No. 1-10-0156

FIFTH DIVISION
March 31, 2011

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTIONETTE IACULLO, Special Administrator of the Estate of DAVID IACULLO, Deceased, Assignee of MARIE IACULLO, Plaintiff-Appellant, v. MARIE IACULLO, Judgment Debtor, and STATE FARM FIRE & CASUALTY COMPANY, Garnishee Defendant-Appellee, STATE FARM FIRE & CASUALTY COMPANY, Counter-Plaintiff-Appellee, v. ANTIONETTE IACULLO, Special Administrator of the Estate of DAVID IACULLO, Deceased,	Appeal from the Circuit Court of Cook County. No. 06L13055 The Honorable Nancy J. Arnold, Judge Presiding.

Assignee of Marie Iacullo and MARIE IACULLO,)
)
Counter-Defendants-Appellants.)

PRESIDING JUSTICE JAMES FITZGERALD SMITH delivered the judgment of the court.

Justices J. Gordon and Howse concur in the judgment.

HELD: Summary judgment in favor of insurer was proper where there was no genuine issue of material fact and it was clear that deceased was a resident member of the named insured's household and therefore excluded from third party coverage under the named insured's homeowner's insurance policy.

ORDER

Appellant Marie Iacullo appeals from the circuit court's grant of summary judgment to appellee State Farm Fire and Casualty Company. Marie, the named insured, contends that the circuit court erred in finding that State Farm had no duty to defend her in a lawsuit filed by her daughter on behalf of Marie's adult grandson who perished in a fire that destroyed a house all three shared. For the following reasons, we affirm.

I. BACKGROUND

The following facts are from depositions and documents submitted to the trial court. At all times pertinent to this appeal, Marie's home was insured under a homeowner's policy issued by State Farm. Marie's house was destroyed by fire on December 17, 2004, and Marie's adult grandson, David Iacullo, was killed. Marie was the named insured on the homeowner's policy.

The insured premise was a house that consisted of a main floor with a basement and a separate three bedroom apartment on the second floor. There is no argument made here that the second floor apartment was covered by the homeowner's policy in question. There were two bedrooms, one bath, full kitchen, guest room, living room, and dining room on the main floor. The basement was accessed from an internal stairway on the main floor as well as from an outside door. The basement consisted of an open living space, bedroom, bathroom, laundry room, and bar. There was a small refrigerator and freezer, sink, and a stovetop in the basement. The first floor and basement used the same utilities.

The homeowners policy provided, in Section I:

> "SECTION 1–COVERAGES
>
> COVERAGE B-PERSONAL PROPERTY
>
> 1. Property Covered. We cover personal property owned or used by an insured while it is anywhere in the world."

The policy also provided, in Section II:

> "SECTION II–LIABILITY COVERAGES
>
> Coverage L–Personal Liability
>
> If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. Pay up to our limit of liability for the damages for which the insured is legally liable; and

2. Provide a defense at our expense by counsel of our choice. We will make any investigation, and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages to effect settlement or satisfy a judgment resulting from the occurrence, equals our limit of liability."

The policy also contains the following exclusion from Section II:

"SECTION II–EXCLUSIONS

1. Coverage L [liability] and Coverage M [medical payments to others] does not apply to:

* * *

h. bodily injury to you or any insured within the meaning of part a. or b. of the definition of insured.

This exclusion also applies to any claim made or suit brought against you or any insured to share damages with or repay someone else who may be obligated to pay damages because of the bodily injury sustained by you or any insured within the meaning of part a. or b. of the definition of insured[.]"

For purposes of both first party coverage under Section I and personal liability coverage under Section II of the policy, "insured" and "you" were defined as follows:

" 'Insured' means you and, if residents of your household:

a. your relatives; and

b. any other person under the age of 21 who is in the care of a person described above."

And:

" 'you' and 'your' mean the 'named insured' shown in the Declarations. Your spouse is included if a resident of your household."

