2015 IL App (1st) 143925-U

FOURTH DIVISION
September 30, 2015

No. 1-14-3925

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JASMINE CARTER, Plaintiff and Citation Petitioner-Appellee, v. LASHAUNDA CARTER, TOMMY BROWN, and, CORTEZ WILLIAMS, Defendants. AMERICAN ACCESS INSURANCE COMPANY, Third Party Citation Respondent-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 12 M1 302241 Honorable Patrick W. O'Brien Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Grant of summary judgment vacated and cause remanded. Question of material fact existed as to whether insurer violated duty to defend insured where no evidence submitted by plaintiff showed that insurer had actual notice of underlying lawsuit against insured.

¶ 2 In this appeal, we address the issue of whether or not respondent American Access Insurance Co. (American Access) violated its duty to defend its insured, defendant Lashaunda

Carter, in a personal-injury suit filed by her sister, plaintiff Jasmine Carter. Plaintiff obtained a default judgment against Lashaunda after she failed to appear in the case. Plaintiff then filed a citation to discover assets, naming American Access as respondent. The trial court awarded plaintiff summary judgment on the citation to discover assets, finding that American Access had a duty to defend Lashaunda in the underlying suit and that, by failing to defend her, American Access was estopped from raising any defenses to its coverage of the judgment.

¶ 3 American Access appeals from the trial court's award of summary judgment, alleging that the trial court erred in concluding that American Access was estopped from raising policy defenses because a question of fact existed as to whether or not American Access had actual notice of the suit. For the reasons stated below, we vacate the trial court's award of summary judgment and remand for further proceedings. Plaintiff failed to present evidence sufficient to prove that there was no genuine issue of material fact regarding whether American Access had actual notice of her lawsuit against Lashaunda, where the evidence simply showed that American Access had been notified of the *possibility* of a lawsuit being filed.

¶ 4 I. BACKGROUND

¶ 5 On July 16, 2011, plaintiff was in a car accident while riding in Lashaunda's car. Lashaunda had been struck by defendant Cortez Williams, who was driving defendant Tommy Brown's car. Cortez Williams was an uninsured motorist.

¶ 6 American Access had issued an automobile insurance policy to Lashaunda that was in effect at the time of the accident. The policy provided coverage for any compensatory damages Lashaunda would have to pay as a result of bodily injury she caused in a car accident. The policy provided that American Access "shall defend any civil suit alleging such bodily injury ***, even if any of the allegations of the suit are groundless, false or fraudulent." Under the section labeled,

"Conditions," the policy had a paragraph, titled "Notice," which required Lashaunda to give American Access written notice of any "accident or loss *** as soon as practicable." It also provided that Lashaunda should forward any filings in a suit brought against her, and that American Access would "not be obligated to pay *** unless [American Access] received actual notice of a lawsuit before a judgment had been entered in said suit." The policy also required that any "dispute with respect to the coverage and the amount of damages" be submitted to arbitration.

¶ 7 Lashaunda's insurance policy with American Access also had an uninsured-motorist provision, which permitted another person riding in the insured's vehicle (here, plaintiff) to seek recovery against American Access for damages resulting from the negligence of the uninsured motorist (Cortez Williams). The policy provided that disputes over damages would be resolved through arbitration, at the request of either party. Thus, on June 1, 2012, plaintiff sent American Access a demand for arbitration (the uninsured-motorist arbitration), seeking arbitration over the amount of damages caused by the uninsured motorist.

¶ 8 The policy's uninsured-motorist provision also required plaintiff, at the request of American Access, to file a lawsuit against the uninsured motorist to protect the subrogation rights of American Access. Accordingly, on April 30, 2012, Rick Lionello, a member of American Access's claims department, sent a letter to plaintiff's counsel demanding that plaintiff sue the uninsured motorist in the circuit court to protect American Access's subrogation interests (the underlying lawsuit). Plaintiff filed that underlying lawsuit on August 10, 2012, naming Cortez Williams (the uninsured motorist) and Brown (the owner of the car Williams was driving) as defendants. The same day, plaintiff's counsel sent American Access a letter notifying them of

the suit against Williams and Brown. That lawsuit, notably, did not name the insured, Lashaunda, as a defendant.

