2016 IL App (1st) 143170-U

No. 1-14-3170

April 29, 2016

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEERLESS INDEMNITY INS. CO and INDIANA INS. CO.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs and Counterdefendants-Appellees,	)	No. 13 CH 11353
v.	)	
RICHARD SUROWIAK, individually, and DR. RICH SUROWIAK, INC., d/b/a CRYSTAL OPTICAL,	)	The Honorable Kathleen G. Kennedy,
Defendants and Counterplaintiffs-Appellants	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.[*]
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

Held: The trial court's judgment is affirmed where (1) the court properly granted judgment on the pleadings in plaintiffs/counter-defendants' declaratory judgment action, as the insurance agreement did not provide coverage for the underlying claims against defendants/counter-plaintiffs, and (2) defendants/counter-plaintiffs' claim for attorney fees and costs lacked merit.

[*] This case was recently reassigned to Justice Burke.

¶ 1 Plaintiffs/counter-defendants in this case are Peerless Indemnity Insurance Company (Peerless) and Indiana Insurance Company (Indiana). Defendants/counter-plaintiffs are Peerless and Indiana's insured, Richard Surowiak and Dr. Rich Surowiak, Inc. (Rich, Inc.) (d/b/a Crystal Optical). Hereinafter, defendants-counterplaintiffs will be referred to collectively as the Surowiak parties.

¶ 2 After a dispute between Surowiak and his business partner resulted in the filing of several lawsuits against the Surowiak parties and other entities, Peerless and Indiana, as plaintiffs, filed a complaint for declaratory judgment.[1] Peerless and Indiana sought a declaration that they did not owe a duty to defend or indemnify the Surowiak parties in the underlying lawsuits. The Surowiak parties, as defendants/counter-plaintiffs, filed an answer and counterclaim in the declaratory judgment action, setting forth (1) a breach of contract claim and (2) a claim that Peerless and Indiana acted in bad faith, thereby entitling the Surowiak parties to attorney fees and costs under section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2012)). Peerless and Indiana, as plaintiffs/counter-defendants, subsequently filed a motion for judgment on the pleadings on the initial complaint. The Surowiak parties filed a response, arguing that discovery would reveal "all of the claims" against them stemmed from Surowiak's attempt to protect his patient files, which the insurance agreement covered. Following a hearing, the trial court granted Peerless and Indiana's motion.

¶ 3 The Surowiak parties appeal, arguing (1) the trial court erred by granting Peerless and Indiana's motion for judgment on the pleadings because the underlying lawsuits related to actions

[1] We note the complaint for declaratory judgment, as well as some of the underlying complaints in this case, referred to Rich, Inc. "d/b/a Crystal Lake Optical" instead of Rich, Inc. "d/b/a Crystal Optical." At times, the complaints also simply make reference to Rich, Inc. There is no dispute that Rich, Inc.; Rich, Inc. (d/b/a Crystal Lake Optical); and Rich, Inc. (d/b/a Crystal Optical) are the same party and one of the defendants/counter-plaintiffs in this appeal. Accordingly, our use of the expression" the Surowiak parties" encompasses Surowiak and any reference to either Rich, Inc.; Rich, Inc. (d/b/a Crystal Optical), and/or Rich, Inc. (d/b/a Crystal Lake Optical).

Surowiak took in connection with his professional recordkeeping services, for which the insurance agreement provided coverage; and (2) the court erred by denying the Surowiak parties' bad-faith counterclaim.

