2018 IL App (1st) 172633-U

No. 1-17-2633

Third Division
December 28, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

UNITED EQUITABLE INSURANCE CO.,	)	
	)	Appeal from the
Plaintiff and Counterdefendant-Appellant,	)	Circuit Court of Cook County
	)	
v.	)	
	)	No. 15 CH 7360
LINDSAY HAWKINS, et al.,	)	
	)	
Defendant,	)	Honorable Diane Larsen,
	)	
v.	)	Judge, presiding.
	)	
SHAWN KILGO, JEROME SMITH, EFRAIN GUERRERO and JARRON ECHOLS,	)	
	)	
Counterplaintiffs-Defendants (Shawn Kilgo, Jerome Smith, Efrain Guerrero and Jarron Echols, Counterplaintiffs-Defendants-Appellees).	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in granting summary judgment in favor of defendants against the insurance company.

¶ 2 On February 22, 2013, Shawn Kilgo, Jerome Smith, Efrain Guerrero, and Jarron Echols (collectively referred to as Defendants) were involved in a car accident in the Village of Hazel Crest, Illinois. On May 5, 2015, United Equitable Insurance Company (UEIC or the Plaintiff-Insurer), sought a declaratory judgment requesting the court find that defendants failed to protect their rights under the automobile policy after their accident. The parties filed cross-motions for summary judgment. The trial court granted defendants' motion for summary judgment and denied UEIC's motion. On appeal, UEIC asks us to reverse the trial court; vacate the summary judgment entered against UEIC; enter summary judgment in favor of UEIC and declare that it owed no coverage for defendants' uninsured motorist claim. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The relevant facts are as follows. On February 22, 2013, defendants were traveling to work in Lindsey Hawkins' car[1] when a vehicle driven by Cameron Moseberry struck them. Cameron was driving a vehicle that belonged to Pamela Moseberry, and was uninsured because Pamela's insurance policy with GEICO Indemnity had recently lapsed. Cameron ignored a stop sign and drove into the intersection of 183rd and Village in Hazel Crest, Illinois. He struck a Pace Suburban Bus, a Division of the Regional Transportation Authority (PACE), driven by Steven Harrison and then collided with Hawkins' vehicle.[2] The four defendants were injured in the collision.[3]

[1] Hawkins was not in the car at the time of the accident. Shawn Kilgo was driving Hawkin's car and the remaining defendants were passengers.

[2] Cameron Moseberry, PACE and Steven Harrison are not parties to this appeal.

[3] Hawkins' policy covered defendants for damages sustained due to injuries caused by an uninsured motorist under the Illinois Insurance Code. 215 ILCS 5/143a(1) (West 2014).

¶ 5 A. Initial Insurance Claim

¶ 6 On May 15, 2013, defendants submitted an Uninsured Motorist claim and a Demand for Uninsured and Underinsured Motorists Arbitration as required by the provisions of Hawkins's insurance policy with UEIC. UEIC sent an acknowledgment letter to the defendants' attorney requesting several items. On August 21, 2014, GEICO sent a letter to defendants stating that it would not provide coverage to Pamela Moseberry and would not be taking further action regarding defendants' claim. On August 27, 2014, UEIC objected to the arbitration demand claiming that defendants had not sued Moseberry and PACE. On November 25, 2014, UEIC issued a denial of coverage letter to defendants.

¶ 7 B. UEIC's Declaratory Action and Defendants' Counter-Complaint

¶ 8 On May 5, 2015, UEIC filed a complaint for declaratory judgment against defendants. UEIC argued that it owed no coverage for any uninsured motorist claim, because Moseberry was an insured party and PACE was self-insured. UEIC further alleged that defendants failed to sue PACE and Moseberry within the statute of limitations. The statute of limitations to sue PACE was within one year from the date of incident, and to sue Moseberry was within two years. According to UEIC, this failure violated section 14 of the insurance policy and prejudiced any potential subrogation rights of UEIC.

