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SIXTH DIVISION
November 23, 2011

2011 IL App (1st) 103426-U
No. 1-10-3426

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEKIN INSURANCE COMPANY,)	
)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County
v.)	
)	No. 09 CH 46661
CUSTOM ROOFING CONTRACTING, LTD., an)	
Illinois Corporation; ISMAEL RAMIREZ and)	Honorable
LYDIA RAMIREZ,)	Mary Anne Mason,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

ORDER

¶ 1 *HELD:* Relying on this court's recent decision in *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336 (2010), the liability insurer in this case, also Pekin Insurance Company, has a duty to defend the subcontractor who was named as an additional insured for claims arising out of a lawsuit brought by a worker who fell through a hole in the second floor of a construction site, as it is clear from the underlying complaint, the insurance policy language and the purpose for which the insurance policy was written taken together, that the ultimate facts

1-10-3426

of the accident potentially brought the lawsuit within the insurance policy's coverage. The circuit court did not err in finding that Pekin Insurance Company had a duty to defend Custom Roofing Contracting, Ltd. in the underlying tort lawsuit.

¶ 2 Defendants Ismael and Lydia Ramirez filed a lawsuit against Total Builders & Remodeling, Inc. (Total Builders), defendant Custom Roofing Contracting, Ltd. (Custom Roofing), and others alleging that Ismael Ramirez suffered injuries when he fell through a second-floor opening while working on the construction site of a single-family home as a laborer employed by Ron's Temporary Services.

¶ 3 Defendant, Custom Roofing, tendered its defense of the Ramirez's complaint to plaintiff, Pekin Insurance Company (Pekin), which had issued an insurance policy to the general contractor, Total Builders, naming Custom Roofing as an additional insured. Pekin denied the tender of the defense and filed this declaratory judgment action.

¶ 4 Cross motions for summary judgment were filed by plaintiff Pekin and defendant Custom Roofing. The circuit court denied Pekin's motion and granted Custom Roofing's motion, finding that Pekin owed Custom Roofing a defense in the underlying litigation involving Ismael and Lydia Ramirez's claims.

¶ 5 The material facts in this litigation are undisputed. Ismael Ramirez, an employee of Ron's Temporary Services, filed a 15 count complaint in the circuit court in July 2009 alleging that he suffered severe injuries when he fell through an unmarked opening in the second floor of the construction site. His wife, Lydia sued for loss of consortium. Ismael and Lydia Ramirez named several parties involved with the construction as defendants, including Total Builders and Custom Roofing. Theories of negligence, premises liability and loss of consortium were pled as

1-10-3426

to all named defendants.

¶ 6 Custom Roofing tendered its defense in the Ramirez lawsuit to Pekin, which had issued an insurance policy to Total Builders as the named insured. Custom Roofing was named as an additional insured. The insurance policy reads, in pertinent part, as follows:

"Who Is an Insured (Section II) is amended to include as an insured the person or organization shown in the schedule. *Such person or organization is an additional insured only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation ***.* It is further understood that the designation of a entity [sic] as additional insured does not increase or alter the scope of coverage of this policy." (Emphasis added.)

¶ 7 Pekin denied tender of the defense claiming that the above provision does not provide coverage for Custom Roofing's own acts or omissions or those in which Custom Roofing played any role. Pekin sought a determination that it is not liable under the policy to defend Custom Roofing in the Ramirez lawsuit. Pekin claims it has no duty to defend Custom Roofing because: 1) the additional insured endorsement provides no coverage to Custom Roofing for its negligence; and 2) that Ramirez sued Custom Roofing based on the alleged negligence of Custom Roofing toward Ramirez.

¶ 8 Both of Pekin's legal theories were denied by the circuit court. It granted summary judgment in favor of Custom Roofing and against Pekin, finding that Pekin owed a duty to defend Custom Roofing in the Ramirez litigation. Pekin appeals that ruling.

