2013 IL App (1st) 122401-U

Third Division
August 7, 2013

No. 1-12-2401 & 1-12-2963 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. ARTHUR S. GOLD, GOLD & COULSON, WILLIAM MESSNER and INSTITUTE OF VOCAL SCIENCE, an Illinois not-for-profit corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. 08 CH 16782 Honorable Kathleen Pantle, Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: In an application for a claims-made malpractice insurance policy, an attorney need not inform the prospective insurer about every client who has expressed dissatisfaction with the attorney's services. A letter in which a client mentions the possibility of suing an attorney for malpractice, and in which the client requests further professional services from the attorney on the client's behalf, does not notify the attorney of a claim for malpractice. When the trial court finds a good faith basis for an insurer's decision to contest coverage, the court may, without abusing its

discretion, deny a claim for sanctions under section 155 of the Insurance Code.

¶ 2 This case involves the extent of a lawyer's obligation to disclose disgruntled clients to a company providing malpractice insurance. In 2004, William Messner sent his attorney, Arthur Gold, a letter expressing great displeasure with Gold's handling of Messner's lawsuit. However, in that letter Messner asked Gold to perform further work on his behalf. When Gold obtained new liability insurance from Illinois State Bar Association Mutual Insurance Company (ISBA Mutual), he did not inform ISBA Mutual about the letter.

¶ 3 Three years after Messner sent the letter, Messner sued Gold for legal malpractice. Gold tendered defense of the suit to ISBA Mutual, who filed a declaratory judgment action contending that it had no duty to defend or indemnify Gold for the claim because Gold knew of the claim at the start of the policy period. Gold filed a counterclaim, asking the court to impose sanctions on ISBA Mutual for its vexatious claims practices. The trial court entered a judgment in favor of Gold on ISBA Mutual's complaint, and held that ISBA Mutual had a duty to defend Gold against Messner's claim. However, the court entered a judgment in favor of ISBA Mutual on the counterclaim. Both parties appeal.

¶ 4 We hold that, viewed in the context of the ongoing attorney-client relationship between Messner and Gold, the letter did not establish that Gold knew, two years after Messner sent the letter, that Messner had a claim against Gold. Accordingly, we affirm the trial court's judgment entered in favor of Gold on ISBA Mutual's complaint. We also affirm the judgment in favor of ISBA Mutual on the counterclaim, because ISBA Mutual had a good faith basis for disputing coverage.

¶ 5 BACKGROUND

¶ 6 In 2002, Messner hired Gold to represent him in a lawsuit he filed against Cynthia and Sarabeth Krenzelak. The trial court entered a judgment against Messner in November 2003. In March 2004, Messner wrote to Gold:

> "I need to make a decision. ***
>
> I seriously question the probability of success of this [proposed] appeal [from the judgment against Messner in the case against the Krenzelaks]. ***
>
> I must tell you, I am *extremely* angered by the way you have handled this case. ***
>
> *** I know how the case should have been presented, both in stating the cause of action and the pleadings that followed.
>
> I know when a lawyer is acting without proper care and is cutting corners. I know what I have the right to expect for the money I pay ***.
>
> Before I state my proposal for pre-appeal settlement, I must give you my assessment of your service to me on this important case.
>
> First, I presented to you all the information about this case in a format that was exceptionally well organized and documented. ***
>
> *** Instead of properly distilling all my information into a

compact format, which stated my case in its entirety, written in precise legal language that give[s] as little as possible to the defense with which to respond and distort, you merely filed *everything* written by *me*, and th[e]n attached a 'seven page cover letter'. ***

*** [Y]ou *** failed to properly state the cause of action that connected all the dots, in a way that left the defense little room for maneuver. All you wrote was *seven* pages(!) to define a case that involved 8 years and hundreds of thousands of dollars. ***

*** All you succeeded in doing was giv[ing] the defense the fuel it needed to build a massive smoke screen with which to hide behind. Frankly, your work is the laziest lawyering I have witnessed. ***

* * *

*** [W]hen I notified you that your response to the *** Krenzelaks response was *filled with factual errors* – that would all come back to hurt my case. I demanded that your document <u>not</u> be filed because of significant factual errors. Yet you did so anyway ***.