¶ 9 On June 5, 2015, defendants filed a counter-complaint for declaratory judgment against UEIC seeking to have the trial court find that (1) UEIC should pay for damages sustained in the accident under the Uninsured Motorist Provisions of the insurance policy and (2) UEIC's conduct was unreasonable and vexatious.

¶ 10 That same day, defendants filed their affirmative defenses, stating that (1) section 14 of the policy does not apply because UEIC failed to pay defendants as a requirement of its

policy, and (2) UEIC failed to make the Illinois Insurance Code (Code) required prepayment of litigation costs. As a result, defendants contended that UEIC had waived its subrogation rights. On October 9, 2015, UEIC moved to dismiss the defendants' affirmative defenses and counter claim under 2-619(a)(9). On November 5, 2015, the court entered an order continuing the motion and allowed for discovery.

¶ 11 C. Discovery

¶ 12 Brian Germain, UEIC's Vice President of Claims, stated during his deposition that he was unaware of any effort by UEIC to contact any driver, witnesses or the investigating police officer who authored the Illinois Traffic Crash Report. Germain was also unaware of any statement form sent to Moseberry from UEIC. Germain was reluctant to believe the Illinois Traffic Crash Report and was suspicious of GEICO's coverage letter which showed that Pamela Moseberry's coverage had lapsed. Marc McEwing, the UEIC claims adjuster that handled defendants' claim, stated during his deposition that he did not contact the other parties or witnesses to the collision. He also performed no evaluation regarding the liability of the claim.

¶ 13 D. UEIC's Amended Complaint

¶ 14 On September 2, 2016, after the close of discovery, UEIC filed an amended complaint adding new defendants, GEICO, Cameron Moseberry, PACE, and Steven Harrison. On January 10, 2017, GEICO filed an answer and a counterclaim requesting that the trial court declare in relevant part that (1) the automobile policy at issue was not in effect at the time of the accident and (2) that GEICO was under no obligation to defend and/or indemnify Cameron Moseberry. On May 4, 2017, GEICO moved for summary judgment against UEIC seeking a declaration that there was no insurance coverage available for Cameron Moseberry

under GEICO's policy at the time of the accident. On May 9, 2017, the trial court granted GEICO's motion for summary judgment with prejudice.

¶ 15 E. UEIC and Defendants Cross Motions for Summary Judgment

¶ 16 Defendants and UEIC filed cross motions for summary judgment on Count I of defendants' counter-complaint. Defendants argued that UEIC (1) failed to comply with the Insurance Code; (2) waived its claim; and (3) was properly estopped from asserting its claim of prejudice. Defendants submitted an Illinois Crash report, and a video recording from the PACE Bus showing that the bus had the right of way and Moseberry ran the stop sign. Defendants further submitted a statement to UEIC requesting compensation for their losses. On October 3, 2017, the trial court granted defendants' motion for summary judgment and denied UEIC's motion for summary judgment on Count I of defendants counter-complaint, and reserved ruling on Count II.[4] The court found that UEIC was estopped from relying on its policy defense. Specifically, the court found that UEIC was notified of the accident and defendants complied with UEIC's post-accident requests, UEIC did not request defendants file a lawsuit and UEIC did not provide advancement of any costs to file a lawsuit. On October 13, 2017, the trial court granted UEIC's motion for 304(a) finding, and entered a final judgment on Count I. This appeal followed.

¶ 17 II. JURISDICTION

¶ 18 Prior to proceeding, we deem it appropriate to determine whether we have jurisdiction over this appeal. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011) (noting that a reviewing court has an independent duty to consider whether it has jurisdiction over an appeal). The denial of a summary judgment motion is not a final order

[4] Count II is still pending in the trial court.

and is normally not appealable even where the court has made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8 2016). *Fogt v. 1-800-Pack-Rat, LLC*, 2017 IL App (1st) 150383, ¶ 95. Our supreme court noted a few exceptions to this rule when "the parties have filed cross-motions for summary judgment and the circuit court has granted one, and the other party's denied." *Id.* "Because the order disposes of all the issues in the case, review of the denial of summary judgment may be had." *Id.* Our supreme court also noted that "the propriety of the denial may be considered if the case is properly before a reviewing court from a final judgment and no trial or hearing has been conducted." *Id.*

