2012 IL App (1st) 112728-U

FIRST DIVISION
November 5, 2012

No. 1-11-2728

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

WEST BEND MUTUAL INSURANCE COMPANY, Plaintiff-Appellant and Counterdefendant, v. HOME and GARDEN SUPPLY COMPANY, INC., TARGET CORPORATION, d/b/a Target Stores, and BARBARA MEISEL, Defendants-Appellees and Counterplaintiffs and Third-Party Plaintiffs (John Waldschmidt, Individually and d/b/a Waldschmidt and Associates or Waldschmidt and Associates, Inc,. and Barbara Meisel, Third-party Defendants; Ohio Casualty Insurance Company, Individually and as Subrogee of Home and Garden Supply Company, Inc., and Target Corporation, d/b/a Target Stores, Counterplaintiffs).	)	Appeal from the Circuit Court of Cook County No. 09 CH 2063 Honorable Carolyn Quinn, Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

HELD: Summary judgment was proper in declaratory judgment action where (1) "completed operations" exclusion did not preclude coverage; (2) both insured's "excess clauses" cancelled each other out and the targeted tender rule applied; and, (3) insured had not waived right to reimbursement.

¶ 1 Plaintiff-Appellant and Counterdefendant, West Bend Mutual Insurance Co. (West Bend), appeals from the trial court's August 17, 2011, and August 30, 2011, orders which granted summary judgment to Counterplaintiff, Ohio Casualty Insurance Co. (Ohio Casualty), and entered judgment in favor of Ohio Casualty. On appeal, West Bend contends that: (1) the "completed operations" exclusion in West Bend's additional insured endorsement precluded coverage; (2) its insurance policy provided that it was excess over any other insurance, so the targeted tender rule in *John Burns Construction Co v. Indiana Insurance Co.*, 189 Ill. 2d 570 (2000) could not be utilized to require West Bend to provide a defense in the underlying lawsuit; and, (3) Ohio Casualty waived the right to seek reimbursement from West Bend to defend and settle the underlying lawsuit. For the following reasons, we affirm the judgment of the circuit court.

¶ 2 Background

¶ 3 West Bend filed this declaratory judgment action against defendants Home & Garden Supply Company, Inc. (Home & Garden), Target Corporation d/b/a Target Stores (Target), and Barbara Meisel (Meisel), as a result of an underlying lawsuit filed by Meisel. In the underlying lawsuit, Meisel filed suit against Home & Garden, Target and Waldschmidt & Associates, Inc. (Waldschmidt), alleging that she was injured when

she slipped and fell on snow and ice in Target's parking lot on February 17, 2007. Waldschmidt provided snow plowing services for Home & Garden and Target. Home & Garden and Target tendered their defense to West Bend, alleging they were additional insureds under West Bend's insurance policy with Waldschmidt. West Bend refused the tender and filed this declaratory judgment action. Ohio Casualty defended Home & Garden and Target and ultimately settled the underlying suit with Meisel on May 5, 2010. Ohio Casualty subsequently intervened in the declaratory judgment action seeking equitable subrogation and contribution against West Bend.

¶ 4 West Bend and Ohio Casualty filed motions for summary judgment. The trial court denied West Bend's motion but granted Ohio Casualty's motion and subsequently entered judgment in favor of Ohio Casualty and against West Bend in the amount of $42,494.74. West Bend appeals from the court's orders and contends that this court should grant summary judgment in its favor. For the following reasons, we affirm the judgment of the circuit court.

¶ 5 Analysis

¶ 6 "Completed Operations" Exclusion

¶ 7 On appeal, West Bend first contends that the "completed operations" exclusion in West Bend's insurance policy with Waldschmidt precluded coverage for Home & Garden and Target and the trial court erred in finding that West Bend had a duty to defend Home & Garden and Target in the Meisel lawsuit.

¶ 8 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 interpretation of an insurance policy and the coverage provided are questions of law that are appropriate for resolution through summary judgment. *American Service Insurance Co. v. Jones*, 401 Ill. App. 3d 514, 520 (2010). We review the trial court's summary judgment ruling under a *de novo* standard of review. *American Service Insurance Co.,* 401 Ill. App. 3d at 520.

