

No. 1-11-0711

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAFEWAY INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
ESPIRIRION CASTRO, CESAR CASTRO and)	
AMERICAN ACCESS CASUALTY COMPANY,)	08 CH 21236
)	
Defendants-Appellees,)	
and)	
)	
LAWRENCE KOLICH,)	Honorable
)	Kathleen M. Pantle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held:* Where the insurance contract provided that the insured must do nothing after loss to prejudice the insurer's right to subrogation, the insured breached the contract when he failed to exercise due diligence in his efforts to serve process on the tortfeasor, even though the insurer never paid the insured's claim.

¶ 2 On March 15, 2005, Lawrence Kolich and Espiririon Castro were involved in a car accident in Kane County. When Espiririon's insurer, American Access Casualty Company, refused to pay Kolich for his injuries, Kolich involved the uninsured motorist provision in the policy with his insurer, Safeway Insurance Co. Kolich also sued Espiririon in Kane County, but Espiririon successfully moved to dismiss the lawsuit because Kolich did not serve process on Espiririon with reasonable diligence. Safeway filed this lawsuit in Cook County, seeking a judgment declaring that it had no duty to pay uninsured motorist benefits to Kolich because Kolich breached the contract by failing to serve process on Espiririon diligently. Kolich argued that Safeway waived the argument, that the trial court should estop Safeway from raising the argument, and that the contract provision on which Safeway relied did not apply. The trial court entered summary judgment in favor of Safeway.

¶ 3 On appeal, we find that neither waiver nor estoppel bars Safeway from claiming a breach of contract here, and we agree with the trial court's interpretation of the insurance policy. Accordingly, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 Cesar Castro, Espiririon's brother, owned the car that Espiririon drove and Rozco Landscaping, Kolich's employer, owned the truck he drove on March 15, 2005, when Espiririon and Kolich were involved in a car accident. In October 2005, a claims adjuster working for American Access told Kolich that American Access denied Kolich's claim because Cesar and Espiririon had refused to cooperate with American Access.

¶ 6 Kolich then filed a claim for uninsured motorist coverage with Safeway. In April 2006,

1-11-0711

Kolich formally demanded arbitration of his claim. The parties prepared for arbitration. In February 2007, shortly before the expiration of the statute of limitations, Kolich filed the lawsuit against Espiririon in Kane County, accusing Espiririon of driving negligently. Kolich's attorney tried to serve Espiririon at the address Espiririon gave police who responded to the accident. No one at that location had any useful information about Espiririon's current address. When Kolich's attorney could not find a valid address for Espiririon, the attorney voluntarily dismissed the lawsuit against Espiririon.

¶ 7 In June 2008, Safeway filed the lawsuit that led to the appeal now before this court, naming as defendants Kolich, Rozco, Espiririon, Cesar, and American Access. Safeway sought a judgment declaring that it owed Kolich nothing for his uninsured motorist claim, and that it had no duty to arbitrate Kolich's claim.

¶ 8 In June 2009, Kolich refiled his Kane County lawsuit against Espiririon and again tried to serve process. Again, Kolich's attorneys could not find Espiririon. A new attorney working for Kolich moved for leave to have the Illinois Secretary of State accept service of summons on behalf of Espiririon. The court granted the motion. In May 2010, the Secretary of State accepted the service of summons.

¶ 9 In July 2010, Espiririon moved to dismiss Kolich's complaint on grounds that Kolich had failed to exercise reasonable diligence in obtaining service of process on Espiririon. See Ill. S. Ct. R. 103(b) (eff. July 1, 2007). In September 2010, the Kane County circuit court dismissed the lawsuit due to the lack of diligence in service of process.

¶ 10 Safeway moved for summary judgment on its complaint for a declaratory judgment. Safeway

argued that Kolich had breached the insurance contract because Kolich, by failing to serve process on Espirion with due diligence, had prejudiced Safeway's subrogation rights. On February 9, 2011, the trial court granted summary judgment in favor of Safeway, finding that Safeway had no duty to arbitrate Kolich's claim for uninsured motorist benefits because Kolich breached the insurance contract. Kolich now appeals.

