2014 IL App (1st) 121763-U
No. 1-12-1763
Order Filed November 14, 2014

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JAMES B. CARROLL, Plaintiff-Appellant, v. STATE FARM FIRE and CASUALTY COMPANY, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County No. 11 CH 41129 Honorable Neil H. Cohen, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order dismissing the insured's complaint for declaratory judgment was affirmed: the insurer's motion to dismiss was not a hybrid motion and, as a matter of law, the insurer did not have a duty to defend the insured in the underlying complaint.

¶ 2 The plaintiff, James B. Carroll (Mr. Carroll), appeals from an order of the circuit court of Cook County dismissing his complaint for declaratory judgment against the defendant, State Farm Fire and Casualty Company (State Farm). On appeal, Mr. Carroll contends that: (1) the circuit court erred when it failed to strike State Farm's hybrid motion to dismiss; and (2) the circuit court erred when it determined that State Farm had no duty to defend Mr. Carroll. We affirm for the reasons set forth below.

¶ 3 BACKGROUND

¶ 4 Drew Peterson, Mr. Carroll's nephew, was married to Kathleen Savio. In 2003, their marriage was dissolved, and a trial on the distribution of the marital assets was scheduled for April 6, 2004. On March 1, 2004, Kathleen was found dead in the bathtub at her residence. The cause of death was ruled accidental. On March 23, 2005, Mr. Carroll was appointed the independent executor of Kathleen's estate. On May 19, 2006, Mr. Carroll filed his final report as independent executor. The circuit court of Will County approved the report, discharged Mr. Carroll and closed the estate.

¶ 5 Based on the results of a new autopsy, members of Kathleen's family petitioned the circuit court to reopen her estate in order to pursue a wrongful death claim against Mr. Peterson and to remove Mr. Carroll as independent executor on the grounds of a conflict of interest and breach of his fiduciary duties. The circuit court granted the petition to reopen the estate. The court ordered Mr. Carroll removed as independent executor and appointed Kathleen's father and one of her sisters as successor co-executors. The circuit court's order was affirmed on appeal. See *In re Estate of Savio*, 388 Ill. App. 3d 242 (2009).

¶ 6 I. The Underlying Complaint

¶ 7 Henry J. Savio and Anna M. Doman, co-executors of the estate of Kathleen Savio (Kathleen's estate) filed a complaint against Mr. Peterson and Mr. Carroll. In counts I through IV, the complaint alleged a claim under the Wrongful Death Act (740 ILCS 180/1 et seq (2010)) and other related claims against Mr. Peterson.[1] This appeal involves the allegations against Mr. Carroll contained in counts V and VI of the fourth amended complaint (the Savio complaint).

¶ 8 The co-executors alleged in count V that, while serving as the independent executor of Kathleen's estate, Mr. Carroll breached his fiduciary duties to Kathleen's estate and her beneficiaries, her minor children. Specifically, Mr. Carroll was alleged to have breached the fiduciary duties he owed to Kathleen's estate in that he: terminated the representation of her dissolution counsel, failed to retain new counsel, chose to represent the estate himself, and allowed the assets of the marriage to pass to Mr. Peterson, rather than to Kathleen's estate and her intended beneficiaries, her minor children. In count VI, the co-executors alleged that in committing the same acts, Mr. Carroll "failed to exercise ordinary and reasonable care" and "negligently breached his duties owed" to Kathleen's estate. In paragraph 70 of the Savio complaint, the co-executors alleged:

> "As a direct and proximate result of one or more of the aforesaid acts and/or omissions of the Defendant James Carroll, Plaintiffs were injured, damaged and incapacitated, were caused to incur related expenses, loss of funds diverted from the Estate, were caused to suffer pain, suffering, and the loss of a normal life."

[1]Mr. Peterson is not a party to this appeal.

The prayer for relief sought judgment against Mr. Carroll in "an amount sufficient to compensate the Estate for loss of funds diverted from the estate by them in the dissolution proceedings."

