

NOT DESIGNATED FOR PUBLICATION

CERTAIN UNDERWRITERS * **NO. 2011-CA-0767**
AT LLOYD'S, LONDON *
SUBSCRIBING TO POLICY * **COURT OF APPEAL**
NO. RKL001166 AND POLICY * **FOURTH CIRCUIT**
NO. MKL00062 *
VERSUS * **STATE OF LOUISIANA**

ZULU SOCIAL AID & * * * * *
PLEASURE CLUB, ET AL.

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2010-11703, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

* * * * *
Charles R. Jones
Judge
* * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Roland L. Belsome)

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December 28, 2011

AFFIRMED

The appellant, Certain Underwriters at Lloyd's, London ("Underwriters") seeks review of a district court judgment denying its petition for declaratory relief, and granting the exception of no cause of action of the appellee, Zulu Social Aid and Pleasure Club (Zulu). Finding no error in the judgment of the district court, we affirm.

Underwriters is the general liability insurer of Zulu under two policies of insurance, Policy No. RKL001166 and Policy No. MKL00062. The policies were issued to Zulu for the periods of February 19, 2009 to February 25, 2009, and February 11, 2010 to February 17, 2010, respectively. The policies afford commercial general liability insurance and are subject to certain claim and aggregate limits and other terms, conditions, definitions, limitations and exclusions as set forth in the policies. Also contained in each of the policies is a provision entitled the "Coconut Exclusion" which reads:

It is hereby agreed and understood that there will be no coverage for any coconut thrown in any fashion from anywhere on the float. Coconuts may be handed from the first layer of the float only.

The insured, Zulu, conducts a Mardi Gras parade every year that is known for its hand-painted coconuts. In recent years, parade spectators have brought suit against Zulu alleging that they were injured by coconuts thrown from Zulu floats during Mardi Gras parades.

On February 22, 2010, Yolanda Moore¹ filed suit against Zulu in the Civil District Court for the Parish of Orleans. Ms. Moore alleged that, on or about February 24, 2009, she was attending the annual Zulu parade when “[s]uddenly and without warning a Zulu Coconut was thrown from a float striking [her] in the face.”

In a separate matter, filed on May 6, 2010, Faith Brooks and Pedro Brooks, both individually and on behalf of their minor son Pedro Brooks, Jr.,² filed a suit for damages against Zulu in the Civil District Court for the Parish of Orleans. The Brookses alleged that, on February 16, 2010, “a member of the Zulu Krewe on the float threw a coconut from the float striking Faith Brooks directly in the face, breaking her nose and injuring her face and head.”

Underwriters was not named as a defendant in either the *Moore* or the *Brooks* lawsuits originally, but was subsequently added as a defendant in the *Brooks* lawsuit on May 5, 2011. Nevertheless, Underwriters undertook the defense of Zulu in both the *Moore* and *Brooks* lawsuits subject to a full reservation of rights.

Underwriters filed a petition for declaratory judgment pursuant to La. Code Civ. Proc. art. 1871 *et seq.*, seeking a judgment declaring that it had no duty under

¹ *Yolanda Moore v. Zulu Soc. Aid and Pleasure Club, Inc., and ABC Ins. Co.*, No. 10-1696, Civ. Dist. Ct., Orleans Parish, State of Louisiana.

the policies to provide Zulu with a defense or indemnity for the claims asserted against Zulu in the aforementioned *Moore* and *Brooks* lawsuits.

Zulu filed exceptions of *prematurity*, *no cause of action* and *lis pendens*. In its memorandum in support of its exceptions, Zulu argued that there was no actual case or controversy at issue in the lawsuit, and that Underwriters could not properly bring a declaratory judgment because “the issue presented is based on [a] contingency [sic] which may or may not arise.”

Underwriters filed an opposition to Zulu’s exceptions arguing that Zulu’s argument on its exception went to the merits of Underwriters’ petition. Underwriters argued that the purpose of the exception of no cause of action, however, is to determine the sufficiency of the petition on its face. Underwriters further argued that its declaratory judgment action was permitted under the Louisiana Civil Code.

