2018 IL App (1st) 172868-U

SIXTH DIVISION
FEBRUARY 23, 2018

No. 1-17-2868

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARCH INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 16 CH 09063
BARTON MALOW COMPANY,	)	
	)	
Defendant-Appellant	)	
	)	Honorable
(Corey Uden and Sonya Uden,	)	Kathleen M. Pantle,
Defendants).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying the defendant-appellant's motion to stay the plaintiff-appellee's declaratory judgment action.

¶ 2 The defendant-appellant Barton Malow Company (Barton) appeals from an order of the circuit court of Cook County denying Barton's motion to stay an insurance coverage declaratory

judgment action brought by the plaintiff-appellee, Arch Insurance Company (Arch), pending resolution of the underlying personal injury action. For the following reasons, we affirm the circuit court's denial of Barton's motion to stay.

¶ 3 BACKGROUND

¶ 4 Arch initiated this declaratory judgment action to determine whether it must defend and indemnify Barton as an "additional insured" in an underlying personal injury lawsuit brought by an employee of Arch's named insured, Core Construction (Core). The underlying lawsuit arose from a construction project to renovate a building on the campus of the University of Illinois in Urbana (University). The renovation was to include installation of a new air conditioning system in the building.

¶ 5 The University hired Barton as the "construction manager" of the project. Barton performed no construction work, but was responsible "to obtain bids and made recommendations to the University in selecting the contractors to perform the work on the project." The University selected Core, Arch's named insured, to be the "General Trades Contractor" on the project. Another entity, King-Lar Company (King-Lar) was selected to be the "Ventilation Contractor" on the project.

¶ 6 The University entered into separate contracts with each contractor on the project, including Core and King-Lar. Each of the University's contracts incorporated "Contract Documents," including "General Conditions," in which the University required each contractor to obtain comprehensive general liability (CGL) insurance coverage. The "General Conditions" describe who must be named as an "additional insured" under this insurance:

> "With respect to the required [CGL] insurance, the Certificate of Insurance should include Additional Insured wording that conveys

> the following: 'The Board of Trustees of the University of Illinois, Construction Manager (if applicable), Contractor with assigned subcontractors(s) (if applicable), and additional parties as designated by Owner (if any) shall be named as an additional insured on a primary and non-contributory basis for liability incurred arising from the activities of Contractor or its subconsultants, subcontractors, officers, agents, representatives, or employees performing work on behalf of Contractor.' "

Elsewhere, the "General Conditions" provided that "Subcontractors must comply with the same underlying insurance coverage requirements as Contractor."

¶ 7 Core obtained CGL coverage in a policy issued from Arch (the policy). The policy states that Arch has the "duty to defend the insured [Core] against any 'suit' seeking" damages for "bodily injury." With respect to who is an "additional insured," the policy includes an endorsement which states that:

> "Who Is an Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for 'bodily injury' . . . caused, in whole or in part, by [Core's] acts or omissions or the acts or omissions of those acting on [Core's] behalf."

In turn, the referenced "Schedule" states that the "Additional Insured Person(s) or Organizations(s)" are "All parties where agreed to by a written contract."

¶ 8 King-Lar's scope of work on the project included installation of air handlers, which, in turn, required installation of concrete pads. King-Lar hired Core to install the concrete pads.

That agreement is evidenced by a single-page document from King-Lar to Core entitled "Subcontract Number: 4055RK" (the subcontract). Under the heading "Description," the subcontract states that Core shall: "Furnish labor, material and equipment to perform the concrete work for the air handling unit pads" and "perform the 1st Floor concrete work per plans, specifications, addendums and [Core's] quote." The subcontract contains no language referencing insurance obligations.

¶ 9 The underlying personal injury lawsuit arose from injuries to Corey Uden (Corey), Core's employee, during his work at the building. Corey and his wife, Sonya Uden, filed a personal injury complaint (the *Uden* complaint) naming two defendants: Barton and King-Lar.

¶ 10 The *Uden* complaint alleged that Corey was injured during work to install concrete pads on the roof of the building. The complaint alleged that King-Lar cut holes in the roof "as part of the installation of duct work for the air conditioning units" and "placed unsecured particle board" over the openings in the roof. Corey was injured when he fell through one of the unsecured holes. The complaint pleaded a negligence count against King-Lar for, *inter alia*, failing to properly cover and secure the hole it created in the roof of the building.

