2015 IL App (1st) 150369-U

FIRST DIVISION
November 2, 2015

No. 1-15-0369

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DOMINICK'S FINER FOODS, LLC, a Delaware Limited Liability Company, Plaintiff-Appellant, v. EUREST SERVICES, INC., a foreign corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 14 L 10029 Honorable Raymond Mitchell, Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *HELD*: Summary judgment on first breach of contract count affirmed, where defendant owed no duty, under the parties' services agreement, to defend plaintiff in a lawsuit when the injury allegedly resulted from plaintiff's own negligence and there was no finding that defendant had been negligent; summary judgment on second breach of contract count reversed, where defendant's failure to procure agreed-upon insurance policy was the proximate cause of plaintiff's damages. Remanded for evidentiary hearing on damages.

¶ 2 Plaintiff filed a breach of contract action against defendant, claiming that the latter failed to defend it in a personal injury suit and failed to procure proper insurance as required by a master services agreement (MSA). The parties filed cross-motions for summary judgment. The

circuit court awarded summary judgment in favor of defendant on both counts of the complaint, finding that: (1) under the MSA, defendant did not have a duty to defend plaintiff in the underlying suit where the claims against plaintiff were based on plaintiff's own negligence, not that of defendant; and (2) even if defendant failed to procure the proper insurance required under the MSA, such failure was not the proximate cause of plaintiff's damages, *i.e.*, legal fees and costs, because defendant had no duty to defend plaintiff in the first place. On appeal, plaintiff contends that the court erred in awarding summary judgment to defendant. For the following reasons, we affirm in part, reverse in part, and remand with directions.

¶ 3 BACKGROUND

¶ 4 Plaintiff, Dominick's Finer Foods, LLC, is a former grocery store chain in the Chicagoland area. Defendant, Eurest Services, Inc., is a company that provides floor care, floor cleaning, and janitorial services to stores and other business entities.

¶ 5 A. The MSA

¶ 6 On March 28, 2010, defendant entered into a master services agreement (MSA) with plaintiff to provide floor cleaning services to plaintiff's grocery store at No. 14 Garden Street, in Western Springs, Illinois (the Western Springs store). At issue in this appeal are two provisions of the MSA: the indemnification provision and the insurance requirements provision.

¶ 7 Section 4.1 of the MSA set forth the requirements for indemnification as follows:

> "**4.1 Indemnification.** [Eurest] agrees to indemnify, defend and hold Dominick's and its subsidiaries and its officers, directors, partners, employees and agents (collectively, the 'Dominick's Parties'), harmless from and against any and all liabilities, claims, demands, losses, damages, costs and expenses, including, without

> limitation, attorneys' fees and costs (collectively 'Claims'), to the extent that any Claims arise out of any negligent action or omission in connection with the performance of this Agreement by [Eurest], its subcontractors, agents, or employees, including, without limitation, Claims for death or injury to any person or damage to any property or loss of use thereof. [Eurest] shall have no obligation to indemnify or hold harmless Dominick's Parties from and against any Claims to the extent that such Claims arise out of any negligent action or omission of Dominick's Parties ***[.]"

¶ 8 Section 4.2 of the MSA sets forth the minimum level of insurance that defendant was required to maintain. It provided in relevant part as follows:

> "**4.2 Insurance Requirements**
>
> A) [Eurest] shall obtain and maintain, at its expense, a policy or policies of Commercial General Liability insurance (including product and completed operations, personal and advertising injury and contractual liability coverage), with a minimum of $2,000,000 per occurrence and a minimum of $2,000,000 per occurrence Products and Completed Operations, each with an aggregate limit of not less than $4,000,000 and written on an occurrence form. ***
>
> B) [Eurest] will provide Certificates of Insurance naming Dominick's as 'Additional Insured' with respect to [a] Commercial

> General Liability *** polic[y]. [Eurest's] insurers shall be rated 'A-' or better by A.M. Best Company. ***
>
> C) Policy limits may not be reduced, terms changed, or policy canceled upon less than thirty (30) days prior written notice to Dominick's. [Eurest's] insurance shall be primary with respect to all obligations assumed by [Eurest] under this Agreement. It shall be the responsibility of [Eurest] to ensure that its agents, representatives, subcontractors and independent contractors comply with the above insurance requirements. Insurance coverage and limits referred to above shall not in any way limit the liability of [Eurest]."

