

COURT OF APPEALS
STATE OF GEORGIA

ROBERT DOWSE AND URSULA DOWSE)	
)	
Petitioners,)	
v.)	
)	
)	
SOUTHERN GUARANTY INSURANCE)	
COMPANY,)	APPEAL NO. A03A1459
)	
Respondent.)	
)	
)	

APPELLANTS' BRIEF

1. STATEMENT OF FACTS

The Dowses filed suit against Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc.[hereinafter Cutter, Inc.] alleging that they had purchased a home which had been constructed in 1994 and clad with a exterior insulation and finishing system [EIFS], also known as synthetic stucco. 1R. 113, 114. [There are two volumes in this appeal. The first references documents dated October 5, 2001 to November 6, 2002 whereas the second volume references documents dated after December 1, 2002. These volumes will be referred to as “1R” and “2R” respectively.]

The Amended Complaint made various allegations against the general contractor, the manufacturer of the EIFS, and Cutter, Inc., the EIFS subcontractor. 1R 118-19. The Seventh Cause of Action alleged that Cutter, Inc. was negligent in the installation of the EIFS and that the EIFS was applied in a manner which failed to prevent water intrusion into the Dowse's home. R. 118. As a result of this negligence, the exterior foam insulation had retained water and caused deterioration of the wood frame of the house. 1R. 118.

The Dowses also alleged that Cutter, Inc. had breached a warranty by improperly applying the EIFS and that Cutter, Inc. had been negligent in performing subsequent repairs to the Dowse's home. 1R. 118. As a result of the negligent subsequent repair attempts, the Dowses had suffered property damage. 1R. 118. Finally, the Dowses alleged that all the Defendants, including Cutter, Inc., had acted in bad faith and had caused the Dowses unnecessary trouble and expense. 1R. 119.

Cutter, Inc. was insured with Southern Guaranty Insurance Company [SGIC] under a general commercial liability policy from January of 1994 until October of 1997 under the same general commercial liability policy. Cutter, Inc. gave timely notice of the claim to SGIC. SGIC responded with a denial letter dated October 11, 2000 to Cutter, Inc. advising that SGIC would not provide a defense or cover any liability of Cutter, Inc. 1R. 206-43. SGIC did not file a declaratory judgment action to determine the coverage issue.

Subsequent to the denial of coverage and defense, Cutter, Inc. negotiated a settlement agreement with the Dowses. In the settlement agreement, the Dowses fully released Cutter,

individually. 1R. 123-28. Cutter, individually, had not been sued and was not a party to the action. Id. The Dowses also agreed not to execute any judgement against Cutter, Inc. except against its insurance assets. The Dowses retained the right to execute any judgement against any insurance policy of Cutter, Inc., specifically including the SGIC policy. Id. In consideration for this agreement, Cutter, Inc. agreed to dismiss its Answer and to assign any rights it may have against SGIC to the Dowses. 1R. 126.

Cutter, Inc. dismissed its Answer on October 19, 2000. 1R. 148. The Dowses filed for entry of default and requested a hearing on damages. 1R. 152. The trial Court tried the issue of damages and on January 26, 2001 a judgment was rendered for the Dowses in the sum of \$83,040.29 with interest and costs. 1R. 6.

The Dowses then filed a garnishment to collect the judgment from the SGIC policy. 1R. 4. SGIC filed an Answer on January 24, 2002 to the garnishment and denied that it had any assets of Cutter, Inc. 1R. 38. The Dowses traversed SGIC's Answer. 1R. 55. SGIC then moved for summary judgment on multiple issues. 1R. 59. The trial Court then dismissed the garnishment by granting the summary judgment motion filed by SGIC on November 6, 2002. 1R. 405. The Dowses initially sought direct review of this Order but then moved to withdraw the appeal on January 6, 2003. See Appeal No. A03A0834. The trial Court entered a new order on January 13, 2003 which again dismissed the garnishment. 2R. 10, 12. The Dowses petitioned for discretionary review of this Order and the petition was granted on February 4, 2003. 2R. 3. On April 4, 2003 the trial Court sua sponte ruled that the Order of January 13,

2003 was void. The parties filed a joint motion for reconsideration on April 17, 2003 and argued that the trial Court could not alter or modify the judgment on appeal. This Order of April 4, 2003 is not on appeal.

