

No. 1-17-2221

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ACUITY, A MUTUAL INSURANCE COMPANY, ) Appeal from the Circuit Court of  
 ) Cook County, Chancery Division.  
 Plaintiff-Appellee, )  
 )  
 v. ) No. 16 CH 15778  
 )  
 NICHOLAS AMAZZALORSO, ) Honorable Neil H. Cohen,  
 )  
 Defendant-Appellant. ) Judge Presiding.

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JUSTICE GRIFFIN delivered the judgment of the court.  
Presiding Justice Mikva and Justice Harris concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Plaintiff did not waive its setoff rights in an underinsured motorist policy such that summary judgment entered in favor of plaintiff and against defendant was warranted.
- ¶ 2 Defendant Nicholas Amazzalorso was injured in a rear-end accident. The other driver, Gabriel A. Valdez, was at fault. Plaintiff Acuity carried the workers' compensation and underinsured motorist insurance for defendant's employer. The parties settled defendant's workers' compensation claim and plaintiff agreed to waive its statutory right to lien defendant's recovery from Valdez. Defendant then accepted the limit of Valdez' insurance policy.

¶ 3 Defendant arbitrated his underinsured motorist claim and received an award that was limited by and subject to setoffs contained in his employer's underinsured motorist policy. On behalf of defendant's employer, plaintiff paid defendant the limit of the underinsured motorist policy as setoff by the amounts defendant received in: (1) workers' compensation payments; and (2) his settlement with Valdez. Plaintiff then filed a complaint for declaratory judgment in the trial court.

¶ 4 Defendant agreed that his arbitral award was subject to the limit of the underinsured motorist policy, but argued that he was entitled to receive the full limit of the policy because plaintiff waived its setoff rights in the letter it sent to defendant offering to settle his workers' compensation claim: "Acuity will waive its rights to recovery in your third party case." The parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor of plaintiff and against defendant. We affirm.

¶ 5 **BACKGROUND**

¶ 6 Defendant was injured in a rear-end accident while driving his employer's commercial vehicle. The other driver, Gabriel A. Valdez, was at fault. Valdez was insured under a policy issued by Esurance Insurance Services, Inc. ("Esurance") with a limit of \$25,000. Defendant's employer carried workers' compensation and underinsured motorist insurance under policies issued by plaintiff.

¶ 7 Defendant filed a workers' compensation claim and plaintiff asserted a lien against Esurance pursuant to section 5(b) of the Illinois Workers' Compensation Act (820 ILCS 305/5(b) (West 2016)) (hereinafter section 5(b) of the Act), which grants an employer a right to recover, from a third-party tortfeasor, an amount equal to the workers' compensation benefits paid to an employee. Esurance offered defendant the limit of its policy in settlement of his claim and

shortly thereafter, defendant received a letter from plaintiff, offering to settle his workers' compensation claim:

“Acuity Workers Compensation is able to recover money paid out under the workers compensation claim from the at fault party in this accident. The at fault party was insured up to \$25,000 for any injury they are at fault for. In this case with a rear end accident, they are 100% at fault. You have opened an underinsured motorist (UIM) claim but recovery from that coverage isn't an option for workers compensation. Recovery from available money from an at fault party is 75% of the available money per IL law so in this case it is \$18,750. Acuity's offer will be reduced by \$18,750 and Acuity will waive its rights to recovery in your third party case. \*\*\* Acuity's settlement offer to you is \*\*\*  
 $\$102,078.80 - \$18,750 = \$83,328.80$ .”

¶ 8 Acting *pro se*, defendant executed a form “Settlement Agreement Lump Sum Petition and Order” that was approved by the Illinois Workers' Compensation Commission (Settlement Agreement):

“THE LUMP SUM SETTLEMENT is the sum of \$83,328.80 which represents 27% of use of the person as a whole and 3% loss of use of the left leg minus Respondent's lien credit of \$18,750.00 pursuant to Section 5(b). \*\*\* Respondent waives all further lien rights pursuant to Section 5(b).”

Defendant then settled with Esurance for the limit of its policy and executed a release of all claims against Valdez.

¶ 9 Defendant's underinsured motorist claim proceeded to arbitration, where a panel of arbitrators entered an award in favor of defendant, and against plaintiff, in an amount of

\$3,000,000 subject to “agreed setoffs.” The parties agreed that defendant’s recovery was limited to \$1,000,000 under his employer’s underinsured motorist policy (“UIM Policy”). However, the parties disagreed about the amount and source of the “agreed setoffs.”

¶ 10 Contractually, the UIM Policy allowed plaintiff to reduce the limit of the underinsured motorist policy by the amounts defendant received in: (1) workers’ compensation; and (2) his recovery from Valdez. So, on behalf of defendant’s employer, plaintiff paid Defendant \$684,783.48, which represented the limit of defendant’s recovery under the UIM Policy less the amount defendant received in workers’ compensation (\$308,966.52) and the amount defendant received in his settlement with Esurance (\$6250) beyond the amount plaintiff received as a credit under the Settlement Agreement.

