2017 IL App (1st) 162623-U

FIFTH DIVISION
November 22, 2017

No. 1-16-2623

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEKIN INSURANCE COMPANY, Plaintiff-Appellant, v. LEDCOR CONSTRUCTION, INC., Defendant-Appellee, (William S. Gregory, Defendant).	)	Appeal from the Circuit Court of Cook County No. 15 CH 8432 Honorable Anna Helen Demacopoulos, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County finding that an insurance company was required to defend an additional insured.

¶ 2 Pekin Insurance Company (Pekin) issued a commercial general liability (CGL) policy to Procaccio Painting & Drywall Company, Inc. (Procaccio), as named insured, and Ledcor Construction, Inc. (Ledcor), as an additional insured. After sustaining injuries while working at a construction site, William S. Gregory (Gregory) filed a complaint against Ledcor, Procaccio, and other defendants. Ledcor tendered the defense of the lawsuit to Pekin, which refused to

accept the tender. Pekin subsequently filed a declaratory judgment action in the circuit court of Cook County, and Ledcor filed a counterclaim. Based on the language of the insurance policy, Pekin argued that it did not owe Ledcor a duty to defend because the underlying lawsuit alleged only the direct, and not vicarious, liability of Ledcor. On cross-motions for judgment on the pleadings, the circuit court ruled in Ledcor's favor, finding that Pekin owes a duty to defend. For the reasons stated herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Ledcor, as contractor, and Procaccio, as subcontractor, entered into a subcontract dated March 27, 2014, whereby Procaccio agreed to provide drywall installation and other services at a construction project in the 4700 block of South Marshfield Avenue in Chicago (project). Pursuant to the subcontract, Procaccio was required to purchase and maintain CGL insurance with specified minimum limits and to include Ledcor as an additional insured.

¶ 5 Pekin issued a CGL insurance policy to Procaccio, as named insured; Ledcor was an additional insured. Pursuant to a policy endorsement, Ledcor was covered only with respect to vicarious liability for bodily injury imputed from Procaccio to Ledcor as a proximate result of Procaccio's ongoing operations performed for Ledcor during the policy period. The endorsement specifically *excluded* coverage for Ledcor for bodily injury liability arising out of or in any way attributable to the claimed negligence of Ledcor, other than vicarious liability imputed to Ledcor solely by virtue of the acts or omissions of Procaccio.

¶ 6 After Gregory – an employee of RHL Insulation & Fire Stop (RHL Insulation) – was allegedly injured when he tripped on a masonry tool belt placed in a passageway at the project, he filed a complaint against Ledcor, Procaccio, and other defendants.[1] According to the

[1] The record also includes a second amended complaint filed in May 2016. The counts in the second amended complaint against Ledcor and Procaccio are identical to the original complaint. For

complaint, Ledcor, "by and through its agents, servants and employees," was guilty of one or more negligent acts or omissions, including improperly operating, maintaining and controlling the premises, and failing to provide Gregory with a safe place to work. The complaint further alleged, in part, that Procaccio placed a tool belt in a passageway which it knew or should have known would pose a dangerous condition to other subcontractors.

¶ 7 Ledcor tendered defense of Gregory's complaint to Pekin. After refusing to accept the tender, Pekin filed a declaratory judgment action against Ledcor[2] pursuant to section 2-701 of the Code of Civil Procedure (Code) (735 ILCS 5/2-701 (West 2014)). Pekin sought a judgment declaring, in part, that it is not liable under the policy to defend Ledcor. According to Pekin, Ledcor was not entitled to coverage because the additional insured endorsement specifically excludes coverage for the negligence of the additional insured. In an answer and a counterclaim, Ledcor sought a judgment declaring that Pekin owes a duty to defend because Ledcor could potentially be found vicariously liable for Procaccio's negligence.

¶ 8 Ledcor and Pekin filed cross-motions for judgment on the pleadings. Ledcor argued, in part, that its subcontract with Procaccio contained indemnification provisions under which Procaccio assumed responsibility for damage or injuries caused by its work, which limited Ledcor's liability. According to Ledcor, the subcontract thus supported its position that Pekin has a duty to defend. Ledcor also noted that another subcontractor on the project, Monarch Enterprises, Inc., d/b/a Monarch Construction Co. (Monarch), had filed a counterclaim for contribution against Procaccio in the *Gregory* lawsuit. Monarch alleged that Procaccio was a subcontractor of Ledcor and had committed various negligent acts or omissions that caused Gregory's injuries. Ledcor asserted that the counterclaim provided additional support for

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clarity purposes, we refer solely to the "complaint."

