SECOND DIVISION
November 8, 2016

No. 1-14-3436

SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST, Plaintiff-Appellee, v. MEMBER'S PROPERTY, INC., Defendant-Appellant (Levi Strauss & Co., Defendant).	)	Appeal from the Circuit Court of Cook County No. 11 CH 25475 Honorable Sophia H. Hall, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Judgment of the circuit court affirmed; denial of summary judgment motion is not subject to appellate review.

¶ 2 BACKGROUND

¶ 3 Levi Strauss & Co. filed a federal lawsuit against Member's Property, Inc. (MPI) for trademark infringement. In September 2010, MPI tendered the defense of the suit to its insurer, Selective Insurance Company of the Southeast (Selective). On January 27, 2011, Selective agreed to defend MPI under a full reservation of rights since certain claims appeared to

potentially fall within the policy's coverage. On July 20, 2011, Selective filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify.

¶ 4 Selective asserts that it had paid all of its portion of the defense costs up until January 6, 2012, when, in anticipation of the underlying claims being resolved, it "informed [MPI] that it would no longer pay defense costs based on the dismissal of the underlying action." On March 6, 2012, the underlying lawsuit was dismissed with prejudice after MPI settled the claims with Levi Strauss. Thereafter, on July 19, 2012, MPI moved for partial summary judgment on Selective's duty to defend, arguing that the underlying suit implicated the advertising injury provision of Selective's policy. Selective moved for additional discovery as to whether certain policy exclusions applied and filed an Illinois Supreme Court Rule 191(b) (eff. July 1, 2002) affidavit in support of its motion. The trial court allowed further discovery, and Selective subsequently filed its cross-motion for summary judgment arguing that there was no coverage because of the policy's prior publication exclusion.

¶ 5 On April 14, 2014, the trial court entered an order on the cross-motions for summary judgment. The trial court ruled in favor of MPI, finding there was potential coverage under the advertising injury provisions of the applicable policy, and granted MPI's motion for partial summary judgment and denied Selective's motion for summary judgment, finding that the policy's knowing violation and trademark exclusions did not apply. The trial court, however, found there were genuine issues of material fact as to whether the policy's prior publication exclusion applied. The trial court therefore denied the cross-motions for summary judgment as to both parties on the issue of whether the policy's prior publication exclusion applied.

¶ 6 The case proceeded to a bench trial after which the trial court, in a written order dated October 9, 2014, "for reasons set forth on the record," entered judgment in favor of Selective

"finding Selective has no duty to defend based on the application of the prior publication exclusion." On November 3, 2014, the trial court entered a final order stating that Selective had no duty to defend or indemnify MPI under the policy for the underlying case based on the prior publication policy exclusion. The trial court entered judgment in favor of Selective on count I of its complaint for declaratory judgment and dismissed counts II-V as moot. MPI filed this timely appeal.

¶ 7 ANALYSIS

¶ 8 MPI does not challenge the trial court's factual findings with respect to the application of the policy exclusion. MPI identifies four issues for review on appeal, but only argues one of those issue in its appellant's brief. Because points not raised in the argument section of an appellant's brief are waived (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)), we will not address the following three appellate issues identified by MPI: whether the trial court erred in (1) allowing discovery before ruling on the summary judgment motions; (2) after trial, finding that Selective had no duty to defend MPI based on the application of the "prior publication" exclusion in the policy at issue; and (3) dismissing this case. Therefore, we will only consider the one issue advanced in the argument section of MPI's appellant's brief: whether the trial court erred in denying MPI's summary judgment motion regarding Selective's duty to defend.