¶ 11

ANALYSIS

¶ 12 On appeal, as in the trial court, Kolich argues that he did not breach the contract because the subrogation provision did not apply, Safeway waived its right to enforce the subrogation provision, and the court should estop Safeway from invoking the subrogation provision. We review the decision to grant summary judgment *de novo*. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510, 519 (2008).

¶ 13

Breach of contract

¶ 14 This case turns on the interpretation of the subrogation clause in Safeway's insurance policy. We must give effect to the intentions of the parties as expressed in the words of the policy. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007). The policy provides:

"14. Subrogation.

(a) In the event of any payments under [the uninsured motorist clause] of this policy, the Company shall be subrogated to all the insured's rights of recovery therefor against any person or organization;

(b) the insured shall execute and deliver instruments and paper

and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

¶ 15 If Safeway paid Kolich under the uninsured motorist clause of the contract, it would acquire, through subrogation, only Kolich's right to recover from Espiririon. *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 283 (1954); *Dworak v. Tempel*, 18 Ill. App. 2d 225, 232 (1958). After the dismissal of Kolich's suit against Espiririon, *res judicata* barred Kolich from recovering from Espiririon. See *Martin v. Yellow Cab Co.*, 208 Ill. App. 3d 572, 575-76 (1990). Therefore, the failure to serve process on Espiririon prejudiced Safeway's subrogation rights.

¶ 16 Kolich argues that Safeway cannot complain of any prejudicial effect on its subrogation rights until it acquires those rights, and it acquires the right to subrogation only after it pays Kolich the uninsured motorist benefits. See *Zurich v. Country Mutual Insurance Co.*, 65 Ill. App. 3d 608, 612 (1978). Since Safeway never paid Kolich the uninsured motorist benefits, according to Kolich, Safeway cannot claim that Kolich breached the contract.

¶ 17 The policy's subrogation clause provides that "[i]n the event of any payments under [the uninsured motorist clause] of this policy," Safeway shall be subrogated to its insured's right to recovery from the uninsured motorist. A separate subclause, labeled section 14(b), adds that "[t]he insured shall do nothing after loss to prejudice such rights." The subclause does not limit its application to acts of the insured after Safeway has paid the claim. Instead, the clause specifically provides that the insured must do nothing "after loss" to prejudice subrogation rights.

¶ 18 Kolich's proposed interpretation of the policy, making the subclause inapplicable until Safeway pays the claim, abuses the unqualified words of the subclause and makes the clause have

1-11-0711

absurd consequences. On Kolich's interpretation, an insured driver who gets in an accident with an uninsured motorist could agree with the uninsured motorist at the scene of the accident (and hence before Safeway acquires subrogation rights) to accept \$100 from the uninsured motorist as full compensation in exchange for waiver of all his rights to collect from the uninsured motorist, with the understanding that the insured driver would seek further compensation only from Safeway. Although the settlement would completely foreclose Safeway from receiving anything from the uninsured motorist for his role in causing the accident, under Kolich's proposed rewriting of the policy, Safeway would have no basis for claiming that its insured breached the policy or otherwise lost the right to uninsured motorist benefits. Kolich's interpretation of the contract, which makes the insured responsible for preserving subrogation rights not after the loss, but only after Safeway has paid its insured for the loss, does not comport with the words of the policy or the intention of the parties. Accordingly, we reject Kolich's proposed interpretation.

¶ 19 Kolich contends that the decision in *Murphy v. United States Fidelity & Guaranty Co.*, 120 Ill. App. 3d 282 (1983), requires reversal of the judgment entered here. In *Murphy*, the insured claimed coverage from her insurer after she got into a car accident with an uninsured motorist. Extensive negotiations with the insurer failed to produce a settlement. More than two years after the accident, the insured made a written demand for arbitration of her uninsured motorist claim, and she petitioned the court to compel arbitration. The insurer moved to dismiss the petition, arguing that because the two year statute of limitations period for the claim against the uninsured motorist had expired, the insurer had lost its subrogation rights.

¶ 20 The policy in *Murphy* required the insured to give the insurer notice of the accident as soon

1-11-0711

as practicable, and it gave the insurer the right to require the insured "to take such action as may be necessary or appropriate to preserve [her] right [and the insurer's right by subrogation] to recover damages from any person * * * alleged to be legally responsible for the bodily injury." *Murphy*, 120 Ill. App. 3d at 288. The insurer appealed from a judgment entered in favor of the insured. The appellate court held:

"[B]y virtue of th[e] provision [quoted above], the insurer had the right to compel the plaintiff to such action as would preserve all rights against the uninsured motorist, which included the instituting of a legal action to toll the statute of limitations and preserve the defendant's subrogation rights. ***

The defendant in the instant case has made no claim that it failed to receive notice of the plaintiff's accident in time for it to act to protect its subrogation rights against the uninsured motorist. Thus, any prejudice to the defendant's rights resulting from the timing of the plaintiff's arbitration demand has been occasioned by its own neglect and should not dictate the use of the shorter tort statute of limitations. *** We therefore find no merit in the defendant's contention that the plaintiff's action must be governed by the two-year tort statute of limitations in order to preserve the defendant's rights against the uninsured motorist." *Murphy*, 120 Ill. App. 3d at 288-89.

¶ 21 Thus, the outcome of the case depended upon the policy language which gave the insurer the

1-11-0711

right to direct its insured to take any steps it felt the insured needed to take to preserve the insurer's subrogation rights. The policy at issue here, on the other hand, requires the insured to "do nothing after loss to prejudice" Safeway's subrogation rights. Thus, while the policy in *Murphy* made the insurer primarily responsible for directing the insured to take any steps needed for the protection of the insurer's subrogation rights, the policy here places the burden on the insured to avoid taking any steps that would prejudice the insurer's subrogation rights. Because the failure to serve process on Espiririon prejudiced Safeway's subrogation rights, the trial court correctly held that Kolich had breached the insurance contract.

¶ 22 Waiver

¶ 23 Kolich argues that Safeway waived its right to subrogation by failing to take any steps to help Kolich preserve those rights. In particular, Safeway offered Kolich no assistance in locating and serving process on Espiririon, even though Kolich kept Safeway informed about the progress of the Kane County lawsuit against Espiririon.

¶ 24 Even construing the policy strictly against Safeway (see *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 438 (1991)), we find no language in the policy from which we could infer that Safeway had the burden of directing Kolich to take any specific steps to preserve its subrogation rights, or any basis for finding that Safeway waived its right to enforce section 14(b) of the policy when it failed to help Kolich serve process on Espiririon.

¶ 25 Estoppel

¶ 26 Finally, Kolich contends that Safeway is estopped from invoking section 14(b) of the policy, because otherwise this decision will encourage insurers not to pay uninsured motorist benefits

1-11-0711

mandated in their policies. Kolich says:

"A company would only have to stall for up to two years after the crash for the statute of limitations to pass. Its insured would routinely have no interest in pursuing a claim against a wrongdoer who in all likelihood has no money as well as no insurance. ***

Then, under the upside-down interpretation of making UM payment conditional on preservation of subrogation rights, the insurer would be free of its obligation to pay UM benefits."

¶ 27 For this argument, Kolich relies on *Richter v. Standard Mutual Insurance Co.*, 279 Ill. App. 3d 501 (1996). In that case an insured with \$100,000 in insurance coverage collided with a motorist with only \$50,000 in coverage. After notifying the insurer about the accident and the insufficient coverage for the other driver, the insured settled its claim against the other driver for the \$50,000 policy limits. The insurer refused to pay the insured anything under its underinsured motorist provision, and the insured sued for a judgment declaring that she had not breached the policy. The appellate court held that because the other driver knew about the plaintiff's interest in the suit, and the settlement did not specifically mention any release of the plaintiff's subrogation rights, the settlement did not prejudice or affect in any way the insurer's right to subrogation. *Richter*, 279 Ill. App. 3d at 507-08. Thus, the holding of *Richter* has no application here, where Kolich's acts had prejudicial effect on Safeway's rights.