¶ 4 For the following reasons, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 The underlying lawsuits in this case stemmed from a dispute between Surowiak and his former business partner, Edward Calzolaio, with whom Surowiak allegedly owned Crystal Lake Optical, Inc. (CLO). In September 2009, Surowiak purportedly removed Calzolaio from his position as secretary of CLO by changing CLO's locks. Thereafter, Surowiak's and CLO's attorney, Alan H. Shifrin & Associates, LLC (Shifrin), allegedly formed another corporation called Rich, Inc., which assumed the name Crystal Optical. The Surowiak parties allegedly continued using CLO's assets by defrauding vendors, including Wisconsin Vision Association, Inc. (Wisconsin Vision).[2]

¶ 7 A. The Underlying Actions Against the Surowiak Parties

¶ 8 1. *The McHenry County Complaints*

¶ 9 In April 2012, Calzolaio and CLO filed a second amended complaint against the Surowiak parties and Shifrin.[3] The complaint alleged that Surowiak conspired to terminate Calzolaio's position as secretary of CLO by changing CLO's locks. All books, records, inventory, and equipment belonging to CLO were allegedly left in Surowiak's exclusive possession and control. Thereafter, the complaint alleged, Shifrin formed Rich, Inc., which assumed the name Crystal Optical. The complaint alleged that as part of the scheme to defraud CLO and Calzolaio,

[2] The aforementioned facts were taken from the April 2012 McHenry County complaint as well as Peerless and Indiana's complaint for declaratory judgment.

[3] The caption of the complaint also listed CLO as a defendant, and the complaint identified CLO as a "[n]ominal [d]efendant." However, the complaint did not set out any claims against CLO.

the word "Lake" was scratched out or covered up on all of the "Crystal Lake Optical" signs. The complaint further alleged that the Surowiak parties continued to use CLO's assets, inventory, and credit, incurring $16,610.74 in liabilities by defrauding vendors. As a result of their conduct, at least one vendor, Wisconsin Vision had purportedly sued CLO.

¶ 10 The complaint set forth (1) a derivative claim against Surowiak for breach of fiduciary duty; (2) a derivative claim against Surowiak for waste of corporate assets; (3) a claim for an injunction against the Surowiak parties; (4) a claim for declaratory relief that Calzolaio owned 100% of all issued and outstanding shares of CLO; (5) a count of common law fraud against Surowiak, in that he intentionally created a competing business out of CLO's business premises and created confusion for vendors and the public with the intent to defraud them; (6) a count for violation of the Consumer Fraud and Deceptive Business Practices Act and Uniform Deceptive Trade Practices Act against the Surowiak parties; and (7) a claim of aiding and abetting.[4]

¶ 11 Prior to Calzolaio and CLO's filing of their second amended complaint, CLO filed a complaint in replevin against Surowiak. That complaint sought to recover CLO property valued at $66,440, including equipment, furniture, and "2000+ Pt Files."

¶ 12 The replevin complaint was later consolidated with the McHenry County complaint.

¶ 13 2. *The Cook County Complaints*

¶ 14 In August 2012, Calzolaio filed a third-party complaint against the Surowiak parties, Shifrin, and CLO. The complaint set forth counts of conversion, implied indemnification, and aiding and abetting. It alleged that Calzolaio and Surowiak were shareholders and officers in CLO, which had the right of possession to goods and services provided by Wisconsin Vision. It further alleged that in September 2010, the Surowiak parties took and unlawfully converted

[4] The complaint also set forth a legal malpractice claim against Shifrin.

products and services from Wisconsin Vision by conspiring to remove Calzolaio's position as Secretary and 49% shareholder of CLO and by changing the locks on the premises. According to the complaint, Surowiak's taking and conversion of the property was done willfully and maliciously, with a wanton disregard for CLO's rights. Further, the complaint alleged, the Surowiak parties willfully and maliciously refused to return the property or reimburse CLO for its value. The complaint claimed that due to Surowiak's conversion, Wisconsin Vision Associates had alleged Calzolaio was liable on a purported personal guarantee on behalf of CLO.

