

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 130792-U
NOS. 4-13-0792, 4-13-0793 cons.

FILED
July 18, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ERIE INSURANCE EXCHANGE,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v. (No. 4-13-0792))	Sangamon County
JASON NIEMAN,)	No. 13MR340
Defendant-Appellant,)	
and)	
GRANGE MUTUAL INSURANCE COMPANY and)	
INTEGRITY MUTUAL INSURANCE COMPANY,)	
Defendants.)	
-----)	
ERIE INSURANCE EXCHANGE,)	
Plaintiff-Appellee,)	
v. (No. 4-13-0793))	No. 13MR337
JASON NIEMAN,)	
Defendant-Appellant,)	
and)	
KEITH HALE, INSURANCE SEARCH GROUP,)	
RICHARD DIKEMAN, and AMERICAN SPECIALTY)	Honorable
INSURANCE,)	Chris Perrin,
Defendants.)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Plaintiff had no duty to defend defendant under either his homeowners policy or excess policy due to defendant's breach of the notice provisions of both policies.
- (2) The trial court correctly dismissed defendant's counterclaim because plaintiff filed its complaint for declaratory judgment and did not breach any duty owed to defendant.

(3) Plaintiff did not violate any provisions of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)).

(4) The trial court correctly stayed/denied defendant's discovery.

¶ 2 Defendant, Jason Neiman, appeals from orders in two declaratory judgment actions initiated by plaintiff, Erie Insurance Exchange. Both cases involved plaintiff's refusal to defend or indemnify defendant for attorney fees assessed against defendant, who was representing himself *pro se* in underlying litigation. The attorney fees were imposed as sanctions for "harassing and oppressive litigation tactics." Defendant argued in both cases the sanctions were covered in plaintiff's insurance policies as "personal injury," where such injury was defined in the policies as arising out of "libel, slander or defamation of character" or "malicious prosecution."

¶ 3 The trial court found in both cases the attorney fees assessed against defendant were in the nature of punitive damages and, as such, they are not covered under plaintiff's policies. Although the two cases were litigated separately in the trial court, they have been consolidated for purposes of appeal. We affirm the trial court in both cases.

¶ 4 I. BACKGROUND

¶ 5 A. Case No. 13-MR-340

¶ 6 On November 3, 2011, defendant filed a lawsuit in the United States District Court for the Central District of Illinois against Grange Mutual Insurance Company (Grange) and Integrity Mutual Insurance Company (Integrity) alleging discriminatory hiring practices in violation of the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.* (West 2010)) and the Illinois Human Rights Act (775 ILCS 5/1 *et seq.*

West 2010)).

¶ 7 On August 7, 2012, Grange and Integrity filed a motion for sanctions against defendant for his "harassing and oppressive litigation tactics." On August 31, 2012, the trial court denied the motion to the extent it sought dismissal and left the remainder of the motion seeking sanctions "otherwise held in abeyance." On February 6, 2013, Grange and Integrity filed a supplemental motion for sanctions against defendant. On April 2, 2013, the court granted the supplemental motion for sanctions. That same day, defendant filed a motion for reconsideration of the court's order, which was denied on April 19, 2013.

¶ 8 During the pendency of this action, on September 14, 2012, defendant filed another action in the United States District Court for the Central District of Illinois against Grange and Integrity, again alleging discriminatory hiring practices in violation of the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, and the Illinois Human Rights Act. On October 23, 2012, Grange and Integrity filed a counterclaim against defendant, alleging defamation and abuse of judicial process. On February 15, 2013, Grange and Integrity filed a motion to voluntarily dismiss their counterclaim against defendant. On February 20, 2013, the motion was granted. On March 6, 2013, Grange and Integrity filed a petition for attorney fees against defendant on the basis of his alleged sanctionable conduct. On April 3, 2013, the trial court allowed the petition for fees and entered judgment in favor of Grange and Integrity in the amount of \$2,495.

¶ 9 Defendant first notified plaintiff of the underlying action and the related suit on April 19, 2013. This was the first notice plaintiff received of these claims against defendant. Plaintiff issued its homeowners liability policy with defendant and his wife, Ann, effective June

15, 2012, to June 15, 2013. The policy provided plaintiff would pay only for personal injury covered by the policy. The policy defines "personal injury" as follows:

" 'personal injury' means injury arising out of:

1. libel, slander or defamation of character;
2. false arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these."

¶ 10 Certain damages are excluded from coverage: "We do not cover punitive or exemplary damages and related defense costs" unless suit is brought against the policyholder for acts or alleged acts falling within the coverage provided seeking both compensatory and punitive or exemplary damages. Then plaintiff will provide a defense without liability for the punitive or exemplary damages.

