2020 IL App (1st) 181557 – U

No. 1-18-1557

Order filed January 10, 2020

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DINING HERITAGE, INC., d/b/a Cardozo's Pub, an Illinois corporation, Plaintiff-Appellant, v. LEADING INSURANCE GROUP INSURANCE COMPANY, LTD. (US), a New Jersey corporation, LEADING INSURANCE SERVICES, INC., a New Jersey corporation, and NORTHERN UNDERWRITING MANAGERS, INC., d/b/a Northern Insurance Agency, Inc., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 06507 Honorable Pamela M. Meyerson, Judge, Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment and opinion.

ORDER

¶ 1 *Held*: Summary judgment was properly granted based on the known loss doctrine where plaintiff knew that the construction project would cause a loss of business income

> prior to the commencement of the business insurance policy coverage and plaintiff did not disclose the construction project to the insurance company.

¶ 2 Plaintiff Dining Heritage, Inc., d/b/a Cardozo's Pub (Dining Heritage), filed a declaratory judgment action against defendants, Leading Insurance Group Insurance Company, Ltd (LIG), Leading Insurance Services, Inc. (LIS), and Northern Underwriting Managers, Inc., d/b/a Northern Illinois Insurance Agency, Inc. (NUM) under a Business Owner's Policy that was in effect from July 19, 2012, to July 19, 2013. Dining Heritage sought a declaration to determine the obligations of defendants to provide it with coverage under a business interruption endorsement for a loss it suffered between May 3, 2013, and June 18, 2013. Dining Heritage also sought relief pursuant to section 155 of the Insurance Code (Code) (215 ILCS 5/155 West 2018)).

¶ 3 LIG filed a motion for summary judgment based on the "known loss" doctrine and the absence of fortuity, which precluded Dining Heritage's claim. After a hearing, the circuit court granted LIG's motion for summary judgment in a written order on March 2, 2018. Dining Heritage filed a timely motion to reconsider, which the circuit court denied on June 26, 2018. Dining Heritage filed its timely notice of appeal on July 20, 2018, pursuant to Rule 303(a)(1) (eff. July 1, 2017).

¶ 4 On appeal, Dining Heritage contends that the circuit court erred in granting LIG's motion for summary judgment because there was a genuine issue of material fact as to what it knew when the policy commenced and there was no duty to inform an insurance company of a potential loss absent an affirmative inquiry. Additionally, Dining Heritage contends that its section 155 claim is viable because the policy covered a claim that was denied, and coverage was available when the insured had no control over the loss. For the reasons that follow, we affirm.

¶ 5 BACKGROUND

¶ 6 The underlying facts are not in dispute.

¶ 7 Dining Heritage purchased a business owner's policy, which contained liability and rental premises coverage issued by LIG through an agency, NUM, for the period of July 19, 2012, through July 19, 2013. The policy also included an endorsement that provided business interruption coverage.

¶ 8 Dining Heritage was a tenant in a building owned by Imperial Realty (Imperial) in Chicago where it operated a restaurant, Cardozo's Pub. On or about November 17, 2010, the City of Chicago filed a lawsuit against Imperial, alleging numerous building code violations. Between 2010 and 2013, Imperial considered different uses for the building, which required many plan revisions before the construction project could begin.

¶ 9 Dining Heritage was told that the construction project would begin on June 30, 2012, and last for 10 to 12 days. Dining Heritage was normally closed during the first week of July during the Taste of Chicago festival. Harry Hajiharis, Dining Heritage's owner, told employees that the restaurant would be closed between June 30, 2012, and July 13, 2012, to accommodate the work that needed to be done to the building, which included access to the basement space where the restaurant was located. However, the work did not take place as anticipated, and no new date was given to Hajiharis prior to Dining Heritage obtaining the insurance policy through LIG that commenced on July 19, 2012. The construction project ultimately did not begin until May 2013, and lasted six and one-half weeks, which was much longer than was originally stated to Hajiharis.

¶ 10 Dining Heritage suffered significant losses as a result of the almost seven-week closure of the restaurant including: loss of business income and profits, spoilage of perishable goods, cost of rent and payroll, and impairment of accounts receivable and accounts payable. Dining Heritage filed a claim with LIG in May 2013, with an addendum in July 2013, seeking coverage under the business interruption endorsement. LIG initially denied the claim in a letter dated September 9, 2013, stating that the claim was denied in its entirety under the policy's "Ordinance or Law Exclusion" found in section I of the policy.

