2014 IL App (1st) 130751-U

FOURTH DIVISION
March 20, 2014

No. 1-13-0751

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY, Plaintiff-Appellant, v. SCE SERVICES, INC., a former Delaware Corporation, and BUILDER SERVICES GROUP, INC., a foreign corporation, Defendants-Appellees, and BOGUSLAW NAUMOWICZ Defendant.	)	Appeal from the Circuit Court of Cook County. No. 10 CH 14063 The Honorable Rita M. Novak Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in plaintiff's insurance coverage action seeking a declaration that plaintiff had no duty to defend defendant because it was not the named additional insured on the written commercial general liability policy. We find that both plaintiff and the third-party subcontractor mistakenly named the incorrect legal entity rather than defendant as the additional insured on the policy. Affirmed.

¶ 2 This interlocutory appeal arises from the trial court's order granting summary judgment in an insurance coverage lawsuit in favor of defendant Builder Services Group, Inc. (Builder), formerly known as SCE Services, Inc. (SCE),[1] and against plaintiff State Auto Property and Casualty Insurance Company (State Auto). State Auto had sought a declaration that it had no duty to defend Builder in an underlying personal injury lawsuit because SCE, not Builder, was the named additional insured on the written commercial general liability policy (CGL) State Auto had issued to Barrett Enterprises (Barrett). In contrast, Builder maintained, among other things, that the parties' objective was merely to insure Barrett's sole contractor, regardless of that entity's name at any given time. On appeal, State Auto challenges the trial court's judgment, asserting that the precise language of the policy precluded coverage. We affirm.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. Barrett was a subcontractor that provided installation of windows, siding, and doors. Masco Contractor Services Central, Inc. (Masco) owned SCE as a subsidiary. For many years, SCE (under various denominations) worked with Barrett as its exclusive contractor to handle the installation of siding. In 2002, SCE Unlimited, Inc. changed its name to "SCE Services, Inc." Effective January 1, 2006, SCE merged into Masco and the surviving legal entity was renamed Builder Services Group, Inc., which asserts it was still doing business as SCE. This rather confusing series of name changes ultimately led to the factual circumstances underpinning the matter *sub judice*.

¶ 5 Barrett was contractually obligated to provide SCE with insurance coverage as an additional insured. Accordingly, Barrett purchased a CGL policy with a "blanket" additional insured. In 2002, to cut costs, Barrett, through its agent Patricia Hermann at Lamb Little

[1] Boguslaw Naumowicz is a defendant in the underlying lawsuit, but is not a party to this appeal.

Company, requested that State Auto change the policy to denominate a specific additional insured as opposed to a blanket insured because Barrett did all of its work for just one contractor, SCE. State Auto made this change and Barrett paid the premiums. Each year Barrett renewed this policy and continued to name SCE Unlimited, Inc. as the additional insured.

¶ 6 The underlying lawsuit stemmed from a work-related injury. Boguslaw Naumowicz, a carpenter employed by Barrett, filed a complaint against several entities not at issue in this appeal, alleging an injury at a construction site in 2008 (No. 2008 L 001554). In April 2009, Naumowicz filed a second-amended complaint adding SCE Services, Inc. as a defendant, even though SCE was by then known as Builder. State Auto then accepted the defense of SCE and assigned it legal counsel. At this time, SCE was insured under Barrett's policy as an "additional insured." In March, 2010, Naumowicz filed a third-amended complaint in which he added Builder as a defendant. State Auto continued to represent SCE, who was later dismissed from the case when the court was informed of the name change. State Auto refused, however, to defend Builder, even though it was doing business as SCE, Unlimited, Inc. Thereafter, State Auto filed a complaint against Builder, seeking a declaration that it had no duty to defend Builder because it was not specifically named as an insured under the CGL policy. Builder[2] filed an answer and an affirmative defense asserting estoppel. In addition, Builder filed a counter-claim seeking a declaration that State Auto had a duty to defend it, asserting mutual mistake, reformation, and, in the alternative, unjust enrichment.

¶ 7 Several depositions were taken during discovery. Hermann testified that she originally placed Barrett's insurance with State Auto on March 1, 2002. The original policy contained a blanket additional-insured endorsement. During the first policy period, Hermann determined

[2] Although Builder and SCE are listed as two separate defendants, SCE is Builders' predecessor, and thus, we treat both entities as one defendant.

that it was more cost-effective to name SCE as a scheduled additional insured under the CGL policy. Each year Hermann would prepare a detailed proposal and coordinate with Barrett's office manager Patricia Barrett (Patricia B) concerning any changes that needed to be implemented. Hermann would then make all requests in writing to the State Auto underwriter. In addition, all communications between Barrett and State Auto went through Hermann, and her assistant faxed or mailed SCE the certificate at the commencement of each policy year.

¶ 8 Hermann further testified that over the years the name and address for SCE changed numerous times. It was always Barrett that requested the change on the GCL policy for the additional insured endorsement, except for one time when SCE requested the change. On March 7, 2006, three months after SCE merged into Builder, Hermann received a phone call from SCE that the certificate incorrectly stated its name as "SC Unlimited," as opposed to "SCE Unlimited, Inc." Hermann corrected the name and State Auto backdated the change. Hermann had no knowledge that SCE had changed its name to Builder and neither Barrett nor SCE requested that Builder be named as an additional insured on the policy. In Hermann's opinion, it was important to have the additional insured named properly on the policy to guarantee coverage.

¶ 9 Patricia B testified that Barrett started in 1986 and was created to do siding work for Exteriors Unlimited, which eventually became SCE. Many contracts were entered into between the two companies over the years. In June 2002, Barrett entered into a subcontract agreement with SCE, which was in effect until 2007, well after SCE merged into Builder. At some point prior to 2007, Patricia B began receiving electronic payments from Builder, but had no knowledge that SCE had merged with Masco and legally changed its name to Builder.

¶ 10 Patricia Crisp (Patricia C), business insurance underwriter at State Auto, testified that she worked on the 2006-2007 policy renewal for Barrett. She directly communicated solely with

Hermann. Patricia C never received a request from Hermann to name Builder as the additional insured, but felt it was important to have the additional insured properly named on the policy.

¶ 11 After the completion of discovery, the parties filed cross-motions for summary judgment. The court granted Builder's motion and denied State Auto's motion. The trial court held that the CGL policy covered Builder based on the law of corporations. Thus, State Auto owed a duty to defend Builder under the CGL policy. State Auto timely filed this notice of appeal.

¶ 12 ANALYSIS

¶ 13 State Auto contends that the trial court erroneously granted defendant's motion for summary judgment because the policy is clear and unambiguous, and the only reasonable interpretation is that State Auto and Barrett intended SCE, not Builder, to be the sole additional insured under the 2006-2007 CGL policy. In response, Builder does not dispute that the policy names SCE rather than it as the additional insured. Builder nonetheless contends that it was still doing business as SCE, so it should effectively be a named additional insured on the policy. Alternatively, it argues that the omission of Builder was due to a mutual mistake of fact. We agree with the latter contention.

¶ 14 Summary judgment is proper where the pleadings, admissions, depositions and affidavits demonstrate there is no genuine issue as to any material fact so that the movant is entitled to judgment as a matter of law. *Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008); 735 ILCS 5/2-1005 (West 2010). In determining whether a genuine issue of material fact exists, the court must consider such items strictly against the movant and liberally in favor of its opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review the trial court's order granting summary judgment *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009). Thus, we may affirm on any basis and without any deference to the trial court's ruling. *Perbix v. Verizon North, Inc.*, 396 Ill. App. 3d 652, 257 (2009).

