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No. 3–10–0439

Order filed April 25, 2011

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IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CRAIG UPHOLSTERING, INC.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellant,	)	Peoria County, Illinois
	)	
v.	)	No. 07-L-81
	)	
ALEA NORTH AMERICA INSURANCE	)	
COMPANY, an insurance company,	)	Honorable
	)	Stephen A. Kouri,
Defendant-Appellee.	)	Judge, Presiding.

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PRESIDING JUSTICE CARTER delivered the judgment of the court.  
Justices Lytton and O'Brien concurred in the judgment.

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**ORDER**

*Held:* The trial court properly granted summary judgment for insurer in action brought by insured for failure to defend, as there was no possibility of coverage for the underlying lawsuit under the insurance policy in question.

Plaintiff, Craig Upholstering, Inc. (the company), brought suit against one of its insurers, Alea North America Insurance Company (Alea), alleging that Alea had failed to defend the company in a previous lawsuit (the underlying suit), which the company had settled. Both sides filed motions for summary judgment. The trial court granted Alea's motion for summary judgment and denied the company's. The company appeals. We affirm the trial court's ruling.

## FACTS

The company was a family-owned upholstering business in Peoria, Illinois. Gary Craig (Gary) was an officer, director, and part owner of the company. In December of 2000, the company entered into an agreement (the redemption agreement) to buy out Gary's interest in the company. The redemption agreement provided that: (1) Gary would continue working as an officer, director, and part owner of the company through the end of 2002; (2) on January 1, 2003 (the redemption date), the company would buy all of Gary's shares in the company for a certain specified amount; (3) beginning on the redemption date and through the end of 2006, Gary would provide consulting services to the company on an as needed basis, not to exceed 30 hours per week; (4) the company would pay Gary a certain specified annual amount in quarterly installments for his consulting services, regardless of whether services were performed by Gary, unless Gary refused to perform those services; and (5) Gary would not directly or indirectly engage in the upholstery business within a 100 mile radius of Peoria for a four year period following the redemption date.

In 2001, Gary suffered from carpal and cubital tunnel syndrome related to his work as an upholsterer at the company and filed a workers' compensation claim. The claim was eventually settled and Gary received a lump sum settlement. After having surgery, Gary returned to work at the company in 2002 and continued to work for the company as an upholsterer until January of 2005.

At some point after the redemption agreement was entered into, Gary's brother, Michael Craig (Michael), became president of the company. In or around January of 2005, a dispute arose between the company and Gary over the number of hours that Gary was working. On January 25, 2005, Gary sent or delivered a letter to his sister, Cathy Craig (Cathy), who was also an employee and part owner of the company, with a note from his doctor, stating that he could not upholster more

than 18 hours per week or that he would be at risk of redeveloping carpal and cubital tunnel syndrome. Later that same month, Cathy sent a letter to Gary on behalf of the company suggesting that the applicable portion of the redemption agreement be rewritten to provide that Gary would work no more than 18 hours per week at the same hourly rate. Cathy resent the letter to Gary the following month, with a handwritten note requesting that Gary return to work as soon as possible and that he provide the company with a copy of his certificate of workers' compensation insurance. Gary never returned to work at the company after January 25, 2005. The circumstances of how and why that occurred were in dispute.

In June of 2005, one of the company's attorneys sent Gary a letter stating that Gary was providing upholstering services in violation of the non-competition clause of the redemption agreement. The letter instructed Gary to cease any upholstering work and to pay to the company all revenue that he had received therefrom. Gary's attorney at the time responded with a letter to the company's attorney stating that the company, rather than Gary, had violated the redemption agreement by refusing to allow Gary to work at the company as a consultant because of Gary's assertion of rights under the Illinois Workers' Compensation Act. The letter stated further that Gary was due over \$70,000 under the redemption agreement and that Gary was the victim of retaliatory discharge. The letter also stated that although Gary had sought to mitigate his damages, he would assert his full legal rights in the event of any litigation and asked the company's attorney to contact Gary's attorney if the company desired to resolve the dispute without litigation.

