2016 IL App (1st) 143672-U
No. 1-14-3672

THIRD DIVISION
May 11, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE FARM FIRE & CASUALTY CO.,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CH 37273
	)	
DAZONTAY MATTHEWS,	)	
	)	The Honorable
Defendant-Appellant,	)	Peter Flynn,
	)	Judge Presiding.
v.	)	
	)	
NAHUM HERNANDEZ and MARIA MAGDALENA MORA-CRUZ	)	
	)	
Defendants.	)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justice Fitzgerald Smith concurred in the judgment.
Presiding Justice Mason specially concurred.

ORDER

¶ 1 *Held:* Judgment affirmed where policy exclusion precluded coverage for the insured against underlying lawsuit.

¶ 2 This appeal involves an insurance coverage dispute under a general business liability policy arising out of a lawsuit filed in the Circuit Court of Cook County. The insurer filed a

declaratory judgment action against its policy holder alleging no coverage under the policy. The parties filed cross-motions for summary judgment. The circuit court found that the policy exclusion precluded coverage for the underlying lawsuit and granted summary judgment in favor of the insurer. For the following reasons we affirm the circuit court.

¶ 3 BACKGROUND

¶ 4 Underlying Lawsuit

¶ 5 The underlying lawsuit was filed by Dazontay Matthews (Matthews), a minor, by his mother, on March 18, 2010, to recover damages for injuries suffered, including the amputation of a significant portion of his left hand, while operating an electric cheese grater at a pizza restaurant. The incident occurred on October 22, 2009, at Nuno's Pizza, located at 16301 S. Halsted, Harvey, Illinois. Nuno's Pizza was owned by Nahum Hernandez (Hernandez) and/or his spouse, Maria Magdalena Mora-Cruz (Mora-Cruz)[1].

¶ 6 The facts alleged in the underlying lawsuit are as follows. Beginning in the summer of 2008, Matthews would perform odd jobs for Rene's Pizza South employees in exchange for cash and/or food. On October 22, 2009, one of Rene's Pizza South's employees asked Matthews to accompany him to Nuno's Pizza to help with certain tasks. These tasks included mopping floors, washing dishes, delivering food orders and grating cheese. At Nuno's Pizza, Matthews was told to put cheese into a power-driven cheese grater. Matthews was injured as his hand was pulled into the grater while attempting to dislodge cheese that had become stuck in the grater.

¶ 7 The third amended complaint in the underlying lawsuit alleged that Hernandez and/or Mora-Cruz owned and operated Nuno's Pizza located at 16301 S. Halsted Street, Harvey, Illinois, as well as Rene's Pizza South, located at 30 E. 159th Street, Harvey, Illinois. The

[1] Hernandez and Mora-Cruz did not participate in the circuit court proceedings. They were dismissed pursuant to stipulation.

complaint alleged that Matthews' injury arose out of conduct of the business that Hernandez and/or Mora-Cruz were carrying on at Nuno's Pizza and/or Rene's Pizza South.

¶ 8 State Farm Fire & Casualty Company (State Farm) issued a general business liability policy to Hernandez and/or his spouse, for Rene's Pizza South. The policy was issued on February 1, 2006, based on an application submitted by Hernandez. The application sought business liability coverage for a pizza business operating as Rene's Pizza South at two locations, 13801 South School Street, Riverdale, Illinois and 30 E. 159th Street, Harvey, Illinois. The policy was renewed annually, with renewal premiums calculated based on audits of the disclosed business locations. This policy was in effect on October 22, 2009, the date of Matthews' injury. The Rene's Pizza South location at 30 East 159th Street, Harvey, Illinois, however, was retroactively deleted at Hernandez's request because he had sold the business, effective September 21, 2009.

¶ 9 The policy issued by State Farm contained, in relevant part, the following provision:

COVERAGE L-BUSINESS LIABILITY

"We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments. This insurance applies only:

1. to bodily injury or property damage caused by an occurrence which takes place in the coverage territory during the policy period;

* * *

Designation of Insured

1. If you are designated in Declarations as:

   a. an individual, you and your spouse are insureds but only with respect to the conduct of a business of which you are the sole owner;

* * *

5. Any organization you newly acquire or form, other than a partnership, joint venture, or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier."

