2014 IL App (1st) 131598-U

No. 1-13-1598

Fifth Division
June 27, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FCCI INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellant, v. WESTFIELD INSURANCE COMPANY, on Its Own Behalf and as Assignee of Mr. Hawley Insurance Company and Alden Bennett Construction Company, Inc., Defendant and Counterplaintiff-Appellee (Alden Bennett Construction Company, Inc.; Alden Design Group, Inc.; Alden Trails II, LLC; Alden Springs, Inc. d/b/a Alden Trails III, Inc.; The Alden Group, Ltd.; Alden Management Services, Inc.; Alden Realty Services, Inc.; Garbe Iron Works, Inc.; Douglas Iron Works, Inc.; and Vincent Hodor, Defendants).	Appeal from the Circuit Court of Cook County. No. 09 CH 6356 The Honorable LeRoy K. Martin, Jr., Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Where an insurer waited nearly 10 months to file a declaratory judgment action after receiving actual notice of a lawsuit against its additional insured, the trial court properly found that the insurer was estopped from asserting policy defenses to coverage.

¶ 2 The instant appeal arises from the trial court's grant of partial summary judgment in favor of defendant Westfield Insurance Company (Westfield), finding that plaintiff FCCI Insurance Company (FCCI) was estopped from raising any policy defenses to its duty to defend Alden Bennett Construction Company (Alden Bennett) against a personal injury lawsuit filed by Vincent Hodor. On appeal, FCCI argues that it should not be estopped from asserting policy defenses, nor had it waived any policy defenses. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Parties

¶ 5 Alden Bennett was the general contractor for the construction of Alden Trails II Young Adult Facility in Bloomingdale (the construction project). Alden Bennett was the named insured on a general liability insurance policy issued by Mt. Hawley Insurance Company (Mt. Hawley).

¶ 6 In connection with the construction project, Alden Bennett executed a subcontractor agreement with Garbe Iron Works, Inc. (Garbe), by which Garbe agreed to perform certain structural steel work for Alden Bennett. Garbe was the named insured on a general liability insurance policy issued by FCCI and Alden Bennett was an additional insured.

¶ 7 Garbe then executed a purchase order contract with Douglas Iron Works, Inc. (Douglas), by which Douglas agreed to perform certain steel work related to the construction project. Douglas was the named insured on a general liability insurance policy issued by Westfield.

¶ 8 Douglas then executed a purchase order contract with JAK Iron Works, Inc. (JAK), by which JAK agreed to perform certain iron work related to the construction project. JAK was the named insured on a general liability insurance policy issued by Westfield.[1]

¶ 9 Vincent Hodor was an employee of JAK and was working at the construction site on March 26, 2006, when he fell through an opening in the concrete floor and fell 10 to 12 feet, injuring his head, neck, arms, hands, and back.

¶ 10 II. Correspondence After Hodor Injury

¶ 11 A fax sent on July 28, 2006, from Mt. Hawley to FCCI stated: "Attached are two letters that I have forwarded to your insured, Garbe Ironworks, and haven't received a response. Please contact me upon receipt ***." A letter from Mt. Hawley to Garbe dated May 2, 2006, provided that Mt. Hawley was tendering the defense and indemnification of Alden Bennett's claim to Garbe pursuant to Alden Bennett's status as an additional insured under Garbe's insurance policy.

¶ 12 A letter dated August 10, 2006, from FCCI to Mt. Hawley provided:

> "This letter is in reference to the above captioned accident that occurred at the Alden Trails II Young Adult Facility construction site. It is my understanding that an actual claim has not been presented for Mr. Hodor as of this date. Your letter of May 2, 2006 was prompted by the incident report of Mr. Hodor's workers compensation incident report.
>
> In light of the fact that no actual claim has been presented and the facts surrounding the incident are unknown, it would be premature for us to accept your tender of defense and indemnification.

[1] There is no relationship found in the record between Douglas and JAK; both happened to have insurance policies issued by Westfield.

If a claim does develop from this incident please contact us at once with the new claim information and we will re-evaluate your tender."