¶ 9 Exhibit A of the MSA identified the basic scope of services to be provided by defendant to plaintiff. As pertinent here, defendant agreed "that its employees and agents [would] return all floor mats to their original location and placement position after all floor cleaning."

¶ 10 B. The Personal Injury Lawsuit

¶ 11 On October 21, 2010, Jane Delaney entered the Western Springs store to purchase coffee. On her way out, she tripped on an unsecured mat at the doorway, fell, and sustained injuries. Earlier that morning, defendant had performed floor-cleaning services at the store. An employee of defendant was seen on the surveillance video moving the floor mat and folding it over.[1]

¶ 12 On October 29, 2010, Jane and her husband (collectively, the Delaneys) filed a four-count complaint against plaintiff and Tom O'Dette, the Western Springs store manager. The Delaneys alleged that plaintiff and O'Dette were negligent in, *inter alia*, failing to secure the mat at the doorway. The Delaneys also alleged loss of consortium.

[1] This testimony was given by Matthew Esp, a regional manager for defendant.

¶ 13 Plaintiff's claims examiner tendered a defense and indemnification in the Delaney suit to defendant and to defendant's insurance carrier, National Union Fire Insurance Company of Pittsburgh (National Union).[2] Both defendant and its carrier denied plaintiff's tender. In rejecting the tender, defendant asserted that there were "no allegations in the Complaint that any act or omission of a Eurest employee caused any of [Jane Delaney's] injuries." National Union, in turn, explained that coverage under the policy was excess, and, therefore, did not apply until defendant had met its $1,000,000 self-insured retention; later, the carrier indicated that its denial was also because Delaney's complaint listed only plaintiff and O'Dette as the negligent parties.

¶ 14 The Delaneys subsequently filed an amended complaint, alleging the same counts against plaintiff and O'Dette. On June 28, 2011, they filed a second amended complaint, adding defendant as a party in the Delaney lawsuit. Count I of the second amended complaint alleged negligence against plaintiff for failing to secure the mat at the doorway. Count II alleged loss of consortium against plaintiff. Count III alleged negligence against O'Dette for permitting rain mats to be placed near the door of the store in the absence of inclement weather and for O'Dette's failure to ensure that the rain mat laid flat. Count IV alleged loss of consortium against O'Dette. Count V alleged that defendant was negligent, where its employees:

> "a. caused buckles along the edge of the mat at the south entrance of the store by folding the mat during the cleaning process;
>
> b. failed to secure the edges of the mat after cleaning when it caused buckles along the edges;

[2] Chartis Insurance Claims-Vendor Services Division operated as the claims administrator for National Union. We refer to them interchangeably as National Union.

> c. failed to notify Dominick's that the mat had buckles along the edges and was not smooth on the floor;
>
> d. Allowed the mat to be used when it had buckles along the edges which could trip Dominick's customers; and
>
> e. Failed to properly move the mat for cleaning of the floor underneath it."

Finally, count VI alleged loss of consortium against defendant.

¶ 15 Subsequently, plaintiff's claims examiner retendered a defense and indemnification to defendant and National Union, stating that "Eurest is now directly named as being negligent and the cause of the plaintiff's incident." National Union responded that all of the requirements of section 4.2 of the MSA had been met and, "[t]herefore, you may qualify for defense and indemni[t]y as an additional insured under the policy." National Union noted, however, that it had "no obligation or responsibility of any kind under the policy until such time as the Self Insured Retention [was] met/exhausted."

¶ 16 Defendant, however, denied the retender and asserted the following:

> "Plaintiff's Amended Complaint specifically alleges that the actions of Dominick's and Odette caused a dangerous condition which led to Jane Delaney's fall: the placement of the unsecured floor mat at the doorway. Section 4.1 specifically provides that Eurest is not required to indemnify Dominick's for claims that arise out of negligent acts or omissions of Dominick's or its employees. This is precisely what is alleged in plaintiffs' Amended Complaint."

