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**IN THE
COURT OF APPEALS OF INDIANA**



EMPLOYERS MUTUAL CASUALTY)
COMPANY,)
)
Appellant-Plaintiff,)

vs.)

No. 66A04-1101-PL-35

GOVERNMENTAL INTERINSURANCE)
EXCHANGE,)
)
Appellee-Defendant.)

APPEAL FROM THE PULASKI SUPERIOR COURT
The Honorable Patrick B. Blankenship, Judge
Cause No. 66D01-0711-PL-7

August 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

This is an insurance coverage dispute. The issue is whether the insured's notice to its insurance broker constituted notice to its insurer so as to trigger defense coverage. We find insufficient designated evidence showing that the broker was an agent of the insurer to whom notice could be tendered. We affirm summary judgment in favor of the insurer.

Facts and Procedural History

The Town of Winamac maintained general liability insurance with Governmental Interinsurance Exchange from 1986 until 1992. Winamac purchased its insurance in a series of annual policies. Winamac obtained the GIE policies through the Budd Agency brokerage firm. The policies obligated GIE to defend Winamac in suits alleging property damage due to occurrences within the coverage territory. The policies' notice provisions stated that "[i]n the event of an occurrence or any other happening to which this policy may apply, written notice . . . shall be given by or for the insured to the company or any of its authorized agents as soon as practicable." Appellant's App. p. 125.

The declarations page of each annual policy was countersigned by "Bliss Indiana, Inc." *See id.* at 348-58. Each policy also contained numerous endorsements, many of which identified Bliss Indiana as GIE's agent. "Eugene D. Bokash" periodically signed as Bliss's authorized representative. However, on one 1988 manuscript endorsement, which sets forth an "airport, heliport, aircraft and related contracts exclusion," the signature of "David Budd" appears beneath Bliss's name and above Eugene Bokash's. *See id.* at 362.

Winamac obtained insurance from Employers Mutual Casualty Company beginning in 1993. Winamac purchased EMC's policies through a brokerage other than the Budd Agency. EMC's policies similarly guaranteed defense coverage in suits against Winamac alleging property damage. The policies also provided that "[i]f the insured has rights to recover all or part of any payment we have made . . . , those rights are transferred to us." *Id.* at 193.

In November 2005, Winamac learned that its old town dump had allegedly released contaminants onto private property owned by Galco, Inc. Winamac notified the Budd Agency of the potential liability on November 17, 2005. Galco later filed suit against Winamac for alleged property damage caused by the contamination. Winamac notified Budd of the claim again on May 16, 2006. Winamac also notified EMC. On January 15, 2007, EMC sent a letter to GIE advising of the litigation and asking if GIE was willing to participate in the defense.

GIE agreed to pay one half of Winamac's defense costs incurred after January 15, 2007, but it refused to pay any costs incurred before then. GIE maintained that Winamac failed to furnish requisite notice before January 2007. GIE claimed that it became aware of the Galco litigation only after receiving EMC's January 15 letter.

EMC covered Winamac's defense costs incurred between May 2006 and January 2007, reserving its rights to equitable contribution from Winamac's other insurers.

EMC later brought this action against GIE seeking contribution for Winamac's pre-2007 defense costs. Each party moved for summary judgment, and the trial court entered judgment in favor of GIE. The court found "no doubt that the Town of Winamac

failed to give GIE notice of the loss occurrence regarding the ground contamination and Galco lawsuit for approximately two years.” *Id.* at 10. The court explained that “notice to Budd was not notice to GIE. Budd is an independent insurance broker, representing many insurance companies’ products. An independent broker is an agent of the insured not the insurer.” *Id.* at 11. The court concluded that Winamac breached its policy and forfeited any pre-2007 defense coverage from GIE, so EMC was owed no corresponding contribution. EMC appeals.

Discussion and Decision

EMC claims the trial court erred by denying its motion for summary judgment and entering summary judgment in favor of GIE. EMC argues that Winamac furnished requisite notice of the Galco suit in 2005 and that GIE thus owes contribution for Winamac’s pre-2007 defense costs.

When reviewing the entry or denial of summary judgment, our standard of review is the same as that of the trial court: summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1269 (Ind. 2009). All facts established by the designated evidence, and all reasonable inferences from them, are to be construed in favor of the nonmoving party. *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1062 (Ind. 2007).

I. Preliminary Evidentiary Issue

We first address an evidentiary issue raised obliquely by the parties.