¶ 13 A fax sent on November 2, 2006, from Mt. Hawley to FCCI provided: "This claim came up for review today. After looking through the file, I see that you have denied our tender request. Although I realize we haven't been placed on notice of a formal claim, I ask that you acknowledge whether our insured is named as an additional insured on your policy. I forsee [*sic*] the workers compensation carrier eventually pursuing a claim down the road. Also, please provide a copy of your insurance policy. If you cannot provide as requested, please provide a written response why."

¶ 14 A letter dated November 14, 2006, from FCCI to Mt. Hawley provides that "[a] review of the contract between Alden Bennett Construction Company and Garbe Iron Works, Inc. reflects that the additional insured language did not add Alden Bennett on a primary non-contributory basis. At this point, it appears that the coverage afforded to Alden Bennett Construction Company would be excess in nature and not cover any of Alden Bennett's own negligence, if there was any. As of this date, there has not been a third party liability claim presented by Mr. Hodor or his attorney. I am also not aware of any type of worker's compensation claim being filed by Mr. Hodor's worker's compensation carrier. I will continue to monitor this case." (Emphasis omitted.)

¶ 15 III. Underlying Lawsuit

¶ 16 On March 19, 2008, Hodor filed a complaint (the underlying lawsuit), against Alden Bennett, several other Alden entities,[2] and Monarch Enterprises, Inc. d/b/a Monarch

[2] The other Alden entities, namely, Alden Design Group, Inc; Alden Trails II, LLC; Alden Springs, Inc. d/b/a Alden Trails III; Alden Group Ltd.; Alden Management Services, Inc.; and Alden Realty Services, Inc.; are not parties to the instant appeal. Accordingly, we do not relate facts relevant only to those entities.

Construction Company (Monarch). The underlying complaint alleges that on March 26, 2006, Alden Bennett and the other Alden entities "were engaged in the design, development, planning, supervision, observation, management of the construction, and construction" of a facility in Bloomingdale known as the Alden Trails II Young Adult Facility. Hodor was an employee of JAK Ironworks, Inc., and was working at the construction site when he fell through an opening in the concrete floor and fell 10 to 12 feet, injuring his head, neck, arms, hands, and back. Hodor brought claims for construction negligence and premises liability against Alden Bennett and the other Alden entities collectively, as well as a claim of construction negligence against Monarch, a carpentry subcontractor at the construction site.

¶ 17 IV. Correspondence After Filing of Underlying Lawsuit

¶ 18 On April 30, 2008, a fax sent from Mt. Hawley to FCCI stated on the cover sheet: "Please review the attached complaint that was recently received in our office. As you'll recall, I previously tendered this file to you based on our additional insured status with Garbe Iron Works. Please provide a written response indicating that you will accept our tender and provide a defense for our insured."

¶ 19 A letter dated June 6, 2008, from FCCI to Mt. Hawley asked for clarification as to whether the April 30 letter was a "target tender," and advised that only Alden Bennett, not Mt. Hawley, could make such a tender. The letter also requested a copy of the certificate of insurance naming Alden Bennett as an additional insured on Garbe's insurance policy and stated that, "[u]pon receipt and review of the documentation requested earlier in this letter, we will formally respond to you in a timely manner."

¶ 20 V. First Amended Complaint in Underlying Lawsuit

¶ 21 On July 1, 2008, Hodor filed an amended complaint in the underlying lawsuit. The amended complaint contained substantially the same allegations as the original complaint, but brought separate claims for construction negligence and premises liability against each defendant instead of discussing them collectively as in the original complaint.

¶ 22 VI. Correspondence After Filing of First Amended Complaint in Underlying Lawsuit

¶ 23 A letter dated August 2, 2008, from Alden Bennett's counsel to FCCI contained the certificate of insurance naming Alden Bennett as an additional insured and the contact between Alden Bennett and Garbe. In response to the letter, FCCI sent a letter dated January 22, 2009, to Alden Bennett's counsel denying Alden Bennett's tender "as the FCCI policy provides only excess coverage to Alden Bennett Construction Company pursuant to its endorsement CGM 3009 (07-03)."

