SECOND DIVISION
JUNE 7, 2011

1-10-1705

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ART BOOKBINDERS OF AMERICA, INC., MARIO POULET AND GREG POULET,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 CH 4188
TUDOR INSURANCE COMPANY,	)	Honorable Rita Novak,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Connors concurred in the judgment.

ORDER

Held: We affirm the trial court's grant of a partial summary judgment in favor of the defendant insurance company. The court held that the defendant did not have a duty to defend the plaintiffs in the underlying lawsuit and the defendant was not estopped from raising affirmative defenses. We affirm the trial court's denial of the plaintiff's motion for summary judgment requesting a finding that the defendant indemnify the plaintiff's defense costs as incurred by the plaintiffs in defending the underlying lawsuit. Further, we affirm the trial court's ruling that a determination of Tudor's potential coverage of the plaintiff's loss in the ongoing underlying lawsuit was not ripe for adjudication.

In May 2008, the plaintiffs in this appeal, Art Bookbinders of America, Inc., a corporation (Art Bookbinders), and Mario Poulet (Mario) and Greg Poulet (Greg), directors of Art Bookbinders,

were sued in the circuit court of Cook County by the vice-president and director of the corporation, Louis Poulet (the Poulet lawsuit). Mario and Greg were sued in their capacities as directors of the Art Bookbinders corporation. Also named as a defendant in the Poulet lawsuit was Ronald Zweig (Zweig), a non-employee board member of the corporation. In his lawsuit, Louis Poulet alleged several counts of breach of fiduciary duty and civil conspiracy by Mario, Greg and Zweig. Poulet sought declaratory and injunctive relief against the defendants for their alleged efforts to oppose, marginalize and reduce his compensation and force him to quit or be terminated from employment with the corporation.

The defendant in this appeal, Tudor Insurance Company (Tudor) issued a directors and officers liability and company reimbursement insurance policy to Art Bookbinders that covered the time period of the Poulet lawsuit. Art Bookbinders requested that Tudor defend and indemnify it for defense costs incurred in the Poulet lawsuit. Tudor declined to do so.

On February 2, 2009, Art Bookbinders, Mario and Greg (collectively, the plaintiffs) filed a one-count complaint against Tudor in the circuit court of Cook County. The plaintiffs requested a declaration that the Tudor policy provided coverage for the matters alleged in the Poulet lawsuit.

On April 22, 2010, the plaintiffs filed a "First Amended Complaint for Declaratory Judgment" (amended declaratory complaint). This amended complaint sought declarations that: (1) Tudor had a duty to defend the plaintiffs against the Poulet lawsuit (count I), and (2) Tudor had a duty to indemnify the plaintiffs regarding the Poulet lawsuit (count II). Both the plaintiffs and Tudor filed motions for summary judgment. 735 ILCS 5/2-1005 (West 2008).

On May 13, 2010, the trial court denied the plaintiffs' motion for summary judgment; granted

partial summary judgment to Tudor by ruling that Tudor did not have a duty to defend the Poulet lawsuit; and granted partial summary judgment to Tudor by ruling that the count in Poulet's lawsuit against Mario regarding his capacity in another entity was not covered by the Tudor insurance policy. The circuit court also held that a determination of Tudor's coverage questions was not ripe for adjudication and was dependent upon the outcome of the Poulet lawsuit.

The trial court ruled that its determination was final and appealable and there was no just reason to delay enforcement or appeal of its rulings. Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006). On June 11, 2010, the plaintiffs filed a timely appeal of the circuit court's judgment. Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). We therefore have jurisdiction to hear this appeal.

