2013 IL App (3d) 120368-U

Order filed April 23, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

AMERICAN ECONOMY INSURANCE COMPANY,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellant,	)	
	)	Appeal No. 3-12-0368
v.	)	Circuit No. 11-MR-278
	)	
HALEY MANSION, INC., JEFFREY L. BUSSEAN, BUSSEAN CATERING, INC., and JULLYA N. MOLBURG,	)	Honorable Bobbi N. Petrungaro,
Defendants-Appellees.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* Insurance company had a duty to defend its insureds because not all of the defamatory statements alleged in the underlying counterclaim were employment-related, and the additional two policy exclusions did not apply.

¶ 2 Plaintiff, American Economy Insurance Company ("American Economy"), appeals an order of the trial court awarding summary judgment in favor of defendants Haley Mansion, Inc.

("the Mansion"), Jeffrey L. Bussean ("Bussean"), and Bussean Catering, Inc ("Bussean Catering") (collectively, "the insureds"). Specifically, the trial court found that American Economy had a duty to defend the insureds against a counterclaim filed by codefendant Jullya N. Molburg ("Molburg") in an underlying lawsuit. On appeal, American Economy argues it does not have a duty to defend the insureds because Bussean's defamatory conduct as alleged in Molburg's counterclaim was subject to three exclusions provided for in the insurance policy, namely: (1) the employment-related practices exclusion, (2) the knowing violation of rights of another exclusion, and (3) the material published with knowledge of falsity exclusion. We affirm.

¶ 3 FACTS

¶ 4 The defendants in this case, 11-MR-278, are all involved in an underlying lawsuit in Will County, case No. 10-L-690. In case No. 10-L-690, the plaintiffs, the Mansion and Bussean, filed a seven count complaint against their former employee, Molburg, alleging various torts including defamation *per se*, defamation *per quod*, false light, violations of various Illinois laws, breach of a fiduciary duty, and intentional interference with a prospective economic advantage.

¶ 5 According to the complaint in case No. 10-L-690, Bussean hired Molburg to be the general manager of the Mansion. The complaint alleged 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 to Molburg about each of them. As a result of Molburg's alleged statements to the employees, the employees abruptly quit, thereby leaving the Mansion unable to host several previously scheduled special events due to

staffing difficulties.

¶ 6 In response, Molburg filed a seven count counterclaim in case No. 10-L-690 alleging defamation *per se*, defamation *per quod*, and false light against the Mansion and Bussean. She also alleged sexual harassment, retaliatory discharge, retaliation, and a violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act. In Molburg's counterclaim, she alleged that Bussean consistently made lewd comments about women's physical features, breasts, and bodies; would become enraged if women in his employ rejected him; installed a camera in the private bridal suite that sent a live feed to his office; and did not want married women to be hired, instead preferring single, attractive women.

¶ 7 According to Molburg's counterclaim, on July 31, 2010, employees at the Mansion advised Molburg that the Joliet police department wanted to search the premises. Molburg met with the two detectives and told them that she did not have the authority to permit their request. Bussean then terminated her employment on July 31, 2010, and after that date, Bussean told others that she was "mentally unstable," "incompetent," "untrustworthy," a "cunt," "engaged in criminal activity," and a "dishonorable woman." Molburg alleged, in part, that Bussean either knew the statements against her were false or acted with reckless disregard as to the falsity of the statements.

¶ 8 On March 21, 2011, American Economy filed a complaint for declaratory judgment in the case at bar, case No. 11-MR-278, seeking a declaration that American Economy had no duty to defend its insureds, the Mansion, Bussean, and Bussean Catering, with regard to Molburg's counterclaim in case No. 10-L-690. American Economy's complaint for declaratory judgment in

case No. 11-MR-278 was amended once on August 22, 2011, and again on April 11, 2012.[1]

¶ 9 According to American Economy's second amended complaint, the insureds were covered under a commercial general liability policy from September 1, 2009, to September 1, 2010, and from September 1, 2010, to September 1, 2011. The policy stated that American Economy had a duty to defend its insureds against any lawsuit seeking damages for a "personal and advertising injury." The policy defined personal and advertising injury to include any oral or written publication that slandered or libeled a person's goods, products, or services, or violated a person's right to privacy. However, the policy also included multiple exclusions to this coverage.