¶ 9 II. Insurance Policies

¶ 10 Mr. Carroll was insured by State Farm under two policies: No. 13-56-0022-4, a homeowners insurance policy and No. 13-93-2158-1, a personal liability umbrella policy (the umbrella policy). The relevant provisions of the insurance policies are set forth below:

¶ 11 The homeowners policy provided as follows:

¶ 12 "**DEFINITIONS**

*** * ***

1. '**bodily injury** means physical injury, including any resulting sickness or disease to a person. This includes required care, loss of services and death resulting therefrom.

* * *

8. '**occurrence**' when used in Section II of this policy, means an accident including exposure to conditions, which results in:

a. **bodily injury** or

b. **property damage**; ***

9. '**property damage**' means physical damage to or destruction of tangible property, including loss of use of this property. Theft or conversion of property by an **insured** is not **property damage**.

* * *

If a claim is made or a suit is brought against an insured for damages because of **bodily injury** or **property damage** to which this coverage applies, caused by an **occurrence**, we will:

1. pay up to the limit of liability for the damages for which the insured is legally liable; and

2. provide a defense at our expense by counsel of our choice."

¶ 13 The umbrella policy provided as follows:

"**DEFINITIONS**

* * *

11. '**property damage**' means physical injury to or destruction of tangible property. This includes the loss of use caused by the injury or destruction."

An endorsement to the personal liability policy set forth the following definitions:

6. '**loss**' means:

a. an accident, including injurious exposure to conditions, which results in **bodily injury** or **property damage** during the policy period. ***

b. the commission of an offense, or series of similar or related offenses, which result in **personal injury** during the policy period.

* * *

9. '**personal injury**' means injury caused by one or more of the following offenses:

a. false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution;

b. libel, slander, defamation of character or invasion of rights of privacy.

* * *

17. '**bodily injury**' means physical injury, sickness, disease, emotional distress or mental injury to a person. This includes required care, loss of services and death resulting therefrom."

III. Complaint for Declaratory Judgment

¶ 14 On May 7, 2009, Mr. Carroll was served with the original Savio complaint. He forwarded the summons and the complaint to State Farm, requesting a defense and indemnification. State Farm denied coverage. Subsequently, the complaint was amended several times, but State Farm continued to deny coverage to Mr. Carroll.

¶ 15 In December 2011, Mr. Carroll filed a complaint seeking a declaratory judgment. In counts I and II, Mr. Carroll sought a declaration that under provisions of the insurance policies State Farm owed a duty to defend him in connection with the Savio complaint. Because it failed to accept his defense or to file a declaratory judgment action within a reasonable time, State Farm was estopped from denying coverage under the policies and was required to defend Mr. Carroll. In count III, Mr. Carroll sought damages and attorney fees under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2010)).

¶ 16 IV. Dismissal of Complaint for Declaratory Judgment

¶ 17 State Farm filed a motion to dismiss the declaratory judgment complaint pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)). In its motion, State Farm maintained that it did not owe a duty to defend Mr. Carroll under the homeowners or umbrella policies since both policies required that the underlying claim was caused by an "accident." State Farm asserted that Mr. Carroll's actions alleged in the fourth amended complaint did not constitute an "accident," because the depletion of Kathleen's

estate was "the natural and ordinary consequences" of Mr. Carroll's breach of his fiduciary duties. It further argued that Mr. Carroll's conduct was not negligent since the results from his actions were "reasonably anticipated." In addition, State Farm asserted that the allegations that Mr. Carroll diminished the value of the estate by dissipating the assets did not allege a physical injury constituting property damage under the policies.

¶ 18 In response, Mr. Carroll maintained that the motion to dismiss should be stricken as an improper hybrid motion in that it sought dismissal of the complaint pursuant to section 2-619, dismissal based on affirmative matter, and judgment on the pleadings pursuant to section 2-615(e) of the Code (735 ILCS 5/2-615(e) (West 2010)). Mr. Carroll argued that the negligence allegations against him in the Savio complaints were sufficient to trigger State Farm's duty to defend him.

