NO. 4-10-0348 Order Filed 2/25/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PRIME INSURANCE SYNDICATE, INC., Plaintiff-Appellee, v. DIAMOND WOODS, Defendant-Appellant, and L.V. BASS, WILLIE BASS, LOLLIGA BASS, Each Individually and d/b/a BASS PLACE, INC., Defendants.	)	Appeal from Circuit Court of Macon County No. 09MR153 Honorable Albert G. Webber, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

Held: Plaintiff insurance company sought summary judgment in this declaratory judgment action contending the insurance policies at issue clearly preclude coverage for the claim brought in the underlying case. Trial court granted plaintiff's motion for summary judgment based on exclusion found in one of the policies. We reverse and remand because a determination cannot be made the claim brought in the underlying case does not fall within or potentially fall within one of the insurance policies at issue because one of the policies is not part of the record before this court.

In March 2010, plaintiff, The Prime Insurance Syndicate, Inc. (Prime), filed a motion for summary judgment in this declaratory judgment action against defendants Diamond Woods and L.V. Bass, Willie Bass, and Lolliga Bass, individually and doing business as Bass Place, Inc. (Bass Place). In April 2010, the trial court granted Prime's motion. Defendant Diamond Woods

appeals, arguing the court erred in granting Prime's motion for summary judgment. We reverse and remand.

I. BACKGROUND

On February 27, 2006, Woods was shot in the leg at Bass Place, a tavern. In an affidavit from L.V. Bass, Bass stated the incident in question occurred in the early morning hours of February 27, 2006. Later that same day, he personally gave notice of the facts of the incident to his insurance agent, Jerry Atteberry. The affidavit stated Atteberry sold the insurance policy in question to L.V. Bass. L.V. Bass stated in the affidavit he was the owner of Bass Place at the time of the occurrence and was vested with the authority to report the claim.

In addition, the record contains a faxed copy of a notice of occurrence/claim sent from Atteberry-Oldweiler Agency to Prime. The fax was sent on May 2, 2006. The May 2 fax gave the following description of the occurrence in question:

> "Diamond Woods was in Bass Place. She had a fake ID and Bass Place had security. A man was tackled and a gun went off and shot her in the leg."

On July 5, 2006, a claims consultant from Claims Direct Access (CDA), the authorized claims-handling agent for Prime, sent a letter to L.V. Bass, Willie Bass, and Lolliga Bass denying

coverage for the incident in this case. The incident was given a claim number (CP05041410016). The letter stated as follows:

> "As you are aware, the above referenced *claim* was recently reported to Claims Direct Access ("CDA"), the authorized claims-handling agent of Prime Insurance Syndicate ("Prime") and involves your Policy Number CP0504141 with effective dates of coverage from April 5, 2005[,] to April 5, 2006 (the "Previous Policy") and your Policy Number CP0604321 with effective dates of coverage from April 5, 2006[,] to April 5, 2007 (the "Current Policy")." (Emphasis added.)

The letter stated the policies excluded coverage for bodily injury or property-damage claims or suits alleging negligent hiring or negligent supervision. The letter also stated both claims related to or arising out of actual or alleged assault and/or battery and bodily injury arising out of a willful violation of a penal statute or ordinance are excluded from coverage. According to the letter, the claim in question in this case arose out of an alleged assault and/or battery. In addition, the letter stated "the alleged assailant willfully violated a penal statute or ordinance by discharging the firearm."

The letter also stated the incident occurred during the first policy period but the claim was not made until the second policy period. The letter quoted the following policy language:

> "Generally, coverage is provided hereby only for otherwise covered Claims (as more fully set forth in the Policy):
>
> 1. Which are first made against an Insured during the Policy Period, and
> 2. Which result from an Accident occurring during the Policy Period, and
> 3. For which written notice is given to the Insurer during the Policy Period."

The letter continued:

> "As you can see, coverage under the Previous Policy is only provided for otherwise covered claims which are first made against you during the policy period and for which written notice is given to the insurer during the policy period. It is CDA's understanding that this claim was neither made nor reported to CDA until May 2, 2006, almost a month after the expiration of the Previous Policy. Therefore, this condition of coverage was not satisfied.