¶ 24 The "endorsement CGM 3009 (07-03)" referenced in the letter refers to an endorsement in the policy numbered CGM 3009 (07-03) and entitled "Blanket Additional Insured Endorsement with Additional Insured Requirement in Contract" (the CGM 3009 endorsement), which provided, in relevant part:

> "Any coverage provided under this endorsement shall be excess over any other valid and collectible insurance, self-insured retention or applicable liability deductible available to or declared by the additional insured, whether primary, excess, contingent or on any other basis unless the written contract or agreement that requires you to add an additional insured on this policy also specifically requires that this insurance be primary."

¶ 25 VII. FCCI Complaint for Declaratory Judgment

¶ 26 On February 13, 2009, FCCI filed a complaint for declaratory judgment, seeking a declaration that it did not owe a duty to defend Alden Bennett or the other Alden entities with regard to the underlying lawsuit. The complaint alleges that, while Alden Bennett was an additional insured under the FCCI policy, the policy provided only excess coverage to Alden Bennett and did not provide primary coverage.

¶ 27 Attached to the complaint were a number of exhibits relevant to the instant appeal, several of which have been related above. Also attached to the complaint for declaratory judgment was a copy of the subcontractor agreement between Alden Bennett and Garbe. Article 13 of the agreement provides that, "[b]efore commencing work Subcontractor must furnish a certificate of insurance from his insurance carrier(s) showing that he has complied with the foregoing provisions of this Article, which certificate shall further provide that the said insurance policies will not be changed or canceled during their terms until at least five days prior written notice to the Contractor has been given, and that the following are added as additional insureds to the general liability policy: Owner, Contractor and/or the Subcontractor, as their interests may appear." The agreement originally provided that the additional insureds were to be added "on a primary and non-contributory basis," but that language was stricken from the executed agreement.

¶ 28 Also attached to the complaint for declaratory judgment was a certificate of insurance for an insurance policy issued to Garbe by FCCI with Alden Bennett "added as Additional Insured on the General Liability [policy] as respects to operations performed by the Named Insured in connection with this project."

¶ 29 Also attached to the complaint for declaratory judgment was a copy of the insurance policy issued by FCCI with Garbe listed as the named insured, several provisions of which are relevant to the instant appeal. In addition to the CGM 3009 endorsement, set forth above, the policy contained an endorsement numbered MG 221 (GL) (05-89) and entitled "Additional Insured – Owners, Lessees or Contractors (Form B) – Primary" (the MG 221 endorsement), which included as an additional insured "[a]ny person or organization (called additional insured) whom you are required to add as an additional insured on this policy under a written contract or agreement pursuant to which a certificate of insurance showing that person or organization as an additional insured has been issued," but "only with respect to liability arising out of 'your work' for that insured or for you. Coverage hereunder does not extend to an additional insured for work performed by the additional insured." With respect to the additional insured, the MG 221 endorsement provided, in relevant part:

> "4. Other Insurance
>
> The insurance afforded by the Coverage Part is primary insurance and we will not seek contribution from any other insurance available to the additional insured shown above unless the other insurance is provided by a sub-contractor of the additional insured. Then we will share with the other insurance by the method described below:
>
> ***"

¶ 30 VIII. Further Amendments to Complaint in Underlying Lawsuit

¶ 31 On April 14, 2009, Hodor filed a second amended complaint in the underlying action, in which Garbe was named as a defendant instead of Monarch, and on October 8, 2009, filed another amendment to the complaint, in which Douglas was added as a defendant. The April

14, 2009, complaint was the first time Garbe, FCCI's named insured, was named as a defendant in the underlying lawsuit.

¶ 32 IX. FCCI Amended Complaint for Declaratory Judgment and "Agreed Order"

¶ 33 On December 16, 2009, FCCI filed an amended complaint for declaratory judgment, adding as defendants Garbe and Douglas Iron Works.

