2017 IL App (1st) 163159-U

FIRST DIVISION
August 21, 2017

No. 1-16-3159

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEKIN INSURANCE COMPANY, Plaintiff-Appellant, v. AP POB BANNOCKBURN, LLC, a foreign corporation; CBRE, INC., a foreign corporation; and MICHELLE JAROL, Defendants. (AP POB Bannockburn, LLC, a foreign corporation; and CBRE, INC., a foreign corporation, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 15 CH 12776 Honorable David B. Atkins, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

Held: The trial court's determination that CBRE is an additional insured under Pekin's insurance policy issued to Snowpusher is reversed where CBRE and Snowpusher did not enter into a written agreement to add CBRE as an additional insured. However, we affirm the trial court's judgment that under the policy, Pekin has a duty to defend AP as an additional insured.

¶ 1 Plaintiff, Pekin Insurance Company (Pekin), appeals the order of the circuit court finding that Pekin had a duty to defend AP POB Bannockburn, LLC (AP) and CBRE, Inc. (CBRE), pursuant to the additional insured endorsement contained in a commercial liability policy issued by Pekin. On appeal, Pekin contends the trial court erred in finding a duty to defend because (1) CBRE is not an additional insured under the policy where no written contract exists between CBRE and Snowpusher, Inc., Pekin's insured; and (2) the underlying complaint did not allege vicarious liability on the part of AP or CBRE, which is required for coverage under the additional insured endorsement. For the following reasons, we reverse the trial court's judgment that CBRE is an additional insured under the Pekin policy but affirm its judgment that Pekin had a duty to defend AP in the underlying action.

¶ 2 JURISDICTION

¶ 3 The trial court entered its order finding a duty to defend on September 30, 2016. On November 16, 2016, the trial court entered an order finding no just reason to delay enforcement or appeal. Pekin filed its notice of appeal on December 1, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), governing appeals from final judgments that do not dispose of an entire proceeding.

¶ 4 BACKGROUND

¶ 5 The following facts are relevant to this appeal. Snowpusher, Inc. (Snowpusher) entered into a contract to provide snow removal services on property owned by AP, specifically the Bannockburn Green Shopping Center located at 2525 Waukegan Road in Bannockburn, Illinois. CBRE managed this property for AP. The service contract stated that it was "entered into *** by and between the Owner identified in Paragraph 1(a) and the Contractor identified in Paragraph

1(b).” In Paragraph 1(a), “Owner” is defined as “AP POB Bannockburn, LLC.” In Paragraph 1(b) “Contractor” is defined as “Snowpusher Inc.” The contract also defined “Owner’s Agent” as “CBRE” and “Agent’s Representative” as “Jeff Tigchelaar.” “Owner Indemnified Parties” was defined as “Owner, Owner’s Agent.” The contract was effective from November 1, 2013, to October 31, 2014.

¶ 6 The contract provided that “[a]ny changes or modifications regarding the Work must be in writing and approved by the Owner or CBRE, Inc. The cost of such approved changes or modifications shall be estimated and agreed upon between Owner or CBRE and Contractor in writing before additional items are supplied.” Also, “Owner or CBRE shall have the right to cancel and terminate this Contract with or without cause at any time upon thirty (30) days written notice to Contractor.” The contract further provided that “[t]o the fullest extent permitted by law, Contractor shall defend (with counsel approved by Owner and/or CBRE), indemnify, pay, save and hold harmless the Indemnified Parties from and against any liabilities, damages, *** costs, expenses, suits, losses, claims, actions, fines and penalties *** that any of the Owner Indemnified Parties may suffer, sustain or incur arising out of or in connection with *** Contractor’s work or presence on the Property, including but not limited to any negligent acts, errors or omissions, intentional misconduct or fraud of Contractor, its employees, subcontractors or agents of others, whether active or passive, actual or alleged, whether in the provision of the Work, failure to provide any or all of the Work or otherwise.”