Following a hearing on the exceptions on February 25, 2011, the district court granted Zulu’s exception of *no cause of action*. While the district court did not provide written reasons for judgment, the transcript of the hearing reflects the reasoning of the court as follows:

MS. MORRIS: . . . Lloyd’s [Underwriters] are [sic] not parties to the underline [sic] suits. So, this is the only way we can have our rights and obligations under the policy determined. We didn't go ahead and deny so we can do this fairly and have it determined by a Judge then willy nilly.

BY THE COURT: But, how am I going to determine it by not knowing the underlining [sic] facts? That's my problem.

² *Faith Brooks, Pedro C. Brooks, Her Husband, and Their Minor Son, Pedro C. Brooks, Jr. v. Zulu Soc. Aid & Pleasure Club, Inc., and Zulu Cmty. Found., Inc.*, No. 10-4694, Civ. Dist.Ct., Orleans Parish, State of Louisiana.

MS. MORRIS: Well, we're going to file a summary judgment on the issue. This—

BY THE COURT: So, I have to try the underlining [sic] case to find out what's going—

MS. MORRIS: No. No. No. It's determined on the pleadings of the underlining [sic] matters.

BY THE COURT: Can't do it. Just can't. There's no way to do it. I don't know any-I don't know what to do-I mean, it seems the other suits have to do--how am I going to know whether somebody threw the coconut or handed the coconut. How am I going to know that? I am not trying those other cases. I'm not. That's not happening. I'm a higher number.

MS. MORRIS: But the determinations are made on pleadings. The determinations of our defense on [sic] based on the four corners of the pleadings and the four corners of our policy?

BY THE COURT: I understand, but the underlining [sic] facts are part of it. So, I'm going to grant the exceptions and I'm going to ask Mr. Miller to prepare a judgment.

The judgment was silent as to the remaining exceptions of Zulu, and was also silent as to the petition for declaratory judgment filed by Underwriters. This timely appeal followed.

In its sole assignment of error, Underwriters argues that the district court erred in holding that Underwriters failed to state a cause of action in its petition for declaratory judgment, particularly as to a determination of Underwriters' duties, if any, to provide defense or indemnity under certain contracts of liability insurance.

DISCUSSION

La. Code Civ. Proc. arts. 1871 through 1883 govern declaratory judgment proceedings, the purpose of which is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. No action or proceeding shall be open to objection on the ground that a declaratory judgment or

decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree. La. Code Civ. Proc. art. 1871. A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. La. Code Civ. Proc. art. 1872. Notably, “[a] contract may be construed either before or after there has been a breach thereof.” La. Code Civ. Proc. art. 1873.

Underwriters argues that the sufficiency of its cause of action turns on whether it may properly seek declaratory judgment under the circumstances alleged in its petition. Underwriters also maintains that pursuant to articles 1872 and 1873, a person with an interest under a written contract may have any question of construction or validity arising thereunder judicially determined, either before or after there has been a breach of the contract. Underwriters argues that Louisiana courts routinely allow declaratory judgment actions in cases involving issues related to the extent of insurance coverage. In particular—and because an insurance policy is a written contract--Louisiana courts have consistently heard declaratory judgment actions to determine whether a liability insurer is required to defend and indemnify a suit. In support of its contention that the petition states a valid cause of action, Underwriters argues that in Western World Insurance Co., Inc. v. Paradise Pools & Spas, Inc., 93-723 (La. App. 5th Cir. 2/23/94), 633 So.2d 790, the appellate court held that the trial court should have entertained the

insurer's petition for declaratory judgment regarding its duty to defend, as it would have removed at least part of the uncertainty that gave rise to the proceeding, while a determination that there was no coverage would have terminated the litigation as to the insurer.

Underwriters further argues that Louisiana courts considering the validity of declaratory judgment proceedings in the context of insurance coverage issues have held that such actions state a valid cause of action under Louisiana law. In support of this contention, Underwriters relies on Poynter v. Fidelity & Casualty Company of New York, 140 So.2d 42 (La. App 3 Cir. 1966), wherein an insured sought a declaratory judgment that its liability insurer had a duty to defend him under a liability policy. The court found that the insured had successfully pled a valid cause of action for a declaratory judgment because he had alleged: (i) a written contract of liability insurance; (ii) that he had been sued on a liability covered by the policy; and (iii) that his insurer had refused to defend him against the lawsuit. Id., 140 So.2d at 47. The court overruled the exception of no cause of action.