In August of 2005, the company filed the underlying suit against Gary, alleging, among other things, that Gary had violated the redemption agreement. In February of 2006, Gary filed a two-count counterclaim. Count I alleged breach of the redemption agreement. Count II, entitled

“[r]etaliation”, essentially alleged a claim of retaliatory discharge. Count II was later stricken or dismissed on the company’s motion for failure to state a cause of action.

In July of 2006, Gary filed an amended count II of the counterclaim. The amended count II was again entitled, “[r]etaliation.” For the most part, the amended count II was very similar to the original count II. Among other things, Gary alleged in the amended count II that: (1) on or about February 21, 2001, while Gary was employed by the company, he presented a claim for injury (the previous injury) under the Workers’ Compensation Act (820 ILCS 305/1 *et seq.* (West 2000)) and the Workers’ Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2000)) (collectively referred to as the Acts) and pursuant to a right granted by the Acts; (2) Gary received benefits from the company as a result of his claim under the Acts and that his receipt of benefits was pursuant to a right granted by the Acts; (3) in January of 2005, the company was provided with medical documentation that Gary had suffered a recurrence of the previous injury; (4) the actions as set forth provided notice of Gary’s claim to the company, the giving of which was required by the Acts and was a right protected by the Acts; (5) the company knew that the recurrence of Gary’s previous injury was caused by or related to Gary’s work for the company; (6) on February 23, 2005, the company discharged Gary; (7) as a result of Gary’s exercise of the rights and remedies granted to him by the Acts, Gary was discharged, and otherwise interfered with, restrained, and coerced in the exercise of his rights under the Acts and further, discriminated against because of rights or remedies granted to him by the Acts. In his prayer for relief in the amended count II, Gary sought compensatory damages in excess of \$50,000 and punitive damages. The company moved to strike or dismiss portions of the amended count II, but that motion was denied. The company’s motion for summary judgment as to the amended count II was also denied.

In October of 2006, after a settlement conference, the company and Gary entered into a settlement agreement, and the underlying suit was stricken from the court's trial calendar. The following month, the company and Gary entered into a mutual release, which provided that each would dismiss all causes of action against the other. As part of the settlement agreement, the company paid Gary \$24,000 (\$12,000 for each count) and the underlying suit was dismissed.

At the time prior to, and during the pendency of, the underlying suit, the company had insurance coverage through Alea.<sup>1</sup> Of relevance to this appeal, the insurance policy provided as follows:

**“PART ONE - WORKERS COMPENSATION INSURANCE**

**A. How This Insurance Applies**

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.
2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

**B. We Will Pay**

We will pay promptly when due the benefits required of you by the workers compensation law.

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<sup>1</sup>The company's first policy from Alea ran from May of 2004 to May of 2005. The company's second policy from Alea ran from May of 2005 to May of 2006. Both policies were essentially the same, and we will not distinguish between the two policies in this appeal.

**C. We Will Defend**

We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

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**PART TWO - EMPLOYERS LIABILITY INSURANCE**

**A. How This Insurance Applies**

This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. The bodily injury must arise out of and in the course of the injured employee's employment by you.
2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.
3. Bodily injury by accident must occur during the policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.
5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States

of America, its territories or possessions, or Canada.

**B. We Will Pay**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
2. for care and loss of services; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee;

provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and

4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

**C. Exclusions**

This insurance does not cover:

1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;
2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;

3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. any obligations imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law, or any similar law;
5. bodily injury intentionally caused or aggravated by you;
6. bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;
7. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions;

\* \* \*

**D. We Will Defend**

We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.

\* \* \*

## **I. Actions Against Us**

There will be no right of action against us under this insurance unless:

1. You have complied with all the terms of this policy; and
2. The amount you owe has been determined with our consent or by actual trial and final judgment.

\* \* \*

## **PART FOUR - YOUR DUTIES IF INJURY OCCURS**

Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

\* \* \*”

(Emphases in original.)

On February 22, 2007, the company filed the instant case against Alea for declaratory judgment, breach of insurance contract, and statutory damages. The company alleged that Alea had failed to defend it against the counterclaim brought by Gary in the underlying suit. The complaint was later amended. The company subsequently filed a motion for summary judgment as to liability, and Alea filed a cross motion for summary judgment.