[2] The complaint also named Gregory as a "nominal but necessary party" to the action. Gregory has not filed an appearance or otherwise participated in this appeal.

Pekin's duty to defend.

¶ 9 In its motion for judgment on the pleadings, Pekin noted that the subcontract between Ledcor and Procaccio expressly provided that Procaccio was an independent contractor and that "any provisions in [the] Subcontract which may appear to give [Ledcor] the right to direct [Procaccio] as to the details of doing the Work herein covered (including safety) or to exercise a measure of control over the Work shall be deemed to mean that [Procaccio] shall follow the desires of [Ledcor] in the results of the Work only, and not the means, methods or details of [Procaccio's] Work." According to Pekin, the foregoing language precludes a possibility that Ledcor retained control over the operative details of Procaccio's work so as to create the potential for vicarious liability based on Procaccio's acts or omissions. Pekin also argued that the Monarch counterclaim did not raise the potential of vicarious liability.

¶ 10 In an order entered on August 24, 2016, the circuit court found that Pekin owes a duty to defend Ledcor. The circuit court granted Ledcor's motion for judgment on the pleadings and denied Pekin's motion for judgment on the pleadings *nunc pro tunc* to August 18, 2016. On September 19, 2016, the circuit court granted Pekin's motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)), and Pekin timely appealed.

¶ 11 ANALYSIS

¶ 12 The circuit court granted Ledcor's motion for judgment on the pleadings and denied Pekin's cross-motion. Pekin contends on appeal that Ledcor is not covered under the CGL policy because the *Gregory* complaint does not allege vicarious liability against Ledcor. Ledcor responds that it could be held vicariously liable for the acts or omissions of Procaccio based on the allegations in the complaint, and thus Pekin owes a duty to defend.

¶ 13 Judgment on the pleadings is properly granted if the pleadings disclose no genuine issue

of material fact and the movant is entitled to judgment as a matter of law. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010); 735 ILCS 5/2-615(e) (West 2014) (providing that "[a]ny party may seasonably move for judgment on the pleadings"). When resolving a motion for judgment on the pleadings, the court must consider as admitted all well-pleaded facts set forth in the pleadings of the non-moving party, and the fair inferences drawn therefrom. *Wilson*, 237 Ill. 2d at 455. We review the grant of judgment on the pleadings *de novo*. *Id.* The construction of the provisions of an insurance policy is also a question of law which we review *de novo*. *Id.*

¶ 14 An insurer's duty to defend is broader than its duty to indemnify. *Id.* at 456. In a declaratory judgment action where the issue is whether the insurer has a duty to defend, a court "ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy." *Id.* at 455. If the facts alleged in the underlying complaint fall within, or potentially within, the coverage of the policy, a duty to defend arises. *Pekin Insurance Co. v. AAA-1 Masonry & Tuckpointing, Inc.*, 2017 IL App (1st) 160200, ¶ 23. See also *Pekin Insurance Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 595 (2009) (noting that an insurer owes a duty to defend unless the insurance cannot possibly cover the liability arising from the alleged facts and the policy terms clearly preclude coverage under all of the facts consistent with the allegations).

¶ 15 In considering the underlying complaint, the allegations must be liberally construed in favor of the insured. *Pekin Insurance Co. v. Lexington Station, LLC*, 2017 IL App (1st) 163284, ¶ 24. See also *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 20 (noting that the "threshold that an underlying complaint must meet to trigger a duty to defend is minimal"). The alleged conduct, rather than the labeling of the claim in the complaint, is controlling. *Lexington Station*, 2017 IL App (1st) 163284, ¶ 24. In considering the

insurance policy, the court must construe the policy as a whole, taking into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Wilson*, 237 Ill. 2d at 456. The clear and unambiguous terms in the policy are given their plain and ordinary meaning. *Id.* at 455-56. If the terms are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer, which drafted the policy. *Id.* at 456. Policy provisions which exclude or limit coverage are interpreted liberally in favor of the insured and against the insurer. *Id.* In sum, any doubts regarding the duty to defend should be resolved in favor of the insured. *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336, 340 (2010).

