsuit." Exhibit E was a copy of the letter sent to Goretzke on January 22, 2009, which states that Goretzke should "retain legal counsel, at your own expense, to have the judgment vacated."

¶ 10 A hearing on the motions for summary judgment was held on December 31, 2015, before the Honorable Chris Kolker. Therein, Ashbrook contended that the plaintiff acted improperly, because Ashbrook had informed the plaintiff on January 12, 2009, of the default, but the plaintiff nevertheless allowed the subsequent February 17, 2009, order to become final, rather than moving to set it aside. Once it was final, the plaintiff then filed the present action. The plaintiff, on the other hand, argued that the default became final on May 6, 2008, long before the plaintiff had notice of the lawsuit. The plaintiff also argued that Goretzke breached both the notice clause of her contract with the plaintiff and the cooperation clause of the contract. Ashbrook responded that the plaintiff could not

demonstrate any prejudice as a result of any breach by Goretzke, because the plaintiff "had an opportunity to go in and set aside the default and instead chose to slither around and do nothing until they filed their [declaratory judgment] action four months later." With regard to the finality of the May 6, 2008, order, Ashbrook argued that it was not final, pursuant to Illinois Supreme Court Rule 272 (Rule 272) (Ill. S. Ct. R. 272 (eff. Nov. 1, 1990)), because the order by its plain language required Ashbrook to submit a written judgment order within 14 days for the judge's signature. Following the hearing, Judge Kolker took the matter under advisement.

¶ 11 On January 8, 2016, Judge Kolker entered a two-page written order in which he ruled that the plaintiff had been informed of the accident by a lien letter mailed to the plaintiff on October 10, 2006, and that, therefore, the plaintiff "had notice." Judge Kolker also ruled that, with regard to the plaintiff's claim that Goretzke failed to cooperate with the plaintiff, the plaintiff had "failed to show that it tried to get the insured's participation," and that, "[i]n fact, there is nothing to suggest [the plaintiff] even called its insured after it received a lien letter about the accident." Accordingly, Judge Kolker denied the plaintiff's motion for summary judgment and granted Ashbrook's motion for summary judgment. This timely appeal followed.

¶ 12 ANALYSIS

¶ 13 We begin with our standard of review and other relevant legal principles. We review *de novo* a circuit court's summary judgment. *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 388 (2009). "The interpretation of an insurance policy and the coverage provided are questions of law that are appropriate for resolution through

summary judgment." *Id.* We may affirm the judgment of the circuit court " 'if it is justified in the law for any reason or ground appearing in the record regardless of whether the particular reasons given by the trial court, or its specific findings, are correct or sound.' " *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 923 (2008) (quoting *Natural Gas Pipeline Co. of America v. Phillips Petroleum Co.*, 163 Ill. App. 3d 136, 142 (1987)).

¶ 14 On appeal, the plaintiff contends the circuit court's ruling granting summary judgment to the defendants was erroneous because: (1) the May 6, 2008, order was a final judgment, and the plaintiff had no notice of the lawsuit prior to the entry of that order; (2) Goretzke breached the notice of lawsuit condition of her policy with the plaintiff, and therefore there can be no coverage in this case; and (3) the plaintiff met its burden to demonstrate that Goretzke breached the assistance and cooperation provisions of her policy with the plaintiff, which again means there can be no coverage in this case.

¶ 15 In support of its first argument, the plaintiff, without citation to authority, claims that the circuit court "no longer had jurisdiction over the case" when it entered the February 17, 2009, order, because the May 6, 2008, order was the final order in the case. With regard to the language of the May 6, 2008, order that Ashbrook's attorney was to "submit judgment order within 14 days," the plaintiff asks this court to ignore that language, claiming that Rule 272 "was intended to resolve questions regarding the timeliness of an appeal where there is an *oral announcement of judgment* from the bench." (Emphasis in original.) In support of this proposition, the plaintiff cites *Swisher v. Duffy*, 117 Ill. 2d 376 (1987). The plaintiff also claims that because the May 6, 2008,

order contained, in writing, the essential elements of the final judgment, once it was signed by the judge and filed, "there simply was nothing left for the parties to do, and no 'details' left for the parties to 'specify' in a written order." Finally, the plaintiff contends that because Ashbrook attempted to collect from the plaintiff after the entry of the May 6, 2008 order, but prior to the entry of the February 17, 2009, order, the May 6, 2008, order must have been final, for one cannot collect on a judgment until it is final.

