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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TNI PACKAGING, INC.,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 09-MR-1322
)	
HANOVER INSURANCE COMPANY,)	Honorable
)	Terence M. Sheen,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: Summary judgment in favor of defendant was affirmed where, although coverage was triggered, defendant owed no duty to defend due to the applicability of a policy exclusion.

¶ 1 Plaintiff, TNI Packaging, Inc., appeals from an order of the circuit court of Du Page County granting defendant's, Hanover Insurance Company's, motion for summary judgment. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff is a poultry packaging business located in West Chicago, Illinois. Defendant insured plaintiff pursuant to a comprehensive general liability (CGL) policy, initially from January 15, 2006, through January 15, 2007, subsequently renewed from January 15, 2007, through January 15, 2008. The instant case arose out of defendant's refusal to defend plaintiff in an underlying motion for civil contempt in federal district court in Atlanta, Georgia.

¶ 4 In February 2006, Volk Enterprises, Inc. (Volk), a producer of a line of disposable cooking thermometers that signal when poultry, meat, or fish is done by sensing the food's internal temperature, sued plaintiff in federal district court in Atlanta for patent and trademark infringement. Volk had developed its cooking thermometer under the brand name and registered trademark "POP UP." According to Volk's complaint, plaintiff had a disposable cooking thermometer manufactured for it in China, which was an inferior product to that produced in the United States by Volk. Volk alleged that plaintiff passed off Volk's superior thermometer as plaintiff's by including photographs of the Volk thermometer in plaintiff's advertising.

¶ 5 The CGL policy issued by defendant to plaintiff provided coverage for "personal and advertising injury" caused by an offense arising out of plaintiff's business. Plaintiff had tendered the defense of the suit to defendant, which defended it under a reservation of rights.

¶ 6 In May 2006, plaintiff and Volk entered into a settlement agreement of the underlying suit. The settlement agreement was incorporated into a consent order. By the terms of the settlement agreement and the consent order, plaintiff was to desist from infringing Volk's trademark and patent. However, from January to June 2007, plaintiff continued to infringe by publishing photographs of Volk's thermometers in plaintiff's advertising. Volk filed a motion for civil contempt in the federal suit in which it alleged that it had been harmed by plaintiff's violation of the consent order. Volk

prayed for attorney fees and costs, \$200 per day until plaintiff ceased distribution of its offensive materials, and \$2,500 per day for a 30-day period during which the infringing advertisements had run. After an evidentiary hearing, the district court found plaintiff in civil contempt and awarded Volk its attorney fees and costs plus \$200 per day in coercive sanctions. The district court found that Volk had not proved any compensatory damages.

¶ 7 Plaintiff had tendered the defense of the motion for civil contempt to defendant. In a letter dated September 4, 2007, defendant declined to defend plaintiff on the basis that the civil contempt motion did not seek any damages that would be covered under the CGL policy. Specifically, defendant cited two policy exclusions for its reasons to decline the defense of the motion: that the very first infringement occurred before the policy period began and that the infringement that led to the motion for civil contempt arose out of a breach of contract. Plaintiff then sued defendant in Du Page County, seeking a declaratory judgment that defendant breached its duty to defend plaintiff. The parties filed cross-motions for summary judgment on plaintiff's second amended complaint, and the trial court granted defendant's motion. Following the trial court's denial of plaintiff's motion to reconsider, plaintiff filed this timely appeal.

¶ 8 ANALYSIS

¶ 9 Plaintiff contends that the contempt proceedings were within the scope of the policy's coverage while defendant claims that coverage was never triggered. An insurance company's obligation to provide a defense for its insured depends upon the allegations in the underlying complaint and the applicable provisions of the insurance policy. *Scudder v. Hanover Insurance Co.*, 201 Ill. App. 3d 921, 925 (1990). To determine whether the underlying complaint alleges facts that potentially fall within coverage, courts look to the allegations in the complaint and compare them

to the relevant provisions of the policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Refusal to defend is unjustifiable unless it is clear from the face of the underlying complaint that the facts alleged do not potentially fall within the policy's coverage. *Outboard Marine*, 154 Ill. 2d at 108. In determining whether there is a duty to defend, the allegations of the underlying complaint must be construed liberally, and any doubts must be resolved in favor of coverage. *Scudder*, 201 Ill. App. 3d at 925. An insurer cannot refuse to defend its insured once the duty to defend is triggered. *Home Insurance Co. v. United States Fidelity & Guaranty Co.*, 324 Ill. App. 3d 981, 995 (2001). Rather, the insurer must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage. *Home*, 324 Ill. App. 3d at 995-96.

