2021 IL App (2d) 200650-U
No. 2-20-0650
Order filed December 9, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WASCO SANITARY DISTRICT, Plaintiff-Appellee, v. FOX MILL LIMITED PARTNERSHIP, and KANE COUNTY LAND COMPANY, Defendants-Appellants	)	Appeal from the Circuit Court of Kane County. No. 10-MR-525 Honorable Kevin T. Busch, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Bridges and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: In response to a lawsuit, the sanitary district and its trustees notified developers that they wished to be defended and indemnified against the suit; the trial court did not err in granting declaratory judgment on coverage in favor of district and its trustees.

¶ 2 Defendants, Fox Mill Limited Partnership and the Kane County Land Company (collectively, FMLP), appeal from a declaratory judgment for defense costs in favor of the Wasco Sanitary District (District). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1994 the District entered into an annexation agreement to provide water and wastewater treatment services for FMLP's residential development, a subdivision called Fox Mill. This subdivision included about 800 high-end custom homes in the Village of Campton Hills. Under the agreement, FMLP would pay for or construct water facilities for the District and in return FMLP could collect for the connection permits for the Fox Mill subdivision. (The connection permits were sold for around $25,000 for each single-family home; builders must typically pay these fees, which are then incorporated into the home's sale price.) The agreement also provided that FMLP could sell the District's excess capacity provided that the excess was created by FMLP's improvements.

¶ 5 Relevant here, in a section titled "Hold Harmless and Indemnification," the 1994 annexation agreement provided as follows:

> "In the event a claim is made against the DISTRICT, its officers, other officials, agents and employees *** or any of them, is made a party-defendant in any proceeding arising out of or in connection with this Agreement, the annexation of the ANNEXATION REALTY, the approval and construction of the WASTEWATER FACILITIES or WATER FACILITIES, or the development of the SUBJECT REALTY, including matters pertaining to hazardous materials and other environmental matters, [FMLP] shall * * * *defend and hold the DISTRICT* such officers, other officials, agents and employees *harmless from all claims*, liabilities, losses, taxes, judgments, costs, fees, including expenses and reasonable attorneys' fees, in connection therewith ***." (Emphasis added.)

The preceding passage is the primary focus of this appeal; however, on the topic of attorneys, the agreement also provided the following:

> "Any such indemnified person may obtain separate counsel to participate in the defense thereof at his own expense. However, if the Illinois Rules of Professional Conduct, as amended, requires such indemnified person to be separately defended where there is no consent to a conflict of interest, then [FMLP] shall bear such expense. In the event of a conflict of interest, it is agreed that [FMLP] will pay for a Kane County attorney to represent such person. The DISTRICT and such officers, other officials, agents and employees shall cooperate in the defense of such proceedings and be available for any litigation related appearances which may be required."

¶ 6 FMLP's ability to sell connection permits related to District's "excess" capacity figures prominently in this story. FMLP's principals, Jerry Boose and Kenneth Blood, operated other residential real estate ventures in the area, including one known as B&B Enterprises. In subsequent amendments to the 1994 agreement, FMLP assigned its excess capacity rights to B&B Enterprises. As an example of one transaction, in July 2008 B&B sold capacity for 106 single-family detached lots in the Norton Lakes subdivision to developers Hudson T. Harrison and others. At $25,000 per lot, B&B—through FMLP—received $2,650,000 for the transaction.

¶ 7 In November 2009, one of the District's residents, Ed Fiala and a third-party home developer, Tim Kobler Custom Homes, Inc. (we can refer to both simply as Fiala) filed suit in federal court against the District, its trustees (Raul Brizuela, Robert Skidmore, Gary Sindelar), its outside counsel (Charles Muscarello), as well as FMLP, B&B, Boos e, Blood, B&B and FMLP's attorney (Patrick Griffin) and Harrison. Fiala's suit was brought as a putative RICO-class action (18 U.S.C. § 1962) alleging a pattern of racketeering activity including bribery, theft, and fraud designed to deprive the District's residents and builders of their property.