¶ 7 The contract also contained the following provision:

> “Contractor agrees to maintain in full force and effect, in form and content and with insurers approved by Owner, and at Contractor’s sole cost and expenses, the following policies of insurance:

***

b. Commercial General Liability Insurance *** with defense costs in addition to limits, insuring Bodily Injury and Property Damage, including Product and Completed Operations coverage *** in an amount not less than $1,000,000.00 per occurrence and $2,000,000.00 in the aggregate per location or project on which the Owner Indemnified Parties shall to the extent permitted by law be named as additional insureds. *** Such policy shall be the primary coverage for all claims of whatever type and nature and shall not seek contribution from any insurance maintained by the additional insureds."

The service contract was signed by Jeff Tigchelaar of CBRE, Inc., as agent for AP, and by the president of Snowpusher.

¶ 8 On February 19, 2014, Michelle Jarol allegedly slipped and fell in a parking lot at the Bannockburn Green Shopping Center. She filed a complaint against AP, CBRE, Language Stars LLC, and Snowpusher.[1] She alleged that Snowpusher "contracted with CBRE to provide snow removal services at Bannockburn Green." Jarol also alleged negligence against AP (count I), and CBRE (count II). The allegations against AP and CBRE are identical, contending that AP and CBRE, "by its agents and employees owed a duty to invitees of the Bannockburn Green shopping center to design, construct and/or maintain the walkways and entryways of the shopping center *** in a safe manner so as to prevent injury to such invitees." It also alleged that they owned a duty to warn of dangerous conditions and allowed the property to become in such condition to allow "for the unnatural accumulation of water that turned into ice and created a slipping hazard." The complaint further alleged that AP and CBRE allowed "maintenance personnel or other agents or employees of Defendant to pile snow adjacent to the paver block

[1] Language Stars LLC is not a party to this appeal.

walkway surface, thereby creating a source of water for melting and refreezing at the entrance portal additional to the water from roof snow melting." Count IV of Jarol's complaint alleged negligence against Snowpusher. In addition to making the same allegations against Snowpusher that were made in counts I and II against AP and CBRE, count IV alleged that Snowpusher failed "to properly clear the ice and snow from the paver walkway."

¶ 9 Snowpusher possessed a commercial liability policy issued by Pekin, effective from May 28, 2013, to May 28, 2014. The policy provided coverage for "sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Relevant to the issues on appeal, the Pekin policy included an additional insured endorsement amending the commercial general liability coverage of the policy. The endorsement provided that an "insured" is amended to include "any person or organization for whom you are performing operations, when you and such person or organization have agreed in a written contract effective during the policy period *** that you must add that person or organization as an additional insured on a policy of liability insurance (hereinafter referred to as the 'Additional Insured')." The endorsement further provided that the insurance did not apply to "[l]iability for 'bodily injury' or 'property damage' arising out of or in any way attributable to the claimed negligence or statutory violation of the Additional Insured, other than vicarious liability which is imputed to the Additional Insured solely by virtue of the acts or omissions of the Named Insured."

¶ 10 AP and CBRE tendered their defense in the underlying Jarol suit to Pekin. Pekin refused the tender and filed a declaratory judgment action seeking a declaration that CBRE was not an additional insured under the policy, and that Pekin had no duty to defend or indemnify AP and CBRE. AP and CBRE filed their answers, and filed a counterclaim against Pekin and

Snowpusher. AP and CBRE also filed separate third-party complaints seeking contribution from Snowpusher in an amount commensurate with its fault. In their complaints, AP and CBRE alleged in part that Snowpusher did not adequately shovel or salt the walkways at Bannockburn Green, failed to supervise employees performing the snow and ice clearing services, failed to inspect and maintain the property, and failed to warn of or remedy the dangerous conditions.

¶ 11 Pekin filed a motion for partial summary judgment on its argument that CBRE was not an additional insured under its policy. Meanwhile, the parties settled the underlying Jarol suit. Pekin, however, did not pay on behalf of AP or CBRE, so they filed an amended counterclaim seeking a declaration that Pekin had a duty to defend and indemnify both AP and CBRE in the underlying suit. After hearing argument on the cross-motions for partial summary judgment, the trial court denied Pekin's motion finding that CBRE qualified as an additional insured because it was "explicitly defined as an entity (the 'owner's agent'); CBRE itself signed [the Service Contract], albeit on behalf of AP; CBRE logos are displayed prominently on almost every page; [the Service Contract] describes Snowpusher as 'a service partner of CBRE' and "doing business with CBRE.'" The trial court also found that Pekin had a duty to defend AP and CBRE under the additional insured endorsement of the policy because "it is entirely plausible that the court in [the underlying] case finds Snowpusher solely responsible and thus that AP and CBRE are vicariously liable. This scenario need only be possible to trigger Pekin's duty to defend, and the court finds that it is."