¶ 9 On December 3, 2012, after the uninsured-motorist arbitration had begun, plaintiff's counsel sent a letter to American Access's claims adjuster, Lionello, demanding the limits of Lashaunda's policy. Counsel noted that American Access's attorney had admitted, at the uninsured-motorist arbitration, that Lashaunda was at fault for the crash and discussed plaintiff's injuries. Plaintiff's counsel also wrote, "Please respond within 21 days from the date of this letter. If you have not agreed to settlement at that time, our demand will expire and we will add Lashaunda Carter as a defendant in the suit we have filed at your request against Cortez Williams."

¶ 10 The next day, at the conclusion of the uninsured-motorist arbitration, an arbitrator awarded plaintiff $12,000. On December 5, 2012, plaintiff's counsel wrote American Access's attorney, requesting payment of the $12,000 arbitration award. Plaintiff's counsel wrote, "The check cannot include language absolving American Access of all claims, since we still have a claim against Lashaunda Carter."

¶ 11 More than four months later, on March 20, 2013, in the underlying lawsuit, plaintiff filed an amended complaint, this time naming Lashaunda, the insured, as a defendant. Plaintiff served Lashaunda with a copy of the complaint on August 28, 2013. On January 13, 2014, after Lashaunda had failed to appear in the case, the trial court entered a default judgment in plaintiff's favor. After a prove-up as to plaintiff's damages, the trial court entered judgment against Lashaunda and Cortez Williams, finding them jointly and severally liable for $30,000.

¶ 12 Plaintiff then filed a citation to discover Lashaunda's assets, listing American Access as respondent and seeking the $18,000 difference between the $12,000 arbitration award and the

$30,000 judgment. American Access responded to the citation by asserting that it did not have any personal property belonging to Lashaunda.

¶ 13 In its response to plaintiff's interrogatories, American Access acknowledged that Lashaunda had a policy with American Access for the period of June 8, 2011 through June 8, 2012. The limits of the policy were $20,000 per person and $40,000 per accident. American Access also acknowledged that plaintiff, in her uninsured-motorist arbitration, "ha[d] previously made a claim under [the] policy *** and was awarded and paid $12,000." In response to plaintiff's question regarding American Access's possible defenses, American Access noted that the policy required that it be given actual notice of any lawsuit before judgment had been entered. And according to American Access, it had not received notice of plaintiff's suit before the default judgment had been entered. American Access attached a copy of the policy to its responses to plaintiff's interrogatories.

¶ 14 Plaintiff moved for summary judgment on the citation to discover assets. Plaintiff alleged that American Access had actual notice of the lawsuit, attaching as evidence (1) the April 30, 2012 letter from Lionello, the American Access claims adjuster, requesting plaintiff to file suit against Williams and Brown, (2) plaintiff's counsel's August 10, 2012 letter that included a copy of the complaint filed against Williams and Brown, (3) plaintiff's counsel's December 3, 2012 letter threatening to add Lashaunda as a defendant in the complaint unless American Access tendered the limits of the policy, and (4) plaintiff's counsel's December 5, 2012 letter noting that plaintiff still had a claim against Lashaunda after the uninsured-motorist arbitration had concluded. Plaintiff argued that American Access "had 'actual notice' of the case, since a copy of the original complaint had been forwarded to them and they were told that their insured would be added as a defendant." According to plaintiff, because American Access knew of the suit but

failed to defend Lashaunda, American Access was estopped from raising any defenses contained in the policy. Along with the letters, plaintiff attached American Access's responses to her interrogatories, as well as the copy of the policy that American Access had attached to its responses.