¶ 34 On May 12, 2010, an "agreed order" was entered by the trial court. The order, which was prepared by FCCI's counsel, stated that, "[t]his cause coming to be heard in relation to an agreement between the plaintiff and Alden Bennett Construction Company, Inc., Alden Design Group, Inc., Alden Trails II, LLC, Alden Springs, Inc., Alden Springs, Inc. d/b/a Alden Trails III, Inc., The Alden Group, Ltd., Alden Management Services, Inc., and Alden Realty Services, Inc.," it was ordered that: (1) the other Alden entities withdrew their tender of defense to FCCI, (2) FCCI did not owe a duty to defend nor a duty to indemnify the other Alden entities because they were not insureds under the FCCI insurance policy, (3) "FCCI Endorsement MG 221 (GL) (05-89) affords no coverage to Alden Bennett Construction Company and Alden Trails III, LLC (owner) in relation to the underlying Hodor lawsuit pursuant to Endorsement CGM 2009 (07-03)," and (4) "FCCI policy No. M00 067 0158 affords excess coverage only to Alden Bennett Construction Company and Alden Trails III, LLC (owner) in relation to the underlying Hodor lawsuit pursuant to Endorsement CGM 2009 (07-03)." The order concluded by stating that "[t]his order resolves all issues among the parties and therefore, this matter is dismissed." The order was signed by counsel for FCCI, as well as counsel for the other Alden entities; the signature block for the latter attorney stated that he was the counsel for Alden Bennett, as well, but black pen struck through that portion of the signature block.

¶ 35 X. Mt. Hawley Intervention

¶ 36 On November 9, 2010, Mt. Hawley, Alden Bennett's insurer, filed a petition to intervene, as well as a petition to vacate the May 12 order. Mt. Hawley claimed that it was not named as a defendant or third-party defendant in the matter, nor was it provided notice of the "agreed order" prior to its entry; Mt. Hawley did not in any way consent to the entry of the order. Mt. Hawley claimed that FCCI was "fully aware" of Mt. Hawley's interest in the matter prior to the filing of the complaint for declaratory judgment, including Mt. Hawley's position that the FCCI policy afforded Alden Bennett coverage on a primary basis, and that Mt. Hawley had tendered Alden Bennett's defense to Garbe, FCCI's named insured, in July 2006. Mt. Hawley claimed that it was a necessary party and that therefore, the trial court did not have jurisdiction to enter the "agreed order."

¶ 37 On November 15, 2010, the trial court granted Mt. Hawley's petition to intervene, and on December 8, 2010, Mt. Hawley filed an intervenor complaint for declaratory judgment against FCCI and Westfield, alleging that FCCI and Westfield owed duties to defend Alden Bennett and that the Mt. Hawley policy was excess to the other two policies.

¶ 38 On January 18, 2011, the order of May 12, 2010, was vacated with respect to any insurance coverage rights or obligations pertaining to Alden Bennett.

¶ 39 XI. Westfield Counterclaim

¶ 40 On December 30, 2011, Westfield filed its second amended counterclaim for declaratory judgment against FCCI, filing the counterclaim on its own behalf and as assignee of Mt. Hawley and Alden Bennett; the counterclaim alleges that in November 2011, Mt. Hawley and Alden Bennett assigned to Westfield all their rights, claims, and causes of action against FCCI relative to FCCI's duty to defend Alden Bennett in the underlying litigation. The

counterclaim sought a declaration that FCCI owed a defense to Alden Bennett on a primary and non-contributory basis, that FCCI must reimburse Westfield for all fees and costs incurred in defending Alden Bennett, that FCCI was estopped from asserting any defenses to coverage under its policy, and that FCCI owed a duty to indemnify Alden Bennett on a primary and non-contributory basis as a result of the estoppel. Count I of the counterclaim sought a declaration that FCCI owed a duty to defend Alden Bennett on a primary and non-contributory basis from April 30, 2008, forward because as of that date, FCCI had actual notice of the underlying litigation. Count II of the countrerclaim is for equitable subrogation, and count III is for equitable contribution. Count IV of the counterclaim sought a declaration that FCCI was estopped from asserting any policy defenses relative to indemnifying Alden Bennett for any damages entered against it in the underlying litigation because FCCI breached its duty to defend Alden Bennett by failing to defend Alden Bennett under a reservation of rights or timely filing a complaint for declaratory judgment.