¶ 9 The primary function of the court when construing an insurance policy is to ascertain and enforce the intentions of the parties as expressed in the agreement. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). In determining whether an insurer has a duty to defend, a reviewing court must compare the allegations of the underlying complaint to the relevant terms of the insurance policy at issue. *Clarendon America Insurance Co. v. B.G.K. Security Services, Inc.*, 387 Ill. App. 3d 697, 702-03 (2008). If the underlying complaint alleges facts within or potentially within the policy's coverage, the insurer's duty to defend arises even if the allegations are groundless, false or fraudulent. *Clarendon America Insurance Co.,* 387 Ill. App. 3d at 703.

¶ 10 At the time of Meisel's accident, Waldschmidt had a contract with Home & Garden to provide snow removal services for Target. The contract provided that snow removal services would commence at "freezing rain and ice conditions and/or snow level of 1.5 inches." The contract also provided that Waldschmidt was required to

maintain an "ice/snow free (i.e. bare pavement) environment." The contract contained an indemnification provision in which Waldschmidt agreed to assume responsibility for all injuries or damages arising out of its performance or failure to perform and agreed to defend, indemnify and hold harmless Home & Garden against any and all claims arising out of Waldschmidt's performance. Further, the contract required Waldschmidt to include Home & Garden and Target as additional insureds on a commercial general liability policy it was required to maintain.

¶ 11 West Bend issued a commercial general liability policy to Waldschmidt that was in effect at the time of Meisel's accident. The policy contained an additional insured endorsement that included as an additional insured "any person or organization whom you are required to add as an additional insured on this policy under a written contract or written agreement." West Bend does not contest that Home & Garden and Target were additional insureds under the policy. The additional insured endorsement contained an exception, which the parties refer to as the "completed operations" exception, which provided that it did not apply to bodily injury occurring after:

> (1) "all work on the project (other than service maintenance or repairs) to be performed by or on behalf of the additional insured at the site of the covered operations has been completed" or,
>
> (2) "that portion of 'your work' out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for

a principal as part of the same project."

¶ 12 West Bend now argues that the "completed operations" exclusion in its policy with Waldschmidt precluded coverage for Home & Garden and Target because when Waldschmidt finished plowing the parking lot, its operations for the day were completed and the parking lot had been put to its intended use.

¶ 13 Meisel alleged in the underlying complaint that she slipped and fell "in an area where new snow had covered an icy surface in the parking lot." In her deposition, she stated that she fell at about 10 a.m. that morning.

¶ 14 John Waldschmidt stated in his deposition that on the day of Meisel's accident, his company began plowing Target's parking lot at about 4 or 4:30 a.m. At that time, he estimated that there was a couple of inches of snow on the ground. He stated that he plowed the parking lot, cleared the sidewalks, salted the parking lot, and salted the sidewalks. Waldschmidt finished about 7 or 7:30 a.m., but noticed a dusting of snow beginning to accumulate when he left. He did not return to the parking lot that day.

¶ 15 Here, as provided in Waldschmidt's contract with Home & Garden, Waldschmidt was required to maintain an "ice/snow free (i.e. bare pavement) environment." The contract specifically included the term "bare pavement" and the parties mutually assented to the use of that term. Waldschmidt's snow removal duties were not complete until the condition of the parking lot was "bare pavement." When Waldschmidt left the parking lot, a dusting of snow had begun to accumulate. Meisel fell at about 10 a.m. where new snow had covered an icy surface. Since the parking lot

had not been cleared to "bare pavement," Waldschmidt had not completed its operations when he left. Therefore, we conclude that the "completed operations" exclusion in West Bend's policy with Waldschmidt does not preclude coverage.

¶ 16 West Bend's contention that Waldschmidt was not required to return to the parking lot until another 1.5 inches of snow had accumulated, misconstrues the contract. Since Waldschmidt failed to return the parking lot to "bare pavement" conditions, his snow removal duties were not yet complete when he left.

