2013 IL App (1st) 121338-U

FIRST DIVISION
FILED: June 24, 2013

No. 1-12-1338

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIA COLELLA, as Special Adm'r of the Estate of Francesco Colella, Deceased, Plaintiff-Appellant, v. OCCIDENTAL FIRE & CASUALTY COMPANY, Defendant-Appellee, (Harco Insurance Services, Inc. and IAT Reinsurance Company, Ltd., Defendants).	)	Appeal from the Circuit Court of Cook County. No. 10-CH-45124 Honorable Alexander P. White, Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of insurer was proper where the insurer's "offer to pay" letter was a sufficient offer to tender and satisfied its policy obligations, thereby terminating its obligation to pay postjudgment interest.

¶ 2 This case involves a garnishment action filed by the plaintiff, Maria Colella, as Special Administrator of the Estate of Francesco Colella, deceased (Colella), against the defendant,

Occidental Fire and Casualty Company (Occidental), following the entry of judgment against Occidental's insureds in a negligence lawsuit, and Occidental's declaratory judgment action, which sought a ruling that its obligation to pay postjudgment interest terminated when it offered to pay Colella the policy limit and interest in a written letter dated June 15, 2007. Both parties filed motions for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)). Colella appeals the circuit court order which granted summary judgment in favor of Occidental and denied her cross-motion. We affirm.

¶ 3 On January 3, 2004, Colella's husband, Francesco, died after being hit by a truck at a construction site in Chicago. Shortly thereafter, she filed a wrongful death and survival action against the truck's owner, JMS Trucking Company (JMS), and its employee, Samuel Inendino. At the time of the accident, JMS and Inendino were insured by an Occidental commercial auto liability policy, which had a liability limit for bodily injury of $1,000,000 per accident. The policy provision relevant to this appeal relates to "Supplementary Payments," and provides:

> "In addition to the Limit of Insurance, we will pay for the insured:
>
> * * *
>
> (5) All costs taxed against the 'insured' in any 'suit' against the 'insured' we defend.
>
> (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any 'suit' against the 'insured' we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance."

¶ 4 Occidental agreed to defend JMS and Inendino and retained attorney Gary Feiereisel to

represent them in the wrongful death action. On May 1, 2007, the jury awarded Colella $8,338,140. The judgment order did not award costs to Colella, and she never filed any petition to modify the judgment to include costs or otherwise move to have costs taxed against JMS and Inendino.

¶ 5 On June 15, 2007, Feiereisel sent a letter to Colella's counsel, Kevin Veugeler, stating:

> "Following up on our conversation in court on June 14, 2007, this will confirm that [Occidental] has offered to [Colella] its full insurance policy limits of one million dollars plus accrued interest to date with respect to the judgment order entered on May 1, 2007 and is willing to pay that amount on [Colella's] request. If you have any questions, please contact me."

¶ 6 It is undisputed that Colella received Feiereisel's letter and did not respond to it. In October 2007, JMS filed for bankruptcy, which triggered an automatic stay of enforcement of the wrongful death judgment. As part of the bankruptcy proceeding, Inendino assigned to Colella his right to pursue bad faith claims against Occidental. An order lifting the automatic stay was entered by the bankruptcy court in February 2008 to allow Colella to file her bad faith claim against Occidental. The bad faith lawsuit remains pending in the circuit court. *Estate of JMS Trucking, Bankrupt, et al. v. Occidental Fire & Casualty Company, et al.,* Case No. 08-L-5244 (Cir. Ct. Cook Cty.).

¶ 7 Another order partially lifting the automatic stay was entered to allow the wrongful death action to proceed on appeal. In October 2008, while the appellate proceedings were pending, Occidental filed in the circuit court an emergency motion to deposit with the court the $1,000,000 policy limit plus $96,631.06 for postjudgment interest through June 16, 2007, and a petition to intervene in order to obtain an order that its June 15 letter terminated its responsibility to pay

postjudgment interest which Colella might be entitled to receive from JMS and Inendino under section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2008)). Colella objected, arguing Occidental's June 15 offer was conditional and did not include costs. The circuit court allowed Occidental to intervene and denied its petition on January 27, 2009, finding that the offer did not include costs and therefore was not a true tender. On February 3, 2009, Colella sent Occidental a letter requesting costs in the amount of $2,811.30.

