2013 IL App (3d) 120364-UB

Order filed April 23, 2013
Modified Upon Denial of Rehearing June 3, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

COUNTRY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. JULLYA MOLBURG, HALEY MANSION, INC., and JEFFREY BUSSEAN, Defendants-Appellees.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-12-0364 Circuit No. 10-MR-1159 Honorable Bobbi N. Petrungaro, Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held:* The business pursuit exclusion of insurance policy did not apply to relieve insurance company of its duty to defend its insured in a defamation action.

¶ 2 Plaintiff, Country Mutual Insurance Company ("Country Mutual") appeals an order of the trial court finding Country Mutual had a duty to defend its insured, Jullya Molburg ("Molburg"), in a lawsuit initiated by Molburg's former employer against Molburg for purported defamatory

conduct. On appeal, Country Mutual argues the former employer's lawsuit against Molburg arose out of Molburg's "business pursuit" and therefore fell within the business pursuit exclusion contained in Molburg's personal umbrella policy. We affirm.

¶ 3 FACTS

¶ 4 On November 18, 2010, in Will County case No. 10-MR-1159, Country Mutual filed a complaint for declaratory judgment seeking a declaration that Country Mutual had no duty to defend Molburg against claims filed by Molburg's former employer as filed in another lawsuit, Will County case No. 10-L-690. Country Mutual's complaint named Molburg, Haley Mansion ("the Mansion"), and Jeffrey Bussean ("Bussean"), the owner of the Mansion, as defendants. According to Country Mutual's complaint for declaratory judgment, Molburg's personal umbrella policy[1] required Country Mutual to defend her against claims of personal injury or property damage involving alleged libel, slander, defamation of character, or invasion of rights of privacy, but the policy excluded coverage for claims arising out of any "business pursuit of [the] insured." Country Mutual also attached a copy of the complaint at law in 10-L-690, which was filed by the Mansion and Bussean against Molburg.

¶ 5 The attached complaint in case No. 10-L-690 alleged that in early June 2010, the Mansion hired Molburg as the general manager of the Mansion to supervise a staff of five other employees. The complaint alleged Molburg "became very insecure" about her continued employment at the Mansion and, consequently, attempted "to preempt her involuntary termination, and to retaliate against [the Mansion and Bussean] for what she believed would be

[1]The declaratory judgment action also sought a declaration that Country Mutual had no duty to defend Molburg under her home policy, and the trial court agreed. That ruling is not part of the instant appeal.

her involuntary termination, [and] *** embarked on an all-out campaign to destroy [the Mansion's and Bussean's] businesses and reputations."

¶ 6 According to the complaint in case No. 10-L-690, just before voluntarily leaving her employment as general manager on July 30, 2010, Molburg breached her fiduciary duty to her employer by making false statements about her employer's "vile conduct" with the intent to cause other employees to leave. Specifically, the complaint alleged on July 30, 2010, Molburg told other employees that Bussean installed hidden surveillance cameras and was secretly taping employees and female guests undressing in the bridal suite of the Mansion. Molburg also allegedly told employees that Bussean repeatedly made sexually graphic and vile statements about each of them. As a result of Molburg's alleged statements, the employees abruptly quit and the Mansion was unable to host several events that it had booked. The complaint also alleged that after voluntarily leaving her employment on July 30, 2010, Molburg continued her campaign to harm the Mansion and Bussean by making false statements to third parties, including but not limited to the Joliet police department.

¶ 7 Molburg, who was represented by private counsel, filed her answer to Country Mutual's complaint for declaratory judgment in case No. 10-MR-1159 on April 4, 2011, as did Bussean and the Mansion, who were represented by different counsel. Thereafter, Country Mutual appeared in court on August 2, 2011, and presented its motion for judgment on the pleadings in case No. 10-MR-1159.

¶ 8 After the parties submitted briefs for the court's consideration, the trial court entered a nine page written order on November 2, 2011, finding the business pursuit exclusion did not apply to all of the former employer's claims against Molburg. The trial court relied on the

rationale of *American Alliance Insurance Co. v. 1212 Restaurant Group, L.L.C.*, 342 Ill. App. 3d 500 (2003), and stated that, "[a]lthough some of [Molburg's] alleged statements arguably are business or employment related, not all of [Molburg's] alleged statements are related to work performance or employment." The court found Molburg's decision to inform her coworkers that Bussean made "sexually graphic and vile statements" about them were similar to the personal insults and lewd comments considered by the court in *American Alliance.* Specifically, the trial court wrote:

> "In this case, the allegations include that plaintiffs Haley and Bussean made 'sexually graphic and vile statements' about other employees. These allegations appear similar to the allegations of personal insults, lewd comments and statements made about the American Alliance Ins. Co.'s employee's sexual activities."

The court then denied Country Mutual's motion for judgment on the pleadings in case No. 10-MR-1159 and denied the request for declaratory relief establishing that Country Mutual had no duty to defend Molburg in case No. 10-L-690.

