2011 IL App (2d) 101000-U
No. 2-10-1000
Order filed October 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEKIN INSURANCE COMPANY, Plaintiff-Appellee, v. PHARMASYN, INC., an Illinois corporation, FRANK MOSELEY, JOHN PIERPONT III, and GLEN NORLEY, Defendants-Appellants.	)	Appeal from the Circuit Court of Lake County. No. 09-MR-1539 Honorable Margaret J. Mullen, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly granted the insurance company's Motion for Summary Judgment because the language of the pollution exclusion in the Commercial General Liability Insurance policy purchased by the defendants-appellants operated to exclude the accidental dispersal of toxic fumes "at" or "from" the premises where they conducted their business.

¶ 1 Defendants, Pharmasyn, Inc., Frank Moseley, John Pierpont III and Glen Norley, appeal the trial court's September 2, 2010, order granting plaintiff's, Pekin Insurance Company's, motion for summary judgment, finding that defendants' insurance policy pollution exclusion applied and that Pekin had no duty to defend. Pharmsyn argues that the underlying complaint did not allege

"traditional environment pollution" and that Pekin had a duty to defend because "Pekin has failed to demonstrate that the policy's pollution exclusion precludes coverage for the underlying allegations." We affirm.

¶ 2 In the underlying case, Robert M. Fergus, Nathan T. Walker and Patricia W. Steward (plaintiffs) alleged in their second amended complaint that they were each occupants of a commercial building located at 1840 Industrial Drive, Libertyville. Pharmasyn, an Illinois corporation located at the same address, was engaged in the business of production of organic compounds. Plaintiffs alleged that they suffered "injury to their persons requiring them to expend money for medical care and treatment and resulting in their experiencing both physical and psychological pain and suffering." Count 1 of their second amended complaint alleged that they were injured when Pharmasyn negligently allowed "dangerous and toxic substances, including, but not limited to, isocyanate chemicals"[1] to be released "from open containers at the property, creating toxic fumes and seepage of hazardous material into the common areas, the environment, and into the premises occupied by the Plaintiffs." Count 2 alleged that defendants Moseley, Pierpont and Norley were employed by Pharmasyn and were guilty of negligence. Counts 3 and 4 alleged negligence on the part of the corporations, and their employees, that owned and operated and/or managed the property. The underlying plaintiffs further alleged that they first discovered that the negligent acts by the various defendants caused their injuries on July 7, 2008.

¶ 3 Pekin issued a Commercial General Liability Coverage policy to Pharmasyn with effective dates of November 8, 2007, to November 8, 2008. Pharmasyn's Business Description on the policy

[1]Methyl isocyanate was included by Congress in 42 U.S.C.A. § 7412 (b)(1) in the list of "hazardous air pollutants."

was "Chemical Distributors." The policy contained an exclusion for bodily injury or property damage caused by pollution as follows:

"This insurance does not apply to:

***

f. Pollution

(1) 'Bodily injury' or 'property damage' arising out of the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured.

***

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) If the pollutants are brought on or to the premises site or location in connection with such operations by such insured, contractor or subcontractor.

***

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

The policy contained definitions for the terms used as follows:

" 'Bodily injury' means bodily injury, sickness or disease sustained by a person, including death resulting form any of these at any time.

***

'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general or harmful conditions.

***

'Property damage' means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."

Pharmasyn tendered its defense to Pekin, which accepted subject to reservation because the claims against the Pharmsyn defendants were for bodily injury caused by pollution, a claim Pekin contended was excluded from coverage under the terms of the policy.

¶ 4 On July 19, 2010, Pekin filed its amended motion for summary judgment, pursuant to 2-1005(a) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1005(a) (West 2008)). Pekin argued that there was no genuine issue as to any material fact and, therefore, it was entitled to judgment as a matter of law. Acknowledging *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997), Pekin argued that the underlying complaint alleged bodily injury arising out of the release of a pollutant, specifically isocyanate, and that the release constituted "traditional environmental pollution" that triggered the exclusion.

¶ 5 On September 2, 2010, the trial court granted Pekin's motion for summary judgment, finding that defendants' insurance policy pollution exclusion applied and that Pekin had no duty to defend. The trial court's order read as follows:

"a) The underlying complaint allege[d] "traditional environmental pollution";

b) The underlying complaint allege[d] that the underlying Plaintiff and underlying Defendant shared premises;

c) The "into the environment" allegation [was] mere surplusage; and

d) The motion [was] decided on *Koloms*, 177 Ill. 2d 473, *Loop Paper*, 356 Ill. App. 3d 67, and *Kim*, 312 Ill. App. 3d 770."[2]

Pharmasyn timely appealed.