¶ 15 As to the implied indemnification count, the complaint alleged, *inter alia*, that Surowiak locked Calzolaio out of the business and, upon information and belief, continued ordering and receiving inventory from Wisconsin Vision. The complaint alleged Surowiak then sold the inventory and unlawfully converted the funds for his use and benefit and the benefit of Rich, Inc. The complaint asserted that if Wisconsin Vision received a judgment against Calzolaio, Calzolaio was entitled to contribution from the Surowiak parties, Shifrin, and CLO. As to the aiding and abetting count, the complaint alleged Shifrin formed Rich, Inc., with the intent to compete against CLO, and that Rich, Inc. was used to divert CLO's business and assets without the knowledge of CLO or CLO shareholders. The complaint further alleged that the Surowiak parties and Shifrin were aware they had a fiduciary duty, and they failed to fulfill that obligation by forming a competing corporation. Further, the complaint alleged, Surowiak and Shifrin were aware they had a duty to disclose their actions and refrain from such conduct, and their assistance in the concealment of the actions constituted a violation of their fiduciary obligations. The complaint alleged the actions of the Surowiak parties and Shifrin were intentional, willful, and wanton, and that they were performed with malice.

¶ 16 In August 2012, CLO filed a third-party complaint for conversion against the Surowiak parties, alleging that they unlawfully converted products and services from Wisconsin Vision by conspiring to remove or terminate Calzolaio's position and by physically changing the locks.

¶ 17 3. *The Arbitration Complaint*

¶ 18 In April 2012, Wisconsin Vision filed a verified complaint against Surowiak, seeking to recover approximately $22,000, plus fees, for breach of contract. A default judgment was entered against Surowiak.

¶ 19 B. Peerless and Indiana's Complaint for Declaratory Judgment

¶ 20 In April 2013, plaintiffs/counter-defendants Peerless and Indiana filed a complaint for declaratory judgment, seeking a declaration that they owed no duty to defend or indemnify defendants/counter-plaintiffs, the Surowiak parties, with respect to the third-party complaints filed by Calzolaio and CLO. Peerless and Indiana also sought a declaration that they did not owe reimbursement for defense costs incurred by the Surowiak parties with respect to the suits brought by Calzolaio, CLO, and Wisconsin Vision.

¶ 21 C. The Policies

¶ 22 The relevant provisions of the Peerless insurance policy provide that Peerless "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage' or 'personal and advertising injury.' " The policy provides coverage only for " 'bodily injury' and 'property damage' " that is caused by an " 'occurrence.' " In turn, an "occurrence" is defined as "an accident."

¶ 23 The "Optometrists Professional Liability-Illinois" endorsement (optometrist endorsement) specifies that coverage "also applies to 'bodily injury', 'property damage' or 'personal and advertising injury' arising out of the rendering of or failure to render professional

services in connection with the 'insured's' business as an optometrist, including treatment, advice or instruction."

¶ 24 The Indiana policy provides commercial umbrella liability coverage. The Surowiak parties' arguments in this appeal are premised solely on the language in the Peerless optometrist endorsement and not on any language in the Indiana policy.

¶ 25 D. The Surowiak Parties' Answer and Countercomplaint

¶ 26 In January 2014, defendants/counter-plaintiffs, the Surowiak parties, filed an answer to Peerless and Indiana's complaint for declaratory judgment. As part of their answer, the Surowiak parties filed a counterclaim consisting of two counts: a breach of contract claim, and a claim that plaintiffs acted in bad faith and defendants were thus entitled to costs and fees under section 155 of the Insurance Code. In their breach of contract claim, the Surowiak parties alleged that Peerless and Indiana breached their contract by failing to provide insurance proceeds as promised under the policy and that the Surowiak parties suffered damages by having to pay an attorney to recover money owed under the policy. The Surowiak parties sought damages in excess of $300,000. In their claim for costs under section 155, the Surowiak parties argued that Peerless and Indiana knowingly failed to settle defendants' claim and failed to provide defendants' cost of defenses. The Surowiak parties sought, *inter alia*, attorney fees and statutory damages of $60,000.