> Further, while this claim was reported during the Current Policy Period, the Current Policy is governed by some of the same conditions of coverage as the Previous Policy. Specifically, coverage under the Previous Policy is provided only for otherwise covered claims 'which result from an Accident occurring during the Policy Period.' This 'accident' occurred on February 27, 2006, several months before the Current Policy became effective. Therefore, this condition of coverage was not satisfied.
>
> Finally, both the Current Policy and the Previous Policy require that you cooperate with us in resolving any and all claims. Specifically, you are required to give us notice within 14 days of any potential claim or suit. It appears that this condition of coverage was not satisfied."

In September 2007, in Macon County case No. 07-L-147, Woods filed a complaint against Bass Place. The lawsuit alleged Bass Place voluntarily undertook the responsibility of providing security for its establishment and, as a result, had a duty to act with reasonable care for the safety of its patrons.

The complaint alleged Bass Place hired security guards to work at the entrance of the establishment. Their duties included, but were not limited to, checking patrons for weapons, keeping those patrons from committing violent acts, and breaking up fights between patrons. Plaintiff alleged these security guards were agents of Bass Place and were acting within the scope of their employment. In addition, plaintiff alleged Bass Place was implying to its patrons the establishment would be free from danger, and she relied on the security provided by Bass Place.

According to Woods, Bass Place voluntarily undertook the responsibility of providing security for its establishment and, in doing so, had to act with reasonable care for the safety of its patrons. However, Woods alleged Bass Place breached that duty in the following ways:

> "a. Negligently failed to maintain its premises[] in safe operating condition; ***
>
> b. Negligently failed to warn patrons and invitees of a dangerous condition on its premises; ***
>
> c. Negligently failed to frisk and/or search the bags and/or person of any and all patrons for weapons or other dangerous materials; ***

d. Negligently failed to apprehend and/or restrain said shooter when he became a danger and/or threat to the patrons and invitees of [Bass Place]; ***

e. Negligently hired security guards who were not properly trained and/or supervised in how to properly search for weapons, contraband or other dangerous materials; and

f. Negligently allowed an individual to enter [Bass Place] with a dangerous weapon."

Woods alleged she was injured as a result of the acts and/or omissions of Bass Place. According to the complaint, Woods was sitting at the bar "when a commotion started and people began running and shouting that someone had a gun." At that time, "someone discharged a firearm and the [p]laintiff, [Diamond Woods], was shot in the leg by a stray bullet."

In January 2008, in a reservation-of-rights letter on behalf of CDA from attorney Daniel G. Wills to L.V. Bass, Willie Bass, and Lolliga Bass, attorney Wills referenced the July 5, 2006, claim-denial letter from CDA which gave CDA's reasons for denying coverage under both policies. The reservation-of-rights letter restated the policy exclusions previously relied upon by

CDA. In addition, the letter stated:

> "[C]overage under the Previous Policy is only provided for otherwise covered claims which are first made against you during the policy period and for which written notice is given to the insurer during the policy period. It is CDA's understanding that this claim was neither made nor reported to CDA until May 2, 2006, almost a month after the expiration of the Previous Policy. Therefore, this condition of coverage was not satisfied.
>
> Further, while this claim was reported during the Current Policy Period, the Current Policy is governed by some of the same conditions of coverage as the Previous Policy. Specifically, coverage under the Previous Policy is provided only for otherwise covered claims 'which result from an Accident occurring during the Policy Period.' This 'accident' occurred on February 27, 2006, several months before the Current Policy became effective. Therefore, this condition of coverage was not satisfied.

> Finally, both the Current Policy and the Previous Policy require that you cooperate with us in resolving any and all claims. Specifically, you are required to give us notice within 14 days of any potential claim or suit. It appears that this condition of coverage was not satisfied."

The letter went on to state CDA/Prime had agreed to defend the Basses pursuant to its reservation of rights. CDA/Prime reserved its right to file a declaratory judgment action to determine whether it was obligated to provide coverage for this incident.