¶ 16 In *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, another division of the First District of the Illinois Appellate Court recently articulated a two-part analysis determining whether an insurer owes a duty to defend an additional insured based on that additional insured's potential vicarious liability: "First, there must be a potential for finding that the named insured was negligent and, second, there must be a potential for holding the additional insured vicariously liable for that negligence." *Id.*, ¶ 37. As discussed below, we see no reason to depart from the cogent approach outlined in *Centex Homes*.

¶ 17 Under *Centex Homes*, our initial inquiry is whether there is a potential for finding that Procaccio, the named insured, was negligent. Courts have recognized that the underlying complaint need not expressly allege that the named insured was negligent. See *id.*, ¶ 38. Instead, courts have "found it sufficient that the underlying complaint contained facts to support a theory of recovery for the underlying plaintiff based on the negligence of the named insured." *Id.*, ¶ 39. For example, in *Pekin Insurance Co. v. CSR Roofing Contractors, Inc.*, 2015 IL App (1st) 142473, ¶ 50, the appellate court found that although the elements of a negligence claim were not

specifically alleged against the named insured, the complaint suggested that the named insured's acts or omissions were an underlying cause of the plaintiff's injuries.

¶ 18 In *Centex Homes* and *CSR Roofing*, the court found a duty to defend even where the named insured was not a defendant in the underlying complaint – a common scenario in the construction injury arena. See also *Lexington Station*, 2017 IL App (1st) 163284, ¶ 11. In each case, the named insured – which was the injured worker's employer – was not included as a defendant in the underlying lawsuit, presumably because the Workers' Compensation Act (820 ILCS 305/5(a) (West 2014)) barred the injured worker from filing a personal injury action against his employer. See *National Fire Insurance Co. of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312, 315 (2009). In the instant case, however, Gregory was employed by RHL Insulation, not by the named insured, Procaccio. The underlying complaint names Procaccio as a defendant and sets forth Procaccio's allegedly negligent acts and/or omissions, including placing the tool belt in the passageway. The express allegations in the *Gregory* complaint are plainly sufficient to support a claim of negligence by Procaccio.

¶ 19 Because we have found that the allegations in the underlying complaint support a claim of negligence by the named insured, we proceed to the second inquiry under *Centex Homes*, *i.e.*, whether there is any potential that Ledcor, as an additional insured, would be vicariously liable for that negligence. *Centex Homes*, 2017 IL App (1st) 153601, ¶ 37. "[W]hether an additional insured can potentially be found vicariously liable for the negligence of the named insured has depended, in our case law, on the degree of control the underlying complaint alleges that the additional insured had over the named insured." *Lexington Station*, 2017 IL App (1st) 163284, ¶ 32.

¶ 20 The *Centex Homes* court noted that "[s]ome of our cases that have wrestled with this

issue have examined the underlying complaint in some detail to determine whether it alleged sufficient specific indicia of control by the additional insured over the named insured to suggest a relationship whereby the additional insured would have vicarious liability for negligent actions of the named insured." *Centex Homes*, 2017 IL App (1st) 153601, ¶ 45. As observed in *Centex Homes*, those cases usually have relied on section 414 of the Restatement (Second) of Torts in this examination. *Id.* Section 414, entitled "Negligence in Exercising Control Retained by Employer," provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965).

¶ 21 In a 2016 decision, the Illinois Supreme Court in *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 36, clarified, however, that section 414 "articulates a basis only for imposition of direct liability," and not vicarious liability. See *Lexington Station*, 2017 IL App (1st) 163284, ¶ 32. Our supreme court explained that section 414 "sets forth one way in which an employer of an independent contractor may be negligent and, thus, directly liable for physical harm to others." *Carney*, 2016 IL 118984, ¶ 36. Pekin primarily relies on a pre-*Carney* case, *Pekin Insurance Co. v. Roszak/ADC, LLC*, but the case appears rooted, in part, in a misunderstanding of section 414. *Roszak*, 402 Ill. App. 3d 1055, 1065 (2010) (stating that "section 414 provides for two mutually exclusive theories of liability" – direct and vicarious – "depending on the amount of control the general contractor retains over the details of the work of subcontractor").

