THIRD DIVISION
January 26, 2011

No. 1-10-0454

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARYLAND CASUALTY INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY
v.	)	No. 98 CH 04607
UNITED NATIONAL INSURANCE COMPANY and W.E. O'NEIL CONSTRUCTION COMPANY, Defendants and Counterplaintiffs-Appellants.	)	HONORABLE PETER FLYNN, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: Defendants and Counterplaintiffs failed to show that one of them was an additional insured on an insurance policy issued by Plaintiff and Counterdefendant; the circuit court's entry of summary judgment for Plaintiff and Counterdefendant was affirmed.

Defendants and counterplaintiffs United National Insurance Company and W.E. O'Neil Construction Company appeal from orders of the circuit court of Cook County denying them

summary judgment and granting summary judgment to Plaintiff and Counterdefendant Maryland Casualty Insurance Company, ruling that O'Neil was not an additional insured under a broad form endorsement to a policy Maryland issued to a subcontractor on a construction project. We agree that O'Neil was not an additional insured under Maryland's broad form endorsement and affirm the judgment of the circuit court.

BACKGROUND

The record on appeal discloses the following facts. In 1993, O'Neil entered into a contract with Target Stores to build a store in West Dundee, Illinois. O'Neil subcontracted with McKinney Steel & Sales, Inc. to provide steel products and related work. Article XXI of the subcontract required McKinney to purchase or otherwise procure "occurrence" form commercial general liability insurance, which would name O'Neil as an additional insured with respect to operations performed pursuant or incident to the subcontract. Article XXI also required McKinney to furnish O'Neil with evidence of insurance for each sub-subcontractor employed by McKinney.

McKinney then entered into a sub-subcontract with Toth Industrial Sales, Inc. for the fabrication and installation of structural steel. Toth was the named insured under a policy issued by Maryland, with a coverage period of March 31, 1993 through March 31, 1994. A work contract endorsement to the general liability coverage of that policy provided as follows:

"WHO IS AN INSURED (Section II) is amended as follows:

5. Any person or organization other than an architect, engineer, or surveyor, which requires in a 'work contract' that such person or organization be

made a protected entity under this policy. However, such person or organization shall be an insured only with respect to covered 'bodily injury' or 'property damage, personal injury' and 'advertising injury' which results from work done by you or on your behalf under that 'work contract.'

The coverage afforded to such person or organization shall continue only for a period of thirty (30) days after the effective date of the applicable 'work contract' or until the end of the policy term, whichever is earlier. However, if you report to us within this period the name of the person or organization, as well as the nature of the 'work contract' involved, the coverage afforded by this endorsement to such person or organization shall continue until the expiration of this policy.

DEFINITIONS (Section V) is amended to add the following definition:

'Work contract' means an agreement into which you enter for work to be performed by you or on your behalf."

The policy also included a broad form additional insured endorsement, which provided as follows:

"ADDITIONAL INSURED – OWNERS OR CONTRACTORS – ILLINOIS

This endorsement modifies insurance provided in the State of Illinois under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART SCHEDULE

(1) Name of person or organization (Additional Insured): To Be Determined At Audit

(2) Designated job location: To Be Determined At Audit

(3) Additional premium: $570 Deposit (8% of premium from Operations, to be determined at Audit)

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the schedule above, but only with respect to Acts or Omissions of the Named Insured in connection with the Named Insured operations at the location shown above."

Toth gave McKinney a verbal bid for the work on the project. McKinney sent Toth a purchase order dated July 8, 1993, for the supply and installation of steel at the project. Toth stamped the purchase order as received on July 12, 1993, and sent McKinney a quotation dated July 21, 1993. On August 4, 1993, Toth's insurance agency issued a certificate of insurance listing McKinney as an additional insured on the Maryland policy, stating:

"THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW."

McKinney signed and returned the quotation on August 11, 1993.

On October 4, 1993, Toth arrived at the O'Neil project work site and was permitted to commence work. James Vozel, a Toth employee, was injured within hours of being on the job.

Toth obtained a certificate of insurance, dated October 4, 1993, that added McKinney, O'Neil and Target as additional insureds. Toth completed work on the project and sent an invoice to McKinney dated October 14, 1993.