¶ 10 Hernandez tendered defense of the underlying lawsuit to State Farm on or about April 13, 2011. State Farm agreed to fund the defense of Hernandez and Mora-Cruz subject to a reservation of rights. However, State Farm then filed a declaratory judgment action and withdrew its defense in the underlying lawsuit. Subsequently, on January 23, 2013, a default judgment was entered against Hernandez, Mora-Cruz and another individual in the amount of $5,523,122.77.

¶ 11 Declaratory Judgment

¶ 12 Matthews filed an answer, affirmative defenses and counterclaim in the declaratory judgment action. Matthews alleged that State Farm was estopped from denying coverage because State Farm: breached its duty to defend Hernandez and Mora-Cruz; breached its duty to appoint independent counsel; and breached its duty of good faith and fair dealing. The counterclaim sought a declaration that State Farm had a duty to defend and alleged bad faith on the part of State Farm.

¶ 13 State Farm filed a second amended complaint for declaratory judgment seeking a declaration that the policy did not provide coverage to Hernandez and/or Mora-Cruz for the matters alleged in the underlying lawsuit; that it was not obligated to defend Hernandez and/or Mora-Cruz, and that it was not obligated to indemnify the default judgment entered against them.

¶ 14 The parties filed cross-motions for partial summary judgment. The court entered an order granting State Farm's motion for summary judgment on Matthews' affirmative defenses, and granting summary judgment to State Farm on Matthews' counterclaim for bad faith.

¶ 15 With respect to the remaining issues presented by the cross-motions for summary judgment, the court directed the parties to submit additional briefing addressing whether Hernandez owned Nuno's Pizza located at 16301 S. Halsted, Harvey, Illinois, on or before February 1, 2006, the date the policy began.

¶ 16 State Farm submitted a supplemental memorandum stating that business license renewal applications filed with the city of Harvey, revealed that a Gustav Martinez owned Nuno's Pizzeria in 2005 and renewed the license in 2005 and on April 19, 2006. Hernandez applied to renew Nuno's Pizza license on April 23, 2007. Matthews did not refute State Farm's supplemental filing and did not submit a supplemental filing of his own. The court found that based on this additional information, Hernandez did not own Nuno's Pizza located at 16301 S. Halsted, Harvey, at the time the policy was written on February 1, 2006, and that Hernandez acquired Nuno's Pizza sometime between April 19, 2006, and April 23, 2007.

¶ 17 On October 14, 2014, the circuit court entered an order granting summary judgment in favor of State Farm. The court reasoned that paragraph 1 was inconsistent with paragraph 5 of the policy and that paragraph 5 limited any coverage of Nuno's Pizza to the 90 days following its acquisition and that the specific provision controlled over paragraph 1, the more general provision which would seem to extend coverage to any business owned by Hernandez.

¶ 18 The court found that: (1) Matthews' injuries occurred during the conduct of the business of Nuno's Pizza; (2) Hernandez did not own Nuno's Pizza at the time of the State Farm policy's inception on February 1, 2006; (3) Nuno's Pizza was a "newly acquired or formed organization"

under the State Farm Policy because it was acquired by Hernandez on some date between April 19, 2006 and April 23, 2007; (4) the policy provided coverage for Nuno's Pizza but only for 90 days after it was acquired by Hernandez, therefore, coverage for Nuno's Pizza under the policy expired by July 22, 2007, at the latest; (5) the policy did not provide coverage for Nuno's Pizza on October 22, 2009, the date of Matthews' accident, because Nuno's Pizza was not listed in the policy declarations as a named insured and it was no longer a "newly acquired or formed organization; and (6) the policy did not provide coverage for the underlying lawsuit.

¶ 19 Matthews filed a motion to reconsider, which was denied. In that order, the court dismissed Hernandez and Mora-Cruz pursuant to stipulation, so that an appeal could be taken. Matthews filed this timely appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, Matthews contends that the circuit court erred in granting summary judgment in favor of State Farm because the policy provided coverage for the underlying lawsuit. Matthews raises two claims in support of his contention. Matthews argues: (1) there was insufficient evidence to support the court's factual finding that Matthews' injury occurred during the conduct of the business of Nuno's Pizza Corporation; and (2) the court improperly found that there was no coverage for the former "newly acquired" business of Nuno's Pizza under a policy exclusion which allowed temporary coverage for the first 90 days of operation. Matthews further argues for additional relief if this court were to reverse.

¶ 22 State Farm responds that Nuno's Pizza was not a named insured or newly acquired under the policy at the time of Matthews' injury and therefore the policy did not provide coverage for the underlying lawsuit. State Farm asks that we affirm the circuit court's judgment.