¶ 19 The circuit court rejected Mr. Carroll's assertion that the motion to dismiss was a hybrid motion and granted the motion to dismiss. Mr. Carroll appeals.

¶ 20 ANALYSIS

¶ 21 I. Hybrid Motion

¶ 22 Mr. Carroll contends that the circuit court erred when it determined that State Farm's motion to dismiss was not an improper hybrid motion. He asserts that while State Farm requested dismissal pursuant to section 2-619 of the Code, it also sought judgment on the pleading pursuant to section 2-615(e) of the Code. See *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (2003) (while section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)) allows for combined sections 2-615 and 2-619 motions, the statute does not authorize hybrid motion practice).

¶ 23 State Farm's motion to dismiss stated it was brought pursuant to section 2-619 of the Code. State Farm attached copies of the Savio complaints and copies of the insurance policies. See 735 ILCS 5/2-619(a)(9) (claim asserted against the defendant is barred by other affirmative matter). State Farm sought the dismissal of Mr. Carroll's complaint "with Prejudice pursuant to" section 2-619 of the Code.

¶ 24 The sole reference to section 2-615(e) of the Code was contained in the introductory portion of the section 2-619 motion and stated as follows:

> "4. 'A judgment on the pleadings is appropriate "where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law." ' [Citation.] Because the issues in this case can be determined as a matter of law, even assuming the facts alleged in the declaratory judgment complaint are true, State Farm is entitled to a dismissal of this matter pursuant to [section 2-619]."

¶ 25 Our review of the relevant pleadings does not support Mr. Carroll's argument that State Farm's motion to dismiss was a hybrid motion. Nothing in the section 2-619 motion suggests that State Farm was seeking judgment on the pleadings under section 2-615(e) as an alternative to a dismissal under section 2-619. The circuit court did not treat the motion as requesting judgment on the pleadings and dismissed the complaint pursuant to section 2-619. The circuit court determined correctly that State Farm's motion to dismiss was not an improper hybrid motion, and its failure to strike the motion did not constitute error.

¶ 26 II. Duty to Defend

¶ 27 Mr. Carroll contends that the circuit court erred in determining that State Farm had no duty to defend him. He maintains that the Savio complaint alleged property damage, bodily

injury and personal injury claims all of which were covered or potentially covered under the homeowners and umbrella policies.

¶ 28 A. Standard of Review

¶ 29 The court reviews the dismissal of a complaint under section 2-619 of the Code *de novo*. *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 973 (2008). In reviewing the dismissal, the court considers whether there is a genuine issue of material fact and whether the defendant is entitled to judgment as a matter of law. *Aurelius*, 384 Ill. App. 3d at 973. The court accepts all well-pleaded facts as true and draws all reasonable inferences from those facts. *Aurelius*, 384 Ill. App. 3d at 973. The construction of the provisions of an insurance policy presents a question of law and is subject to *de novo* review. *Aurelius*, 384 Ill. App. 3d at 973.

¶ 30 B. Discussion

¶ 31 In determining whether an insurer has a duty to defend its insured from a lawsuit, the court compares the facts alleged in the underlying complaint to the relevant portions of the insurance policy. *Owners Insurance Co. v. Seamless Gutter Corp.*, 2011 IL App (1st) 082924-B, ¶ 44. The insurer is required to defend its insured "if the complaint alleges facts within or potentially within the policy's coverage" and "even if the allegations are false or groundless and even if only one theory of recovery is covered under the policy." *Seamless Gutter Corp.*, 2011 IL App (1st) 082924-B, ¶ 44. Both the underlying complaint and the insurance policy should be liberally construed in favor of the insured. *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 702 (1996).