A hearing was held on the motions for summary judgment. At the time of the hearing, the trial court had before it numerous pleadings, depositions, affidavits, and letters. Among other things, the depositions contained contradictory evidence as to such matters as: (1) the timing of when Alea was notified of the claim itself and of the filing of counterclaim in the underlying suit; (2) whether the company requested that Alea defend it against the counterclaim in the underlying suit; and (3) whether Alea refused to defend the company against the counterclaim in the underlying suit. About the only conclusions that could be drawn with any certainty from the evidence presented were that: (1) Alea was notified of the counterclaim in the underlying suit before the parties settled; (2) Alea did not take an active role in the underlying suit, even after notification; and (3) Alea was not notified of the settlement in the underlying suit until after the settlement occurred. At the hearing on the motions for summary judgment, although the record is not quite clear on the matter, it appears that the trial court heard the arguments of the attorneys and took the case under advisement. On May 21, 2010, the trial court entered a written order granting Alea's motion for summary judgment and denying the company's. The company subsequently appealed.

## ANALYSIS

On appeal, the company argues that the trial court erred in granting Alea's motion for summary judgment and in denying the company's motion for the same. The company asserts that summary judgment should have been granted in its favor on the issue of liability because: (1) Alea was aware of the counterclaim and had a duty to defend the company against it; (2) based on Alea's failure to timely file a declaratory judgment action or to defend against the counterclaim under a reservation of rights, Alea breached its duty to defend the company and is estopped at this point from denying its duty to defend or from asserting contract defenses to defeat its duty to defend; (3) even if Alea could challenge its duty to defend at this point, coverage for the counterclaim was provided for by the insurance policy because Gary was potentially asserting physical and psychological harm (bodily injury), which could be recovered for in a workers' compensation claim; (4) regardless of the label put on count II of the counterclaim, the facts alleged in count II would support a number of causes of action, apart from retaliation, and retaliation was not specifically excluded from coverage under either part of the policy; and (5) the company did not violate the requirements of the policy with regards to notice or settling the underlying claim, or at the very least, disputed issues of fact remain as to Alea's policy defenses. The company asks that we reverse the trial court's order granting summary judgment in Alea's favor and that we remand this case to the trial court with instructions to enter summary judgment on the issue of liability in favor of the company. Alternatively, the company asks that we find that disputed issues of material fact remain, that we reverse the trial court's grant of summary judgment in favor of Alea, and that we remand this case to the trial court for further proceedings.

Alea argues that the trial court's grant of summary judgment in its favor was proper in this

case. Alea asserts that the insurance policy did not provide coverage for the counterclaim in the underlying suit because: (1) the counterclaim did not assert bodily injury to an employee by accident or disease; (2) the policy specifically excluded coverage for damages arising out of termination of any employee, or any personnel practices, policies, acts, or omissions; and (3) the policy specifically excluded coverage for liability assumed under a contract. Alea asserts further that because there was no possibility of coverage under the policy, Alea had no duty to defend the company in the underlying suit. In the alternative, Alea contends that even if the policy provided coverage, it had no duty to defend the company because the company breached the policy by failing to provide Alea with timely notice of the claim and by settling the claim without Alea's consent or participation. Alea disputes the company's assertion of the estoppel doctrine and asserts that the doctrine does not apply in this case because a declaratory judgment action was filed, albeit by the company, and because it is clear that Alea did not wrongfully deny coverage under the circumstances of the present case. Alea contends, therefore, that the trial court's grant of summary judgment in its favor should be affirmed and that the company's assertions to the contrary in this appeal should be rejected.

The purpose of summary judgment is not to try a question of fact, but rather, to determine if one exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Adams*, 211 Ill. 2d at 43. In appeals from summary judgment rulings, the standard of review is *de novo*. *Adams*, 211 Ill. 2d at 43. The construction of an insurance policy is a question of law, which may properly be resolved in a summary judgment

proceeding, and is also subject to a *de novo* standard of review on appeal. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 360 (2006); *Westfield National Insurance Co. v. Continental Community Bank and Trust Co.*, 346 Ill. App. 3d 113, 116 (2003).