¶ 41 XII. FCCI Second Amended Complaint for Declaratory Judgment

¶ 42 On March 22, 2012, FCCI filed its second amended complaint for declaratory judgment against Alden Bennett, Garbe, Douglas, Hodor, Westfield, and Mt. Hawley. The complaint alleges that Alden Bennett was afforded no coverage pursuant to the MG 221 endorsement because the endorsement excluded coverage to an additional insured for work performed by the additional insured, and was afforded only excess coverage pursuant to the CGM 3009 endorsement. The complaint further alleges that Alden Bennett violated a condition precedent to coverage by withdrawing its tender of defense to Mt. Hawley and Westfield. Finally, the complaint alleges that Westfield is estopped from asserting defenses to coverage. The complaint sought a declaration that both Mt. Hawley and Westfield had duties to defend

and indemnify Alden Bennett, that the MG 221 endorsement affords no coverage to Alden Bennett, and that the CGM 3009 endorsement affords only excess coverage to Alden Bennett.

¶ 43 On April 26, 2012, Westfield filed its answer to FCCI's second amended complaint and asserted as affirmative defenses waiver, estoppel, and "mend the hold." Common to all three defenses were the allegations that FCCI had actual notice of Hodor's claim no later than August 10, 2006, and that on November 14, 2006, FCCI asserted that it owed no coverage to Alden Bennett because the CGM 3009 endorsement afforded only excess coverage; FCCI did not raise any defense to coverage under the MG 221 endorsement and did not make any statement reserving the right to assert additional defenses. On June 6, 2008, FCCI again denied coverage to Alden Bennett and did not assert that its policy was excess to any other insurance and did not raise any defense to coverage under the MG 221 endorsement. On January 22, 2009, FCCI again denied coverage on the basis that the CGM 3009 endorsement provided only excess coverage and did not raise any defense to coverage under the MG 221 endorsement.

¶ 44 XIII. Motions for Summary Judgment

¶ 45 On June 22, 2012, Westfield filed a motion for partial summary judgment with respect to FCCI's obligations under the MG 221 endorsement, arguing that FCCI owed a duty to defend Alden Bennett in the underlying litigation and that pursuant to the doctrines of waiver and estoppel, FCCI was barred from asserting any defense to indemnity.

¶ 46 On August 28, 2012, FCCI filed a response to the motion for summary judgment and a cross-motion for summary judgment. Attached to the response was a copy of an order

entered in the underlying litigation, granting summary judgment in favor of Garbe, FCCI's named insured.

¶ 47 On December 7, 2012, the trial court granted Westfield's motion for partial summary judgment. The trial court found that there was a targeted tender to FCCI on April 30, 2008, and further found that FCCI had conceded that there was a proper tender in its complaint. The trial court found that there was a 10-month delay between the tender and the filing of the complaint for declaratory judgment and that, "[u]nder Illinois law, seven months is the outer limit of time within which an insurer must file, defend under reservation of rights, or file a declaratory judgment action." Accordingly, the trial court found that estoppel and waiver both applied to bar FCCI from raising defenses to coverage under the policy.

¶ 48 On April 22, 2013, the trial court found that there was no just reason for delaying enforcement or appeal of the December 7, 2012, order, and also granted Westfield leave to file a third amended counterclaim for declaratory judgment based on the settlement of the underlying lawsuit.

¶ 49 This appeal follows.

¶ 50 ANALYSIS

¶ 51 On appeal, we are asked to decide whether the trial court erred in finding that estoppel and waiver applied to bar FCCI from raising defenses to coverage under the policy.

¶ 52 A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v.*

Cincinnati Insurance Co., 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). " 'The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment.' " *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 755 (2005) (quoting *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993)).

¶ 53 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). A defendant moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). In other words, there is no evidence to support the plaintiff's complaint.