¶ 15 An insurance policy is a contract for which the general rules apply and the intent of the parties determines its scope. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). When construing the language of an insurance policy, the court's primary objective is effectuating the parties' intentions. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 293 (2001). In doing so, the court must construe the policy as a whole and consider the risk undertaken, the subject matter insured, and the policy's purpose. *Stoneridge Development Co., Inc. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 749 (2008). Generally, the parol evidence rule applies; however, it is well settled that the parol evidence rule does not bar the admission of extrinsic evidence on the question of mutual mistake, even when the instrument to be reformed is clear and unambiguous on its face. *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 29.

¶ 16 A "mutual" mistake is one common to both contracting parties with each laboring under the same misconception. *Id.* In other words, the parties are in actual agreement but the agreement in its written form does not express the parties' true intent. *Id.* Thus, the mistake must have existed at the time of the execution of the instrument, must have been mutual and common to all parties, and must have been such that the parties intended to say one thing but by the written instrument expressed another. *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill. App. 3d 754, 760 (1983). In a reformation action, parol evidence is admitted to prove by clear and convincing evidence that the written agreement fails to express the original intent and actual agreement entered into between the parties. *First Health Group Corp. v. Ruddick*, 393 Ill. App. 3d 40, 53 (2009).

¶ 17 Here, even assuming the language of the contract did not provide Builder with coverage, State Auto and Barrett clearly intended to insure Barrett's sole contractor as the additional insured on the policy. Both parties understood that Barrett was requesting a named additional

insured rather than a blanket additional insured because it was more economical given that Barrett had only one contractor. At the time of the policy's renewal, Builder was Barrett's sole contractor. *Cf. Alliance Syndicate Inc., v. Parsec, Inc.*, 318 Ill. App. 3d 590, 604 (2000) (the defendant was not covered as an additional insured under the insurance policy because the policy failed to specify by name any of the numerous railroads for which the plaintiff performed work making it unclear who was the intended additional insured). Although State Auto argues that Barrett told State Auto to put SCE Unlimited, Inc. as the additional insured on the policy, State Auto fails to suggest it would not have insured Builder in place of SCE or would have charged more to do so. Moreover, State Auto does not argue that the merger with Masco would have affected the policy in any way, and State Auto originally accepted the defense of SCE in the underlying lawsuit. See also *Harden v. Desideri*, 20 Ill. App. 3d 590, 597-600 (1974) (the court concluded that reformation of the lease agreement was appropriate when both parties mistakenly thought that the document properly reflected their agreement, namely that the beneficiaries not the trustees should have been designated as the lessors).

¶ 18 Further, the record demonstrates that if Barrett had known of the legal name change it would have provided Builder coverage as it had done throughout its tenure. Specifically, Patricia B testified that SCE changed its name and address multiple times over the years and she was aware of its affiliation with Masco as its subsidiary. Barrett clearly did not mean to pay for insurance coverage for a party that no longer existed and State Auto should not charge for coverage that is a mere illusion. Based on the record, there is no question of fact that both parties intended that the additional insured entity on the policy was Barrett's sole contractor. See *Schaffner v. 514 West Grant Place Condominium Ass'n, Inc.*, 324 Ill. App. 3d 1033, 1044 (2001) (in an action for reformation what is sought to be reformed is not the understanding between the

parties, but rather the written instrument which inaccurately reflects it); See also *Roots v. Uppole,* 81 Ill. App. 3d 68, 72 (1980) (the court granted reformation when the deed insufficiently described the parcel of land, but extrinsic evidence presented a clear identification of the parcel agreed upon by the parties). Thus, both parties mistakenly named SCE Unlimited, Inc. instead of Builder in the written policy and Builder was not "a stranger to the policy" as State Auto contends.

¶ 17 In light of our determination, we need not address whether Builder was entitled to summary judgment based on the laws of corporation, the umbrella coverage or unjust enrichment.

¶ 21 CONCLUSION

¶ 22 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.