¶ 11 The *Uden* complaint also contained a negligence count against Barton, alleging that Barton was the "general contractor" and "retained some control over the safety of the work being done at the building." The complaint alleged that Barton failed to properly inspect King-Lar's work, failed to warn of the opening, and failed to stop work "until the opening could be properly guarded and secured." The complaint also pleaded two counts of loss of consortium against Barton and King-Lar, on behalf of Sonya Uden. The *Uden* complaint contained no allegations against Core.

¶ 12 On August 30, 2016, Barton filed a third-party complaint for contribution against Core. Barton pleaded that Corey's injuries were caused by Core's negligent acts or omissions, including failing to maintain the building in a reasonably safe condition and failing to properly inspect King-Lar's work. Barton pleaded that if it is found liable in the underlying suit, it is entitled to contribution from Core in an amount commensurate with Core's relative degree of fault.

¶ 13 King-Lar also filed a third-party complaint seeking contribution against Core due to Core's alleged negligence. In addition, King-Lar pleaded two affirmative defenses: a "comparative fault" defense that Corey's negligence contributed to his injuries, and an "assumption of risk" defense that Corey "appreciated the danger of working from a height, in the proximity of holes."

¶ 14 Barton tendered its defense of the *Uden* lawsuit to Arch. Arch agreed to defend Barton, subject to a strict reservation of Arch's rights to deny coverage to Barton.

¶ 15 On July 11, 2016, Arch filed a complaint in the circuit court of Cook County for a declaratory judgment against Barton, Corey Uden, and Sonya Uden. Arch sought declarations that it had no duty to defend or indemnify Barton, because Barton was not an "additional insured" under Arch's policy to Core. Arch alleged that when Corey was injured, Core was performing as King-Lar's subcontractor. Arch pleaded that Barton does not qualify as an additional insured under the policy "because the King-Lar/Core subcontract did not require Core Construction to name Barton Malow as an additional insured." Arch further pleaded that Barton was not an additional insured because the *Uden* complaint did not allege that Barton's liability was caused by Core's acts or omissions.

¶ 16 On June 14, 2017, Barton moved to stay the declaratory judgment action, pursuant to the "*Peppers* doctrine" derived from *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976). Barton urged that resolution of Arch's declaratory judgment action—including the question of whether Barton is an additional insured—would require the trial court to decide factual issues that should be determined in the underlying *Uden* personal injury action. Specifically, Barton claimed that both actions involved whether Corey's "injuries were caused, in whole or in part, by Core's acts or omissions," as well as determinations regarding the parties' contractual obligations. Barton contended that a stay of the declaratory judgment action was warranted because it "could be bound in the Underlying Suit if this Court finds that Mr. Uden's injuries were not the result of Core's negligence."

¶ 17 On October 26, 2017, the trial court denied the motion to stay, rejecting Barton's claim that the declaratory judgment action would require the determination of facts at issue in the *Uden* lawsuit. The trial court recognized that the duty to defend is determined by comparing the allegations in the underlying lawsuit to the terms of the policy. The court reasoned that, even if it were to consider the allegations of the third-party complaints and affirmative defenses in the underlying action, "the Court would not be determining whether Corey's injuries were, in fact, caused in whole or in part by Core Construction's alleged negligence" but "would merely be examining the allegations and comparing them against the Policy language." The trial court found no reason why its "examination of the various contracts *** to determine whether *** Core Construction agreed to add Barton Malow as an additional insured would have any effect on the underlying *Uden* lawsuit." The court concluded that Barton failed to show "that the *Peppers* doctrine has been implicated" so as to justify a stay.

¶ 18 On November 22, 2017, Barton filed a notice of interlocutory appeal, citing Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) as the basis for appellate jurisdiction.

¶ 19 ANALYSIS

¶ 20 We first note that, because a stay is injunctive in nature, we have jurisdiction to review the denial of a motion for a stay under Rule 307(a)(1) (eff. Feb. 26, 2010), which allows appeals from interlocutory orders "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 39 ("the denial of a stay of trial court proceedings is treated as a denial of a request for a preliminary injunction and is appealable as a matter of right under Illinois Supreme Court Rule 307(a)(1)").

¶ 21 Barton argues that a stay of the declaratory judgment action is warranted under the *Peppers* doctrine, in order to allow common issues of fact to be decided first in the underlying *Uden* suit. Barton asserts that this action involves "two issues of ultimate fact in common with the underlying suit," and that adverse rulings on these issues "could estop Barton from pursuing its contribution claim" against Core in the underlying suit.