¶ 54 " 'The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable issue of fact exists.' " *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). However, "[w]hen, as in this case, parties file cross-motions for summary judgment, they concede the absence of

a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Steadfast Insurance*, 359 Ill. App. 3d at 755 (citing *Continental Casualty Co. v. Law Offices of Melvin James Kaplan*, 345 Ill. App. 3d 34, 37-38 (2003)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 55 In Illinois, the duties to defend and to indemnify are not coextensive, with the obligation to defend being broader than the obligation to pay. *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.*, 168 Ill. App. 3d 361, 366 (1988). In determining whether an insurer has a duty to defend its insured, a court looks to the allegations in the underlying complaint and compares them to the relevant provisions of the insurance policy. *Outboard Marine Corp.*, 154 Ill. 2d at 107-08. "If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises." *Outboard Marine Corp.*, 154 Ill. 2d at 108. However, if it is clear from the face of the complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy's coverage, an insurer may properly refuse to defend. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991) (quoting *State Farm Fire & Casualty Co. v. Hatherley*, 250 Ill. App. 3d 333, 336 (1993)). "[W]here an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured." *International Minerals & Chemical Corp.*, 168 Ill. App. 3d at 367. "[W]here the language of an insurance policy is clear and unambiguous, it will be applied as written." *Hatherley*, 250 Ill. App. 3d at 337. The construction of an insurance policy presents a question of law that is reviewed *de novo*. *Outboard Marine*, 154 Ill. 2d at 108. As noted, *de novo* consideration

means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578.

¶ 56 In the case at bar, FCCI argues that the trial court erred in finding that it was estopped from denying coverage because (1) the April 30, 2008, letter from Mt. Hawley was not a targeted tender that triggered FCCI's duty to defend, (2) no set time limit applies when determining whether a declaratory judgment action was timely filed for purposes of estoppel, and (3) estoppel could not create rights under FCCI's policy that were not already present. Additionally, FCCI argues that the trial court erred in finding that it waived its defenses to coverage without providing any reasoning. Finally, FCCI argues that the trial court prematurely concluded that Alden Bennett could target FCCI's policy to the exclusion of both Westfield policies.

¶ 57 I. Estoppel

¶ 58 We first consider whether the trial court properly found that FCCI was estopped from denying coverage to Alden Bennett. An insurer has two options when taking the position that it has no duty to defend: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 19. "If the insurer fails to take either of these actions, it will be estopped from later raising policy defenses to coverage." *Lay*, 2013 IL 114617, ¶ 19; *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150-51 (1999).

¶ 59 "This estoppel doctrine applies only where an insurer has breached its duty to defend." *Ehlco*, 186 Ill. 2d at 151. Accordingly, a court must determine whether the insurer had a duty to defend and whether that duty was breached. *Ehlco*, 186 Ill. 2d at 151. "Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's

duty to defend was not properly triggered. These circumstances include where the insurer was given no opportunity to defend; where there was no insurance policy in existence; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage." *Ehlco*, 186 Ill. 2d at 151.

¶ 60 In the case at bar, FCCI first argues that it timely filed its complaint for declaratory judgment, so estoppel should not prevent it from asserting policy defenses. Thus, the first issue we must consider is when FCCI's duty to defend was triggered. Then, we consider whether the filing of FCCI's declaratory judgment action was timely. Finally, we consider whether FCCI's claim that its policy was excess and not primary has any effect on our result.

¶ 61 A. Duty to Defend Triggered

¶ 62 FCCI first argues that the April 30, 2008, letter from Mt. Hawley was not a targeted tender that triggered FCCI's duty to defend. Westfield, by contrast, argues that FCCI's duty to defend arose on April 30, 2008, when FCCI first had notice of the underlying lawsuit identifying Hodor's employer as JAK, a subcontractor of Garbe, FCCI's named insured. We agree with Westfield.

¶ 63 Our supreme court has instructed that "where the insured has not knowingly decided against an insurer's involvement, the insurer's duty to defend is triggered by actual notice of the underlying suit, regardless of the level of the insured's sophistication." *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 329 (1998). Furthermore, "the lack of a tender by the insured does not relieve the insurer of its duty to defend if the insurer had 'actual notice' of the underlying suit." *Ehlco*, 186 Ill. 2d at 143 (citing *Cincinnati*, 183 Ill. 2d at 329). " '[A]ctual notice' " is defined as " ' "notice sufficient to permit the insurer to locate and defend the lawsuit." ' " *Cincinnati*, 183 Ill. 2d at 329 (quoting *Cincinnati Cos. v. West*

