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2014 IL App (3d) 130888-U

Order filed December 19, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

UNITED FIRE & CASUALTY COMPANY,	)	Appeal from the Circuit Court
an Iowa Stock Insurance Company,	)	of the 14th Judicial Circuit,
	)	Whiteside County, Illinois.
Plaintiff-Appellant/Cross-Appellee,	)	
	)	
v.	)	
	)	
CIVIL CONSTRUCTORS, INC., a Foreign	)	Appeal No. 3-13-0888
Corporation, KRISTINE M. HOLLOWAY,	)	Circuit No. 11-MR-40
Individually and as Special Administrator of the	)	
Estate of MICHAEL S. HOLLOWAY,	)	
Deceased, E.H. STRALOW, INC., an Illinois	)	
Corporation, and NORTHWEST ILLINOIS	)	
CONSTRUCTION, an Illinois Corporation,	)	The Honorable
	)	John L. Hauptman,
Defendants-Appellees/Cross-Appellants.	)	Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court did not err in finding insurer had a duty to defend general contractor who was additional insured on subcontractor's policy where complaint alleged that general contractor retained control over allegedly negligent subcontractor's work. Trial court erred in finding insurer was estopped from asserting policy defenses even though it waited 14 months before instituting declaratory judgment action where case was ongoing and settlement was not imminent. Trial court

properly struck insurer's affirmative defense of collusion where facts did not support that plaintiff brought her action for an evil purpose or that insurer was substantially prejudiced by plaintiff's amended complaint.

¶ 2 United Fire filed a declaratory judgment action against Civil and Northwest. Civil and Northwest filed counterclaims for declaratory judgment and then motions for summary judgment. The trial court granted the motions for summary judgment, holding that United Fire had a duty to defend Civil and that United Fire was estopped from asserting policy defenses against Civil. We affirm the trial court's order finding that United Fire had a duty to defend Civil, but reverse its ruling on the application of estoppel.

¶ 3 In 2009, the Illinois Department of Transportation entered into an agreement with Civil to be the general contractor for a construction project known as the Rock Creek Bridge Project. Civil subcontracted a portion of the work to Northwest. The agreement between Civil and Northwest stated that Northwest was to act "as an independent contractor to provide all labor, materials[,] equipment and services necessary or incidental to complete the work." The agreement further stated that Northwest "shall perform the Subcontract Work under the general direction of the Civil Constructors, Inc. of IL and in accordance with the Subcontract Documents." The agreement required Northwest to carry Civil as an additional insured on Northwest's commercial general liability insurance policy.

¶ 4 Northwest purchased an imputed liability endorsement, naming Civil as the additional insured, from United Fire. The endorsement provided that an "additional insured" is "[a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The policy further stated: "Such person or organization is an additional insured only with respect to your liability which may be imputed to

that person or organization directly arising out of your ongoing operations performed for that person or organization.”

¶ 5 Michael Holloway, an employee of Northwest, was killed while working on the construction project when Erwin Strawlow, the owner of E.H. Stralow, Inc., a subcontractor on the project, struck Holloway while backing up his truck. In December 2009, Kristine Holloway, Michael’s wife, filed a complaint against Civil and Stralow for the wrongful death of her husband. The complaint alleged that Civil was the general contractor for the project, that Civil contracted with Northwest to perform work on the project, and that Northwest contracted with Stralow to provide trucking or hauling services on the project. The complaint alleged that Civil “was negligent” for failing to perform various acts.

¶ 6 Both Civil and Stralow then filed third party complaints against Northwest. Those complaints alleged that Northwest owed a duty to Holloway and breached that duty by various negligent acts and/or omissions.

¶ 7 On January 25, 2010, Civil tendered its defense to United Fire, which United Fire refused. On May 8, 2011, United Fire filed a claim for declaratory judgment, seeking a declaration that it had no duty to defend or indemnify Civil. Civil and Northwest filed counterclaims for declaratory judgment.

¶ 8 In June 2011, Holloway filed an amended complaint against Civil and Stralow, alleging direct negligence and vicarious liability against Civil. The complaint alleged: “That CIVIL CONSTRUCTORS, INC. is vicariously liable for any negligence of its subcontractor, NORTHWEST ILLINOIS CONSTRUCTION, LLC \*\*\*, as it was required to oversee their activity to insure that safety policies were followed and to enforce safety laws and rules.” The

complaint specifically alleged that Civil was liable because “[i]t failed to require that Northwest” perform various acts.

¶ 9 Civil and Northwest filed amended counterclaims in United Fire’s declaratory judgment action. Civil filed a motion for summary judgment against United Fire, which the trial court denied.

