

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (4th) 131084-U

NO. 4-13-1084

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 9, 2014

Carla Bender

4th District Appellate

Court, IL

ERIE INSURANCE EXCHANGE,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
JASON NIEMAN,)	No. 13MR824
Defendant-Appellant.)	
)	Honorable
)	John Madonia,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Plaintiff had no duty to defend defendant under either his homeowners policy or excess policy because no suit was brought against defendant, no personal injury based on malicious prosecution was alleged, and punitive damages are excluded under plaintiff's policy.
- (2) The trial court correctly dismissed defendant's counterclaim because plaintiff filed its complaint for declaratory judgment and did not breach any duty owed to defendant.
- (3) Plaintiff did not violate any provisions of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)).
- (4) Plaintiff's complaint was not barred by failing to raise the issues in a prior case.
- ¶ 2 Defendant, Jason Nieman, appeals from an order in a declaratory judgment action initiated by plaintiff, Erie Insurance Exchange. The case involved plaintiff's refusal to defend or

indemnify defendant for sanctions asked for in underlying appellate litigation. Defendant was representing himself *pro se* in that underlying litigation. The sanctions were requested in the underlying appeal because of "frivolous" and "retaliatory" litigation tactics. Defendant argued the sanctions were covered in plaintiff's insurance policies as "personal injury," where such injury was defined in the policies as arising out of "malicious prosecution."

¶ 3 The trial court found the sanctions requested against defendant were in the nature of punitive damages and they are not covered under plaintiff's policies. The court also found no "suit" was brought against defendant, as required by plaintiff's policy, when the sanctions were sought and, hence, plaintiff had no duty to defend defendant. We affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 On August 30, 2011, defendant filed a lawsuit in the Sangamon County circuit court against Insurance Search Group (ISG), Keith Hale, American Specialty Insurance, Richard Dikeman, and others, alleging discriminatory hiring practices in violation of the Illinois Human Rights Act (775 ILCS 5/1 *et seq.* West 2010) and Illinois common law.

¶ 6 On October 25, 2011, the matter was transferred to the Peoria County circuit court. On December 12, 2011, defendant filed a second amended complaint. On January 6, 2012, the matter was removed to the United States district court for the Central District of Illinois. On March 20, 2012, ISG, Hale, American Specialty Insurance, and Dikeman filed separate motions for sanctions against defendant alleging violations of Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). On January 13, 2013, the United States district court granted the motions for sanctions. On April 3, 2013, the court denied defendant's motion to reconsider and

entered an award of sanctions in favor of Hale and ISG in the amount of \$17,000 and in favor of Dikeman and American Specialty Insurance in the amount of \$22,500. On April 8, 2013, these awards were entered as judgments against defendant. Defendant filed a notice of appeal to the United States Seventh Circuit Court of Appeals.

¶ 7 On April 30, 2013, after defendant tendered the defense of the underlying actions to plaintiff, plaintiff filed a complaint for declaratory judgment in the Sangamon County circuit court, seeking a ruling it owed no duty to defend defendant in the underlying action. Plaintiff and defendant each filed cross-motions for judgment on the pleadings, and a hearing and oral argument were set for July 25, 2013.

¶ 8 On July 19, 2013, Hale and ISG filed a motion for sanctions against defendant in the underlying appellate action under Rule 38 of the Federal Rules of Appellate Procedure (Fed. R. App. P. 38), alleging defendant's appeal against them was "frivolous" and "retaliatory" and seeking damages in excess of \$34,000. Defendant informed plaintiff of the motion for sanctions against him on July 19, 2013.

¶ 9 On July 25, 2013, the hearing on the cross-motions for judgment on the pleadings was held in the Sangamon County circuit court and the matter was taken under advisement. On September 9, 2013, defendant filed a motion for leave to amend his answer and counterclaim in the Sangamon County case to incorporate the argument plaintiff had the duty to defend defendant in the underlying appellate action also. Defendant noticed his motion for hearing on October 16, 2013.

¶ 10 On September 12, 2013, the trial court in the Sangamon County case entered its order granting judgment in favor of plaintiff and against defendant, ruling plaintiff had no duty to

defend defendant in the underlying action. The ruling made no mention of defendant's motion for leave to amend nor did it make any reference to the motion for sanctions against defendant in the underlying appellate action.

¶ 11 On or about September 14, 2013, defendant sent correspondence to plaintiff's counsel (dated July 15, 2013) maintaining plaintiff still had a duty to defend defendant in the underlying appellate action. Plaintiff refused to accept tender of defense in the appellate action, stating the appellate motion for sanctions against defendant did not constitute a "suit" against defendant and defendant had not been "sued" in the underlying appellate action. Plaintiff contended its duty to defendant had not been triggered.