¶ 19 Here, the circuit court's October 3, 2017 order granting defendants' motion for summary judgment and denying UEIC's motion for summary judgment on Count I of defendants' counter-complaint disposed of the controversy between the parties in the declaratory action with respect to the interpretation of UEIC's insurance policy. See *Indiana Ins. Co v. Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667, ¶ 22 (stating that courts have jurisdiction over cross motions for summary judgment when a court grants a motion that was a final and appeal order which fixed "absolutely and finally" the rights of the parties in a declaratory judgment action). However, the court's resolution of the cross motions for summary judgment did not resolve all of the claims below. The court reserved ruling on Count II of defendants' counter-complaint, which alleges that UEIC's conduct in response to defendants' coverage claim was unreasonable and vexatious, pending appeal of the ruling on the cross summary judgments motions for declaratory relief. We nevertheless have jurisdiction to hear this appeal because the trial court entered a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016), that there was no just reason to delay the

appeal of the court's ruling in the motions for cross summary judgment. Thus, we proceed with our analysis.

¶ 20 III. ANALYSIS

¶ 21 UEIC's major contention in this appeal is that under the terms of the insurance policy, the defendants were required to protect their rights after loss. UEIC points specifically to section 14 of the policy which provides, in relevant part, that "[t]he insured shall do nothing after loss to prejudice [the insurer's] rights." UEIC interprets this language to require the defendants, once having filed their claim, to have then independently proceeded with a lawsuit against the alleged tortfeasors.

¶ 22 In its brief, UEIC sets forth six (6) separate arguments, the viability of each, which are dependent on our interpretation of that single provision in the insurance policy. Specifically, UEIC argues that (1) defendants breached the term in the policy which required the insureds to protect their rights after loss by filing a lawsuit; (2) by failing to file suit against the tortfeasors, defendants failed to protect their rights, thereby breaching the cooperation and assistance clause (paragraph 6) of the insurance policy; (3) the trial court misperceived the distinction between protecting rights after loss and protecting subrogation rights after payment of a claim, thus the court's basis for ruling against UEIC was erroneous; (4) the clause requiring the insureds to protect their rights after loss and claim do not violate public policy; (5) the insured's contractual duty to protect their rights after loss (and claim) against all parties is logical and reasonable and failure to comply is prejudicial to UEIC; and, (6) UEIC did not waive the policy terms and should not be estopped from enforcement of the policy in its entirety.

¶ 23 A. Standard of Review

¶ 24 Summary judgment is proper only when the "pleadings, affidavits, depositions and admissions of record, viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005 (c) (West 2014). We review a trial court's grant of of summary judgment *de novo*. *Safeway Insurance Co. v. Ebijimi*, 2018 IL App (1st) 170862, ¶ 49. If both parties to an insurance coverage declaratory judgment action submit cross-motions for summary judgment, then the parties agree that no factual issues exist and that the resolution of the case turns purely on legal issues. *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 23. As there is no dispute that a genuine issue of material fact existed preventing the court from entering summary judgment, we focus on whether the court's granting of summary judgment in favor of defendants was correct. We note finally, that in our review, we are not bound by the reasoning of the trial court, and we may affirm on any basis in the record. *Berglind v. Paintball Business Ass'n*, 402 Ill. App. 3d 76, 85 (2010).