¶ 32 Mr. Carroll contends that the circuit court failed to construe the allegations of the Savio complaint in his favor as the insured. However, as this court's review is *de novo*, we do not

defer to the circuit court's construction of the complaint and policy provisions. Our determination as to whether there is a duty to defend in this case will be based on our own comparison of the allegations of the Savio complaint to the relevant policy provisions.

¶ 33 For coverage purposes, the homeowners policy provided that " '**occurrence**' when used in Section II of [the homeowners policy], means an accident *** which results in: a. bodily injury or b. property damage; ***." The umbrella policy provided coverage for a loss from an "accident," which resulted in bodily injury or property damage. The policies do not define the term "accident." Therefore, we turn to case law for the meaning of that term.

¶ 34 " 'An accident has been defined as an unforeseen occurrence, usually *** an undesigned sudden or unexpected event of an inflictive or unfortunate character. ' "*State Farm Fire & Casualty Co. v. Young*, 2012 IL App (1st) 103736, ¶ 26 (quoting *Aetna Casualty & Surety Co. v. Fryer*, 89 Ill. App. 3d 617, 619 (1980)). The term "accident" excludes " '[t]he natural and ordinary consequences of an act ***.' " *Young*, 2012 IL App (1st) 103736, ¶ 26 (quoting *Fryer*, 89 Ill. App. 3d at 619). If the result was intended or expected by the insured, the event was not an accident. *Young*, 2012 IL App (1st) 103736, ¶ 26; see *Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 409 (2004) (in determining whether an occurrence is an accident, the focus is on whether the injury is expected or intended by the insured, not whether the acts were performed intentionally).

¶ 35 Mr. Carroll maintains that since the Savio complaint alleged that his actions were negligent, the allegations are within the homeowner's policy's definition of an "occurrence." The fact that count VI of the Savio complaint is couched in negligence terms does not, by itself, place it potentially within the coverage of the policies. *Atlantic Mutual Insurance Co. v. American Academy of Orthopedic Surgeons*, 315 Ill. App. 3d 552, 563 (2000) (the

potential for coverage depends on the facts alleged, not on the semantics of the underlying suit); see *Steadfast Insurance Co. v. Caremark RX, Inc.*, 359 Ill. App. 3d 749, 755-56 (2005) (it is the alleged conduct rather than what the party labels the claim that controls whether there is a duty to defend). "[W]e do not look to the asserted legal theory, seeking to impose liability upon the defendant for his actions, to determine whether an accident occurred; rather, we look to the intended or expected results arising from the defendant's actions ***." *Young*, 2012 IL App (1st) 103736, ¶ 31.

¶ 36 The Savio complaint alleged that Mr. Carroll used his authority as the independent executor of Kathleen's estate to divert the marital assets to Mr. Peterson, rather than to her estate. The injury in this case resulted from the alleged fact that Kathleen's estate was deprived of those assets and was the natural and ordinary consequence of his action in diverting the marital assets to Mr. Peterson rather than to Kathleen's estate.

¶ 37 Mr. Carroll contends that the Savio complaint alleged bodily injury and property damage that were not the natural and ordinary consequences of his actions as independent executor, and therefore constituted an accident, triggering the duty to defend. We disagree.

¶ 38 Mr. Carroll maintains that the allegations that he dissipated Kathleen's estate by diverting the marital assets to Mr. Peterson and allowed Mr. Peterson to take personal property constituted property damage under the policies. Under the homeowners policy, property damage meant "physical damage to or destruction of tangible property, including loss of use. Theft or conversion of property by an **insured** is not **property damage**." Under the umbrella policy, property damage means "physical injury to or destruction of tangible property. This includes loss of use caused by the injury or destruction." Under each provision, the damage, injury or destruction must be to tangible property.