¶ 22 The *Gregory* complaint alleges, in part, that Ledcor, "by and through its agents, servants and employees," was guilty of various acts and/or omissions. Reviewing the complaint as a whole, it is possible that Procaccio – a co-defendant of Ledcor – is one of the responsible agents,

servants, or employees. Like the court in *Centex Homes*, we decline to parse the underlying complaint for allegations of a specific amount or type of control by Ledcor over Procaccio. *Centex Homes*, 2017 IL App (1st) 153601, ¶ 51. See also *Lexington Station*, 2017 IL App (1st) 163284, ¶¶ 32-34. Such approach is "consistent with well-settled principles differentiating an insurer's broad duty to defend from the far narrower duty to indemnify." *Centex Homes*, 2017 IL App (1st) 153601, ¶ 52. As noted in *Centex Homes*, "there is a continuum with respect to the relationship between the control an additional insured exercises over the work of a named insured and the type of liability an additional insured may have: a certain amount of control over the work of the named insured will result in direct liability, greater control over 'operative detail' could properly result in vicarious liability, and a lesser amount of control could give rise to no liability at all." *Id.*, ¶ 54. The allegations of an underlying complaint, even if detailed, are unlikely to assist in making this determination. *Id.*

¶ 23 We further observe that the *Gregory* complaint contains commonly-used phrases, *e.g.*, Ledcor "participated in coordinating the work being done," "designated various work methods," "maintained and checked work progress," and "participated in the scheduling of the work and the inspection of the work." The use of such boilerplate language is not surprising given the slim likelihood that Gregory – an employee of RHL Insulation – would be knowledgeable regarding the relationship or degree of control between Ledcor and Procaccio. See *id.*, ¶ 56. As noted above, an insurer owes a duty to defend if the facts alleged in the underlying complaint fall within, or potentially within, the coverage of the policy. *AAA-1 Masonry*, 2017 IL App (1st) 160200, ¶ 23. Where, as here, the "complaint alleges that the additional insured had control of operations and was liable for the actions of its agents, there is a 'potential' basis for vicarious liability." *Centex Homes*, 2017 IL App (1st) 153601, ¶ 56.

¶ 24 We acknowledge that, pursuant to the allegations in the underlying complaint, Ledcor might be found to be independently liable to Gregory, but those allegations do not preclude the possibility that Ledcor could be found liable solely by virtue of the acts or omissions of Procaccio. See *Pulte Home*, 404 Ill. App. 3d at 342. Where the facts alleged support multiple theories of recovery, there is a duty to defend if any one of those theories potentially falls within the policy coverage. See *Centex Homes*, 2017 IL App (1st) 153601, ¶ 43 (stating that it "makes no difference" that the underlying complaint could also support a theory of direct liability against the additional insured). See also *Wilson*, 237 Ill. 2d at 453, fn. 2 (noting that "if Pekin has a duty to defend as to at least one count of the lawsuit, it has a duty to defend in all counts of that lawsuit").

¶ 25 Pekin urges us to refrain from following *Centex Homes* and *Lexington Station*, a recent decision which relies heavily on *Centex Homes*. *Lexington Station*, 2017 IL App (1st) 163284; *Centex Homes*, 2017 IL App (1st) 153601. We decline to do so. Both cases appear to address the provisions of the additional insured endorsement to the Pekin CGL policy at issue in the instant case. Furthermore, we do not view the *Centex Homes* approach as an expansion of the scope of an insurer's duty to defend, as Pekin suggests. We also disagree with Pekin's contention that *Centex Homes* "improperly considered hypothetical potentialities." Pekin accurately observes that "we cannot read into the complaint something that is not actually there, but rather we are confined to what was actually alleged." *Westfield Insurance Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 20. The potential exists, however, that based on the actual allegations in the *Gregory* complaint, a jury could find that Ledcor retained sufficient operative control over the project such that Procaccio was its agent, and that Ledcor was thus vicariously liable for the negligence of Procaccio.