¶ 12 Pekin filed a motion for a Rule 304(a) finding, which AP and CBRE opposed. Instead, AP and CBRE moved for entry of a money judgment seeking $56,439.14 in defense costs and $60,000 in indemnity, plus interest. The trial court granted Pekin's motion and stayed the remaining portion of the proceedings before it, subject to resolution of this appeal.

¶ 13 ANALYSIS

¶ 14 The trial court granted partial summary judgment in favor of AP and CBRE. Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmovant, show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). We review the trial court's grant of summary judgment *de novo*. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 400 (2010).

¶ 15 Pekin first challenges the trial court's finding that CBRE qualifies as an additional insured under its policy issued to Snowpusher. "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment." *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). In construing an insurance policy, a court must ascertain and give effect to the parties' intent as expressed by the plain terms of the policy. *Schultz*, 237 Ill. 2d at 400. If these terms "are clear and unambiguous, they must be enforced as written unless doing so would violate public policy." *Id*.

¶ 16 The Pekin policy endorsement here defines "additional insured" as "any person or organization for whom you are performing operations, when you and such person or organization have agreed in a written contract effective during the policy period *** that you must add that person or organization as an additional insured on a policy of liability insurance." This court considered a nearly identical provision in *Westfield Insurance Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730 (2011). The court found that the policy unambiguously limits the insurer's obligations to its insured, and those parties within whom the insured "directly contracts in writing for additional coverage." *Id*. at 735. It reasoned that "[b]y repeatedly using the term

'such' instead of 'any,' the provision necessarily requires that, in order to qualify as an additional insured, an entity must enter into a direct written agreement with [the insured] listing them as an additional insured." *Id*. at 734.

¶ 17 We acknowledge, as AP and CBRE argue in their brief, that although CBRE is listed in the service contract with Snowpusher as AP's agent, there are numerous references throughout the contract to Snowpusher's obligations toward both AP and CBRE. As the trial court noted, "CBRE logos are displayed prominently on almost every page; [the Service Contract] describes Snowpusher as 'a service partner of CBRE' and 'doing business with CBRE.'" Also, the service contract requires Snowpusher to list AP and CBRE as additional insureds. However, we disagree with the trial court that this evidence satisfies the requirements for coverage under the additional insured endorsement of the Pekin policy.

¶ 18 The first sentence of the service contract explicitly states that the contract "is entered into *** by and between" Snowpusher and AP only. Although Jeff Tigchelaar, CBRE's representative, signed the service contract, no one disputes that he signed as the agent of AP. Generally, "an agent of a disclosed principal is not individually or personally bound by the terms of the contract which he executes on behalf of the principal, where the agency relationship is known to the other party at the time of contracting ***." *Yellow Book Sales & Distribution Co. v. Feldman*, 2012 IL App (1st) 120069, ¶ 38. "Where an agent signs a contract for a disclosed principal, the agent is not a party to the contract." *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 666-67 (2010). The plain terms of the additional insured provision require an entity to enter into a direct written agreement with the insured listing them as an additional insured. See *Westfield*, 407 Ill. App. 3d at 734. Since CBRE signed as an agent of AP, AP is the only party to the written contract with Snowpusher and the only party covered

by the additional insured endorsement of Snowpusher's Pekin policy. See *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 24 (finding that an additional insured provision containing the same language used in the Pekin policy required the insured to have a written agreement with a party seeking coverage as an additional insured).