¶ 10 In December 2011, Holloway filed a second amended complaint against Civil and Stralow, again alleging negligence and vicarious liability against Civil. The complaint stated:

“That CIVIL CONSTRUCTORS, INC. retained control over the operative details of the work of its subcontractor, agent and servant, Northwest Illinois Constuction [sic] LLC and is vicariously liable for the following acts or omissions of Northwest:

- (a) Northwest failed to require the Stralow truck to have a reverse signal alarm \*\*\*
- (b) Northwest failed to require observers at the rear of Stralow’s truck when Stralow backed up his truck \*\*\*;
- (c) Northwest failed to inspect the trucks on site each day or require the truckers to do a daily inspection of their trucks;
- (d) Northwest failed to have an adequate safety program;
- (e) Northwest failed to stop Stralow from backing his truck when it knew or reasonably should have known that the truck did not have a reverse signal alarm and there were no observers assisting Stralow while backing;
- (f) Northwest failed to have an adequate number of personnel on site to monitor the work;

(g) Northwest failed to have enough workers on site to act as observers to assist trucks backing up.”

¶ 11 Again, Civil and Northwest filed amended counterclaims for declaratory judgment against United Fire, and subsequently filed summary judgment motions against United Fire, arguing that United Fire had a duty to defend Civil and should be estopped from raising policy defenses against Civil.

¶ 12 United Fire responded, raising the affirmative defense of collusion, alleging that Civil’s attorney drafted Holloway’s second amended complaint to ensure that United Fire would have a duty to defend Civil. Civil and Northwest moved to strike the affirmative defense, and the trial court granted the motions.

¶ 13 The trial court also granted Northwest’s and Civil’s motions for summary judgment, holding that (1) the allegations of Holloway’s second amended complaint triggered United Fire’s duty to defend Civil, and (2) United Fire was estopped from asserting policy defenses against Civil because of its delay in filing its declaratory judgment action. United Fire filed a motion to reconsider, which the trial court denied.

¶ 14 I

¶ 15 United Fire first argues that the allegations of Holloway’s second amended complaint are insufficient to establish that it had a duty to defend Civil.

¶ 16 In a declaratory action where the issue is whether the insurer has a contractual duty to defend pursuant to an insurance policy, a court looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. *Pekin Insurance Co. v. United Contractor Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 21. If the underlying complaint alleges facts within or potentially within policy coverage, the insurer is

obligated to defend its insured. *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). An insurer may not justifiably refuse to defend an action against its insured unless it is clear from the face of the underlying complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy's coverage. *Id.* If the underlying complaint alleges several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy. *Id.*

¶ 17 The test is not whether the complaint directly alleges facts that show that the claim is within the coverage provided by the policy. *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 595 (2009). Rather, the insurer owes a duty to defend unless the insurance cannot possibly cover the liability arising from the facts alleged and the terms of the policy preclude coverage. *Id.* The allegations of the complaint must be construed liberally in favor of coverage. *Id.* Under the language of an additional insured endorsement, a defendant is an additional insured entitled to coverage so long as it is (or potentially could be) liable as a result of the original insured's acts or omissions. *Id.*

¶ 18 Generally, a person who employs an independent contractor is not vicariously liable for the acts or omissions of the independent contractor. *United Contractor Midwest, Inc.*, 2013 IL App (3d) 120803, ¶ 25 (citing Restatement (Second) of Torts § 414 (1965)). However, an exception exists where the general contractor retains control over the independent contractor's work. *Id.* A general contractor can be vicariously liable for the negligent acts of a subcontractor if the general contractor exercised control over the operative details of the subcontractor's work. *Id.* ¶ 26; *Hallmark Homes*, 392 Ill. App. 3d at 594. When a fair reading of the complaint shows that the plaintiff has alleged a vicarious liability theory against the general contractor and that the subcontractor's own negligence caused the plaintiff's injury, liability under the complaint is

“potentially within” the policy, and the insurer has a duty to defend the additional insured. *Hallmark Homes*, 392 Ill. App. 3d at 595.

¶ 19 Here, Holloway’s second amended complaint alleged that Civil “retained control over the operative details of the work of its subcontractor, agent and servant, Northwest Illinois Constuction [sic] LLC” and then alleged seven negligent acts and/or omissions committed by Northwest. Such allegations are sufficient to potentially bring liability within the policy. See *id.* Thus, the trial court properly ruled that United Fire had a duty to defend Civil under Holloway’s second amended complaint.<sup>1</sup>

¶ 20 II

¶ 21 United Fire next argues that the trial court erred in finding that it was estopped from asserting policy defenses against Civil.

