

The Fairchild Corporation, Fairchild Holding Corporation, and RHI Holdings, Inc. (Fairchild), in several underlying product liability lawsuits (the Profiler Litigation), and awarded Fairchild's attorneys statutory and equitable attorneys liens for a total of \$205,968.69. For the reasons that follow, we reverse.

¶ 3

FACTS

¶ 4 Fairchild filed its amended complaint on November 9, 2007, seeking a declaratory judgment against Arrowood and National Union that they had a duty to defend and indemnify Fairchild in the Profiler Litigation that had been brought against Fairchild. The amended complaint also sought damages for a breach of the applicable contracts of insurance. On or about April 30, 2008, Fairchild filed a motion for a partial summary judgment as to National Union's duty to defend. On January 21, 2009, the law firm of Nester & Constance, P.C., attorneys for Fairchild in this action, filed a notice of attorneys lien.¹

¶ 5 On April 6, 2009, Fairchild filed a document titled "Notice of Pendency of Case Under Chapter 11 of the Federal Bankruptcy Code and of Automatic Stay." According to this document, Fairchild had filed a voluntary petition for relief under chapter 11 of Title 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.* (1978)), and as a result of the pendency of the bankruptcy case, all claims against Fairchild, including the instant action, were subject to the automatic stay set forth in section 362 of the Bankruptcy Code (11 U.S.C. § 362 (2006)). Subsequent orders of the circuit court acknowledged the automatic stay, and the cause was continued for some time due to the stay.

¶ 6 In January 2011, litigation recommenced in the instant case when Fairchild called its partial motion for a summary judgment against National Union for a hearing. The motion was continued pending further briefing. On June 10, 2011, Nester & Constance, P.C., along

¹A notice of attorneys lien from the law firm of Schopf & Weiss, LLP, counsel for Fairchild in the underlying litigation, does not appear of record.

with Schopf & Weiss, LLP, filed a verified petition to enforce their attorneys liens. Arrowood and National Union filed an answer in which they objected to the liens on the grounds that there had been no recovery in the instant litigation for a lien to attach and that the underlying litigation had been settled in the bankruptcy proceedings. Arrowood and National Union attached the following documents from the bankruptcy proceedings to its objection to the liens: (1) "National Union's Motion for an Order Approving the Settlement Agreement Resolving the Debtors' Liability for the Profiler Claims," (2) "Settlement Agreement," and (3) a signed "Order Pursuant to Sections 105 and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving the Settlement Agreement Resolving Profiler Claims." According to these documents, a liquidating trust had been created in the bankruptcy proceedings, and this trust had been assigned all interests Fairchild had in any and all insurance policies. Under the terms of the proposed settlement agreement, each insurance company, including Arrowood and National Union, was assigned an amount to contribute to the settlement of the Profiler Litigation.² In return, Fairchild, which was defined to include its attorneys, *inter alia*, agreed to release all of its insurers from any other claims, including attorney fees, and agreed to dismiss the instant action within 10 days. The signed order approving the settlement agreement found that the liquidating trustee had agreed to execute the settlement agreement and authorized the trustee to sign the agreement. However, a signed agreement does not appear of record, although Fairchild does not affirmatively represent that the agreement was not consummated, and does not dispute that a liquidating trust was established and assigned all of Fairchild's rights under its insurance policies. In fact, in its brief at page nine, Fairchild, by its counsel, states,

²Under the settlement agreement, Arrowood was assigned to contribute \$349,000 and National Union was assigned to contribute \$375,700 to the settlement of the Profiler Litigation.

"Arrowood and National Union then agreed on December 31, 2009[,] to settle the profiler lawsuits *** without respecting Schopf & Weiss' and Nester & Constance's attorneys liens or allowing those firms to protect their interests in fees and costs during bankruptcy proceedings."

¶ 7 On January 12, 2012, a hearing was held on Fairchild's motion for a partial summary judgment as to National Union's duty to defend and the petition to enforce the attorneys liens. On July 17, 2012, the circuit court entered an order granting the motion for a partial summary judgment and granting both Nester & Constance, P.C., and Schopf & Weiss, LLC, statutory and equitable attorneys liens for a total award of \$205,968.69. Arrowood and National Union filed timely notices of appeal.

¶ 8 ANALYSIS

¶ 9 1. *Partial Summary Judgment on National Union's Duty to Defend*

¶ 10 We will first address whether the circuit court erred in granting Fairchild's motion for a partial summary judgment on the issue of National Union's duty to defend Fairchild in the Profiler Litigation. The standards for granting a motion for summary judgment, as well as this court's standard of review, are well-settled:

"Summary judgment is a drastic and extraordinary remedy and must be granted only when the movant's right to judgment as a matter of law is absolutely clear and free from doubt. [Citations.] In deciding a motion for summary judgment, the trial court is to determine whether issues of material fact are present, but is not to try those issues. [Citation.] The trial court should grant summary judgment only when the pleadings, affidavits, and other supporting evidence on file present no genuine issue of material fact. [Citations.] The court must construe the record before it most strictly against the movant and in favor of the nonmovant and draw all reasonable inferences in favor of the nonmovant. [Citation] *** Even if the facts are not in

dispute, if reasonable persons could draw conflicting inferences from the undisputed facts, the court should deny summary judgment. [Citation.]

On review, when the appellate court is faced with an appeal involving only the propriety of summary judgment, the *de novo* standard of review should be applied. The appellate court, like the trial court, determines whether there is a genuine issue of material fact. [Citation.]" *Green v. International Insurance Co.*, 238 Ill. App. 3d 929, 933-34 (1992).