¶ 23 Summary judgment is appropriate only where "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 2004). In considering a summary judgment motion, the court has a duty to construe the evidence strictly against the movant and liberally in favor of the nonmoving party. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 131-32 (1992).

¶ 24 The resolution of this matter calls for the application of well-established principles of contract construction. The insurance policy is a contract and is subject to the same rules that govern the interpretation of contracts. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). The primary objective of the court is to determine and give effect to the intent of the parties as expressed in the language of the policy. *Id*. On review, the court is to assume that every provision in the contract serves a purpose. *Central Illinois Light Co v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004). The policy is to be construed as a whole taking into account the type of insurance provided, the nature of the risks involved, and the overall purpose served by the contract. *American States Insurance Co. v. Kolons*, 177 Ill. 2d 437, 479 (1997).

¶ 25 Our review of summary judgment is *de novo. Outboard Marine Corp.,* 154 Ill. 2d at 102. Specifically, the construction of an insurance policy is a question of law, which is reviewed *de novo. Central Illinois Light Co.,* 213 Ill. 2d at 153.

¶ 26 We now turn to Matthews' argument that the circuit court erred in granting summary judgment in favor of State Farm because there was insufficient evidence to support the court's factual finding that Matthews' injury occurred during the conduct of the business of Nuno's Pizza Corporation. First, Matthews claims that the Secretary of State's records show that the corporation was administratively dissolved in 2008, well before the date of his injury. Matthews

maintains that Nuno's Pizza Corporation was not even operational at the time he was injured and that the corporate shield no longer existed to insulate Hernandez from liability. Matthews contends that if Nuno's Pizza was a sole proprietorship maintained by Hernandez, as his complaint states, the policy provided coverage with respect to the conduct of the business of which Hernandez, as a named insured individual, was the sole owner.

¶ 27 State Farm responds that the court properly found that "Matthews' injury occurred during the conduct of the business of Nuno's Pizza", and therefore, Matthews discussion of Nuno's Pizza Corporation's dissolved status is irrelevant.

¶ 28 Alternatively, Matthews argues his complaint asserted that his injuries arose out of activities at Rene's Pizza South, 30 E. 159th Street, Harvey. Matthews claims that a reasonable fact finder could have found that his injury was attributable to the activities at Rene's Pizza South's Harvey location where he arrived before going to Nuno's Pizza. Matthews also questions the timing and motive of the deletion of this location from the policy, requested by Hernandez in November 2010, after the date of his injury, and made retroactive to a date prior to his injury. Matthews asserts that this is a question of material fact and contrary to the court's factual finding that Matthews' injury occurred during the conduct of business at Nuno's Pizza. Matthews contends that State Farm proffered insufficient evidence for the court's finding.

¶ 29 State Farm further responds that Matthews' assertion that his injury could be attributed to Rene's Pizza South at 30 E. 159th Street, Harvey is in contravention of the facts. State Farm claims that the retroactive deletion of the 30 E. 159th Street, Harvey location was made at Hernandez's request because the location had been sold. State Farm asserts that at the time of Matthews' injury it was the intent of the parties that the only insured location of Rene's Pizza South was 13801 South School Street, Riverdale, and that none of the events giving rise to the

alleged injury occurred there. State Farm maintains that Matthews' injury occurred at Nuno'a Pizza, located at 16301 S. Halsted Street, Harvey, and in support, State Farm points to the undisputed facts that Matthews was operating the power-driven cheese grater at that location, the 911 call was made from that location and the ambulance arrived at that location. State Farm contends that there was sufficient evidence to support the court's finding.

¶ 30 Here, there was sufficient evidence that Matthews' injuries occurred during the conduct of the business of Nuno's Pizza. Although on the date of Matthews injury he arrived at a Rene's Pizza South location, it is undeniable that his injury occurred at Nuno's Pizza, on Halsted Street in Harvey, where he encountered issues with the power-driven cheese grater and where the paramedics arrived to treat his injury.

¶ 31 We agree with the circuit court and its factual finding. See *Oakley Transport, Inc. v. Zurich Ins. Co.*, 271 Ill. App. 3d 716, 726 (1995) (citing *International Minerals and Chemical Corp. v. Liberty Mutual Insurance Co.* 168 Ill. App. 3d 361, (1998) ("an insurance policy is not to be interpreted in a factual vacuum and without regard to the purpose for which the insurance was written. The paramount objective in construing a policy is to give effect to the intent of the parties as expressed by the terms of the agreement")).