¶ 27 E. Motion For Judgment on the Pleadings

¶ 28 In May 2014, plaintiffs/counter-defendants Peerless and Indiana filed a motion for judgment on the pleadings. Peerless and Indiana argued that the underlying complaints did "not allege 'bodily injury,' " or " 'property damage' caused by an 'occurrence.' " Further, Peerless and Indiana posited, the complaints did not allege " 'personal and advertising injury' caused by any

covered offense, damages arising out of Surowiak's professional services, or claims brought by employees of Surowiak for injurious employment practices." Thus, Peerless and Indiana claimed, they did not owe a duty to defend or indemnify the Surowiak parties on the pending underlying actions, nor did they owe a duty to reimburse them for the costs of defending against the no-longer-pending underlying actions.

¶ 29 Later that month, the trial court entered and continued Peerless and Indiana's motion. The court further ordered that all discovery be held in abeyance until further order of the court.

¶ 30 Defendants/counter-plaintiffs, the Surowiak parties, filed a response to Peerless and Indiana's motion for judgment on the pleadings, arguing, *inter alia*, that discovery in this matter would show that all of the claims against them stemmed from Surowiak's attempt to prevent Calzolaio, a non-physician, from stealing or removing patient files. The Surowiak parties argued that Calzolaio's attempt to protect the files was "an issue sounding under malpractice or professional liability" and was contemplated by the policies. Further, the Surowiak parties alleged, discovery would show Peerless and Indiana acted with "intentional, vexatious and unreasonable bad faith" by failing to defend or pay the claims.

¶ 31 F. The Trial Court's Order

¶ 32 A hearing commenced in September 2014. Following the hearing, the trial court granted plaintiff/counter-defendants Peerless and Indiana's motion for judgment on pleadings. The court asked the parties whether "that would then dispose of the entire case." Peerless and Indiana's attorney responded, "That's correct." The Surowiak parties' attorney made no contrary assertion. The court's written order states that Peerless and Indiana's motion for judgment on the pleadings is granted and that Peerless and Indiana owe no duty to defend or indemnify the Surowiak parties

or owe any reimbursement or defense costs. The order further states that it "is a final and appealable order disposing of all issues and claims between the parties."

¶ 33 This appeal followed.

¶ 34 II. ANALYSIS

¶ 35 On appeal, defendants/counter-plaintiffs, the Surowiak parties, argue (1) the trial court erred by granting Peerless and Indiana's motion for judgment on the pleadings because the underlying lawsuits related to actions Surowiak took in connection with his professional recordkeeping services, for which the insurance agreement provided coverage; and (2) the court erred by denying the Surowiak parties' bad-faith counterclaim.

¶ 36 At the outset, we wish to clarify the trial court's ruling. Although both parties characterize the court as having ruled on the Surowiak parties' bad-faith counterclaim, our review of the record shows the court did not explicitly rule on the Surowiak parties' counterclaim. The parties did not address the Surowiak parties' counterclaims at the hearing on Peerless and Indiana's motion for judgment on the pleadings. The court asked the parties' attorneys whether its ruling would dispose of the entire case, and neither of the parties' attorneys disagreed. The court's order also indicated it was "a final and appealable order disposing of all issues and claims between the parties." However, the court's order stated only that it was granting Peerless and Indiana's motion for judgment on the pleadings and that they did not owe a duty to defend or indemnify. The order did not mention the Surowiak parties' counterclaim.

¶ 37 Given the trial court's failure to explicitly rule on the Surowiak parties' counterclaim, a review of our jurisdiction is warranted. We have jurisdiction to review only those orders that are final and appealable. *American Country Insurance Co. v. Chicago Carriage Cab Corporation,* 2012 IL App (1st) 110761, ¶ 21. An order is final and appealable where it terminates the

litigation between the parties on the merits and sets, fixes, or disposes of the rights of the parties, whether on the entire controversy or a separate part thereof, so that if the judgment or order is affirmed, the trial court need only execute it. *MidFirst Bank v. McNeal*, 2016 IL App (1st) 150465, ¶ 23. Whether an order that disposes of fewer than all claims is appealable is governed by Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Rule 304(a) allows an appeal to be taken from a final judgment as to fewer than all of the 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." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). However, a finding under Rule 304(a) is not required "where the rights and liabilities in a complaint and counterclaim are identical" because "an order disposing of one would, in effect, dispose of the other." *Lynch Imports, Inc. v. Frey*, 200 Ill. App. 3d 781, 785 (1990).