¶ 10 In construing an insurance policy, the court must ascertain the intent of the parties to the contract. *Outboard Marine*, 154 Ill. 2d at 108. Courts construe the policy as a whole with due regard to the risk undertaken, the subject matter that is insured, and the purposes of the entire policy. *Outboard Marine*, 154 Ill. 2d at 108. If the words used in the policy are unambiguous, courts afford them their plain, ordinary, and popular meaning. *Outboard Marine*, 154 Ill. 2d at 108. However, if the words used are susceptible to more than one reasonable interpretation, they are ambiguous and will be construed in favor of the insured. *Outboard Marine*, 154 Ill. 2d at 108-09.

¶ 11 The parties filed cross-motions for summary judgment in this case, and the trial court granted defendant's motion and denied plaintiff's motion. Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012

IL App (2d) 110195, ¶ 28. When parties file cross-motions for summary judgment, they agree that only a question of law is involved, and they invite the court to decide the issues based on the record. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769 (1993). We review summary judgment rulings *de novo*. *Outboard Marine*, 154 Ill. 2d at 102.

¶ 12 Plaintiff argues that defendant was obligated to afford it a defense of the contempt proceeding, because it fell within the scope of coverage for personal and advertising injury. Plaintiff further maintains that, if defendant had doubts about the potential for coverage, it should have filed a declaratory judgment suit or defended under a reservation of rights. Failing to do either of those things, plaintiff argues, results in defendant being estopped from asserting any policy defenses. We first examine the relevant policy provisions.

¶ 13 Section II A1, styled “business liability,” provided in pertinent part: “We will pay those sums that the insured becomes legally obligated to pay as damages because of ***personal and advertising injury to which this insurance applies.” Subsection b(2) provided that the insurance applies to “personal and advertising injury caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you but only if the offense was committed in the coverage territory during the policy period.” The policy defined “personal and advertising injury” as an “injury *** arising out of *** infringing upon another’s copyright, trade dress or slogan in your advertisement.” The policy exclusions applicable to this case provide that:

“This insurance does not apply to:

Personal and advertising injury [a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

[Personal and advertising injury] arising out of a breach of contract except an implied contract to use another's advertising idea in your advertisement.”

Defendant contends that it was under no obligation to defend plaintiff against the motion for civil contempt, because coverage was never triggered. Defendant argues that the policy covered “damages” but not contempt sanctions. “Damages” was not defined in the policy. However, contrary to the suggestion plaintiff makes in its brief, a policy term is not ambiguous because the term is not defined within the policy. *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 529 (1995). The common, plain, and ordinary meaning of “damages” is “money claimed by, or ordered to be paid to, a person as compensation for loss or injury.” Black’s Law Dictionary 416 (8th ed. 2004). We look to the underlying motion for civil contempt to see if it pleaded “damages.”

¶ 14 The affidavit of Daniel J. Volk, vice-president of Volk, attached to the motion for civil contempt, alleged that plaintiff’s false advertising caused harm to Volk’s reputation in the marketplace. In the motion’s prayer for relief, Volk sought its attorney fees and costs incurred in bringing the motion; \$200 per day from the date of infringement to the date when plaintiff ceased distribution of its offending literature; and \$2,500 per day for the 30-day period during which plaintiff’s offending advertisement had run. Defendant asserts that the motion requested coercive relief only and that Illinois law holds that punitive damages are uninsurable.

¶ 15 Defendant ignores that federal law controls this question. A contempt sanction imposed by a federal court for violation of a federal court order is governed by federal law. *Roe v. Operation Rescue*, 919 F. 2d 857, 869 (3d Cir. 1990). Civil contempt is a unique sanction, because its aim is both coercive and compensatory. *United States Securities & Exchange Comm’n v. Hyatt*, 621 F. 3d

687, 692 (7th Cir. 2010). Civil contempt proceedings are remedial and coercive, not punitive, in their nature. *Boylan v. Detrio*, 187 F. 2d 375, 378 (5th Cir. 1951). If the fine is compensatory, it is payable to the complainant and must be based on proof of the complainant's actual loss. *In re Chase & Sanborn Corp. v. Nordberg*, 872 F. 2d 397, 401 (11th Cir. 1989). The payment of the attorney fees and costs of bringing civil contempt proceedings are "clearly" compensatory to the injured party. *Lance v. Plummer*, 353 F.2d 585, 591 (5th Cir. 1965).