A court's main objective in construing an insurance policy is to determine and give effect to the intent of the parties as expressed in the words of the policy. *Valley Forge Insurance Co.*, 223 Ill. 2d at 362. An insurance policy must be construed as a whole, giving effect to every provision, if possible (*Valley Forge Insurance Co.*, 223 Ill. 2d at 362-63), and considering the type of insurance purchased, the nature of the risks involved, and the overall purpose of the policy (*State Farm Mutual Automobile Insurance Co. v. Villicana*, 181 Ill. 2d 436, 442 (1998)). If the words used in an insurance policy are ambiguous—reasonably susceptible to more than one interpretation—they will be strictly construed against the insurer, as the drafter of the policy. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363; *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 141 (1999). However, if the words of the policy are clear and unambiguous, they will be applied as written. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. “ ‘In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer.’ ” *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 456 (2010) (quoting *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997)). For an insurer to rely upon a such a provision to exclude coverage, it must be clear and free from doubt that the policy’s exclusion applies. *Aetna Casualty & Surety Co. v. O'Rourke Brothers, Inc.*, 333 Ill. App. 3d 871, 879 (2002).

“To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy.” *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. If the facts alleged in the

underlying complaint, liberally construed in favor of the insured, fall within, or potentially within, the policy's coverage, the insurer is obligated to defend the insured. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. This rule applies even if the allegations in the complaint are groundless, false, or fraudulent, and even if only one of the several theories of recovery alleged in the complaint falls within the potential coverage of the policy. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. “Thus, an insurer may not justifiably refuse to defend a lawsuit against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in the complaint fail to state facts that bring the case within, or potentially within, the coverage of the policy.” *Valley Forge Insurance Co.*, 223 Ill. 2d at 363.

Once a duty to defend has been triggered, the insurer cannot merely sit back and ignore the claim or simply refuse to defend the insured. See *Employers Insurance of Wausau*, 186 Ill. 2d at 150-54. Rather, if the insurer believes that coverage is not provided, the insurer must either defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. See *Employers Insurance of Wausau*, 186 Ill. 2d at 150. If the insurer fails to do so and is later found to have wrongfully denied coverage, under the estoppel doctrine, the insurer is estopped from raising policy defenses to coverage, such as lack of timely notice, even if those defenses would have proven to be successful. *Employers Insurance of Wausau*, 186 Ill. 2d at 150-52. However, before the estoppel doctrine may be applied, it must first be shown that the insurer breached its duty to defend the insured. See *Employers Insurance of Wausau*, 186 Ill. 2d at 151. “Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered.” *Employers Insurance of Wausau*, 186 Ill. 2d at 151. Such a circumstance would include a situation where, when the policy and the complaint are compared, there clearly was

no coverage or potential for coverage. See *Employers Insurance of Wausau*, 186 Ill. 2d at 151.

In the present case, before any other matter may be addressed, we must first determine whether count II of the counterclaim was covered under either part of the policy. There seems to be no dispute between the parties that count I of the counterclaim, which sought damages for breach of the redemption agreement, was not covered under the policy. Count II of the counterclaim was based upon a theory of retaliatory discharge and sought damages, alleging that the company, because of Gary's exercise of his rights and remedies under the Acts, discharged Gary, discriminated against him, and otherwise interfered with, restrained, and coerced him in the exercise of his rights under the Acts. The words of the two parts of the policy are not ambiguous on this point. They apply only to claims of bodily injury by accident or disease to an employee of the company. In count II of the counterclaim, although Gary alleged that his previous physical injury reoccurred and specified several different types of allegedly illegal or improper conduct on the part of the company, Gary did not seek recovery for any type of bodily injury. Rather, Gary's claim was based upon the company's conduct of improper discharge, discrimination, and harassment against him because of the exercise of his rights under the Acts (his notifying the company that his previous injury had reoccurred and the effect it would have on his ability to work as an upholsterer). Thus, neither part of the policy in question provided coverage for count II of the counterclaim, even on a potential basis. As the policy clearly did not provide for even potential coverage, Alea had no duty to defend the company in the underlying suit. See *Valley Forge Insurance Co.*, 223 Ill. 2d at 363.

Having reached that conclusion, we need not address the additional assertions made by each of the parties. The trial court properly granted summary judgment in Alea's favor and properly denied summary judgment for the company.

For the foregoing reasons, we affirm the judgment of the circuit court of Peoria County.

Affirmed.