¶ 17 Plaintiff and O'Dette eventually obtained summary judgment on counts I through IV of the Delaney suit, whereas defendant settled and was dismissed from the case with prejudice.[3]

¶ 18 C. The Instant Litigation

¶ 19 On September 25, 2014, plaintiff filed a two-count complaint against defendant. In count I, plaintiff accused defendant of breaching section 4.1 of the MSA by failing to provide plaintiff a defense in the underlying Delaney lawsuit. In count II, plaintiff asserted that defendant breached section 4.2 of the MSA by failing to obtain a commercial general liability (CGL) policy with an insurance company rated "A-" or better by A.M. Best Company in the amount of $2,000,000 per occurrence. In its answer, defendant denied that it breached the MSA.

¶ 20 The parties filed cross-motions for summary judgment.[4] Defendant claimed that it was not required to defend plaintiff under section 4.1 of the MSA. It argued: (1) that counts I through IV of the Delaney lawsuit did not allege a negligent act or omission of defendant, and (2) that section 4.1 did not impose a duty on defendant to indemnify or hold harmless plaintiff from any claims based on plaintiff's own negligent act or omission. Defendant additionally claimed that it was not required to procure insurance to provide plaintiff a defense in the Delaney lawsuit given that the suit claimed that plaintiff was negligent by its own acts or omissions, not the acts or omissions of defendant.

¶ 21 Plaintiff maintained that it was entitled to a defense from defendant under section 4.1 of the MSA. It noted that "but for the alleged actions of the Eurest employee who mishandled the placement of the floor mat and caused a buckle in it, Dominick's and its employee [O'Dette]

[3] On July 21, 2014, this court, in a Rule 23 order, affirmed the order of the circuit court granting summary judgment to plaintiff.

[4] The MSA contained a choice of law provision stating that California law would apply. It was undisputed that basic principles of contract interpretation applied to the instant dispute and that such principles are essentially the same under California or Illinois law. Accordingly, the motion for summary judgment was properly decided under Illinois law.

would never have been sued." According to plaintiff, defendant breached section 4.2 of the MSA because a self-insured retention is not the same as, or equivalent to, a CGL policy.

¶ 22 On January 23, 2015, the court granted summary judgment in favor of defendant. The court found that defendant had no obligation to defend plaintiff in the personal injury suit. It read section 4.1 of the MSA as obligating defendant "to defend Dominick's if a claim asserted against Dominick's arose out of Eurest's negligent actions, except to the extent that the claim was *also due to Dominick's negligent actions*." (Emphasis added.) The court then noted that "neither party was actually found to be negligent." It concluded that "[s]ince there [was] insufficient evidence from which to conclude that Eurest was negligent, there [was] insufficient evidence from which to conclude that the underlying lawsuit arose from Eurest's negligent action or omission."

¶ 23 Regarding defendant's failure to procure proper insurance, the court found that "Dominick's was not denied a defense because Eurest had a self-insured retention to exhaust. [Rather, it] was denied a defense because the insurance company determined that Eurest was not obligated to defend Dominick's based on the allegations in the complaint." The court concluded that, even if defendant failed to procure proper insurance, its breach did not cause the damages alleged by plaintiff.

¶ 24 Plaintiff timely appealed. We have jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. Jan. 1, 2015).

¶ 25 ANALYSIS

¶ 26 Plaintiff contends that the court erred in granting summary judgment to defendant. It argues that defendant: (1) breached section 4.1 of the MSA by failing to defend plaintiff in the Delaney lawsuit, and (2) breached section 4.2 of the MSA by failing to procure the proper CGL policy. Plaintiff maintains that summary judgment should have been granted in its favor.

¶ 27 A. Standard of Review

¶ 28 Summary judgment should be granted if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review *de novo* a court's ruling on a motion for summary judgment. *Tunca v. Painter*, 2012 IL App (1st) 110930, ¶ 13.[5]

¶ 29 B. Count I – Failure to Defend

¶ 30 Plaintiff argues that it was entitled to summary judgment on count I of the complaint, which alleged that defendant breached section 4.1 of the MSA by failing to defend plaintiff in the underlying Delaney lawsuit. Plaintiff reads section 4.1 as requiring defendant to defend Plaintiff "from any and all claims *** to the extent that the claims [arose] out of any negligence or omission in connection with Eurest's performance of the Agreement." According to plaintiff, Illinois courts use a "but for" causation test to determine whether "arising out of" language has been satisfied. Plaintiff claims that, applying that test here, it is clear that defendant had a duty to defend under section 4.1 of the MSA. As Plaintiff notes, the Delaneys alleged that Jane's injuries resulted from the handling of the floor mat; thus, "*but for* the alleged actions of the Eurest employee who mishandled the placement of the floor mat ***, Dominick's and its employee would never have been sued."