¶ 8 Occidental appealed that order. Because Occidental failed to seek relief from the automatic stay in the bankruptcy court, this court determined that we lacked jurisdiction to reach the merits of the appeal. We vacated the circuit court's order, instructing the court to dismiss Occidental's petition to intervene for want of jurisdiction. *Colella v. JMS Trucking Co. of Ill., Inc.,* No. 1-09-0473 (2010) (unpublished order under Supreme Court Rule 23). On the same day, this court affirmed the jury verdict in the wrongful death suit. *Colella v. JMS Trucking Co. of Ill., Inc.*, 403 Ill. App. 3d 82, 932 N.E.2d 1163 (2010).

¶ 9 On October 8, 2010, Colella filed a supplemental garnishment action against Occidental, seeking recovery of the $8,338,140 judgment, $2,811.30 in costs, and the postjudgment interest that she claimed had accrued and was continuing to accrue against JMS and Inendino. See *Marcheschi v. P.I. Corp.,* 84 Ill. App. 3d 873, 879, 405 N.E.2d 1230 (1980) ("In determining the rights of a judgment creditor against a garnishee, the judgment creditor stands in the shoes of the judgment debtor.").

¶ 10 The bankruptcy court again entered an order lifting the automatic stay to allow Occidental to seek an adjudication of its postjudgment interest obligation in a declaratory judgment action

pursuant to section 2-701 of the Code (735 ILCS 5/2-701 (West 2010)); that order extends to any appeals related to the action. Occidental filed its complaint on October 15, 2010, alleging that its June 15 letter satisfied the requirements of its Supplemental Payments provision, thereby terminating its obligation to pay any postjudgment interest that accrued after that date.

¶ 11 The declaratory judgment and the garnishment actions were consolidated in the circuit court. On April 26, 2011, Occidental moved for summary judgment on its declaratory judgment action. On June 8, 2011, Colella responded to Occidental's motion and filed a cross-motion for summary judgment, arguing that the June 15 letter was merely an "offer to settle," not a tender, because it failed to offer to pay Colella's costs and impermissibly conditioned payment upon her acceptance of the amount in full satisfaction of the judgment. In support of her argument that Occidental's offer was conditional, Colella attached an affidavit from Veugeler. In his affidavit, Veugeler states that he spoke to Feiereisel on June 14, 2007, and Feiereisel indicated that he had the authority to offer the $1,000,000 policy limit as full satisfaction of the claim. Veugeler stated that Feiereisel never indicated that he was tendering the policy limit as partial satisfaction of the judgment, never offered to pay costs, and never requested an itemization of costs. Occidental submitted a counter-affidavit from Feiereisel, in which he denied making the statements contained in Veugeler's affidavit. The court took the matter under advisement on October 18, 2011.

¶ 12 On April 5, 2012, Occidental filed a motion to supplement the record, which included the affidavit of its attorney handling the bad faith litigation. Rebecca Ross states in her affidavit that Veugeler was deposed on March 27, 2012, in connection with the pending bad faith litigation. In that deposition, Veugeler admitted that he received the June 15 letter and that Colella never

requested payment because she did not want to sign a release of any claims. Ross states that Occidental had never before been told that Colella would accept the amount offered in the June 15 letter. Following the deposition, Occidental immediately issued a check to Colella for $1,096,631.06; the $96,631.06 represented postjudgment interest through June 16, 2007. A copy of the check, dated April 3, 2012, was attached to the motion.

¶ 13 On April 12, 2012, the circuit court granted summary judgment in favor of Occidental and denied Colella's cross-motion. First, the court determined that the Supplementary Payments provision required only an "offer to pay," not a tender, to terminate Occidental's obligation to pay postjudgment interest. Because the policy used the "offer to pay" language, the court found it unnecessary to determine whether Occidental's offer was conditional. Second, the court agreed with Occidental that section 2-1303 of the Code did not apply to the judgment debtor's insurer's obligation to cover the postjudgment interest; rather, the insurance policy controlled. Thus, the court determined that Occidental's obligation to pay interest ended on June 15. Third, the court determined that Occidental did not have an obligation to pay Colella's costs because costs were neither included in the judgment order nor taxed by the court clerk against JMS and Inendino. Colella timely appealed.