II. ENUMERATION OF ERRORS

The enumerations of error for which review is sought are the following:

1. The trial Court erred in equating the release of Cutter, individually, with a release of Cutter, Inc., because a general release of one legal entity does not release a separate legal entity against which specific rights have been expressly retained.

2. The trial Court erred when it held that the insurance policy of the insured Cutter, Inc. provided by the carrier SGIC could not be garnished because Cutter, Inc. was not legally obligated to pay the Dowse's claim.

3. Questions of fact remain on the coverage issue which make summary judgment inappropriate.

Jurisdictional Statement

Jurisdiction of this petition is based on O.C.G.A. § 5-6-35(a)(4) which states that all appeals from cases involving garnishment, except of judgments or orders involving fraudulent debtors, shall follow the discretionary appeal procedure of O.C.G.A. §5-6-35. This Court granted a petition seeking discretionary review of the Order of January 13, 2003. Rule 31(a), Ga. App. Rules. The summary judgment standard of review would apply to this de novo review of legal issues. O.C.G.A. § 9-11-56.

The trial Court entered an Order sua sponte on April 4, 2003 that held that the Order of January 13, 2003 was void because it was entered before the case had been remitted back to the trial Court after the initial appeal. The parties have filed a joint motion for reconsideration of this Order which seeks to modify an Order on appeal. O.C.G.A. § 5-6-46(a). An order on appeal may not be altered or modified. Id.

The parties contend that the order of January 13, 2003 was a new Order from which an appeal could be taken. Turner v. Harper, 233 Ga. 483, 211 S.E.2d 742 (1975); Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978). Additionally, the Appellant had filed a Motion to Withdraw the Appeal on January 6, 2003 because the discretionary petition procedure of O.C.G.A. § 5-6-4(a) had to be followed because the appeal involved a garnishment. The Court of Appeals dismissed the prior appeal. Order, No. A03A0834 (1/15/03) citing Thomas v. Grissom, 191 Ga. App. 421, 383 S.E.2d 907 (1989). The parties have joined in the motion for

reconsideration because both wish to have this legal issue resolved so that other pending garnishments may be resolved in conformance with the Court's ruling on this legal issue.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Cutter, Inc. Was Never Fully Released in the Settlement Agreement Which Expressly Retained the Right to Collect any Judgment Against Cutter, Inc.'s Insurance Policies

The Order of January 13, 2003 confuses the difference between Ulysses Cutter Sr., the individual, and Ulysses Cutter, Sr. Plaster and All Texture Stucco Co, Inc. [Cutter, Inc.]. Cutter, Inc is a totally different legal entity than Cutter, individually. The Order held that Cutter had been released, and therefore, the Dowses could not recover from Cutter and so could not recover from SGIC. 1R. 13. However, the settlement agreement referred to in the Order did not release Cutter, Inc. 1 R. 123-27. The default judgement was obtained against Cutter, Inc. 1 R. 252-53. The settlement agreement contained an agreement not to execute against Cutter, Inc. except to the extent of its insurance coverage. 1 R. 123, 124.

This is a recognized procedure by which insureds, who have been abandoned by their carriers, can protect themselves from loss of assets and substantial legal fees. Warren v. Instant Loans & Rentals, Inc., 241 Ga. App. 232, 526 S.E.2d 424 (1999); Liberty Mutual Insurance Co. v Wheelwright Trucking Co, Inc., No. 1010818, 1010819, 1010820 and 1010821, 2002 WL 31663569, 9, --So. 2d-- (Ala. 11/27/02) [applying Ga. law]; J. Harris, "Judicial Approaches To Stipulated Judgements, Assignment of Rights, and Covenants Not to Execute in Insurance Litigation", 47 Drake L. Rev. 853 (1999)[hereinafter referred to as "Judicial Approaches"]; Am. Physicians Ins. Exch. v Garcia, 876 S.W.2d 842, 871, 51 A.L.R.5th 899 (Tex. 1994); Red Giant Oil Co. v Lawlor, 528 N.W.2d 524, 531-32 (Iowa 1995).

An individual and a corporation owned by an individual are two separate and distinct legal entities. Hickman v Hyzer, 261 Ga. 38, 39, 401 S.E.2d 738, 739 (1991); Acree v McMahan, 258 Ga. App. 453, 574 S.E.2d 567 (2002). A finding of liability of a corporation does not create liability for the owner of the corporation. Id.

Additionally, liability of the individual owner of the corporation does not create liability for the corporation. Id. Furthermore, the full release of one party, does not operate to cause release

of a party against which rights of recovery are expressly reserved.

Lackey v. McDowell, 415 Ga. 185, 415 S. E. 2d 902 (1992); Moon v. Mercury Ins. Co. 253 Ga. App. 506, 559 S. E. 2d 532 (2002) [A general release only releases the parties who are named as being fully released].

In the case sub judice, the Dowses never released Cutter, Inc., although they did fully release Cutter, individually. 1R. 123, 124. The Dowses agreed to only execute any judgement against Cutter, Inc. to the extent of Cutter, Inc.'s insurance coverage. This covenant not to execute is a contract and is not a release of tort liability. See Judicial Approaches, supra. at 857; Gainsco Ins. Co. v Amoco Prod. Co., 53 P. 3d 1051 (Wyo. 2002); Red Giant Oil Co. v Lawlor, 528 N. W. 2d 524, 531 (Iowa 1995); Gray v Grain Dealers Mut. Ins. Co., 871 F. 2d 1128, 1133 n. 7 (D.C. Cir. 1989); State Farm Mut. Auto. Ins. Co. v Paynter, 593 P. 2d 948, 953 (Ariz. Ct. App. 1979); Globe Indem. Co. v. Blomfield, 562 P. 2d 1372, 1375 (Ariz. Ct. App. 1977); Critz v Farmers Ins. Group, 41 Cal Rptr. 401, 410 (Dist. Ct. App. 1964).

The settlement agreement between the Dowse and both Ulysses Cutter, Sr. individually and Ulysses Cutter Sr., Plaster and All Texture Stucco Co., Inc. states the following in pertinent part:

Whereas, the Second Party [i.e. the Dowse's] has and does hereby agree that they will fully release and forever discharge Ulysses Cutter, Sr, individually, from all and any manner of action and actions cause and causes of action

.

Whereas, . . . the Second Party has agreed that they will not seek to recover or collect any sums as against Ulysses Cutter, Sr., individually or Ulysses Cutter, Sr. Plaster and All Texture Stucco Co, Inc. . . . except, however the Second Party may seek to recover any funds available to the First Party [i.e. including both Cutter individually and Cutter, Inc.] as indemnity under Southern Guaranty Insurance Policy No. 00CPP13492, or any other available policies of insurance, for the claims of the Second Party in the Lawsuit, it being the express intent of all Parties hereto to enter into an agreement providing the Second Party shall limit their recovery to whatever Second Party may recover

under the Southern Guaranty Insurance Company Policy No. 00CPP13492, or any other available policies of insurance, whether as a assignee of the benefits of this Policy or as a judgment creditor of Ulysses Cutter, Sr., Plaster and All Texture Stucco Co., Inc.

.....

Now Therefore, based on the mutual covenants and promises set forth herein, the Parties hereby further agree as follows:

1. Second Party, , shall only look to and make claim for any additional sums recoverable under Policy No. 00CPP13492 issued by Southern Guaranty Insurance Company for claims ... against Ulysses Cutter, Sr. and/or Ulysses Cutter, Sr, Plaster and All Texture Stucco Co., Inc

2. Second Party ... expressly agrees to limit all recovery on any judgement in the Lawsuit or any claim arising from the incident described in the Lawsuit to any amount recoverable against Southern Guaranty...

3. If it is determined by a court that Policy No. 00CPP13492 issued by Southern Guaranty Insurance Company or any other policy of insurance, provides no coverage for the claims ... the Second Party agrees to execute a full and final release in favor of Ulysses Cutter, Sr. and/or Ulysses Cutter Sr., Plaster and All Texture Stucco Co., Inc. for all claims raised in the Lawsuit.

4. Without limiting the generality of the foregoing, Second Party ... covenant and agree not to collect any judgment obtained in the Lawsuit from Ulysses Cutter, Sr., individually, ...

5. Second Party shall indemnify and hold harmless Ulysses Cutter Sr. and/or Ulysses Cutter Sr., Plaster and All Texture Stucco Co., Inc... from any and all claims, which the Parties indemnified herein may sustain relating to, or in any manner connected with any action taken by the Second Party against Southern Guaranty Insurance Company..... However, the amount of indemnity shall be limited to the amount actually received by the Second Party.

