THIRD DIVISION
June 30, 2011

2011 IL App (1st) 101842-U
No. 1-10-1842

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMICA MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. STATE FARM INSURANCE COMPANY, Defendant-Appellee, (Mark R. Czernek, Julia Ann Czernek, and Raymond P. Czernek, Defendants).	)))))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 07 CH 34823 HONORABLE SOPHIA HALL, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: Because a genuine issue of material fact exists about whether the defendant should be equitably estopped from relying on a voluntary dismissal in the underlying tort action between insureds, the trial court erred in granting summary judgment. Reversed and remanded.

¶ 1 Plaintiff, AMICA Mutual Insurance Company (AMICA), appeals an order of the circuit court of Cook County granting summary judgment to defendant State Farm Insurance Company

(State Farm) in a declaratory judgment action over the extent of State Farm's policy coverage of a motor vehicle collision between insureds of both companies.[1] The circuit court granted summary judgment on the ground that the voluntary dismissal of the underlying tort action between the insureds eliminated any actual controversy between the insurers. However, we conclude AMICA raised a genuine issue of material fact about whether State Farm should be equitably estopped from relying on the voluntary dismissal. Accordingly, for the following reasons, we reverse and remand the case for further proceedings.

¶ 2 BACKGROUND

¶ 3 The record on appeal discloses the following facts. In 2006, Cheryl Niedzwiedz filed a lawsuit against Mark R. Czernek, Raymond P. Czernek, Czernek, Inc., and Delivery Corporation. Cheryl claimed that, while operating her motor vehicle, she suffered bodily injury as a result of a January 20, 2004, collision with a 1997 Dodge van driven by Mark. Cheryl is an insured under an automobile policy issued by AMICA. The Dodge van, owned by Raymond, was insured under policy number D306130-13A (Policy D30) issued by State Farm. Mark and his wife, Julie Ann, are also named insureds under State Farm policy number 902 2777-E02-13E (Policy 902) for a 1998 Ford Expedition.

¶ 4 State Farm retained counsel to represent its insureds in the *Niedzwiedz* suit. Cheryl notified AMICA of her intent to file a claim under her underinsured motorists coverage. While

[1] Defendants Mark R. Czernek, Julia Ann Czernek, and Raymond P. Czernek are not parties to this appeal.

the case was pending in the circuit court, State Farm offered to settle for the $100,000 limits of Policy D30. Cheryl, through counsel, rejected the offer, asserting Policy 902 provided additional liability coverage to the *Niedzwiedz* defendants. AMICA advanced Cheryl $100,000 to preserve its subrogation rights under its policy. AMICA also paid Cheryl $50,000 on her underinsured motorists claim and $5,000 in medical costs. AMICA substituted retained counsel for Cheryl's personal attorneys in order to pursue its subrogation rights.

¶ 5 On November 14, 2007, the circuit court granted a motion by Cheryl to voluntarily dismiss the *Niedzwiedz* suit pursuant to section 2-1009 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2006)).

¶ 6 On November 28, 2007, AMICA filed this action, seeking a declaration that Policy 902 provided additional coverage for Cheryl's claims against Mark, Raymond, Czernek, Inc., and Delivery Corporation. State Farm filed its appearance on January 7, 2008, and its answer on April 22, 2008. Service of summons on the Czernek defendants was unsuccessful in January 2008, and no further attempt was made. On June 16, 2008, the circuit court granted Judge Nancy Arnold's request to recuse herself from the case and transferred the matter to the presiding judge of the chancery division for reassignment.

¶ 7 On October 24, 2008, AMICA filed a motion to assign the case to a calendar. The motion was presented on November 3, 2008. Although AMICA does not identify the reassignment in the record on appeal, the record shows the case was reassigned to Judge Sophia Hall.

¶ 8 In March 2009, AMICA issued discovery requests to State Farm. State Farm failed to respond to the discovery requests. AMICA filed a motion to compel a response. On September 23, 2009, the circuit court ordered State Farm to answer the discovery requests on or before October 14, 2009.

¶ 9 On October 5, 2009, State Farm filed a motion for summary judgment. State Farm noted the *Niedzwiedz* suit was voluntarily dismissed on November 28, 2007, and not refiled within a year. Thus, State Farm argued Cheryl's claims were time-barred. Accordingly, State Farm argued a controversy no longer existed between the parties regarding the policy coverage because its insureds could not be liable.