¶ 10 The first exclusion, which was added as a separate document to the insurance policy, involved "Employment-Related Practices" and excluded coverage for claims of any person arising out of:

> "(b) Termination of that person's employment; or
>
> (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person;"

The second exclusion, which was set out in section I, coverage B, paragraph 2, subsection (a) of the policy, involved "Knowing Violation of Rights of Another," and excluded coverage for

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[1] We note that the second amended complaint was filed after the trial court rendered its decision in this declaratory action on April 5, 2012. According to the record, the trial court allowed American Economy to file its second amended complaint as a matter of "housekeeping" in order to preserve the trial court's ruling with regard to two of the three exclusions at issue in this appeal.

claims of any person arising out of:

> "'personal and advertising injury' caused by the insured *with knowledge* that the act would violate the rights of another and would inflict 'personal and advertising injury.'" (Emphasis added.)

¶ 11 The third exclusion, which was also set out in section I, coverage B, paragraph 2, subsection (b) of the policy, involved "Material Published with Knowledge of Falsity," and excluded coverage for claims of any person based on:

> "'personal and advertising injury' arising out of oral or written publication of material, if done by or at the direction of the insured *with knowledge* of its falsity." (Emphasis added.)

¶ 12 In the case at bar, the parties to case No. 11-MR-278, American Economy, Bussean, the Mansion, and Bussean Catering, filed cross motions for summary judgment on October 11, 2011. After reviewing relevant case law, the trial court issued a written order on December 12, 2011, granting summary judgment in favor of the insureds and against American Economy concerning the duty to defend.

¶ 13 The trial court framed the issue as "whether [Bussean's] statements were made in the context of *** employment and related to employment performance." The trial court noted that just because "the alleged defamatory statements arose out of [Bussean's] business does not necessarily mean that they were employment-related within the meaning of the [employment-related practices] exclusion." Specifically, the court concluded that some of Bussean's alleged statements describing Molburg to third parties as a "c_nt," "mentally unstable," and a "dishonorable woman" were not made in the context of her employment or related to her

employment performance and therefore did not involve Bussean's employment practices.

¶ 14 American Economy filed a motion to reconsider on January 5, 2012, alleging, in part, that the trial court failed to consider the two other non-employment related policy exclusions raised by American Economy in its motion for summary judgment. The insureds replied by arguing that those additional two exclusions could not be considered by the trial court for purposes of summary judgment because American Economy's first amended complaint was not based on these two exclusions.

¶ 15 The trial court heard arguments on American Economy's motion to reconsider on March 9, 2012. In a written order entered on April 5, 2012, the trial court granted American Economy leave to file a second amended complaint so that, in addition to the "Employment-Related Practices" exclusion, American Economy could also argue the "Knowing Violation of the Rights of Another" and "Material Published with Knowledge of Falsity" exclusions. The trial court then considered whether the two additional exclusions relieved American Economy of its duty to defend the insureds. The court found the two added exclusions did not apply because Molburg alleged in her counterclaim, in part, that Bussean's statements were made with reckless disregard for their falsity, and recklessness was not the same as knowingly making a falsehood. The court did not refer to the employment-related practices exclusion in its order, but did deny the motion to reconsider. American Economy appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, American Economy argues the trial court erred by finding that American Economy had a duty to defend its insureds against Molburg's counterclaim. The insureds reply that the trial court properly awarded summary judgment in their favor because American

Economy could not clearly establish that any one of the three exclusions applied. We affirm the decision of the trial court.

¶ 18 Summary judgment is proper if "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 2010). Where parties file cross motions for summary judgment, "they indicate their mutual agreement that only a question of law is involved and, thus, invite the court to decide the issues based on the record." *A.B.A.T.E. of Illinois, Inc. v. Quinn*, 2011 IL 110611, ¶ 22. Since the grant of summary judgment is a question of law, our review is *de novo*. *Richard W. McCarthy Trust v. Illinois Casualty Company*, 408 Ill. App. 3d 526, 533 (2011).

¶ 19 When a declaratory judgment action is brought seeking to ascertain and determine 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 Insurance Co. v. 1212 Restaurant Group L.L.C.*, 342 Ill. App. 3d 500, 505 (2003). 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. The insurance company has the burden of proving the exclusion applies. *Montgomery Ward Insurance Co. v. Merit Insurance Co.*, 171 Ill. App. 3d 799, 802 (1988).

¶ 20 In this case, American Economy contends an employer's alleged defamatory statements

need not be related to the employee's performance for the exclusion to apply. American Economy suggests that when an employer shares no other relationship with the employee outside of the workplace, an alleged defamatory remark by the employer should be automatically considered to arise out of the employment relationship, and the defamation is therefore employment-related. We disagree. This argument belies the plain language of the exclusion, which specifically excludes coverage for any claims of a person arising out of "*[e]mployment-related* practices, policies, acts or omissions, such as *** defamation *** directed at that person." (Emphasis added.) Thus, with regard to the act of defamation, the exclusion applies if the *statement* relates to the employment of the alleged defamed person. See *American Alliance*, 342 Ill. App. 3d at 510. In other words, we focus on the content of the statement, not the nature of the relationship between the parties, to determine if the exclusion applies to Bussean's actions. We conclude the policy, by its own terms, is clear that the exclusion applies to any employment-related statement by Bussean that gives rise to a defamation claim.