American Insurance Co., 287 Ill. App. 3d 505, 512 (1997), quoting *Federated Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 282 Ill. App. 3d 716, 724 (1996)). "[I]n order to have actual notice sufficient to locate and defend a suit, the insurer must know both that a cause of action has been filed and that the complaint falls within or potentially within the scope of the coverage of one of its policies." *Cincinnati*, 183 Ill. 2d at 329-30. Thus, in the case at bar, regardless of whether the April 30, 2008, letter was a targeted tender to FCCI, FCCI's duty to defend would have been triggered when it received "actual notice" of the underlying lawsuit.

¶ 64 On April 30, 2008, Mt. Hawley sent a fax to FCCI stating on the cover sheet: "Please review the attached complaint that was recently received in our office. As you'll recall, I previously tendered this file to you based on our additional insured status with Garbe Iron Works. Please provide a written response indicating that you will accept our tender and provide a defense for our insured." Thus, as of April 30, 2008, FCCI knew that the underlying lawsuit had been filed. Importantly, FCCI does not dispute on appeal that this contact from Mt. Hawley provided actual notice of the underlying lawsuit, despite the fact that Westfield's brief spends a full seven and a half pages making the argument that FCCI had actual notice of the lawsuit. The only hint that FCCI could feel otherwise occurs in a passing reference in its brief that, "assuming *arguendo* that a potential for coverage could exist, there could be no potential for coverage under MG 221 until April 14, 2009, when Garbe was named as a defendant." However, this statement is not supported by any further argument or citation to authority. Accordingly, we consider the April 30, 2008, date as the date that FCCI had actual notice of the underlying lawsuit and, therefore, the date its duty to defend Alden Bennett was triggered.

¶ 65 B. Timeliness of Declaratory Judgment Complaint

¶ 66 Given that FCCI's duty to defend Alden Bennett was triggered on April 30, 2008, we must next consider whether the trial court properly found that FCCI's filing of a declaratory judgment action on February 13, 2009, was untimely. As noted, an insurer has two options when taking the position that it has no duty to defend: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. *Lay*, 2013 IL 114617, ¶ 19. However, even if a declaratory judgment action is filed, "the insurer must file the declaratory judgment action in a timely manner to avoid application of the estoppel doctrine." *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 959 (2006) (citing *L.A. Connection v. Penn-America Insurance Co.*, 363 Ill. App. 3d 259, 262 (2006)).

¶ 67 "[T]he insurer must take some action to adjudicate the issue of coverage or undertake to defend the insured under a reservation of rights, and it must take that action within a reasonable time of a demand by the insured." *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451, 458 (2001). In the case at bar, the trial court stated that, "[u]nder Illinois law, seven months is the outer limit of time within which an insurer must *** defend under reservation of rights, or file a declaratory judgment action." We agree with the parties that, despite the trial court's statement, there is no hard and fast time limit as to timeliness and that each case must be decided on its own facts and circumstances. See *L.A. Connection*, 363 Ill. App. 3d at 265. However, the trial court's misstatement does not mean that its ultimate conclusion---that FCCI's complaint was not filed in a timely manner---is incorrect.

¶ 68 Here, FCCI's complaint was filed nearly 10 months after it received actual notice of the underlying lawsuit. There is no reason apparent from the record why FCCI waited so long. In its brief, FCCI claims that it filed suit "approximately six months after [Alden Bennett] provided information necessary for FCCI to conduct its investigation." However, the only additional information FCCI requested in response to the April 30, 2008, fax was a copy of the certificate of insurance naming Alden Bennett as an additional insured, which was sent to FCCI on August 2 and which FCCI does not dispute receiving. Prior to that point, FCCI had the complaint in the underlying action, a copy of the FCCI insurance policy, and a copy of the subcontract between Garbe and Alden Bennett containing the requirement that Alden Bennett be added as an additional insured on the FCCI policy. Even looking at the situation from FCCI's perspective, there is no explanation for why the addition of the certificate of insurance would require an additional six months before FCCI completed its "investigation," especially since there is no dispute that FCCI received the document upon its request. We also note that FCCI was apprised of the events in the underlying case almost immediately after Hodor was injured---Hodor was injured on March 26, 2006. By May 2, 2006, Mt. Hawley had contacted Garbe and by July 28, 2006, Mt. Hawley had contacted FCCI directly. Thus, FCCI was aware of the incident and Alden Bennett's position that it was covered under the FCCI policy nearly two years prior to the filing of the underlying lawsuit, and nearly three years before filing its complaint for declaratory judgment. Under the facts before us, we agree with the trial court that FCCI's filing of its declaratory judgment complaint was untimely and therefore, FCCI is estopped from asserting policy defenses to coverage.