¶ 17 Further, West Bend's contention that Waldschmidt's operations were complete because the parking lot had been put to its intended use, is misplaced. West Bend relies on *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 335, 339 (2005). In *Liberty Mutual*, the parties had entered into two service agreements to modernize and upgrade the elevators at a power generating facility. After the modernizing and upgrading were finished and the elevators had been put to their intended use, several individuals were injured when one of the elevators malfunctioned. This court held that since the work on the elevators had been completed and the elevators had been put to their intended use, the "completed operations" exclusion in the parties' insurance policy precluded coverage. *Liberty Mutual*, 363 Ill. App. 3d 335 at 340.

¶ 18 We find *Liberty Mutual* distinguishable. Here, the parking lot had not undergone repairs as had the elevators in *Liberty Mutual*. At any given time, the parking lot was being put to its intended use regardless whether snow plowing or salting operations

were occurring. Therefore, we are not persuaded by West Bend's reliance on *Liberty Mutual*. In conclusion, the "completed operations" exclusion in West Bend's policy with Waldschmidt did not preclude coverage to Target and Home & Garden for the underlying lawsuit.

¶ 19 Primary or Excess Coverage and Target Tender

¶ 20 West Bend next contends that since its insurance policy with Waldschmidt provided that it was excess over any other insurance, the targeted tender rule in *John Burns* could not be utilized to require West Bend to provide a defense in the underlying lawsuit.

¶ 21 Both the West Bend and Ohio policies contained "other insurance" provisions, which provided that they were excess over any other insurance. West Bend's "other insurance" provision provided the insurance was excess over "[a]ny other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless a written contract specifically requires that this insurance be either primary or primary and noncontributing." The Ohio Casualty policy's "other insurance" provision provided the insurance was excess over "[a]ny other insurance, whether primary, excess, contingent or on any other basis."

¶ 22 We initially note the differences between primary insurance coverage policies and excess insurance coverage policies. Primary policies and excess policies are clearly distinct and serve different purposes. A "true" excess policy exists as part of an overall insurance package and provides a secondary level of coverage to protect the

insured where a judgment or settlement exceeds the primary policy's limits of liability. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 114 (2007). An excess policy will not be triggered until the limits of the primary insurance coverage are exhausted. The West Bend and Ohio policies are not "true" excess policies. They are primary policies with "other insurance" provisions that contain "excess" clauses. Both "excess" clauses intend to apply over and above or after any other available insurance.

¶ 23 We must attempt to reconcile "other insurance" clauses whenever possible. *Ohio Casualty Insurance Co. v. Oak Builders, Inc.*, 373 Ill. App. 3d 997, 1002 (2007). However, when faced with two primary insurance policies that contain similar "other insurance" provisions, specifically, "excess" clauses, the policies are mutually repugnant and incompatible. *Oak Builders, Inc.*, 373 Ill. App. 3d at 1002. In *Oak Builders*, this court considered two insurance policies that both contained "other insurance" provisions with "excess" clauses. One of the "excess" clauses provided that the insurance was excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment or endorsement." The other "excess" clause provided that "[a]ny coverage provided hereunder shall be excess over any other valid and collectible insurance available to [insured] whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be primary or you request that it apply on a primary basis." This court held

that since both of the policies provided primary coverage and contained "other insurance" provisions with "excess" clauses, the two "excess" clauses cancelled each other out and both insurers would share the costs in the underlying lawsuit. *Oak Builders*, 373 Ill. App. 3d at 1002-03.

¶ 24 Here, similar to *Oak Builders*, both the West Bend and Ohio Casualty policies contain "other insurance" provisions with "excess" clauses. The "excess" clauses, although not identical, are similar in that each clause provides that when any other insurance is available, the policy applies as excess. Therefore, as in *Oak Builders*, we are faced with two "excess" clauses that are mutually repugnant and incompatible and must cancel each other out.