¶ 22 An insurer’s duty to defend is broader than its duty to indemnify. *Aetna Casualty & Surety Co. v. O’Rourke Bros., Inc.*, 333 Ill. App. 3d 871, 880 (2002). An insurer can normally dispute coverage even after a court determines there is no duty to defend. *Id.* However, when an insurer breaches its duty to defend, the estoppel doctrine bars the insurer from raising policy defenses to coverage. *Id.*

¶ 23 When an insurer believes that its policy does not cover a claim, it may not simply refuse to defend the insured. *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*,

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<sup>1</sup> Because we affirm the trial court’s holding that United Fire had a duty to defend Civil under Holloway’s second amended complaint, Civil has been granted the relief it requested. Thus, Civil’s cross appeal claiming that United Fire had a duty to defend under earlier versions of Holloway’s complaint is rendered moot. See *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 1009 (2008); *Boatmen’s National Bank of Belleville v. Benton*, 219 Ill. App. 3d 117, 118 (1991).

364 Ill. App. 3d 946, 959 (2006). Instead, the insurer must either (1) defend the suit under a reservation of rights, or (2) seek a declaratory judgment that no coverage exists within a “reasonable time.” *Id.* at 959-60. An insurer that does neither and is subsequently found to have wrongfully denied coverage is estopped from raising policy defenses to coverage. *Id.* at 959.

¶ 24 In determining whether an insurer has filed a declaratory judgment action within a “reasonable time,” courts should consider the amount of time that has elapsed between the insured’s tender and the insurer’s filing of the declaratory judgment action, as well as the status of the underlying suit. *Id.* at 960; *O’Rourke Bros., Inc.*, 333 Ill. App. 3d at 880. Where trial or settlement is imminent, what amounts to a “reasonable time” will likely be shorter than if no resolution is expected in the near future. See *Kingsport Development, Inc.*, 364 Ill. App. 3d at 961 (2006) (7-month delay reasonable where case was ongoing with no expectation of settlement); *Central Mutual Insurance Co. v. Kammerling*, 212 Ill. App. 3d 744, 750 (1991) (10-month delay unreasonable where insurer has notice of possible settlement). However, a delay of over 21 months is “unreasonable as a matter of law.” *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 87 (2002).

¶ 25 Here, approximately 14 months passed between Civil’s tender of the case to United Fire and United Fire’s institution of its declaratory judgment action. At that time, Holloway’s action was still ongoing with no settlement anticipated. Under these circumstances, we find that United Fire brought its declaratory judgment action within a “reasonable time,” and we reverse the trial court’s finding that estoppel applied.

¶ 26 III

¶ 27 Finally, United Fire argues that the trial court erred in striking its affirmative defense of collusion.

¶ 28 “Black’s Law Dictionary defines collusion as a deceitful agreement or compact between two or more persons, for the one party to bring an action against the other for some evil purpose, as to defraud a third party of his right.” *Williams v. Williams*, 108 Ill. App. 3d 936, 937 (1982). The plaintiff bears the burden of pleading and proving the affirmative defense of collusion between two parties. See *Ogren v. Graves*, 39 Ill. App. 3d 620, 623 (1976). An insurer seeking to avoid responsibility because of an insured’s allegedly collusive or improper actions or inactions must plead and prove substantial prejudice. See *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 499 (1977); *Founders Insurance Co. v. Shaikh*, 405 Ill. App. 3d 367, 375 (2010). Proof of substantial prejudice requires an insurer to demonstrate that it was actually hampered in its defense by the insured’s actions. *M.F.A.*, 66 Ill. 3d at 500.

¶ 29 Here, United Fire cannot establish the necessary elements of collusion. United Fire alleged that Civil engaged in collusion by assisting Holloway in drafting a complaint that required United Fire to defend Civil. Such allegations are insufficient to show “an evil purpose” on the part of Holloway and Civil. There is nothing presumptively improper about opposing parties working together for the purpose of obtaining insurance coverage. *Chartis Specialty Insurance Co. v. Queen Anne HS, LLC*, 867 F.Supp.2d 1111, 1122 (W.D. Wash. 2012).

¶ 30 Similarly, there can be no finding of substantial prejudice in this case. It cannot be said that but for the actions of Civil, United Fire would have no duty to defend Civil. Holloway could have amended her complaint to include allegations of vicarious liability without Civil’s assistance. It is immaterial that Civil helped Holloway draft her complaint. See *Messier v. Commercial Union Insurance Co.*, 1987 Me. Super. LEXIS 188. The trial court properly struck United Fire’s affirmative defense of collusion.

¶ 31 The judgment of the circuit court of Whiteside County is affirmed in part and reversed in part.

¶ 32 Affirmed in part; reversed in part.