2013 IL App (1st) 112888-U

FOURTH DIVISION
February 14, 2013

No. 1-11-2888

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 JUDICIAL DISTRICT

JOZEF LAS,	)	Appeal from the
	)	Circuit Court of
Plaintiff,	)	Cook County
	)	
v.	)	
	)	
JAMES McHUGH DEVELOPMENT	)	
COMPANY, an Illinois Corporation, *et al.,*	)	
	)	
Defendants,	)	
	)	
JAMES McHUGH CONSTRUCTION	)	No. 09 L 8536
COMPANY, an Illinois Corporation,	)	
	)	
Defendant and Third-Party	)	
Plaintiff-Appellant,	)	
	)	
(MASTERSHIP CONSTRUCTION COMPANY,	)	
INC.,	)	
	)	
Third-Party	)	
Defendant-Appellee,	)	
	)	
EMC INSURANCE COMPANIES,	)	The Honorable
	)	Lynn M. Egan
Intervenor.)	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justice Fitzgerald Smith concurred in the judgment.
Justice Pucinski dissented.

ORDER

¶ 1 *Held*: The trial court erred by finding the general contractor waived the subcontractor's alleged failure to obtain the contractually required insurance where the certificate of insurance tendered to the general contractor did not reveal the alleged defect at issue.

¶ 2 This interlocutory appeal arises from a dispute between James McHugh Construction Company (McHugh), a general contractor, and Mastership Construction Company, Inc. (Mastership), a subcontractor, regarding the latter entity's alleged failure to procure the contractually required insurance for a construction project. The trial court granted Mastership's motion to dismiss McHugh's claim that Mastership breached the subcontract by failing to obtain the requisite insurance and subsequently denied McHugh's motion for reconsideration. Specifically, the trial court found McHugh waived any defect in the insurance procured where McHugh, after receiving a certificate of insurance from Mastership, allowed it to perform its work under the contract and issued a final payment. On appeal, McHugh asserts that the trial court erred in finding McHugh had waived any deficiency in the insurance procured by Mastership because the defect at issue did not appear on the certificate of insurance and Mastership learned of the defect only when Mastership's insurance company denied coverage. We reverse the judgment and remand for further proceedings.

¶ 3 This dispute began in 2009 when Jozef Las, an employee of Mastership, filed an action against McHugh as well as James McHugh Development Company, which is not a party to this appeal. In his amended complaint, Las alleged, in pertinent part, that he sustained permanent injuries on September 8, 2005, when he fell from scaffolding while working at

the Battle Stations 21 Facility project at Great Lakes Naval Base and Naval Air Force Station in Great Lakes, Illinois. Las attributed his injuries to McHugh's negligence. The trial court subsequently granted the petition of EMC Insurance Companies (EMC), Mastership's workers' compensation insurer, to intervene as Mastership's subrogee. EMC alleged that Las had also initiated a workers' compensation action against Mastership.

¶ 4 In March 2010, McHugh filed a two-count, third-party complaint against Mastership, seeking contribution from Mastership and also asserting that it breached the subcontract by failing to procure insurance that would name McHugh as an additional insured on Mastership's commercial general liability policy "pursuant to ISO form CG2010-1158 or equivalent endorsement." McHugh alleged that when it sought insurance coverage in August 2009, EMC advised McHugh that coverage was not available because the subject policy was endorsed with coverage form CG7482 (12-00), rather than the contractually required insurance.

¶ 5 Attached to the third-party complaint was the subcontract, which states, in pertinent part, as follows:

"Subcontractor agrees to obtain and submit to Contractor, and to cause all of its subcontractors to obtain and submit to Contractor, within seven (7) days of the date hereof and in any event before commencing work hereunder policies or certificates of insurance issued by a company or companies acceptable to Contractor showing the insurance coverage required by Schedule 'B' (Insurance

Requirements Bulletin), attached hereto.

Each of the aforesaid policies shall name Contractor and such other parties designated on Schedule 'B' as additional insured parties and shall provide that it is primary to any general liability insurance maintained by Contractor or any other additional insured party and also that it may not be canceled or changed except upon thirty (30) days notice in writing to Contractor."