¶ 10 On December 7, 2009, AMICA filed its response to the motion for summary judgment. AMICA asserted that after it paid Cheryl, defense counsel in the *Niedzwiedz* suit contacted AMICA's counsel and advised there were no "justiciable issues remaining" in the *Niedzwiedz* suit and "the only real issue left in the case" was the issue of coverage afforded under the State Farm policies. AMICA attached correspondence from defense counsel in the *Niedzwiedz* suit as an exhibit to its response. AMICA argued State Farm should be estopped from denying a justiciable controversy exists in the declaratory judgment action. AMICA also argued that whether it can establish liability remained an open question and State Farm was thus entitled at most to a dismissal of the complaint, not summary judgment.

¶ 11 On December 17, 2009, the circuit court granted State Farm's motion for summary judgment.

¶ 12 On January 19, 2010, AMICA filed its motion to reconsider. AMICA supported its motion with an affidavit by AMICA's counsel in the *Niedzwiedz* suit, recounting representations made by defense counsel. AMICA's counsel stated, in addition to comments similar to those in the letter quoted from earlier, defense counsel had told the judge in the *Niedzwiedz* suit that the case had essentially become a declaratory judgment action involving the issue about whether any other State Farm policy covered the collision. AMICA's counsel in the *Niedzwiedz* suit also stated the judge offered to transfer the case from the law division to the chancery division at that time. AMICA's counsel in the *Niedzwiedz* suit further stated he and defense counsel had agreed that he would dismiss the personal injury action and the dispute over State Farm's policy coverage would continue in this declaratory judgment action. AMICA's counsel stated he took no steps to refile the *Niedzwiedz* suit because he believed the parties agreed no issues remained about the settlement of Cheryl's claim or any other matter with respect to the *Niedzwiedz* suit. AMICA again argued that State Farm should be estopped from claiming it was not bound by defense counsel's actions. AMICA further claimed State Farm had unclean hands in the matter.

¶ 13 State Farm filed a response, arguing AMICA's argument that liability remained an open question contradicted its claim that an agreement existed between counsel in the *Niedzwiedz* suit that AMICA would dismiss the *Niedzwiedz* suit and litigate the policy coverage in this declaratory judgment action. State Farm also argued there was no agreement between counsel in the *Niedzwiedz* suit and per the letter attached to AMICA's response to the motion for summary judgment was ambiguous at best. State Farm further argued there was no evidence that defense counsel in the *Niedzwiedz* suit had the authority to bind State Farm to any such agreement.

Moreover, State Farm denied AMICA's assertion that it had unclean hands.

¶ 14 On May 11, 2010, the circuit court denied AMICA's motion for reconsideration. On June 9, 2010, AMICA filed a timely notice of appeal to this court.

¶ 15 DISCUSSION

¶ 16 The issue on appeal is whether the trial court erred in granting summary judgment to State Farm. 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 2010). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). Our review of a summary judgment ruling is *de novo*. *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 146 (2003).

¶ 17 In this case, the circuit court granted summary judgment based on the dismissal of the *Niedzwiedz* suit. "A plaintiff seeking a declaratory judgment must show that such relief would be based on an actual justiciable controversy." *DesPain v. City of Collinsville*, 382 Ill. App. 3d 572, 580 (2008) (quoting *SBL Associates v. Village of Elk Grove*, 247 Ill. App. 3d 25, 29 (1993)). An actual controversy requires in part a showing that the underlying facts and issues of the case are not moot or premature. *Id.* "Where the issue is an insurer's duty to indemnify, the controversy does not arise until the insured becomes legally obligated to pay damages in the underlying action." *Czapski v. Maher*, 385 Ill. App. 3d 861, 867 (2008).

¶ 18 The *Niedzwiedz* suit was dismissed pursuant to section 2–1009(a) of the Code (735 ILCS

5/2–1009(a) (West 2006)), which generally provides that a plaintiff may, at any time before trial or hearing begins, dismiss her action without prejudice. Section 13–217 of the Code permits a plaintiff who voluntarily dismissed her claim to refile the claim within the greater of one year or the remaining period of limitations. 735 ILCS 5/13–217 (West 1994); see *Hudson v. City of C¶ 19hicago*, 228 Ill. 2d 462, 469 n.1 (2008) (the version of section 13–217 in effect is the version that preceded the amendments of Public Act 89–7, which the Illinois Supreme Court found unconstitutional in its entirety). The circuit court accepted State Farm's argument that no actual controversy existed after Cheryl failed to refile her suit within the limitations savings period of section 13-217 of the Code. *Cf. Babich v. River Oaks Toyota*, 377 Ill. App. 3d 425, 432 (2007) (once the limitations period for a products liability action expired, plaintiff could not proceed with his negligent spoliation action because: (1) the negligent spoliation action is a derivative action with the same limitations period; and (2) once the products liability action expired, there was no pending products liability action in which the chair could be introduced as evidence).

