Third District Court of Appeal

State of Florida

Opinion filed October 30, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-1571
Lower Tribunal No. 15-16651

Diamond State Insurance Company,
Appellant,

vs.

The Florida Department of Children and Families,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Maria De Jesus Santovenia, Judge.

Banker Lopez Gassler, P.A., and Ezequiel Lugo, and Chris W. Altenbernd (Tampa), for appellant.

The Law Offices of Anthony & Associates, P.A., and Andrew J. Anthony and Bradley A. Silverman, for appellee.

Before SALTER, LOGUE, and SCALES, JJ.

LOGUE, J.

The insurer, Diamond State Insurance Company, seeks review of the declaratory judgment finding that it owes a duty to defend The Florida Department of Children and Families (DCF). We reverse.

Background

In 2000, the State of Florida privatized the provision of foster care and related services. § 409.1671 (1)(a), Fla. Stat. (2000). With the privatization of foster care, DCF was able to contract for the provision of child protective services with private corporations deemed to be "eligible lead community-based provider[s]." § 409.1671 (1)(b), Fla. Stat. (2000). DCF contracted with Our Kids of Miami-Dade/Monroe, Inc. for the provision of foster care services in Miami-Dade County. By law, Our Kids was required to maintain insurance coverage under section 409.1671 (1)(f), and did so by purchasing a "claims made and reported" professional liability policy from the insurer. The policy contained an endorsement which provided coverage for DCF, except where DCF was sued for its own negligence. The policy had a limit of $1,000,000 per claim and $3,000,000 in the aggregate and was in effect for the period of 2010-2011.

Two minors in the care of Our Kids sued it for allowing abuse. The lawsuits were eventually settled for a combined amount of $2,990,000. After settling with Our Kids, the minors filed lawsuits against DCF. The complaints against DCF alleged that "DCF contracted with Our Kids of Miami-Dade/Monroe, Inc. . . . as the

lead agency provider of foster care and related services in Miami-Dade County." The complaints further alleged that the minors suffered damages "[a]s a direct and proximate result of the negligence of Defendant DCF, through its employees, agents, and servants," and that "the minors suffered years of abuse and neglect resulting in permanent and continuing damages."

DCF demanded the insurer defend the lawsuits, but the insurer refused, citing a provision in the policy which specifies that the insurer's "right and duty to defend ends when [it has] used up the applicable limit of insurance in the payment of judgments and settlements." Because the insurer refused to defend the lawsuit, DCF sued for a declaratory judgment that the insurer had a duty to defend. The insurer answered and raised the affirmative defense that "[c]overage was extinguished through settlement of other claims prior to claims being made against DCF. The policy's aggregate limits are exhausted and [the insurer] has no further duties."

DCF moved for partial summary judgment on the duty to defend, asserting that (1) the duty to defend is determined by looking only to the pleadings, which made no reference to policy limits; and (2) in any event, the insurer could not establish that its policy limits had been exhausted. In response to the motion for summary judgment, the insurer filed the affidavit of its senior claims examiner which stated the policy limits had been exhausted, thereby ending any duty to defend. In argument, DCF maintained that the affidavit lacked credibility because

the insurer admitted in discovery that it lacked some of the documentation normally associated with such a payment of the policy limits; the insurer had promised to provide the missing documents but failed to do so; and the insurer had a history of making false statements. The trial court ultimately ruled in favor of DCF and granted partial summary judgment. Upon DCF's motion, the trial court subsequently entered a final declaratory judgment finding that the insurer owed DCF a duty to defend. This appeal followed.

Standard of Review

We review "a trial court's ruling on a motion for summary judgment de novo." Cascar, LLC v. City of Coral Gables, 274 So. 3d 1231, 1233 (Fla. 3d DCA 2019). "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Id. at 1234 (quoting Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). "Summary judgment 'is designed to test the sufficiency of the evidence to determine if there is sufficient evidence at issue to justify a trial or formal hearing on the issues raised in the pleadings.'" Cascar, 274 So. 3d at 1234 (quoting The Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla. 2006)).