Schedule B states that the minimum limits for commercial general liability required were $2 million for each occurrence and $2 million for general aggregate. Schedule B further states that Mastership's "policies shall be primary for the benefit of the additional insureds and on ISO Form CG20101185 or equivalent coverage."

¶ 6 Also attached to the complaint was a certificate of insurance dated June 14, 2005, that listed Illinois Emcasco Ins. Co. (Emcasco) as the insurer,[1] and stated that the policies covered the period between June 11, 2005, and June 11, 2006. As to commercial general liability, the certificate stated that the limit for each occurrence was $1 million and the general aggregate limit was $2 million. In addition the certificate stated that McHugh was an "Addl Insds Primary Non-Contributory (CG7193) as respects General Liab Policy." The certificate's disclaimer further stated that the certificate was "a matter of information only and confers no rights upon the certificate holder."

¶ 7 In January 2011, Mastership moved to dismiss McHugh's breach of contract claim

[1]Although the record does not identify the relationship between EMC and Emcasco, both entities are referred to as being Mastership's insurer in this matter.

pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)), arguing that Mastership had complied with the insurance procurement provisions of the subcontract or alternatively, McHugh waived the insurance requirements. Specifically, Mastership argued that as evidenced by the certificate of insurance, Mastership had asked its insurance agent to add McHugh as an additional insured to Mastership's commercial general liability policy. In support of this argument, Mastership attached the affidavit of its president, Michael Juszczyk, who made the same allegation. Although Juszczyk alleged that the certificate of insurance was submitted to McHugh, Juszczyk did not allege that McHugh received the policies themselves. In addition, the motion argued that McHugh waived its breach of contract claim because McHugh did not raise any defects when it received the certificate of insurance provided by Mastership, but rather, permitted Mastership to perform services. Mastership alleged that it completed its work and received a final payment in June 2008.

¶ 8 McHugh responded that "at the time MASTERSHIP was hired to do the work at issue MCHUGH was led to believe that Mastership had complied with its contract by MASTERSHIP providing a certificate of insurance identifying coverage consistent with that required by contract. EMCASCO denied that the coverage represented was actually provided." In addition, McHugh argued that whether Mastership breached the contract by not procuring the requisite insurance essentially turned on whether Emcasco's declaratory action was successful. McHugh further argued that a ruling that Emcasco did not owe McHugh coverage "would indicate MASTERSHIP breached its contract by misleading

MCHUGH into believing that the appropriate coverage was provided by evidence of the exhibits attached to the motion to dismiss, when in fact, it had procured different coverage."

¶ 9 Attached to the response was correspondence between EMC and McHugh. During this correspondence, EMC acknowledged that McHugh was an additional insured but stated that an exclusion applied to Las's action against McHugh for "the additional insured's sole or contributing cause of the loss." EMC observed that Las's allegations were directed solely against McHugh. In a subsequent letter, EMC stated that while the certificate of insurance provided that McHugh was an additional insured under form CG7193, the policy was changed to add endorsement CG7479, which contained limitations to coverage. EMC's representative further stated that "[s]ince there is a question in my mind as to which form should apply to McHugh's request for coverage, we are obtaining an opinion from independent coverage counsel." The correspondence reflects that EMC ultimately denied coverage, stating that the policy had been endorsed with coverage form CG7482, which placed limitations on coverage.

¶ 10 The trial court granted Mastership's motion to dismiss pursuant to 2-619(a)(9). The court found that a genuine issue of material fact existed regarding whether Mastership complied with the subcontract but the court was persuaded by Mastership's contention that McHugh waived any deficiency in insurance. In addition, the court found that McHugh did not contest Mastership's waiver argument and concluded that "there is no issue of fact about whether Mastership's conduct in procuring insurance and tendering

certificates of insurance were satisfactory as any deficiencies were impliedly waived by McHugh when it allowed Mastership to complete all work without raising the issue."

¶ 11 The trial court subsequently denied McHugh's motion to reconsider, which had essentially argued that McHugh had not addressed Mastership's waiver argument because that argument was based on the erroneous position that McHugh believed the certificate of insurance revealed the alleged defective in the insurance procured by Mastership. McHugh now appeals.

¶ 12 On appeal, McHugh challenges the dismissal of its breach of contract claim and subsequent denial of its motion to reconsider. Specifically, McHugh contends that the trial court erroneously determined that McHugh waived Mastership's failure to obtain the insurance required by the subcontract.