¶ 31 Defendant responds that it was not required to defend plaintiff under section 4.1 because the claims asserted against defendant were alternative to the claims asserted against plaintiff. Defendant takes issue with plaintiff's reliance on legal principles applicable to insurance policies. It argues that "[t]he MSA is not an insurance policy but a contract for floor cleaning services

[5] There continues to be no dispute on appeal that California and Illinois law are consistent and that either state's laws may apply when interpreting the MSA. We accept the parties' concession and rely on the law of both states.

between two non-insurance entities." Citing *Ervin v. Sears, Roebuck & Co.*, 127 Ill. App. 3d 982 (1984), *Goldman v. Ecco-Phoneix Electric Corp.*, 396 P.2d 377 (Cal. 1964), and *Crawford v. Weather Shield Manufacturing Inc.*, 187 P.3d 424 (Cal. 2008), defendant maintains that insurance policies are "a special type of contract" with "standards of construction different from those applied to non-insurance indemnity contracts such as the MSA involved in this case." Defendant argues that, in the case at bar, ordinary principles of contract construction apply and lead to the conclusion that defendant was not required to defend plaintiff in the Delaney lawsuit.

¶ 32 1. Insurance Principles vs. Ordinary Contract Principles

¶ 33 Our initial task is to resolve the question of the proper interpretive principles to apply when reading the indemnification provision of the MSA. The parties do not dispute on appeal that California and Illinois law are consistent and that either state's laws may apply when interpreting the MSA. That being the case, we believe that this issue was correctly resolved by this court in *Ervin v. Sears, Roebuck & Co*.

¶ 34 In *Ervin*, Sears, Roebuck and Company (Sears) was sued after a pair of thermal underwear purchased by the plaintiff caught fire and severely burned him. *Ervin*, 127 Ill. App. 3d at 986. Sears tendered its defense to Flagg-Utica Corporation (Flagg), which had sold Sears the underwear, and American Mutual Liability Insurance Company (American), which had issued Flagg a products liability insurance policy with a vendor's endorsement naming Sears. *Id.* at 985-86. Both companies refused Sears' tender. *Id.* at 986. Sears then filed a third-party complaint against Flagg and American, alleging (1) that American had failed to defend Sears pursuant to the vendor's endorsement in the Flagg policy, and (2) that Flagg had failed to defend Sears under the terms of the parties' purchase contract. *Id.* The purchase contracts between Flagg and Sears stated: " '[Flagg] agrees to protect, defend, hold harmless and indemnify [Sears] from and against

any and all liability and expense *** arising out of any alleged or claimed defect in such merchandise." *Id.* at 984. The circuit court granted summary judgment to Sears, awarding it the attorney's fees and costs it incurred in defending against the plaintiff's suit. *Id.* at 987.

¶ 35 On appeal, the Fifth District Appellate Court reversed the order of summary judgment against Flagg, finding it relevant that Flagg was not an insurance company. *Id.* at 989. The court found no caselaw where the principles for determining an insurer's duty to defend were applied "to situations not involving questions of coverage under an insurance policy." *Id.* The court also found the purchase contracts between Flagg and Sears "to be more akin to indemnity agreements than to insurance policies." *Id.* It noted that indemnity agreements must be strictly construed, unlike insurance policies, which are liberally construed in favor of the insured. *Id.* at 989-90. The court then stated:

> "[W]hile the law expressly prohibits those in the business of insurance from refusing to defend based on what they have discovered from 'looking behind' the subject complaint, no such restriction is imposed on a business which, as part of its agreement with a purchaser of its products, agrees to defend and/or indemnify that customer in suits involving those products. *** As noted by our supreme court long ago, an insurance company's agreement to defend actions against the insured is one of the 'fundamental obligations' of the insurance contract [citation]; in contrast, the agreement to defend and indemnify in a contract of the type between Flagg and Sears is incidental to the main purpose of the agreement; namely, the purchase and sale of a product. Given the