¶ 11 Here, the circuit court clearly erred in granting Fairchild's motion for a summary judgment on the issue of National Union's duty to defend. It is clear from the documents from the bankruptcy proceeding that all of Fairchild's interests in its insurance policies were transferred to the liquidating trustee by order of the bankruptcy court, which had exclusive jurisdiction over all of the property of Fairchild as of the commencement of its bankruptcy. See 28 U.S.C. § 1334(e)(1) (2005). Fairchild does not dispute National Union's contention that the settlement agreement was consummated, nor does it dispute that the settlement agreement required that the instant litigation be dismissed. For these reasons, we find that the circuit court erred in granting the motion for a summary judgment, and hereby reverse the circuit court's ruling on that issue.

¶ 12 *2. Statutory Attorneys Liens*

¶ 13 We next address whether the circuit court erred in finding that Nester & Constance, P.C., and Schopf & Weiss, LLC, were entitled to enforcement of attorneys liens pursuant to section 1 of the Attorneys Lien Act (770 ILCS 5/1 (West 2010)). This issue presents a question of statutory interpretation, which is a question of law which we review *de novo*. *Evans v. Doherty Construction, Inc.*, 382 Ill. App. 3d 115, 119 (2008). Section 1 of the Attorneys Lien Act provides, in relevant part, as follows:

"Attorneys at law shall have a lien upon all claims, demands and causes of action ***

which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients ***. ***

To enforce such lien, such attorneys shall serve notice in writing *** upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action. *Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice.*" (Emphasis added.) 770 ILCS 5/1 (West 2010).

¶ 14 Here, the circuit court erred in entering a judgment on Fairchild's complaint for a declaratory judgment and breach of contract because once the bankruptcy commenced, the bankruptcy court obtained exclusive jurisdiction over Fairchild's interests in its insurance policies by operation of law. See 28 U.S.C. § 1334(e)(1) (2005). Fairchild's interests in its insurance policies were assigned to the liquidating trustee and settled as part of the settlement of the Profiler Litigation in the bankruptcy proceeding, not on account of the instant action. Accordingly, Fairchild did not recover any money or property on account of the instant lawsuit or the claims, demands, or causes of action asserted herein. Absent a recovery in the instant action, there can be no enforcement of an attorneys lien. For these reasons, the circuit court erred in enforcing any statutory attorneys liens.

¶ 15 *3. Equitable Attorneys Liens*

¶ 16 The circuit court also found that equitable attorneys liens were proper. The decision to grant equitable relief is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Lewsader v. Wal-Mart Stores, Inc.*, 296 Ill. App. 3d 169, 175 (1998). However, before a trial court may exercise its discretion to grant an

equitable lien, it must find a *res* to which the lien can attach. *Id.* at 178. As previously discussed, the circuit court did not have jurisdiction over Fairchild's interests in the insurance proceeds at the time it entered its order, as such interests were assigned to the liquidating trustee in the bankruptcy proceedings, who in turn consummated a settlement. Accordingly, the circuit court abused its discretion in granting equitable liens.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, the July 17, 2012, order of the circuit court of St. Clair County that granted the motion for a partial summary judgment as to National Union's duty to defend Fairchild, and awarded Fairchild's attorneys statutory and equitable attorneys liens for a total of \$205,968.69, is reversed.

¶ 19 Reversed.

¶ 20 JUSTICE GOLDENHERSH, dissenting:

¶ 21 I respectfully dissent. In my opinion, the majority misconstrued the essence of the order of the circuit court of St. Clair County. As the trial court noted, the lack of notice of the bankruptcy hearings and an opportunity to participate was crucial to its decision:

"Critical to this case is whether Schopf & Weiss, LLP and Nester & Constance, P.C. received notice of the bankruptcy proceedings in which their rights were thought to be at stake and if they were given the opportunity to meaningfully participate. Those two firms did not get notice of those proceedings and this [c]ourt does not find the [o]rder of the [b]ankruptcy [c]ourt is controlling in this matter as to their fees and their rights as against the parties."

The majority fails to consider this crucial point which is supported by the record in this case and, accordingly, errs in its treatment of the three points explained by the majority. In point

1 of its analysis, the majority fails to consider this lack of notice and opportunity to participate and, instead, focuses on the transfer of Fairchild's interests to the liquidating trustee and the subsequent consummation of the settlement agreement in the Profiler Litigation. The record and the majority's analysis, however, are devoid of any indication that these attorney fees and liens were resolved and, accordingly, the *res* as to these attorney fees was not resolved by the bankruptcy proceeding.

¶ 22 As to point 2, the majority claims that, pursuant to the attorneys lien, Fairchild did not recover any money or property on account of the Profiler Litigation. However, the majority, in the last paragraph of its treatment of this question, notes that Fairchild's interests were assigned to the liquidating trustee and, again, fails to deal with the problem that the attorneys failed to receive notice and, in effect, were blocked from participation in the bankruptcy proceeding. Again, the *res* was formed, but participation was blocked.

¶ 23 As to point 3, the majority claims that the granting of equitable relief is within the sound discretion of the trial court, citing *Lewsader v. Wal-Mart Stores, Inc.*, 296 Ill. App. 3d 169, 175 (1998). I agree. Again, however, the majority errs in determining that, in this litigation, there is no *res* to which the lien can attach. When notice is not given to the holders of an attorneys lien and participation of said lienholders is not allowed, as in this case, the operation and enforcement of an attorney's lien, as contemplated by our statute, is frustrated. Again, based on the lack of notice and, as a practical matter, exclusion of the holders of these liens from participating in the underlying proceeding, the trial court did not abuse its discretion in granting an equitable lien.

¶ 24 The majority's position is permeated with the fundamental error of concluding that a *res* was not formed and its failure to consider that petitioners did not receive notice and were effectively blocked from participating in the disposition of the *res*. For the reasons stated, I respectfully dissent.