¶ 22 First, because Arch's policy identifies "additional insured" parties as those "agreed to by a written contract," Barton states that the trial court must decide "which contract applies" to determine if Barton is an additional insured. That is, while Barton claims that it is an additional insured under the Core-University contract, Arch relies on the subcontract (which does not mention any insurance obligations) to argue that Barton is not an additional insured. In turn, Barton claims the determination of "which contract governs Core's obligations with respect to the project" impacts the underlying personal injury case, to the extent that the Core-University

contract contains "safety requirements" that Core promised to adhere to. Barton asserts that, if the declaratory judgment action determines that the subcontract governs, Core will argue in the underlying suit that "Barton is estopped from arguing that Core's contract with the University evidences safety duties that have been breached." That is, Barton suggests that the trial court's determination of the "additional insured" question in this case could preclude Barton from relying on Core's contractual safety obligations in the underlying personal injury suit.

¶ 23 As a second "issue of ultimate fact" common to both actions, Barton claims that the declaratory judgment action will decide whether Core's actions caused Corey's injuries, which should be resolved in the underlying action. Barton relies on the policy language providing that coverage for an additional insured includes bodily injury "caused, in whole or in part, by [Core's] acts or omissions," or acts or omissions of those acting on Core's behalf.

¶ 24 Barton asserts that, in denying its motion to stay, the trial court erroneously found "no allegations of fault on Core's part" in the underlying action because it considered only the original *Uden* complaint, which did not allege negligent conduct by Core. Barton emphasizes that King-Lar and Barton's third-party complaints alleged negligence by Core, and that King-Lar's affirmative defenses alleged contributory negligence by Corey, Core's employee. Barton claims "the trial court erred by not using those allegations in determining that this case and the Underlying Suit both involve whether Core caused Uden's injuries." Barton asserts that, should the court in this declaratory judgment action find that Corey's injuries were not caused by Core, Core will "argue in the underlying suit that Barton is estopped" from seeking contribution from Core. Barton avers that, because findings on these two issues could estop Barton in the underlying suit, the trial court abused its discretion when it refused to grant a stay under *Peppers*.

¶ 25 Arch responds that the *Peppers* doctrine is inapplicable, because the declaratory judgment action will not decide issues of "ultimate fact" in common with the underlying personal injury lawsuit. Arch argues that, even if the trial court determines that the subcontract governs the question of whether Barton is an additional insured, that finding would not "vitiate the contract between [Core] and the [University] or decide a crucial issue of liability" in the underlying case. Arch further asserts that, in deciding whether Arch has a duty to defend, the trial court will *not* be compelled to decide whether Corey's injuries were, in fact, caused by Core's negligence.

¶ 26 As the movant, Barton was required to demonstrate that a stay was warranted. "A party seeking a stay bears the burden of proving adequate justification for the stay. [Citations.] The party seeking the stay must justify it by clear and convincing circumstances outweighing its potential harm to the opposing party. [Citation.]" *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶17.

¶ 27 We apply a deferential standard of review. "Our courts have consistently found that '[t]he decision to grant or deny a motion to stay will not be overturned unless the court abused its discretion.'" *Sentry Insurance v. Continental Casualty Co.*, 2017 IL App 161785, ¶ 27. The trial court's decision "will be deemed an abuse of discretion only if the decision is unreasonable and arbitrary or where no reasonable person would take the view adopted by the circuit court." *Id.* ¶ 32.

¶ 28 Before considering Barton's specific arguments for a stay of the declaratory judgment action, we note the principles that will govern the trial court's determination of whether Arch owed a duty to defend and indemnify Barton as an additional insured. Our court recently recognized:

> "The scope of an insurer's duty to defend an additional insured under a policy issued to a named insured is a reoccuring issue in construction coverage cases. General principles of insurance coverage apply to this scenario. The insurer's duty to defend is broader than its duty to indemnify. [Citation.] Generally, when determining whether an insurer has a duty to defend, a court 'must compare the allegations in the underlying complaint to the policy language.' [Citations.]" *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 34.

" 'If the facts alleged in the underlying complaint fall within, or potentially within, the policy's coverage, the insurer's duty to defend arises.' [Citation.] However, if it is clear from the face of the complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy's coverage, an insurer may properly refuse to defend. [Citations.]" *Sentry Insurance*, 2017 IL App (1st) 161785, ¶ 36. Where there is no duty to defend, there is no duty to indemnify. *Id.* ¶ 39.