¶ 21 Although the trial court carefully considered the applicable case law when rendering its decision, only two Illinois cases analyze the application of an employment-related exclusion to defamatory statements about past employees uttered by former employers. In *American Alliance*, the insurance company sought a declaratory judgment that it had no duty to defend its insureds (a restaurant group, the owner of the restaurant, and manager of the restaurant) in an underlying lawsuit where a former employee of the restaurant filed a defamation action claiming that the owner and manager had called him names such as "gimp," "cokehead," "faggot," and "homo" in front of other employees. *Id.* at 502-03. The owner eventually terminated the employee after forcing him to sign a separation agreement by threatening to tell others that the employee was

"robbing the joint." *Id.* at 503. After the employee signed the agreement, the owner and manager continued to tell third parties that the employee had been stealing from the restaurant. *Id.*

¶ 22 The *American Alliance* court held that the employment-related practices exclusion of the employer's policy did not apply because "the salient question is whether the alleged defamatory statements were made in the context of *** employment and related to *** employment performance [of the employee]." *Id.* at 510. In *American Alliance*, the court concluded that the employers' personal insults and lewd comments were not employment-related. *Id.*

¶ 23 In contrast, in *West Bend Mutual Insurance Co. v. Rosemont Exposition Services, Inc.*, 378 Ill. App. 3d 478 (2007), the court considered an employer's statements regarding former employees and found the insurance company did not have a duty to defend the former employer against an action initiated by the former employees for defamation. *Id.* at 492. The court specifically found the alleged defamation was employment-related because the defamatory statement at issue suggested that the employees were terminated from their employment for filing a false workers' compensation claim. *Id.* at 491-92. Thus, the defamation by the employer was related to the plaintiffs' previous employment.

¶ 24 In this appeal, American Economy argues that the decision in *West Bend*, rather than *American Alliance*, controls the outcome of this case. We disagree because the nature of the employer's alleged defamatory comments about a former employee in *West Bend*, namely that the former employees filed a fraudulent workers' compensation claim, was directly related to the reason for their subsequent termination. Here, after carefully reviewing Molburg's counterclaim, we note the counterclaim does not include any allegation that Bussean told others she was fired

because she was a "cunt," "dishonorable woman," or "mentally unstable." Instead, as was the case in *American Alliance*, Bussean's alleged defamatory remarks involved personal insults that had no bearing on Molburg's employment or her previous work performance. Since the employment-related practices exclusion does not apply to some of these statements, we conclude American Economy has a duty to defend the insureds. *American Alliance*, 342 Ill. App. 3d at 510.

¶ 25 Next, the other two exclusions, "Knowing Violation of Rights of Another" and "Material Published with Knowledge of Falsity," will be addressed together since the analysis is the same for both. In her counterclaim, Molburg alleged that Bussean allegedly made the defamatory statements about her either knowing those statements were false or with *reckless* disregard as to their falsity. According to the plain language of the policy, in order for either exclusion to apply, the insured had to cause the injury, in this case defamation, with *knowledge* of its falsity. The case law provides that, "[a]llegations of recklessness may bring a defamation claim within the potential coverage of a policy which covers defamation but excludes knowing falsehoods." *St. Paul Insurance Company of Illinois v. Landau, Omahana & Kopka, Ltd.*, 246 Ill. App. 3d 852, 859 (1993). Accordingly, we conclude the trial court's ruling granting summary judgment in favor of the insureds was correct.

¶ 26 CONCLUSION

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

¶ 28 Affirmed.

¶ 29 JUSTICE HOLDRIDGE, dissenting.

¶ 30 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).

¶ 31 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.").

¶ 32 In its second amended complaint for declaratory judgment, American Economy sought: (1) a declaration that it had no duty to defend Haley Mansion against the Molburg counterclaim; and (2) a declaration that it had no duty to indemnify Haley Mansion in the Molburg litigation. On December 12, 2011, the trial court issued an order granting the defendants' motion for summary judgment as to American Economy's duty to defend against the Molburg counterclaim and denying American Economy's motion for summary judgment as to that same issue. However, the trial court did not rule on American Economy's duty to indemnify Haley Mansion. American Economy's claim for declaratory relief on the indemnification issue remains pending. Nevertheless, American Economy 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 American Economy has appealed in this action (*i.e.*, the trial court's December 12, 2011, order on American Economy's duty to defend and the trial court's denial of American Economy's

motion to reconsider that order) 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.

¶ 33 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.