

2012 IL App. (1st) 110467-U

FIRST DIVISION
July 30, 2012

No. 1-11-0467

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ELECTRIC INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
MICHAEL VIRGILIO and CONSTANCE VIRGILIO,)	No. 2009 CH 44318
)	Consolidated With
Defendants)	No. 2009 CH 44744
)	
(Calpine Corporation, Calpine Construction Management)	
Company, Inc. and Calpine Northbrook Energy Marketing, LLC,)	Honorable
)	Martin Agran,
Defendants-Appellants).)	Judge Presiding.
)	
CALPINE CORPORATION, CALPINE CONSTRUCTION)	
MANAGEMENT COMPANY, INC., CALPINE)	
NORTHBROOK ENERGY MARKETING LLC, CCFC)	
DEVELOPMENT COMPANY, LLC, CALPINE OPERATING)	
SERVICES COMPANY, INC., CALPINE FOX, LLC and BLUE)	
SPRUCE ENERGY CENTER, LLC.,)	
Plaintiffs-Appellants,)	

v.)
)
GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC)
INTERNATIONAL, INC., GENERAL ELECTRIC)
CONTRACTUAL SERVICES, GENERAL ELECTRIC)
POWER SYSTEMS, GENERAL ELECTRIC ENERGY,)
GENERAL ELECTRIC COMMERCIAL FINANCE, ENERGY)
FINANCIAL SERVICES, FOX ENERGY, FOX ENERGY)
COMPANY, LLC, FOX ENERGY OPLP, MICHAEL)
VIRGILIO and CONSTANCE VIRGILIO,)
)
Defendants)
)
(Electric Insurance Company,)
)
Defendant-Appellee).)

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 **Held** : The circuit court's determination that the insurer owed no duty to defend was affirmed in part and reversed in part. (1) Separate corporations which were 100% owned by the additional insured were not "constituent" partners of the additional insured and were not entitled to additional insured coverage. (2) Comparison of the allegations of the underlying complaint to the policy and other relevant evidence established that there was potential coverage for the additional insureds.

¶ 2 Plaintiffs Calpine Corporation (Calpine Corp.), Calpine Construction Management Company, Inc. (CCMC), Calpine Northbrook Energy Marketing, LLC, CCFC Development Company, LLC, Calpine Operating Services Company, Inc., Calpine Fox, LLC and Blue Spruce Energy Center, LLC (Blue Spruce) (collectively the Calpine Entities) appeal from an order of the circuit court of Cook County granting summary judgment to Electric Insurance Company

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(Electric Insurance) and denying their cross-motion for summary judgment. On appeal, the Calpine Entities contend that under the terms of a policy of insurance Electric Insurance issued to General Electric Company, Electric Insurance owed a duty to defend them in a personal injury law suit. Therefore, the court erred in its summary judgment ruling. The pertinent facts are set forth below.

¶ 3 On April 16, 2004, the General Electric Company entered into an "Amended and Restated Purchase Contract" (the Purchase Contract) to sell a gas turbine generator to Blue Spruce for the Fox Energy Center project. Article 12 of the Purchase Contract pertained to insurance and provided in pertinent part as follows:

"12.2 Policies. The insurance policies required by Section 12.1 shall be indorsed to provide that:

* * *

(b) for insurance required in ***Section 12.1., Buyer, Lender and each of their constituent partners, members, employees, directors, officers, agents and representatives are additional insureds, by endorsement in the form of Exhibit H, but only to the extent of liability resulting from the negligent acts or omissions of Seller, its vendors, subcontractors of any tier, Affiliates, employees or agents, with such coverage being primary to any insurance carried by the additional insureds."

Exhibit H to the Purchase Contract provided in pertinent part as follows:

"The definition of insured is amended to include as an insured the person or organization shown below as an insured but only as respects liability arising out of the

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Named Insurer's operations or ownership, maintenance or use of the premises or equipment utilized in performing the designated contract or agreement. If the additional insured named herein is an organization, the additional insured provision shall extend to any partners, officers, agents or employees of such organization."

Two of the Calpine Entities were listed on exhibit H: Calpine Corp. and CCMC.