¶ 29 In addition to the allegations of the original complaint, the trial court may also (subject to certain exceptions) consider a third-party complaint in determining whether the allegations of the underlying action trigger an insurer's duty to defend. *Pekin Insurance Co. v. Johnson-Downs Construction, Inc.*, 2017 IL App (3d) 160601, ¶¶ 16-17 (putative additional insured may not rely on its own third-party complaint, filed after insurer's declaratory action, to bolster its claim for coverage).

¶ 30 Further, we recognize that since the Workers' Compensation Act (820 ILCS 305/5(a) (West 2016)) gives tort immunity to the injured worker's employer, "the direct employer, who is

generally the named insured, is not typically a named defendant in the underlying case." *Pekin Insurance Co.*, 2017 IL App (1st) 153601, ¶ 36. Thus, "the allegation of the underlying complaint must be read with the understanding that the employer may be the negligent actor even where the complaint does not include allegations against that employer. [Citation.]" *Id.*

¶ 31 Under the *Peppers* doctrine, set forth by our supreme court in *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187 (1976), an insurer's declaratory judgment action may be stayed, in order to allow common factual issues to be resolved in the underlying personal injury action. In *Peppers*, an insurer contended that it had no duty to defend an underlying action that alleged intentional, negligent, and willful and wanton conduct by its insured. *Id.* at 193. The relevant policy excluded coverage for intentionally inflicted injuries. *Id.* at 191. The trial court in the declaratory judgment action determined that the insured's actions were intentional, precluding coverage under the policy. *Id.* Our supreme court reasoned that, under the principle of collateral estoppel, the finding that the injury was intentional "could possibly establish the allegations of the assault count in the [underlying] complaint and might preclude [the underlying plaintiff's] right to recover" under other theories. *Id.* at 197. Our supreme court concluded that it was "not proper" for the trial court in the declaratory judgment action to make a finding of an intentional injury, because "[t]his issue was one of the ultimate facts upon which recovery is predicated" in the underlying action. *Id.*

¶ 32 Thus, under the *Peppers* doctrine, "it is generally inappropriate for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties to the underlying litigation. [Citations.] This proscription specifically precludes determination of any ultimate facts upon which liability or recovery might be predicated in the underlying case.

[Citation.] Thus it is an abuse of discretion for a trial court in a declaratory judgment action to make such a determination." *Sentry Insurance*, 2017 IL App (1st) 161785, ¶ 43.

¶ 33 We now consider whether the *Peppers* doctrine is implicated by either of the two "issues of fact" claimed by Barton as having potentially preclusive effect in the underlying *Uden* action. First, we reject Barton's claim that the determination of which contract governs whether Barton is an additional insured is a "determination on an issue of ultimate fact critical to the underlying case," subject to the *Peppers* doctrine. *Pekin Insurance*, 2017 IL App (3d) 160601, ¶ 11. The construction of contracts, including insurance policies, presents questions of *law* for the trial court, not factual determinations. See *Intersport, Inc. v. National Collegiate Athletic Ass'n*, 381 Ill. App. 3d 312, 318 (2008) ("The construction of a contract is an issue of law to be determined by the court. [Citation.]"); *United Stationers Supply Co. v. Zurich American Insurance Co.*, 386 Ill. App. 3d 88, 99 (2008) ("The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court that are appropriate subjects for disposition by summary judgment. [Citation.]"). To the extent that the trial court in the declaratory judgment action will interpret the policy, the subcontract, and the Core-University contract to determine whether Barton qualifies as Arch's additional insured, those interpretations are not issues of ultimate fact subject to the *Peppers* doctrine.

¶ 34 Moreover, even if the question of whether Barton is an "additional insured" was one of ultimate fact, we are not persuaded that it would have the preclusive effect that Barton suggests. Barton contends that a determination that the subcontract governs the "additional insured" question will estop Barton, in the underlying suit, from relying on Core's safety obligations in the Core-University contract. Specifically, Barton suggests that the determination that the subcontract controls in this case would be used by Core "to argue that Barton is estopped from

arguing that Core's contract with the University created a duty to cover any holes on the Project."

¶ 35 However, collateral estoppel will apply only to an *identical* issue decided in a prior action. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390 (2001) (one of the "minimum threshold requirements for the application of collateral estoppel" is that "the issue decided in the prior adjudication is *identical* with the one presented in the suit in question." (Emphasis in original.)) Further, "[a]pplication of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment." *Id.* at 390-91.