¶ 39 The Savio complaint contained no allegations of physical injury, physical damage to or destruction of any tangible property. Mr. Carroll's reliance on *Universal Underwriters Insurance Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723 and *Country Mutual Insurance Co. v. Carr*, 372 Ill. App. 3d 335 (2007), is misplaced as both cases involved injury or destruction to tangible property. In *LKQ Smart Parts, Inc.*, a vehicle that was evidence in a lawsuit was destroyed by the insured. The reviewing court found that the consequential damages arising from the destruction of property are covered. *LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 37. In *Carr*, the court found physical damage to basement walls caused by backfilling operations constituted property damage. *Carr*, 372 Ill. App. 3d at 341.

¶ 40 Mr. Carroll's reliance on *Gibraltar Casualty Co. v. Sargent & Lundy*, 214 Ill. App. 3d 768 (1991), is also misplaced. There the reviewing court found allegations of an increase in the cost of an investment and construction delays were sufficient to allege a loss of use and were covered under the property damage provision. In contrast to the property damage provision in the present case, in that case, property damage included, " 'loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an *occurrence* during the policy period.' (Emphasis in original.) " *Sargent & Lundy*, 214 Ill. App. 3d at 778. But see *First Newton National Bank v. General Casualty Co. of Wisconsin*, 426 N.W.2d 618 (Ia. 1988) (loss of the victims' homes, farming profits and personal possessions in a foreclosure action under property damage even though there was no physical injury to or destruction of the property).

¶ 41 In the present case, the Savio complaint alleged intentional acts on the part of Mr. Carroll, which were clearly the natural and ordinary consequences of allegedly diverting the

assets of Kathleen's estate to Mr. Peterson and allowing him to take possession of the personal property. Mr. Carroll failed to establish any property damage caused by an accident as required under the policies.

¶ 42 Mr. Carroll then contends that he is entitled to a defense because the physical and emotional injuries alleged in paragraph 70 of the Savio complaint were not the "natural and ordinary" consequences of his actions and therefore constituted an accident. In paragraph 70, the co-executors alleged as follows:

> "As a direct and proximate result of one or more of the aforesaid acts and/or omissions of the Defendant James Carroll, Plaintiffs were injured, damaged and incapacitated, were caused to incur related expenses, loss of funds diverted from the Estate, were caused to suffer pain, suffering, and the loss of a normal life."

¶ 43 Mr. Carroll relies on *Aetna Casualty & Surety Co. v. O'Rourke Brothers, Inc.*, 333 Ill. App. 3d 871 (2002). In that case, Aetna's commercial excess liability policy (CEL) provided coverage for bodily injury which was defined as including " 'shock, fright, mental injury, disability, mental anguish, humiliation, sickness or disease sustained by a person, including death resulting from any of these at any time.' " *O'Rourke Brothers, Inc.*, 333 Ill. App. 3d at 875. The underlying complaints alleged that the insured made misrepresentations to its customers, committed fraud, breached contracts and violated truth-in-lending statutes. The complaints alleged that the customers suffered mental anguish as a result of the scheme to defraud them. *O'Rourke Brothers, Inc.*, 333 Ill. App. 3d at 874.

¶ 44 On appeal, the reviewing court agreed with the circuit court that Aetna had a duty to defend its insured, explaining as follows:

> "Although the *economic injuries* that O'Rourke's customers suffered followed naturally from O'Rourke's defrauding scheme, these injuries are not recoverable under the terms of the insurance policy. The bodily injury covered under the CEL policy is the *mental anguish* that the customers suffered. Because Aetna failed to establish that the emotional injuries were the natural and ordinary consequences of O'Rourke's actions, Aetna had a duty to defend under the CEL policy." *O'Rourke Brothers, Inc.*, 333 Ill. App. 3d at 878-79.

¶ 45 We find *O'Rourke Brothers, Inc.* distinguishable. The plaintiffs-consumers' complaint alleged mental anguish as a result of O'Rourke's scheme to defraud them. In the present case, the Savio complaint alleged that the "plaintiffs" suffered physical and emotion pain as a result of Mr. Carroll's conduct. The plaintiffs in the Savio complaint were the co-executors of Kathleen's estate. Kathleen Savio was deceased at the time Mr. Carroll committed the acts. Therefore, she could not have sustained bodily or emotional injury resulting from Mr. Carroll's conduct.