¶ 4 Michael Virgilio and his wife, Constance, filed a complaint seeking damages for injuries Mr. Virgilio suffered in a work-related accident. The Virgilio second amended complaint set forth two counts against each of two groups of defendants: the Calpine Entities, and General Electric Company, General Electric International, Inc., General Electric Contractual Services, General Electric Power Systems, General Electric Energy, General Electric Commercial Finance and Energy Financial Services (collectively General Electric).

¶ 5 Count I, titled "Construction Negligence\Personal Injury" against the Calpine Entities alleged that, on or before May 27, 2006, General Electric entered into an arrangement with the Calpine Entities to perform work at the Fox Energy Center in Kaukauna, Wisconsin. On May 27, 2006, in connection with that arrangement, Mr. Virgilio was performing his work duties and sustained injuries while working on a generator. Count I further alleged that, at all relevant times, the Calpine Entities: "knew or should have known of the work which was being performed on the aforesaid site; ***retained the authority to stop unsafe work practices and/or order work to be done in a safe manner[;] ***retained the authority to coordinate the work of contractors; ***retained the authority to direct the order in which the work was done; ***retained the authority to forbid the work from being done in a manner dangerous to the workers." Count I

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also alleged that the Calpine Entities were negligent in the following ways:

- "a. Failed to provide [Mr. Virgilio] with a safe place to work.
- b. Failed to coordinate the work such that [Mr. Virgilio] could perform his work safely.
- c. Caused or allowed plaintiff to perform his work in a manner dangerous to himself.
- d. Failed to develop a safe order for the work to be done.
- e. Failed to remove the Generator Terminal Enclosure or have it removed before causing or allowing [Mr. Virgilio] to work there.
- f. Was otherwise negligent."

Count I further alleged that "[a]s a proximate result of one or more of the foregoing negligent acts or omissions, [Mr. Virgilio] sustained injuries of a personal and pecuniary nature." Count II alleged Mrs. Virgilio's loss of consortium cause of action against the Calpine Entities based on the allegations of count I.

¶ 6 Count III, titled "Construction Negligence\Personal Injury" against General Electric, contained allegations of fact and negligent acts and omissions identical to those against the Calpine Entities in count I.¹ Count IV alleged Mrs. Virgilio's loss of consortium cause of action against General Electric based on the allegations of Count III.

¶ 7 Electric Insurance issued a commercial general liability policy of insurance (CGL) to General Electric as the named insured for the effective policy period of January 1, 2006 to January 1, 2007. Relevant to coverage for additional insureds, endorsement 3 to the policy

¹Count III stated "aforesaid construction site," and did not include subsection "f."

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provided in pertinent part as follows:

"WHO IS AN INSURED is amended to include as an insured ***any person or organization to whom you are obligated by a written agreement to procure additional insured coverage ***:

* * *

The coverage afforded to the Additional Insured is limited to liability incurred as a result of some negligent act or omission of the Named Insured, its employees, agents, or subcontractors in the conduct of the Named Insured's ongoing operations unless other Additional Insured requirements are specifically and expressly agreed to in the written agreement and then those will apply." (Emphasis in original omitted.)

¶ 8 The Calpine Entities tendered their defense in the Virgilio law suit to Electric Insurance. Following Electric Insurance's rejection of the tender, the Calpine Entities and Electric Insurance filed separate complaints for declaratory judgment. The circuit court ordered the complaints consolidated.

¶ 9 In its declaratory judgment complaint, Electric Insurance contended that its additional insured indorsement afforded no coverage to the Calpine Entities because the Virgilio law suit against the Calpine Entities was based on their own negligence and not on the negligence of General Electric, the named insured. In their amended complaint for declaratory judgment, the Calpine Entities contended that Electric Insurance was required to provide a defense and indemnify them because the Virgilio action alleged some negligence on the part of General Electric and because the Virgilio complaint alleged that Mr. Virgilio's injuries occurred as a

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result of the ongoing operations of General Electric.

¶ 10 The Calpine Entities further contended that, as "constituent" partners of Calpine Corp., they qualified as for additional insured coverage. In support of their contention, they submitted the affidavit of Kevin Chung, a manager with Calpine Corp. In his affidavit, Mr. Chung explained how through a chain of intermediate companies, Calpine Corp. owned 100% of each of the Calpine Entities.