¶ 11 Certain requirements are made of the insured (defendant). "When there is an occurrence, claim or suit," the insured will notify plaintiff or its agent in writing "as soon as possible" and "promptly" give to plaintiff "any papers that relate to the occurrence, offense, claim or suit."

¶ 12 Plaintiff also issued to defendant and his wife an "excess policy" entitled Personal Catastrophe Liability policy effective October 7, 2012, to October 7, 2013. Plaintiff promised to pay the "ultimate net loss which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damaged resulting from an occurrence during this policy

period." The policy defines "personal injury" as

- "1. bodily injury;
2. libel, slander or defamation of character;
3. False arrest, wrongful detention or imprisonment, malicious prosecution, racial or religious discrimination, wrongful entry or eviction, invasion of privacy, or humiliation caused by any of these."

¶ 13 Certain damages are excluded and those include punitive or exemplary damages and related defense costs, unless suit is brought against the insured seeking both compensatory and punitive or exemplary damages.

¶ 14 Like the homeowners policy, the excess policy required the insured (defendant) to notify plaintiff "as soon as possible." On April 19, 2013, defendant tendered defense of the second underlying action to plaintiff.

¶ 15 On April 24, 2013, plaintiff refused defendant's tender of defense. On May 1, 2013, plaintiff filed this declaratory judgment action seeking a declaration it had no duty to defend defendant against the underlying action.

¶ 16 On May 13, 2013, defendant filed his answer and counterclaim to plaintiff's complaint for declaratory judgment. In his counterclaim, defendant alleged plaintiff had a duty to defend him against the judgment and awards for sanctions in the underlying action and the second, related action because they consisted of claims for malicious prosecution, a covered "personal injury" as defined by both policies. Defendant also alleged he is entitled to judgment against plaintiff for (1) breach of the insurance contracts; (2) violation of section 155 of the

Illinois Insurance Code (215 ILCS 5/155 (West 2012)); and (3) indemnification of the judgment against him in the underlying action.

¶ 17 The parties filed cross-motions for judgment on the pleadings, defendant on May 21, 2013, and plaintiff on June 11, 2013. Defendant asserted plaintiff owed him a duty of defense and indemnification in both underlying actions. Plaintiff asserted it owed no duty to defend defendant in either underlying action because (1) an award for sanctions does not constitute "malicious prosecution" as a personal injury covered by the liability insurance policies in question; (2) the awards of sanctions constitute punitive damages excluded from coverage by the terms of the policies; and (3) defendant breached the notice provision of both policies. Plaintiff's cross-motion for judgment on the pleadings also sought a dismissal of defendant's counterclaim.

¶ 18 On May 13, 2013, defendant sent interrogatories and request to produce documents to plaintiff and on May 28, 2013, a request to depose one of plaintiff's representatives. Plaintiff refused to produce any discovery or supply its representative for a deposition and defendant maintained a constant correspondence with plaintiff's counsel in regard to discovery. On July 9, 2013, plaintiff mailed to the clerk of the court for filing its motion for protective order/motion to quash written discovery and defendant's request for a deposition of one of its representatives.

¶ 19 On July 25, 2013, after oral arguments on the pending motions, the trial court took the parties' cross-motions under advisement. On July 29, 2013, defendant filed a motion for leave to file a reply brief to supplement oral arguments. On September 9, 2013, defendant noticed his motion for hearing on October 15, 2013.

¶ 20 On September 12, 2013, the trial court issued an order finding plaintiff has no duty to defend defendant for the award of sanctions in the underlying action because (1) an award for sanctions does not constitute "a covered peril insured by [plaintiff's] policies"; (2) the sanctions imposed against defendant in the underlying action "do not constitute 'malicious prosecution' as a covered peril insured by [plaintiff's policies]"; (3) the sanctions imposed against defendant in the underlying action "are in the nature of punitive damages which are specifically excluded from coverage by the terms of [plaintiff's] policies"; and (4) defendant breached the notice provisions of both plaintiff's policies. Therefore, the court denied defendant's motion for partial judgment on the pleadings, granted plaintiff's cross-motion for judgment on the pleadings, and dismissed defendant's counterclaim.

¶ 21 On September 16, 2013, defendant filed a timely notice of appeal. On September 19, 2013, the trial court issued an additional order cancelling the hearing on defendant's motion set for October 15, 2013, because the court no longer had jurisdiction after the appeal was filed.