On April 7, 1997, James Vozel filed suit against O'Neil and McKinney for the injuries suffered onsite on October 4, 1993. On July 29, 1997, O'Neil tendered its defense to McKinney's insurance carrier, Statewide Insurance Company, as well as to Maryland. Maryland's claims representative, Patricia Kane, requested a copy of the work contract from O'Neil, but never received one. She received a letter dated October 10, 1997, from O'Neil's counsel, stating that Statewide had assumed O'Neil's defense without a reservation of rights.

On April 8, 1998, Statewide filed a declaratory judgment action against United National Insurance Company (O'Neil's carrier) and Maryland, alleging that O'Neil was an additional insured under the Maryland policy. United National and O'Neil cross-claimed for declaratory relief and alleged bad faith in denying defense of the claims.

On March 21, 2001, the Vozel personal injury suit settled, with payments made by several insurers, including United National and Industrial Insurance Company of Hawaii (one of O'Neil's other carriers).

The declaratory judgment action and cross-claim proceeded to trial on December 1, 2004. At the conclusion of the hearings, the trial court ruled that the controlling issue was whether O'Neil was an additional insured under the policy Maryland issued to Toth. The trial court ruled that O'Neil was an additional insured based on the purpose and language of the work contract endorsement to the policy.

The trial court finalized its findings, rulings and allocations of recovery in orders dated May 6, 2005 and April 20, 2006. Maryland, O'Neil and United appealed from these orders. Their appeals were consolidated for decision by this court, which ultimately entered an order reversing the judgment of the circuit court and remanding the case for further proceedings consistent with this court's order. *Maryland Casualty Co. v. United National Insurance Co.*, Nos. 1-06-1444, 1-06-1045 (Ill. App. Nov. 6, 2008), *pet. for leave to appeal denied*, No. 108309 (May 28, 2009). This court ruled that while the work contract endorsement was clearly designed to streamline the process of adding as additional insureds those with whom Toth had a work contract, it clearly did not extend to parties not in privity with Toth in such a work contract. *Id.* at 14. Accordingly, this court concluded that the trial court erred in ruling that the work contract endorsement was ambiguous and that O'Neil was an additional insured under the Maryland policy. *Id.* at 14.

On remand to the circuit court, O'Neil and United filed a joint motion for summary judgment on September 8, 2009, arguing that O'Neil was an additional insured under the "broad form" endorsement to the Maryland policy. Maryland filed a response based primarily on the doctrine of *res judicata*. On November 5, 2009, the circuit court entered an order rejecting Maryland's argument and directing the parties to brief the remaining issues.

On January 8, 2010, following briefing and a hearing on the matter, the circuit court denied O'Neil and United's motion for summary judgment, ruling that O'Neil was not an additional insured under the "broad form" endorsement to the Maryland policy. The circuit court continued the matter to consider Maryland's oral cross-motion for summary judgment. On

January 28, 2010, the trial court entered an order granting Maryland's cross-motion for summary judgment and memorializing the denial of O'Neil's and United's motion. On February 16, 2010, O'Neil and United filed a timely notice of appeal to this court.

DISCUSSION

I. THE STANDARD OF REVIEW

On appeal, O'Neil and United argue that the trial court erred in granting summary judgment to Maryland. Appellate review of a summary judgment is *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146, 787 N.E.2d 786, 789 (2003). Summary judgment is appropriate 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 2008). The interpretation of an insurance policy and the coverage provided under the policy presents questions of law that are appropriate for resolution through summary judgment. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391, 620 N.E.2d 1073, 1077 (1993).

II. RES JUDICATA

At the outset, we address Maryland's argument that the circuit court should not have considered O'Neil's and United's motion for summary judgment on remand because this court's order was conclusive on the issue of whether O'Neil was an additional insured. *Res judicata* is an equitable doctrine designed to prevent multiple lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299, 685 N.E.2d 1357, 1363

(1997). Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334, 665 N.E.2d 1199, 1204 (1996).