¶ 8 According to Fiala, these transactions were rife with conflicts of interest due to "family connections." Fiala alleged, for example, that Skidmore's wife, Kim, was an employee of B&B and was also Blood's niece; that Brizuela's wife, Caroline, was Blood's daughter and held an interest in a third-party investment firm with connections to Griffin, Muscarello, and Sindelar; that Griffin's wife, Sarah, was also Blood's daughter; and that Sindelar was employed by B&B as well. Fiala's suit sought the disgorgement of "all monies received by B&B, FMLP, and the B&B family" from the sale of the District's excess wastewater capacity. Fiala alleged that all of the defendants had misrepresented the District's existing capacity in order to sell more permits as excess.

¶ 9 As the District notes in its brief, the 1994 annexation agreement was "literally Exhibit A" to Fiala's complaint. In April 2010, Fiala voluntarily dismissed his federal lawsuit and refiled it in state court in Kane County. Two months later, Fiala removed his suit to federal court. Eventually, the district court dismissed Fiala's sole federal RICO claim and relinquished supplemental jurisdiction remanding his state-law claims to state court. *Fiala v. Wasco Sanitary District*, 2012 WL 917851 (N.D.Ill. 2012). The Seventh Circuit affirmed. *Fiala v. B&B Enterprises*, 738 F.3d 847 (2013).

¶ 10 Now, back in state court, the Fiala litigation remains pending in Kane County. Fiala's amended state-court complaint is included in the record. Like all of the prior federal and state complaints, Fiala continued to assert claims against both FMLP and the District.

¶ 11 The District notified FMLP that it and its trustees wanted to be defended under the 1994 annexation agreement; FMLP refused. The District began to pay its own defense costs and those of its trustees (70 ILCS 2805/12.1 (West 2010)) and, in October 2010, the District filed this case against FMLP. Count I of the complaint sought a declaratory judgment that Fiala's suit arose from the 1994 annexation agreement and that, under the agreement, FMLP was obligated to defend and

indemnify the District. Count II was a breach-of-contract claim alleging that FMLP failed to defend and indemnify the District.

¶ 12 The case largely remained on the back burner in the trial court, by agreement; meanwhile, the District's legal expenses began to add up to nearly $2 million. To raise funds for attorney fees for the Fiala litigation, the District added a $20 per month per resident fee. Eventually, FMLP answered the complaint and filed several affirmative defenses. Relevant here, FMLP asserted that the Fiala litigation did *not* arise from the 1994 agreement because Fiala was not seeking to overturn that agreement; that the District failed to "tender" the Fiala suit to FMLP; that the District failed to hire "a Kane County attorney" to represent them; and, that the District refused to cooperate with FMLP in its defense against Fiala.

¶ 13 In January 2020, the parties filed cross motions for summary judgment and, after hearing arguments, the trial court issued a four-page, single-spaced judgment, largely in the District's favor. We will discuss the court's findings in more detail below, but for now it suffices to say that, on count I, the court granted a declaratory judgment for the District on defense and indemnity under the 1994 agreement. On count II, however, the court found that there was insufficient evidence to grant summary judgment because it could not determine from the record the extent to which the District had mitigated its damages. This, however, the court found, was relevant only to the breach-of-contract claim and would not impact the District's right to declaratory judgment on the issue of whether FMLP had a continuing duty to defend it. See generally *Boyer v. Buol Properties*, 2014 IL App (1st) 132780, ¶ 67 (a plaintiff in a breach of contract suit cannot recover losses that could reasonably have been avoided).

¶ 14 FMLP indicated that it wished to appeal the trial court's order and the parties agreed to an immediate appealability finding under Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016). The

District, in turn, received an order granting it approximately $1.3 million in attorney fees expended in the Fiala litigation. In January 2021, the trial court modified its order to include approximately $400,000 in additional fees that were not included in the original order or had accrued since the order was entered. FMLP timely appealed from the trial court's judgment.

¶ 15 II. ANALYSIS

¶ 16 Before this court, FMLP largely renews its arguments that were unsuccessful in the trial court. Whether in a declaratory judgment action or otherwise, summary judgment is proper only where the pleadings and evidence on file show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2020). Our review is *de novo*. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15.

¶ 17 One argument that FMLP chose to abandon was its contention that because Fiala was not seeking to void the 1994 annexation agreement, the litigation did not "arise" out of that agreement. The trial court found that argument was "duplicitous" and noted that *all* of the District's operations, like Fiala's claims, arise from the 1994 annexation to provide water and wastewater services to the Fox Mill subdivision. We concur with the trial court's observation.

¶ 18 On appeal, FMLP's first contention is that the District was required, but failed, to "formally tender" Fiala's suit to trigger FMLP's duty to defend. The concept of tender—a matter common in most insurance coverage cases—is often a provision in insurance contracts:

> "An insurer's duty to defend an insured is triggered (1) when the insured tenders the defense of an action that is potentially within the scope of coverage [Citation] or (2) when the insurer has 'actual notice' of such a claim, even without a formal tender [citation]. Tendering a defense, in this context, means asking the insurer for assistance in defending the suit." *Crawford v. Belhaven Realty LLC*, 2018 IL App (1st) 170731, ¶ 37.

FMLP repeats its citations to *Forum Insurance Co. v. Ranger Insurance Co.*, 711 Supp. 909 (N.D.Ill. 1989), and an unpublished federal district court case, *TNT Logistics North America, Inc. v. Bailly Ridge TNT, LLC*, 2006 WL 2726224 (N.D.Ill. 2006), but neither case is apposite. Both cases involve tender in accordance with standard insurance contracts. Here, however, FMLP is not an insurer, and the District is not seeking defense and indemnity under the terms of an insurance policy. Even where a party "step[s] into the shoes of the insurer as a *de facto* insurer," that party only has the rights and responsibilities it has been assigned under the relevant contract. *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2019 IL 123936 ¶ 29. Nothing in the 1994 annexation agreement or subsequent amendments required the District to "formally tender" a suit to FMLP to trigger its duty to defend and indemnify. "Tender" language, which would be standard boilerplate in a typical insurance contract, was not in the 1994 annexation agreement, which was categorically *not* an insurance contract. So, FMLP's tender argument is irrelevant.

¶ 19 But even if we were to treat FMLP as an insurer, we agree with the trial court that FMLP had ample notice of Fiala's claim against the District. "If the facts alleged in the underlying complaint fall within, or potentially within, [an insurance] policy's zone of coverage, then the insurer is obligated to defend the insured for the entire action." *McCormick Foundation*, 2016 IL App (2d) 150303, ¶ 9 (citing *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 127 (1992)). An insurer has actual notice of a suit when it has sufficient information to locate and defend the action. *Crawford*, 2018 IL App (1st) 170731, ¶ 38 (citing *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 190 (2010)); see also *Cincinnati Companies v. West American Insurance Co.*, 183 Ill. 2d 317, 328 (1998) ("actual notice of a claim *** trigger[s] the insurer's duty to defend, irrespective of the level of the insured's sophistication, except where

the insured has knowingly forgone the insurer's assistance").

¶ 20 FMLP notes five instances in 2010 where the District referenced the 1994 agreement and requested FMLP defend and indemnify the District and its officers in the Fiala litigation. FMLP reasserts that none of these communications specifically "tendered" the District's defense to FMLP, but on that score FMLP has completely missed the point. Each of the communications in question sought defense and indemnification from FMLP pursuant to the 1994 agreement and referenced Fiala's lawsuit. Those communications indicate that the District was not attempting to go its own way; the District was actively seeking FMLP's help against Fiala only to be repeatedly turned away by FMLP.

¶ 21 At oral argument, counsel for FMLP asserted that *if* the District and its trustees sought coverage, they did so only "by stealth." That assertion is incredible. Each letter from the District's trustees and their substitute counsel made reference to the defense and indemnification provisions from the 1994 agreement in response to the Fiala litigation. Three of the letters quote the hold-harmless provision *in its entirety*. These were not acts of "stealth." They were plainly requests that FMLP defend and indemnify the District and its trustees.

¶ 22 FMLP has never denied that it knew the District was also a named defendant in each version of Fiala's complaint. FMLP would prefer a contrary result which would ultimately make no sense: having the District "jump through meaningless hoops towards an absurd end: telling [FMLP] something it already kn[e]w[ ]" (internal quotation marks omitted.) (*Cincinnati Companies*, 183 Ill. 2d at 328)—*i.e.*, that it was being sued by Fiala and wanted to be defended and indemnified under the 1994 agreement. Candidly, it is hard to imagine what more the District could have done under the circumstances. After nearly a decade of state and federal litigation, surely, FMLP cannot express bewilderment that the District was a party to the Fiala litigation; both

FMLP and the District were represented at counsels' table in the same suit concerning the 1994 agreement. Like the trial court, we will not permit FMLP to continue to deny the obvious. Accordingly, we reject FMLP's argument that it had insufficient notice or "tender."