> unique position of an insurance company as a professional 'seller' of protection against loss, and the fundamentally different role of the manufacturer of goods, we hold that it is not unreasonable to compel American to defend the suit based on the allegations of [the plaintiff's] complaint, while allowing Flagg a greater degree of freedom to investigate those allegations for the purpose of determining what its contractual obligations to Sears in connection with the [plaintiff's] suit in fact are." *Id.* at 990.

Ultimately, the *Ervin* court remanded the case, finding that there was a genuine issue of material fact as to whether Flagg had made the underwear in question and therefore breached its duty to defend Sears under the terms of the purchase contracts. *Id.* at 990-91.

¶ 36 We find the reasoning of *Ervin* persuasive and, therefore, choose to adopt it going forward. We agree that there is a fundamental difference between insurers and non-insurers. Companies like defendant, *i.e.*, non-insurers, simply do not have the same specialized experience of providing insurance as an actual insurance company. The reason for imposing a heightened duty to defend on insurers—because they are professional sellers of insurance—is therefore not present in the non-insurance context. There is also a fundamental difference between contracts to sell goods or provide services, such as the MSA, and contracts for insurance. Unlike insurance contracts, the fundamental purpose of a contract to sell goods or provide services is not to provide for a defense of the purchaser of such goods or services; rather, it is simply *to sell goods or provide services*, an activity that comes with its own set of obligations, separate and apart from the obligations of an insurer. When it comes to a non-insurer, we find that it would be entirely inappropriate to impose a heightened duty to defend merely because the parties included

an indemnification provision in their contract. We therefore agree with defendant that the MSA should be analyzed under ordinary contract principles. Further, we conclude, as in *Ervin*, that defendant was entitled to go beyond the allegations of the complaint to determine what its obligations were under section 4.1 of the MSA. We acknowledge that cases such as *Crawford* and *McNiff* are somewhat in tension with *Ervin*. However, we believe that *Ervin* presents the more well-reasoned approach to this issue and, therefore, we will follow it.

¶ 37 2. Breach of Section 4.1 of the MSA

¶ 38 We now turn to the main issue of whether plaintiff established a claim of breach of contract as a matter of law. To establish a breach of contract—or, in this case, the MSA—plaintiff must prove: (1) a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant damages or injury to the plaintiff. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68.

¶ 39 The parties here dispute only whether there was a breach of the MSA by defendant. "Whether a breach of contract has occurred generally is not a legal question subject to *de novo* review, but rather a question of fact which will not be disturbed unless the finding is against the manifest weight of the evidence." *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009). " 'Where only the construction of a contract is at issue, [however,] the legal effect and interpretation of the contract is a question of law, and summary judgment is proper.' " *Id.* (quoting *Kennedy, Ryan, Monigal & Associates, Inc. v. Watkins*, 242 Ill. App. 3d 289, 295 (1993)).

¶ 40 Plaintiff maintains that defendant breached section 4.1 of the MSA by failing to defend it in the Delaney lawsuit. Defendant, on the other hand, argues that it was not required to defend plaintiff under section 4.1 of the MSA because the claims against plaintiff were based on

plaintiff's *own* negligence, not the negligence of defendant or one of its employees. The dispositive issue is one of contract interpretation: namely, whether defendant was required to defend plaintiff in the Delaney lawsuit pursuant to section 4.1 of the MSA. Under the circumstances, we find this case to be appropriate for summary judgment.

¶ 41 Our primary goal in interpreting a contract is to give effect to the intention of the parties by interpreting the contract as a whole and giving unambiguous terms their plain and ordinary meaning. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. We will not find contract language ambiguous simply because the parties disagree as to its interpretation. *Id.* Any disagreement as to interpretation must be reasonable, and "this court 'will not strain to find an ambiguity where none exists.' " *Id.* (quoting *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005)).