¶ 16 Here, the motion for civil contempt pleaded both coercive and compensatory damages. The request for \$2,500 per day for the 30-day period the infringement took place was a request for compensation for the injury Volk alleged it had suffered.¹ Moreover, the request for attorney fees and costs sought compensatory damages. Accordingly, liberally construing the allegations of the motion—as we must—we agree with plaintiff that coverage was triggered.

¶ 17 Plaintiff concludes that because coverage was triggered, defendant's refusal to defend it breached the insurance contract. Plaintiff relies on the estoppel doctrine, which provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy may not simply refuse to defend but must defend under a reservation of rights or seek a declaratory judgment that there is no coverage or be estopped from raising policy defenses to coverage. *Gould & Ratner v. Vigilant Insurance Co.*, 336 Ill. App. 3d 401, 405-06 (2002). However, the estoppel doctrine applies only if the insurer has wrongfully denied coverage.

¹Our determination that the motion sought compensatory damages is supported by the fact that the district court found that Volk had failed to prove them, indicating the issue was before the district court in the contempt proceedings.

Employers Insurance of Wausau v. Ehlco Liquidating Trust, 186 Ill. 2d 127, 150 (1999). To determine this issue, we must look at the exclusions defendant urges.

¶ 18 Our duty liberally to construe any doubts as to coverage in favor of the insured applies particularly where the insurer seeks to avoid coverage based upon an exclusion in the policy. *Oakley Transport, Inc. v. Zurich Insurance Co.*, 271 Ill. App. 3d 716, 722 (1995). The applicability of the exclusion must be clear and free from doubt. *Oakley*, 271 Ill. App. 3d at 722. The allegations in the underlying complaint are dispositive of the insurer's duty to defend, and not the findings of the underlying litigation. *Oakley*, 271 Ill. App. 3d at 719.

¶ 19 Here, the exclusion of coverage for an injury arising out of a breach of contract is applicable. Plaintiff and Volk entered into a settlement agreement, which was incorporated into the consent order. Under Illinois law, consent decrees entered by courts to effectuate settlements are considered contracts between the parties, and the law of contracts controls their interpretation. *People v. Scharlau*, 141 Ill. 2d 180, 195 (1990). Similarly, federal law treats consent orders as contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975) (“Since consent decrees and orders have many of the attributes of ordinary ***contracts, they should be construed basically as contracts.”). In the present case, defendant denied coverage, in part, on the basis that the policy excluded injuries arising out of breach of contract. Plaintiff does not dispute that the consent order must be treated as a contract but contends that Volk's injury arose out of a further intellectual property infringement, not a breach of the consent order. Plaintiff reasons that the motion for civil contempt, alleging a violation of the consent order, was but one possible cause of action Volk could have brought to redress the wrong. Plaintiff's argument is without merit. Illinois law has long held that an insurer's duty to defend an action brought against the insured is determined *solely* by

reference to the allegations of the complaint. (Emphasis added). *Pekin*, 2012 IL App (2d) 110195, ¶ 35.

“Illinois adheres to an ‘eight corners’ analysis when determining a carrier’s duty to defend, where the court compares the four corners of the complaint with the four corners of the insurance policy to determine whether facts alleged in the underlying complaint fall within or potentially within coverage.” *Pekin*, 2012 IL App (2d) 110195, ¶ 35.

Thus, whatever other causes of action Volk might have had, our duty is to examine the pleading it actually filed against plaintiff. After all, plaintiff asked defendant to defend it against the motion for civil contempt, not any other possible cause of action. In the motion for civil contempt, Volk pleaded the existence of the consent order and alleged the factual basis underlying the claimed violation. In paragraph 7 of the motion, Volk alleged that “[TNI] is violating the Order by displaying and continuing to display images of Volk’s products ***.” The applicability of the exclusion is clear and free from doubt.

¶ 20 Because we determine that defendant did not wrongfully deny coverage, it follows that defendant is not estopped from asserting its policy defenses. Since we hold that defendant owed plaintiff no duty to defend based upon the breach-of-contract exclusion, we need not address the second exclusion, which is based upon an injury prior to the commencement of the policy period. Nor need we address plaintiff’s argument that it is entitled to damages from defendant for wrongfully denying coverage.

¶ 21 Accordingly, the trial court properly entered summary judgment in favor of defendant, properly denied plaintiff's motion for summary judgment, and the judgment of the circuit court of Du Page County is affirmed.

¶ 22 Affirmed.