6. In the event, after execution of this Agreement, Southern Guaranty Insurance Company decides either to tender a defense to the First Party under a reservation of rights, First Party agrees to abide by the duties . . . imposed on its insured.

7. Second Party hereby fully release and forever discharge Ulysses Cutter, Sr. individually,

8. Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. shall upon the execution of this Agreement, file a dismissal of its answer which it filed in the case known as, Robert Dowse and Ursula Dowse v. C. Richard Dobson Builders, Inc., et al., Chatham County Superior Court Civil Action No. CV99-0302-BA

9. Ulysses Cutter Sr. Plaster and All Texture Stucco Co, Inc. and Ulysses Cutter, individually, do hereby assign any causes of action they may have against Southern Guaranty Insurance Co., including but not limited to any claims for bad faith, to the Second Party.

9. [sic] This Agreement is the entire agreement between the Parties. . . . This Agreement shall be governed and construed by the laws of the State of Georgia.

10. First Party makes no representations or warranties as to the efficacy of this Agreement as to permit or to preserve any claim against Southern Guaranty Insurance Company, 1R. 123-128.

The settlement agreement never provides a general release to Cutter, Inc. although it does provide a full release to Cutter, individually. Lackey, supra. 415 Ga. 185. The agreement does include a covenant not to execute against any assets of Cutter, Inc. except to the extent of insurance coverage. 1R. 123, 124. The agreement was signed by Ulysses Cutter, individually, and as president of Cutter, Inc. on October 16, 2000. The settlement agreement assigns all rights of Cutter, Inc. to the Dowses. 1R. 123, 126-27. The trial Court erred when it held that Cutter, Inc. had been fully released.

B. An Insured Has the Right to Protect Itself By Entering Into a Covenant Not to Execute Except Upon Certain Named Assets.

The SGIC policy states that it will pay claims for which its insured is legally obligated to pay. 1 R. 129 at 1.1.a. The trial Court found that Cutter, Inc. was not legally obligated to pay to the Dowses, and so, dismissed the Dowses' garnishment of the SGIC policy. This interpretation of the legally obligated language of the CGL conflicts with the majority rule. When an abandoned insured settles his claim based on a covenant not to execute, the carrier's liability does not evaporate. Allowing the coverage to evaporate would reward the carrier for abandoning the insured while leaving the insured without any leverage to protect itself. The Courts have recognized this inequity and so have acted to balance the rights of the parties by recognizing the carrier's obligation to pay settled or defaulted claims. *Judicial Approaches*, supra.

Covenants not to execute may serve as consideration for settlement of a claim by an abandoned insured. Liberty Mutual

Insurance Co. v Wheelwright Trucking Co, Inc., supra. 2002 WL 31663569, 20-21; Warren, supra. 251 Ga. App. 232. The insured may settle a claim with a covenant which allows the third-party claimant to prove coverage. This allows the insured to protect himself from excessive legal fees and potential excess judgments. See Judicial Approaches, supra.

The Courts have been concerned with balancing the rights of the insured and the carrier. Id. When an insured is abandoned by his carrier and refuses to provide a defense, then the insured must act reasonably to protect its own interest. Judicial Approaches, supra. at 874. The carrier's concern is that a stipulated settlement amount may be fraudulent or collusive. Id. However, when the damages are proven to a Court, as opposed to an consent judgment containing an amount of damages, fraud is a minimal concern. Judicial Approaches, supra. at 869 citing Pruyr v Agricultural Ins. Co., 42 Cal. Rptr.2d 295, 304 (Ct. App. 1995). If the insurance carrier was provided with an opportunity to defend and failed to do so, then equities favor allowing a stipulated or consent judgment to stand as a basis for collection. Judicial Approaches, supra. at 875.

The arrangement also allows the carrier who denied coverage to dispute coverage with the claimant who is seeking the payment.

The financial risk created by the coverage denial is thus placed on the carrier. The carrier must then prove its denial or face the consequences of its inappropriate denial.