¶ 46 Mr. Carroll maintains that a question of fact exists as to whether he anticipated the legal consequences of his actions. He relies on *Country Mutual Insurance Co. v. Olsak*, 391 Ill. App. 3d 295 (2009) wherein the reviewing court reversed summary judgment for the insurer even though the underlying complaint alleged an intentional act on the part of the insured.

¶ 47 In *Olsak*, the insurer argued there was no duty to defend where the policy excluded intentional contact and the underlying complaint alleged that Thomas Olsak had committed a battery with malicious intent against the victim and alleged a claim of failure to supervise against Thomas' stepfather, both of whom were insureds. Thomas filed affirmative defenses claiming the victim instigated the altercation, and he felt threatened by the victim. In the

declaratory judgment action, the circuit court granted summary judgment to the insurer finding no duty to defend or indemnify Thomas. The court also dismissed amended affirmative defenses alleging, *inter alia*, that the insurer failed to conduct a proper investigation into whether Thomas should receive a defense. *Olsak*, 391 Ill. App. 3d at 298-300.

¶ 48 The reviewing court reversed the grant of summary judgment and the dismissal of the affirmative defenses, finding the appearance of a conflict of interest which must be finally determined on remand. The court also rejected the insurer's argument that the conflict of interest was irrelevant because the policy excluded coverage for intentional conduct. The court noted that even in cases of criminal conduct, a potential for coverage had been found. *Olsak*, 391 Ill. App. 3d at 305; see *Cowan v. Insurance Co. of North America*, 22 Ill. App. 3d 883 (1974). The court held that if an insurer relied on an exclusionary provision, it must be clear and free from doubt. *Olsak*, 391 Ill. App. 3d at 305. Even a criminal conviction was only *prima facie* evidence of an insured's intent. *Olsak*, 391 Ill. App. 3d at 307. The court determined that the underlying complaint allegations revealed "a *potential* for coverage." (Emphasis in original.) *Olsak*, 391 Ill. App. 3d at 307.

¶ 49 Unlike *Olsak*, the result in this case is not based on an exclusionary provision. Moreover, in the case of a battery, the court in *Olask* recognized that there may a potential for coverage because the " 'gist of an action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the victim.' " *Olsak*, 391 Ill. App. 3d at 306 (quoting *Cowan*, 22 Ill. App. 3d at 890). The Savio complaint alleged acts on the part of Mr. Carroll that were intentional and the results predictable. The fact that Kathleen's estate did not receive the marital assets deprived the estate of the benefit of those assets and

was the only reasonable expectation from Mr. Carroll's alleged actions in arranging for Mr. Peterson to receive those assets. See *Young*, 2012 IL App (1st) 103736, ¶ ¶ 31-32 (although couched in negligence, where the complaint alleged that the defendant drugged, beat and then failed to obtain medical treatment for the victim, the death of the victim was the only reasonable expectation from her condition and, therefore, it was not the result of an accident necessary to trigger coverage).

¶ 50 As alleged in the Savio complaint, Mr. Carroll's actions do not constitute an accident. Under the policies, in the absence of an accident, there was no occurrence and no loss as required for coverage for bodily injury or property damage under the homeowners policy and the umbrella policy. Therefore, the claims against Mr. Carroll in the Savio complaint are not within or potentially within the coverage of the policies.

¶ 51 CONCLUSION

¶ 52 Based on our comparison of the allegations of the Savio complaint and the relevant provisions of the homeowners policy and the umbrella policy, we conclude that State Farm did not owe a duty to defend Mr. Carroll. The order dismissing the complaint for declaratory judgment is affirmed.

¶ 53 Affirmed.