¶ 13 A motion to dismiss under section 2-619(a)(9) admits the complaint's legal sufficiency but raises defenses, defects or other affirmative matters that defeat a claim. *Gibbs v. Top Gun Delivery and Moving Services, Inc.*, 399 Ill. App. 3d 765, 769 (2010). In ruling on the motion, the trial court must construe the pleadings as well as the supporting documents in the light most favorable to the nonmovant. *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). On appeal, the relevant question is whether a genuine issue of material fact existed that should have precluded dismissal or, whether the dismissal was proper as a matter of law in light of the absence of such an issue. *Id*. at 17-18. We review the trial court's ruling on a motion to dismiss *de novo*. *Gibbs*, 399 Ill. App. 3d at 769. In addition, the purpose of a motion to reconsider is to bring to the trial court's

attention changes in the law, newly discovered evidence or errors in the court's prior application of the law. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 29. Although a reviewing court generally will not reverse the trial court's decision to deny a motion for reconsideration absent an abuse of discretion (*Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 17), we review a motion to reconsider based on the trial court's misapplication of existing law *de novo* (*Bank of America, N.A. v. Ebro Foods, Inc.*, 409 Ill. App. 3d 704, 709 (2011)).

¶ 14 As a threshold matter, Mastership contends that the trial court properly found McHugh forfeited its challenge to Mastership's assertion that any defect in its procurement of insurance was waived. Specifically, Mastership argues that McHugh failed to even use the word "waiver" in its response to the motion to dismiss and addressed waiver for the first time in its motion to reconsider. See *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41 ("A party may raise a new issue for the first time in a motion to reconsider only when a party has a reasonable explanation for why it did not raise the issue earlier in the proceedings"); *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1022 (2007).

¶ 15 In its motion to dismiss, Mastership raised the issue of whether McHugh waived any defect in the procurement of insurance. Accordingly, it is inaccurate to characterize this as a "new issue" raised by McHugh in its motion to reconsider. In addition, while McHugh did not actually use the word "waiver" in its response to the motion to dismiss, it's position on this issue was apparent. Although it might be advisable for McHugh to

respond to its opponent's arguments in a more direct manner, for clarity's sake, the essence of McHugh's response was that the certificate of insurance did not notify McHugh of noncompliance with the contractual insurance requirements, but rather, misled McHugh to believe that Mastership had complied by obtaining adequate insurance. In addition, McHugh's response substantially argued that contrary to the insurance reflected in the certificate, Emcasco ultimately declined coverage, placing the accuracy of the certificate of insurance in doubt for the first time. Under these circumstances, where the issue of waiver was clearly before the court, where Mastership had the opportunity to convey its position and where McHugh's position may be easily deciphered from its response, we find the application of forfeiture would be inappropriate. Accordingly, we now turn to McHugh's contention that the trial court improperly found McHugh waived the contractual insurance requirements.

¶ 16 Waiver occurs upon the intentional, voluntary relinquishment of a known right. *Lavelle v. Dominick's Finer Foods, Inc.*, 227 Ill. App. 3d 764, 771 (1992). Although waiver can be implied, the intention to waive must nonetheless be clearly inferred from the circumstances. *Id*. In addition, a party may demonstrate implied waiver where the other party's conduct is inconsistent with any intention other than waiver. *Lehman v. IBP, Inc.*, 265 Ill. App. 3d 117, 120 (1994). Specifically, implied waiver may arise where (1) the party's unexpressed intention to waive his right can be clearly inferred from the surrounding circumstances; or (2) the party's conduct has misled the other party to reasonably believe that waiver has occurred. *Batterman v. Consumers Illinois Water Co.*,