Marie moved into the house in 1952 and resided there until the fire. Marie raised her children in the house. Antionette Iacullo is Marie's eldest daughter and David's mother. Antionette resided on the main floor of the home until she was 17 years old. She then moved to the basement for more privacy, considering the move a "rite of passage". Antionette moved out of the house in the 1970's, but returned after her father's death in 1980. Thereafter, until the day of the fire, Antionette shared the main floor with her mother.

David was born in 1980 while Antionette lived at the insured premises with her mother. Antionette and her then infant son, David, slept in the basment for the first few months after he was born. Antionette and David later moved into a bedroom on the main floor. David used one of the two bedrooms on the main floor until he began high school in 1994. David then moved his belongings to the basement and used the basement bedroom to gain more privacy and a greater sense of independence. Antionette considered her son's move to the basement a rite of passage. David lived in the basement from 1999 through December 2004, except for several months when he was away at college.

David was 14 years old when he first moved into the basement. He did not pay Marie rent at that time. David shared family meals with his grandmother and mother before he moved his bedroom to the basement. After high school, David shared some family meals and often ate in the basement. David purchased his own groceries and kept all of his food in the basement. David had household chores he was expected to complete, such as swimming pool maintenance, lawn care, and snow removal.

David began paying his grandmother $200 per month in 2000. This obligation was imposed upon him by his mother, Antionette, who wanted him to have a monthly financial obligation. Marie did not expect her grandson to pay her for living in her house, but considered his contribution part of him "doing his share." David had a key to the front door of the home. David did not have renter's insurance.

David's childhood friend, David Perez, moved into the Iacullo residence in or about 1999 and lived with David Iacullo in the basement. Perez had been living with his grandmother before then. He paid Marie $50 per month for residing in the Iacullo home, representing the same amount he paid to his grandmother when he lived with her. Perez kept all of his clothing and personal items in the basement. Perez did not have renter's insurance.

A fire destroyed the house on December 17, 2004. David was asleep in the basement when the fire erupted. He did not survive.

State Farm assigned two claims representatives, Deborah Przyszlak and Steve Romas, to administer the property damage under the first party section of the policy. Przyszlak was assigned the personal property aspect of the claim. Among her responsibilities was to determine

whose personal property would be covered. Przyszlak spoke with either Antionette or Marie's sister-in-law Lucille regarding the coverage determination as to David. Przyszlak concluded that the personal property belonging to Marie, Antionette, and David would be covered based on the latters' status as resident relatives, which are insureds by definition under the homeowner's policy issued to Marie. In her deposition, Przyszlak testified that:

> "[PRZYSZLAK:] I guess there was never any question why [David] wouldn't be covered. We were told he was a grandson. He lived in the home with his grandmother, and he was an insured by definition. There was really never in our opinion a question whether or not he was or was covered. I never got the impression from the insured that they were questioning whether or not he was covered either."

She also observed that neither Marie nor Antionette questioned David's status as an insured for purposes of the personal property claim. Antionette expected that both she and David would be covered under Marie's policy.

Przyszlak determined that there would be no personal property coverage extended to David's friend, Perez, who shared the basement with him, since Perez did not qualify as an insured by definition under the policy because he was not a relative of Marie. Personal properly coverage was also not extended to the second floor tenants. Przyszlak observed that Marie's first party claim included a claim for lost rent from the second floor apartment.

The itemization of personal property damaged or destroyed in the fire was initiated by a

contents restoration specialist, who prepared an initial list of personal property which was then given to Marie for her review and supplementation. Marie's son-in-law prepared a list of all personal property in the home at the time of the fire belonging to Marie, Antionette, and David. The personal property inventory form that was submitted to State Farm included David's personal property which was located in the basement and was either lost or destroyed in the fire. Przyszlak worked closely with Antionette regarding the value assigned to the personal property listed in the personal property inventory form. Antionette disputed the values assigned to David's property. State Farm instructed Antionette to locate pricing information to corroborate the value she believed the property was worth. Przyszlak did not instruct Antionette, Marie, or any other family member as to what property to include in the personal property inventory form. The instruction issued by State Farm via Przyszlak was to identify any and all property for which coverage would be sought as a result of the fire. Ultimately, State Farm agreed to pay the value of the property as demanded by Antionette. The first party claim was resolved and closed in late 2007.