¶ 36 Barton has not identified "identical" issues implicating collateral estoppel. The question of which contract governs the "additional insured" determination in this case is clearly distinct from the determination of Core's safety obligations, contractual or otherwise, in the underlying personal injury lawsuit. Even if this declaratory judgment action determines that the subcontract governs whether Barton is an "additional insured," Barton has not explained why that determination would negate, or preclude reference to, the safety provisions of the Core-University contract in the underlying *Uden* lawsuit. Barton's claim that a stay is necessary to prevent collateral estoppel on that issue is, at best, speculative. Thus, with respect to the first asserted "ultimate fact," Barton does not meet its burden to justify a stay under the *Peppers* doctrine.

¶ 37 Barton's second claimed issue of "ultimate fact" is also unconvincing. Barton asserts that, to decide the duty to defend issue in this declaratory judgment action, the trial court will be forced to decide whether conduct by Core (or others on Core's behalf) caused the personal injuries alleged in the underlying action. Barton suggests that a finding in this action that Core

did not cause the injuries could be used by Core in the underlying lawsuit to argue "that Barton is estopped from arguing that Core's actions contributed to [Corey's] injuries."

¶ 38 Barton's argument is plainly incorrect, as it fails to distinguish between the issue of whether Core is *alleged* to have caused Corey's injuries, as opposed to whether Core, *in fact*, caused the injuries. To determine if Arch has a duty to defend Barton as an additional insured, the trial court will compare the allegations in the underlying action to the relevant policy language. That is, the trial court will determine if there are *allegations* that implicate the policy's "additional insured" coverage for bodily injury "caused, in whole or in part, by [Core's] acts or omissions or the acts or omissions of those acting on [Core's] behalf." This does not require that the court make a factual finding regarding the cause of the alleged injuries.

¶ 39 Our court emphasized this distinction in our recent decision in *Pekin Insurance Co. v. Johnson-Downs Construction*, 2017 IL App 3d 160601. Similar to this case, the insurer (Pekin) sought a declaratory judgment that it did not owe a duty to defend a construction contractor (Johnson-Downs) as an additional insured in an underlying personal injury action, in which Johnson-Downs was sued by an employee of Pekin's named insured. *Id.* ¶ 1. Pekin claimed that it owed no duty to defend Johnson-Downs, because its "policy states that an additional insured is only covered for vicarious liability claims and the underlying complaint lacks such allegations." *Id.* ¶ 13. Johnson-Downs moved to stay the declaratory judgment action, claiming that it presented an "issue of ultimate fact critical to the underlying case." *Id.* The trial court granted the stay, but our court reversed, explaining:

> "[T]he trial court can make a determination of whether the complaint contains any allegations of vicarious liability that Pekin has a duty to defend by comparing the complaint to the language in

> the insurance policy. This can be decided without examining the extent of Johnson-Downs' supervisory control over [the named insured]'s alleged negligent acts and, ultimately, determining whether Johnson-Downs is in fact vicariously liable. Thus, we find that the trial court abused its discretion in granting the motion to stay ***." *Id.* ¶ 13.

The same logic applies here. The trial court may determine whether the underlying case alleges bodily injury caused by Core's acts or omissions, and any corresponding duty to defend by Arch, without deciding whether any injuries, in fact, actually resulted from Core's acts or omissions.

¶ 40 We note that this conclusion is unaffected by Barton's claim that, in denying the motion to stay, the trial court failed to adequately consider the allegations against Core in the third-party complaints, as well as King-Lar's affirmative defenses. Regardless of whether the trial court considered these additional pleadings, it would still merely be deciding whether there were *allegations* that triggered a duty to defend, without making a factual determination of causation. As the trial court correctly recognized, even if it considered these other pleadings, it "would not be determining whether Corey's injuries were, in fact, caused in whole or in part by Core Construction's alleged negligence" but "would merely be examining the allegations and comparing them against the Policy language." Thus, we reject Barton's suggestion that the declaratory judgment action will decide the "ultimate fact" of causation. As Barton does not identify any common issue of fact implicating the *Peppers* doctrine, the trial court did not abuse its discretion in denying the motion to stay.

¶ 41 For the foregoing reasons, we affirm the order of the circuit court of Cook County, denying the motion to stay.

¶ 42 Affirmed.