¶ 38 Here, the trial court did not include Rule 304(a) language in its order. However, such language was unnecessary. The Surowiak parties' breach of contract and section 155 claims were each premised on Peerless and Indiana's duty to defend or indemnify under the insurance agreements. Thus, when the court granted Peerless and Indiana's motion for judgment on the pleadings and found Peerless and Indiana did not owe a duty to defend or indemnify the Surowiak parties, the court necessarily disposed of the claims in the Surowiak parties' counterclaim. See *American Country Insurance Co.*, 2012 IL App (1st) 110761, ¶¶ 2, 22 (where the court granted summary judgment to the insured in an action seeking a declaration that the insured owed no duty to indemnify a taxi lessee, the court necessarily disposed of the taxi lessee's counterclaim for attorney fees, as the counterclaim "was inextricably tied to the declaratory judgment action"). Accordingly, we conclude a finding under Rule 304(a) was not required, and we have jurisdiction to consider this appeal. See *id.* ¶ 22; see also *Lynch Imports*,

Ltd., 200 Ill. App. 3d at 785 (a finding under Rule 304(a) was unnecessary where the buyers' counterclaim was predicated on the same grounds as their defense to the seller's complaint and thus, the order granting summary judgment in favor of the seller's complaint necessarily entailed the disposition of the issues raised in the counterclaim). We turn then to the merits of the Surowiak's parties claims.

¶ 39 1. Judgment on the Pleadings

¶ 40 The Surowiak parties first posit that the trial court erred by granting judgment on the pleadings. Specifically, the Surowiak parties argue the court failed to "properly evaluate all the evidence as to coverage" where it did not consider their response to Peerless and Indiana's motion for judgment on the pleadings, in which the Surowiak parites alleged that Surowiak's actions were taken to protect his patient files. Citing to the Illinois Optometric Practice Act of 1987 (Act) (225 ILCS 80/6 (West 2008)) and a portion of the Illinois Administrative Code (Administrative Code) (68 Ill. Adm. Code 1320.105 (eff. June 29, 2012)), the Surowiak parties maintain that Surowiak had a legal duty to protect his patient files. The Surowiak parties also argue the underlying complaints showed Calzolaio filed the lawsuits to illegally obtain the patient files. The Surowiak parties assert that because Calzolaio was complaining of property damage caused by actions Surowiak was required to take as an optometrist, the Peerless optometrist endorsement provided coverage.

¶ 41 " 'Judgment on the pleadings is properly granted if the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " *State Bank of Cherry v. CBG Enterprises, Inc.*, 2013 IL 113836, ¶ 65 (quoting *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010)). A court considers as admitted all well-pleaded facts set forth in the nonmoving party's pleadings and the fair inferences that can be drawn therefrom. *Id.*

The court may consider only the facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). We apply a *de novo* standard of review to a trial court's entry of judgment on the pleadings. *West American Insurance Co. v. Midwest Open MRI, Inc.*, 2013 IL App (1st) 121034, ¶ 19.

¶ 42 In a declaratory judgment action, where the issue is an insurer's duty to defend, a court compares the allegations in the underlying complaint to the relevant provisions of the insurance policy. *Pekin Insurance Co.*, 237 Ill. 2d at 455. "If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises." *Id.* An insured's duty to defend is broader than its duty to indemnify and thus, where an insured owes no duty to defend, it likewise owes no duty to indemnify. *Margulis v. BCS Insurance Co.*, 2014 IL App (1st) 140286, ¶ 19.