We address the following issues: (1) whether the trial court erred in granting partial summary judgment to Tudor by finding that it did not have a duty to defend the Poulet lawsuit; (2) whether the trial court erred in holding that the estoppel doctrine barring Tudor from alleging affirmative defenses does not apply because Tudor did not have a duty to defend; (3) whether the trial court erred in holding that Tudor's indemnification insurance policy did not require payment of defense costs as they were incurred by the plaintiffs; (4) whether the trial court erred in determining that Tudor did not have to reimburse Art Bookbinders for its indemnification of Zweig; and (5) whether the trial court erred in determining that issues regarding Tudor's coverage of the loss involved in the Poulet lawsuit were not ripe for adjudication pending the outcome of the Poulet lawsuit.

BACKGROUND

This appeal arises from a coverage dispute between the defendant-appellee insurance company (Tudor) and its insured, the plaintiff-appellant (Art Bookbinders). Also included as

plaintiffs in the declaratory judgment action which gave rise to this appeal are Mario, Greg and Zweig who Art Bookbinders sought to indemnify for purposes of the underlying lawsuit.

On May 6, 2008, Louis Poulet filed a five-count complaint in the circuit court of Cook County against Art Bookbinders, Mario, Greg (the plaintiffs-appellants in this appeal) and Zweig. The complaint established that Art Bookbinders was a non-public, closely held Illinois corporation. Louis Poulet was the vice-president and director of the corporation; Louis' brother Mario was the president of the corporation; Mario's son Greg was a director of the corporation; and Zweig was a non-employee board member of the corporation. Mario owned 40% of the outstanding shares of the corporation and 50% of the voting shares. Louis owned 40% of the corporation's outstanding shares, and 50% of the voting shares. Greg owned 20% of the corporation's outstanding shares, but his stock was non-voting. Zweig owned no shares or stock in the corporation.

The Poulet lawsuit alleged, in part, that Mario, Greg and Zweig had acted in an illegal and oppressive manner and used "their status as majority shareholder and majority control of the board of directors to limit or even eliminate the job responsibilities of Louis, in order to justify a reduction of compensation for Louis, all of which [was] designed to frustrate Louis and too [sic] induce Louis into terminating his employment." Further, Louis alleged that actions on the part of Mario, Greg and Zweig occurred "with the view toward gaining personal wealth for themselves as well as to discriminate and punish Louis for his personal decision to transition from a man to a woman." The five counts of the lawsuit were : (1) request for declaratory judgments; (2) request for injunctive relief pursuant to section 12.56 of the Illinois Business Corporation Act of 1983 (805 ILCS 5/12.56 (West 2006)); (3) breach of fiduciary duty by Mario, Greg and Zweig; (4) civil conspiracy by Mario,

Greg and Zweig; and (5) breach of fiduciary duty by Mario regarding a land partnership not related to Art Bookbinders. Poulet requested compensatory and punitive damages, and attorney fees incurred by him as a result of the illegal actions alleged in the lawsuit.

The plaintiffs notified Tudor of the Poulet lawsuit and requested that Tudor pay the defense costs as purportedly provided in the insurance policy that they had with Tudor. Tudor declined to pay the plaintiffs' defense costs or to reimburse Art Bookbinders for indemnification of Zweig. On February 2, 2009, the plaintiffs filed a one-count complaint against Tudor requesting a declaration that the Tudor policy provided coverage for the matters alleged in the Poulet lawsuit.

On July 28, 2009, both the plaintiffs and Tudor filed motions for summary judgment. The plaintiffs argued in their motion that the Tudor insurance policy provided coverage for the allegations contained in the Poulet complaint. They also claimed that Tudor was required to immediately pay for the defense fees and costs advanced to Zweig by Art Bookbinders. Further, the plaintiffs alleged, Tudor was estopped from asserting policy defenses because it failed to defend the plaintiffs under a reservation of rights or file a lawsuit seeking a declaratory judgment of its insurance policy obligations. In its motion for summary judgment, Tudor raised three affirmative defenses which it claimed barred coverage under the insurance policy. They were: (1) there was an "insured v. insured" exclusion in the policy that barred coverage of the Poulet lawsuit; (2) no wrongful employment practices were alleged which would trigger coverage under the "Employment Practices Coverage Endorsement"; and (3) count V of the Poulet lawsuit alleged Mario's breach of fiduciary duty arising out of his actions with an entity not covered under the insurance policy.