¶ 14 We note that we have jurisdiction to consider this appeal under Illinois Supreme Court Rule 304(b)(4) (eff. Feb. 26, 2010), which provides that a final judgment entered in a supplementary garnishment proceeding is appealable without the special finding required under Rule 304(a).

¶ 15 Summary judgment is appropriate only when the pleadings, depositions, admissions, and affidavits on file, if any, show that there is no genuine issue of material fact and that the moving

party is entitled to a judgment as a matter of law. *Roe v. Jewish Children's Bureau of Chicago*, 339 Ill. App. 3d 119, 129, 790 N.E.2d 882 (2003). The purpose of summary judgment is not to decide a question of fact but to determine whether one exists. *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769, 629 N.E.2d 133 (1993). While the filing of cross-motions for summary judgment demonstrates that the parties agree that only a question of law is involved, the parties' agreement does not establish that no question of material fact remains and does not require the circuit court to grant summary judgment. *Id.* We may affirm a grant of summary judgment on any basis appearing in the record, regardless of whether the lower courts relied upon that ground. *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307, 315, 821 N.E.2d 269 (2004). We review *de novo* a ruling on a summary judgment motion. *Roe*, 339 Ill. App. 3d at 128-29.

¶ 16 On appeal, Colella argues that the "offer to pay" language in Occidental's policy must be construed as an "offer to tender" and that the June 15 letter was an insufficient tender offer because it failed to include costs, failed to include the interest amount with any specificity, and was conditioned upon her signing a release. Thus, Colello argues that Occidental should be liable for postjudgment interest accrued after June 15. We disagree.

¶ 17 Section 2-1303 of the Code provides that judgments shall accrue interest "from the date of the judgment until satisfied" and that a "judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment nothwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment." 735 ILCS 5/2-1303 (West 2012). Occidental argues that section 2-1303 of the Code has no application here, because, under *Casciola v. Gardner*, 101 Ill. App. 3d 852, 856, 428 N.E.2d 921

(1981), this section of the Code "applies to payment in full by a judgment debtor" and "has no application" to situations "involving an insurance carrier in the process of discharging its policy obligation." In *Casciola*, the court determined that the insurer made a valid offer to tender and the creditor's refusal excused actual tender. *Casciola*, 101 Ill. App. 3d at 855-56. The court made the statement which Occidental relies upon in *dicta*, when it rejected the creditor's argument that actual tender was required under the statute. *Id.* at 856. Thus, we do not find the language in *Casciola* controlling in this case, and we consider the requirements of section 2-1303 of the Code. However, we must construe the statutory rules in light of the insurance policy. *Farmer v. Country Mutual Ins. Co.*, 365 Ill. App. 3d 1046, 1053, 851 N.E.2d 614 (2006) ("We apply postjudgment interest rules in light of the insurance policy provisions in question."); *Halloran v. Dickerson*, 287 Ill. App. 3d 857, 864, 679 N.E.2d 774 (1997) (stating that it must apply the statutory rules "in light of the insurance policy provisions in question").

¶ 18 "Insurance policies are subject to the same rules of construction applicable to other types of contracts." *Nicor, Inc. v. Associated Electric & Gas Insurance Services*, 223 Ill. 2d 407, 416, 860 N.E.2d 280 (2006). Our primary objective is to ascertain and give effect to the intention of the parties as expressed in their agreement. *Id.* In so doing, we construe the policy as a whole, giving the words of the policy their plain and ordinary meaning. *Id.* Where a policy provision is clear and unambiguous, the provision will be applied as written unless doing so would violate public policy. *Id.* at 416-17. "However, if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous and will be construed in favor of the insured and against the insurer who drafted the policy." *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90,

108-09, 607 N.E.2d 1204, 1212 (1992). The construction of the provisions of an insurance policy is a question of law, subject to *de novo* review. *Nicor*, 223 Ill. 2d at 416.

¶ 19 Here, Occidental's policy provides that it is obligated to pay postjudgment interest that accrues after entry of the judgment, until it has "paid, offered to pay or deposited in court the part of the judgment that is within [its] Limit of Insurance." Colella argues that the "offer to pay" language must be construed as an "offer to tender." See *Davis v. Allstate Insurance Co.*, 434 Mass. 174, 184-86, 747 N.E.2d 141 (2001) (construing insurance policy language "offer to pay" as "offer to tender," meaning offer must be unconditional in order to terminate postjudgment interest). Occidental argues its policy language encompasses conditional offers. See *Campbell v. Turner*, 744 So. 2d 1261, 1263 (Fla. 1999) (construing "offer to pay" language to include conditional offers). In the alternative, it argues that its June 15 letter was a sufficient offer to tender because it was an unconditional offer to pay the policy limit and interest. We agree with Occidental's latter argument.

