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2019 IL App (3d) 180402-U

Order filed April 3, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

GRAPHIC ARTS MUTUAL INSURANCE COMPANY,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	
DaVITA HEATHCARE PARTNERS, INC., d/b/a DaVita Renal Center West Joliet, and PATRICIA D. SISTEK, Independent Administrator of the Estate of Patricia L. Terry, Deceased,)	Appeal No. 3-18-0402 Circuit No. 16-MR-2149
Defendants)	
(DaVita Healthcare Partners, Inc., d/b/a DaVita Renal Center, Defendant-Appellant).)	Honorable John C. Anderson, Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in granting summary judgment for plaintiff and failing to consider defendant's third-party complaint filed in the underlying action.

¶ 2 Defendant, DaVita Healthcare Partners, Inc., d/b/a DaVita Renal Center West Joliet (DaVita), appeals the circuit court’s granting of summary judgment in favor of plaintiff, Graphic Arts Mutual Insurance Company (Graphic Arts), arguing that the court erred in determining that Graphic Arts did not have a duty to defend DaVita and failing to consider DaVita’s counterclaim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 22, 2015, DaVita entered into a contract with Enviro Resources II (Enviro). The contract provided that Enviro would provide janitorial services at DaVita facilities, including the DaVita Renal Center in Joliet, for an initial period of three years. The contract required Enviro to obtain an insurance policy covering DaVita as an additional insured for any liability arising out of Enviro’s work. Enviro obtained an insurance policy from Graphic Arts starting February 5, 2015, which met this requirement.

¶ 5 On Saturday, October 31, 2015, Patricia Terry attended her regularly scheduled dialysis appointment at the DaVita Renal Center in Joliet. After her appointment, around 7 p.m., she was taken in her wheelchair to the waiting room where she awaited the arrival of an ambulance to transport her to the nursing home where she resided. While Terry was in the waiting room, the renal center closed, and all of the staff left through the back door. Terry was left in the waiting room alone, locked in the renal center. Terry died at 7:19 p.m. on Sunday, November 1, 2015. The autopsy revealed that the cause of death was an acute myocardial infarction (heart attack) which had occurred 12 to 24 hours prior to her death.

¶ 6 Following Terry’s death, defendant, Patricia D. Sistek, filed a complaint bringing wrongful death, personal injury, and survival actions against DaVita, the nursing home, and the

ambulance company on behalf of Terry's estate (the underlying action). The claims against DaVita stated that they were based on DaVita's negligence and stated,

“[DaVita], by and through its agents, apparent agents and/or employees, breached its duty of care in one or more of the following ways:

A. Failed to call Kurtz Ambulance Service and get a confirmed pick up time for Mrs. Terry.

B. Failed to ensure transportation was called and in fact came and picked up Mrs. Terry after dialysis.

C. Failed to check on Mrs. Terry post dialysis while she was in the waiting room of their dialysis center.

D. Failed to check on Mrs. Terry allowing her to remain for an extended period of time in her wheelchair without supervision.

E. Failed to establish a Policy & Procedure for physically checking the dialysis [facility] to ensure all patients have been picked up and have left the premises.

F. Failed to have a Policy & Procedure regarding keeping patients in the dialysis facility waiting room and checking on patients post dialysis until picked up.

G. Abandoned Mrs. Terry in their facility leaving her locked in the building after all staff went home.

H. Failed to ensure all patients were off premises before leaving the facility.

I. Failed to question why Mrs. Terry was still in the waiting room when they locked the front doors to the dialysis suite.

J. Abandoned Mrs. Terry when they left out the back door, leaving her in the waiting room.

*** As a direct and proximate result of one or more of these negligent acts and/or omissions, [Terry] sustained injuries of a personal and pecuniary nature that resulted in her death.”