In Wheelwright Trucking, the defendant insurance company argued that the insured was not legally obligated to pay any part of a judgment relying in part on American Casualty Co. v. Griffith, 107 Ga.App. 224, 129 S.E.2d 549 (1963). However, the Alabama Supreme Court disagreed and relied on the fact that “[N]umerous courts in other jurisdictions have held that an injured party’s agreement not to collect a judgment against an insured does not necessarily nullify insurance coverage. Wheelwright Trucking Co, Inc., supra. 2002 WL 31663569, 20-21; Auto-Owners Ins. Co. v. St. Paul Fire & Marine Ins. Co., 547 So.2d 148 (Fla.Dist.Ct.App. 1989) [holding that a covenant not to execute on a judgment against an insured does not negate insurance coverage and stating that many courts, including Florida’s courts, look with disfavor on the idea that a covenant not to enforce against one party automatically releases that party’s insurance carrier]; Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524,529 (Iowa 1994) [holding that a plaintiff’s agreement to collect only against a defendant’s insurance company was merely a covenant and did not constitute a release of the defendants from liability and stating that the defendant “is still ‘legally obligated’ to the injured party, and the insurer still must make good on its contractual promise to pay]; Coblentz v. American Surety Co., 416 F.2d 1059 (5th

Cir. 1969) [holding that an insurance company which chose not to defend its insured could not later deny coverage by asserting the 'legally obligated to pay' provision in the policy after the insured reached a settlement where the injured party agreed to collect only against insurance proceeds].

Federal law also follows the majority rule. The 11th Circuit and other federal Courts have held that a corporation's insurance carrier must pay claims although the corporation enjoys bankruptcy protection from its judgment creditors. In re Ink Jet Florida Systems, Inc., 883 F.2d 970, 975 (11th Cir. 1989); In re Honosky, 6 B.R. 667 (Bankr. D.W.Va. 1980) [Plaintiff could proceed to suit to extent of debtor's insurance coverage]; In re McGraw, 18 B.R. 140 (Bankr. D. P. Wis. 1982); In re White, 73 B.R. 983 (Bankr. D. Col 1987). An insurance policy is still an asset that can be used for payment of a judgment creditor, even though a corporation may not be legally obligated to pay its judgment creditors due to bankruptcy discharge and stay protection. Otherwise, the insurance company is unjustly enriched since it accepted premiums to insure against losses. Ink Jet Florida, supra. 883 F. 2d at 976.

When an insurer wrongfully denies coverage and refuses to defend an action against an insured, when it could do so with

reservation of its rights as to coverage, the legal consequence of such refusal is that it waives the provisions of the policy against a settlement by the insured and becomes bound to pay the amount of any settlement made in good faith plus expenses and attorneys' fees.

Wheelwright Trucking, supra. 2002 WL 31663569, 20-21 citing Metcalf v. Hartford Accident & Indemnity Co., 176 Neb. 468, 475, 126 N.W. 2d 471, 475-476 (1964). The amount of the settlement is material only if it is so excessive and exorbitant as to show bad faith or if it, in conjunction with other facts in the case, shows that the settlement was made in bad faith. Id., citing Georgia Southern & Florida Railway Company v. United States Casualty Company, 97 Ga.App. 242, 244, 102 S.E.2d 500, 502 (1958).

SGIC denied a defense for Cutter, Inc. and denied coverage for the claims raised in the lawsuit. 1R. 206-43. SGIC's failure to defend and denial of coverage exposed Cutter, Inc. to loss. Southern Gen. Ins. Co. v. Holt, 200 Ga. App. 759, 761(2), 409 S.E.2d 852 (1991), affirmed in part, rev'd in part, 262 Ga. 267, 416 S.E.2d 274 (1992).

Although not asserted in the garnishment, the assignees (i.e. the Dowses) are entitled to assert whatever claim the insured (i.e., Cutter, Inc.) may have had against SGIC, including bad faith claims.

If the assignment is made when the insured is, because of the bad faith of the insurer, exposed to losses due to potential liability, the assignee presumably receives something of value. The assignment of the insured's claim may serve as consideration for the injured party's release of the insured from any further liability. Atlanta Casualty Insurance Co. v. Gardenhire, 248 Ga. App. 42, 545 S.E.2d 182 (2001). The assignment would be separate consideration for the covenant not to execute.

The case law cited in the Order is inapplicable to the issues. In Pridgen v. Auto-Owners Ins. Co., 204 Ga. App. 322, 323 (1992), coverage was precluded because the assignment was executed more than 6 years after the date of injury and the statute of limitations had expired. 2 R. 13. In the case of Gant, Inc. v. C & S National Bank, 151 Ga. App. 212, 214 (1979), the issue before the court was whether a debtor's advanced commissions were subject to garnishment. Id.