¶ 6 II. ANALYSIS

¶ 7 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). In an insurance dispute, in order to determine if an insurer must defend its insured, the trial court "looks to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy." *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). Under *Koloms*, this court's primary objective in construing the language of the policy is to "ascertain and give effect to the intentions of the parties as expressed in their

[2]*American States Insurance Co. v. Harvey Koloms*, 177 Ill. 2d 473 (1997); *Connecticut Specialty Insurance Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67 (2005); and *Moon Kim v. State Farm Fire and Casualty Co.*, 312 Ill. App. 3d 770 (2000).

agreement." *Id.* at 479. If the facts alleged in the complaint fall within, or potentially within, the language of the policy, then the duty to defend arises. *Id*. at 479. Contracts of insurance are subject to the same rules of construction as other types of contracts. *Fruit of the Loom, Inc. v. Travelers Indemnity Co.*, 284 Ill. App. 3d 485, 494 (1996). In construing a contract, the primary objective is to effectuate the intent of the parties which "may be ascertained from the circumstances surrounding the issuance of the policy, including the situation of the parties and the purpose for which the policy was obtained." *Fruit of the Loom*, 284 Ill. App. 3d at 494. We must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Koloms*, 177 Ill. 2d at 479. Additionally, "provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer." *Id*.

¶ 8 Summary judgment is a drastic remedy that should only be granted when the movant's right to relief is free from doubt. *Wood v. National Liability and Fire Insurance Co.*, 324 Ill. App. 3d 583, 585 (2001). Summary judgment is inappropriate where rational persons could draw different inferences from the facts, even if those facts are undisputed. *Id*. Our standard of review of a summary judgment ruling is *de novo*. *Crum v. Forster Managers Corp v. Resolution Trust Corp.*, 156 Ill. 2d 384, 390 (1993). This court may review the entire record and affirm on any ground called for by the record, regardless of whether the trial court relied on that ground. *Thomson Learning, Inc. v. Olympia Properties*, LLC, 365 Ill. App. 3d 621, 632-633 (2006).

¶ 9 In this case, Pharmasyn conducted its business of production of organic compounds at the same address as the underlying plaintiffs; however, the parties occupied separate suites at that address. The complaint alleged that the harmful fumes were negligently allowed to escape from open containers "at the property" into the "common areas, the environment, and into the premises"

occupied by the plaintiffs, allegedly harming plaintiffs. Even liberally construing the policy's coverage provisions in favor of the insured, we find that the complaint alleged facts that would not potentially bring it within the policy's coverage. We conclude that it is excluded.

¶ 10 Section f. (1)(a) in the policy excludes coverage for injuries resulting from the dispersion of a pollutant "[a]t or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to, any insured." Section f. (1)(d)(i) of the policy specifically states that the insurance does not apply to pollution at the premises "[i]f the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor ***." We do not find the policy language "at or from the premises" ambiguous, as Pharmasyn argued. The language of the exclusion is broad, covering both factual scenarios; either pollution "at" the location of the business or pollution leaking "from" the location of the business.

¶ 11 Our next step is to read the complaint in its entirety. See *Koloms*, 177 Ill. 2d at 479. The complaint alleged that the harmful fumes were allowed to escape from open containers "at the property" into the "common areas, the environment, and into the premises" occupied by the Plaintiffs. Pharmsyn argued that the two different locations, even though they are spaces within the same building at the same address, satisfied the requirement of being "outside" the premises and, therefore, the incident did not fall within the exclusion. In fact, the complaint mirrored the exclusionary language of the policy, and the contract itself clearly states that the release of hazardous material is not covered "at or from" the premises. In our view, the complaint alleging the release of the chemicals into the "common areas" and "premises occupied" by the defendants and the underlying plaintiffs does not take this event out of the exclusionary language of the policy. Even though we liberally construe the policy's coverage provisions in favor of the insured, we find that the complaint did not allege facts that would potentially bring it within the policy's coverage.

¶ 12 Pekin's memorandum of law in support of its amended motion for summary judgment relied on *Kim* and pointed out that Pharmasyn was operating in a "classic industrial setting, typical of traditional environmental pollution." On appeal, Pharmasyn argues that the underlying allegations in the complaint should not be excluded under the policy because they do not allege "traditional environmental pollution." Pharmasyn relies on *Koloms*, 177 Ill. 2d 473; *Loop Paper Recycling*, 356 Ill. App. 3d 67; and *Kim*,312 Ill. App. 3d 770. These cases turn on the definition of the term "traditional environmental pollution."