¶ 11 Electric Insurance and the Calpine Entities filed cross-motions for summary judgment. The circuit court granted summary judgment to Electric Insurance and denied the Calpine Entities' motion for summary judgment. The court found that since only the Calpine Corp. and CCMC were listed on exhibit H of the Purchase Contract, only those two entities were additional insureds. The court further found that the additional insured endorsement did not extend coverage to any of the Calpine Entities because the Virgilio second amended complaint alleged that Mr. Virgilio's injuries resulted from the Calpine Entities' own acts, and did not allege that they were liable for General Electric's negligence. The court concluded that Electric Insurance owed no duty to defend the Calpine Entities. This appeal followed.

¶ 12 ANALYSIS

¶ 13 The sole issue on appeal is whether Electric Insurance owes a duty to defend the Calpine Entities in the Virgilio law suit.

¶ 14 I. Standard of Review

¶ 15 The *de novo* standard of review applies to our review of a circuit court's grant of summary judgment. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 678 (2002).

¶ 16

II. Applicable Principles

¶ 17 The principles guiding the court's review of the grant of summary judgment are well-settled. "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006). The grant of summary judgment should be upheld only when the right of the moving party is free from doubt. *Hall*, 363 Ill. App. 3d at 993. Where cross-motions for summary judgment are filed, the parties invite the court to determine issues as a matter of law and enter judgment in favor of one of the parties. *Hall*, 363 Ill. App. 3d at 993.

¶ 18 In construing a contract, the primary objective is to give effect to the parties' intention. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The court first examines the language of the contract. *Thompson*, 241 Ill.2d at 441. Where the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. *Thompson*, 241 Ill. 2d at 441. If the contract language is susceptible to more than one meaning, the language is ambiguous, allowing the court to consider extrinsic evidence to determine the parties' intent. *Thompson*, 241 Ill.2d at 441.

¶ 19

III. Discussion

¶ 20 Two requirements must be satisfied before the duty to defend arises: (1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose potential policy coverage. *Federal Insurance Co. v. Economy Fire & Casualty Co.*, 189 Ill. App. 3d 732, 735 (1989). "Where the allegations of the complaint reveal that the action was not brought

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against an insured and there was no potential coverage under the policy, there is no duty to defend the underlying action." *Owners Insurance Co. v. Seamless Gutter Corp.*, 2011 IL App (1st) 082924-B, ¶ 33.

¶ 21 *A. Were the Calpine Entities Insureds*

¶ 22 Under the provisions of the Electric Insurance policy, the term "insured" included any persons or organization for whom General Electric was obligated by a written agreement to provide insurance. Article 12.2 of the Purchase Contract provided that Blue Spruce and its "constituent partners, members *** agents" were additional insureds.² The term "constituent" is defined as "(Of a component that helps make up or complete a whole." Black's Law Dictionary 330 (8th ed. 2004). Relying on the definition of "constituent" and Mr. Chung's affidavit, the Calpine Entities assert that because they are 100% owned by Calpine Corp., they are "constituent" members of Calpine Corp. We disagree.

¶ 23 We note that Calpine Corp was listed in exhibit H, which provided that "[t]he definition of insured is amended to include as an insured the person or organization shown below as an insured" and further provided that the additional insured coverage extended to "any partners, officers, agents or employees" of those organizations. Unlike article 12.2, the term "constituent" does not appear in exhibit H.

¶ 24 The terms used in exhibit H are not ambiguous and therefore the clear and natural meaning of those terms applies. Even if we considered that the Calpine Entities were 100%

²For purposes of this issue, Electric Insurance does not dispute that Blue Spruce qualified as an additional insured.

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owned by Calpine Corp., that fact does not establish that they were "partners, officers, agents or employees" under plain, ordinary and popular use of those terms.

¶ 25 We conclude that under exhibit H, only Calpine Corp. and CCMC qualify for additional insurance coverage.

¶ 26 *B. Policy Coverage*

¶ 27 An insurer is obligated to defend the insured if the underlying complaint alleges facts within or potentially within the policy's coverage, even if the allegations are false or groundless and even if only one theory of recovery is covered under the policy. *Owners Insurance Co.*, 2011 IL App (1st) 082924-B, ¶ 44. In determining whether the allegations of the underlying complaint disclose the potential of policy coverage, the facts contained in the allegations of the underlying complaint are compared to the relevant portions of the insurance policy. *Owners Insurance Co.*, 2011 IL App (1st) 082924-B, ¶ 44. The court "may consider evidence usually considered in ruling on a motion for summary judgment, so long as such evidence does not tend to determine an issue critical to the determination of the underlying law suit." *Owners Insurance Co.*, 2011 IL App (1st) 082924-B, ¶ 47.

¶ 28 In general, each coverage case is dependent on its own unique facts, which include the exact terms of the policy and the allegations of the underlying complaint. *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 596 (2009). In determining whether there is a duty to defend, courts interpret liberally the allegations of the underlying complaint and the language of the insurance policy. *Hallmark Homes, L.L.C.*, 392 Ill. App. 3d at 596.

¶ 29 The Virgilio second amended complaint alleged that the time of his injury, Mr. Virgilio

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was working on a generator pursuant to an arrangement between General Electric and the Calpine Entities. In separate counts, General Electric and the Calpine Entities were alleged to have responsibility for the premises, control over the work and to have committed the acts of negligence and omissions, which were the proximate cause of Mr. Virgilio's injuries. Under Electric Insurance's policy additional insured coverage was limited to "liability incurred as a result of some negligent act or omission of [General Electric], its employees, agents, or subcontractors in the conduct of [General Electric's] ongoing operations unless other Additional Insured requirements are specifically and expressly agreed to in the written agreement and then those will apply." (Emphasis in original omitted.)

¶ 30 Our analysis of the coverage question may include other relevant pleadings and documents. See *Pulte Home Corp.*, 404 Ill. App. 3d at 341-42, 343 (court considered contract between the parties in determining coverage). Under article 12.2, Blue Spruce was an additional insured "only to the extent of liability resulting from the negligent acts or omissions of [General Electric], its vendors, subcontractors of any tier, Affiliates, employees or agents." Under exhibit H, Calpine Corp. and CCMC were additional insureds "only as respects liability arising out of [General Electric's] operations, or ownership, maintenance or use of the premises or equipment utilized in performing the designated contract or agreement."

¶ 31 Also relevant to the coverage question is Mr. Virgilio's deposition testimony and General Electric's admissions. See *Owners Insurance Co.*, 2011 IL App (1 st) 082924-B, ¶ 47(we may consider the type of evidence usually considered in a summary judgment proceeding). At his deposition, Mr. Virgilio testified that he received his assignment to work on the generator field

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housing from Rich Molenhouse. According to Mr. Virgilio, Mr. Molenhouse was employed by General Electric. His crew on the job included Ken Ferrari, a generator specialist. Mr. Virgilio explained to Mr. Ferrari that removal of a bushing box would make the job easier. However, after checking if the bushing box could be removed, Mr. Ferrari told him it had to be done according the way "GE laid it out." From the beginning of the job until he was injured on May 27, 2006, all directions came from General Electric personnel. Mr. Virgilio also testified that he reported his accident to Jan Wachowski, who was a General Electric employee.

¶ 32 In its answers to the Virgilio interrogatories, General Electric acknowledged that Mr. Ferrari was a witness to the occurrence, that he was employed by "GE" and that he had been on the site of the occurrence, within 10 days of or 10 days subsequent to the occurrence. It further acknowledged that Mr. Wachowski was Mr. Virgilio's supervisor at the site.

¶ 33 Electric Insurance argues that there was no coverage for the Calpine Entities because they were sued for their own negligence and were not alleged to be vicariously liable for the negligence of General Electric, relying on *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055 (2010). In that case, the reviewing court reversed the circuit court's finding of a duty to defend. Comparing the allegations of the underlying complaint to the policy provisions, the court pointed out that the complaint did not allege an agency relationship between Pekin's insured, Rockford, and Roszak; it merely alleged that Roszak was the general contractor and Rockford was the steel fabricator. The complaint alleged that the plaintiff's injury resulted from Roszak's acts of negligence, and there was no allegation that Roszak was vicariously liable for Rockford's negligent acts. *Rozzak/ADC, LLC*, 402 Ill. App. 3d at 1063.