¶ 32 Turning to Matthews' second argument that the circuit court erred in granting summary judgment in favor of State Farm, Matthews states that the court improperly found that there was no coverage for the former "newly acquired" business of Nuno's Pizza under a policy exclusion which allowed temporary coverage for the first 90 days of operation. Matthews maintains that the policy provided coverage to Hernandez with respect to Nuno's Pizza, which Hernandez solely owned, whether or not "newly acquired." Matthews claims that Hernandez was afforded personal

liability coverage with respect to any business Hernandez owned at any time during the policy's effective period.

¶ 33 Matthews claims that paragraph 5 of the policy imposes on State Farm an additional, time-limited obligation to certain qualifying business entities. Matthews maintains that State Farm's time-limited obligation exists independent of its obligation to Hernandez. Matthews acknowledges paragraph 5 of the policy provides temporary coverage for "newly acquired" businesses for the first 90 days of operation, but this temporary coverage applies to the business entity only and does not alter the fact that Hernandez, as the named insured individual in the policy, remained entitled to coverage with respect to the conduct of Nuno's Pizza, so long as it was solely owned by Hernandez.

¶ 34 Matthews argues that nothing in paragraph 5 limits, narrows, or confines other coverage existing under the policy. Matthews asserts that the fact that the temporary coverage for Nuno's Pizza lapsed prior to the date of his injury has no effect. Matthews claims that under the policy, Hernandez was a named insured individual with respect to any business Hernandez solely owned and Hernandez had coverage for liability associated with the operation of Nuno's Pizza, during the effective policy period. Matthews contends that the court improperly found that a provision that supplies additional coverage to a "newly acquired" business eliminated coverage for the named insured individual.

¶ 35 Additionally, Matthews argues that State Farm agreed to insure Hernandez for claims against liability that occurred in the coverage territory, which by policy definition, covered the entire United States. Matthews claims that the policy was not limited to locations, addresses, or businesses listed in the declarations of the policy. Matthews maintains that his injury occurred at either 16301 South Street, Harvey, or alternatively at 30 E. 159th Street, Harvey. Matthews

states that both of these locations are in the coverage territory. Matthews maintains that the court erred in finding no coverage under an exclusion provision for the former "newly acquired" entity of Nuno's Pizza, where the general policy provided coverage to Hernandez with respect to any business Hernandez solely owned in the coverage territory.

¶ 36 State Farm responds that the court properly found that there was no coverage for the former "newly acquired" business of Nuno's Pizza under a policy exclusion where the temporary coverage afforded such entities expired before the date of Matthews' injury. State Farm states that the court did not err when it found that Hernandez, as the named insured in the policy, was entitled to coverage for liability associated with the "newly acquired" business, Nuno's Pizza, but only for the first 90 days of operation. State Farm contends that coverage expired two years prior to the date of Matthews' injury.

¶ 37 State Farm states that the policy anticipates that any named insured individual in the policy may acquire or start a new business during a given policy period. Paragraph 5 addresses this possibility by expressly extending 90 days of temporary coverage for the named insured relative to the new business. State Farm maintains that there is no reason to include paragraph 5 relative to "newly acquired" businesses, if the named insured individual is insured for liability arising out of any business he or she may own at any time during the effective policy period, regardless of when acquired. State Farm asserts that Matthews' proffered construction reads paragraph 5 out of the policy and this result is against the well established rule that a policy construction that renders terms meaningless will be avoided.

¶ 38 In response to Matthews' argument that State Farm agreed to insure Hernandez for any business in the coverage territory, State Farm contends that it did not extend limitless coverage to Hernandez as the named insured individual with respect to any business he solely owned and

whose operations and location were undisclosed. State Farm maintains that at no time was it informed that any other business owned by Hernandez was operating from a location other than those disclosed in the policy application or listed in the policy. State Farm maintains that if such a business and its location had been disclosed and coverage not requested, State Farm would have added an endorsement that is used when an insured has multiple business locations but does not request that State Farm insure all of the locations. The endorsement was not added here because when Hernandez sought coverage, it was sought for all then existing and disclosed business locations. State Farm contends that it was never notified of the existence of Nuno's Pizza and Hernandez never requested insurance for the operations of Nuno's Pizza. State Farm contends that the court properly found that under the policy exclusion the temporary coverage to Nuno's Pizza at 16301 S. Halsted Street, Harvey, had expired at the time of Matthews' injury.