Antionette, in her capacity as representative of David's estate, filed a wrongful death suit against Marie, alleging Marie's negligence was the proximate cause of David's death in the 2004 fire. The complaint, filed on December 14, 2006, was forwarded to State Farm by Antionette's attorney. Marie did not contact an attorney in response to the suit. Paragraph 3 of the complaint alleged:

> "David Iacullo, a resident of 5353 N. Wayne, Chicago, Illinois was present in the basement of that home."

According to Antionette, the purpose of filing the suit against her mother was to reach any insurance available under the homeowner's policy; Antionette did not intend to collect a judgment against her mother.

State Farm claims representative Gwen Cooper was assigned to the third party claim. Cooper reviewed the first party claim file and noted that David had been designated an insured by definition. Cooper also noted that the first party claim included a claim for David's personal property lost or destroyed in the fire. Cooper then contacted Marie and took her recorded statement on January 17, 2006. In that statement, Marie said that David lived with her at the time of the fire; his friend Perez lived there, as well; that David ate meals with Marie and Antionette; Marie washed David's clothes; David used the front door of the home to enter and exit the house; and David did not pay Marie rent.

State Farm sent Marie a letter in January 2007 advising her that the complaint filed against her by Antonette on behalf of David's estate created a question of whether coverage was available to her under the homeowner's policy due to her grandson's potential status as an insured by definition. State Farm advised Marie that coverage could be excluded by the household exclusion. Marie was instructed to retain counsel to protect her interests in the underlying civil case. State Farm said it would reimburse Marie defense fees should it determine that a duty to defend exited.

State Farm concluded its coverage investigation in February 2007 and soonafter advised Marie that it denied coverage because David was a resident relative at the time of the fire and hence an insured by definition subject to the household exclusion. This determination was based

on the allegations of the complaint, Marie's statement, and a review of the first party claim file. Antionette's attorney was advised of the coverage determination.

Antionette's attorney filed an amended complaint on behalf of the Estate of David Iacullo in April 2007. The amended complaint was identical to the original complaint except for paragraph 3, which alleged that David "was present and resided in the basement apartment" at the time of the fire.

Deborah Dunn was a State Farm team manager who supervised the administration of the third party claim. Dunn reviewed the original and amended complaints and approved the correspondence to Marie regarding the denial of coverage for David's claim. According to Dunn, the coverage determination was made on review of the complaints, the first party claim log, and the third party investigation which included Marie's recorded statement. Dunn admitted that neither the original nor amended complaints expressly alleged that the grandson was a resident of his grandmother's household.

State Farm section manager Juan Parilo supervised the administration of the third party claim. Dunn reported to Parilo. Parilo testified that the claim was investigated by Cooper and that coverage was excluded under the household exclusion. Parilo explained that State Farm had investigated a first party claim under which the grandson was identified as an insured by definition. Consistent with its customary practices, State Farm conducted a separate investigation of the third party claim. The amended complaint did not alter State Farm's coverage determination.

Antionette's attorney sought an order of default against Marie in the underlying case. A

prove up order entering judgment in the amount of $600,000 was entered against Marie in July. Marie had no knowledge of the order nor any attempt to collect a judgment against her. Marie does not recall seeing the order. Antionette was not present in court when the order was entered and does not know how the $600,000 figure was computed. Antionette, on behalf of David's estate, then instituted collection proceedings against State Farm through a third party citation served in September 2007. No collection proceedings were instituted against Marie.

State Farm responded to the citation by claiming that it was not in possession of any assets belonging to the debtor that could satisfy the judgment. State Farm also filed a counterclaim seeking a declaration that State Farm has no duty to indemnify Marie for the default judgment entered against her. The Estate filed a motion to dismiss the counterclaim. Eventually, the case was transferred to the Chancery Division where the trial court denied the motion to dismiss State Farm's counterclaim for declaratory judgment and ordered the Estate to answer.

