2015 IL App (1st) 142119-U

SIXTH DIVISION
March 27, 2015

No. 1-14-2119



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDAIIAL DISTRICT

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| DIRECT AUTO INSURANCE COMPANY,<br><br>Plaintiff and Counterdefendant-Appellant,<br><br>v.<br><br>STATE FARM INSURANCE COMPANY,<br><br>Defendant and Counterplantiff-Appellee,<br><br>(Juan Gonzales, Everett Robinson, Rodney Wilson, and the Hertz Corporation d/b/a Hertz Rental Car,<br><br>Defendants). | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 2010 CH 32673<br><br>Honorable Kathleen M. Pantle, Judge Presiding. |

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JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

## ORDER

¶ 1 *Held:* We dismissed this appeal from the circuit court's order granting summary judgment against plaintiff-insurer on claim that its insured violated his contractual duty to assist and cooperate, where a counterclaim seeking a declaration that plaintiff-insurer had a duty to indemnify remained pending and the circuit court made no Rule 304(a) finding.

¶ 2 Plaintiff and counterdefendant-appellant, Direct Auto Insurance Company (DAI), brought this declaratory judgment action against its insured, Juan Gonzales, defendant and counterplantiff-appellee, State Farm Insurance Company (State Farm), and others. DAI sought

rescission of its policy because Mr. Gonzales had allegedly made material misrepresentations by omitting residents of his household from his application for insurance, or—and in the alternative—a declaration that Mr. Gonzales failed to cooperate with DAI as was required by the assistance and cooperation clause of his policy, such that DAI was not obligated to provide Mr. Gonzalez with insurance coverage as to a July 5, 2009, automobile collision. State Farm filed a counterclaim, seeking—*inter alia*—a declaration as to DAI's duty to indemnify. State Farm thereafter filed a motion for summary judgment.

¶ 3 After finding that Mr. Gonzales had not made material misrepresentations and that DAI had failed to present a sufficient factual basis to support its claim of a breach of the contractual duty to assist and cooperate, the circuit court granted State Farm's motion for summary judgment against DAI. DAI has now appealed, but only as to that part of the summary judgment order finding Mr. Gonzales did not breach his contractual duty to assist and cooperate. Because the request for a declaration as to DAI's duty to indemnify raised in State Farm's counterclaim remains pending, we dismiss this appeal for lack of jurisdiction.

¶ 4 I. BACKGROUND

¶ 5 Mr. Gonzales was the named insured under DAI policy number 30418 (policy), issued on May 24, 2009, which covered a 2003 Chrysler Town & Country van. On July 5, 2009, Mr. Gonzales was driving his vehicle on 63rd Street in Chicago, in the lane next to a vehicle driven by Everett Robinson in which Rodney Wilson was a passenger. Mr. Robinson's vehicle was owned by the Hertz Corporation d/b/a Hertz Rental Car (Hertz), and insured by State Farm. When Mr. Gonzales attempted to change lanes, his vehicle side-swiped Mr. Robinson's vehicle.

¶ 6 DAI filed suit on July 29, 2012, alleging "upon information and belief" that: (1) State Farm had paid benefits to Mr. Robinson for injuries he suffered as a result of the collision; and (2) Mr. Robinson, Mr. Wilson, Hertz, and State Farm "have made, or may in the future, make claims presumptively seeking coverage under the DAI policy." In its two-count complaint, DAI sought rescission of the policy based upon undisclosed residents in Mr. Gonzales' household (count I) or, in the alternative, for a declaration that DAI had no duty to defend or indemnify Mr. Gonzales in connection with any suit or claim brought against him as a result of the July 5, 2009, collision, because he had violated the assistance and cooperation provision of the policy (count II). DAI's complaint named Mr. Gonzales, Mr. Robinson, Mr. Wilson, Hertz, and State Farm as defendants. State Farm is the only defendant participating in this appeal.

¶ 7 State Farm answered the complaint and filed a counterclaim which was subsequently amended several times. In its third-amended counterclaim, State Farm sought declarations that the policy provided coverage for the July 5, 2009, collision (count I), and that the policy could not be rescinded (count II). The third-amended counterclaim was dismissed on November 8, 2012, and State Farm was granted leave to file a fourth-amended counterclaim. On December 5, 2012, State Farm filed a fourth-amended counterclaim which again asserted a claim for a declaratory judgment that the policy covered Mr. Gonzales as to the July 5, 2009, collision (count I), and which also reasserted—solely for purposes of preserving the issue for appeal—a claim for a declaration that the policy could not be rescinded (count II). State Farm alleged that as a result of DAI's denial of coverage, both Mr. Robinson and Mr. Wilson had made uninsured motorist claims under State Farm's policy for their injuries resulting from the July 5, 2009, collision. The fourth-amended counterclaim alleged Mr. Wilson's claim had been resolved and

resulted in a payment of $50,000 by State Farm. According to the fourth-amended counterclaim, at that time, State Farm was defending Mr. Robinson's claim. In count I, State Farm sought declarations that the policy afforded Mr. Gonzales liability coverage for the July 5, 2009, collision and that DAI had both the duty to defend and to indemnify Mr. Gonzales as to the collision. Additionally, State Farm sought an order directing DAI to reimburse State Farm $20,000 of the $50,000 it paid to Mr. Wilson and reimburse its attorney fees and costs.