At the summary judgment stage, EMC designated an affidavit of employee John Bissell authenticating various exhibits and items of correspondence. One of the exhibits was a letter received by EMC from Winamac's attorney, Frank Deveau. The letter stated, "Enclosed are copies of the notice letters sent to . . . Governmental Interinsurance Exchange." Appellant's App. p. 68. Attached were unsigned copies of two letters purportedly sent by Deveau to GIE on August 12, 2006, and October 27, 2006, advising GIE of the Galco lawsuit and requesting coverage. *Id.* at 69, 70. Although EMC argues primarily that Winamac's notice to the Budd Agency in 2005 triggered GIE's defense obligations, EMC also references these two Deveau letters as additional evidence that Winamac tendered notice to GIE before January 2007.

The summary judgment rules provide that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies not previously self-authenticated of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Ind. Trial Rule 56(E).

"To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence. Thus, a letter submitted for consideration under Rule 56(e) must be attached to an affidavit and authenticated by its author in the affidavit or a deposition." 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 2722 (3d ed. 1998) (citations omitted).

Here we conclude that the two letters allegedly sent by Deveau to GIE are not properly authenticated proof of notice. The two letters were supposedly sent by Deveau to GIE, but they are not authenticated by an affiant with personal knowledge that the letters were sent and/or received. Neither Deveau nor another competent affiant affirms that the letters were sent. There is no indication that affiant Bissell had personal knowledge of their mailing. The letters are attached enclosures of properly-authenticated correspondence between Deveau and EMC, but this does not establish that GIE ever received them. Thus, these letters add nothing to the issue of whether GIE received notice of this lawsuit.

II. Notice

The principal question in this case is at what point GIE received notice of Galco's claim against Winamac—and more specifically, whether Winamac's notice to the Budd Agency in 2005 constituted effective notice to GIE.

An insurer's duty to defend does not arise until the insurer receives the foundational information designated in its insurance policy's notice requirement. *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009). The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. *Id.* An insurer cannot defend a claim of which it has no knowledge. *Id.* Until an insurer receives such enabling information, it cannot be held accountable for breaching the duty to defend its insured. *Id.* Furthermore, "prejudice" to the insurer in this context is irrelevant. *Id.*

GIE's policies required Winamac to furnish timely written notice to GIE "or any of its authorized agents."

Indiana courts have stated that "when a broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer." *Aetna Ins. Co. v. Rodriguez*, 517 N.E.2d 386, 388 (Ind. 1988) (citing *Ind. Ins. Co. v. Hartwell*, 123 Ind. 177, 24 N.E. 100 (1889)); *see also Conrad v. Universal Fire & Cas. Ins. Co.*, 686 N.E.2d 840, 844 (Ind. 1997); *Malone v. Basey*, 770 N.E.2d 846, 851 (Ind. Ct. App. 2002), *trans. denied*.

However, in *Benante v. United Pacific Life Insurance Co.*, our Supreme Court clarified that whether an insurance intermediary is an agent of the insured or the insurer is a "fact sensitive" inquiry requiring consideration of "the facts and circumstances of the case, the relation of the parties, their actions, their usual course of dealing, any instructions given to the person by the company, the conduct of the parties generally, and the nature of the transaction." 659 N.E.2d 545, 547-48 (Ind. 1995); *see also Estate of Mintz v. Conn. Gen. Life Ins. Co.*, 905 N.E.2d 994, 1001 (Ind. 2009).

Here we conclude that EMC has designated insufficient evidence that Budd was an authorized agent to whom notice could be tendered under the GIE policy. EMC offers no evidence of Budd and GIE's relationship, conduct, or course of dealing that would demonstrate Budd was an agent of GIE. *See, e.g., Mintz*, 905 N.E.2d at 1002 ("[T]he undisputed facts in this case demonstrate that Gruber was not the agent of Connecticut General. There was simply nothing before the trial court showing that the relationship between Gruber and Connecticut General, their actions, or their usual course of dealing,

made Gruber Connecticut General's insurance agent."'). EMC stresses that on one of Winamac's numerous policy endorsement forms, David Budd appears to be named as an authorized representative of Bliss Indiana. Regardless of how David Budd's name wound up on a single, isolated policy endorsement, that form and all other relevant policy pages still specify "Bliss Indiana" as GIE's actual "agent." Nowhere is the "Budd Agency" designated an agent of GIE. And there is no dispute that Winamac furnished notice only to the Budd Agency, not to Bliss Indiana. For these reasons we find no issue of material fact as to whether Budd was a GIE agent for purposes of the subject notice provisions. Accordingly, we conclude that Winamac's notice to the Budd Agency was not effective to trigger GIE's defense obligations, and applicable notice was first provided only in January 2007 when EMC advised GIE of the Galco suit. GIE contributed to Winamac's defense costs thereafter, but it rightfully denied coverage for any costs incurred beforehand. EMC is therefore owed no contribution for pre-2007 costs.

We affirm the trial court's entry of summary of judgment in favor of GIE and its denial of summary judgment for EMC.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.