¶ 15 In response, American Access argued that plaintiff had not presented any evidence showing that it had actual notice of the amended complaint. American Access stated that neither Lashaunda nor plaintiff's counsel had notified it of the fact that Lashaunda had been named in the amended complaint. In support of its response, American Access attached an affidavit from Donald Santo, another claims adjuster with American Access. Santo attested that he had been assigned to handle all claims relating to the accident on June 14, 2012. Santo acknowledged receiving the August 10 and December 3, 2012 letters from plaintiff's counsel. But Santo said that he "was not given notice by Lashaunda Carter or Plaintiff's counsel that Lashaunda Carter had been added as a Defendant *** prior to service on American Access on May 27, 2014" of the citation to discover assets. American Access also attached a letter from plaintiff's counsel dated April 18, 2014, informing American Access that the default judgment had been entered against Lashaunda.

¶ 16 In plaintiff's reply in support of her motion for summary judgment, plaintiff included the December 5, 2012 letter her attorney had written asking American Access for a $12,000 check. Plaintiff also included a copy of the check American Access had sent her, which was dated June 13, 2013. Plaintiff argued that the date of the check—nearly three months after Lashaunda had been added as a defendant in the amended complaint—showed that American Access had actual notice of the lawsuit against Lashaunda because, in order for American Access to have been

unaware of the suit, it "would have had to actively avoid checking in on the progress of a case that it asked to be filed to protect its interest."

¶ 17 The trial court granted plaintiff's motion for summary judgment. The court found that American Access "had actual notice of the suit against their insured, Lashaunda Carter." American Access appeals.

¶ 18 II. ANALYSIS

¶ 19 American Access argues that the trial court erred in concluding that it was estopped from raising policy defenses. Specifically, American Access claims that it could not have breached its duty to defend because that duty never arose—because it never had actual notice of the amended complaint that named its insured, Lashaunda, as a defendant. At the very least, it argues, a question of fact existed as to whether it had actual notice of the suit.

¶ 20 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003). The moving party bears the initial burden of production on a motion for summary judgment. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. If the court finds that the movant has met its burden of production by introducing evidence that, if uncontroverted, would entitle it to judgment as a matter of law, then the burden of production shifts to the non-movant to present facts that controverts the movant’s evidence and shows that the non-movant could arguably be entitled to judgment. *Helfers-Beitz v. Degelman*, 406 Ill. App. 3d 264, 267 (2010).

¶ 21 In this analysis, a court must strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally construe them in favor of the opponent. *Mashal*, 2012

IL 112341, ¶ 49. Because summary judgment "remains a drastic means of disposing of litigation," it "should be allowed only where the right of the moving party is clear and free from doubt." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007). We review a grant of summary judgment *de novo*. *Hall*, 208 Ill. 2d at 328.

¶ 22 The doctrine of estoppel states that an insurer may not simply deny coverage when a complaint alleges facts potentially covered by a policy. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). Instead, the insurer must either seek a declaratory judgment that the policy does not cover the suit or defend the suit while reserving its rights under the policy. *Id.* If the insurer fails to take these steps, and is subsequently found to have wrongfully denied coverage, then it may not later assert policy defenses to avoid coverage. *Id.* at 150-51; *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 208 (1991). For example, an insurer may not wrongfully deny coverage and then raise defenses such as the insured's failure to provide timely notice (*Ehlco*, 186 Ill. 2d at 154), waiver (*State Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 424 (2009)), or cancellation of the policy (*American Standard Insurance Co. of Wisconsin v. Gnojewski*, 319 Ill. App. 3d 970, 978 (2001)). The burden of proving that estoppel applies rests with the party asserting it. *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1986).

¶ 23 But an insurer's duty to defend is only triggered when it has "actual notice of a claim against an insured." *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 574-75 (2000). Our supreme court has defined "actual notice" as "notice sufficient to permit the insurer to locate and defend the lawsuit." (Internal quotation marks omitted.) *Cincinnati Companies v. West American Insurance Co.*, 183 Ill. 2d 317, 329 (1998). An insurer may obtain actual notice of an underlying lawsuit by a tender from its insured, but that is not the exclusive

manner by which it may obtain notice. See *Rios v. Valenciano*, 273 Ill. App. 3d 35, 40 (1995); *Olivieri v. Coronet Insurance Co.*, 173 Ill. App. 3d 867, 871-72 (1987). For example, an insurer may obtain actual notice of the lawsuit from the plaintiff's counsel. *Olivieri*, 173 Ill. App. 3d at 871.

