

NOTICE

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FIRST DIVISION
Date Filed: March 15, 2010

No. 1-07-2732

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EMPLOYERS REINSURANCE CORPORATION,)	Appeal from the
)	Circuit Court of
Plaintiff)	Cook County.
)	
v.)	05 CH 10429
)	
STEPHEN R. HASTINGS, MARK HORNUNG,)	Honorable
F. DAVID RADLER, DAILY SOUTHTOWN,)	James F. Henry,
HOLLINGER, INC., HOLLINGER)	Judge Presiding.
INTERNATIONAL, INC., MIDWEST SUBURBAN)	
PUBLISHING, INC., STAR NEWSPAPERS,)	
THE CHICAGO SUN-TIMES, INC., DOES 1-20)	
and Other Necessary Parties,)	
)	
Defendants)	
)	
(Sun-Times Media Group, Inc.,)	
Chicago Sun-Times, LLC, and Midwest)	
Suburban Publishing, Inc.,)	
)	
Defendants and)	
Third-Party Plaintiffs-Appellants,)	
)	
and)	
)	
Hartford Fire Insurance Company,)	
Safeco Surplus Lines Insurance)	
Company, General Insurance Company of)	
America, ACE American Insurance)	
Company and Executive Risk Indemnity,)	
Inc.,)	
)	
Third-Party Defendants-Appellees.)))	

O R D E R

Employers Reinsurance Company (Employers Re) filed a complaint for declaratory judgment against the Sun-Times Media Group, Inc., Chicago Sun-Times, LLC, Midwest Suburban Publishing,

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Inc. (collectively the insureds), and other named defendants seeking a declaration that it had no duty to defend or indemnify the insureds in connection with a class action lawsuit brought against the insured by advertisers in their publications. The insureds filed a third-party complaint for declaratory judgment against Hartford Fire Insurance Company (Hartford), Safeco Surplus Lines Insurance Company (Safeco), General Insurance Company of America,¹ American Insurance Company (ACE) and Executive Risk Indemnity Company (ERII) (or collectively the insurers) seeking an adjudication of the rights and liabilities of the parties under various insurance policies issued by the insurers to the insureds. The circuit court granted ACE's motion to dismiss the third-party complaint, granted Hartford's motion for judgment on the pleadings and granted summary judgment to the remaining insurers.

The insureds appeal raising the following issues: (1) whether the insurance policies issued by ACE, Safeco and Hartford required those insurers to defend the insureds in connection with the advertisers' suit; and (2) whether circuit court erred in determining that ERII's agreement to provide a defense was voluntary. We affirm the orders of the circuit court.

Between the years 1999 and 2004, the insurers provided the insureds with media coverage insurance. In 2004, various

¹ The Safeco policy was renewed by General Insurance Company. "Safeco" will refer to both companies.

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advertisers in the insureds' publications filed lawsuits against the insureds seeking damages for the overstatement of the circulation figures of those publications.² The cases were joined in a consolidated class action (the circulation lawsuit). The second amended consolidated complaint alleged the following pertinent facts.

The advertisers paid for advertizing based on the insureds' representation as to the number of persons who received the Sun-Times newspaper. The insureds provided circulation figures to the advertisers to induce them to advertize in the Sun-Times newspaper. The circulation figures are audited by the Audit Bureau of Circulations (ABC). ABC issued standardized statements of circulation data reported by the member (in this case, the plaintiffs) based on its verification of the figures and disseminates the data for the benefit of advertisers.

On June 15, 2004, the insureds issued a press release announcing that an internal review was being conducted "into practices that resulted in the overstatement of circulation figures for The Chicago Sun-Times over the past several years. *** The Sun-Times has discontinued the practices believed to have led to the overstated circulation reporting." On October 5, 2004, Hollinger International issued a press release announcing

²Federal law required the Sun-Times to publish circulation figures in the newspaper once a year. See 39 U.S.C. §3685 (____).

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the findings of the internal review. The audit revealed that beginning in 1998, the circulation figures for the daily and Sunday editions of The Chicago Sun-Times were improperly overstated. The inflated figures were reported to ABC, which then reported the figures in its semi-annual audit reports issued with respect to the Sun-Times. The audit committee determined that the inflation practices were instigated by the newspaper's former management and that the officers responsible for the inflated figures were no longer employed by the company. In addition, disciplinary action had been taken against other employees, and procedures had been implemented to prevent circulation overstatements in the future.

In the press release, John Cruickshank, publisher of The Chicago Sun-Times, acknowledged: "The unacceptable practices we uncovered and discontinued betrayed the trust placed in us by advertisers." The Chicago Sun-Times "intends to make restitution to all its advertisers for losses associated with the overstatements in the ABC circulation figures."