¶ 9

ANALYSIS

¶ 10

A. Standard of Review

¶ 11 Ordinarily, a circuit court's declaratory judgment ruling is reviewed for abuse of discretion. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 414 (2006). However, when the reviewing court examines essentially the same legal arguments applied to undisputed facts, there is no reason to defer to the lower court's judgment and the lower court ruling is reviewed *de novo*. *Id.* Additionally, this case involves the interpretation of the terms of an insurance policy which, in this case, is a purely legal issue subject to *de novo* review. *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 129 (2005).

¶ 12

B. Pekin's Claim

¶ 13 On appeal, Pekin submits that the circuit court erred in its finding that it has a duty to defend Custom Roofing because the underlying Ramirez complaint against Custom Roofing has allegations that are independent of those against Total Builders. Pekin argues that, by the terms of the additional insured endorsement when read in conjunction with the Ramirez complaint, Custom Roofing is not an additional insured for the liability that Ramirez alleges against it. Custom Roofing contended that in reviewing both the allegations in the Ramirez complaint and other evidence concerning the relationship between Custom Roofing and Total Builders, it is quite possible that Total Builders might be found liable for Custom Roofing's acts and/or omissions and, therefore, Pekin has a duty to defend Custom Roofing in the underlying litigation.

¶ 14 We do not analyze this case on a blank slate. The recent First District decision in *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336 (2010), *cert. denied*, 238 Ill. 2d 654,

1-10-3426

involved the appellant as the identical insurance company propounding its identical theories concerning an additional insured endorsement containing the identical language as the additional insured endorsement at issue in this case. In that case, Pulte, the additional insured, argued that the allegations in the underlying complaint combined with additional evidence raised a distinct possibility that it could be held liable "solely as a result of some act or omission" of Pekin's named insured.

¶ 15 As in the *Pekin Insurance Co. v. Pulte Home Corp.* case, the underlying Ramirez complaint alleges direct and indirect theories of liability against all named parties. A review of the evidence presented to the circuit court reveals that defendant Custom Roofing could possibly be held vicariously liable as a result of the actions of another company's actions on the construction site.

¶ 16 Additionally, the subcontract between Custom Roofing and Total Builders should be reviewed in conjunction with the insurance policy issued by Pekin in order to adequately construe the parties' intent. *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d at 343. Just as in *Pekin Insurance Co. v. Pulte Home Corp.*, the result of that review demonstrates that any liability attributed to Custom Roofing could arise solely as a result of the acts or omissions of the named insured and Custom Roofing would be an additional insured under the terms of the endorsement to the insurance policy.

¶ 17 Additionally, as noted in *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d at 344-45, the underlying purpose of the insurance policy in question supports the circuit court's finding of a duty to defend.

1-10-3426

¶ 18 In *American Country Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960 (2003), the court held that "[I]n [the prototypical construction site] scenario, the employee of a contractor injured in the course of his employment on a construction site sues another entity, usually the premises owner or another contractor, who is an additional insured under his employer's liability policy. Under such a factual situation, this court has frequently found that the additional insured is covered because it is apparent that the worker's injury arose out of the named insured's operations, and 'but for' the plaintiff's presence on the site in the service of the named insured, the accident would not have happened." *Id.* at 971.

¶ 19 In this case, although the underlying plaintiff, Ramirez, is not an employee of a contractor, he was injured in the course of his employment at the construction site when he fell into an uncovered hole in the second floor and sued the subcontractor, Custom Roofing, an additional insured, and the general contractor, Total Builders. Under these facts, as in *James McHugh Construction Co. and Pekin Insurance Co. v. Pulte Home Corp.*, we find that the additional insured is covered because it is apparent that Ramirez's injury arose out of Total Builders construction's operations.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court granting summary judgment in favor of Custom Roofing finding that Pekin had a duty to defend Custom Roofing in the underlying Ramirez litigation.

¶ 22 Affirmed.

1-10-3426