

THIRD DIVISION
July 23, 2003

No. 1-02-0433

TWIN CITY FIRE INSURANCE COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
THOMAS J. SOMER, KENNETH W. PILOTA,)	
ROBERT A. GROSSI, and BLOOM TOWNSHIP)	
AND HIGHWAY DEPARTMENT, a Municipal)	
Corporation,)	Honorable
)	Sophia H. Hall,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE SOUTH delivered the opinion of the court:

This appeal arises from an order of the circuit court of Cook County granting plaintiff's motion for summary judgment, holding that plaintiff, Twin City Fire Insurance Company (Twin City), had no duty to defend or indemnify defendants pursuant to the terms and conditions of the "Public Officials Errors and Omissions Liability" insurance policy it issued to Bloom Township (the Township). Plaintiff instituted this declaratory judgment action against defendants seeking a determination of its duty to defend and indemnify the insureds in an underlying action (*Dieringer v. Somer*, No. 99 CH 84721) (hereinafter *Dieringer*) brought against defendants by taxpayers who alleged that defendants improperly and illegally conveyed certain property acquired by the Township at tax scavenger sales.

At the trial level, Twin City moved for summary judgment with respect to its duty both to defend and indemnify defendants. Defendants filed a cross-motion for summary judgment on the issue of Twin City's duty to defend them in the *Dieringer* action. The trial court granted Twin City's motion for summary judgment and denied defendants' motion for summary judgment, finding that the underlying action against defendants was based solely upon occurrences that were specifically excluded under the errors and omissions insurance policy.

The undisputed facts are that on June 8, 1999, Charles E. Dieringer, Jr., and Yolanda Hill, as taxpayers and on behalf of various government entities, filed a complaint for declaratory judgment, damages, and other relief against defendants, alleging that Somer, Pilota, and Grossi were involved in a fraudulent scheme, which consisted of Pilota acquiring certificates of purchases at delinquent tax scavenger sales conducted by Cook County for seven specific tax delinquent properties located within the City of Chicago Heights, Illinois. The subject properties were located at 1404-06 Park, two parcels collectively known as 1805 East End Avenue, 17th and Center Streets, 1523 Otto Boulevard, 106 East Main, and 182 East 23rd Street.

The *Dieringer* lawsuit further alleged that Pilota, in a series of what the complaint characterized as

"sham transactions," assigned the certificates to the Township, which was under the control of Grossi prior to May 1997, and Somer after May 1997, both as Township supervisors. The Dieringer plaintiffs alleged that Pilota used the Township to briefly hold ownership of the purchase certificates, which allowed the Township, as a governmental unit, to waive the outstanding property taxes owed on those properties, and then transfer the properties to Pilota or his designees without satisfying the outstanding tax liens, thereby "cheating" the taxpayers out of thousands of dollars.

The amended Dieringer complaint alleged the following causes of action:

"Count I - Breach of Fiduciary Duty: This count alleged that Somer and Grossi as Township Supervisors and Pilota as Township Attorney and School Board President, breached their fiduciary duties to the Township for failing to publicly post for public bidding the sale of the properties and for failing to have the conveyances approved at a meeting of the Township electors, as required by law.

Count II - Conspiracy between Pilota and Grossi: This count alleged that Pilota and Grossi entered into an agreement and conspiracy to, and did commit the acts necessary to acquire delinquent property and avoid payment of outstanding taxes for the benefit of Pilota and clients.⁽¹⁾

Count III - Conspiracy between Pilota and Somer: This count alleged that Pilota and Somer entered into an agreement and conspiracy to, and did commit the acts necessary to acquire delinquent property and avoid payment of outstanding taxes for the benefit of Pilota and his clients.

Count IV - This count sought an accounting and restitution for the property taxes which were unpaid, the fair value of the properties involved and the lost profits.

Count V - This count alleged a cause of action for fraud and sought recovery from defendants for fraudulently obtaining public funds through the scheme of acquiring the properties."

In June of 1999, after being served in the Dieringer lawsuit, defendant Bloom Township notified Twin City, requesting coverage under the policy. Twin City issued its denial of coverage in a letter to the Township dated August 13, 1999. In that letter, Twin City stated its reasons for denying coverage to the defendants under the policy:

"The complaint fails to plead an 'occurrence' resulting in an 'errors or omissions injury' with a request for 'damages' as required by the Insuring Agreement and defined by the policy.

Furthermore, the individual defendants do not qualify [*sic*] as 'an insured' under the policy as their actions were not within the scope of their official capacities.

Finally, coverage for this matter is precluded by the following policy exclusions:

- e. Liability arising out of any dishonest, fraudulent, criminal or malicious act or omission of any insured.
- f. Liability arising out of any insured's activities in a fiduciary capacity or as a trustee or in any similar activity.
- h. Liability arising out of any insured obtaining remuneration or financial gain to which such insured was not legally entitled; but only as respects such insured.