¶ 9 Initially, we note that MPI's opening and reply briefs do not present the relevant facts, procedural history, and legal analysis in a readily accessible and understandable manner. This made it difficult to distill the precise arguments being advanced. Nevertheless, we have reviewed, to the best of our ability, the arguments MPI raises in its brief. MPI essentially challenges the trial court's insistence on conducting an unnecessary trial on an issue that MPI asserts is irrelevant given that a potential for coverage existed at the time the underlying action

was resolved. MPI asserts that summary judgment should have been entered in its favor on Selective's duty to defend and the case should not have proceeded to a trial on the merits. The crux of MPI's argument is that because Selective agreed to provide a defense where some of the underlying claims were potentially covered and Selective never withdrew from the defense, Selective was obligated to pay defense costs until it either denied coverage or until the duty to defend was extinguished by the trial court. MPI contends that the summary judgment order is reviewable because that ruling is better understood as a partial summary judgment in its favor, since MPI "won" on the issue of whether the complaint potentially gave rise to coverage, but the trial court determined that there was a question of fact as to whether an exclusion applied, necessitating a trial. It appears that in MPI's view, the trial court's order of April 14, 2014, finding there was a potential for coverage was as far as the trial court needed to go to determine whether Selective was on the hook for defense costs, rendering the rest of the proceedings moot.

¶ 10 In response, Selective argues that the denial of MPI's motion for summary judgment is not reviewable. We agree. "When a motion for summary judgment is denied and the case proceeds to trial, the denial of summary judgment is not reviewable on appeal because the result of any error is merged into the judgment entered at trial." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355 (2002). The exception to this rule applies only where there has been no evidentiary hearing and the party seeking review of the denial of summary judgment did nothing to prevent or avoid the evidentiary hearing or trial. *Cedric Spring & Associates, Inc. v. N.E.I. Corp.*, 81 Ill. App. 3d 1031, 1034 (1980). Here, the exception does not apply because a bench trial was held, evidence was heard, findings of fact were made, and a final judgment was entered. Therefore, we find the denial of MPI's cross-motion for summary judgment on the applicability of any policy exclusions merged into the final judgment entered

after trial and is not reviewable on appeal. *Belleville Toyota*, 199 Ill. 2d at 355.

¶ 11 MPI essentially argues that, even if the denial of its summary judgment motion was appealable after trial, Selective should be estopped from denying that it had a duty to defend because Selective acknowledged the potential for coverage in its reservation of rights letter, the trial court determined that there was the potential for coverage, and Selective never withdrew its defense of the underlying claims until the underlying case was dismissed with prejudice. In short, MPI claims Selective must pay "incurred defense costs prior to the time its coverage obligation was resolved by the trial court." We disagree.

¶ 12 There was nothing inequitable about Selective's management of its defense obligations. Selective paid its share of the defense costs under a full reservation of rights that notified MPI of a potential denial of coverage due to policy exclusions, which precludes any type of estoppel argument. *Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill. App. 3d 966, 973-74 (1991). Selective states on appeal that it notified MPI on January 6, 2012, that the underlying claims were effectively disposed of and the underlying case was dismissed with prejudice in March 2012. Selective argues that MPI is seeking reimbursement of Selective's share of the defense costs incurred after January 6, 2012, which Selective stated it would not pay. When Selective filed the present declaratory judgment action, which clearly contested whether there was any coverage at all, it effectively suspended its obligation to make payments towards the defense of the underlying claims until the resolution of the coverage dispute. *Certain Underwriters at Lloyd's v. Professional Underwriters Agency, Inc.*, 364 Ill. App. 3d 975, 983 (2006). If the trial court resolved the coverage issue in MPI's favor, then Selective would have been required to reimburse MPI for its defense costs. *Id.* But that is simply not the case here. The final judgment of the circuit court was that the policy's prior publication exclusion applied and

Selective had no duty to defend or indemnify. MPI has not appealed that final judgment. Selective protected its right to challenge coverage by defending under a reservation of rights and by initiating this declaratory judgment action. Under these circumstances, the fact that Selective paid some defense costs and then stopped paying defense costs does not mean that it was obligated to continue paying defense costs until it secured a final judgment that it owed no duty to defend.

¶ 13 Finally, MPI's reliance on *General Agents Insurance Co. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146 (2005) is misplaced. There, our supreme court addressed the question of whether an insurer defending under a reservation of rights could recover defense costs where the policy did not provide for a recovery of defense costs. *Id.* at 165. That issue is not presented here.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 15 Affirmed.