Where this court reverses a judgment of the circuit court and remands for further proceedings, the judgment of reversal is conclusive only of the questions actually decided; questions not decided by the reviewing court and which were not at issue or involved in the appeal are not concluded and may be considered by the court below in subsequent proceedings on the case. *Pioneer Trust & Savings Bank v. Zonta*, 96 Ill. App. 3d 339, 344-45, 421 N.E.2d 239, 244 (1981). The ultimate question is whether the judgment fully and finally disposes of the rights of the parties to the cause so that no material controverted issue remains to be determined. *Wilkey v. Illinois Racing Board*, 96 Ill. 2d 245, 249, 449 N.E.2d 843, 844 (1983); *Hickey v. Riera*, 332 Ill. App. 3d 532, 540-41, 774 N.E.2d 1, 8 (2001).

Maryland notes that the broad form endorsement was discussed during the trial of this case and that Exhibit 23 (a copy of the broad form endorsement) is discussed in the circuit court's written findings of fact and conclusions of law. The circuit court did state that it "considered and applied" Exhibit 23 and Exhibit 24 (the work contract endorsement) to determine whether O'Neil was an additional insured. However, the circuit court's subsequent findings and conclusions refer to Exhibit 24 and not Exhibit 23. Accordingly, while judicial economy might have been better served had the circuit court ruled on the effect of the broad form endorsement in its trial findings of fact and conclusions of law, we conclude that the issue was not decided at that time.

Moreover, a review of this court's prior order shows that it was entirely concerned with the interpretation of the work contract endorsement. Thus, we conclude that further proceedings on the issue of the broad form endorsement were not precluded by the doctrine of *res judicata*.

III. THE BROAD FORM ENDORSEMENT

O'Neil and United further argue (reframing the argument in several ways throughout their brief) that the circuit court erred in ruling that O'Neil was not an additional insured under the broad form endorsement to the Maryland policy. O'Neil and United argue that the phrase "to be determined at audit" is undefined and ambiguous. However, O'Neil and United also claim that "there is only one plausible explanation for this language," *i.e.*, that the Maryland policy, like many insurance policies, is "loss sensitive," allowing the insurer to perform an audit after the policy expires to recalculate the premium based on the risk. See, *e.g.*, *Virginia Surety Co. v. Adjustable Forms, Inc.*, 382 Ill. App. 3d 663, 671, 888 N.E.2d 733, 740 (2008). We note that not all audits take place after the expiration of a policy period. In some cases, the insurer will audit the insured contractor to make sure the contractor is obtaining additional insured endorsements from their subcontractors. See, *e.g.*, *Glassell Development, Inc. v. NIC Insurance Co.*, No. SA CV 08-208 AHS (Anx), 2009 WL 1941811 at *5 (C.D. Cal. June 30, 2009).

The broad form endorsement does not specify the timing of an audit, but that does not render it ambiguous for the purpose of this case. The ultimate issue is how a person becomes an additional insured under the policy, not the timing of the audit. As noted by the circuit court, the broad form endorsement unambiguously provides three ways in which a person or entity may

become an additional insured under that endorsement. First, the person or entity may be listed in the endorsement's schedule. Second, the person or entity may be listed in the declarations applicable to the endorsement. Third, the person or entity may be determined to be an additional insured as the result of an audit. In this case, O'Neil and United have identified no evidence that O'Neil fall into any of these three categories. Indeed, as the circuit court noted, the only testimony regarding audits came from Maryland underwriter Michelle Marshall, who testified there was an audit, but there was no evidence that O'Neil was determined to be an additional insured.

O'Neil and United also rely on the certificate of insurance issued to O'Neil. It is well-established that where, as here, a certificate refers to the policy and expressly disclaims any coverage other than that stated in the policy, the policy governs the extent and terms of the coverage. See *United Stationers Supply Co. v. Zurich American Insurance Co.*, 386 Ill. App. 3d 88, 102, 896 N.E.2d 425, 437 (2008) (and cases cited therein). A certificate of insurance does not satisfy the additional insured endorsement because a certificate of insurance does not constitute a contract between the parties. See *Clarendon America Insurance Co. v. Aargus Security Systems, Inc.*, 374 Ill. App. 3d 591, 597, 870 N.E.2d 988, 993 (2007).