¶ 12 On September 16, 2013, defendant filed a notice of appeal of the decision in the declaratory judgment action in the Sangamon County circuit court. On September 19, 2013, the trial court entered a docket entry cancelling the hearing set for October 16, 2013, as the court no longer had jurisdiction due to the filing of the notice of appeal.

¶ 13 On September 27, 2013, plaintiff mailed to the Sangamon County circuit clerk a new complaint for declaratory judgment against defendant in which it alleged it owed no duty to defendant in the underlying appellate action. The circuit clerk filed the case on October 3, 2013. The day before, October 2, 2013, the Seventh Circuit Court of Appeals denied the motion for appellate sanctions filed by Hale and ISG against defendant and vacated the district court judgment against defendant.

¶ 14 After receiving notice of the resolution of the underlying appellate action in defendant's favor, plaintiff's counsel sent correspondence to defendant on October 11, 2013, indicating plaintiff would voluntarily dismiss its declaratory judgment action if defendant would

send to plaintiff a written withdrawal of his tender of defense in the underlying appellate action. Defendant refused and on October 15, 2013, filed his answer and counterclaim against plaintiff. In his counterclaim, defendant alleged plaintiff had a duty to defend him against the motion for appellate sanctions because the motion for sanctions constituted "malicious prosecution" as a covered "personal injury" in plaintiff's policies. Defendant also alleged he is entitled to judgment against plaintiff for breach of insurance contracts and violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)). Defendant's counterclaim also prayed for a ruling plaintiff's declaratory judgment action is barred by *res judicata*, collateral estoppel, or issue preclusion because the issues raised could have been raised in plaintiff's previous declaratory judgment action.

¶ 15 On November 18, 2013, plaintiff filed a motion for judgment on the pleadings. That same day, defendant filed his own motion for judgment on the pleadings. On December 9, 2013, the trial court found plaintiff had no duty to defend defendant on a motion for sanctions in the underlying appellate action because (1) no "suit" was brought against defendant and (2) no personal injury based on "malicious prosecution" was alleged against defendant.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Review of a judgment on the pleadings and the trial court's construction of an insurance policy are reviewed *de novo*. *Kim v. State Farm Fire & Casualty*, 312 Ill. App. 3d 770, 772, 728 N.E.2d 530, 532 (2000). Judgment on the pleadings is appropriate when an examination of the pleadings shows the absence of any material issue of fact and the rights of the parties can be declared as a matter of law. *M.A.K. v. Rush-Presbyterian-St. Luke's Medical*

Center, 198 Ill. 2d 249, 255, 764 N.E.2d 1, 4 (2001). A court may consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *Id.*

¶ 19 Defendant argues plaintiff's declaratory judgment complaint in regard to the underlying appellate action should have been barred under theories of *res judicata*, collateral estoppel, or issue preclusion because the issues it raises could have been raised in plaintiff's previous declaratory judgment action filed in the Sangamon County circuit court but were not.

¶ 20 The doctrine of *res judicata* provides a final judgment on the merits bars any later actions between the same parties on the same cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467, 889 N.E.2d 210, 213 (2008). The rulings of the trial court on plaintiff's previous declaratory judgment action involved plaintiff's duty to defend defendant in the underlying trial court action. The issue now before the court is plaintiff's duty to defend in the underlying appellate action for sanctions. These issues are not the same.

¶ 21 Defendant also argues plaintiff knew of the request to defend the motion for appellate sanctions on July 19, 2013, six days prior to the hearing in the previous declaratory judgment action, and was required to amend its complaint for declaratory judgment to include this new issue. This was despite the fact the parties' cross-motions for judgment on the pleadings were already fully briefed and set to be heard in only six days.

¶ 22 Defendant has presented no legal theory to support his argument plaintiff was required to amend its original complaint for declaratory judgment to add the issue of coverage for the underlying appellate action or it is barred from raising this issue in a later declaratory judgment action. We find no theory to support this argument after reviewing the record.

Plaintiff's declaratory judgment action contesting its presumed duty to defend defendant against motions for sanctions in the underlying appellate court action was not barred.

¶ 23 Plaintiff contends it owes no duty to defend defendant in the underlying appellate action because no suit was filed against defendant, no personal injury was found based on "malicious prosecution," and a motion for sanctions under Rule 38 of the Federal Rules of Appellate Procedure (Fed. R. App. P. 38) is not a malicious prosecution or a suit. There was no error in granting plaintiff's motion for judgment on the pleadings and denying that of defendant.