¶ 22 B. Case No. 13-MR-337

¶ 23 On August 30, 2011, defendant filed an action in Sangamon County circuit court against Insurance Search Group (ISG), Keith Hale, American Specialty Insurance (American Specialty), Richard Dikeman, and others alleging discriminatory hiring practices in violation of the Illinois Human Rights Act (775 ILCS 5/1 *et seq.* (West 2010)) and Illinois common law. On October 25, 2011, this matter was transferred to the Peoria County circuit court. On December 12, 2011, defendant filed a second amended complaint against the same defendants. On January 6, 2012, the matter was removed to the United States District Court for the Central District of Illinois under case No. 12-CV-1012.

¶ 24 On March 29, 2012, ISG, Hale, American Specialty, and Dikeman filed separate motions for sanctions against defendant alleging violations of Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). On January 18, 2013, the district court granted all of these motions for sanctions. On April 3, 2013, the court denied defendant's motion to reconsider and entered an award of sanctions in favor of Hale and ISG and against defendant in the amount of \$17,000; and it entered an award of sanctions in favor of Dikeman and American Specialty in the amount of \$22,500. The court entered judgments in these amounts on April 8, 2013.

¶ 25 Defendant first gave notice to plaintiff of these claims for sanctions on April 9, 2013. This was the first notice plaintiff received of these claims against defendant.

¶ 26 The same insurance policies discussed above in case No. 13-MR-340 are applicable to defendant's claims in this case. Plaintiff denied defendant's tender of defense and, on April 30, 2013, filed this declaratory judgment action in Sangamon County circuit court (No. 13-MR-337) seeking a declaration it had no duty to defend defendant in the underlying action.

¶ 27 On May 13, 2013, defendant filed his answer and counterclaim. In his counterclaim, defendant alleged, in part, plaintiff had a duty to defend him against the judgment and awards for sanctions in the underlying action because they constituted "malicious prosecution" as a covered "personal injury" as defined by the policies. Defendant also alleged he is entitled to judgment against plaintiff for (1) breach of the insurance contracts; (2) violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)); and (3) failure to indemnify him for the judgments against him in the underlying actions.

¶ 28 The parties filed cross-motions for judgment on the pleadings, defendant on May 21, 2013, and plaintiff on June 11, 2013. Plaintiff's motion also sought dismissal of defendant's

counterclaim.

¶ 29 On July 9, 2013, plaintiff mailed to the circuit clerk for filing its motion for protective order/motion to quash written discovery and a request for deposition of plaintiff's representative previously issued by defendant.

¶ 30 On July 25, 2013, after hearing oral argument on the pending motions, the trial court took the motions under advisement and stayed pending discovery. On July 31, 2013, defendant filed a motion for leave to file a reply brief to supplement oral arguments. That same day, he filed a motion for leave to file an amended answer and amended counterclaim and had them set for hearing on October 16, 2013.

¶ 31 On September 12, 2013, the trial court issued an order finding plaintiff had no duty to defend defendant for the awards of sanctions in the underlying actions under the two policies for the same reason the court found no coverage in case No. 13-MR-340. The order denied defendant's motion for partial judgment on the pleadings, granted plaintiff's cross-motion for judgment on the pleadings, and dismissed defendant's counterclaim.

¶ 32 On September 16, 2013, defendant filed his notice of appeal in this case. On September 19, 2013, the trial court struck the hearing previously set for October 16, 2013, finding it no longer had jurisdiction since an appeal was filed.

¶ 33 II. ANALYSIS

¶ 34 Review of a judgment on the pleadings and the trial court's construction of an insurance policy are reviewed *de novo*. *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 772, 728 N.E.2d 530, 532 (2000). Judgment on the pleadings is appropriate when an examination of the pleadings shows the absence of any material issue of fact and the rights of the

parties can be declared as a matter of law. *M.A.K. v. Rush-Presbyterian-St. Luke's Medical Center*, 198 Ill. 2d 249, 255, 764 N.E.2d 1, 4 (2001). A court may consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record.

¶ 35 The issues are the same in both cases: whether plaintiff owed a duty to defend defendant in the underlying actions where defendant breached the notice provisions of the policies in both cases.