The Estate and Marie then filed answers denying the material allegations of the counterclaim. State Farm filed a motion for summary judgment that it had no duty to indemnify Marie for the judgment entered against her for the reason that her grandson, David, was a resident of the insured household on the date of his death. State Farm argued that it was not estopped to contest coverage because no duty to defend arose and that, in any event, the grandson's inclusion in the first party claim estopped plaintiff from triggering general liability coverage under the homeowner's policy.

The Estate filed a response and cross motion for summary judgment. The Estate contended that State Farm's failure to defend its named insured estopped it from relying on the

household exclusion. It also argued that, even if extrinsic facts were considered, there was no clear and convincing evidence that the grandson was a member of his grandmother's household. It argued that State Farm was not permitted to rely on extrinsic facts to evaluate its duty to defend.

Following a hearing in December 2009, the trial court granted State Farm's motion and denied the Estate's cross motion. The trial court found that it could look to extrinsic evidence to determine the residency status of the grandson. It found no issue of fact existed that the grandson was a resident of Marie's household as a matter of law.

The Estate appeals.

II. ANALYSIS

In the instant case, the circuit court properly granted summary judgment in favor of State Farm where there was no genuine issue as to any material fact.

Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis,* 197 Ill. 2d 28, 35 (2001). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35, quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). We review a trial court's grant of summary judgment *de novo* (*Morris*, 197 Ill. 2d at 35), and we will only disturb the decision of the trial court where we find that a genuine issue of material fact

exists (*Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

To determine whether an insurer has a duty to defend, the court generally compares the provisions of the insurance contract to the allegations in the underlying complaint. *Crum and Forster Managers Corporation v. Resolution Trust Corporation*, 156 Ill. 2d 384, 393 (1993). A court may consider extrinsic evidence in making the threshold determination of whether a party is an "insured" under the insurance contract. See *Bituminous Casualty Corporation v. Fulkerson*, 212 Ill. App. 3d 556, 562 (1991) ("A court may look beyond the allegations in the complaint only if the coverage issue involves such ancillary matters as whether the insured paid the premiums or whether he is the proper insured under the policy"); *Transcontinental Insurance Company v. National Union Fire Insurance Company of Pittsburgh*, 278 Ill App. 3d 357, 368 (1996) ("A court may look beyond the allegations of a complaint if the coverage issue involves the question of whether the party asserting coverage is a proper insured under the policy"). "If the conduct alleged in the underlying action is within or potentially within the policy's coverage, the insurer is duty bound to defend its insured, even if the insurer discovers that the allegations are groundless, false, or fraudulent." *Bituminous Casualty Corporation*, 212 Ill. App. 3d at 562 (*citations omitted*).

Accordingly, we begin our analysis by determining whether the conduct alleged in the underlying action is within or potentially within the policy's coverage. Like the court below, we find that it is not, and affirm the grant of summary judgment for State Farm.

Initially, we note that it was appropriate for both State Farm and the trial court to consider limited extrinsic evidence in order to determine whether the alleged conduct was potentially with

the policy's coverage. In this regard, the trial court stated:

> "[THE COURT:] I think the case law is very strong that when you look for the status of the insured under the policy, you have a right–the Court has a right to look–and the insurance company first had a right to look at, as Counsel put it, its institutional knowledge of the situation. And the Court has a right to look at the facts."

Accordingly, the trial court considered the first party claim history under which the grandson was deemed an insured by definition and the first party benefits paid out for his damaged or destroyed personal property. The court properly considered institutional knowledge about the first party claim in its determination of coverage on the third party claim. See *Transcontinental Insurance Company*, 278 Ill. App. 3d at 368.

The household exclusion at issue here excludes coverage for "bodily injury" suffered by two categories of persons: (1) relatives of the named insured if the relative is a "resident" of the household; and (2) any person under the age of 21 who is in the care of the named insured. David Iacullo qualified as an insured by definition whose bodily injury is excluded under the policy because he was a resident relative of the insured's household on December 17, 2004.