¶ 13 In *Koloms*, a furnace at an insured's property released carbon monoxide that allegedly caused tenants of the property to become ill after they inhaled the toxic fumes. The language of the pollution exclusion in the *Koloms* policy was virtually identical to the language in the policy involved in this case. *Koloms*, 177 Ill. 2d at 476-77. The supreme court concluded that the exclusion in the policy did not preclude coverage where the underlying complaint alleged damages caused by the release of toxic fumes that were confined to the insured's building. The supreme court found that the pollution exclusion applies only to those injuries caused by the type of "traditional environmental pollution" involving industrial, commercial or large scale pollution. Therefore, the supreme court held, after considering the facts alleged in the underlying complaints, that the insurer's duty to defend was triggered because the release of carbon monoxide inside a commercial building did not constitute "traditional environmental pollution." *Koloms*, 177 Ill. 2d at 494.

¶ 14 In *Loop Paper Recycling*, a fire set by vandals at the defendant's cardboard recycling facility burned for several days, sending clouds of smoke with highly toxic substances emitted from burning cardboard into the atmosphere. In that case, the underlying plaintiffs' complaint alleged that the fire produced clouds of smoke containing highly toxic substances that were released into the air

throughout the surrounding neighborhoods. The underlying complaint further alleged that the hazardous material (toxic smoke) was not confined to the recycling facility but, instead, spread to the surrounding neighborhoods. The court defined "traditional environmental pollution" as "hazardous material discharged into the atmosphere." The court enunciated the proposition that "for there to be traditional environmental pollution, triggering the absolute pollution exclusion, the pollutant must actually spill beyond the insured's premises and into the environment." *Loop Paper Recycling*, 356 Ill. App. 3d at 81-2. Therefore, the court found that "traditional environmental pollution" had occurred and the insurance policy's absolute pollution exclusion barred coverage.

¶ 15 In *Kim*, separate lawsuits were brought for breach of lease and for injunctive relief and damages, after a machine malfunction caused tetrachloroethane (perc) to leak onto the floor and into the soil below the building. The trial court ruled that the pollution exclusion applied to preclude coverage. Relying on *Koloms*, the appellate court affirmed, holding that the cleaning company's discharge of a hazardous material into the soil met the definition of traditional environmental pollution, "*i.e.*, hazardous material discharged into the land, atmosphere, or any watercourse or body of water." *Kim*, 312 Ill. App. 3d at 774. The appellate court found that the absolute pollution exclusion applied regardless of whether the perc was a waste product or whether it was legally and intentionally placed in the dry cleaning machine as part of the cleaning company's normal business activity. Also, the exclusion applied regardless of whether the cleaning company thought the policy would protect it from the type of activity at issue in that case. *Id.* at 776-77.

¶ 16 At oral argument, Pharmasyn contended that, if we uphold the grant of summary judgment, the insurance contract would then be an illusory agreement and the insurance policy would be nullified, because this type of tort would always fall within the exclusion and would never be covered. This argument ignores the more basic tenet of contract law; *i.e.*, that we must ascertain and

give effect to the intentions of the parties as expressed in their agreement. See *Koloms*, 177 Ill. 2d at 479. We believe that the arguments proferred by the parties both below and before this court constitute a red herring, and the trial court's ruling was correct, although the portion of the trial court's order that found that the " 'into the environment' allegation [was] mere surplusage" would have been more accurate had it related that " 'traditional pollution' was immaterial under the circumstances."

¶ 17 However, as we point out above, this court may review the entire record and affirm on any ground called for by the record, regardless of whether the trial court relied on that ground. *Thomson Learning,*, 365 Ill. App. 3d at632-633. Determinative here is that the type of insurance Pharmasyn purchased was general commercial; the nature of the risks were the usual risks involved in an industrial setting; and the overall purpose of the contract was to insure those risks. See *Koloms*, 177 Ill. 2d at 479. The policy in this case contained several exclusionary clauses, and the pollution exclusion was carefully worded regarding the "premises." Unlike the cases discussed, this case presents a factual scenario that is controlled not by the question of whether this dispersion of fumes constituted "traditional environmental pollution"; rather, the question in this case is whether the dispersion of pollutant fumes that caused injury to others at or from the premises was the type of accident specifically excluded by the insurance policy purchased by Pharmasyn.

¶ 18 Accordingly, for the reasons stated, we find that the trial court properly granted summary judgment to Pekin. We affirm the judgment of the circuit court of Lake County.

¶ 19 Affirmed.