¶ 16 Rule 272 states, in its entirety:

> "If at the time of announcing final judgment the judge requires the submission of a form of written judgment to be signed by the judge or if a circuit court rule requires the prevailing party to submit a draft order, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such signed written judgment is to be filed, the judge or clerk shall forthwith make a notation of judgment and enter the judgment of record promptly, and the judgment is entered at the time it is entered of record." Ill. S. Ct. R. 272 (eff. Nov. 1, 1990).

It is certainly true, as the plaintiff maintains, that in *Swisher v. Duffy*, 117 Ill. 2d 376, 378 (1987), the Supreme Court of Illinois stated that "Rule 272 was intended to resolve questions regarding the timeliness of an appeal where there is an oral announcement of judgment from the bench." Significantly, however, neither *Swisher*, nor the case it cited for the foregoing proposition (*West v. West*, 76 Ill. 2d 226, 233 (1979)), nor the language of the rule itself *limits* Rule 272 to situations where there was an oral announcement of judgment from the bench. In our view, it is not unreasonable—or an abuse of a trial

judge's discretion−for a trial judge to request a written judgment order separate from a standard, check-box type form such as the one used for the May 6, 2008, order, and described in detail above. Indeed, the fact that the standard form contains a check-box requesting a separate order is strong evidence that, at least in the jurisdiction in question, there is a perceived need, or at least preference, for separate orders in some cases wherein the standard check-box form is initially used. Clearly, the perceived need is not limited to situations where there has been an oral announcement of judgment from the bench–if it were, there would be no need to include the check-box on a written judgment form. We decline to adopt a blanket rule that Rule 272 applies only to oral announcements of judgment from the bench, for to do so would be to tell practitioners not only that they are free to ignore language such as that found on the standard check-box form in the case underlying this one, but that if they fail to ignore such language, they risk a judgment becoming final prematurely. That, in our view, would be an improper usurpation of the discretion of a trial judge to determine whether a separate written order is needed or desired in any particular case, and would invite chaos, rather than predictability, to a judge's attempt to manage his or her docket effectively.

¶ 17 Having concluded that the trial judge properly could, and did, require a separate written order in the case underlying this one−and that pursuant to Rule 272, the judgment in that case could become final only when the separate written order was signed and filed by the judge−we next consider whether the fact that the order was not submitted by Ashbrook's attorney within 14 days means that the May 6, 2008, judgment nevertheless somehow became the final judgment in that case. We note that the plaintiff has provided

no argument or authority in support of such a proposition, and we are aware of none. We also note that at the December 31, 2015, hearing before Judge Kolker, Ashbrook's attorney argued that she "intentionally waited several months to enter the final order" because she wanted to give the plaintiff the chance to get the default judgment set aside, but that instead the plaintiff told Goretzke that she should retain legal counsel, at her own expense, to have the judgment vacated. Moreover, on appeal, Ashbrook's attorney aptly notes that the plaintiff had clear notice that the May 6, 2008, order was not a final order because by its own terms it required a subsequent written order to be prepared and submitted by Ashbrook's attorney, and that pursuant to the plain language of Rule 272, until that happened and the judge signed and filed the subsequent written order, there could be no final order in the underlying case. We agree that based upon the foregoing analysis, the plaintiff had clear, actual notice of the lawsuit prior to a final judgment being entered in the lawsuit, and we do not believe that anything in the principal case relied upon by the plaintiff−*Vega v. Gore*, 313 Ill. App. 3d 632 (2000)−requires a different result in this case.