¶ 7 On August 15, 2016, Graphic Arts filed a complaint for declaratory judgment against DaVita and joined Sistek in the action so that she would “be bound by the judgment rendered.”¹ The complaint stated that DaVita tendered the underlying action to Graphic Arts claiming to be an additional insured on the policy Graphic Arts issued to Enviro. Graphic Arts denied coverage of DaVita’s claim. The complaint noted that Enviro was “not a party to the underlying action and that action contain[ed] no allegations directed against Enviro.” The complaint further stated,

“Graphic Arts has no obligation to provide coverage to DaVita under the Graphic Arts policy for [the] underlying action:

(a) The underlying action does not allege a claim with respect to liability for Enviro[’s] work, providing janitorial services; and

(b) The underlying action does not allege a claim that would hold DaVita liable for the acts or omissions of Enviro.”

DaVita answered the complaint on November 14, 2016, admitting that Enviro was not a party to the underlying action, but denying that the action contained no allegations directed against

¹Subsequently, Sistek agreed to be bound by any judgment and was dismissed from the action.

Enviro, stating, “The *** Complaint makes allegations against [DaVita] and its agents. Enviro *** was an agent of [DaVita] for purpose of the underlying action.”

¶ 8 On January 12, 2017, DaVita filed a third-party complaint against Enviro for breach of contract and contribution in the underlying action.² The complaint alleged that Enviro breached its contract by failing to (1) be present at the close of business on October 31, 2015, (2) notify DaVita that it would not be present, and (3) report the presence of Terry, an injured patient, as required by the contract. The complaint further alleged that, had Enviro provided services on that day, Terry would not have suffered personal injury or death. DaVita attached a copy of the service agreement that provided that Enviro would clean “[o]nly on days of operation” and “[a]fter [the] clinic ha[d] completed the day operations.” DaVita operated Monday through Saturday. The contract also included a subsection entitled, “Reporting Unusual Occurrences/Cooperation in Investigations,” which stated in pertinent part,

“All unusual occurrences arising during the term of this Agreement at any [DaVita] site of service or within proximity thereof shall be reported to [DaVita].

Such unusual occurrences include, but are not limited to:

Known or suspected injuries to any [DaVita] personnel, patient, visitor or member of [DaVita] medical staff, as observed by [Enviro’s] personnel and/or reported to them by any source[.]

* * *

²Graphic Arts asks us to take judicial notice of the fact that Enviro was granted judgment on the pleadings with regard to DaVita’s third-party complaint filed in the underlying action. DaVita subsequently filed a motion asking us to take judicial notice of the fact that the circuit court subsequently granted DaVita’s motion to reconsider and vacated the judgment on the pleadings. We deny both motions for judicial notice.

All such reports shall be made on or before the next business day following [Enviro's] knowledge of any such event, and in any event no later than five (5) days after any [Enviro] personnel reasonably suspect the occurrence of any act or event requiring a report as set forth above.”

¶ 9 DaVita then filed a counterclaim for declaratory judgment against Graphic Arts on January 31, 2017, attaching the third-party complaint and stating that Enviro was now a party to the underlying action. The counterclaim stated that DaVita was wrongfully denied coverage by Graphic Arts as Enviro's failure to be present on October 31, 2015, and failure to report Terry “as a known or suspected injured DaVita patient, proximately caused, in whole or in part, the alleged personal injury and subsequent death of *** Terry. As a result of [Enviro's] acts/omissions, DaVita is exposed to liability arising from [Enviro's] work.” Therefore, DaVita alleged that Graphic Arts, under its policy with Enviro, had a legal obligation to provide defense to DaVita for the underlying action.

¶ 10 On May 1, 2017, Graphic Arts filed a motion for summary judgment, stating that Sistik made no claims against Enviro, that the only allegations against Enviro were by DaVita so they should not be considered in the duty to defend calculus. DaVita filed a cross-motion for summary judgment on June 15, 2017. A hearing was held on the motions, and the court took the matter under advisement. The court granted Graphic Arts's motion and denied DaVita's stating that it “adopts the rationale set forth in Graphic Arts[s] motion, including that no allegations/causes of action are directed against Enviro except by DaVita, which is self-serving.”