¶ 28 In the course of the opinion, the *Richter* court quoted the following passage from *Illinois Law and Practice*:

"Where a person stands by and sees another about to commit, or in the course of committing, an act infringing on his rights and fails to assert his title or right, he will be estopped afterward to assert it. 18 Ill. L. & Prac. *Estoppel* § 30, at 102 (1956)." *Richter*, 279 Ill. App. 3d at 508.

The *Richter* court then noted particularly that the court that decided *Standard Mutual Insurance Co. v. Petreikis*, 183 Ill. App. 3d 272 (1989), applied the estoppel principles it found in *Illinois Law and Practice*.

¶ 29 In *Petreikis*, the defendant suffered extensive injuries in a car accident with an underinsured motorist who had only \$15,000 in coverage. The defendant reached a settlement of all claims against the underinsured motorist for the \$15,000 liability limits. The plaintiff, the defendant's insurer, sought a judgment declaring that it had no duty to pay the defendant's claim for benefits under the underinsured motorist provision of its policy, because the settlement prejudiced its right to subrogation. The trial court granted the insurer the judgment it sought.

¶ 30 On appeal, the defendant argued that the trial court should have estopped the plaintiff from denying coverage because the defendant informed the plaintiff of the negotiations with the underinsured motorist and the plaintiff did not tell the defendant not to settle the claim. In response to a letter about the underinsured motorist's limited coverage and the offer of \$15,000 in settlement, the plaintiff wrote:

"When the primary carrier has tendered their policy limits, we will need proof of their policy limits, plus a copy of any investigative

material you have which would provide us information upon which we can evaluate this entire claim and thereafter we will attempt an evaluation if we are required to do so." *Petreikis*, 183 Ill. App. 3d at 281.

¶ 31 The court quoted the passage from *Illinois Law and Practice* that the *Richter* court quoted and said:

"Estoppel implies the prejudicial reliance of the insured upon some act, conduct, or nonaction of the insurer. An estoppel may be found even though the insurer neither intended to mislead, nor to relinquish its own rights. Nevertheless, to establish an estoppel, the insured must show that (1) it was in some manner misled by the acts or statements of the insurer or its agents; (2) it relied on this conduct or misrepresentation; (3) such reliance was reasonable; and (4) it was prejudiced thereby. ***

* * *

*** Regardless of plaintiff's intention, if there was conduct on plaintiff's part which misled defendants, and defendants reasonably relied on the misrepresentation to their prejudice, then estoppel should apply. ***

*** We find [the plaintiff's letter] was not sufficient to justify defendants proceeding with a complete settlement with Olson for his

policy limits without further contact with plaintiff." *Petreikis*, 183

Ill. App. 3d at 280-83.

¶ 32 Here, we find that neither Safeway's acts nor its inaction could have misled Kolich to his detriment. Safeway did nothing to hinder Kolich from finding Espiririon, and Kolich presented no evidence that he had reason to rely on Safeway to help him serve process on Espiririon. Accordingly, under the principles applied in *Petreikis* and restated in *Richter*, we will not find Safeway estopped from arguing that Kolich breached the insurance contract when he failed to serve process on Espiririon.

¶ 33 **CONCLUSION**

¶ 34 Kolich breached the insurance contract with Safeway when he prejudiced Safeway's subrogation rights by failing to serve process on Espiririon. Safeway's failure to help Kolich find Espiririon does not estop Safeway from claiming breach of contract, and Safeway did not waive its right to claim that Kolich breached the contract. Therefore, we affirm the judgment entered in favor of Safeway.

¶ 35 Affirmed.