¶ 20 "Tender is 'an unconditional offer to perform coupled with manifested ability to carry out the offer and production of subject matter of tender.' " *Halloran,* 287 Ill. App. 3d at 865 (quoting Black's Law Dictionary 1315 (5th ed. 1979)). In order to stop the accrual of interest under section 2-1303 of the Code, a tender must be unconditional (*id.*) and must include the amount of the judgment, costs and the interest accrued as of the date of the tender (*Yassin v. Certified Grocers of Ill., Inc.*, 133 Ill. 2d 458, 462, 551 N.E.2d 1319 (1990)). While actual tender is generally required under the Code, unless excused by the judgment creditor's rejection of a sufficient offer to tender (*Yassin*, 133 Ill. 2d at 462-63), Occidental's policy limits its obligation to pay postjudgment interest upon its offer to pay its policy limit.

¶ 21 In this case, there is no genuine issue of material fact that Occidental's June 15 letter was unconditional. The offer stated that, upon Colella's request, Occidental would pay the $1,000,000 policy limit plus accrued interest on the judgment to date. Contrary to Colella's position, the written offer contains no language indicating that the offer was conditioned upon her release of the entire judgment. Colella argues that Veugeler's affidavit regarding his June 14 conversation with Feiereisel creates a question of fact regarding whether Feiereisel made a conditional offer to pay. However, regardless of Veugeler's conversation on June 14, there can be no dispute that the written offer on June 15 contained no conditions. No other evidence was presented regarding the condition that Colella argues was a part of the written offer. Based on this record, we cannot say that there is a genuine issue of material fact as to whether the June 15 offer was conditional.

¶ 22 Next, we agree with the circuit court's conclusion that Occidental was not required to pay costs unless such costs had been taxed against the policyholder. Costs were not included in the judgment entered against JMS or Inendino, and Colella never filed a motion for costs pursuant to section 5-108 of the Code (735 ILCS 5/5-108 (West 2006)). See *Halloran*, 287 Ill. App. 3d at 863 (" 'a judgment for costs is as much the judgment of the court as the damages awarded and that interest may therefore be awarded upon the judgment for costs' " (quoting *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 157 Ill. 2d 282, 301, 626 N.E.2d 213 (1993)). Moreover, the provision of the policy that terminates Occidental's obligation to pay postjudgment interest states that its duty to pay interest ends when it has offered to pay the "part of the judgment that is within [its] Limit of Insurance." The provision does not require Occidental to offer to pay costs in order for its postjudgment interest obligation to terminate. Thus, Occidental was not

obligated to pay untaxed costs or to offer to pay untaxed costs in order to stop the accrual of postjudgment interest.

¶ 23 Finally, we reject Colella's argument that Occidental's offer was an insufficient tender offer because it failed to state the interest amount with any specificity, including the interest rate, a calculation of the interest, and time period. The June 15 letter states that Occidental will pay "accrued interest to date with respect to the judgment order entered on May 1, 2007." While cases require an offer to include an offer to pay the postjudgment interest, there is no case that requires the specificity that Colella contends is required. See *Poliszczuk v. Winkler*, 2011 IL App (1st) 101847, ¶ 26 ("Before a letter can be considered an offer for sufficient tender, the letter must clearly offer to pay, within a set time period, all that the judgment creditor is entitled to, which includes the amount of the judgment, interest to the date of payment, and all applicable costs."); *Casciola*, 101 Ill. App. 3d at 853-855 (the insurer's offers to pay were sufficient tender offers, including its verbal offer to pay the "policy limit, interest on the judgment, and 'costs'" and its written offers to pay the policy limit and interest on the judgment from the date of judgment to the date of the verbal offer).

¶ 24 Because Occidental's June 15 letter was a sufficient offer to tender that terminated its obligation to pay postjudgment interest under its policy, summary judgment in favor of Occidental was proper. For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.