* * *

So far, you've charged me approximately $300 per <u>*page*</u> of written representation. You have produced nothing in return. ***

So where do I go from here?

Option 1) I let you file the appeal with the same quality of representation as the original case, and be barred *forever* from recovering my damages, including the $7,500 I paid to you.

Option 2) I go to war against you, for full reimbursement of all fees, which resulted in nothing but my being *barred* from bringing my case to trial again.

Option 3) I settle the case for the money it would cost the Krenzelak[s] to defend on appeal (plus other consideration)[.]

For now I am willing to explore Option 3) for the simple reason, I can't function in a state of continual anger. Anger against the defendant, I can deal with. Anger against my own attorney, is a whole other matter.

***

So here is my proposal – to *everyone*.

The Krenzelak[s] pay me what it would cost them to go through the entire appeal, *plus* Sara assigns her ownership percentages of the copyrights for all the compositions *** we co-wrote ***.

***

*** You will need to be satisfied with what I have paid you

to date, for the quality of your legal work." (Emphasis in original.)

¶ 7 Gold represented Messner in further negotiations with the Krenzelaks. When the Krenzelaks offered $5,000 to settle the lawsuit, Gold wrote to Messner, "I suggest we file our brief first before countering. Do you agree?" Messner wrote back, "I agree. Thank you for letting me know." Gold filed the brief on appeal.

¶ 8 Later in 2004, Gold purchased professional liability insurance from ISBA Mutual.

¶ 9 On June 30, 2005, the appellate court affirmed the dismissal of Messner's complaint against the Krenzelaks. Gold renewed his ISBA Mutual insurance policy in 2005 and 2006. In June 2007, more than three years after Messner sent the letter criticizing Gold's efforts in the case against the Krenzelaks, Messner sued Gold for legal malpractice. Gold tendered defense of the lawsuit to ISBA Mutual. ISBA Mutual accepted the tender with a reservation of the right to dispute coverage.

¶ 10 In 2008, ISBA Mutual filed the complaint at issue before this court. ISBA Mutual sought a declaration that it had no duty to defend or indemnify Gold because Gold failed to notify it of the potential liability before he purchased the policy, as the policy required. ISBA Mutual attached a copy of the insurance contract to the complaint. The contract provides:

> "WE agree to pay on YOUR behalf all DAMAGES and CLAIM EXPENSES *** YOU become legally obligated to pay as a result of a CLAIM first made against YOU and reported to US in writing during the POLICY TERM ***, provided that *** As of the effective date of this Policy, YOU had no knowledge of the CLAIM;

> and *** Notice of the WRONGFUL ACT was not given nor required to be given to any prior insurer.
>
> * * *
>
> *** CLAIM means:
>
> 1. a demand received by YOU for money or services, or the service of a suit or the initiation of an arbitration proceeding against YOU that seeks DAMAGES arising out of YOUR WRONGFUL ACT;
>
> 2. an incident or circumstance of which YOU have knowledge that may result in a demand against YOU that seeks DAMAGES arising out of YOUR WRONGFUL ACT."

¶ 11 ISBA Mutual moved for summary judgment on the complaint, arguing that Messner first made the claim in his letter of March 2004, and Gold had knowledge of the claim as of the effective date of the policy. Gold filed a counterclaim for damages due to ISBA Mutual's vexatious and unreasonable claims practices. Gold also moved for summary judgment on ISBA Mutual's complaint.

¶ 12 The trial court held:

> "When analyzing the letter as a whole, and taking into account the subsequent actions and communications between Gold and Messner, it is clear that when Gold applied for the policy, he had no knowledge of a potential claim as the term is defined in the policy.

> First, Messner explicitly stated in his letter that he decided, at that time, not to pursue a suit against Gold for malpractice. *** [H]is letter was intended to express dissatisfaction with previous services and a suggestion for moving forward with the ultimate disposal of the case. Additionally, it is clear from subsequent communications that Gold continued to represent Messner as his client. *** No reasonable attorney would presume that a letter expressing frustration with *** services rendered to date, followed by the request for continu[ed] services on the same matter, would constitute a malpractice claim under the terms of his or her insurance. The letter does not exhibit a clear and unmistaken future intention to press a legal claim against Gold for damages, and as such, does not constitute a claim within the meaning of the contract."