On January 8, 2010, the court held a hearing on the motions and entered a "Memorandum

Decision and Order." The court: (1) denied the plaintiff's motion for summary judgment; (2) denied Tudor's motion for summary judgment, with the exception of ruling that there was no coverage for Mario's actions arising out of his affiliation with a separate entity; and (3) requested that the parties advise the court regarding the status of the remaining issues which the court found were not ripe for determination.

The plaintiffs subsequently filed a motion for a finding pursuant to Illinois Supreme Court Rule 304(a), or in the alternative, Rule 308, with regard to the January 8, 2010, ruling. Ill. S. Ct. Rs. 304(a) (eff. Feb. 26, 2010); 308 (eff. Feb. 26, 2010). The court denied the motion, but advised the parties that neither the complaint nor Tudor's answer specifically raised the issue of whether Tudor had a duty to defend under the insurance policy. The court allowed the plaintiffs to amend their pleadings and allowed Tudor to amend its answer and affirmative defenses.

On April 22, 2010, the plaintiffs filed their amended declaratory complaint seeking declarations that: (1) Tudor had a duty to defend the plaintiffs against the Poulet lawsuit (count I); and (2) Tudor had a duty to indemnify the plaintiffs regarding the Poulet lawsuit (count II). Tudor filed an answer to the amended declaratory complaint and raised eight affirmative defenses.

On May 13, 2010, the trial court issued a superseding memorandum and order based on the amended pleadings. The trial court denied the plaintiffs' motion for summary judgment, granted Tudor's motion for summary judgment as to count I, finding that Tudor did not have a duty to defend the Poulet lawsuit. The court also granted Tudor's motion for summary judgment as to the finding that the estoppel doctrine was not applicable against Tudor since it had no duty to defend. The court partially granted Tudor's motion for summary judgment, ruling that an exclusion to the liability

insurance policy barred Tudor's duty to provide coverage for any loss as contained in count V of the Poulet lawsuit[1]. The trial court also ruled that the issues concerning whether Tudor will eventually be held liable under the policy were not ripe for adjudication and were dependent upon the outcome of the Poulet lawsuit. The plaintiffs filed a timely appeal from that judgment.

ANALYSIS

The first argument that the plaintiffs advance is that the trial court erred in holding that the terms of the Tudor insurance policy did not impose a duty on Tudor to defend the Poulet lawsuit.

On May 13, 2010, the trial court granted Tudor's motion for summary judgment and held that Tudor only had a duty to indemnify the plaintiffs pursuant to the Tudor insurance policy, not a duty to defend the Poulet lawsuit. A reviewing court uses a *de novo* standard when reviewing a trial court's grant of summary judgment. *Perbix v. Verizon North, Inc.*, 396 Ill. App. 3d 652, 657, 919 N.E.2d 1096, 1101 (2009). We examine the pleadings and depositions in the record to determine whether the trial court correctly found that there was no genuine issue of material fact and the movant was entitled to judgment as a matter of law. *Interior Crafts, Inc. v. Leparski*, 366 Ill. App. 3d 1148, 1151, 853 N.E.2d 1244, 1247 (2006).

This case involves the interpretation of the provisions of an insurance policy, which is a question of law that our court reviews *de novo*. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455, 930 N.E.2d 1011, 1016 (2010). The primary objective that a court has in construing the language of an insurance policy is to "ascertain and give effect to the intentions of the parties as expressed in

[1] Poulet's count V concerned Mario's breach of fiduciary duty to an entity not covered under the policy and that is not involved in this appeal.

their agreement." *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479, 687 N.E.2d 72, 75 (1997). If the terms of the policy are clear and are not ambiguous, the terms must be given their plain and ordinary meaning. *Id.*

Tudor issued a claims-made "Directors and Officers Liability and Company Reimbursement" policy to the plaintiffs which stated in part:

"INSURING AGREEMENTS

A. DIRECTORS AND OFFICERS LIABILITY

The Insurer shall pay the Loss of each and every Director or Officer (hereinafter called the Insureds) arising from any claim first made against the Insureds and reported to the Insurer during the Policy Period by reason of any Wrongful Act.