¶ 8 DAI moved to dismiss the fourth-amended counterclaim and argued, in part, that the circuit court could not "make a finding of a duty to indemnify because no determination of liability has been made and the determination of liability *is not before this Court*." (Emphasis in original.) On March 22, 2013, the circuit court struck all prayers for relief in the fourth-amended counterclaim, except the prayer for a declaration that DAI had a duty to indemnify under the policy. The circuit court also found that the issue of indemnification was not ripe because there had been no finding that the policy provided coverage and "no finding of liability against [Mr.] Gonzales in the underlying case." The circuit court stayed State Farm's fourth-amended counterclaim for a declaration as to indemnification "pending further orders in this case and the underlying case." DAI then answered count I of the fourth-amended counterclaim.

¶ 9 On November 19, 2013, State Farm moved for summary judgment against DAI on both count I of its fourth-amended counterclaim, and DAI's complaint. As to its fourth-amended counterclaim, State Farm contended only that it had demonstrated that the policy covered Mr. Gonzales, as a matter of law, at the time of the collision, as set forth in count I of its fourth-amended counterclaim. The motion for summary judgment did not make an argument as to DAI's duty to indemnify, nor as to the ripeness of the indemnification issue. Further, State Farm

did not seek to vacate the stay of its indemnification claim. As to DAI's complaint, State Farm argued that Mr. Gonzales had not made material misrepresentations and that DAI could not meet its burden of establishing Mr. Gonzales breached the assistance and cooperation provision of the policy.

¶ 10 In opposition to the motion for summary judgment, DAI argued that Mr. Gonzales had failed to: (1) inform DAI of residents in his household; (2) provide notice to DAI about the loss; and (3) cooperate with DAI in its investigation of the collision. DAI made no argument as to the fourth-amended counterclaim nor, in particular, its duty to indemnify.

¶ 11 On July 2, 2014, the circuit court entered a written order granting State Farm's motion for summary judgment. After finding, as a matter of law, that Mr. Gonzales had not made any material misrepresentations as set forth in count I of the complaint, the circuit court found—as to count II of the complaint—that DAI had not produced sufficient evidentiary facts to show a breach of the assistance and cooperation clause by Mr. Gonzales.

¶ 12 II. ANALYSIS

¶ 13 DAI has appealed from the order granting summary judgment, but seeks reversal of only that part of the order granting summary judgment against DAI on its claim of breach of the assistance and cooperation clause.

¶ 14 However, and despite the fact that the issue has not been raised by the parties, we find we are without jurisdiction to address plaintiff's appeal. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006) (court has a duty to *sua sponte* determine whether it has jurisdiction to decide the issues presented).

¶ 15 Except as specifically provided by Supreme Court Rule 301, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994), *et seq.*; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center,* 162 Ill. 2d 205, 210 (1994). "A judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997).

¶ 16 However, a final judgment or order is not necessarily immediately appealable. Supreme Court Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. 304(a) (eff. Feb. 26, 2010).

¶ 17 The order granting State Farm's motion for summary judgment addressed and determined the issues raised in DAI's complaint as to whether Mr. Gonzales had made material misrepresentations which required rescission of the policy or, in the alternative, had failed to cooperate in violation of the policy. The summary judgment order finally resolved DAI's complaint in its entirety. The order, however, made no mention of DAI's duty to indemnify as raised in State Farm's fourth-amended counterclaim. The order does not lift the stay as to State

Farm's prayer for a declaration that DAI had an indemnification duty. Thus, the record shows that State Farm's prayer for a declaration as to DAI's duty to indemnify in its fourth-amended counterclaim remains pending.

¶ 18 On February 27, 2015, we asked DAI and State Farm to address our jurisdiction and, whether State Farm's prayer for a declaration as to indemnification had been resolved by the circuit court. Both parties have complied with our request.

¶ 19 DAI stated that State Farm's request for a declaration for indemnification had been stayed because there was no underlying judgment entered against Mr. Gonzales at that time. DAI further maintained that the parties and the circuit court "treated" the order granting summary judgment as a final order because it addressed the complaint and the fourth-amended counterclaim. DAI does not cite to the record on appeal in support of this assertion.

¶ 20 State Farm responded and stated that Mr. Robinson's suit against Mr. Gonzales had resulted in a judgment entered against Mr. Gonzales on February 4, 2013. State Farm was unaware of this judgment at the time the circuit court denied DAI's motion to dismiss State Farm's request for a declaration of DAI's duty to indemnify, and entered the stay. State Farm maintained that based on these circumstances, the stay was in error. State Farm asked that we affirm the order of summary judgment and affirm that there is liability coverage for the July 5, 2009, automobile collision.

¶ 21 The parties' responses lead us to conclude that State Farm's claim as to indemnification has not, in fact, been finally determined by the circuit court. Pursuant to Rule 304(a), the July 2, 2014, order granting State Farm's motion for summary judgment was, thus, not appealable in the

absence of an "express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). No such finding was made here.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we dismiss this appeal for a lack of jurisdiction.

¶ 24 Appeal dismissed.