¶ 20 AMICA argues: (1) its counsel's affidavit established the existence of an agreement between AMICA and State Farm that the *Niedzwiedz* suit did not need to be litigated; (2) State Farm is judicially estopped from changing its position that there were no justiciable issues remaining in the *Niedzwiedz* suit; (3) State Farm is equitably estopped from changing its position that there were no justiciable issues remaining in the *Niedzwiedz* suit; (4) State Farm was barred from seeking summary judgment by the doctrine of "unclean hands"; and (5) there was a genuine issue of material fact where State Farm disputed the existence of an agreement

with AMICA. We need only address the issue of equitable estoppel, as it is dispositive of this appeal.

¶ 21 In order to establish equitable estoppel, the plaintiff must show he or she was led to rely upon the conduct or statements of the defendant to his or her detriment and such reliance was in good faith. *Pothier v. Chicago Transit Authority*, 238 Ill. App. 3d 702, 705, (1992) (citing *Searcy v. Chicago Transit Authority*, 146 Ill. App. 3d 779, 783 (1986)). If there is evidence of conduct "which induces plaintiff to reasonably believe his claim will be settled without suit or lulls plaintiff into a false sense of security which causes him to delay the assertion of his rights," a question of fact exists as to whether the defense of estoppel is available to the plaintiff. *Id.* (quoting *Myers v. Centralia Cartage Co.*, 94 Ill. App. 3d 1139, 1143 (1981)). Similarly, equitable estoppel may extend to cases where the defendant induces the plaintiff to voluntarily dismiss his or her suit. See *Ciers v. O.L. Schmidt Barge Lines, Inc.*, 285 Ill. App. 3d 1046, 1049 (1996).

¶ 22 Generally, an insurer may be estopped with respect to issues or defenses regarding its insured's liability because insureds and insurers are in privity of contract. See, *e.g.*, *Preferred America Ins. v. Dulceak*, 302 Ill. App. 3d 990, 995 (1999) (citing *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 194 (1991)). When an insurer retains the attorney to defend the insured, the attorney represents both the insured and the insurer in furthering the interests of each. *Id.* (citing *Waste Management*, 144 Ill. 2d at 194.) Of course, when the insurer and insured have a conflict of interest, the insurer typically will not hire

counsel, but pay for independent representation of the insured; in such cases, estoppel may not apply. See *Illinois Farmers Insurance Co. v. Puccinelli*, 276 Ill. App. 3d 293, 296 (1995).

¶ 23 In this case, State Farm retained counsel to represent its insureds in the *Niedzwiedz* suit. State Farm points to no evidence of any conflict of interest. Accordingly, we conclude State Farm and its insureds were in privity of contract and defense counsel in the *Niedzwiedz* suit was representing the interests of State Farm as well as the insureds.

¶ 24 State Farm notes that in Illinois, an attorney employed to represent his client in litigation has no authority to compromise, to consent to a judgment against his client, or to give up or waive any right of his client without the express consent or authorization of that client. *Shapo v. Tires 'N Tracks, Inc.*, 336 Ill. App. 3d 387, 399 (2002). However, the letter from defense counsel in the *Niedzwiedz* suit did not purport to do any of those things. Rather, the letter from defense counsel merely stated there were no "justiciable issues remaining" in the *Niedzwiedz* suit and "the only real issue left in the case" was the issue of coverage afforded under the State Farm policies, as well as referred to a prior discussion between counsel regarding dismissing the *Niedzwiedz* suit and filing a declaratory judgment action with respect to the coverage issue. The uncontradicted affidavit of AMICA's counsel states defense counsel made similar representations to the circuit court in the *Niedzwiedz* suit to avoid producing its insureds for deposition. The affidavit also states counsel in the *Niedzwiedz* suit agreed the suit would be dismissed and the dispute over the availability of other insurance to cover AMICA's $55,000 payment above the $100,000 limit of Policy D30 would continue in a newly-filed declaratory judgment action.

Moreover, the record shows State Farm chose not to raise the voluntary dismissal as an issue in this action until the limitations savings period expired.

¶ 25 Given the record before us, we conclude that AMICA raised a genuine issue of material fact about whether State Farm should be equitably estopped from relying on the voluntary dismissal of the *Niedzwiedz* suit to obtain summary judgment in this declaratory judgment action. Accordingly, we conclude the circuit court erred in entering summary judgment in favor of State Farm.

¶ 26 CONCLUSION

¶ 27 In sum, AMICA raised a genuine issue of material fact on its claim of equitable estoppel. Thus, the circuit court erred in granting summary judgment to State Farm. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is reversed and remanded for further proceedings consistent with this order.

¶ 28 Reversed and remanded.