C. Questions of Fact Concerning Coverage Must Be Resolved at An Evidentiary Hearing

Once a final judgement is obtained, a Plaintiff may garnish a responsible party according to statute. O.C.G.A. § 18-4-48. Garnishment is a matter of right to all persons who have

obtained a money judgement. O.C.G.A. § 18-4-60. There is no right to a jury trial in a garnishment proceeding. Worsham Bros. Co. v FDIC, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

An insurance policy is an asset of the insured. Hodges v. Ocean Accident & Guarantee Corp., 66 Ga. App. 431, 18 S.E. 2d 28, 30 (1941). A plaintiff judgment creditor may garnish the insurance policy of the insured defendant. Warren v Instant Loans & Rental, Inc., 241 Ga. App. 232, 526 S.E.2d 424 (1999); Insurance Co. of North America v Hall, 125 Ga. App. 865, 189 S.E.2d 469 (1972)[plaintiff judgment creditor could garnish the auto insurance liability policy by showing a policy providing coverage was in effect at the time of the injurious incident]; see also Helden v. Sruba, et al., 412 Mich. 92, 611 N.W.2d 309 (2000) [garnishment of carrier based on default of insured]; Safeway Insurance Co. of Alabama v. Thompson, 688 So. 2d 271 (Ala. App. 1996) [Garnishment of carrier limited to amount of policy].

The facts of the underlying action in which the liability was established are res judicata and are now established as a matter of law. SGIC Guaranty took the risk that these facts would be established when it refused to defend Cutter, Inc. Leader National Insurance Company v Smith, 177 Ga. App. 267, 339 S.E.2d 321 (1985); Richmond v Ga. Farm Bureau Mut. Inc. Co., 140 Ga. App. 215, 231 S.E.2d 245 (1976). The only remaining issue to be determined at the traverse hearing is whether there is coverage on the policy based on the facts of the underlying case. Morgan v Guaranty Nat. Company, 268 Ga. 343, 489 S.E.2d 803 (1997). The Dowses can carry their burden of proof by showing that the admitted allegations in the underlying case are within the coverage provisions of the insurance policy.

The duties to provide a defense and to provide coverage for payment of a claim are separate and distinct. Penn-America Ins. Co. v Disabled Am. Veterans, Inc., 268 Ga. 564, 490 S.E.2d 374, 376 (1997). To determine questions of coverage, the allegations in the complaint must be compared to the provisions of the policy. Gardenhire, *supra*. 249 Ga. App. at 61; Glen Falls Insurance Company v Donmac Golf Shaping Company, Inc. , 203 Ga. App. 508, 417 S.E.2d 197 (1992); Great American Ins. Co. v McKenzie, 244 Ga. 84, 85-86, 259 S.E.2d 39, 40-41 (1979). If the allegations are within the policy provisions, then the duty to defend is triggered. Id. A duty to pay a claim is not established until a judgment is entered against an insured. The facts established in the underlying case in which the judgement was entered control the issue of coverage. Id.

At the traverse hearing, the trial court must determine whether the SGIC policy covered the loss for which the judgement was obtained. The Dowses would submit copies of the certified court records for the action in which the judgement was obtained to establish the facts which were established as a matter of law by the default. OCGA § 9-11-55(a). The Amended Complaint from the underlying action on which the judgment was entered is in the record. 1R. 113, 118-19. The court records from the action in which the judgment was entered will provide evidence for the Court to review in determining the issue of coverage at a traverse hearing.

D. The Rules of Construction Require That Any Doubts of Coverage Must Be Resolved in Favor of the Insured In a Summary Judgment Motion

At this summary judgment stage of the proceedings, all factual doubts must be resolved in favor of the nonmovant. OCGA 9-11-56. Therefore, if there are any facts which would allow coverage, the Court must allow the traverse hearing to proceed. Furthermore, in construing the insurance policy at issue, the policy must be read as a reasonable person would understand the policy. Atlantic Wood Industries, Inc. v Lumbermen's Underwriting Alliance, 196 Ga. App. 503, 505, 396 S.E.2d 541 (1990). If a policy provision is susceptible to two or more constructions, the court must adopt the construction most favorable to the insured. Id. Any doubt of coverage under a commercial general liability policy(CGL), must be resolved in favor of coverage. Elan Pharmaceutical Research Corp. v Employers Ins. of Wausau, 144 F.3d 1372, 1375 (11th Cir. 1998); Penn-America, supra. 490 S.E.2d at 376.