¶ 19 We recognize that the cases AP and CBRE cite to support their position that CBRE is an additional insured, *First Mercury Insurance Co. v. Shawmut Woodworking & Supply, Inc.*, 48 F. Supp. 3d 158 (D.Conn 2013), and *Pro Con, Inc. v. Interstate Fire &Casualty Co.*, 794 F.Supp. 2d 242 (D.Me. 2011), interpreted similar provisions more broadly. In *First Mercury*, the court determined that the written agreement to include a party as an additional insured "could be memorialized in separate contracts without requiring a direct contractual relationship between the two parties." *First Mercury*, 48 F.Supp. 3d at 166. Similarly, in *Pro Con, Inc*. the court found that the provision only required the parties to "contract in *a* writing" to add an entity as an insured, and no direct written contract with the entity was necessary. *Pro Con, Inc.*, 794 F.Supp. 2d at 252. However, *First Mercury* and *Pro Con, Inc.* are federal cases from other jurisdictions and as such, this court is not bound by their decisions. *Travelers Insurance Co. of Illinois v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 302-303 (2001). Instead, we follow *Westfield* and *Centex Homes*, both first district cases, and reverse the trial court's judgment finding that CBRE is an additional insured under the Pekin policy.

¶ 20 Pekin also challenges the trial court's determination that it had a duty to defend AP as an additional insured in the underlying Jarol suit. The clear terms of Pekin's policy limit coverage to an additional insured's vicarious liability imputed "solely by virtue of the acts or omissions of [Snowpusher]," and explicitly preclude coverage for damages "in any way attributable to the

claimed negligence or statutory violation of the Additional Insured." Pekin argues that the underlying complaint makes no allegations of vicarious liability on the part of AP.

¶ 21 To determine whether an insurer has a duty to defend, a court examines the allegations in the underlying complaints. "If the underlying complaints allege facts within or potentially within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent." (Emphasis omitted.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). An insurer may not refuse to defend its insured in an action "unless it is clear from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Northbrook Property & Casualty Co., v. Transportation Joint Agreement*, 194 Ill. 2d 96, 98 (2000). Where the underlying complaints allege multiple theories of recovery, the insurer has a duty to defend even if only one of those theories falls within potential coverage of the policy. *Wilkin*, 144 Ill. 2d at 73. An insurer may refuse to defend its insured "only if the allegations of the underlying complaint preclude any possibility of coverage." *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 359-60 (2003). Any doubt regarding an insurer's duty to defend will be resolved in favor of the insured. *United Services Automobile Ass'n v. Dare*, 357 Ill. App. 3d 955, 963 (2005).

¶ 22 *Pekin Insurance Co. v. Pulte Home Corp.*, 404 Ill. App 3d 336 (2010), is instructive. In *Pulte*, the general contractor, Pulte Home Corporation (Pulte) hired Jim Kunde Construction, Inc. (Kunde) as a subcontractor on a sewer project for a home under construction. Kenneth Kaiser, an employee of Commonwealth Edison/Exelon, fell into an unguarded sewer manhole on the project site, sustaining severe injuries. *Id.* at 337. Kaiser filed a complaint, naming both Pulte and Kunde as defendants. In the negligence count, Kaiser alleged that Pulte and Kunde "individually

and through their agents, servants and employees" were "guilty of one or more of the following careless and negligent acts and/or omissions:" failure to reasonably inspect the premises or exercise ordinary care in inspecting the premises, improper maintenance of the premises, failure to warn of dangerous conditions, failure to provide a safe place to work, failure to barricade or cover the sewer opening, allowing workers around the uncovered sewer opening, and permitting the sewer opening to be uncovered. The complaint further alleged that "as a direct and proximate result of one or more of the aforesaid careless and negligent acts and/or omissions of the Defendants," Kaiser was injured. *Id*. at 337-38. Pulte filed a counterclaim against Kunde for contribution. *Id*. at 338.

¶ 23 Pulte also tendered its defense in the Kaiser suit to Pekin, which had issued a policy to Kunde. The Pekin policy contained an additional insured endorsement, and Pulte was named as an additional insured pursuant to that endorsement. The endorsement provided that Pulte "is an additional insured only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence ***." *Id*. Pekin denied the tendered defense, claiming that the additional insured endorsement does not cover Pulte's own negligence. *Id*. Pekin further argued that the underlying complaint does not allege that Kunde's actions are the sole basis for Pulte's liability. *Id*. at 342. The trial court found Pekin had a duty to defend Pulte, and Pekin appealed.