¶ 25 As disposition of this appeal turns on our interpretation of the insurance policy, we set forth those familiar principals which guide our review. "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). "The court's primary objective in construing an insurance policy is to ascertain and give effect to the intentions of the parties as expressed in the policy language." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). Insurance policies should be construed as a whole, giving effect to every part. *Standard Mutual Ins. Co. v Petreikis*, 183 Ill. App. 3d 272, 280 (1989). Where the language in a policy is clear and

unambiguous, it must be taken in its plain, ordinary, and popular sense. *Id*. Unambiguous terms control the rights of the parties and should generally be enforced as they appear. *Batson v. The Oak Tree, Ltd.*, 2013 IL App (1st) 123071, ¶ 35

¶ 26 When a reviewing court interprets an insurance policy, there are only two sources upon which it may base its analysis: (1) the plain language of the policy; and (2) the plain language of the Insurance Code as it existed at the time the policy was written. *Harrington v. American Family Mutual Insurance Co.*, 332 Ill. App. 3d 385, 389 (2002). Statutes that are in force at the time a policy is issued are controlling. *Brooks v. Cigna Property & Casualty Cos*, 299 Ill. App. 3d 68, 72 (1998).

¶ 27 B. Breach of the Terms in the Policy

¶ 28 UEIC first contends that defendants breached section 14 of the insurance policy which provides that "the insured shall do nothing after loss to prejudice [the insurer's] rights." UEIC maintains that after the loss, defendants had all of the information they needed, in addition to legal advice, sufficient to know that they had negligence claims against the alleged tortfeasors. Additionally, the defendants were responsible for knowing the applicable statutes of limitations for their claims. Having failed to file suit within the applicable limitations period, they breached section 14 of the insurance policy and, therefore, coverage for the claim is not available. UEIC takes the position that the language in section 14 of the policy is unambiguous and that the trial court erred in failing to enforce the provision as written.

¶ 29 Defendants respond that the Illinois Insurance Code (Code) is controlling on this issue. Pursuant to the Code:

> "An insurance carrier may upon good cause require the insured to commence a legal action against the owner or operator of an uninsured motor vehicle before

> good faith negotiation with the carrier. If the action is commenced at the request of the insurance carrier, the carrier shall pay to the insured, before the action is commenced, all court costs, jury fees and sheriff's fees arising from the action." 215 ILCS 5/143a(7) (West 2014).

Defendants maintain that as UEIC neither made a request nor advanced costs, they were under no obligation to file an independent lawsuit. Thus, they did not breach the insurance contract and summary judgment in their favor was correct.

¶ 30 UEIC rejects defendants' reliance on section 143a(7) of the Code as controlling. However, we need not belabor the point. The plain language in the policy controls. Nothing in section 14 of the policy required the defendants to file a lawsuit independently of UEIC on their behalf and we decline to either infer or read language into it. UEIC points to nothing, other than its lost opportunity to file suit, to support its reading of the contract. Section 14 simply creates no affirmative duty on the part of the defendants to file suit.

¶ 31 Having determined that section 14 did not require defendants to independently file a lawsuit, we find no breach. Accordingly, UEIC's remaining issues, premised on its claims of breach must also fail. Specifically, as there was no duty to file an independent lawsuit, the defendants' failure to do so could not support a claim that they failed to protect their rights under the policy. In light of our interpretation of section 14 of the policy, the trial court's distinction, if any, between protecting rights after loss and protecting subrogation rights after payment is not relevant to our disposition. Based on our construction of the policy, no public policy concerns are implicated. Finally, as defendants were not required to file an independent lawsuit, their failure to do so could not have been prejudicial to UEIC.

¶ 32 In the final issue on appeal, UEIC responds to defendants' argument that the UEIC's failure to advance cost for litigation resulted in a waiver of its claimed rights under section 14 of the policy and that it should be estopped from enforcement. UEIC again contends that defendants' failed to comply with the language from section 14 of the insurance policy, which it interprets as requiring defendants to file an independent lawsuit. Thus, UEIC maintains that it has the right to assert this section as its policy defense. This argument too must fail. Absent express language, we can find no basis in the policy upon which to conclude that defendants had a duty to file a lawsuit against the uninsured motorists in the accident. As such, it is not the case that UEIC waived its section 14 policy defense. The section 14 defense, as UEIC perceived it, simply did not exist. And, to that extent, it is estopped from asserting it.

¶ 33 IV. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.