The Court of Appeals reviewed an insurance claim concerning a general commercial liability policy such as the one sub judice. Glen Falls, supra. 203 Ga. App. 508. In Glens Falls, Donmac was hired to construct a golf course. The United States sued the developer when it discovered that the course was constructed upon federally protected wetlands without a permit. The developer, in turn, sued several other entities, including Donmac. Donmac filed an action against Glens Falls Insurance Company seeking a declaratory judgment that the insurance company was obligated under a CGL policy to provide it with a defense and coverage for liability for the negligent construction. Id. at 508.

The trial court ruled that there was coverage under the policy. In making this determination, the opinion first held that the Complaint provided the basis for determining coverage. Coverage was found because the Complaint in Glens Falls brought the underlying facts and negligence within policy provisions.

The insurance company has the burden of establishing whether any coverage exclusions apply. Reliance Ins. Co. v Walker Co., 208 Ga. App. 729, 731, 431 S.E.2d 700 (1993); Tifton Machine Works v Colony Ins. Co., 224 Ga. App. 19, 480 S.E.2d 37 (1996). In determining if the insurance company has meet its burden, there are three applicable rules of construction. First, all ambiguities are resolved in favor of coverage. Isdoll v Scottsdale Ins. Co., 219 Ga. App. 516, 518, 466 S.E.2d 48 (1995). Ambiguities arise when the phrasing of an insurance policy is so confusing that an average person could not make out the boundaries of coverage. Id. Second, all exclusions must be strictly construed. Richards v Hanover Ins. Co., 250 Ga. 613, 615, 299 S.E.2d 561 (1983). Third, insurance contracts are to be read in accord with reasonable expectations of the insured. Id. At this summary judgment stage of the proceedings, any factual doubt on the issue of coverage must resolved in favor of the nonmovant. O.C.G.A. §9-11-56.

E. The CGL Policy Provided Coverage For the Alleged Property Damage Proven By the Default

The CGL policy purchased by Cutter, Inc. which was in operation from Jan. of 1994 until October of 1997 was attached to SGIC's motion for summary judgment. The policy period of 1/29/94 to 10/25/97 has been admitted. 1R. 31. The policy states that the insurance company has agreed to the following:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. 1R. 129 at § I.1.a.

The limit of coverage is \$300,000. Numerous exclusions also are listed which include intentional acts, contracted for obligations, alcohol intoxication caused damage, workers compensation liability, pollution, use of auto or watercraft, use of mobile equipment, property owned or leased, damage to insured's own property, damage to "your work", property which has not been physically damaged, damages claimed for loss based on "your produce ," "your work ," or "impaired property." 1R. 129-31 §§ I.2.a.-n.

The Amended Complaint to this action alleges that property damage had occurred to the Dowse's property due to the negligent actions of Cutter, Inc. 1R. 113, 118. This negligence allegedly caused wood rot and substantial deterioration in the Dowse home which was

constructed in 1996. Id. These allegations were admitted upon default. O.C.G.A. §9-11-55(a). These facts establish coverage for property damage.

F. Facts Established By the Default Defeat Summary Judgment on the Coverage Issue

The policy was in effect in 1994. The negligent act causing the property damage to the Dowses' home allegedly occurred in 1994. By his default, Cutter, Inc. admitted that the negligence of the insured occurred in 1994 and that this negligence caused damage to other work and property not performed or owned by the insured. O.C.G.A. §9-11-55(a). Under the multiple trigger doctrine that has utilized for consideration of coverage issues, the occurrence is a covered event. Arrow Exterminators, Inc. v. Zurich American Insurance Co., et al., 136 F. Supp. 2d 1340, (N.D. Ga. 2000); Boardman Petroleum, Inc. v. Federated Mutual Insurance Co., 926 F. Supp. 1566, 1577 (S.D. Ga. 1995) rev'd on other grounds, 150 F. 3d 1327, 1328, (11th Ga. 1998); Boardman Petroleum, Inc. v. Federated Mutual Insurance Co., 269 Ga. 326, 335, 498 S.E.2d 492, 498-99 (1998) [J. Canley, dissenting]. The following factual matters alleged in the numbered paragraphs of the Amended Complaint establish the facts that trigger coverage: R. 113-19.