B. COMPANY REIMBURSEMENT

The Insurer shall reimburse the Company for Loss arising from any claim first made against the Insureds and reported to the Insurer during the Policy Period by reason of any Wrongful Act but only when and to the extent the Company has indemnified the Insureds for such Loss pursuant to law, statutory or common, or pursuant to the Charter or By-Laws of the Company.

SECTION 1 DEFINITIONS

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E. 'Loss' shall mean damages, judgments, settlements and Defense

Costs; however, Loss shall not include fines or penalties imposed by law, punitive or exemplary damages, the multiplied portion of multiplied damages, taxes or any amount which may be incurred in connection with any matter uninsurable under the law pursuant to which this Policy shall be construed.

F. 'Wrongful Act' shall mean any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission by the Insureds solely in the discharge of their duties in their capacity as Directors or Officers of the Company, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.

G. 'Defense Costs' shall mean reasonable and necessary fees, costs and expenses consented to by the Insurer *** resulting solely from the defense and appeal of any claim against the Insureds, but excluding salaries of officers or employees of the Company.

SECTION 2 EXCLUSIONS

The Insurer shall not be liable under this Policy to make any payment for Loss in connection with any claim made against the Insureds:

A. brought about or contributed to by the committing in fact of any fraudulent, criminal or dishonest act of an Insured;

***

D. which are brought by an Insured or the Company or which are brought by any security holder of the Company, whether directly or derivatively, unless such claim is instigated and continued totally independent of, and totally without solicitation of, or assistance of, or active participation of, or intervention of, any Insured or the Company;

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SECTION 4 DEFENSE COSTS

The Insurer does not have a duty to defend. Defense Costs shall not be incurred without the Insurer's consent, which consent shall not be unreasonably withheld. Defense Costs are included in Loss and, as such, Defense Costs are subject to the Limit of Liability stated in Item 3 of the Declarations.

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SECTION 6 COOPERATION CLAUSE

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B. The Insurer does not under this policy have a duty to defend. The Insurer shall have the right to associate with the Insureds in the defense and settlement of any claim that appears reasonably likely to involve the Insurer.

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D. With respect to Defense Costs and any joint settlement of any claim made against the Company and the Insureds, the Company, the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of the amount of Defense Costs and joint settlement as between the Company, the Insureds and the Insurer.

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ENDORSEMENT #5

EMPLOYMENT PRACTICES COVERAGE ENDORSEMENT

*** the policy is amended as follows:

1) The definition of 'Wrongful Act' in SECTION 1, DEFINITION F of the policy is to INCLUDE Wrongful Employment Practices.

2) 'Wrongful Employment Practices' shall mean any actual or alleged act of 'Discrimination,' 'Sexual Harassment' or 'Wrongful Termination' by any Insured."

The policy applied "only as excess over any other valid and collectible insurance."[2] The policy period was from September 26, 2007 to September 26, 2008, and had a $1 million limit for each policy year. The "Schedule of Directors/Officers/Trustees" attached to the policy listed Mario (President/Officer/Director/Trustee), Louis (Secretary/Treasurer/Officer/Director/Trustee), Greg

[2]Art Bookbinders had an "Employment Practices Liability Insurance" policy issued by Evanston Insurance Company for the policy period of October 20, 2006, to October 20, 2007. The corporation was insured under an "Employment Liability Insurance Policy" issued by Markel American Insurance Company for the policy period of October, 20, 2007, to October 20, 2008.

(Officer/Owner) and Zweig (Director/Accountant).