¶ 42 Here, the language of section 4.1 of the MSA calls for defendant to defend plaintiff "to the extent that any Claims arise out of any negligent action or omission in connection with the performance of this Agreement by [Eurest]." Contrary to plaintiff's claim, we do not believe that defendant breached its obligation to defend under section 4.1. The record shows that plaintiff and its store manager, O'Dette, were sued by the Delaneys for their *own* negligent acts and omissions, not for the negligent acts or omissions of defendant or its employees. The Delaneys alleged, in the second amended complaint, that plaintiff and O'Dette had, *inter alia*, placed a mat with a buckle in it on the floor, failed to provide safe egress to the store, failed to remove an unsafe mat from the entrance/exit of the store, and used mats that were likely to buckle. Absent from any of these claims was an allegation of negligent conduct by defendant. While defendant was a party to the complaint, the record shows that the claims brought against defendant were alternative to the claims asserted against plaintiff and O'Dette. Under the circumstances, we

cannot say that defendant breached section 4.1 of the MSA by failing to defend plaintiff and O'Dette from claims asserting that they were independently negligent.

¶ 43 We believe there is yet another reason why there was no breach in this case. As the circuit court noted, there was never any finding that either plaintiff or defendant was negligent in the Delaney lawsuit. Plaintiff obtained summary judgment; defendant, meanwhile, settled the claims brought against it. We agree with the court, that absent evidence of negligence, there is insufficient evidence from which to conclude that defendant was required to defend plaintiff in the Delaney lawsuit. Defendant's entire obligation to defend was predicated on a negligent act or omission by one of its employees; without any finding of negligence, there is simply no evidence that defendant breached section 4.1 of the MSA by failing to defend plaintiff.

¶ 44 Plaintiff responds that a settlement of claims results in a presumption that an injured party would have prevailed in a suit, citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 325-26 (2004), and *Home Insurance Co. v. Certain Underwriters at Lloyd's London*, 729 F.2d 1132, 1134 (7th Cir. 1984). Plaintiff, however, did not raise this argument in the court below.[6] We therefore decline to consider it for the first time on appeal. *IFC Credit Corp. v. Magnetic Technologies, Ltd.*, 368 Ill. App. 3d 898, 902 (2006). Under the circumstances, we conclude that the circuit court properly granted summary judgment to defendant on Count I of the complaint.

¶ 45 C. Count II – Failure to Procure Insurance

¶ 46 Plaintiff contends that it was also entitled to summary judgment on Count II of its complaint, which alleged that defendant failed to procure insurance as required by section 4.2 of

[6] Plaintiff argues that it "repeatedly asserted that [defendant] settled the underlying case which prevented a ruling on the merits." This assertion, however, is not a substitute for the argument that there should be a presumption of liability. To consider such an argument now would unfairly deny defendant the opportunity to present evidence challenging the alleged presumption of liability.

the MSA. According to plaintiff, defendant breached the MSA by obtaining a CGL policy with a self-insured retention as opposed to a $2,000,000 CGL policy naming plaintiff as an additional insured. Plaintiff claims that, as a result of defendant's breach, it was required to fund its own defense.

¶ 47 Defendant agrees that its failure to obtain a $2,000,000 per occurrence liability limit "may have been a breach of the MSA." Notwithstanding, it argues that the expenses incurred by plaintiff in defending the Delaney suit were not proximately caused by such breach. We accept defendant's concession that it breached the MSA by failing to procure proper insurance and limit our review to the proximate cause issue, which defendant concedes is the "only relevant question as to Count II."

¶ 48 As an element of a breach of contract action, the plaintiff must " 'establish an actual loss or measurable damages resulting from the breach in order to recover.' " *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19 (quoting *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 149 (2005)). "Damages which are not the proximate cause of the breach are not allowed." *Id.*

¶ 49 Contrary to defendant's claim, we find that plaintiff sustained damages as a proximate result of defendant's failure to obtain proper insurance under section 4.2 of the MSA. Defendant was required under the MSA to obtain a CGL policy that was "primary with respect to all obligations assumed by [Eurest] under [the MSA]." This means that the insurer on the CGL policy would have been required to defend plaintiff under the same terms as provided in section 4.1 of the MSA. As discussed below, we believe that the third-party insurer required to underwrite a CGL policy would have owed plaintiff a defense in this case.