3. Ulysses Cutter, Sr. Plaster & All Texture Stucco Co., Inc. can be served through Ulysses Cutter, Sr., 903 Porter Street, Savannah, GA 31401

4. This Court has jurisdiction over all parties and matters in this action and venue properly rests in Chatham County, Georgia..

5. Plaintiffs purchased a home located at 103 Steeplechase Road, Southbridge Subdivision, Savannah, Chatham County, Georgia during November, 1994. The home was constructed by C. Richard Dobson Builders, Inc. An “exterior insulation and finishing system”[EIFS] was used as the exterior finish on the house

6. As a result of the cracking, chipping and splitting of the EIFS on the home owned by Plaintiffs, the foam has become wet and created a moisture problem in the house. The moisture has caused potential wood rot and termite infestation in the house, the extent of which will not be fully known until the EIFS is removed.

30. Defendant Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. [Cutter] failed to use reasonable care in the installation and inspection of the EIFS on Plaintiff's home.
31. Defendant Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. failed to install the EIFS on the Plaintiff's home according to the manufacturer's instructions.
32. **As a result of the negligence of Defendant Cutter, moisture has entered the EIFS and caused substantial wood rot to the underlying wooden structure of the Plaintiff's house which requires removal of the EIFS and repair of the wood substrate and wooden framing** [emphasis added].
34. Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. failed to apply the EIFS in accordance with the manufacturers instructions and failed to satisfy duties and obligations under express and implied warranties that his work would be done in a workmanship like manner.
35. As a result of the breach of warranty by Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc., the Plaintiffs have suffered property damage.

37. The Defendants, and each of them have acted in bad faith in the transaction and have caused the Plaintiffs unnecessary expense and trouble.

38. The Plaintiffs have incurred attorney fees and expenses as a result of the bad faith of the Defendants, and each of them.

The Amended Complaint is the reference point to determine if the duty to defend is triggered. Gardenhire, *supra*. 248 Ga. App. at 60-61. Initially, the Complaint is nothing more than allegations. However, once Cutter, Inc. went into default, the allegations were established as fact. O.C.G.A. §9-11-55(a). When a defendant goes into default, plaintiff is entitled to judgement as if every item and paragraph of the Complaint or other original pleading were supported by proper evidence unless the action involves unliquidated damages, in which event the damages must be established before the Court without a jury. Id.

SGIC cannot relitigate the issues that were established by the default. Gardenhire, *supra*. 248 Ga. App. at 60-61; Leader National Ins. Co. v Smith, 177 Ga.App. 267, 272, 339 S.E.2d 321, 326 (1985) cert. denied. Default operates to admit the well-pleaded allegations of the complaint and the fair inferences and conclusions of fact to be drawn therefrom. Azarat Mkg. Group v Georgia Dept. of Admin. Affairs, 245 Ga. App. 256, 537 S.E.2d 99 (2000). Therefore, it is established as a matter of law that Cutter, Inc.'s negligent acts

occurred in 1994 and so occurred within the coverage period. These established facts now determine the coverage issue just as the factual allegations would have determined the duty to defend.

If SGIC had provided a defense, then the default could have been avoided. However, Cutter, Inc. was placed in a position in which it had to protect its own interest. SGIC abandoned Cutter, Inc. and so Cutter, Inc. was left to make the best deal it could.

CONCLUSION

The issues presented to the Court by this appeal are important to the many insured small businesses in Georgia. These businesses buy CGL policies with the standard “legally obligated to pay” language in them. If the carriers refuse to honor these policies, then these businesses must have some leverage to protect their remaining assets. Settlements which include covenants not to execute are the fairest methods by which a small business can protect itself from potential ruinous liability and attorney fees. The Court can maintain a fair balance between these competing interests by recognizing that such settlements do not relieve the small business of its “legal obligation to pay” from the specific asset of its CGL policy which the small business has purchased for financial protection.

To hold otherwise will allow insurance companies the windfall of avoiding the expense of providing a defense to the insured and of payment of claims. The financial risk that is created when the carrier wrongfully denies a defense should rest on the carrier. The majority

rule places this risk where it belongs. Appellants Dowse respectfully request this Court to reverse the trial Court's Order granting summary judgment in this garnishment and to return this case for a traverse hearing for the purpose of determining coverage.

This the _____ day of April, 2003.

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