In February 2009, Prime filed a complaint for declaratory judgment with regard to Woods's claim in case No. 07-L-147. Prime described Woods's complaint in the underlying case as a cause of action for negligent hiring and supervision. Prime's complaint alleged it issued two insurance policies to Bass Place. According to the complaint, the first policy, No. CP0504141, was in effect from April 5, 2005, to April 5, 2006, and the second policy, No. CP0604321, was in effect from April 5, 2006, to April 5, 2007. Prime stated the second policy was a renewal of the first policy. Prime alleged Woods's claim was not covered under either of the insurance policies it issued to Bass Place.

Prime did not attach a copy of policy No. CP0604321 to

its complaint for declaratory judgment. In addition, the record before this court does not contain a copy of that policy, the declaration sheet for that policy, or the application for that policy.

As a result, we do not know whether the two policies contained identical language. In its complaint, Prime relied on three exclusions and the notice provisions found in policy No. CP0504141. Because we do not have a copy of policy No. CP0604321 in the record before this court, we do not know if these exclusions and notice requirements were included in that policy.

In February 2010, Woods filed a motion for summary judgment. In March 2010, Prime filed its own motion for summary judgment. The trial court heard arguments on the respective motions that same month. In April 2010, the trial court ruled on the motions, noting both sides agreed the case was ripe for judgment on the issues raised by the respective motions. The trial court granted Prime's motion for summary judgment, stating policy exclusion (3)(b) applied. Policy exclusion (3)(b) in policy No. CP0504141 states the policy excludes coverage for:

> "3. Bodily Injury or Property Damage:
>
> ***
>
> b. Arising out of acts of the Insured or third-party general contractors, subcontractors,

> independent contractors, or property owners or their employees involving [c]laims or [s]uits alleging negligent hiring of employees or subcontractors, failure to contract with subcontractors, negligent supervision, or any liability relating to any independent contractor's service or failure to provide service."

The court stated:

> "[Prime] argues this exclusion squarely fits into the allegation contained in [Woods's] complaint. The [d]efendants argue it does not, as 'negligent performance of a voluntary undertaking' is different from negligent hiring or supervision. Alternatively, the [d]efendants argue this exclusion is void as being against public policy. Both of the [d]efendants' contentions must be rejected. Any hiring or supervision of employees would in every instance be voluntary by Bass--the

exclusion is narrow and unambiguous. Here, whether the security persons were Bass employees or third[-]party employees, this particular exclusion contemplates exactly this situation. The [d]efendant[]s attempt to draw a distinction without a difference between Woods's complaint and this exclusion. Regarding public policy, the [d]efendants can direct this court to no case authority concerning such an exclusion, which is not on its face obnoxious. [Woods's] claim is clearly excluded from coverage by [Prime's] policy. Summary [j]udgment is therefore entered in favor of [Prime] and the [c]ourt finds no coverage for Wood's [*sic*] claim of injury. Based on its view of the policy exclusion, the [c]ourt did not reach the other issues raised by [Prime's] motion, and the [d]efendant's motion must be denied."

This appeal followed.

II. ANALYSIS

We review a trial court's ruling on a motion for summary judgment *de novo*. *Hall v. Henn*, 208 Ill. 2d 325, 328, 802 N.E.2d 797, 798 (2003).

In its complaint for declaratory judgment, Prime alleged it had no duty to defend or indemnify Bass Place with regard to the underlying lawsuit filed by Woods. An insurance company owes a duty to defend its insured if there is any potential coverage for a claim. See *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150-51, 708 N.E.2d 1122, 1134-35 (1999).

> "'When determining whether an insurance provider has a duty to defend its insured in a lawsuit, a court should generally apply an 'eight[-]corners rule'--that is, the court should compare the four corners of the underlying complaint with the four corners of the insurance contract and determine whether the facts alleged in the underlying complaint fall within, or potentially within, the insurance policy's coverage.'" *Pekin Insurance Co. v. Fidelity & Guaranty Insurance Co.*, 357 Ill. App. 3d 891, 896, 830 N.E.2d 10, 14-15 (2005) (quoting *Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 694, 698, 722 N.E.2d 1228, 1232 (2000)).