¶ 26 We are unpersuaded by Pekin's reliance on *Roszak*. The appellate court in *Roszak* found that the insurer did not owe a duty to defend where the complaint did not expressly allege vicarious liability or an agency relationship between the additional insured and the named insured. *Roszak*, 402 Ill. App. 3d at 1063. As noted above, however, the reasoning of the *Roszak* appellate court was tied to a flawed interpretation of section 414 of the Restatement (Second) of Torts. *Id.* at 1064-65. We further observe that *Roszak* was based, in part, on *Pekin Insurance Co. v. United Parcel Service*, 381 Ill. App. 3d 98 (2008), and *Pekin Insurance Co. v. Beu*, 376 Ill. App. 3d 294 (2007), wherein the courts "relied primarily on language from the complaint alleging that 'the defendants and each of them' were negligent as a basis for finding that the insurer had no duty to defend." *Pulte Home*, 404 Ill. App. 3d at 348 (discussing cases). The foregoing language is absent from the *Gregory* complaint, and both *United Parcel Service* and *Beu* have been criticized by subsequent courts. *E.g.*, *Hallmark Homes*, 392 Ill. App. 3d at 597 (stating that *United Parcel Service* and *Beu* represent "an unduly narrow reading of the applicable test"). See also *CSR Roofing*, 2015 IL App (1st) 142473, ¶ 48. In any event, we recognize that "plaintiffs draft their complaints with their own ends in mind, not with the goal of spelling out whether an insurance company has a duty to defend a particular defendant." *Hallmark Homes*, 392 Ill. App. 3d at 597.

¶ 27 Pekin also points to the subcontract between Ledcor and Procaccio, which describes Procaccio as an independent contractor. Although courts generally compare only the allegations of the underlying complaint and the insurance policy to determine whether an insurer has a duty to defend, our supreme court had recognized that courts may consider documents beyond the underlying complaint in certain circumstances, provided that the court does not determine an issue critical to the underlying action. *Lexington Station*, 2017 IL App (1st) 163284, ¶ 30, citing

Wilson, 237 Ill. 2d at 460-62. Accord *AAA-1 Masonry*, 2017 IL App (1st) 160200, ¶ 24; *Centex Homes*, 2017 IL App (1st) 153601, ¶ 35. While a principal may be vicariously liable for the conduct of its agent but not for the conduct of an independent contractor (*e.g., Sperl v. C.H. Robinson Worldwide, Inc.*, 408 Ill. App. 3d 1051, 1057 (2011)), the subcontract herein is not dispositive. *E.g., Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 362 (2003) (noting that the fact that the named insured "counts as an independent contractor for some purposes" was "not alone dispositive of the possibility of imputed liability for negligent acts").

¶ 28 As noted in *Lexington Station*, "[i]f the independent contractor status in the construction agreement was the end of the inquiry, there would seldom, if ever, be coverage for an additional insured in these cases and the requirement that the named insured provide coverage would likely be meaningless." *Lexington Station*, 2017 IL App (1st) 163284, ¶ 35. It is well-settled that a contract "is not conclusive of the nature of the relationship between the parties." *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 80. Despite a contract labeling the relationship as that of an independent contractor, the facts of the case may demonstrate an agency relationship. *Id.*; *Sperl*, 408 Ill. App. 3d at 1057 (stating "[s]pecific conduct can demonstrate by inference the existence of an agency relationship, despite contractual evidence that the parties intended an independent contractor relationship"). In this case, the "independent contractor" designation does not preclude the possibility that Procaccio could be found to be an agent of Ledcor and that Ledcor could therefore be liable for Procaccio's negligence.

¶ 29 For the reasons stated above, we conclude that the possibility of Ledcor's vicarious liability for Procaccio's negligence brings this action within the broad duty to defend. "It does not matter if a finding of vicarious liability is unlikely; 'it is a potentiality.' " *Lexington Station*,

2017 IL App (1st) 163284, ¶ 38, citing *Centex Homes*, 2017 IL App (1st) 153601, ¶ 57. See also *AAA-1 Masonry*, 2017 IL App (1st) 160200, ¶ 29 (affirming finding that the duty to defend was triggered where there was a "possibility" of vicarious liability); *CSR Roofing*, 2015 IL App (1st) 142473, ¶ 50 (opining that the allegations in the complaint did not "preclude the possibility" that the contractor could be found liable solely as a result of the acts or omissions of the subcontractor). The circuit court thus did not err in granting Ledcor's motion for judgment on the pleadings and denying Pekin's motion for judgment on the pleadings.

¶ 30 Finally, we note that Ledcor contends that the counterclaim filed by Monarch provides further support for the possibility that Procaccio was negligent and that Ledcor could be held liable for Procaccio's acts or omissions. Because we have concluded that Pekin owed a duty to defend without any consideration of the third-party complaint filed by Monarch – and we may affirm on any basis supported by the record – we need not consider this argument. See *e.g.*, *Lexington Station*, 2017 IL App (1st) 163284, ¶ 40.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 33 Affirmed.