The second amended consolidated class action complaint alleged causes of action for violation of the Illinois Consumer Fraud Act (815 ILCS 505/2 (West 2004)), the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 2004)) and for unjust enrichment, breach of contract and civil conspiracy. The second amended complaint sought compensatory and punitive damages.

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The insureds tendered the defense of the circulation law suits to the insurers. With the exception of ERII, the insurers denied coverage. ERII agreed to defend the insureds under a reservation of rights. On June 21, 2005, Employers Re filed its complaint for declaratory judgment against the insureds. Employers Re sought a declaration that it owed no duty to defend or indemnify the Sun-Times with regard to the circulation lawsuits.

In September 2005, a stipulation of settlement was filed in connection with the circulation lawsuit. Under the terms of the settlement agreement, the insureds agreed to pay \$7.6 million to the class members, \$5.575 million to the attorneys for the class members, \$145,000 in incentive payments to the named plaintiffs in the class action and \$50,000 in cy pres payments. The insureds made no admission of liability in connection with the settlement. On January 20, 2006, a final judgment on the settlement was entered, and the class action was dismissed. As of March 6, 2006, the insureds had incurred legal fees and related expenses in the amount of \$2,827,123.86, of which they had paid \$2,789,344.93.

On November 2, 2005, the insureds filed their third-party complaint against the insurers in Employers Re's declaratory judgment suit. The third-party suit sought damages for breach of contract by the insurers and sought a declaration that the insurers had a duty to indemnify insureds and to pay their

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defense costs. The third-party complaint also alleged that ERII was estopped from challenging its obligation to pay defense costs.

ACE filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2004) (the Code)); Hartford filed a motion for judgment on the pleadings. Both ACE and Hartford alleged that the circulation lawsuits alleged claims which did not fall within the coverage of the media liability policies it issued to the plaintiffs and that coverage was barred by policy exclusions. In addition, ACE alleged that New York law applied and that New York law does not recognize the estoppel doctrine. ERII, Safeco and the plaintiffs filed cross-motions for summary judgment.

On July 21, 2006, the circuit court issued its memorandum opinion and order, inter alia, disposing of the motions filed by ACE and Hartford. The court's findings are summarized below.

As to ACE's motion to dismiss, the circuit court noted that the parties agreed that there were no significant differences between New York and Illinois law regarding the coverage issues raised but determined that New York law applied. The court found that no coverage existed under either the "assumed under contract" or under any of the enumerated "occurrences." The court further found that coverage was precluded under both the false advertising exclusion and the intentional acts exclusions in the policy. The court determined that the same analysis

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applied to Hartford's motion for judgment on the pleadings and found no coverage under the Hartford policy for the causes of action alleged in the circulation lawsuits.

On August 16, 2007, the circuit court issued its memorandum opinion and order with respect to the cross-motions for summary judgment filed by the insureds, Safeco and ERII. The court found that the Safeco policy did not afford coverage to the Sun-Times based on its analysis in connection with the ACE and Hartford policies. The court further found that, while the Safeco policies did not contain an intentional exclusion provision, its prior finding that the intentional acts exclusion provision precluded coverage under the ACE policy, ultimately meant that the loss was not fortuitous. Therefore, Safeco was entitled to rely on the common law fortuity doctrine, which also precluded coverage.

The court agreed with ERII that the false advertizing provision of its policy barred coverage and that the common law doctrine of fortuity precluded coverage, given the non-fortuitous nature of the loss. Finding that ERII's agreement to pay an allocated amount of defense expenses was voluntary, the court concluded it would not be fair or logical to bind ERII to that agreement.

The circuit court granted summary judgment to Safeco and ERII and denied summary judgment to the insureds. On August 31, 2007, the court entered an order voluntarily dismissing Employers

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Re's complaint for declaratory judgment and dismissed the insureds' remaining motion for summary judgment against ACE.

The insureds filed a timely notice of appeal.

ANALYSIS

I. Mootness

Initially, Hartford contends that this appeal is moot under the principles of res judicata and collateral estoppel because the plaintiffs failed to appeal from the grant of summary judgment to Employers Re. The circuit court granted summary judgment to Employers on the basis that the false advertizing provision of the Employers Re' policy excluded coverage for the plaintiffs.

"The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the same parties or their privies involving the same claim, demand or cause of action." Arvia v. Madigan, 209 Ill. 2d 520, 533, 809 N.E.2d 88 (2004). Res judicata does not apply in the present case because the claim litigated was between the plaintiffs and Employer's and there is no privity between Hartford and either of those parties.