¶ 24 This court agreed with Pekin that "pursuant to the allegations in the underlying complaint, Pulte might be found independently liable to Kaiser." *Id*. However, the court also looked beyond the allegations of the underlying complaint, to other pleadings and the contract between Pulte and Kunde, finding it proper as long as doing so does not determine a critical issue in the underlying complaint. *Id*. at 340-41, citing *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446,

462 (2010). The court found that the allegations in the underlying complaint "do not preclude the possibility that Pulte could be found liable solely as a result of the acts or omissions of Kunde." *Id*. at 342. In its answer to Pulte's counterclaim, Kunde admitted that Pulte contracted with Kunde to perform sewer work, and the underlying litigation involves Kunde's portion of the project. Also, Kunde's employees were present at the work site when the accident occurred. Therefore, the possibility existed that Pulte could be found vicariously liable solely for Kunde's actions. *Id*. at 342. The court affirmed the trial court's finding that Pekin had a duty to defend Pulte pursuant to the additional insured endorsement of its policy to Kunde. *Id*. at 344. See also *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735 (citing *Pulte* and finding that allegations in a third-party complaint and a subcontract agreement, considered along with the allegations in the underlying complaint, raised the possibility that the additional insured may be vicariously liable for the insured's actions).

¶ 25 In the underlying complaint here, Jarol claimed she was injured when she slipped on an unnatural accumulation of ice that formed "where the paver walkway met a covered cement walkway" on the property. Jarol alleged negligence against AP, CBRE, and Snowpusher, "by its agents and employees." The complaint alleged negligence on the part of AP and CBRE, but it also alleged one count of negligence against Snowpusher only: that Snowpusher "Fail[ed] to properly clear the ice and snow from the paver walkway." The complaint alleged that Snowpusher entered an agreement to provide snow removal services on AP's property, and further alleged that AP allowed its agents or employees "to pile snow adjacent to the paver block walkway surface." Although the complaint did not specifically allege vicarious liability on the part of AP, the possibility exists that AP could be found vicariously liable solely on the basis of Snowpusher's actions or omissions. See *Cochran v. George Sollitt Construction Co.*, 358 Ill.

App. 3d 865, 874 (2005) (noting that a general contractor who "retain[s] control over the operative details of its subcontractor's work[] may become vicariously liable for the subcontractor's negligence"). Since these allegations bring the underlying case potentially within the policy's coverage, we find that Pekin has a duty to defend AP in the underlying action pursuant to the additional insured provision of the policy. *Northbrook Property & Casualty Co.*, 194 Ill. 2d at 98.

¶ 26 The two cases on which Pekin primarily relies, *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (2008), and *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055 (2010), are distinguishable. In neither case did the underlying complaint allege negligence solely based on the acts or omissions of the insured, as did the Jarol complaint. Furthermore, in the *UPS* case Pekin's insured was not named as a defendant in the underlying complaint and the complaint alleged negligence against "Defendants, and each of them." *UPS*, 381 Ill. App. 3d at 104. The complaint made no allegations of vicarious liability. The court in *UPS* concluded that "[t]here is nothing in the underlying complaint" to support an allegation that the insured's acts or omissions were the sole cause of the accident. *Id*. In *Roszak*, the underlying complaint alleged only negligence on the part of Roszak, the additional insured, and the complaint nowhere alleged an agency relationship between Roszak and the insured. *Roszak*, 402 Ill. App. 3d at 1063-64. We find *UPS* and *Roszak* inapplicable here.

¶ 27 In its reply brief, Pekin devotes a portion of its argument to point out that the facts alleged in the complaint do not support a finding of an agency relationship between AP and Snowpusher, or vicarious liability on the part of AP under the law. We decline to address this argument, as "it may tend to determine an issue crucial to the determination of the underlying suit." *Pekin Insurance Co. v. CSR Roofing Contractors, Inc.*, 2015 IL App (1st) 142473, ¶ 55.

The question here is not whether AP is vicariously liable for Snowpusher's acts or omissions, but whether Pekin has a duty to defend AP because the potential exists that AP could be found vicariously liable for Jarol's injuries. *Id*. We answer that question in the affirmative.

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed in part and reversed in part, and the cause remanded for further proceedings.

¶ 29 Affirmed in part and reversed in part; cause remanded.