The plaintiffs argue that Tudor's policy is ambiguous and contradictory. The plaintiffs claim that a lay person would not be expected to know the legal implications of the phrase "duty to defend" and it is not defined in the policy. The plaintiffs point out that the insurance policy clearly states that Tudor has to pay their defense costs. They contend that Tudor's assertion that it does not have a duty to defend is "directly contrary to the coverage grant which expressly states Tudor will *pay* the Insureds' defense costs." (Emphasis in original.) The plaintiffs also argue that Tudor should not be allowed to negate its promise by inserting an unexplained and undefined legal term of art, "duty to defend," at the end of the policy.

The plaintiffs further contend that the Tudor insurance policy is contradictory because it states that it does not have a duty to defend, yet it allows Tudor to control the plaintiffs' defense. The plaintiffs argue that Tudor has attempted to assert rights afforded an insurer who has a duty to defend. The Tudor policy states that the defense costs "shall not be incurred without Tudor's consent." Under the policy, the plaintiffs must cooperate with Tudor with respect to any claims made against the plaintiffs and Tudor must consent to any settlement of those claims.

The plaintiffs urge that the policy is ambiguous, and therefore must be construed against Tudor. *Koloms*, 177 Ill. 2d at 479, 687 N.E.2d at 75. Therefore, they conclude that this court must hold that Tudor has a duty to defend the plaintiffs regarding the underlying Poulet lawsuit.

The trial court in this case did not agree with the plaintiffs that the Tudor insurance policy was ambiguous. The trial court noted that an insurer does not have a duty to defend unless there is a contractual obligation to do so; the language of the contract is what governs the insurer's duty and

therefore an insurance policy may relieve the insurer of this duty, or obligate the insurer to the duty. *Zurich Insurance Co. v. Raymark Industries*, *Inc.*, 118 Ill. 2d 23, 48, 514 N.E.2d 150, 161 (1987). The court looked to the explicit language in the Tudor insurance policy which stated that it did not have the duty to defend. The court examined the insurance policy as a whole and determined that it was intended to provide indemnification to the insured in the case of a loss. The court did not equate the terms in the policy which stated that Tudor had to pay defense costs and had the "right to associate with the Insureds in the defense and settlement of a claim" as meaning that Tudor had a duty to defend.

Our review of the record and applicable case law leads us to the same conclusion. The Tudor insurance policy specifically states, in both in "Section 4 Defense Costs" and in "Section 6 Loss Provisions" that Tudor does not have a duty to defend. It has been recognized in Illinois that insurance companies may reserve a duty to indemnify their insureds as opposed to a duty to defend them. *Employers Reinsurance Corp. v. E. Miller Insurance Agency, Inc.*, 332 Ill. App. 3d 326, 335, 773 N.E.2d 707, 714 (2002). The plaintiffs assert that the phrase "duty to defend" is not defined in the policy, and that reasonable lay persons can speculate as to what the terms means. Language of an insurance policy "is not considered ambiguous merely because a term is not defined within the policy or because the parties can suggest creative possibilities for the term's meaning." *Board of Education of Maine Township High School District No. 207 v. International Insurance Co.*, 344 Ill. App. 3d 106, 112, 799 N.E.2d 817, 823 (2003).

We assume that as business owners, the plaintiffs had a modicum of sophistication when they were negotiating the terms of the Tudor insurance policy. The plaintiffs are asking us to interpret

the policy to impose on Tudor a coverage duty which, in hindsight, they should have included in the insurance policy. Although the plaintiffs urge us to rule otherwise, we agree with the trial court and find that there was no duty on the part of Tudor to defend the underlying Poulet lawsuit.

Based on our conclusion that Tudor did not have a duty to defend against the Poulet lawsuit, we also determine that Tudor cannot be estopped from asserting affirmative defenses against the plaintiffs. The doctrine of estoppel would only be applicable if it was determined that an insurer has breached its duty to defend but is not appropriate if the insurer has no duty to defend. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151, 708 N.E.2d 1122, 1135 (1999).