¶ 69 C. Allegation that Insurance is Excess

¶ 70 Finally, we consider whether FCCI's allegation that its insurance policy provided only excess and not primary coverage changes this result. We find that it does not. First, we note that, as Westfield points out, the CGM 3009 endorsement relied upon by FCCI is only one of two endorsements aimed at additional insureds. The other, the MG 221 endorsement, provides that the FCCI policy provides primary insurance. Thus, despite FCCI's argument, the policy does not provide for only excess insurance.

¶ 71 Additionally, several courts have found that an insurer's argument concerning the scope of its coverage falls within the "policy defenses" the insurer is estopped from asserting. See *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 87 (2002) (finding that due to its delay in filing a declaratory judgment action, the insurer "was estopped from raising the policy defenses under the blanket additional insured endorsement and its exclusionary language," which included language indicating that the policy was excess); *Korte Construction*, 322 Ill. App. 3d at 459 ("The affirmative defense [raised by the insurer, American States,] simply attempts to establish a policy defense – that there is no duty to defend because the St. Paul policy is primary and the American States policy is excess. Even if the affirmative defense is deemed admitted, American States cannot raise it. American States is estopped from raising this policy defense, because it failed to seek a declaratory judgment or defend Korte under a reservation of rights."). Similarly, here, FCCI is estopped from arguing that the CGM 3009 endorsement limits the policy to excess coverage.

¶ 72 We do not find FCCI's reliance on our recent case, *Certain Underwriters at Lloyd's, London v. Central Mutual Insurance Co.*, 2014 IL App (1st) 133145, to be persuasive. While

there, we noted that the estoppel doctrine was "not relevant" because the insurance policy was excess and did not obligate the insurer to defend the underlying lawsuit (*Central Mutual*, 2014 IL App (1st) 133145, ¶ 21), we also found that the record indicated that the insurer in that case "was *not* just 'sitting on the sidelines and doing nothing' " as the underlying lawsuit progressed and instead timely sought a declaratory judgment in its favor by filing an answer and affirmative defenses to the declaratory judgment action filed by a rival insurer (emphasis in original) (*Central Mutual*, 2014 IL App (1st) 133145, ¶ 22). Here, by contrast, as we have noted above, FCCI did not file its declaratory judgment in a timely manner. Moreover, unlike *Central Mutual*, in which only one insurance endorsement was at issue, here, there are two---one which provides primary insurance and one which provides excess. Thus, we find *Central Mutual* inapplicable to the case at bar and agree with the trial court's determination that FCCI was estopped from raising policy defenses to coverage. Accordingly, we affirm the grant of summary judgment in Westfield's favor.

¶ 73 II. Waiver

¶ 74 Since we have determined that FCCI is estopped from raising policy defenses to coverage, we have no need to determine whether FCCI also waived its policy defenses to coverage.

¶ 75 III. Decision to Target FCCI

¶ 76 Finally, FCCI's argument that the trial court prematurely concluded that Alden Bennett could target FCCI's policy to the exclusion of both Westfield policies relies on its argument that the FCCI policy provides excess coverage. Since we have determined that FCCI is estopped from raising this policy defense, we have no need to consider its merits.

¶ 77 CONCLUSION

¶ 78 Since FCCI did not timely file a declaratory judgment action after receiving actual notice of the underlying lawsuit, the trial court properly found that FCCI was estopped from raising policy defenses to coverage and properly granted Westfield's motion for partial summary judgment.

¶ 79 Affirmed.