2011 IL App (2d) 110302-U
No. 2-11-0302
Order filed December 23, 3011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CLARENDON NATIONAL INSURANCE COMPANY,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 09-L-1105
ALL MODES, INC.,	)	Honorable David M. Hall,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: The general rule is that the doctrine of estoppel cannot be used to create primary liability under an existing insurance policy (*i.e.*, to change the terms of the policy). An exception to the general rule exists where an insurer defends an action on behalf of the insured, with knowledge of facts that would provide a defense to coverage, but without reservation of a right to later deny coverage and seek reimbursement *in that action*. The exception does *not* apply here, where the insurer declined to reserve a right to reimbursement *in an earlier case* but *did* reserve a right to reimbursement in the instant claim. Moreover, even if the exception did apply, the insured here fails to set forth facts that, if true, establish the elements of estoppel.

¶ 1 Plaintiff, Clarendon National Insurance Company (Clarendon), moved for summary judgment against defendant, All Modes, Inc., in an insurance subrogation action. The trial court

granted summary judgment and denied the subsequent motion to reconsider. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 All Modes is an Illinois corporation that provides "transportation solutions" to its customers. It purchased a common carrier motor insurance policy (the Policy) from Clarendon. The Policy period was from February 1, 2005, to February 1, 2006. As required by federal law governing contracts between insurers and motor carriers of property, the Policy contained what is known as an MCS-90 endorsement. 49 C.F.R. § 387.7 (b)(3)(ii) (West 2005). The MCS-90 endorsement in the Policy required Clarendon to pay third parties for damages caused by All Modes even if the policy did not cover the vehicle at issue (hence satisfying the endorsement's purpose of protecting third parties). All Modes, in turn, was required to reimburse Clarendon for payments made pursuant to MCS-90 endorsement.

¶ 4 On January 16, 2006, an All Modes employee caused a rear-end collision while driving an All Modes truck (2006 claim). The All Modes truck hit a vehicle operated by third party Robert Keen, resulting in $115,000 in damages. Neither the particular employee nor the truck happened to be covered by the Policy. According to a subsequent affidavit by All Modes' president, the truck was a substitute vehicle the company used because its covered vehicle was temporarily out of service.

¶ 5 Third party Keen filed a lawsuit, and Clarendon was notified. In response, Clarendon issued written and verbal notice to All Modes that it would deny All Modes coverage and that it *reserved its right* to seek reimbursement from All Modes for eventual payment. Clarendon paid Keen the $115,000 in damages, pursuant to the MCS-90 endorsement in the Policy. Clarendon then filed the instant lawsuit seeking reimbursement from All Modes, based on the *truck's* lack of coverage (for

the instant suit, at least, abandoning its claim that the *driver* also was not covered). Clarendon argued that when an accident vehicle is not a "covered auto" under the Policy, the MCS-90 clause mandates the insurer to pay the injured third party, but expressly allows the insurer to recoup the payment from the insured. The trial court agreed and granted Clarendon's motion for summary judgment (ordering the reimbursement).

¶ 6 After the court granted summary judgment, All Modes discovered "new evidence:" a 2005 letter to All Modes from Clarendon's general agent. The letter acknowledged a 2005 claim filed by All Modes in relation to a minor traffic collision involving the *same* truck involved in the 2006 claim. In the 2005 case, Clarendon paid approximately $8,000 in damages to the third party, even though the All Modes truck involved in the accident was not covered under the Policy. Clarendon did not send notice to All Modes that it would be seeking reimbursement; in fact, as of yet, it has not sought reimbursement.[1]

¶ 7 Upon discovering this "new evidence," All Modes moved to reconsider, arguing that Clarendon should be estopped from seeking reimbursement for the 2006 claim ($115,000) because it did not send notice, in regard to the 2005 claim ($8,000), that the truck at issue was not covered under the Policy (thereby inducing All Modes to believe that the truck *was* covered). The trial court decided to consider the 2005 letter, because Clarendon, for whatever reason, failed to produce it in discovery, even though it had been required to turn over "[its] entire file with regard to All Modes." Nevertheless, the trial court, upon reconsideration, denied All Modes relief from its original judgment. This appeal followed.