The plaintiffs also argue that the trial court erred in denying their motion for summary judgment specifically by not ruling that Tudor had a duty to indemnify the plaintiffs for the defense costs and to reimburse the plaintiffs as they incurred costs. The plaintiffs argue that "a reasonably prudent insured would understand Tudor's assertion that it has no duty to defend to mean that Tudor has no duty to supply the Insureds with an attorney or engage in the Insureds' defense. A reasonably prudent insured would not understand Tudor's assertion that it has no duty to defend to mean that Tudor will *only reimburse, not pay,* the Insureds' defense costs." (Emphasis in original.) The plaintiffs argue that the meaning of the word "pay" when used by Tudor in the insurance policy means that Tudor will pay the defense costs as they arise. Otherwise, the plaintiffs contend, Tudor should have inserted the word "reimburse" if the meaning was that the defense costs would be paid at the conclusion of the litigation.

The plaintiffs strongly rely upon the case of *National Union Fire Insurance Co. of*

Pittsburgh, Pa. v. Brown, 787 F. Supp. 1424 (S.D. Fla.1991) to support their argument that Tudor should have to pay their defense costs as the costs are incurred. In the *Brown* case, the Florida district court interpreted an insurance policy which stated that the insurer would pay "'any amount which the Insureds *legally must pay* for a claim or claims for Wrongful Acts.'" *Id.* at 1428. (Emphasis in original.) The insurance policy covered the loss, including defense costs, incurred by the directors or officers of a company by reason of any wrongful acts committed in their official capacities. There was an exclusion for the insureds' actions which were adjudicated to be fraudulent, dishonest or criminal. *Id.* at 1428-29.

The court in the *Brown* case first determined that the underlying complaint contained allegations which triggered the coverage of the directors and officers insurance policy. After this initial determination was made, the court then looked to the language of the policy to determine whether the insurer was required to contemporaneously fund the insureds' defense costs. The court found that the question of whether an exclusion for coverage would be applicable was not ripe until there was a final adjudication of whether the insureds had engaged in acts excluded under the policy.

The court in the *Brown* case determined that a plain reading of the language of the liability policy requiring the insurer to pay any amount which the insureds "legally must pay" meant that the insurer's obligation accrued when the insureds were billed for defense costs. *Id.* at 1429. The court further reasoned that policy considerations should not be ignored, and it would be unreasonably harsh to allow the insurer to wait on the sidelines while the insureds have to advance defense expenditures that would likely be staggering. *Id.* at 1433.

We note that decisions by courts in other states are not binding on this court. *Those Certain*

Underwriters at Lloyd's v. Professional Underwriters Agency, Inc., 364 Ill. App. 3d 975, 981, 848 N.E.2d 597, 602 (2006). In any case, the language of the cited insurance policy in the *Brown* case regarding the insurer's payment obligation does not mirror the language of the insurance policy in the case before us.

We have also examined the *Zaborac* case that Tudor relies upon and the plaintiffs distinguish. *Zaborac v. American Casualty Co. of Reading, PA.*, 663 F. Supp. 330 (C.D. Ill. 1987). In that case, the district court reviewed a directors and officers liability policy which contained a clause that is absent in this case. Specifically, the language stated that no action would be taken against the insurer until the insureds' liability was finally determined. *Id.* at 333. The court in the *Zaborac* case decided, partially relying on that clause in the insurance policy, that a determination of the insurer's indemnification obligation was not required until resolution of the underlying lawsuit. *Id.* The court did not alter its decision because of another policy clause, also absent in this case, which gave the insurer the option of advancing expenses to the insureds prior to the disposition of the claims. *Id.* at 334. Although the policy terms in the *Zaborac* case are somewhat dissimilar to Tudor's, the court's interpretation of Illinois case law regarding the timing of the insurer's obligation to indemnify is supportive of Tudor's position. *Id.* at 332-33.