¶ 23 Next, FMLP asserted that it had no obligation to defend the District because the District failed to hire "a Kane County attorney." The agreement stated that, "[i]n the event of a conflict of interest, it is agreed that [FMLP] will pay for a Kane County attorney to represent [any indemnified] person." Like the trial court, we find this provision of the annexation agreement puzzling. Attorneys are licensed to practice law in any judicial circuit in this state. Is "a Kane County attorney" any attorney that practices law in a Kane County courtroom? Must they have an office in Kane County? In order to satisfy the provision, is the attorney barred from practicing law in another county? Perhaps the provision is intended to cap attorneys' fees at the lodestar typically charged by attorneys in Kane County. At oral argument, FMLP's counsel posited (unhelpfully) that "a Kane County attorney" is simply an attorney that is "not from New York, London, or L.A."

¶ 24 We need not ponder the issue for too long, however. The need to hire "a Kane County attorney" only would have arisen if there was a conflict of interest in having the same attorney jointly represent FMLP and the District while the parties adopted inconsistent positions. See generally *In re Br. M.,* 2021 IL 125969, ¶ 44. We agree with the trial court that, ultimately, the provision is irrelevant since "FMLP never endeavored to accept [the District's] defense," so there was no occasion to question whether counsel's representation was conflicted and no need to determine whether "a Kane County attorney" was required. The hiring of conflict counsel was, simply, a contractual nonevent.

¶ 25 The issue of conflict counsel, too, seems to have been completely illusory. For example, Boose, in his deposition, testified that *even if* the District had sought "defense through a Kane

County lawyer," FMLP *still* would not have agreed to defend the District because FMLP "wouldn't have been able to *** afford it." (Boose further testified that FMLP never tendered the Fiala suit to FMLP's general liability commercial insurance on its own behalf.) Like the trial court, we are convinced that the issue of "a Kane County attorney" was merely another straw man conjured by FMLP to avoid providing the District with its contractually promised defense and indemnification.

¶ 26 In addition, citing the 1994 agreement's cooperation clause, FMLP also alleges that the District failed to cooperate with FMLP in the underlying Fiala litigation. As the trial court noted, cooperation is a fact-bound issue that speaks to damages and mitigation. See *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 191-93 (1991); *Grill v. Adams*, 123 Ill. App. 3d 913, 921 (1984). Furthermore, as the District rightly points out: "the issue of cooperation would have no impact on the District's right to a declaratory judgment on the issue of whether FMLP had a continuing duty to defendant." Accordingly, this issue must first be resolved in the trial court before we can properly consider it.

¶ 27 Finally, FMLP challenges the trial court's turnover orders, which released nearly $2 million from FMLP's bond posted with the circuit clerk to cover a decade of the District's attorneys' fees. We find no error here. FMLP elected to appeal the trial court's declaratory judgment separately while matters were still pending in the trial court. FMLP specifically sought an immediate appealability finding under Supreme Court Rule 304(a) and that entails an immediate enforceability finding as well. That is, here, the trial court "made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a). FMLP cites no authority at all on this issue, and no authority that would undermine the plain language of Rule 304(a). See *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 14 ("Supreme court rules are not mere suggestions; they are rules that must

be followed."). And, to put it differently, without an immediate enforceability finding, we would not have jurisdiction to consider this appeal. See, *e.g.*, *Arachnid, Inc. v. Beall*, 210 Ill. App. 3d 1096, 1102 (1991).

¶ 28 III. CONCLUSION

¶ 29 Like the trial court, we reject FMLP's contentions. The 1994 annexation agreement plainly obligated FMLP to defend and indemnify the District, and the trial court correctly determined that FMLP had a continuing duty to defend and indemnify the District and its trustees. For these reasons, we affirm the judgment of the Circuit Court of Kane County granting a declaratory judgment in the District's favor.

¶ 30 Affirmed.