¶ 9 After the court's ruling in case No. 10-MR-1159, Molburg filed her own motion for judgment on the pleadings on November 9, 2011, requesting a judgment that Country Mutual had a duty to defend her in case No. 10-L-690. Country Mutual filed a motion to reconsider the denial of declaratory judgment in case No. 10-MR-1159 on November 21, 2011. On January 19, 2012, the trial court set a ruling on Country Mutual's motion to reconsider and also set a briefing schedule on Molburg's motion for judgment on the pleadings in case No. 10-MR-1159.

¶ 10 On April 5, 2012, the trial court denied Country Mutual's motion to reconsider the previous ruling finding a duty to defend Molburg in case No. 10-L-690 and granted Molburg's

motion for judgment on the pleadings. Country Mutual appeals.

¶ 11 ANALYSIS

¶ 12 On appeal, Country Mutual argues the trial court erred because Molburg's alleged statements to other employees involved Molburg's business pursuits, which were specifically excluded from coverage pursuant to the terms of the umbrella policy. Molburg replies that the trial court correctly relied on *American Alliance,* and, in addition, the business pursuit exclusion did not apply because some of the alleged defamatory statements were made by Molburg after Molburg terminated her employment with the Mansion.

¶ 13 A motion for judgment on the pleadings is appropriate only when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Standard Mutual Insurance Co. v. Mudron*, 358 Ill. App. 3d 535, 536 (2005). A trial court's decision on a motion for judgment on the pleadings is *de novo*. *Id.* at 537.

¶ 14 When a declaratory judgment action is brought seeking to ascertain the rights of the parties with regard to an insurance company's duty to defend, the court must look to the underlying complaint to determine whether the alleged conduct is within or potentially within the scope of coverage. *American Alliance*, 342 Ill. App. 3d at 505. Illinois law provides that the allegations in the complaint and the policy terms be liberally construed in favor of the insured, with all ambiguities and doubts resolved in favor of the insured. *United Services Automobile Ass'n v. Dare*, 357 Ill. App. 3d 955, 963 (2005). Provisions that limit coverage or exclude coverage are to be liberally construed in favor of the insured and most strongly against the insurance company. *American Alliance*, 342 Ill. App. 3d at 505.

¶ 15 The insurance company has the burden of proving the exclusion applies in this case.

Montgomery Ward Insurance Co. v. Merit Insurance Co., 171 Ill. App. 3d 799, 802 (1988). The business pursuit exclusion at issue in this appeal is based on the language of section II (E) of Molburg's personal umbrella policy which states:

"**SECTION II–EXCLUSIONS**

This policy does not apply to:

***

E. **personal injury** or **property damage** arising out of any:

1. **business** pursuit of any **insured**." (Emphasis in original.)

¶ 16 Here, the umbrella policy defines a "business" as "any gainful employment, trade, occupation, or enterprise other than farming." We agree with Country Mutual that Molburg's position as general manager of the Mansion was "gainful employment" under the terms of her personal umbrella policy, and that her employment therefore falls within the concept of a "business" as defined by that policy.

¶ 17 Next, we consider Country Mutual's contention that the complaint filed by Bussean and the Mansion in case No. 10-L-690 arose out of the "business pursuit of any insured," in other words, Molburg. However, we note the policy does not provide a definition of a "business pursuit" of the insured. Therefore, we turn to the existing case law for guidance.

¶ 18 The term "business pursuit" has been repeatedly defined by the courts as "a continuous or regular activity, done for the purpose of earning a *profit*." (Emphasis added.) *State Farm Fire & Casualty Co. v. Moore*, 103 Ill. App. 3d 250, 252 (1981); *Insurance Company of Illinois v. Markogiannakis*, 188 Ill. App. 3d 643, 655 (1989). This definition includes even part-time or supplemental income activities. *Industrial Indemnity Co. v. Vukmarkovic*, 205 Ill. App. 3d 176,

182 (1990).

¶ 19 In this case, the trial judge issued a very comprehensive order, carefully identifying the applicable case law and the relevant facts she considered. However, the trial court did not specifically consider whether Molburg's employment at the Mansion was a "business pursuit" as defined by the case law. Since our review is *de novo*, we will briefly, but independently, address the terms of the policy and examine the allegations in the complaint to determine whether the allegations describe Molburg's activities such that they would qualify as a business pursuit.

¶ 20 Specifically, the complaint alleges that Molburg was employed by Bussean and falsely reported the presence of a hidden camera, and she also vindictively repeated Bussean's crude comments about female employees to third parties, including the Joliet police department. However, absent an allegation that Molburg's statements arose out of a continuous and regular activity, done for the purpose of making a profit, we cannot conclude the purported defamation arose out of Molburg's own business pursuit as defined in the case law. Therefore, like the trial court, we conclude that the business pursuit exclusion is inapplicable.

¶ 21 Ignoring for the moment the case law defining "business pursuit," and assuming, *arguendo*, that Molburg's gainful employment was a business subject to the business pursuit exclusion, we next consider whether the trial court correctly found that some of Molburg's alleged statements were not related to her employment duties at the Mansion. Here, Bussean's salacious remarks were not employment-related, but rather constituted personal insults about female employees that Molburg repeated without Bussean's permission. We agree with the trial court that Molburg's decision to inform her coworkers that Bussean made "sexually graphic and vile statements" about each of them may have been defamatory but did not relate to, or arise out

of, her "business." See *American Alliance*, 342 Ill. App. 3d at 510.