" 'Resident of the household' " has no fixed meaning, and the reasonable interpretation of the phrase requires a case-specific analysis of intent, physical presence and permanency of abode." *Farmers Automobile Insurance Association v. Gitelson*, 344 Ill. App. 3d 888, 893-94 (2003) (*citations omitted*). The controlling factor, however, is the intent, which is evidenced by the acts of the person whose residency is questioned. *Farmers Automobile Insurance*

Association, 344 Ill. App. 3d at 894, citing *Cincinnati Insurance Company v. Argubright*, 151 Ill. App. 3d 324, 331 (1986). The term "household" is defined as an "organized family and whatever pertains to it as a whole; a domestic establishment;" and a "family considered as consisting of all those who share in the privileges and duties of a common dwelling." *Argubright*, 151 Ill. App. 3d at 331, citing *Liberty National Bank v. Zimmerman*, 333 Ill. App. 94, 102 (1947).

Here, it is clear that David belonged to a family unit that consisted of his mother and grandmother. He resided with them in the basement of his grandmother's home and shared in the responsibility of a common dwelling. David lived with his grandmother his entire life, occupying different areas of the house during that time. He lived in the basement as an infant, on the main floor as growing up, and then returned to the basement as a teenager. David continued to have household responsibilities when he moved to the basement, such as swimming pool maintenance, lawn care, and snow removal. He had unrestricted access to the main floor of the home.

David's contribution of $200 per month towards household expenses, even if considered rent, does not change our analysis of David's intent to be a part of a family household. This obligation was imposed upon him by his mother in order to teach him about financial obligations. His grandmother did not expect David to pay for living at her house, but considered his monthly financial contribution toward the household part of David "doing his share."

Neither the location of David's bedroom in the basement of the house nor the Estate's reference to the basement as an "apartment" changes the fact that David resided in his grandmother's household. Regardless of how the basement is labeled, the evidence is clear that

David shared in the privileges and duties of a common dwelling. David's actions, demonstrative of his intent, show that he was not attempting to become independent or live on his own.

The Estate also contends that State Farm should be estopped from denying coverage because it failed to file a declaratory judgment action to determine coverage when the third party claim was initially filed. It argues that State Farm was required to elect to either defend the named inured or file a declaratory judgment action . We disagree.

Estoppel is an equitable doctrine providing, in this context, that an insurer taking the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured, but must either defend under a reservation of rights or seek a declaratory judgment that there is no coverage. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). The Estate's argument fails because the obligation to elect one of the options enunciated by the *Ehlco* court is triggered only when the complaint gives rise to a potential for coverage, which is not the case here. See *Gould & Ratner v. Vigilant Insurance Company*, 336 Ill. App. 3d 401, 411-12 (2002) ("Absent a clear duty to defend, an insurer would have no reason or obligation to file a declaratory judgment before the underlying suit is resolved. To hold to the contrary would lead to an illogical result: insurers would be required to promptly file actions for declaratory judgments to preserve their rights every time they are informed of a claim from an insured, even where there clearly is no potential for coverage"). Here, as discussed above, there is no duty to defend. Accordingly, State Farm was under no obligation to file a declaratory action and, accordingly, is not now estopped for its failure to do so.

The Estate's reliance on *Central Mutual Insurance Company v. Kammerling*, 212 Ill. App. 3d 744 (1991), and *State Automobile Insurance Company v. Kingsport Development, LLC*, 364 Ill. App. 3d 946 (2006), to argue that State farm is estopped because it failed to contest coverage until after judgment against Marie was entered is misplaced. The Estate contends that State Farm waited too long where it first sought declaratory relief in response to a third party citation. This argument fails where the requirement that an insurer must seek declaratory relief within a reasonable period of time after learning of the underlying lawsuit is only triggered when there is a duty to defend. See, *e.g.*, *Kammerling*, 212 Ill. App. 3d at 749-50; *Kingsport*, 364 Ill. App. 3d at 959. As discussed, there was no duty to defend in the instant case and, accordingly, State Farm was not unreasonable in its decision not to immediately file a declaratory action.

Accordingly, the trial court did not err in granting State Farm's motion for summary judgment where there was no genuine issue of material fact. The trial court properly considered State Farm's institutional knowledge to determine that David was a resident relative and therefore excluded from coverage in the third party complaint.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.