¶ 50 Generally, when determining whether an insurer owes a duty to defend, courts look to the allegations in the underlying complaint and compare them to the relevant coverage provision. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). If the facts of the complaint potentially fall within coverage, a duty to defend arises. *Id.* Our primary objective is to ascertain and give effect to the intentions of the parties as expressed in their agreement. *Id.* Clear and unambiguous terms will be given their plain and ordinary meaning. *Id.* Conversely, terms that are susceptible to more than one meaning will be considered ambiguous and construed against the drafter. *Id.* The construction of a coverage provision presents a question of law, which we review *de novo*. *Id.* at 479-80.

¶ 51 Here, the Delaneys' claims against plaintiff and O'Dette potentially fell within the scope of coverage under the terms of section 4.1 of the MSA. Plaintiff and O'Dette were sued for negligence in connection with the unsecured floor mat that caused Jane Delaney's fall. In their second amended complaint, the Delaneys alleged that it was defendant's employees who had negligently failed to secure the mat after they finished cleaning the floor. Section 4.1 of the MSA states: "[Eurest] agrees to indemnify, defend and hold Dominick's *** harmless from and against any and all liabilities, claims, *** costs and expenses, including, without limitation, attorneys' fees and costs (collectively 'Claims'), to the extent that any Claims arise out of any negligent action or omission in connection with the performance of this Agreement by [Eurest]." The phrase "arising out of" is liberally construed in favor of an insured and " 'but for' causation, not necessarily proximate causation, satisfies this language." *Maryland Casualty Co. v. Chicago & North Western Transportation Co.*, 126 Ill. App. 3d 150, 154 (1984). *Id.* In the case at bar, "but for" the alleged negligent act of defendant in failing to secure the floor mat in question, there would have been no claims against plaintiff or O'Dette. The allegations of the Delaneys' second

amended complaint therefore potentially exposed plaintiff to liability for defendant's negligence. See *McNiff*, 303 Ill. App. 3d at 1081. Under the circumstances, we find that an insurer would have owed plaintiff a duty to defend.

¶ 52 Because of defendant's decision to opt for a $1,000,000 self-insured retention, as opposed to a CGL policy with a $2,000,000 per occurrence limit, plaintiff was ultimately deprived of the opportunity to be defended by an insurance company. This meant that defendant, alone, made the sole decision as to whether to provide plaintiff with a defense in the Delaney suit. It is not surprising that defendant, a floor cleaning company, chose to reject plaintiff's tender. We would not expect the same result from an insurance company. Presumably, the insurance company would have recognized that the Delaneys' second amended complaint potentially exposed plaintiff to liability for a negligent act of defendant, thereby requiring it to provide plaintiff with a defense. Indeed, this was National Union's response on September 1, 2011, when it recognized that plaintiff "may qualify for defense and indemni[t]y as an additional insured under the policy."[7] This court has noted that a breach of a contract to obtain insurance results in liability for any damages caused by the breach, including the costs of defending an action. *Zettel v. Paschen Contractors, Inc.*, 100 Ill. App. 3d 614, 618 (1981). In this case, we have no doubt that plaintiff was deprived of a defense in the Delaney suit as a proximate result of defendant's failure to obtain proper insurance as required by the MSA. Defendant's self-insured retention was not an acceptable substitute for the CGL policy called for in the MSA. Accordingly, we find that plaintiff was entitled to summary judgment on count II of its complaint.

[7] Defendant argues that the "tender letters" sent between the parties and National Union should not be considered because they were neither sworn nor certified under penalty of perjury. The letters were attached to plaintiff's complaint, however. Under section 2-606 of the Code of Civil Procedure (735 ILCS 5/2-606 (West 2012)), a written instrument attached to a pleading as an exhibit "constitutes a part of the pleading for all purposes." We may certainly consider pleadings on summary judgment; therefore, we may consider the tender letters.

¶ 53 CONCLUSION

¶ 54 For the reasons stated, we affirm the order of the circuit court of Cook County granting summary judgment to defendant on count I, reverse the order granting summary judgment to defendant on count II, and remand the cause for entry of summary judgment in favor of plaintiff on count II and for the trial court to conduct a hearing on damages.

¶ 55 Affirmed in part; reversed in part; remanded with directions.