¶ 24 The mere possibility of a lawsuit, or even the threat of one by a plaintiff's lawyer, is not actual notice; the duty to defend is not triggered until the underlying lawsuit is filed. See, *e.g.*, *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 531, 532 (1995) (noting that official letters from U.S. EPA threatening potential suit against insured did not trigger insurer's duty to defend; "before [insured] can claim that [insurer] has breached its duty to defend, a suit must have been filed against [insured]."); *Grinnell Mutual Reinsurance Co. v. LaForge*, 369 Ill. App. 3d 688, 698 (2006) (noting that "Illinois case law speaks only to the duty to defend that arises when a lawsuit has been filed"); *United Farm Family Mutual Insurance Co. v. Frye*, 381 Ill. App. 3d 960, 967 (2008) ("A duty to defend does not arise until after the underlying lawsuit is filed."); *Johnson v. Banner Mutual Insurance Co.*, 40 Ill. App. 2d 417, 419-20 (1963) (plaintiff's attorney's threats to insurer that, if claim was not settled, plaintiff would file suit within two weeks, was not actual notice that lawsuit was filed); *Rice v. AAA Aerostar, Inc.*, 294 Ill. App. 3d 801, 808 (1998) ("mere statements threatening the possibility of suit are not sufficient for 'actual notice' purposes"), *overruled on other grounds by Country Mutual Insurance Co. v. Livorsi Marine, Inc.*, 222 Ill. 2d 303 (2006). The bottom line is that, however it may occur, the insurer must have actual notice of the lawsuit—that is, "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 Companies*, 183 Ill. 2d at 329-30.

¶ 25 Thus, American Access's duty to defend was only triggered if it received actual notice that an amended complaint, naming Lashaunda as a defendant, was filed. As applied to this case—the review of a grant of summary judgment in plaintiff's favor—the question is whether plaintiff has carried her burden of demonstrating that there is no question of material fact on this issue, and thus that we may hold, as a matter of law, that American Access received actual notice of the amended complaint. *Hall*, 208 Ill. 2d at 328.

¶ 26 We believe that plaintiff has failed to carry her burden. Plaintiff attached no correspondence or affidavits showing that she notified American Access that she had added Lashaunda to the amended complaint, nor did she present any evidence that Lashaunda, the insured, ever tendered the amended complaint to American Access. Instead, in support of her motion for summary judgment, plaintiff submitted four letters that simply discussed the possibility of plaintiff suing Lashaunda. We do not find any of these letters sufficient to demonstrate, as a matter of law, that American Access had actual notice of the amended complaint naming Lashaunda as a defendant.

¶ 27 In the first letter, Rick Lionello of American Access's claims department requested that plaintiff's counsel file a lawsuit against the driver and owner of the car that struck plaintiff and Lashaunda "in order to protect [American Access's] subrogation interest." In the second, plaintiff's counsel sent Lionello a letter that enclosed "a copy of the Complaint and Summo[ns] that [Lionello] requested [to] be filed," a complaint that named as defendants the driver of the other car (Williams) and the owner of the car (Brown), but not Lashaunda. In the third, plaintiff's counsel threatened to add Lashaunda as a defendant in the complaint unless American Access tendered the limits of the policy. And in the fourth, plaintiff's counsel noted that American

Access's check for the uninsured-motorist arbitration award should not contain release language because plaintiff still had a claim against Lashaunda.

¶ 28 None of this correspondence showed that American Access had actual notice that a suit had been filed against Lashaunda. It only showed the possibility that Lashaunda would be added to the underlying lawsuit, which is insufficient based on the case law we have referenced. See *Lapham-Hickey Steel Corp.*, 166 Ill. 2d at 531-32; *Grinnell*, 369 Ill. App. 3d at 698; *Frye*, 381 Ill. App. 3d at 967; *Johnson*, 40 Ill. App. 2d at 419-20.

¶ 29 Nor did the date of American Access's check for her uninsured-motorist arbitration award show actual notice of the amended complaint. Although the check was drafted months after Lashaunda had been named as a defendant, we fail to see how American Access's payment of the uninsured-motorist arbitration award amounts to notice that Lashaunda had been sued in the separate, underlying lawsuit.

¶ 30 In sum, plaintiff's evidence simply showed that American Access was given notice of the possibility—or even probability—that Lashaunda would be sued. Without any evidence showing that American Access had actual notice of the amended complaint, plaintiff failed to carry her initial burden of production to demonstrate that she was entitled to judgment as a matter of law. See *Mashal*, 2012 IL 112341, ¶ 49; *Helfers-Beitz*, 406 Ill. App. 3d at 267.

¶ 31 Plaintiff argues that the affidavit from Donald Santo, American Access's claims adjuster, that American Access filed in response to her motion for summary judgment "fails to claim that American Access had no knowledge of the suit against its insured prior to judgment." Santo swore in his affidavit that "[he] was not given notice by Lashaunda Carter or Plaintiff's counsel that Lashaunda Carter had been added as a Defendant to [t]his cause" until after the default judgment and prove-up against Lashaunda in the underlying proceeding, when plaintiff filed her

citation to discover assets and served American Access. Plaintiff's point is that the language used in the Santo affidavit is evasive—that Santo never said that he did not know of the inclusion of Lashaunda in the underlying lawsuit, only that neither Lashaunda nor plaintiff's counsel told him about it. Plaintiff is free to pursue that inquiry upon remand of this case, as well as any other argument she may make regarding American Access's actual notice. But at this stage, as we have said, she has not sustained her initial burden of production to even require a response from American Access; she has presented no evidence that American Access had actual notice that Lashaunda had been named in the underlying lawsuit. And the Santo affidavit, while perhaps not dispositive in American Access's favor, at least demonstrated that he was the officer at American Access who handled this matter, and that neither plaintiff's counsel nor Lashaunda told him about the amended complaint naming Lashaunda; it only bolsters our conclusion that there is a genuine issue of material fact on this issue, and that summary judgment should not have been entered in plaintiff's favor at this stage. See *Brochu*, 105 Ill. 2d at 500. Viewing the evidence in the light most favorable to American Access, we cannot say, as a matter of law, that plaintiff's right to relief is "clear and free from doubt." *Bagent*, 224 Ill. 2d at 163.

¶ 32 Finally, plaintiff argues that we should affirm the trial court's judgment because American Access failed to produce "a certified or sworn copy of the insurance policy" in its response to plaintiff's motion for summary judgment. Plaintiff claims that, absent such a copy of the policy, defendant could not prevail. We do not agree. First, plaintiff attached a copy of the correct version of the policy in her motion for summary judgment—a copy that she received from American Access, in response to her interrogatories. Thus, the proper copy was before the court, and the party carrying the initial burden of production—plaintiff—presented it as part of her summary judgment motion.

¶ 33 Plaintiff cites *American Service Insurance v. Miller*, 2014 IL App (5th) 130582, in support of her argument, but that case has nothing to do with an insurer's burden on a motion for summary judgment. Rather, *Miller* dealt with the propriety of a trial court's award of *sanctions* pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). *Miller*, 2014 IL App (5th) 130582, ¶¶ 13-16. In that case, the insurer filed a complaint for declaratory judgment and attested that the policy attached to its complaint was a certified copy of the policy at issue. *Id.* ¶ 3. It turned out that, not only was the copy attached to the complaint not a certified copy, but it differed from the policy that was in effect at the time in question. *Id.* ¶ 4. Unlike *Miller*, this case does not involve an award of sanctions. And there is no dispute that the policy that plaintiff attached to her motion for summary judgment was the policy in effect at the time of the car accident. We see nothing in *Miller* that requires an insurer opposing a motion for summary judgment to supply a certified copy of the policy when it had already been furnished by the movant.

¶ 34 Because plaintiff failed to present sufficient evidence eliminating any questions of material fact regarding American Access's actual notice of the amended complaint, the trial court's award of summary judgment must be vacated. We express no opinion on whether American Access did or did not receive actual notice of the amended complaint; we hold only that a question of material fact exists.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we vacate the trial court's award of summary judgment and remand for further proceedings.

¶ 37 Vacated and remanded.