¶ 11 Plaintiff filed a complaint for declaratory judgment in the trial court seeking a declaration that it exhausted the limits of the UIM Policy and had no further obligation for any additional payments to defendant. Defendant filed affirmative defenses, arguing that plaintiff waived its setoff rights when it made the following statement to defendant in its letter offering to settle defendant’s workers’ compensation claim: “Acuity will waive its rights to recovery in your third party case.” The parties filed cross-motions for summary judgment pursuant to 735 ILCS 5/2-1005 (West 2014) and the trial court expressed its findings in a clear and concise written ruling:

“The \*\*\* letter does not show an express or implied waiver of Acuity’s contractual right to a setoff under the Underinsured Motorist Coverage of the Acuity Policy. Rather, \*\*\* the letter shows a waiver of Acuity’s legal right to assert a lien against Amazzolorso’s recovery in his suit against Valdez. Acuity’s legal right to asset a lien against any recovery from the party at fault under the Workers’ Compensation Act, 820 ILCS 305/5(b) is separate from Acuity’s

contractual right to a setoff of paid worker's compensation benefits under the Underinsured Motorists Coverage of the Acuity policy.”

The trial court granted summary judgment in favor of plaintiff and against defendant. Defendant appeals the trial court's judgment.

¶ 12

#### ANALYSIS

¶ 13 The issue on appeal is whether plaintiff waived its setoff rights in the UIM Policy such that summary judgment was warranted. The parties agree that we review the trial court's ruling *de novo*. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 16.

¶ 14 Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Schweih's v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48. When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Id.* This court may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower courts relied upon that ground. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 34.

¶ 15 We hold that plaintiff did not waive its contractual setoff rights in the UIM Policy. A waiver is an express or implied intentional relinquishment of a known right that may arise from acts, words, conduct, or knowledge of the insurer. *Home Insurance Company v. Cincinnati Insurance Company*, 213 Ill. 2d 307, 326 (2004). Here, the UIM Policy allowed plaintiff to reduce the limit of defendant's recovery by any amount paid to defendant by Valdez and any amount paid to defendant in workers' compensation: “the [UIM Policy Limit] shall be reduced

by all sums paid or payable: (a) By or for anyone who is legally responsible \*\*\* (b) Under any workers' compensation, disability benefits or similar law.”

¶ 16 First, we find no express waiver of plaintiff's setoff rights under the UIM Policy. Plaintiff's letter to defendant offering to settle his workers' compensation claim and the Settlement Agreement do not even mention setoff rights. As the trial court correctly indicated in its written ruling, the third party language contained in plaintiff's letter (“Acuity will waive its rights to recovery in your third party case”) was a reference to Valdez.

¶ 17 Second, we find no implied waiver of plaintiff's setoff rights under the UIM Policy. Plaintiff consistently *asserted* its setoff rights as evidenced by the fact that defendant's arbitral award was subject to “agreed setoffs.” *Home Insurance*, 213 Ill. 2d at 326 (an implied waiver arises when conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it). Accordingly, plaintiff did not impliedly waive its setoff rights.

¶ 18 Defendant argues, alternatively, that if we find plaintiff did not waive its setoff rights under the UIM Policy then the waiver of its statutory right to recovery under section 5(b) of the Act was illusory because plaintiff waived its right to recover the same amount it was already taking in a credit.

¶ 19 Plaintiff's waiver was not illusory. Plaintiff waived its statutory right to recovery under section 5(b) of the Act, not its contractual rights under the UIM Policy. *Terry v. State Farm Mutual Automobile Insurance Company*, 287 Ill. App. 3d 8, 12–13 (1997) (the language of section 5(b) of the Act refers to liability in tort, not contractual liability under an underinsured motorist policy). As the trial court astutely indicated in its written ruling, the contractual rights contained in the UIM Policy were wholly separate and distinct from plaintiff's statutory right to recovery under section 5(b) of the Act. See *In re Estate of Dierkes*, 191 Ill. 2d 326, 328 (2000)

(section 5(b) grants the employer a lien on an employee's recovery from a third party tortfeasor equal to the amount of workers' compensation benefits paid or owed to the employee). A contrary ruling would blur the clear legal line drawn between statutory and contractual rights and re-write the Settlement Agreement.

¶ 20 We are not persuaded by defendant's argument that, because he did not have legal counsel when he executed the Settlement Agreement, plaintiff's waiver of its statutory right to recovery under 5(b) of the Act is ambiguous and subject to defendant's interpretation. plaintiff's waiver was unequivocal and in choosing to represent himself, Defendant accepted full responsibility for his representation and was held to the same standards as an attorney when he settled his claim. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78. Moreover, the Settlement Agreement was approved by the Illinois Workers' Compensation Commission and contained an express admonition not to "sign this contract unless you understand \*\*\* its terms."

¶ 21 Finally, we hold that defendant's recovery under the UIM Policy does not violate Illinois public policy. Our Supreme Court has held that an insurer is allowed to reduce the amount owed under an underinsured motorist policy by the amount of the workers' compensation payments made to the insured. *Sulser v. Country Mutual Insurance Company*, 147 Ill. 2d 548, 553 (1992). Here, plaintiff reduced the limit of the UIM Policy in accordance with its terms and defendant was thereby placed in the position he would have occupied had Valdez carried auto insurance coverage in the same amount as defendant's employer. *Illinois Emcasco Insurance Company v. Tufano*, 2016 IL App (1st) 151196, ¶ 23 (underinsured motorist coverage should place the insured in the same position he or she would have occupied if the tortfeasor had carried insurance in the same amount as the insured).

¶ 22 The trial court's grant of summary judgment in favor of plaintiff and against defendant

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was warranted.

¶ 23

## CONCLUSION

¶ 24 Accordingly, we affirm.

¶ 25 Affirmed.