¶ 34 We find *Roszak/ADC, LLC* distinguishable from the present case. In that case, as an additional insured, Roszak was afforded coverage " 'only with respect to liability incurred *solely* as a result of some act or omission of the named insured and not for its own negligence or statutory violation." (Emphasis ours.) *Roszak/ADC, LLC*, 402 Ill. App. 3d at 1058. Unlike the policy provision in *Roszak/ADC, LLC*, neither the Electric Insurance policy nor the relevant provisions of the Purchase Contract require that the negligence arise *solely* from the negligence of General Electric, and none of the relevant provisions bar coverage where the additional insureds are also alleged to be negligent.

¶ 35 We also reject Electric Insurance's argument that the second amended complaint alleges negligence only on the part of Mr. Virgilio's employer, General Electric International. Initially, we note that it is far from clear that only General Electric International was his employer. At his deposition, Mr. Virgilio was uncertain whom his actual employer was at the time of his accident: the dispersing agent on his pay check was "General Electric" for "GE International Power SYS." According to the second amended complaint, Mr. Virgilio's assignment to work on the generator came about as the result of an arrangement between the Calpine Entities and General Electric. According to his deposition testimony, Mr. Virgilio was assigned to work on the generator housing by Mr. Molenhouse, who was employed by GE, his work was directed by Mr. Ferrari, employed by GE and his supervisor on the site was Mr. Wachowski, also employed by GE.

¶ 36 *Pulte Home Corp.* further supports the finding of a duty to defend in this case. Pulte was named an additional insured on its subcontractor, Kunde's, policy with Pekin. Both Pulte and Kunde were sued when Kenneth Kaiser, a Commonwealth Edison employee, was injured on the

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site. The negligence count of the underlying complaint alleged that Pulte and Kunde owned or controlled the construction, were present on the site individually or through their agents and employees, participated in coordinating the work done, scheduled and inspected the work and had authority to stop the work, refuse the work and materials, and order changes in the work.

The complaint further alleged acts of negligence on the part of Pulte and Kunde were the direct and proximate cause of Mr. Kaiser's injuries. *Pulte Home Corp.*, 404 Ill. App. 3d at 337-38.

Pekin denied Pulte's tender of its defense, because the additional insured endorsement did not provide coverage for Pulte's own acts or omissions or those in which Pulte played a role. *Pulte Home Corp.*, 404 Ill. App. 3d at 338. The circuit court granted summary judgment to Pulte finding that Pekin had a duty to defend Pulte. On appeal, the reviewing court affirmed.

¶ 37 Pertinent to the case before us, the court found that the purpose of the insurance policy supported the duty to defend. *Pulte Home Corp.*, 404 Ill. App. 3d at 344. The court noted that frequently, coverage for an additional insured is found "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.'" *Pulte Home Corp.*, 404 Ill. App. 3d at 345 (quoting *American Country Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960, 971 (2003)). While Mr. Kaiser was not the employee of a contractor, because his injury arose out of Kunde's operations, Pulte, as an additional insured under Kunde's policy with Pekin, was covered. *Pulte Home Corp.*, 404 Ill. App. 3d at 345.

¶ 38 Likewise, in this case, Mr. Virgilio was injured while performing work ordered by, directed by and supervised by employees of General Electric. "But for" his presence on the site,

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performing that work, he would not have been injured. As his work was alleged to have arisen out of General Electric's operations, and as a result of its employees' actions, there is potential for insurance coverage for Blue Spruce, Calpine Corp. and CCMC.

¶ 39

CONCLUSION

¶ 40 Comparing the allegations of the second amended complaint with the relevant terms of the Purchase Contract and the Electric Insurance policy, as well as the relevant discovery evidence, there was at least the potential of coverage for Blue Spruce, Calpine Corp. and CCMC. Therefore, Electric Insurance owed a duty to defend Blue Spruce, Calpine Corp. and CCMC.

¶ 41 We affirm the grant of summary judgment to Electric Insurance as to Calpine Northbrook Energy Marketing, LLC, CCFC Development Company, LLC, Calpine Operating Services Company, Inc., Calpine Fox, LLC and Blue Spruce. We reverse the denial of summary judgment as to Calpine Corp. and CCMC. We remand the cause to the circuit court for entry of an order granting summary judgment to Calpine Corp and CCMC on the Calpine Entities' amended complaint for declaratory judgment.

¶ 42 Affirmed in part, reversed in part, and remanded with directions.

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