¶ 39 Initially, we note that State Farm asserts that Matthews' policy construction argument is raised for the first time on appeal and should be waived. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996) (It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.) Here, we recognize that waiver is a limitation on the parties and not the courts. *Daley v. License Appeal Comm'n*, 311 Ill. App. 3d 194, 200 (1999). Therefore, we will consider the merits of Matthews' argument on appeal.

¶ 40 The circuit court found that Hernandez did not own Nuno's Pizza at the time of the State Farm's policy's inception on February 1, 2006, and Nuno's Pizza was a "newly acquired or formed organization" under the State Farm policy because it was acquired by Hernandez on some date between April 19, 2006 and April 23, 2007. The court further found that the policy provided coverage for Nuno's Pizza but only for 90 days after it was acquired by Hernandez, therefore, coverage for Nuno's Pizza under the policy expired by July 22, 2007, at the latest. The

court reasoned that the policy did not provide coverage for Nuno's Pizza on October 22, 2009, the date of Matthews' injury, because Nuno's Pizza was not listed in the policy declarations as a named insured and it was no longer a newly acquired or formed organization. The court concluded that the policy did not provide coverage for the underlying lawsuit.

¶ 41 Here, we find that the general provision did not establish coverage when read in the context of the entire policy, including paragraph 5. The circuit court reasoned "that Paragraph 1 is inconsistent with Paragraph 5, which states that the policy provides coverage for a newly acquired or formed business not listed in the policy declarations but only for 90 days after the business is acquired or formed." We agree with the circuit court and conclude that the general policy provision is overridden by the specific policy exclusion. See *Alberto-Culver Co.*, 351 Ill. App. 3d at 136; citing Restatement of Contracts (Second) § 203(c) (1981); 11 Williston on Contracts § 32:15, at 507, 509-12 (4th ed.1990) (Where an inconsistency arises between a clause that is general and one that is more specific, the later prevails).

¶ 42 We conclude that if we were to adopt Matthews' interpretation of the policy, the coverage exclusion would serve no real purpose. We must assume however, that every provision in an insurance policy was intended to serve a purpose. See *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 438 (2010). Because Matthews' reading of the coverage exclusion is inconsistent with the policy as a whole, and would render the exclusion superfluous, we reject Matthews' argument that his interpretation is the proper one.

¶ 43 We find that State Farm's policy did not provide coverage for the underlying lawsuit based on the facts of this case and conclude that the court did not err in granting summary judgment in favor of State Farm.

¶ 44 In light of our holding, we need not address Matthews' arguments underlying his request for remand.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 47 Affirmed.

¶ 48 JUSTICE MASON, specially concurring:

¶ 49 I agree that summary judgment in favor of State Farm should be affirmed. I write separately because the construction of paragraph 1 of the State Farm policy urged by Matthews is, under any circumstances, unreasonable and inconsistent with the risk insured under the policy. Paragraph 1, which insured Hernandez and his spouse "with respect to the conduct of a business of which you are the sole owner," is not, as Matthews contends an unlimited insuring agreement for any business enterprise Hernandez determined to operate anywhere in the United States after the inception of the policy whether or not State Farm was informed of that business. Rather, as the declarations page makes clear, Hernandez sought and State Farm agreed to provide coverage for Hernandez d/b/a Rene's Pizza South located at 13801 S. School Street in Riverdale. Hernandez later added another location for the business (and notified State Farm), but never requested coverage from State Farm for himself or his spouse in connection with the operations of Nuno's Pizza at an entirely separate location.

¶ 50 The hallmark of a business insurance policy is an undertaking by the insurer to cover the risks associated with the business after it has had an opportunity to evaluate those risks and calculate an appropriate premium. Under Matthews' reading of paragraph 1, as long as the business was solely owned by Hernandez at any time after inception of the policy, State Farm agreed to insure it whether it involved running a pizza parlor, high-rise window washing or

cutting down trees with buzz saws. And again according to Matthews, although the risks involved in the foregoing business operations vary widely, State Farm agreed that the premium it charged for the operation of a pizza parlor would suffice to cover those activities as well. Matthews' obviously absurd interpretation of paragraph 1 was properly rejected by the trial court and no claimed inconsistency between paragraphs 1 and 5 would lead to a ruling in Matthews' favor.