¶ 13 The court granted Gold's motion for summary judgment on the complaint, but the court entered a judgment in favor of ISBA Mutual on the counterclaim for damages, finding no vexatious and unreasonable claims practices. ISBA Mutual appeals from the order granting summary judgment on its complaint, and Gold cross-appeals from the judgment entered on the counterclaim.

¶ 14 ANALYSIS

¶ 15 ISBA Mutual's Appeal

¶ 16 We review *de novo* the order granting Gold's motion for summary judgment.

Outboard Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 102 (1992). Our supreme court established the principles that guide our interpretation of the insurance policy:

> "In construing an insurance policy, the court must ascertain the intent of the parties to the contract. [Citations.] To ascertain the meaning of the policy's words and the intent of the parties, the court must construe the policy as a whole [citations], with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract [citation]. If the words in the policy are unambiguous, a court must afford them their *plain, ordinary, and popular meaning.* [Citations.] However, if the words in the policy are susceptible to more than one reasonable interpretation, they are ambiguous [citation] and will be construed in favor of the insured and against the insurer who drafted the policy." (Emphasis in original.) *Outboard Marine*, 154 Ill. 2d at 108-09.

¶ 17 By its own terms, ISBA Mutual's policy covers the claim Messner made by filing the complaint in 2007, provided that Messner first made the claim during the 2006-07 policy period, and provided that "[a]s of the effective date of this Policy, [Gold] had no knowledge of the CLAIM."

¶ 18 The policy at issue took effect on September 1, 2006. As of that date, Gold knew that Messner sent him a letter, in March 2004, accusing Gold of lazy lawyering, acting without due care, and failing to distill the information Messner provided into a viable complaint. In

that letter, Messner said that Gold's handling of Messner's case angered Messner, and listed as one of Messner's options, "go[ing] to war against [Gold], for full reimbursement of all fees." But Messner, in that same letter, asked Gold to continue representing him in negotiations with the Krenzelaks, and later Messner agreed that Gold should prepare the brief for the appeal from the adverse decision the trial court rendered in Messner's case against the Krenzelaks. In Messner's case against the Krenzelaks, the appellate court affirmed the trial court's judgment in June 2005, and Messner took no further action and made no further complaints against Gold for more than a year between the date of the decision and the effective date of the insurance policy.

¶ 19 The parties compare this case to *Stiefel v. Illinois Union Insurance Co.*, 116 Ill. App. 3d 352 (1983) and *Gibraltar Casualty Co. v. A. Epstein & Sons, International, Inc.*, 206 Ill. App. 3d 272 (1990). In *Stiefel*, the plaintiff, an attorney, received a letter from an attorney for the plaintiff's former clients advising the plaintiff that his former clients retained new counsel to "prosecute their claim for damages arising out of [the plaintiff's] advice, action and inaction surrounding" his work as their attorney. *Stiefel*, 116 Ill. App. 3d at 354. The letter also included advice that the plaintiff should "refer this matter to [the plaintiff's] errors and omissions carrier." *Stiefel*, 116 Ill. App. 3d at 354. After receiving the letter, the plaintiff purchased new malpractice insurance from a predecessor of Illinois Union Insurance, and in his application he stated that he was not aware of any circumstance that might result in a former client making a claim against him. The former clients sued the plaintiff for legal malpractice and Illinois Union denied coverage. The plaintiff then sued

Illinois Union for breach of the insurance contract. The trial court dismissed the complaint and the appellate court affirmed, holding that before the plaintiff obtained the policy from Illinois Union, he received a letter that "clearly and unmistakenly exhibited the intention of the claimants to press a legal claim against plaintiff for damages based on alleged professional malpractice. That letter justified the able and experienced trial judge in determining that plaintiff should have 'reasonably foreseen' circumstances under which a suit for malpractice might very well be filed against him." *Stiefel*, 116 Ill. App. 3d at 356.