Furthermore, "[b]ecause summary judgment tests the sufficiency of the evidence to justify a trial, it 'is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party, and assuming the jury would

resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law.'" Cascar, 274 So. 3d at 1234 (quoting Moradiellos v. Gerelco Traffic Controls, Inc., 176 So. 3d 329, 334–35 (Fla. 3d DCA 2015)).

Analysis

The dispute on appeal concerns the insurer's affirmative defense that, because it exhausted the $3,000,000 aggregate policy limit for claims made or reported during the effective dates of the policy, it was excused from defending a subsequent suit against DCF.

It is generally true that "the allegations of the complaint govern the duty of the insurer to defend." Nat'l Union Fire Ins. Co. v. Lenox Liquors, Inc., 358 So. 2d 533, 536 (Fla. 1977). The policy at issue, however, specifically provides the duty to defend terminates when the policy limits have been exhausted by payments. The policy states:

> We will have the right and duty to select counsel and to defend any "suit" seeking damages. However, we will have no duty to defend the insured against any "suit" seeking damages for injury to which this insurance does not apply. But:
>
> (1) The amount we will pay for damages is limited as described in SECTION IV-LIMITS OF INSURANCE;
>
> (2) We may at our discretion, investigate any "wrongful act" and settle any "claims" or "suit" that may result; and

> (3) Our right and duty to defend ends when we have used up the applicable limit of the insurance in the payment of judgments or settlements.

(Emphasis added).

Because the existence and exhaustion of policy limits is not a matter normally addressed in a complaint, it would be impossible to enforce the bargain reached by the parties if the court refused to look beyond the pleadings. For this reason, a case like this one presents a narrow exception to the general rule that the duty to defend is determined by looking only at the pleadings. In order to resolve a duty to defend dispute which turns on whether the policy limits were exhausted, courts must look to the actual facts behind the pleadings. See Aetna Ins. Co. v. Borrell-Bigby Elec. Co., Inc., 541 So. 2d 139, 141 (Fla. 2d DCA 1989) ("As to actions instituted after its policy limits have been exhausted through payment of a valid judgment or settlement [the insurer] may decline to defend."); Underwriters Guarantee Ins. Co. v. Nationwide Mut. Fire Ins. Co., 578 So. 2d 34, 35 (Fla. 4th DCA 1991) ("[The insurer] was not obligated by its contract to continue defending the additional insured after payment of its policy limits in settlement for its named insured."); Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16, 21 (Fla. 4th DCA 2006) ("Under the terms of its policy, had U.S. Security paid out its limits, its duty to settle or defend would have ceased.").

DCF argues that the insurer failed to provide sufficient evidence of the policy's exhaustion. In making this argument, DCF acknowledges that the insurer filed the affidavit of its senior claims examiner stating the policy limits were exhausted by the payment of settlements. DCF contends, however, the affidavit lacks credibility for the reasons stated earlier in this opinion. But "[q]uestions regarding the relative credibility or weight of the evidence cannot be resolved on summary judgment, but must be left for the trier of fact," Keys Country Resort, LLC v. 1733 Overseas Highway, LLC, 272 So. 3d 500, 505 (Fla. 3d DCA 2019). A "motion for summary judgment is not a trial by affidavit or deposition. Summary judgment is not intended to weigh and resolve genuine issues of material fact, but only identify whether such issues exist. If there is disputed evidence on a material issue of fact, summary judgment must be denied, and the issue submitted to the trier of fact." Perez–Gurri Corp. v. McLeod, 238 So. 3d 347, 350 (Fla. 3d DCA 2017). While a trier-of-fact may well agree with DCF as a factual matter that the testimony of the senior claims examiner lacks credibility, summary judgment is not the vehicle to make such a determination.

Here, the affidavit filed by the insurer creates a genuine issue of material fact as to whether the policy limits were exhausted which precluded the granting of DCF's motion for summary judgment. Accordingly, we reverse the final declaratory judgment on appeal and remand for further proceedings consistent with this opinion.