¶ 43 At the outset, we note that Peerless and Indiana contend we should disregard the Surowiak parties' arguments because the Surowiak parties did not raise them in the trial court. See *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006) (issues not raised in the trial court are forfeited and may not be raised for the first time on appeal).[5] We agree that at no point in the trial court proceedings did the Surowiak parties make the precise arguments they now make, *i.e.*, that the Act and the Administrative Code required Surowiak to protect the patient files and thus, any property damage he caused arose from his rendering of professional services as an optometrist. However, the Surowiak parties did argue in their response to Peerless and Indiana's motion for judgment on the pleadings that "all of the claims" against them stemmed

[5] The *Vine Street Clinic* court expressed the aforementioned rule in terms of waiver, not forfeiture. However, our supreme court has clarified that waiver is the voluntary relinquishment of a known right, whereas forfeiture is the failure to comply with procedural rules. *Gallagher v. Lenert*, 226 Ill. 2d 208, 229 (2007). Accordingly, the Surowiak parties' actions here are properly framed in terms of "forfeiture."

from "Surowiak's attempt to recover and/or protect his patient files from being stolen/removed by Calzolaio, a non-physician," which was "an issue sounding under malpractice or professional liability" and was "contemplated under the policies and should afford coverage." Further, at the hearing on the motion for judgment on the pleadings, the Surowiak parties posited that Surowiak was "bound by HIPAA and bound by certain medical ethical rules" and "had an obligation to protect his clients and their files upon the breakup of the practice." The Surowiak parties also argued that coverage was implicated because Surowiak was required to protect the files. Thus, to the extent the Surowiak parties raised the issue of whether coverage was triggered by Surowiak's protection of the client files in accordance with his duties as an optometrist, we will consider their argument on appeal.

¶ 44 Nonetheless, in doing so, we find the Surowiak parties' claim of error to be meritless. Their sole assertion as to how policy coverage was implicated is based on the following language in the optometrist endorsement to the Peerless policy: "Coverages also applies to *** 'property damage' *** arising out of the rendering of *** professional services in connection with the 'insured's' business as an optometrist, including treatment, advice or instruction." Relying on *Pekin Insurance Co.*, the Surowiak parties argue the court failed to consider their response to Peerless and Indiana's motion for judgment on the pleadings, in which they stated that discovery would show all of the claims against them stemmed from Surowiak's "attempt to recover and/or protect his patient files from being stolen/removed by Calzolaio, a non-physician."

¶ 45 The Surowiak parties' reliance on *Pekin Insurance Co.* is misplaced. There, the insured was accused of assault, battery, intentional infliction of emotional distress, and negligence. *Pekin Insurance Co.*, 237 Ill. 2d at 449-50. The insured's policy excluded coverage for "bodily injury" and "property damage" arising from intentional acts; however, it also contained a self-defense

exception to the intentional-act exclusion. *Id.* at 450-51. The insurer filed a declaratory judgment action, seeking a finding that it owed the insured no duty to defend. *Id.* at 451. The insured filed an answer and counterclaim in the underlying action, alleging that he was defending himself and that his accuser was guilty of assault, battery, and intentional infliction of emotional distress. *Id.* at 451-52. The insurer subsequently filed a motion for judgment on the pleadings. *Id.* at 452.

¶ 46 Before the supreme court, the insurer argued that the determination of an insured's duty to defend had to be based solely upon the allegations in the underlying complaint. *Id.* at 454. The supreme court disagreed, concluding that a trial court "may, under certain circumstances, look beyond the underlying complaint in order to determine an insurer's duty to defend." *Id.* at 459. The *Pekin* court reasoned that since the insurance policy at issue included a self-defense exception to the intentional-act exclusion that the underlying complaint did not address, the court had to examine the insured's counterclaim "for the presence of allegations of fact sufficient to trigger that self-defense exception." *Id.* at 463. Otherwise, the court could not determine whether a genuine issue of material fact existed as to whether the pleadings were substantially insufficient in law. *Id.* The *Pekin* court also reasoned that "unusual or compelling circumstances" existed that required the trial court to look beyond the underlying complaints' allegations. *Id.* at 465. The supreme court explained that if the insured could not plead facts alleging that his accuser's injury arose through self-defense, there would be no way for the self-defense exclusion in the policy to be triggered, as it was "unlikely" that the underlying complaint would set forth allegations supporting the self-defense exception. *Id.* at 465-66.