¶ 11 II. ANALYSIS

¶ 12 On appeal, DaVita argues that the court erred by (1) granting Graphic Arts's motion for summary judgment and denying DaVita's same motion because Graphic Arts owed a duty to

defend DaVita in the underlying action, and (2) failing to consider DaVita’s third-party complaint against Enviro in the duty to defend calculus. Because the underlying complaint contains no allegations that could be imputed on Enviro, we find that Graphic Arts did not have a duty to defend DaVita. In reaching this decision, we will not consider DaVita’s third-party complaint as it was filed after the declaratory action was initiated and would require a determination of “ ‘an issue crucial to the determination of the underlying lawsuit.’ ” *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 461 (2010) (quoting *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 304-05 (1983)).

¶ 13 By filing cross-motions for summary judgment, the parties “agree that no factual issues exist and that the disposition of [this case] turns only on our resolution of purely legal issues. [Citations.] Accordingly, our review proceeds *de novo*.” *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 432 (2010).

¶ 14 “It is well established, when determining an insurer’s duty to defend an action, Illinois applies an ‘eight corners’ analysis by comparing the four corners of the underlying complaint with the four corners of the insurance policy to determine whether the case falls within or potentially within coverage.” *Pekin Insurance Co. v. Illinois Cement Co., LLC*, 2016 IL App (3d) 140469, ¶ 29.

“When construing the language of an insurance policy, a court’s primary objective is to ascertain and give effect to the intentions of the parties as expressed in their insurance contract. [Citation.] In order to ascertain the meaning of the policy’s language and the parties’ intent, the court must construe the policy as a whole and consider the type of insurance purchased, the nature of the risks involved, and the overall purpose of the insurance contract. [Citations.] If the

words of a policy are clear and unambiguous, a court must afford them their plain and ordinary meaning. [Citation.] The construction of the provisions of an insurance policy involves a question of law for which we conduct a *de novo* review.” *Pekin Insurance Co. v. United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 23.

¶ 15 With these principles in mind, we will first review the provisions of Enviro’s insurance policy issued by Graphic Arts. The basic policy stated:

“We will pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.”

Stated another way, in order for Graphic Arts to defend DaVita based on this insurance policy, DaVita had to (1) be an insured and (2) the insurance had to apply to the suit. The policy further included two provisions regarding additional insureds. The “Blanket Additional Insured-Contractors” endorsement stated that an additional insured included “any person or organization (called additional insured), but only with respect to liability for ‘your work’ arising out of a written contract with such person or organization.” “Your work” was defined as “[w]ork or operations performed by [Enviro] or on [their] behalf.” The “Janitorial Services Extension Endorsement” stated,

“Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Coverage Part will be an additional insured, but only:

(a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured.”

¶ 16 The parties do not dispute that DaVita had a written contract with Enviro in which Enviro was required to provide insurance. Therefore, under these provisions, DaVita was an additional insured under the policy, but only with respect to either (1) Enviro’s work arising out of the contract, or (2) any acts or omissions committed by Enviro during their work for DaVita.

¶ 17 We will now review the allegations of the underlying complaint to determine whether the complaint alleges sufficient facts that DaVita is being held liable for Enviro’s work arising under the contract or any acts or omissions committed by Enviro during their work for DaVita to warrant coverage and a duty to defend DaVita.

“[DaVita], by and through its agents, apparent agents and/or employees, breached its duty of care in one or more of the following ways:

A. Failed to call Kurtz Ambulance Service and get a confirmed pick up time for Mrs. Terry.

B. Failed to ensure transportation was called and in fact came and picked up Mrs. Terry after dialysis.

C. Failed to check on Mrs. Terry post dialysis while she was in the waiting room of their dialysis center.

D. Failed to check on Mrs. Terry allowing her to remain for an extended period of time in her wheelchair without supervision.

E. Failed to establish a Policy & Procedure for physically checking the dialysis [facility] to ensure all patients have been picked up and have left the premises.

F. Failed to have a Policy & Procedure regarding keeping patients in the dialysis facility waiting room and checking on patients post dialysis until picked up.

G. Abandoned Mrs. Terry in their facility leaving her locked in the building after all staff went home.

H. Failed to ensure all patients were off premises before leaving the facility.

I. Failed to question why Mrs. Terry was still in the waiting room when they locked the front doors to the dialysis suite.

J. Abandoned Mrs. Terry when they left out the back door, leaving her in the waiting room.

*** As a direct and proximate result of one or more of these negligent acts and/or omissions, [Terry] sustained injuries of a personal and pecuniary nature that resulted in her death.”

¶ 18 The complaint does not allege any negligent act in the performance of Enviro’s work or its failure to provide janitorial services, nor can any of the claimed negligence that is alleged in the complaint be imputed to Enviro. Instead, the complaint alleges in a multitude of ways that DaVita and its employees failed to adopt and/or follow policies or practices intended to ensure

that no patient was left unattended on the premises during the workday and after the facility closed each day. “The failure to specify a negligent act committed by [Enviro] not only fails to trigger coverage to an additional insured in [Enviro’s] insurance policy, but also defeats a theory of vicarious liability.” *United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 28. DaVita cannot be found vicariously liable for its own acts. See *id.*

¶ 19 Lastly, we determine whether we should consider any other documents when deciding whether Graphic Arts had a duty to defend DaVita. “[A] circuit court may, under certain circumstances, look beyond the underlying complaint in order to determine an insurer’s duty to defend.” *Wilson*, 237 Ill. 2d at 459. Thus, it may be appropriate, for example, to consider the written agreements between the named insured and the additional insured in determining whether the insurer has a duty to defend. See *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 35. However, there are limitations to such outside review. This is particularly the case where a third-party complaint is prepared by a putative additional insured seeking coverage under the policy. See *Illinois Cement Co., LLC*, 2016 IL App (3d) 140469, ¶ 29; *United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 29; *National Fire Insurance of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312, 322 (2009); *American Economy Insurance Co. v. DePaul University*, 383 Ill. App. 3d 172, 180 (2008). Moreover, the court may not consider any evidence that “ ‘tends to determine an issue crucial to the determination of the underlying lawsuit.’ ” *Wilson*, 237 Ill. 2d at 461 (quoting *Envirodyne Engineers, Inc.*, 122 Ill. App. 3d at 304-05).

¶ 20 Here, DaVita asks us to consider the third-party complaint it filed against Enviro in the underlying action, which the circuit court refused to consider when determining whether Graphic Arts had a duty to defend. DaVita states,

“In the underlying action, DaVita is accused of not having a policy to prevent patients, like Ms. Terry, from being in the dialysis center after-hours; accused of not having someone check on the underlying decedent and prevent her from being in the dialysis center after-hours; and accused of permitting the underlying decedent to remain in the dialysis center after-hours after the close of business. *** But DaVita contracted with Enviro ten months earlier to provide a scope of services addressing these very allegations. Enviro agreed to be the after-hours contractor physically present on Saturdays.”

DaVita then points to the portion of their contract, which states,

“All unusual occurrences arising during the term of this Agreement at any [DaVita] site of service or within proximity thereof shall be reported to [DaVita].

Such unusual occurrences include, but are not limited to:

Known or suspected injuries to any [DaVita] personnel, patient, visitor or member of [DaVita] medical staff, as observed by [Enviro’s] personnel and/or reported to them by any source[.]

* * *

All such reports shall be made on or before the next business day following [Enviro’s] knowledge of any such event, and in any event no later than five (5) days after any [Enviro] personnel reasonably suspect the occurrence of any act or event requiring a report as set forth above.”

DaVita filed the third-party complaint imputing negligence to Enviro after the declaratory relief action was initiated.³ Moreover, we note that reviewing DaVita’s complaint and supporting documentation, including its contract with Enviro, and determining whether it potentially provided coverage and a duty to defend would “ ‘tend[] to determine an issue crucial to the determination of the underlying lawsuit.’ ” *Wilson*, 237 Ill. 2d at 461 (quoting *Envirodyne Engineers, Inc.*, 122 Ill. App. 3d at 304-05). We, therefore, will not do so.

¶ 21

III. CONCLUSION

¶ 22

The judgment of the circuit court of Will County is affirmed.

¶ 23

Affirmed.

³On this point, we note that, according to the record, “Enviro contends it had DaVita’s approval to not clean the facility on Halloween.”