¶ 11 Dining Heritage filed a declaratory judgment action against LIG, LIS and NUM based on the denial of coverage, and it is the third amended complaint filed on February 8, 2017, that is the operative complaint.[1] The third amended complaint contained seven counts: counts I through IV sought a declaratory judgment against LIS and LIG; count V alleged a violation of the Illinois Consumer Fraud Act against NUM; count VI alleged fraudulent misrepresentation by NUM; and count VII alleged a bad faith claim against LIG based on section 155 of the Code. Dining Heritage alleged that it had purchased the insurance policy, paid all premiums and properly filed its claim under the business interruption endorsement. It further alleged that, four months after the claim was filed, LIG improperly denied its claim because the loss occurred during the policy period and was a covered loss.

¶ 12 The record indicates that on October 18, 2016, the circuit court granted NUM's motion to dismiss pursuant to a settlement, and dismissed with prejudice all claims and potential claims against NUM for contribution or otherwise. That order contained Rule 304(a) (eff. Mar. 8, 2016)

[1] The record does not contain a copy of the initial or second amended complaints.

language. Also on that date, LIS, the United States Manager for LIG, was dismissed as a specific additional party.

¶ 13 LIG filed its motion for summary judgment based on the "known loss" doctrine and the absence of fortuity. In its motion, LIG alleged that based on information gleaned in discovery, Hajiharis knew with substantial probability that the restaurant would be shut down and that Dining Heritage would realize a loss prior to purchasing the insurance policy on July 19, 2012. As such, LIG was not required to cover the "known loss." Specifically, Hajiharis testified at his deposition that he first learned of the construction project a year before it actually happened, sometime around May 2012. Additionally, Hajiharis testified that he knew that the construction project would take place at some point in the future. This testimony was corroborated by two emails sent by Amy Hauser of Imperial to her colleagues, Al Klairmont, Ben Lockwood, and Casey Polmanski, dated May 16, 2012, and May 24, 2012, indicating that Hajiharis had inquired when the construction project would begin. A later email on June 27, 2012, from Polmanski to Klairmont and Lockwood indicated that Hajiharis advised his staff that the restaurant would be closed the first two weeks of July 2012, due in part to the construction project. LIG also alleged that summary judgment was proper on Dining Heritage's section 155 claim of bad faith because there was not a covered claim against LIG under the policy, and alternately, there was a *bona fide* dispute as to coverage.

¶ 14 A hearing was held on LIG's summary judgment motion on November 30, 2017. After hearing argument from both sides, the circuit court took the matter under advisement and subsequently issued a written order on March 2, 2018, granting LIG's motion for summary judgment.

¶ 15 In its written order, the circuit court held that there were no genuine issues of material fact regarding Dining Heritage's knowledge, noting that the city filed its building code violations against Imperial in November 2010. The court also noted Hajiharis' testimony that he found out about the construction project a year before it happened, approximately May 2012, which was two months before the policy began. While the project was delayed and Hajiharis did not know exactly when it would begin, Imperial advised him that the project would "eventually" get done. The court found that Dining Heritage's argument that it was "wholly unclear when, or if in fact, the work would occur," to be insufficient to raise a genuine issue of fact as to Dining Heritage's knowledge. The circuit court applied our supreme court's holding in *Outboard Marine Corporation v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90 (1992), in finding that LIG did not need to show that Dining Heritage knew the exact start date of the shutdown, finding that it produced:

> "competent, unimpeached evidence that Plaintiff was aware of the *substantial probability* it would suffer a loss during the Policy period. At no time before the shutdown did Plaintiff share this information with LIG. Therefore, the known loss doctrine bars Plaintiff's recovery under the Policy. It follows then that LIG's denial of coverage was not unreasonable or vexatious." (Emphasis in original).

¶ 16 The court further noted that although LIG's September 2013 denial letter relied upon a different and inapplicable basis to deny the claim, LIG was not precluded from relying on the known loss doctrine in its summary judgment motion because LIG indicated that the first time it realized that the doctrine might apply was when it received emails in discovery, and such

evidence was not easily obtainable outside of discovery. The court found that, under the circumstances, LIG could be excused from failing to cite the known loss doctrine in the denial letter. The court also found that the denial letter, by its terms, did not purport to be an exhaustive list of all the reasons for the denial of coverage. The order granted LIG's motion for summary judgment on counts I, II, III, IV, and VII, and indicated that it was a final order.

¶ 17 Dining Heritage filed a motion to reconsider on March 30, 2018, alleging that the circuit court misunderstood the facts which resulted in a misunderstanding of Illinois insurance law.

