

Nos. 1-16-2948 and 1-17-1701, cons.

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

CASTILIAN COURTS CONDOMINIUM)	Appeal from the
ASSOCIATION, an Illinois Not-for-Profit Corporation,)	Circuit Court of
)	Cook County
Plaintiff-Appellee and Cross-Appellant,)	
)	
)	
v.)	No. 13 CH 22321
)	
THE TRAVELERS INDEMNITY COMPANY OF)	
AMERICA and MARILYN ZORETIC, an Illinois)	
Resident,)	
)	
Defendants,)	
)	Honorable
(The Travelers Indemnity Company of America,)	Thomas R. Allen,
Defendant-Appellant and Cross-Appellee).)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the orders of the circuit court (1) entering judgment in favor of the insured and denying judgment in favor of the insurer on their cross-motions for summary judgment where the underlying complaint did not allege facts bringing the action within the scope of coverage, and (2) granting the insured attorney fees and costs. We affirm the circuit court’s judgment in all other respects.

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¶ 2 In this declaratory judgment action, the defendant, The Travelers Indemnity Company of America (Travelers), appeals from orders of the circuit court of Cook County: (1) entering a summary judgment in favor of the plaintiff, Castilian Courts Condominium Association (Castilian), finding that Travelers has a duty to defendant Castilian and its property manager, First Merit Realty Services, Inc. (First Merit), in an underlying tort action; (2) denying Travelers' cross-motion for summary judgment; and (3) entering a judgment in favor of Castilian on its petition for attorney fees and costs. Castilian cross-appeals from the circuit court's order denying its request for an award pursuant to section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2012)). For the following reasons, we affirm in part and reverse in part.

¶ 3 The following factual and procedural history, derived from the pleadings and exhibits of record, is not in dispute.

¶ 4 Castilian and First Merit manage a condominium complex (complex) in Glenview, Illinois. In 2009, Travelers issued an insurance policy (Policy) for the complex. The Policy, which was in effect at all times relevant to this litigation, lists Castilian as the "named insured," and states that coverage extends to "[a]ny agent of [Castilian], *** or agent of the management agency, while acting within the scope of their duties."¹ Pursuant to the Policy, Travelers has the "duty to defend the insured" against, *inter alia*, "personal injury" claims involving "an offense arising out of [Castilian's] business," unless the injury is "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and inflict 'personal injury.'" The Policy defines personal injury as an injury, "other than 'bodily injury', arising out of *** [t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner,

¹ For readability, this order omits emphasis and uppercase type when quoting the Policy, pleadings, and briefs on appeal.

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landlord or lessor,” provided that the wrongful eviction, entry, or invasion “is performed by or on behalf of the owner, landlord or lessor.”

¶ 5 In 2008, Castilian filed a complaint in the circuit court seeking possession of unit 209E (unit) against the unit’s owner, Marina Shef, and “[a]ll [u]nknown [o]ccupants.” Castilian alleged, in relevant part, that Shef failed to pay assessments and fees totaling \$4260.88, and that, as a result, it was entitled to possession of the unit pursuant to section 9-111 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/9-111 (West 2008)). On September 2, 2008, the circuit court entered an *ex parte* order granting Castilian possession of the unit, but stayed enforcement of the order until November 3, 2008.

¶ 6 On September 21, 2010, Marilyn Zoretic filed suit in the United States District Court for the Northern District of Illinois, Eastern Division, against Castilian, First Merit, Cook County, Cook County Sheriff Thomas J. Dart, and several deputy sheriffs (Zoretic action). In her eight-count amended complaint, Zoretic alleged that she began renting Shef’s unit on a month-to-month basis in September 2006, and that, pursuant to the circuit court’s *ex parte* order entered on September 2, 2008, Castilian evicted her on January 6, 2009. According to Zoretic, Castilian’s “agent” then changed the unit’s locks, gave her a new key, and allowed her to reoccupy the unit. She claimed that, after learning about the agent’s actions, Castilian and First Merit “intentionally directed *** [the] Cook County Sheriff to evict” her again, “without obtaining a proper order from the court and without giving [her] proper notice.” She alleged that, on June 5, 2009, sheriffs entered the unit, “pointed” guns at her and her family, “went through” their belongings, and removed them from the premises.

¶ 7 Predicated on these factual allegations, Counts VI and VII of Zoretic’s amended complaint claimed that Castilian and First Merit, respectively, committed intentional infliction of

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emotional distress. Zoretic argued that Castilian and First Merit engaged in “extreme and outrageous conduct” by “ordering” the sheriffs to evict her from the unit “knowing they did not possess a lawful order of possession, and without any notice.” She further posited that Castilian and First Merit “intended” or “knew that there was a high probability” that these actions would cause her “severe emotional distress.”²

¶ 8 On October 4, 2010, First Merit apprised Castilian’s insurance broker of the Zoretic action, and the broker informed Travelers. In a letter dated November 1, 2010, Travelers stated that it had no obligation to defend or indemnify Castilian. Travelers listed several reasons for denying coverage, including that “coverage is otherwise precluded by” the Policy’s “expected or intended exclusion.” Castilian disputed Travelers’ denial of coverage, but Travelers reiterated its decision in a letter dated January 20, 2012.