[1] Clarendon stated in its briefs that it chose not to seek reimbursement because it did not want to expend resources to pursue reimbursement for a relatively small claim.

¶ 8 II. ANALYSIS

¶ 9 All Modes appeals the trial court's denial of relief from summary judgment following the hearing on the motion to reconsider. Summary judgment is appropriate only when the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005 (West 2005); *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201 (2009). A trial court's grant of summary judgment is reviewed *de novo*. *Id.*

¶ 10 A. Estoppel Argument

¶ 11 All Modes concedes that the truck is not covered under the existing policy and that, under ordinary circumstances, Clarendon would be entitled to seek reimbursement for payment of the 2006 claim where it reserved its right to do so. However, All Modes argues that Clarendon should be estopped from seeking reimbursement for the 2006 claim because it paid a 2005 claim on the same truck without reserving a right to reimbursement for that 2005 claim, allegedly inducing All Modes to believe that the truck at issue was covered.

¶ 12 Estoppel prevents the assertion of a contractual condition by a party who, through words or conduct, has fostered the impression that the condition will not be asserted as a legal defense. *Nationwide Mutual Insurance Company v. Filos*, 285 Ill. App. 3d 528, 533 (1996) (quotes omitted). Estoppel is defensive in nature; its function is to preserve rights, not to create a cause of action. *Id.* In keeping with this rationale, the general rule is that the doctrine of estoppel cannot be used to create primary coverage—or increase coverage provided—under an existing insurance policy. *Id.* at 534. Further reason for the general rule is that an insurance company should not be made to pay for a loss for which it has not charged a premium. *Id.*

¶ 13 Two exceptions to the general rule that estoppel cannot create coverage where none exists have developed in various jurisdictions, the second of which is at issue here: (1) where an insurer misrepresents the extent of the coverage to an insured, thereby inducing the insured to purchase coverage that does not in fact cover the disputed risk;[2] and (2) where an insurer defends an action on behalf of an insured, with knowledge of facts that would provide a defense to coverage, but without a reservation of a right to later deny coverage or seek reimbursement. *Id*. at 534. The rationale for the second exception is to: (1) prevent an insurer's potential conflict of interest in defending the insured against a third party while simultaneously formulating policy defenses to deny coverage at a later date; and (2) ensure that an insured is not deprived of his right to control his defense. *Id*. at 534-35.

¶ 14 We decline to extend the second exception to the instant case. The second exception, adopted by an Illinois appellate court in *Nationwide*, applies when an insurer defends an action on behalf of an insured, with knowledge of facts that would provide a defense to coverage, but *without* reservation of a right to later deny coverage and seek reimbursement *in that action*. *Id*. at 534-36. Here, Clarendon *did* reserve a right to later deny coverage and seek reimbursement in the 2006 action. Beyond citing to principles of good faith and fair dealing, All Modes cites no specific authority to support the proposition that the second exception should be extended to instances where, as here, an insurer defends an action on behalf of an insured, *does reserve* a right to later deny coverage and seek reimbursement *in that action*, but previously had declined to reserve a right to seek reimbursement in a *prior action* (and, indeed, did not seek reimbursement for the prior action).

[2] The first exception has not yet been firmly adopted in Illinois. *Nationwide*, 285 Ill. App. 3d at 534.

See, *e.g.*, Ill. S. Ct. R. 341(h)(7) (eff. Sept.1, 2006) (failure to cite authority results in forfeiture). The cases cited by All Modes are inapposite because they do not involve an insurer's failure to reserve its right to reimbursement in a prior action. See, *e.g.*, *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 207-08 (1991); *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill. App. 3d 743, 754 (1997); and *J.A. Jones Construction Co. v. Hartford Fire Insurance Co.*, 269 Ill. App. 3d 148, 151 (1995).