In *Pekin*, the insured raised his defense in response to the *underlying complaint*. *Id.* at 451. By contrast, the Surowiak parties here raised their defense in their response to the motion for judgment on the pleadings. Notably, the Surowiak parties' response did not cite to any of the

underlying pleadings. However, " 'judgment on the pleadings is properly granted if the *pleadings* disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.' " (Emphasis added.) *State Bank of Cherry*, 2013 IL 113836, ¶ 65 (quoting *Pekin Insurance Co.*, 237 Ill. 2d at 455). Further, the Surowiak parties' response contained only the conclusory assertion that the dispute in this case stemmed from Surowiak's attempt to recover and/or protect his patient files from Calzolaio. A party cannot avoid judgment on the pleadings by making bald assertions without providing any factual support. See *State Farm Fire & Casualty Co. v. Young*, 2012 IL App (1st) 103736, ¶ 19 (where the defendant failed to provide any factual support for his denials of the allegations in the underlying complaint, those denials were "no more than bald assertions" and did not override the well-pleaded facts in the complaint).

¶ 47 The Surowiak parties correctly point out that Peerless and Indiana's motion for judgment on the pleadings included the replevin complaint as an attachment, and the replevin complaint referenced "2000 Pt files" in a list of several items. The Surowiak parties also note that Calzolaio sought a constructive trust and injunctive relief. They speculate that the only asset for which Calzolaio could not be compensated with money damages was the "2000 Pt files."[6]

¶ 48 The bare reference to "2000 Pt files," listed among several other items, was insufficient to implicate policy coverage. The replevin complaint contained no allegations that would trigger policy coverage, nor have the Surowiak parties cited or claimed they filed a response to the replevin complaint in which they made allegations that would trigger policy coverage. See *Pekin Insurance Co.*, 237 Ill. 2d at 455 (to determine an insured's duty to defend in a declaratory

[6] Peerless and Indiana argue that the Surowiak parties' argument as to the "2000 Pt files" in the replevin complaint is a new argument that the Surowiak parties are raising on appeal. However, we note that during the hearing on the motion for judgment on the pleadings, the Surowiak parties posited Calzolaio sued Surowiak because Surowiak took substantial steps to prevent Calzolaio from taking the patient files and "in fact, part of what Calzolaio is suing for and has previously sued for is replevin." Thus, we will consider the Surowiak parties' assertion on appeal.

judgment action, a court compares the allegations in the underlying complaint to the insurance policy provisions). All of the underlying complaints in this case solely involved allegations that the Surowiak parties engaged in intentional torts and unfair business practices by locking Calzolaio out of CLO, using CLO's assets and credit, and engaging in fraudulent activity. These allegations, relating to intentional business torts and unfair competitive practices, were insufficient to trigger policy coverage under the Peerless policy. See *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391-95 (1993) (insurers had no duty to defend under policy providing coverage for claims made against the insured "by reason of any act, error or omission in professional services rendered or that should have been rendered by the Insured *** and arising out of the conduct of the Insured's profession as a real estate agent or real estate broker" where claims arose from the insureds' purportedly tortious conduct and improper business practices, which were "ancillary to the performance of real estate services"); see also *Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 IL App (1st) 101155, ¶ 39 (noting that "Illinois law views professional liability policies to be limited forms of insurance, which generally provide coverage only for those risks 'inherent' in the insured's professional services"); *Margulis v. BCS Insurance Co.*, 2014 IL App (1st) 140286, ¶ 28 (insured's allegedly negligent acts of transmitting automated, unsolicited advertising calls did not fall within scope of the insurance policy, as the acts "did not arise out of the conduct of [the insured's] business in rendering services for others as an insurance agent, general agent or broker." (Emphasis omitted.)).