¶ 9 On October 1, 2013, Castilian filed a declaratory judgment action against Travelers in the circuit court, seeking a declaration that Travelers had a duty to defend and indemnify it in the Zoretic action. Subsequently, First Merit assigned Castilian its claims against Travelers. Castilian amended its complaint several times, with the last iteration being a six-count second amended complaint that added Zoretic as a defendant, but did not name First Merit as a party plaintiff. Castilian raised claims for declaratory judgment (Count I), breach of contract (Count II), and an award under section 155 of the Insurance Code. Counts IV through VI were identical to the previous counts, but were “based on assignment of First Merit’s claims.” Castilian sought a finding that Travelers “waived any defense to its obligation to indemnify [Castilian] and First Merit by breaching its duty to defend and not filing a declaratory judgment action,” and in

² The district court granted the defendants’ motion for summary judgment on each of Zoretic’s claims. On appeal, the Seventh Circuit reversed the summary judgment on her claims against the sheriffs, but affirmed as to her claims against Castilian and First Merit for intentional infliction of emotional distress. See *Zoretic v. Darge*, 832 F.3d 639 (7th Cir. 2016).

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Counts I, II, IV, and V, requested that the circuit court order that Travelers pay Castilian's and First Merit's expenses in defending the Zoretic action.

¶ 10 Castilian filed a motion for partial summary judgment on its second amended complaint, which did not distinguish between the counts regarding declaratory judgment and breach of contract. Castilian requested that the court find that: (1) Travelers "breached its duty under the Policy;" (2) Travelers "is liable" for attorney fees and costs incurred by Castilian and First Merit in the Zoretic action "in amounts to be proved at a later date;" and (3) Travelers' conduct was "unreasonable and vexatious under section 155 of the Insurance Code." Travelers filed a cross-motion for summary judgment, arguing that it had no duty to defend or indemnify Castilian or First Merit.

¶ 11 On October 11, 2016, the circuit court entered a written order: (1) entering a summary judgment in favor of Castilian "as to [Travelers'] duty to defend Castilian *** and First Merit;" (2) denying Travelers' cross-motion for summary judgment; and (3) denying Castilian's request for an award pursuant to section 155 of the Insurance Code. Travelers filed a notice of appeal on November 8, 2016, which it subsequently corrected, seeking reversal of the summary judgment, and Castilian filed a notice of cross-appeal on November 9, 2016, seeking the reversal of the denial of its request for a section 155 award (appeal No. 16-2948).

¶ 12 On February 23, 2017, Castilian filed a "Petition for Determination of Attorneys' Fee Award" based on the circuit court's finding that Travelers "breached its duty" to defend. On June 23, 2017, the circuit court entered a written order granting Castilian \$173,145.75 for attorney fees, costs, and prejudgment interest, along with postjudgment interest of \$42.69 *per diem*. Travelers filed a notice of appeal on July 7, 2017, which it subsequently amended, seeking reversal of the circuit court's June 23, 2017 order, and Castilian filed another notice of cross-

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appeal on July 1, 2017, from the circuit court's October 11, 2016 denial of a section 155 award (appeal No. 17-1701). This court consolidated the appeals.

¶ 13 On appeal, Travelers urges us to reverse both the partial summary judgment entered in favor of Castilian and the denial of its own motion for summary judgment. Travelers contends that the Policy does not cover the claims asserted against Castilian for several reasons, including that (1) Castilian was not the owner, landlord, or lessor of the unit and, therefore, did not evict Zoretic while acting in a capacity covered under the Policy, and (2) even if Castilian acted in a capacity covered under the policy, Zoretic's claim for intentional infliction of emotional distress alleged knowing and intentional conduct, which is excluded from coverage. As to the latter issue, which is dispositive and where we begin our analysis, Castilian responds that the Policy's exclusion for knowing conduct does not *per se* preclude coverage for intentional infliction of emotional distress predicated on the wrongful eviction, as Zoretic's allegations "are not dependant on [Castilian's] affirmative and actual 'knowledge' that the eviction violated Zoretic's rights or inflicted personal injury." Because Castilian and First Merit could be found liable "regardless of whether they knew they were violating Zoretic's rights," Castilian maintains that coverage is not excluded under the Policy.