¶ 15 In any case, even if the second exception applied, All Modes would still have the burden of establishing the elements of estoppel, which it failed to do. *Nationwide*, 285 Ill. App. 3d at 536 (even where application of the second exception is admitted, the insured must establish the elements of estoppel). The party asserting estoppel must establish that the opposing party's representation was made not only to induce the asserting party to act, but must have actually reasonably induced the asserting party to act. *Allstate Insurance Co. v. Horn*, 24 Ill. App. 3d 583, 588-89 (1974). Also, the party asserting estoppel must have detrimentally relied upon the actions or representations of the opposing party and must have had no knowledge or convenient means of knowing the true facts. *Levin v. Civil Service Commission of Cook County*, 52 Ill. 2d 516, 524 (1972). The forgoing must be proved by clear, concise, and unequivocal evidence. *Nationwide*, 285 Ill. App. 3d at 536.

¶ 16 All Modes alleges that Clarendon's 2005 failure to notify it that the truck was a non-covered auto "left [it] unaware" of the truck's status. Aside from the fact that this allegation is rather conclusory and is unsupported by affidavit, it is insufficient to establish detrimental reliance. The record rebuts that All Modes had no means of knowing the true facts. All Modes was in possession of the Policy, which showed the truck at issue was not covered. See, *e.g.*, *Level 3 Communications, Inc. v. Federal Insurance*, 168 F. 3d 956, 959 (7th Cir. 1999) (insured had no basis to assert estoppel because it had a duty to facially examine its policy and know its contents). In fact, All Modes'

president affirmatively implied that the company *was* aware of the truck's status, stating in his affidavit that the truck was a "substitute" for another All Modes truck that was "temporarily out of service." For all of these reasons, the trial court correctly rejected All Modes' estoppel argument.

¶ 17 B. Clarifications

¶ 18 We acknowledge that the trial court initially framed the question as: "whether an insurer is obligated to notify the insured, prior to making a payment to the third party pursuant to an MCS-90 provision, that the claim and/or the vehicle is not covered by the policy [even if it ultimately does not seek reimbursement]." This framing points to the alleged wrong associated with the 2005 claim, not the 2006 claim (where Clarendon did notify All Modes that the vehicle was not covered and that it would be seeking reimbursement). All Modes does not cite specific case law requiring an insurance company to notify its insured that a particular accident is not covered by a given policy where the insurance company chooses to pay the third party without seeking reimbursement from the insured, as in the 2005 claim. See, *e.g.*, Ill. S. Ct. R. 341(h)(7) (eff. Sept.1, 2006) (failure to cite authority results in forfeiture). However, even if an insurance company was required to do so, the isolated question of whether Clarendon committed a wrong in 2005 by failing to notify All Modes that the truck was not covered under the policy is not before this court. An alleged mishandling of the 2005 claim can only be reviewed if it is connected to the 2006 claim, for which Clarendon obtained a $115,000 judgment and from which All Modes now appeals. All Modes attempted to link the alleged 2005 wrong to the 2006 claim at issue through an estoppel argument, which, as discussed above, failed.

¶ 19 With this appeal, Clarendon filed a motion to strike, which addresses this confusion between the 2005 claim and the 2006 claim. Clarendon requests that we strike portions of All Modes' reply brief that imply that Clarendon did not reserve its right to reimbursement as to the 2006 claim. We

agree with Clarendon that it only declined a right to reimbursement as to the 2005 claim and that any indication otherwise is incorrect. However, given that the trial court originally framed the question to focus on an alleged 2005 failing, we will give All Modes the benefit of the doubt. Rather than strike portions of All Modes' brief as intentionally misleading, we considered those portions but determined them to contain weak, imprecise argument that did not influence our ruling.

¶ 20 III. CONCLUSION

¶ 21 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 22 Affirmed.