Further, O'Neil and United rely on *West American Insurance Co. v. J.R. Construction Co.*, 334 Ill. App. 3d 75, 777 N.E.2d 610 (2002). In that case, Altra Steel (Altra), a subcontractor, orally agreed to add J.R. Construction (J.R.), a general contractor, as an additional insured on Altra's policy with West American. *West American Insurance Co.*, 334 Ill. App. 3d at 77, 777 N.E.2d at 612-13. When an injured employee of one of J.R.'s sub-subcontractors sued,

J.R. tendered its defense to West American. *West American Insurance Co.*, 334 Ill. App. 3d at 77, 777 N.E.2d at 612. West American refused to defend J.R. because the insurance commitment was not in writing. However, the appellate court rejected the defense, concluding that J.R. was entitled to coverage because, among other things, West American admitted in a letter to J.R. that it was an additional insured under the Altra policy and in West American's own internal documents, as well as having issued a certificate of insurance to the same effect. *West American Insurance Co.*, 334 Ill. App. 3d at 80-81, 777 N.E.2d at 615. In reaching its conclusion, the court did not rely on the automatic additional insured provision in Altra's policy. See *West American Insurance Co.*, 334 Ill. App. 3d at 80, 777 N.E.2d at 615. *West American Insurance Co.* is best characterized as an estoppel case, as it is not clear that any other legal theory applies. See *Westchester Surplus Lines Insurance Co. v. Stonitsch Construction, Inc.*, 572 F. Supp. 2d 946, 954 (N.D. Ill. 2008). Here, O'Neil and United have identified no evidence that Maryland admitted that O'Neil was an additional insured or treated O'Neil as such in internal documents.

O'Neil and United suggest that Maryland is improperly trying to assume the power to determine who is an additional insured after a known loss. We disagree, as the question being litigated is simply whether O'Neil was an additional insured under the broad form endorsement to the Maryland policy at the time of the incident forming the basis of the Vozel personal injury suit. As noted earlier, O'Neil and United identified no evidence that they fell into any of the three categories created by the broad form endorsement. We also note in passing that O'Neil and United did not prove that Maryland was even required to conduct an audit to ascertain the full

scope of coverage. See, *e.g.*, *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 281 Ill. App. 3d 1080, 1087, 667 N.E.2d 581, 586 (1996).

O'Neil and United argue that Maryland is barred from relying on the broad form endorsement because it never expressly denied coverage based on that endorsement. However, as Maryland correctly notes, this argument is based on a fundamental misconstruction of the broad form endorsement. The plain language of the endorsement identifies the ways in which persons or entities could become additional insureds. It is not an exclusionary clause, nor has Maryland invoked it as such.

In short, we conclude that the circuit court did not err in its interpretation of the broad form endorsement to the Maryland policy. We find there was no genuine issue of material fact precluding the entry of summary judgment in favor of Maryland.

IV. THE DUTY TO DEFEND

Finally, O'Neil and United argue that Maryland breached its duty to defend and thus is estopped from asserting any policy defenses. It is true in general that whether an insurer must defend the insured is a question resolved by comparing the allegations of the underlying complaint against the insured to the insurance policy. *E.g.*, *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 532, 655 N.E.2d 842, 847 (1995). However, the term insured is key to the application of the rule. A court may look beyond the allegations in the complaint where the coverage issue involves such ancillary matters as whether the insured paid the premiums or whether the party is the proper insured under the policy. *State Farm Fire & Casualty Co. v. Shelton*, 176 Ill. App. 3d 858, 867, 531 N.E.2d 913, 919 (1988); see also *Pekin*

Insurance Co. v. Pulte Home Corp., ___ Ill. App. 3d ___, ___, 935 N.E.2d 1058, 1062-63 (2010) (and cases cited therein). Here, O'Neil and United failed to raise a genuine issue of material fact as to whether O'Neil was an additional insured under any provision of the Maryland policy. Accordingly, O'Neil and United failed to show Maryland breached a duty to defend O'Neil.

CONCLUSION

In sum, we conclude that the circuit court's consideration of the broad form endorsement to the Maryland policy was not barred by *res judicata* on remand. We also conclude that the circuit court correctly interpreted the endorsement, concluding that O'Neil was not an additional insured. Lastly, we conclude that O'Neil and United failed to show Maryland breached a duty to defend O'Neil. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.