Based on the record in this case, neither the trial court nor

this court could possibly determine whether Woods's complaint in the underlying action fell within, or potentially within, the coverage provided by policy No. CP0604321 because that policy is not contained in the record.

Prime and Woods both filed motions for summary judgment. This is normally an invitation to the trial court to decide the issues presented as questions of law (*Kopier v. Harlow*, 291 Ill. App. 3d 139, 141, 683 N.E.2d 536, 538 (1997)). However, a trial court is not obligated to grant summary judgment. *Kellner v. Bartman*, 250 Ill. App. 3d 1030, 1033, 620 N.E.2d 607, 609 (1993).

> "'The purpose of summary judgment is to determine whether there are any genuine issues of material fact [citation], and summary judgment should be granted 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" [citation]. Although summary judgment is an expeditious method of disposing of a lawsuit, it should only be allowed when the right of the moving party is clear and free from

doubt.' [Citation.]" *Kellner*, 250 Ill. App. 3d at 1033, 620 N.E.2d at 609.

Based on the record in this case and the arguments presented by appellate counsel for both Woods and Prime, we cannot say either party's right to summary judgment is clear and free from doubt.

Even if policy No. CP0604321 contains language identical to policy No. CP0504141, summary judgment was still improper based on Prime's arguments on appeal and the record in this case. At oral argument, Prime's appellate counsel argued Bass Place was not covered because of three policy provisions which excluded coverage for (1) claims or suits alleging negligent hiring or supervision, (2) claims or suits arising out of or related to actual or alleged assault and/or battery, and (3) claims arising out of the willful violation of a penal statute or ordinance. Prime's appellate counsel also argued no coverage exists because Woods's lawsuit was filed after Bass Place no longer had insurance with Prime.

We first address Prime's notice argument. At oral argument, Prime's appellate counsel made no argument regarding whether Bass Place provided sufficient notice of the *occurrence* to satisfy the policy's requirements. In fact, Prime's appellate counsel stated he was not contending Bass Place failed to provide sufficient notice of the occurrence. Prime's contentions at oral argument centered on when the *claim* was made and notice of the

claim was given to Prime.

Prime's appellate counsel argued Prime no longer insured Bass Place when the lawsuit was filed. (However, it does not appear the record definitively establishes this point.) Building on this unestablished assertion, Prime's appellate counsel argued the filing of the lawsuit was the first time a "claim" was made based on the incident in question. Prime's appellate counsel conceded the filing of a lawsuit is not the only method for making a "claim." The definition section of policy No. CP0504141 defines a "claim" as "any demand for Damages, including a written demand, a civil action, Suit, or institution of arbitration proceeding."

Prime's appellate counsel argued no coverage existed because the lawsuit or "claim" was not filed until Bass Place's "claims made and reported" insurance policies with Prime were no longer in effect. However, this argument is belied by the record. According to the July 2006 letter from CDA denying coverage for Bass Place, a claim based on the incident in question was made on May 2, 2006. The record is clear Bass Place still had insurance coverage through Prime on May 2, 2006.

In the letter, CDA denied coverage in part because the incident or occurrence in question occurred during the first policy period, but the claim was not made until the second policy period. The coverage section of policy No. CP0504141 states in

part:

"1. Subject to all of the terms, limitations, conditions, definitions, exclusions, and other provisions of this Policy, we will pay Damages in excess of any SIR that you are legally obligated to pay because of Bodily Injury or Property Damage to which this Policy applies:

a. Should an Accident causing Bodily Injury or Property Damage result from those specified activities or operations to which this Policy is limited; and

b. If such accident occurs during the Policy Period *(including any Policy Period extended by a specifically identified Retroactive Date)* stated on the Declarations within the United States of America or its territories; and

c. A Claim arising out of the Accident is made against you and reported to us in writing during the Policy

> Period and any applicable SIR has been timely paid.
>
> The date of an Accident is the date upon which an Accident that results in Bodily Injury or Property Damage occurs regardless of when the Bodily Injury or Property Damage is first discovered or first manifested or reported. Claims arising from Accidents occurring prior to the coverage date of the Policy are not covered regardless of when Damages are first manifest or discovered." (Emphasis added.)