¶ 18 Dining Heritage alleged that: there were questions regarding the extent of its knowledge of the construction project prior to its purchase of the insurance policy with LIG; it did not have control over the timing or duration of the construction project; it believed that the project would be completed before the policy commenced: there was no evidence or fact presented that it had specific knowledge prior to the purchase of the policy in July 2012 that the work would be done during the policy period, Hajisharis' deposition established that there were unanswered questions concerning the extent of his knowledge prior to entering into the policy, and he had no definitive knowledge regarding the construction project.

¶ 19 Additionally, Dining Heritage alleged that the emails constituted inadmissible hearsay and alternately, only evidenced a business shutdown period prior to the commencement of the policy. Dining Heritage further alleged that there is no duty under section 154 of the Code (215 ILCS 5/154 (West 2018)) to disclose a known risk prior to entering into a contract for insurance absent an affirmative inquiry by the insurance company for the specific risk that the insurer is unwilling to assume. Dining Heritage further alleged that LIG produced no evidence that a misrepresentation as to coverage was made or stated in the policy, endorsement or written

application for insurance as required under the Code. According to Dining Heritage, the action against Imperial was a matter of public record so it was readily discoverable by LIG, and there was no evidence or fact presented that an affirmative inquiry was made by LIG, citing *DiLeo v. U.S. Fidelity & Guaranty Co.*, 50 Ill. App. 2d 183 (1964), as support.

¶ 20 A hearing was held on Dining Heritage's motion to reconsider on June 26, 2018. After hearing argument, the circuit court found that there was no misapplication of existing law and no genuine issue of material fact and denied the motion to reconsider.

¶ 21 This appeal followed.

¶ 22 ANALYSIS

¶ 23 Dining Heritage contends that the circuit court erred in denying its motion to reconsider the order granting summary judgment in favor of LIG. As it argued in the trial court, Dining Heritage asserts that there is a genuine issue of fact concerning what Hajiharis knew at the time the policy commenced, which is critical in applying the "known loss" doctrine. Additionally, Dining Heritage reasserts its argument that there is no duty to inform an insurance company of a potential loss absent an affirmative inquiry, relying on *DiLeo*. Finally, Dining Heritage contends that its section 155 claim should not have been dismissed when the policy at issue covered its erroneously denied claim and moreover, coverage was available for losses over which the insured has no control.

¶ 24 As a general matter, the plaintiff in a declaratory judgment action bears the burden of proof. *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 IL App (1st) 112346, ¶ 34.

¶ 25 Appellate review of an order granting summary judgment is *de novo*. *Barnard v. City of Chicago Heights*, 295 Ill. App. 3d 514, 519 (1998). A motion for summary judgment should only be granted if the pleadings, depositions and affidavits on file demonstrate that no genuine issues of material fact exist, and the movant is entitled to judgment as a matter of law. *Barnard*, 295 Ill. App. 3d at 519. In determining whether a genuine issue as to any material fact exists, a reviewing court must view the evidence in the light most favorable to the nonmoving party. *Barnard*, 295 Ill. App. 3d at 519. Where, as here, the facts are undisputed, the court may draw inferences from them. *Garde by Garde v. Country Life Insurance Co.*, 147 Ill. App. 3d 1023, 1029 (1986). If no fair-minded person could draw different inferences from those facts, there is no triable issue of fact, and the motion for summary judgment should be granted. *Garde*, 147 Ill. App. 3d at 1029. Summary judgment is a drastic measure and should only be allowed when the right of the moving party is clear and free from doubt. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986).

¶ 26 Insurance is based on contingent risks. *Allianz Insurance Co. v. Guidant Corp.*, 355 Ill. App. 3d 721, 734 (2005). Insurance is defined as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event and is applicable only to some contingency or act occurring in the future. *Outboard Marine*, 154 Ill. 2d at 103. In Illinois, the "known loss" doctrine may be invoked if, when purchasing an insurance policy the insured knows or has reason to know that there is a substantial probability that it will suffer a loss, the risk ceases to be contingent and becomes a probable or known loss that will not be covered by the policy. *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275, 288 (2005); *Missouri Pacific Railroad Co. v. American Home*

Assurance Co., 286 Ill. App. 3d 305, 309 (1997). See also *Outboard Marine Corp.*, 154 Ill. 2d at 103. "There is no bright-line test to determine whether and at what point in time the insured knew or had reason to know of the substantial probability of the loss at issue. The extent of the insured's knowledge of the loss must be determined on a case-by-case basis. In a motion for summary judgment, the court must determine whether any factual questions exist with respect to the insured's knowledge at the time it bought the policy." *Outboard Marine Corp.*, 154 Ill. 2d at 104.