Here, there are coverage questions as to whether Tudor will be found to be obligated under the terms and exclusions of the insurance policy to pay for the loss in the underlying lawsuit. It is well established in Illinois that when determining whether there is a duty to indemnify, which is a more narrow duty than a duty to defend, the court looks to see if the insured's loss *actually* falls within the policy's coverage. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d

90, 127-28, 607 N.E.2d 1204, 1222 (1992). Thus, the duty to indemnify will not be defined until the adjudication of the action wherein the insured has already incurred liability. *Id.* at 127, 607 N.E.2d at 1221.

In the case before us, it is clear from the policy language that there needs to be a determination of the ultimate liability of the plaintiffs in the underlying, ongoing Poulet lawsuit in order to determine whether Tudor must reimburse the plaintiffs for their loss. The trial court properly denied the plaintiffs' motion for summary judgment on this point.

The plaintiffs further argue that the trial court erred in denying their motion for summary judgment regarding Tudor's obligation to reimburse the corporation for defense costs expended by the plaintiffs for Zweig's defense. Zweig is a non-owner director who was named as a defendant in the underlying Poulet lawsuit but who is not a party to the action involved in this appeal. As of July 28, 2009, Art Bookbinders had indemnified and reimbursed Zweig the sum of $61,219.94 for attorney fees he incurred as a result of the Poulet lawsuit. The plaintiffs claim that the insurance policy expressly requires Tudor to reimburse Art Bookbinders whenever the corporation indemnifies its officers and directors, and thus the trial court erred in holding that Tudor is not required to immediately reimburse the corporation for Zweig's defense costs.

As a director, Zweig is an insured under the policy. The policy provides that Tudor will reimburse the corporation for loss arising from a claim by reason of a wrongful act "but only when and to the extent the Company has indemnified the insureds for such Loss pursuant to law, statutory or common, or pursuant to the Charter of By-Laws of the Company." The by-laws of the

corporation[3] state in pertinent part:

"ARTICLE XII

INDEMNIFICATION OF OFFICERS,

DIRECTORS, EMPLOYEES AND AGENTS

***

SECTION 2. The corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer *** against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made with respect to any claim, issue or matter as to which such person shall have been adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the court in which such action or suit was brought shall determine upon application that

[3]The by-laws state they are of the corporation "A Better Copy, Inc." which is the former name of Art Bookbinders.

> despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper."

The plaintiffs claim that pursuant to this section of the corporation's by-laws, Tudor has a duty to reimburse them for the indemnity expenditure for Zweig's defense costs in the underlying lawsuit. Tudor claims that its duty will not be triggered under the by-laws until: (1) the underlying lawsuit is resolved and it is determined that Zweig was not negligent in the performance of his duty to the corporation; or (2) a court deems indemnification is proper. Because neither of these triggering events has occurred, Tudor claims that it does not have a duty to reimburse Art Bookbinders for the amount it has paid to Zweig as indemnification for his defense costs incurred in the Poulet lawsuit.

Tudor also dismisses the plaintiff's allegation that a separate "Indemnity Agreement" made between the corporation and Zweig imposes a duty on Tudor to reimburse Art Bookbinders for Zweig's defense costs. We agree that this separate indemnity agreement has no bearing on the issues in this appeal or the underlying lawsuit since it is not a part of the insurance policy at issue or the corporation's by-laws.

Our examination of the records reveals that the ultimate determination of an obligation to indemnify Art Bookbinders for Zweig's defense costs under the Tudor policy depends on the outcome of the Poulet lawsuit. Thus, the trial court correctly denied the plaintiff's motion for summary judgment on that issue.

For the reasons stated, we hold that the trial court properly denied the plaintiffs' motion for summary judgment. We also hold that the trial court properly allowed Tudor's motion for partial summary judgment in ruling that Tudor did not have a duty to defend the Poulet lawsuit and therefore was not estopped from raising affirmative defenses. Further, we affirm the trial court's ruling that Tudor's coverage and indemnification obligations are not ripe for adjudication.

Affirmed.