¶ 49 In sum, we find no error in the trial court's granting of judgment on the pleadings in favor of Peerless and Indiana.

¶ 50 2. The Surowiak Parties' Bad-Faith Counterclaim

¶ 51 The Surowiak parties next argue that the trial court should have awarded fees under section 155 of the Insurance Code. They posit that Peerless and Indiana ignored evidence that they knew supported coverage and engaged in activities designed to mislead the trial court by suppressing knowledge of those facts, by filing a motion for judgment on the pleadings, and by arguing "that the known facts should be ignored because of the standard of review." Peerless and Indiana respond that (1) the Surowiak parties' brief contains assertions that are unsupported by any citation to the record in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013); (2) the Surowiak parties have forfeited review of their arguments where they did not make a dispositive motion on their counterclaim, seek a ruling from the court that Peerless and Indiana violated section 155, or argue in support of their counterclaim in response to Peerless and Indiana's motion for judgment on the pleadings; and (3) the Surowiak parties' section 155 claim lacks merit. We need not address Peerless and Indiana's first two assertions, as we agree that the Surowiak parties' claim fails on the merits.

¶ 52 The trial court may award reasonable attorney fees and other costs in an insurance coverage action where the court finds an insured's action or delay in settling the claim is "vexatious and unreasonable." 215 ILCS 5/155(1) (West 2012). In other words, "[s]ection 155 allows for 'an extracontractual remedy' of attorneys fees and costs for an insurer's 'unreasonable and vexatious' refusal to comply with its policy obligations." *Illinois State Bar Ass'n Mutual Insurance Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶ 26. In determining whether an insurer's conduct is "vexatious and unreasonable," the court "should consider the totality of the circumstances," including the insurer's attitude. *Area Erectors, Inc. v. Travelers Property Casualty Co. of America*, 2012 IL App (1st) 111764, ¶ 33.

¶ 53 Generally, we apply an abuse of discretion standard in reviewing a trial court's decision regarding attorney fees and costs under section 155 of the Insurance Code. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 29. However, when a court "denies section 155 relief via a dispositive motion," we "apply the standard of review that is appropriate for that motion." (Internal quotation marks omitted.) *Id.* As we have previously detailed, the trial court here did not explicitly rule on the Surowiak parties' claim for sanctions pursuant to section 155 of the Insurance Code. However, the court implicitly did so when, in granting Peerless and Indiana's motion for judgment on the pleadings, it found that Peerless and Indiana did not owe a duty to defend or indemnify. See *American Country Insurance Co.*, 2012 IL App (1st) 110761, ¶ 22 (explaining that the insurer "owed no attorney fees once it was absolved of a duty to indemnify."). Our review is thus *de novo*. *American Service Insurance Co. v. China Ocean Shipping Co. (Americas) Inc.*, 2014 IL App (1st) 121895, ¶ 49 (our court applies a *de novo* standard when the trial court's section 155 determination is made in the context of a ruling on a motion for judgment on the pleadings because the applicable standard of review for judgment on the pleadings is *de novo*).

¶ 54 Where an insurance policy does not apply, a court cannot find the insurer acted vexatiously and unreasonably in denying a claim. *Illinois State Bar Ass'n Mutual Insurance Co.*, 2012 IL App (1st) 111810, ¶ 26; see also *Area Erectors, Inc.*, 2012 IL App (1st) 111764, ¶ 33 ("If a *bona fide* coverage dispute exists, an insurer's delay in settling a claim will not be deemed vexatious or unreasonable for purposes of section 155 sanctions." (Internal quotation marks omitted.)). Because we have concluded the trial court did not err by finding the allegations against Peerless and Indiana did not implicate coverage, the Surowiak parties' section 155 claim fails.

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm the trial court's judgment.

¶ 57 Affirmed.