261 Ill. App. 3d 319, 321 (1994).

¶ 17 In *Lavelle*, the reviewing court rejected the movant's argument that the nonmovant impliedly waived the contractual requirement that the movant provide insurance. *Lavelle*, 227 Ill. App. 3d at 771. Specifically, the reviewing court found that the nonmovant's alleged intent to waive the contractual provision requiring the movant to procure insurance could not be inferred, notwithstanding that the movant had provided a certificate insurance that did not name the nonmovant as an additional insured and that the movant was allowed to complete its work without procuring insurance. *Id.*; but see *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372, 374, 389-91 (1992) (the requirement that the contractor provide a certificate of insurance and obtain insurance before beginning work was waived where the contractor was allowed to begin working without submitting the certificate of insurance and was paid in full); *Whalen v. K-Mart Corp.*, 166 Ill. App. 3d 339, 344 (1988) (contractual provision requiring proof of insurance was waived where the general contractor failed to demand proof of insurance before the subcontractors commenced work and the subcontractors were paid in full). The court also found the movant had not suggested it was misled by a reasonable belief that waiver had occurred. *Lavelle*, 227 Ill. App. 3d at 771. Although the reviewing courts' findings of waiver in *Geier* and *Whalen* arguably conflict with the principles set forth in *Lavelle*, *Batterman* and *Lehman*, the appellate court has twice held that the holdings of *Geier* and *Whalen* are limited to the specific facts in those respective cases. *Batterman*, 261 Ill. App. 3d at 321; *Lehman*, 265 Ill. App. 3d at 120. In any event, the

facts before us differ from *Geier* and *Whalen* and are more compelling than *Lavelle*, as here, McHugh received a certificate of insurance stating that it was an additional insured.

¶ 18 The question before us is whether the certificate of insurance put McHugh on notice that it was not insured under Mastership's policy, as required by the subcontract, so that McHugh's unexpressed intention to waive its right can be clearly inferred from the surrounding circumstances or that its conduct can be said to have led Mastership to reasonably believe that waiver had occurred. *Cf.* also *Owners Insurance Co. v. Seamless Gutter Corp.*, 2011 IL App (1st) 082924-B, ¶¶ 32-40 (addressing whether the general contract was entitled to coverage, rather than whether the general contractor waived the subcontractor's noncompliance). We find the certificate of insurance did not provide McHugh with such notice. The subcontract required, in pertinent part, that Mastership obtain general liability coverage for McHugh as an additional insured "on ISO Form CG20101185 or *equivalent in coverage*." It is undisputed that the certificate identified McHugh as an additional insured. *Cf. Owners Insurance Co.*, 2011 IL App (1st) 082924-B, ¶ 39 ("The fact that the certificate at issue in this case did not refer to Westfield as an additional insured should have alerted Westerfield that there was some question as to its additional-insured status.") Juszczyk, Mastership's president, alleged that after he had Mastership's insurance agent add McHugh to Mastership's commercial general liability policy and umbrella policy, the certificate of insurance was submitted to McHugh. Although Mastership argues that McHugh failed to rebut Juszczyk's affidavit, there would be no reason for McHugh to do so because McHugh substantially agrees with the

affidavit.

¶ 19 McHugh does not dispute that the coverage reflected on the certificate of insurance was the equivalent of ISO Form CG20101185 but rather, McHugh argues that the insurance actually procured was not accurately reflected on the certificate of insurance. Specifically, McHugh states that "[t]he Certificate of Insurance furnished by Mastership prior to commencement of the work was proper; however, Mastership never procured the insurance as provided in the Certificate of Insurance, thereby breaching *** the Subcontract." In addition, the correspondence between McHugh and the insurance company somewhat corroborates McHugh's position that the limitations on the policy were not evident from the certificate of insurance.

¶ 20 The pleadings indicate that McHugh first learned of the limitation on coverage when it tendered its defense to Emcasco, after Mastership had already completed work and received its final payment. Nothing in the record shows that McHugh would have been put on notice of the limitation or had reason to even suspect that further inquiry was necessary prior to the denial of coverage. If anything, the certificate of insurance may have misled McHugh into a false sense of security. Although the amount of coverage per each occurrence on the certificate differed from the amount required by the subcontract, McHugh is challenging the absolute denial of coverage under these circumstances, not the amount. Thus, this monetary discrepancy has little relevance to the inquiry before us.[2] In

[2] The certificate of insurance did not indicate that McHugh was an additional insured under the umbrella policy; however, the record is equivocal as to the insurance company's view of that matter.

addition, although the certificate of insurance's disclaimer may be relevant to determining the insurance company's duty to defend McHugh, it cannot be said to have triggered any obligation for McHugh to obtain the relevant policies themselves to prevent a finding of waiver. *Cf. Owners Insurance Co.*, 2011 IL App (1st) 082924-B, ¶¶ 34-40. Furthermore, the subcontract required Mastership to submit "policies *or* certificates of insurance *** showing the insurance coverage required (emphasis added)," not both. Contrary to Mastership's suggestion, McHugh, having received a certificate of insurance showing no unacceptable deviation from the contractually required insurance, had no contractual basis to demand seeing the policies as well. More importantly, the contract did not impose upon McHugh the burden to do so.