Hartford acknowledges that the issue is more appropriately characterized as direct estoppel, but further acknowledges that the same rules apply to both. See People v. Daniels, 187 Ill. 2d 301, 320 n.3, 718 N.E.2d 149 (1999). "Collateral estoppel" is an

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equitable doctrine and is evoked to prevent the relitigation of issues previously decided. Garley v. Columbia LaGrange Hospital, 377 Ill. App. 3d 678, 682, 881 N.E.2d 370 (2007). Collateral estoppel applies where "(1) the issue decided in the prior adjudication is identical to the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." Garley, 377 Ill. App. 3d at 682-83.

Hartford's direct/collateral estoppel argument fails because estoppel would apply in "any future lawsuit" not in an appeal of the present one. See Daniels, 187 Ill. 2d at 320-21 (that issue cannot again be litigated between the same parties in any future lawsuit).

We conclude that neither the doctrine of res judicata nor direct/collateral estoppel applies to moot the plaintiffs' appeal as to Hartford.

II. Duty to Defend - ACE, Safeco, Hartford Policies

A. Standard of Review

The de novo standard applies to this court's review of the circuit court's rulings in this case. See Gillen v. State Farm Mutual Automobile Insurance Co., 215 Ill. 2d 381, 393, 830 N.E.2d 575 (2005) (grant of judgment on the pleadings); Luise, Inc. v. Village of Skokie, 335 Ill. App. 3d 672, 678, 781 N.E.2d 353 (2002) (grant of summary judgment); Westmeyer v. Flynn, 382

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Ill. App. 3d 952, 954-55, 889 N.E.2d 671 (2008) (dismissal pursuant to section 2-619). As the construction of an insurance policy's provisions presents a question of law, we apply the de novo standard of review. See Hobbs v. Hartford Insurance Co. of the Midwest, 214 Ill. 2d 11, 17, 823 N.E.2d 561 (2005).

B. Applicable Legal Principles

The principles applicable to the review of the grant of summary judgment are well settled. "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Illinois Farmers Insurance Co. v. Hall, 363 Ill. App. 3d 989, 993, 844 N.E.2d 973 (2006). Where as in this case, the parties have filed cross-motions for summary judgment, they invite the court to determine the issues as a matter of law and enter judgment in favor of one of the parties. Hall, 363 Ill. App. 3d at 993. We will uphold the grant of summary judgment only when the right of the moving party is free from doubt. Hall, 363 Ill. App. 3d at 993.

Similar to summary judgment, judgment on the pleadings should only be granted where there is no genuine issue of material fact. Gillen, 215 Ill. 2d at 385. "In ruling on a motion for judgment on the pleadings, the court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the

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record." Gillen, 215 Ill. 2d at 385. We will accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those well-pleaded facts. Gillen, 215 Ill. 2d at 385

The principles applicable to the review of dismissal of a complaint pursuant to section 2-619 of the Code are also well-settled. All well-pleaded allegations are taken as true and all reasonable inferences are drawn in the plaintiff's favor. Westmeyer, 382 Ill. App. 3d at 955. A section 2-619 motion to dismiss should be granted if, after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the circuit court finds that no set of facts can be proved upon which relief could be granted. Westmeyer, 382 Ill. App. 3d at 955.

C. Discussion

The plaintiffs contend that policies issued to it by ACE, Safeco and Hartford required them to provide a defense to the plaintiffs because the circulation lawsuit alleged claims potentially covered by the policies. It is undisputed that ACE, Safeco and Hartford declined to provide the plaintiffs with a defense to the claims in the circulation lawsuit. As a result, the plaintiffs assert that those insurers are estopped from raising any policy defenses and must indemnify and pay the defense costs incurred by the plaintiffs.

An insurer who takes the position that a complaint potentially alleging coverage is not covered under a policy that

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includes a duty to defend has two options: (1) defend the suit under a reservation of rights or (2) seek a determination of no coverage in a declaratory judgment suit. Employers Insurance of Wausau v. Ehlco Liquidating Trust, 186 Ill. 2d 127, 150, 708 N.E.2d 1122 (1999). Where the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage. Employers Insurance of Wausau, 186 Ill. 2d at 150-51. The estoppel doctrine does not apply if the insurer has no duty to defend or the insurer's duty to defend was not properly triggered. Employers Insurance of Wausau, 186 Ill. 2d at 151. If a comparison of the policy and the complaint reveal that there was clearly no coverage or potential for coverage, the estoppel doctrine does not apply. Employers Insurance of Wausau, 186 Ill. 2d at 151.

1. Estoppel

a. ACE

ACE correctly notes that New York law does not recognize the estoppel rule. See Household International, Inc. v. Liberty Mutual Insurance Co., 321 Ill. App. 3d 859, 869, 749 N.E.2d 1 (2001) (under New York law, an insurer does not forfeit policy defenses to coverage for improperly failing to defend its insured). The plaintiffs maintain the circuit court erred in determining that New York law applied to ACE/s policy.

Our supreme court has held that where the insurance policy