¶ 20 In *Gibraltar*, the owner of a warehouse hired Epstein, in 1982, to repair the roof of the warehouse. During the repairs the roof collapsed, and the owner sent Epstein a letter directing Epstein to stop working on the roof. The owner also wrote, "Preliminary investigation has revealed that our client has been substantially damaged due to the negligence, nonfeasance and malfeasance of the Epstein Group of Companies and certain individuals." *Gibraltar*, 206 Ill. App. 3d at 274. Epstein purchased new liability insurance from Gibraltar in 1983. He told Gibraltar that he had no "knowledge of prior acts, errors or omissions which might reasonably be expected to give rise to a claim under this insurance." *Gibraltar*, 206 Ill. App. 3d at 275.

¶ 21 The warehouse owner sued Epstein late in 1983, and Gibraltar denied coverage. Gibraltar then sued Epstein, seeking a judgment declaring that Gibraltar had no duty to defend or indemnify Epstein in the underlying lawsuit because the letter sent in 1982 gave Epstein notice of a claim. The trial court granted summary judgment in favor of Epstein. The appellate court found that the letter informed Epstein about only the result of a

preliminary investigation, not a claim. *Gibraltar*, 206 Ill. App. 3d at 281.

¶ 22 While the case before us differs from both *Stiefel* and *Gibraltar*, we find it more similar to *Gibraltar*. The letter Messner sent in 2004 informed Gold that Messner had considered "go[ing] to war" against Gold, but the letter did not state a clear and unmistakable intent to bring a claim for professional malpractice. In one respect, Gold had better reason than Epstein for not disclosing the letter to his new insurer. The warehouse owner directed Epstein to stop work on the damaged roof, indicating that he did not trust Epstein to perform the work competently. Messner, on the other hand, continued to seek and use Gold's professional services, both in the letter he sent in 2004 and thereafter, in negotiations and in an appeal. Messner made no further mention of dissatisfaction with Gold for more than two years before Gold applied for the insurance policy at issue here. The entire course of the attorney-client relationship showed that the threat of a claim had apparently dissipated before Gold applied for the policy that covered claims brought in 2006 and 2007. We find that the policy did not require Gold to inform ISBA Mutual of every client who had expressed some dissatisfaction with Gold's services. As of the effective date of the policy in 2006, Gold had no knowledge of a claim by Messner, and therefore the policy covered the claim Messner first made in 2007. See *Gibraltar*, 206 Ill. App. 3d at 281-82. The trial court did not err when it granted summary judgment in favor of Gold on ISBA Mutual's complaint.

¶ 23 Gold's Cross-Appeal

¶ 24 The trial court dismissed Gold's counterclaim against ISBA Mutual for attorney fees and a penalty. Section 155 of the Insurance Code authorizes the award of fees and a penalty

of up to $60,000 if the insurer's "action or delay is vexatious and unreasonable." 215 ILCS 5/155 (West 2008). We review the decision to deny relief under section 155 for abuse of discretion. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010). "A trial court must consider the totality of the circumstances including the insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of her or his property." *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). The trial court deciding whether to impose sanctions should bear in mind that "[a]n insurer does not violate the statute merely by insisting on a trial it loses." *Buais v. Safeway Insurance Co.*, 275 Ill. App. 3d 587, 591 (1995).

¶ 25 Here, the trial court found that ISBA Mutual had a good faith basis for contesting the claim under the policy. Gold knew that in 2004, Messner considered the option of "go[ing] to war" against Gold. We cannot say that the trial court abused its discretion when it found that, in light of Messner's letter, ISBA Mutual did not act vexatiously or unreasonably when it decided to contest Gold's claim for coverage. See *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 469 (2003).

¶ 26 CONCLUSION

¶ 27 Messner's March 2004 letter did not establish that in September 2006, Gold knew of a claim against him, within the meaning of ISBA Mutual's policy. Therefore, the trial court did not err when it granted Gold's motion for summary judgment on ISBA Mutual's declaratory judgment action. We find no abuse of discretion in the trial court's decision to deny Gold's claim for sanctions under section 155 of the Insurance Code. Accordingly, we

affirm the judgment of the trial court.

¶ 28 Affirmed.