¶ 27 The "known loss" doctrine may be invoked if the insured " 'knew or had reason to know * * * that there was a substantial probability that loss or liability would ensue due to the [conduct] for which it is seeking coverage.' " *Allianz*, 355 Ill. App. 3d at 734 (quoting *Outboard Marine*, 154 Ill. 2d at 107); *Westchester Fire Insurance Co. v. G. Heileman Brewing Co., Inc.*, 321 Ill. App. 3d 622, 634 (2001).

¶ 28 In *Outboard Marine*, the insured filed a declaratory judgment action against its commercial general liability (CGL) insurers, alleging that the primary insurers breached their duty to defend against suits filed by governmental agencies for water pollution from the insured's facility. *Outboard Marine*, 154 Ill. 2d at 100. The policy was issued after the insured received an administrative order from the Environmental Protection Agency confirming the contamination. *Outboard Marine*, 154 Ill. 2d at 104. The insurers argued that the contamination was a known loss because the insured had knowledge that it was releasing hazardous material into the environment and our supreme court agreed, holding that the letter gave the insured knowledge of a substantial probability that contamination claims would be made against it.

Outboard Marine, 154 Ill. 2d at 106. The court held that an insurer is not required to prove that the insured knew the exact extent of its liability. *Outboard Marine*, 154 Ill. 2d at 107.

¶ 29 Turning to the case at bar, we find that the same reasoning applies. In order to prevail on the "known loss" theory, LIG needed only demonstrate that Dining Heritage knew or had reason to know that it would sustain a business interruption related to the pending construction project prior to the policy period, which it did. It is undisputed that Hajiharis testified at his deposition that he knew as early as May 2012 that there would be a construction project related to the building code violations and although he did not know the exact dates of construction or its length, he knew that the project would eventually occur and that the business would be closed for the duration of the construction project. The fact that Dining Heritage did not know the exact dates of construction or that construction did not actually begin until May 2013 and took longer than expected is of no consequence. Moreover, although it was Dining Heritage's expectation that the construction project would be completed prior to the commencement of the policy period, when it was not, Dining Heritage knew that the construction project was still pending when it purchased the policy. This evidence certainly supports a finding of substantial probability to constitute a known loss. We find that there is no issue of genuine fact concerning Dining Heritage's knowledge of the construction project.

¶ 30 Dining Heritage next contends that it had no affirmative duty to disclose a potential loss absent an affirmative inquiry by the insurance company and cites to *DiLeo* for support.

¶ 31 We find *DiLeo* to be distinguishable as that case raised questions of the construction of an increased hazard exemption policy provision from coverage, and whether plaintiffs engaged in the willful concealment or misrepresentation of a material fact or circumstance concerning the

insurance that would void the policy. *DiLeo*, 50 Ill. App. 2d at 191. Additionally, that case involved condemnation proceedings, which were a matter of public knowledge, and the court found that it would be unreasonable to put the burden on the insured to anticipate that such proceedings and the result were material circumstances that required affirmative action; the court concluded that there was no genuine issue of concealment or fraud. *DiLeo*, 50 Ill. App. 2d at 192. Those are not the circumstances presented in the present case.

¶ 32 Here, the evidence is clear through Hajiharis' deposition and emails that Dining Heritage knew at the time it purchased the policy at issue that there was a pending construction project for the building that would cause some sort of business interruption, whether it was for 10-12 days or six and one-half months. Thus, as previously stated, this was a known loss and was exempt from coverage under the policy purchased after Dining Heritage became aware of the known loss. We conclude that the circuit court properly granted summary judgment in favor of LIG based on the "known loss" doctrine.

¶ 33 Finally, Dining Heritage contends that summary judgment should not have been entered on its section 155 claim of bad faith.

¶ 34 The relevant inquiry to determine whether an insurer's actions were unreasonable or vexatious within the meaning of the statute allowing attorney fees for insurer's unreasonable or vexatious delay in settling claim is whether the insurer had a *bona fide* defense to the claim. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 745 (2010). Additionally, section 155 does not create a duty to settle, and a delay in settling a claim does not violate the Code if the delay was caused by a *bona fide* dispute concerning coverage. *West Bend*, 406 Ill. App. 3d at 745. As we have already determined that summary judgment was properly entered in favor of

LIG based on the known loss doctrine, we find that summary judgment was properly entered on Dining Heritage's section 155 claim.

¶ 35 CONCLUSION

¶ 36 For the foregoing reason, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.