¶ 14 "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment." *Crum & Forster Managers Corp. v. Robinson Trust Corp.*, 156 Ill. 2d 384, 391 (1993). Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 720 ILCS 5/2-1005(c) (West 2016). When, as here, the parties file cross-motions for summary

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judgment, “they concede the absence of a genuine issue of material fact, agree that only questions of law are involved, and invite the court to decide the issues based on the record.” *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 11. Our review of the circuit court’s ruling on a motion for summary judgment is *de novo*. *Id.*

¶ 15 In construing an insurance contract, a court’s primary objective “is to ascertain and give effect to the intention of the parties as expressed in the agreement.” *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400 (2010). Therefore, in a declaratory judgment action where the issue is whether the insurer has a duty to defend, “a court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy.” *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). The underlying complaint and the insurance policy “must be liberally construed in favor of the insured.” *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 74 (1991). As our supreme court has explained:

“If the underlying complaints allege facts within or *potentially* within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent. [Citation.] An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy’s coverage. [Citation.]” (Emphasis in original.) *Id.* at 73.

¶ 16 In considering whether an insurer has a duty to defend its insured, “it is the alleged conduct, and not the labeling of the claim in the complaint, that is controlling.” *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755-56 (2005); see also *Lexmark*

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International, Inc. v. Transportation Insurance Co., 327 Ill. App. 3d 128, 135-36 (2001) (recognizing that a reviewing court gives “little weight to the legal label that characterizes the underlying allegations,” but instead, must “determine whether the alleged conduct arguably falls within at least one of the categories of wrongdoing listed in the policy”).

¶ 17 Because our resolution of this appeal turns on the issue of whether Zoretic’s underlying complaint alleges facts which bring that action within, or potentially within, the coverage afforded to Castilian under the Policy, we turn to the relevant language of the Policy and complaint. As noted, the Policy obliges Travelers to defend Castilian, or its agents “acting within the scope of their duties,” against “personal injury” claims involving “an offense arising out of [Castilian’s] business.” The Policy defines personal injury as an injury, “other than ‘bodily injury’, arising out of *** [t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy,” which is “performed by or on behalf of the owner, landlord or lessor.” The Policy excludes coverage for injuries that are “caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and inflict ‘personal injury.’ ” Zoretic, in her amended complaint, alleged that Castilian and First Merit “ordered” sheriffs to evict her from the unit, despite “knowing they did not possess a lawful order of possession,” and “intended” or “knew that there was a high probability” that the wrongful eviction would cause her severe emotional distress.

¶ 18 In comparing the allegations in the underlying complaint with the relevant provisions of the Policy, we conclude that they are insufficient to impose a duty to defend. Read plainly, the Policy generally covers non-bodily injuries arising from wrongful eviction, unless Castilian orders the eviction knowing that it would violate the evictee’s rights and cause non-bodily injury. Zoretic’s amended complaint, at a minimum, alleged knowing conduct on the part of Castilian

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and First Merit in ordering sheriffs to unlawfully evict her, resulting in severe emotional distress. Although, as Castilian observes, it may be *possible* for an actor to be found liable for intentional infliction of emotional distress without “affirmative and actual ‘knowledge’ ” that its conduct would violate another’s rights, it is the allegations in “ ‘the *actual complaint*, not some hypothetical version, that must be considered.’ ” (Emphasis added.) *Steadfast Insurance Co.*, 359 Ill. App. 3d at 761 (quoting *Connecticut Indemnity Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 350-51 (7th Cir. 2003); see also *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 60 (“The alleged conduct, rather than the manner in which the claim is labeled in the underlying complaint, determines whether the insurer has a duty to defend.”)). The counts directed against Castilian and First Merit in Zoretic’s amended complaint predicated liability on a theory of intentional or knowing conduct. As the Policy excludes coverage for such conduct, we find that Travelers does not have a duty to defend or indemnify Castilian or its agent, First Merit, in the Zoretic action.

¶ 19 Castilian argues, however, that Travelers is estopped from relying on the Policy’s exclusion for knowing conduct as a defense to coverage because it did not file its own declaratory judgment action in the circuit court. This argument is without merit, as the estoppel doctrine does not apply when, as in the present case, the insurer had no duty to defend its insured. See *Bartkowiak v. Underwriters at Lloyd’s, London*, 2015 IL App (1st) 133549, ¶ 48 (citing *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151 (1999)).

¶ 20 In summary, in appeal No. 16-2948, we reverse the circuit court’s orders entering summary judgment in Castilian’s favor and denying summary judgment in Travelers’ favor. Accordingly, we need not address Travelers’ additional bases for challenging the judgment below. As Castilian was not entitled to summary judgment, in appeal No. 17-1701, we reverse

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the circuit court's order entering judgment in its favor on its petition for attorney fees and costs.

In view of the foregoing, the circuit court's order denying an award under section 155 of the Insurance Code, which Castilian challenged in appeal Nos. 16-2948 and 17-1701, must be affirmed.

¶ 21 No. 1-16-2948, Affirmed in part and reversed in part.

¶ 22 No. 1-17-1701, Affirmed in part and reversed in part.