¶ 24 No complaint or lawsuit was filed against defendant in the underlying appellate action to trigger coverage. Instead, it was a motion for sanctions in the appellate court. Illinois law has long held an insurer's duty to defend is triggered by a lawsuit filed against its insured. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 140-41, 708 N.E.2d 1122, 1130 (1999); *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 531, 655 N.E.2d 842, 847 (1995). The difference between "motions" and "pleadings" in a lawsuit is noted in *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 413, 622 N.E.2d 105, 107 (1993). There, it was noted "[a] motion is an application *** for a ruling or an order in a pending case. *** A pleading, in contrast, consists of a party's formal allegations of his claims or defenses." *Id.*

¶ 25 Any duty to defend defendant must arise from the policy language itself. Here, in plaintiff's homeowners policy issued to defendant, the insuring agreement provides as follows:

"We will pay all sums up to the amount shown on the Declarations which anyone we protect becomes legally obligated to pay as damages because of personal injury caused by an offense

committed during the policy period. We will pay for only personal injury covered by this policy.

We may investigate or settle any claim or suit for damages against anyone we protect, at our expense. If anyone we protect is sued for damages because of personal injury covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true."

¶ 26 No suit or claim was made against defendant in the underlying appellate action. The cases cited by defendant stating a "suit" is not required to trigger an insurer's duty to defend or indemnify deal with insurance policies where "suit" was defined as including arbitration proceedings or alternative dispute resolution proceedings and, thus, "suit" as it is traditionally thought of was not required to trigger the insurer's duty. Plaintiff does not define "suit" in its policy and the traditional definition should be used.

¶ 27 Further, although defendant argues the motion for sanctions against him constitutes "malicious prosecution," which is covered under plaintiff's insurance policies as a personal injury, Illinois courts have held an award of sanctions against an insured does not constitute "malicious prosecution" covered as personal injury in an insurance policy. *William J. Templeman Co. v. Liberty Mutual Insurance Co.*, 316 Ill. App. 3d 379, 382, 735 N.E.2d 669, 673 (2000); *Spiegel v. Zurich Insurance Co.*, 293 Ill. App. 3d 129, 135, 687 N.E.2d 1099, 1102 (1997). The *Spiegel* court dealt specifically with a motion for sanctions under Rule 38 of the Federal Rules of Appellate Procedure (Fed. R. App. P. 38). The court held coverage in an insurance policy for claims of malicious prosecution against an insured does not extend to

liability incurred as a result of sanctions imposed by a federal court for the filing of a frivolous appeal. *Id.*

¶ 28 Defendant argues, despite the *William J. Templeman Co. and Spiegel* cases, the term "malicious prosecution" is ambiguous and a "reasonable man" could likely think a sanctions motion would constitute malicious prosecution. However, defendant ignores the definition of the term he cites in his own brief: "Malicious prosecution refers to filing a lawsuit for purpose of harassing the defendant..." Here, the underlying defendants never filed an independent, separate action against defendant.

¶ 29 Defendant also tries to argue the *William J. Templeman Co. and Spiegel* cases were wrongly decided, and he cites cases from other states in which sanctions motions are equated with malicious prosecution for insurance coverage purposes. He also points out the court in *William J. Templeman Co.* simply followed *Spiegel* and no other cases in Illinois have been reported following either case. This does not mean those cases were wrongly decided. It simply means this issue has not been dealt with on the appellate level in reported opinions. A possible explanation for that is trial courts and other appellate districts in Illinois have found the *William J. Templeman Co. and Spiegel* cases to be dispositive and have not taken up the issue.

¶ 30 Finally, we find plaintiff did not violate section 155 of the Illinois Insurance Code as it did not unreasonably deny coverage or refuse to defend defendant in the underlying actions. Nor did plaintiff breach its insurance contract. It is well established when an insurer contests its duty to defend its insured, it has three choices: (1) seek a declaratory judgment to determine the rights of the parties prior to or pending the trial in the underlying action; (2) defend the insured under a reservation of rights; or (3) refuse to either defend or seek a declaratory judgment.

Eclipse Manufacturing Co. v. United States Compliance Co., 381 Ill. App. 3d 127, 134-35, 886 N.E.2d 349, 356 (2007). Plaintiff chose to file this declaratory judgment action, as it was entitled to do.

¶ 31

III. CONCLUSION

¶ 32

We affirm the trial court's judgment.

¶ 33

Affirmed.