¶ 36 The terms and conditions of an insurance policy control the insured's duties. *American Country Insurance Co. v. Bruhn*, 289 Ill. App. 3d 241, 247, 682 N.E.2d 366, 370 (1997). When an insurance contract includes a provision requiring the insured to notify the insurer of an occurrence or a claim against it, the notice provision is a "condition precedent to the triggering of the insurer's contractual duties." *Northbrook Property & Casualty Insurance Co. v. Applied Systems, Inc.*, 313 Ill. App. 3d 457, 464, 729 N.E.2d 915, 920-21 (2000). Where an insurance policy requires the insured to notify the insurer of an occurrence "as soon as practical," the test is whether notice was given within a reasonable time. *Northern Insurance Co. of New York v. City of Chicago*, 325 Ill. App. 3d 1086, 1091, 759 N.E.2d 144, 149 (2001). "[T]he insured has a duty to give timely notice to the insurer if the circumstances of an occurrence would suggest to a reasonably prudent person a claim for damages covered by the policy might be asserted against the insured." *National Bank of Bloomington v. Winstead Excavating of Bloomington*, 94 Ill. App. 3d 839, 842, 419 N.E.2d 522, 524 (1981). When an insured fails to comply with the notice provision, the insurer may be relieved of its duty to defend the insured under the policy. *Northern Insurance*, 325 Ill. App. 3d at 1091, 759 N.E.2d at 149.

¶ 37 In case No. 13-MR-337, motions for sanctions were filed against defendant in March 2012, and the motions were heard and sanctions awarded against defendant in April 2013. After the sanctions were awarded, defendant notified plaintiff of the claim against him. This was 12 months after defendant was aware of the claim against him, 4 months after the trial court heard the claim, and 1 day after it awarded damages. The record shows a gap in excess of 12 months between knowledge of the claim and notification of plaintiff. Defendant breached the notice conditions of the policies and plaintiff was relieved of its duties to defend or indemnify defendant for the sanctions in the underlying action.

¶ 38 In case No. 13-MR-340, a motion for sanctions was filed against defendant in August 2012, and that same month the trial court denied the motion to dismiss defendant's suit in the underlying action but held the remainder of the motion for sanctions "in abeyance." On April 3, 2013, a judgment for attorney fees was awarded against defendant in regard to sanctions, and on April 9, 2013, he notified plaintiff of the claim against him. The record shows a gap of eight months between knowledge of the claim and notification of plaintiff. Defendant breached the notice provisions of the policies and plaintiff was relieved of its duties to defend or indemnify defendant in the underlying action.

¶ 39 Additionally, defendant did not notify plaintiff of the claims against him in either case until after the judgments had been entered against him. Illinois courts look to see if the insurer was prejudiced in evaluating whether the insured breached the notice provisions of the policy. *Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303, 312, 856 N.E.2d 338, 343 (2006). Prejudice has been found to be established as a matter of law under circumstances preventing an insurer from participating in the underlying lawsuit until after

judgment has been entered. See *Vega v. Gore*, 313 Ill. App. 3d 632, 634-35, 730 N.E.2d 587, 589 (2000); *American Country Insurance Co. v. Cash*, 171 Ill. App. 3d 9, 10-11, 524 N.E.2d 1016, 1017-18 (1988).

¶ 40 Defendant provided notice to plaintiff of the award of sanctions in both underlying actions after the judgment awards were entered against him. This prevented plaintiff from participating in the underlying actions. Should plaintiff have been found to have had the duty to defend defendant, this would have resulted in prejudice to plaintiff.

¶ 41 The trial court did not err in dismissing defendant's counterclaims in both cases because plaintiff has been shown to not owe him any duty to defend or indemnify in the underlying actions because defendant failed to comply with the policies' notice provisions. Neither did plaintiff violate section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)) as it did not unreasonably deny coverage or refuse to defend defendant in the underlying actions. Nor did plaintiff breach the insurance contract. When an insurer contests its duty to defend its insured, it has three choices: (1) seek a declaratory judgment to determine the rights of the parties prior to or pending the trial in the underlying action; (2) defend the insured under a reservation of rights; or (3) refuses to either defend or seek a declaratory judgment. *Eclipse Manufacturing Co. v. United States Compliance Co.*, 381 Ill. App. 3d 127, 134-35, 886 N.E.2d 349, 356 (2007). Plaintiff chose to file these declaratory judgment actions as it was entitled to do.

¶ 42 Finally, the trial court did not abuse its discretion in staying discovery pending a ruling on the parties' cross-motions for judgment on the pleadings. It is proper for courts to deny discovery where the only issue in the case is an insurer's duty to defend. *Illinois State Bar Ass'n*

Mutual Insurance Co. v. Cavenagh, 2012 IL App (1st) 111810, ¶¶ 45-46, 983 N.E.2d 468.

¶ 43

III. CONCLUSION

¶ 44

We affirm the trial court's judgments in case Nos. 13-MR-340 and 13-MR-337.

¶ 45

Affirmed.