Thus, as argued by Underwriters, the remedy sought is a valid and entirely appropriate cause of action under the present circumstances. Underwriters argues that it has demonstrated valid grounds for seeking a declaratory judgment under the Louisiana Code of Civil Procedure, and that the district court's grant of Zulu's exception of no cause of action should be reversed. Underwriters argues that Zulu has been sued in cases potentially implicating policies of liability insurance; thus Underwriters seeks a determination as to its obligations with regard to the underlying lawsuits.

Lastly, Underwriters argues that counsel for Zulu misinformed the district court of the law during the hearing on the exceptions. Particularly, Underwriters

maintains that counsel for Zulu indicated to the district court that an insurer may not obtain a determination of coverage through an action for declaratory judgment. However, Underwriters points out insurers routinely obtain determinations of coverage by instituting declaratory judgment actions in Louisiana courts. Underwriters maintains that such actions are common and encouraged as an efficient way to resolve coverage disputes.

Zulu argues that declaratory relief is not appropriate in the instant matter because the petition does not assert a valid cause of action. Further, it also maintains that the district court was correct in its judgment.

The Louisiana Supreme Court, in Abbott v. Parker, 249 So.2d 908, 918 (La. 1971), defined a justiciable controversy in relation to declaratory relief, as follows:

[a] “justiciable controversy” connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character. Further, the party seeking the declaratory judgment should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of the declaratory judgment.

When a proceeding under Arts 1871 through 1883 involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. La. Code Civ. Proc. art. 1879. However, “[t]he court may refuse to render a declaratory judgment or decree where such judgment or decree, if rendered, would not terminate the uncertainty or controversy giving rise to the proceeding.” La. Code Civ. Proc. art. 1876.

Our review of the record indicates that at the time Underwriters filed suit for declaratory relief on November 19, 2010, it was not a party to either the *Brooks* or the *Moore* lawsuits.³ We note that the aforementioned date on which the suit for declaratory relief was filed is vital, as Underwriters was not a defendant in any suit on November 19, 2010, and there was no actual controversy between the parties. Under normal circumstances, piecemeal litigation is frowned upon by the courts of this State. The same is true regarding a declaratory action that fails to state a cause or controversy between the parties. A district court is well within its discretion to deny declaratory relief when there is no actual cause or controversy set forth in the petition. Thus, we find no error in the judgment of the district court.

Finally, as to the remaining exceptions of *prematurity*, and *lis pendens*, the judgment only addresses the exception of *no cause of action*. Generally, when a trial court judgment is silent as to a claim or demand, it is presumed the relief sought was denied. M.J. Farms, Ltd. v. Exxon Mobil Corp., 2007-2371, p. 12 (La. 7/1/08), 998 So. 2d 16, 26; Barham & Arceneaux v. Kozak, 02-2325 (La. App. 1 Cir. 3/12/04), 874 So. 2d 228, 241, *writ denied*, 04-0930 (La. 6/4/04), 876 So. 2d 87; Brooks v. Tuesday Morning, Inc. Co., 32,452 (La. App. 2 Cir. 10/27/99), 745 So. 2d 161; Martinez v. Reno, 99-114 (La. App. 5 Cir. 9/15/99), 742 So. 2d 1014; Living v. Langston Companies, Incorporated/Continental Bag Div., 96-636 (La. App. 3 Cir. 12/5/96), 685 So. 2d 405; Zatzkis v. Zatzkis, 91-1623, 92-0633, 92-0717 and 92-2637 (La. App. 4 Cir. 12/16/93), 632 So. 2d 307, *writ denied*, 94-0157 (La. 6/24/94), 640 So. 2d 1340, *writ denied*, 94-0993 (La. 6/24/94), 640 So. 2d 1341. There being no mention in the district court judgment of Zulu's

³ The Court acknowledges that after the judgment of the district court was rendered on March 10, 2011, Underwriters was made a party to the *Brooks* lawsuit on May 5, 2011.

remaining exceptions of *prematurity* and *lis pendens*, it is presumed the trial court rejected those matters. Thus, we pretermitted discussion of the remaining exceptions of Zulu.

DECREE

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED