

NOTICE

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2019 IL App (4th) 180513-U

NO. 4-18-0513

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 15, 2019

Carla Bender

4th District Appellate Court, IL

PEKIN INSURANCE COMPANY,
Plaintiff-Appellant,

v.

TWIN SHORES MANAGEMENT, LLC, an Illinois
Limited Liability Company, and DEBRA K.

WILLIAMS, Individually and as Independent Executor
of the Estate of Michael S. Williams, Deceased,

Defendants-Appellees.

) Appeal from the
) Circuit Court of
) Champaign County
) No. 17MR349
)
) Honorable
) Jason Matthew Bohm,
) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holder White and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The insurer has a duty to defend its additional insured, a contractor, because under the factual allegations of the underlying tort complaint, the primary insured, the subcontractor, is potentially liable for its own negligence and the contractor faces potential vicarious liability for the subcontractor’s negligence, given the authority the contractor allegedly had to control the manner in which the subcontractor performed its work.

¶ 2 Pekin Insurance Company (Pekin) sought a declaratory judgment that it had no duty to defend its additional insured, Twin Shores Management, LLC (Twin Shores), against a tort action brought by Debra K. Williams individually and as the independent executor of the estate of Michael C. Williams. Pekin moved for a summary judgment to that effect, and the Circuit Court of Champaign County denied Pekin’s motion. The parties then agreed that, given the denial of Pekin’s motion, the court should enter summary judgment in favor of Twin Shores in the declaratory-judgment case. The court did so, declaring that Pekin had a duty to defend

Twin Shores against the tort action. Pekin appeals. In our *de novo* review (see *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1059 (2010)), we conclude that the factual allegations of the tort complaint potentially fall within the coverage that Twin Shores has from Pekin as an additional insured. Therefore, we affirm the judgment.

¶ 3

I. BACKGROUND

¶ 4

According to the tort complaint in *Williams v. Twin Shores Management, LLC*, Champaign County circuit court No. 14-L-100, Twin Shores and Henson Electric, Inc. (Henson), were in charge of construction work on a building in Champaign, Illinois, and Michael C. Williams, an employee of Professional Labor Support, LLC, was assigned to help with the installation of electrical wiring. In count I, which was directed against Twin Shores, the tort complaint alleged:

“3. That at the aforesaid time and place and prior thereto, Defendant Twin Shores, individually and through its agents, servants and employees, was present during the course of such erection, construction, repairs[,] and/or alteration. Defendant Twin Shores participated in coordinating the work being done and designated various work methods, maintained and checked work progress[,] and participated in the scheduling of the work and the inspection of the work. In addition thereto, at that time and place, Defendant Twin Shores had the authority to stop the work, refuse the work and materials[,] and order changes in the work, in the event the work was being performed in a dangerous manner or for any other reason.”

On June 10, 2013, while working on the construction project, Michael C. Williams fell off a ladder and onto a concrete floor, suffering a fatal injury. Count I accused Twin Shores of several

negligent acts or omissions, including failing to provide scaffolding, a scissor lift, and safety equipment. Count II accused Henson of the same negligent acts or omissions.

¶ 5 Twin Shores was the general contractor, and Henson was the electrical subcontractor. Pekin had issued Henson a liability insurance policy, which (as Twin Shores had required in the subcontracting agreement) named Twin Shores as an additional insured. The insurance policy, however, covered Twin Shores not for its own negligent acts or omissions in the construction project but, rather, only for negligent acts or omissions by Henson for which Twin Shores could be held vicariously liable—even though the subcontracting agreement stipulated that Henson would do the electrical work as an independent contractor. In this declaratory judgment action, Pekin contended that under the factual allegations of the tort complaint, Twin Shores faced no potential of vicarious liability for Henson’s negligence and that, hence, Pekin had no duty to defend Twin Shores.

¶ 6 The circuit court disagreed. The docket entry for June 26, 2018, reads:
“[Pekin’s] Motion for Summary Judgment is denied based on *Pekin Insurance Company v. Lexington Station, LLC*[,] 2017 IL App (1st) 163284. While there is no cross[-]motion for summary judgment, the parties agree that summary judgment in favor of *** Twin Shores *** is appropriate and is hereby entered. No written order required.”

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 An insurer has a duty to defend the insured “[i]f the facts alleged in the underlying complaint fall within, or potentially within, the policy’s coverage.” *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). In an action for a declaratory judgment on the

question of whether an insured has a contractual duty to defend its insured, a court compares the allegations of the tort complaint to the provisions of the insurance policy. *Id.*

¶ 10 Under the insurance policy that Pekin issued to Henson, Twin Shores, the additional insured, “is covered only with respect to vicarious liability for ‘bodily injury’ or ‘property damage’ imputed from [Henson] to [Twin Shores].”

¶ 11 “Vicarious liability” is another name for the doctrine of *respondeat superior*. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2016 IL App (1st) 150128, ¶ 42, *rev’d in part on other grounds*, 2018 IL 120951. Under that doctrine, “a principal can be held liable for the negligent conduct of an agent acting within the scope of his or her agency.” *Id.*

¶ 12 By the terms of the insurance policy that Pekin issued to Henson, Twin Shores has coverage not against vicarious liability in general but, more specifically, against vicarious liability for bodily injury or property damage that Henson tortiously causes in performing electrical work in the construction project. Thus, to decide that Pekin owed a duty to defend Twin Shores, the trial court had to find two *possibilities* from the factual allegations in the underlying tort complaint: (1) Henson was negligent, and (2) Twin Shores was vicariously liable for Henson’s negligence. See *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 37.

¶ 13 The underlying tort complaint alleges that Henson was negligent, *e.g.*, that it failed to provide scaffolding and reasonable supervision. Therefore, unlike the policyholder in a case on which Pekin heavily relies, *Pekin Insurance Co. v. United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803, Henson potentially was negligent—which is to say, the tort complaint accuses Henson of negligence. *Cf. id.* ¶ 28 (“The failure to specify a negligent act committed by

[the policyholder] not only fails to trigger coverage to an additional insured in [the policyholder's] insurance policy, but also defeats a theory of vicarious liability.”).

¶ 14 But Henson’s potential negligence is not enough to trigger Pekin’s duty to defend Twin Shores. The complaint also must allege facts that, if proven, *might* make Twin Shores vicariously liable for Henson’s negligence. See *Centex Homes*, 2017 IL App (1st) 153601, ¶ 37.

¶ 15 The subcontracting agreement between Twin Shores and Henson tries to head off vicarious liability by stipulating that Henson is an independent contractor. Generally, one who hires an independent contractor incurs no liability for the independent contractor’s acts or omissions. *Roszak/ADC*, 402 Ill. App. 3d at 1064; 17 Ill. Law & Prac. *Employment* § 207 (2018) (exceptions). Just because the subcontracting agreement stipulates, however, that Henson is an independent contractor, it does not necessarily follow that the stipulation is true. Case law declines to treat such a contractual stipulation as dispositive; instead, a court should scrutinize the actual relationship between the hiring party and the ostensible independent contractor, especially the allocation of power over how the work is done. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 44; *Lexington Station*, 2017 IL App (1st) 163284, ¶ 35.

¶ 16 The supreme court has prescribed a multi-factor test for distinguishing between an independent contractor and an agent, and no single factor is conclusive:

“As this court has previously explained, no precise formula exists for deciding when a person’s status as an independent contractor is negated. [Citation.] The determination of whether a person is an agent or independent contractor rests upon the facts and circumstances of each case. [Citation.] [T]he cardinal consideration is whether that person retains the right to control the manner of doing the work. [Citation.] Courts should also consider the following

factors in considering the question of whether a person is an agent or independent contractor: (1) the question of hiring; (2) the right to discharge; (3) the manner of direction of the servant; (4) the right to terminate the relationship; and (5) the character of the supervision of the work done. [Citation.] The presence of one or more of the above facts and *indicia* are not necessarily conclusive of the issue. [Citation.] These factors merely serve as guides to resolving the primary question of whether the alleged agent is truly an independent contractor or is subject to control.” (Internal quotation marks omitted.) *Lawlor*, 2012 IL 112530, ¶ 44.

¶ 17 The tort complaint alleges that not only did Twin Shores designate “various work methods” but Twin Shores had authority to stop the work, refuse the work and materials, and order changes in the work if it “was being performed in a dangerous manner or for any other reason.” Arguably, the tort complaint thereby alleges that Twin Shores had significant authority over the manner in which the work was done, leading potentially to the conclusion that Henson was an agent of Twin Shores, instead of an independent contractor, and in turn to the further conclusion that Twin Shores is vicariously liable for torts that Henson committed in the scope of the agency. See *Lexington Station*, 2017 IL App (1st) 163284, ¶ 34. Twin Shores need not have exercised such authority; possessing such authority would be enough to make Twin Shores a principal. See *Anderson v. Boy Scouts of America, Inc.*, 226 Ill. App. 3d 440, 443-44 (1992) (“The ability or right to control is a key element to the determination, regardless of whether or not the principal exercises that right to control.”).

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the circuit court’s judgment.

¶ 20 Affirmed.