Because the record does not contain the declarations page for policy No. CP0604321, we do not know the retroactive date for that policy. However, at oral argument, Prime's appellate counsel stated he believed the retroactive date would be April 5, 2005.

If Prime's appellate counsel is correct, CDA should not have denied coverage based on its reasoning the incident occurred and the claim was made in different policy periods. If in fact the retroactive date for policy No. CP0604321 was April 5, 2005, CDA's reasoning was incorrect because the incident occurred and the claim was made during the same policy period (*i.e.*, the policy period for policy No. CP0604321) as extended by the

specifically identified retroactive date.

We next turn to the policy exclusions Prime relied on to deny coverage. The trial court granted Prime's motion for summary judgment because it found exclusion (3)(b) applied to Woods's claim. According to Prime, Woods's claim of negligent performance of a voluntary undertaking is "nothing more than a claim that Bass Place negligently supervised the security personnel on the night in question, which led to Woods's bodily injury." We disagree with this interpretation of Woods's claim. Woods's complaint in the underlying case is based on her allegation Bass Place voluntarily undertook the responsibility of providing security for its establishment and, as a result, had a duty, which it breached, to act with reasonable care to provide security for its patrons.

Exclusion (3)(b) would apply to one particular allegation in plaintiff's complaint but not the entire claim. In subparagraph (12)(e) of Woods's complaint in the underlying case, Woods does allege Bass Place breached its voluntary duty by committing the following negligent act or omission:

> "Negligently hired security guards who were not properly trained and/or supervised in how to properly search for weapons, contraband or other dangerous materials."

This allegation clearly falls within exclusion (3)(b). However,

we do not find the language in exclusion (3)(b) clearly and unambiguously precludes coverage for an entire claim simply because one allegation in that claim falls within the exclusion when other allegations in the claim do not. Woods's complaint alleged other ways in which Bass Place breached its voluntarily undertaken duty in addition to negligently hiring its security guards. This exclusion does not clearly preclude coverage for the entire claim.

In addition, again assuming the two insurance policies at issue contain identical language, we also could not affirm the trial court's order granting summary judgment based on the two other exclusions Prime relied on in its motion and the record before this court. Exclusion (B)(7) precludes coverage for claims arising out of or related to actual or alleged assault and/or battery. Exclusion (B)(20) precludes coverage for bodily injury arising out of the willful violation of a penal statute or ordinance. Before a court can determine whether a claim arose out of or is related to an actual or alleged assault and/or battery, a court needs to know the facts of the occurrence in question. The same is true in determining whether a bodily injury arose out of the willful violation of a penal statute.

In this case, the record before this court does not reveal the specifics of what occurred in the bar. According to Woods's complaint in the underlying case, she was seated at the

bar conducting herself peacefully. A commotion started in the bar and people began running and shouting that someone had a gun. Someone discharged a firearm, and Woods was shot in the leg by a stray bullet. In the May 2 fax from the Atteberry-Oldweiler Agency, the description of the occurrence was as follows: "Diamond Woods was in Bass Place. She had a fake ID and Bass Place had security. A man was tackled and a gun went off and shot her in the leg." The record does not reveal who possessed the gun or why the gun discharged.

As a result, this court cannot determine as a matter of law Woods's claim arose out of or is related to an actual or alleged assault and/or battery or a willful violation of a penal statute or ordinance. Based on the record before us, it could just as logically be determined the gun discharged accidentally. If Prime wanted to exclude all claims arising out of or related to a gunshot wound, it should have included that specific language in the policy.

For the above stated reasons, summary judgment was not appropriate in this case based on the record before this court.

III. CONCLUSION

For the reasons stated, we reverse the trial court's order granting Prime's motion for summary judgment and remand for further proceedings.

Reversed and remanded.