¶ 22 Although we acknowledge that the court in *American Alliance* considered an employment-related exclusion rather than a business pursuit exclusion when considering whether an alleged defamatory statement was excluded from coverage, the reasoning used in *American Alliance* is helpful in this case. *Id.* Specifically, in *American Alliance*, the court held that an employer's personal insults and lewd comments about an employee were not employment-related, and thus did not fall into the employment-related exclusion. *Id.* Similarly, in this case, we believe that Molburg's repetition of Bussean's "sexually graphic and vile statement," which were similar to the statements at issue in *American Alliance*, was a separate matter that did not arise from her alleged "business pursuit." Accordingly, we affirm the decision of the trial court.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 25 Affirmed.

¶ 26 JUSTICE HOLDRIDGE, dissenting.

¶ 27 I respectfully dissent. In my view, we have no jurisdiction to hear this appeal because the trial court orders appealed from are not appealable. A judgment or order is final and appealable if it ends the litigation between the parties on the merits of the cause so that, if affirmed, the trial court need only to proceed with execution of the judgment. *Kellerman v. Crowe*, 119 Ill. 2d 111, 115 (1987). Although the order does not have to dispose of all issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy, or a definite and separate part thereof. *Id.*; see also *P & A Floor Co., Inc. v. Burch,* 289 Ill. App. 3d 81, 87 (1997).

¶ 28 However, not all final orders are immediately appealable. Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) governs those circumstances in which a judgment involving multiple parties or multiple claims disposes of at least one but less than all of such parties or claims. See *American Country Insurance Co. v. Chicago Carriage Cab Corp.*, 2012 IL App (1st) 110761, ¶ 21 ("[w]hether an order disposing of fewer than all claims pending is appealable is controlled by Illinois Supreme Court Rule 304(a)"). Rule 304(a) provides, in pertinent part:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties."
>
> Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

Prior to the resolution of all claims with respect to all parties, any order entered in the case—even if final as to any one party or claim—remains nonappealable unless it contains a finding in compliance with Rule 304(a) that there is no just reason to delay enforcement or appeal. See *P & A Floor Co.*, 289 Ill. App. 3d at 88; see also *American Country Insurance Co.*,

2012 IL App (1st) 110761, ¶ 21 ("[a]n appeal may be taken from a final judgment as to one or more but fewer than all *** claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.").

¶ 29 In its complaint for declaratory judgment, Country Mutual sought: (1) a declaration that it had no duty to defend Julya Molburg in a lawsuit initiated by Molburg's former employer alleging that Molburg had engaged in defamatory conduct; and (2) a declaration that it had no duty to indemnify Molburg in the underlying litigation. On November 2, 2011, the trial court issued an order denying Country Mutual's motion for judgment on the pleadings as to its duty to defend. However, the trial court did not rule on Country Mutual's duty to indemnify Molburg. Country Mutual's claim for declaratory relief on the indemnification issue remains pending. Nevertheless, Country Mutual never sought or obtained a Rule 304(a) finding from the trial court that there was no just reason for delaying enforcement or appeal. Accordingly, the orders that Country Mutual has appealed in this action (*i.e.*, the trial court's November 2, 2011, order on Country Mutual's duty to defend and the trial court's subsequent order denying Country Mutual's motion to reconsider and granting Molburg's motion for judgment on the pleadings as to Country Mutual's duty to defend) are not appealable. See, *e.g.*, *P & A Floor Co.*, 289 Ill. App. 3d at 93 (noting that, if trial court's order had disposed of a claim for declaration regarding insurer's duty to defend but reserved ruling on a pending claim for declaration regarding the insurer's duty to indemnify, "no appeal could be taken" absent a Rule 304(a) finding by the trial court); see also *American Country Insurance Co.*, 2012 IL App (1st) 110761, ¶ 21. These orders are nonappealable even if we assume that the trial court's ruling on the duty to defend issue was a final judgment as to that issue. See, *e.g.*, *P & A Floor Co.*, 289 Ill. App. 3d at 88; *American*

Country Insurance Co., 2012 IL App (1st) 110761, ¶ 21.

¶ 30 It is possible that the trial court's orders in this case would have been appealable had the trial court provided a Rule 304(a) certification. See, *e.g.*, *Freemont Casualty Insurance Co. v. Ace-Chicago Great Dane Corp.*, 317 Ill. App. 3d 67, 72 (2000) (holding that trial court's order disposing of insurer's claim for declaration regarding its duty to defend but reserving judgment on insurer's claim for declaration regarding its duty to indemnify was a final determination with respect to a definite and separate portion of the litigation, and was therefore appealable, where the trial court's order contained the language required by Rule 304(a)). However, as noted, the orders appealed from in this case contained no such language. Accordingly, I would dismiss the appeal for lack of jurisdiction.