¶ 18 We note as well that in another key case relied upon by the plaintiff, *Northern Illinois Gas Co. v. Martam Construction Co.*, 240 Ill. App. 3d 988, 989-92 (1993), this court dismissed the appeal in question for lack of jurisdiction for the second time, concluding that even though more than two years had passed since the oral announcement of judgment from the bench by the judge, because no subsequent written order had ever been signed by the judge and filed−although a written order had been requested by the judge, and therefore was required by Rule 272−there was no final,

appealable judgment in the case. Accordingly, we cannot agree with the plaintiff that the May 6, 2008, order was the final judgment in the case underlying this one, and that the plaintiff had no notice of the lawsuit prior to the entry of the final judgment. To the contrary, Ashbrook is correct that the final judgment was rendered on February 17, 2009, more than a month after the plaintiff was notified of the lawsuit, and in ample time for the plaintiff to protect its interests in that case.[2]

¶ 19 In support of its second argument on appeal−that Goretzke breached the notice of lawsuit condition of her policy with the plaintiff, and therefore there can be no coverage in this case−the plaintiff focuses on the fact that Goretzke never notified the plaintiff of the lawsuit initiated against Goretzke by Ashbrook. However, as Ashbrook notes in response to the plaintiff's argument, this court has long held that an insurance company "has an obligation to defend under an insurance contract if it has actual notice of a lawsuit." *Illinois Founders Insurance Co. v. Barnett*, 304 Ill. App. 3d 602, 607 (1999). It is equally well-established that "[a]ctual notice means notice from 'any source sufficient to permit the insurer to locate and defend its insured.' " *Id*. (quoting *Insurance Co. of Illinois v. Federal Kemper Insurance Co.*, 291 Ill. App. 3d 384, 388 (1997)). As a result, "an insurer may be liable under an insurance contract even if the insured never tenders a

[2]Nor do we find it significant that Ashbrook attempted to collect on the judgment before it was final. After all, it was Ashbrook's "collection" attempt that notified the plaintiff, in writing on January 12, 2009, of the default, at a time when the plaintiff could still do something about the default.

defense of the lawsuit." *Id*. Moreover, the Supreme Court of Illinois has held that because there is in Illinois a strong public policy in favor of coverage, the actual notice standard does not unduly burden insurers permitted to operate in this state. *Id*. (citing *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 329 (1998)). As explained in detail above, the plaintiff in this case had actual notice of the lawsuit in question prior to the entry of final judgment, and had ample time to protect its interests in that case. There is no merit to the plaintiff's second argument on appeal.

¶ 20 In support of its third and final argument on appeal−that the plaintiff met its burden to demonstrate that Goretzke breached the assistance and cooperation provisions of her policy with the plaintiff, which again means there can be no coverage in this case−the plaintiff raises two principal contentions: (1) that the plaintiff cannot be faulted for failing to seek Goretzke's cooperation because it did not have notice of the lawsuit until a final judgment had been entered, and (2) Goretzke breached the policy by assigning her "rights" to Ashbrook, which, according to the plaintiff, "smacks of collusion" between Goretzke and Ashbrook. As explained in detail above, we have already rejected the plaintiff's contention that it did not have notice of the lawsuit until after a final judgment had been entered. Moreover, aside from the question of notice of the lawsuit, we agree with Ashbrook that it is undisputed that the plaintiff was informed of the accident itself by a lien letter mailed to the plaintiff on October 10, 2006, and that the plaintiff has not produced any evidence that it attempted to contact Goretzke to obtain her assistance and cooperation in an investigation of the accident.

¶ 21 As Ashbrook points out in response to the plaintiff's argument, in *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 499-500 (1977), the Supreme Court of Illinois established the rule that "unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action, it is not a defense under the contract." The *Cheek* court went on to hold that "[p]roof of substantial prejudice requires an insurer to demonstrate that it was actually hampered in its defense by the violation of the cooperation clause," and held as well that there exists no "presumption of prejudice." *Id*. at 500. We note that the *Cheek* rule, with regard to cooperation clauses, has survived subsequent tweaking of the rules with regard to prejudice in the context of notice of a lawsuit clauses. See, *e.g.*, *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 319-20 (2006). In light of the facts described above, and the foregoing legal principles applicable to claims of breach of a cooperation clause, we agree with Ashbrook, and Judge Kolker, that the plaintiff has not met its burden to demonstrate that it was substantially prejudiced by any actions taken by Goretzke. Moreover, with regard to the plaintiff's argument that Goretzke breached her policy with the plaintiff by assigning her "rights" to Ashbrook, we agree with Ashbrook that by the time this happened, Goretzke had already been told by the plaintiff that it would not provide a defense to her unless and until she, at her own expense, hired an attorney to have the initial May 6, 2008, default order vacated, effectively forcing Goretzke to fend for herself.

¶ 22 CONCLUSION

¶ 23 For these reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 24 Affirmed.