¶ 25 Since the excess clauses cancel each other out, both the West Bend and Ohio Casualty policies would share the costs of defending and indemnifying the underlying lawsuit if not for the targeted tender rule. The targeted tender rule allows an insured covered by multiple concurrent insurance policies the right to select which insurer will defend and indemnify it regarding a specific claim. *John Burns*, 189 Ill. 2d at 574. Here, Home & Garden and Target targeted tender to West Bend. West Bend was solely obligated to defend and indemnify Home & Garden and Target in the underlying lawsuit.

¶ 26 We now address West Bend's contention that its insurance policy was to apply as excess over and above Ohio Casualty's policy because its policy provided that the insurance was excess unless a written contract specifically required that the insurance

be primary and, Waldschmidt's contract with Home & Garden did not specifically require the insurance to be primary.

¶ 27 The trial court determined that the parties intended West Bend's policy to be primary since Waldschmidt's contract with Home & Garden required Waldschmidt to provide insurance coverage for its indemnification obligations, even though the contract did not specifically use the term "primary." The court relied on *Bieda v. Carson International*, 278 Ill. App. 3d 510, 511-12 (1996), which held that a written agreement upon which insurance coverage was based need not specify whether an insurance policy's coverage would be primary if the intent to require primary insurance could be determined from the policy.

¶ 28 West Bend argues that *Bieda* is inapplicable to this case. It further maintains that this court should follow *River Village I, LLC v. Central Insurance Companies*, 396 Ill. App. 3d 480 (2009), which held that if the written agreement upon which insurance coverage is based is silent as to whether the insurance policy's coverage is primary or excess and the insurance policy has a provision that the coverage is excess unless a written agreement specifically required it to be primary, then the coverage would be deemed excess.

¶ 29 Although we acknowledge that the facts in the present case are more similar to *River Village I* rather than *Bieda*, we need not reach a determination as to which case to follow since we have concluded that the "excess" clauses in both policies cancel each other out. Therefore, Home & Garden and Target could target tender West

Bend's insurance coverage and West Bend was required to defend and indemnify Home & Garden and Target in the underlying lawsuit.

¶ 30 Waiver

¶ 31 Lastly, West Bend contends that Ohio Casualty waived its right to seek reimbursement from West Bend under the theory of equitable subrogation. West Bend argues that Ohio Casualty waived its right because it filed its counterclaim in this declaratory judgment action after it settled the underlying lawsuit and did not reserve its right to reimbursement prior to settling the underlying lawsuit.

¶ 32 Waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right. *Home Insurance*, 213 Ill. 2d at 326. An implied waiver arises when the conduct of the person against whom waiver is asserted is inconsistent with any intention other than to waive it. *Home Insurance*, 213 Ill. 2d at 326. The failure of a paying insurer to reserve its rights against a nonpaying insurer may constitute a waiver of the right to equitable remedies. *Home Insurance*, 213 Ill. 2d at 326. An insurer who intends to reserve its rights against a second insurer must make its position clear in its correspondence with the second insurer, and it is also considered good practice to include such reservation language in any settlement agreement or order, then provide a copy of it to the nonsettling insurer. *Home Insurance*, 213 Ill. 2d at 326.

¶ 33 Here, we find no waiver. Home & Garden and Target's third-party complaint alleged that Waldschmidt (i.e. West Bend) must defend and indemnify them against the

underlying complaint. Ohio Casualty's amended counterclaim alleged that West Bend must reimburse Ohio Casualty for 100% of the defense fees and costs and the settlement judgment paid to plaintiff in the underlying lawsuit. Further, the settlement agreement in the underlying lawsuit provided that:

> "[t]his release is not intended to and shall not be construed as abridging, waiving, or limiting the right of the Released Parties to assert claims for reimbursement * * * regardless of whether such reimbursement claims be based on equitable contribution, equitable subrogation, or otherwise, and the parties specifically agree that the Released Parties preserve any and all rights."

Home & Garden, Target and Ohio Casualty consistently took the position that West Bend was obligated to defend and indemnify them in the underlying lawsuit. There was neither an intentional relinquishment of a known right, nor any conduct inconsistent with their position. Therefore, we find no waiver.

¶ 34 Accordingly, we affirm the judgment of the circuit court.

¶ 35 Affirmed.