¶ 21 Given that the certificate of insurance did not alert McHugh to the alleged deficiency in the policy actually obtained by Mastership, it follows that no intent to waive the required insurance can be inferred from these circumstances. Similarly, Mastership could not have reasonably believed that McHugh intended to waive those rights. Thus, the trial court incorrectly applied the principles of waiver in this instance and erred by dismissing McHugh's breach of contract claim under section 2-619(a)(9). Accordingly, we reverse and remand for further proceedings.

¶ 22 Reversed and remanded.

¶ 23 JUSTICE PUCINSKI, dissenting.

¶ 24 With respect to the opinion of the majority, I disagree.

¶ 25 I am concerned about relying on *LaVelle* because from the opinion we cannot tell if the

certificate of insurance at issue included a disclaimer requiring the additional insured to check the full policy to determine if coverage is satisfactory, which makes it distinguishable.

¶ 26 Since then our court has decided *Owners Insurance v. Seamless Gutter Corp*., 2011 IL App (1st) 082924-B, in which the impact of such disclaimers is reiterated, that if the certificate has a disclaimer the contractor must look at the policy, and in which we held that the disclaimer was significant:

> "Our court has recognized two lines of cases addressing the issue of coverage where there is a certificate of insurance separate from the policy itself. Where the certificate did not refer to the policy and the terms of the certificate conflicted with the terms of the policy, the certificate language governed the extent and terms of the coverage. Where the certificate referred to the policy and expressly disclaimed any coverage other than that contained in the policy itself, the policy governed the extent and terms of the coverage. *United Stationers Supply Co. v . Zurich American Insurance Co*., 386 Ill. App. 3d 88, 102 (2008) (cases cited therein).
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> * * *
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> ***The fact that the certificate at issue in this case did not refer to Westfield as an additional insured should have alerted Westfield that there was some question as to its additional-insured status, requiring it to review the policy and bring the discrepancy to Seamless' or Owners' attention. There was no evidence that Westfield ever requested to view the CGL policy to verify its status as

an additional insured." *** *Owners*, 2011 IL App (1st) 082924-B at ¶¶ 34, 39.

¶ 27 *Owners* was a coverage case and we found that *Owners* did not have a duty to defend Westfield because Westfield was not an additional insured.

¶ 28 In McHugh there is a certificate with a disclaimer. The certificate clearly shows that McHugh is an additional insured but it also clearly shows that the coverage for each occurrence is $1 million, not the $2 million required by the contract, and the policy itself indicates that McHugh is not covered at all if any injury results from its own negligence, which is why the insurance company is denying coverage in the chancery case.

¶ 29 Mastership's section 2-619 motion to dismiss count II is based on McHugh's waiver of the insurance requirement as a defense to McHugh's breach of contract claim. It is, I think, clear that waiver is an acceptable defense to a breach of contract claim, but then the questions are: (1) was there a waiver in THIS case; and (2) did McHugh give up or waive the waiver argument of Mastership by failing to rebut the affidavit of Juszczyk.

¶ 30 Answering the first question: since the certificate's disclaimer required looking at the full policy to determine if coverage was satisfactory and McHugh either did not (there is no record of McHugh asking for or looking at the policy) or looked at it but didn't call attention to the deficiencies, then I think under *Owners*, McHugh did waive the full insurance coverage, and even if it didn't, answering the second question, under the waiver of argument theory, McHugh failed to rebut the affidavit of Juszczyk, which means we are, like the trial court, obligated to accept it as true.

¶ 31 For the above reasons, I would not rely on *LaVelle* and would find that in this case, where

the difference between $1 million and $2 million is noticeable, where the certificate's disclaimer required a reading of the full policy, where McHugh took no other steps to assure compliance with the contract, and where there were no further negotiations or actions to persuade Mastership that McHugh was unsatisfied with the insurance, I would find for Mastership.