2015 IL App (4th) 140713-U

NO. 4-14-0713

FILED
May 21, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

GARDNER DENVER, INC., Plaintiff-Appellant, v. NATIONAL INDEMNITY COMPANY; RESOLUTE MANAGEMENT, INC.; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, Defendants-Appellees,	)	Appeal from Circuit Court of Adams County No. 13L45 Honorable Thomas J. Ortbal, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed, concluding the trial court erred in dismissing plaintiff's complaint for failure to state a cause of action where the complaint alleged sufficient facts to overcome defendants' conditional agency privilege.

¶ 2 In October 2013, plaintiff, Gardner Denver, Inc. (Gardner Denver), filed a complaint against defendants, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (National Union), National Indemnity Company (National Indemnity), and Resolute Management, Inc. (Resolute). As to National Indemnity and Resolute, Gardner Denver alleged they tortiously interfered with its settlement agreement with National Union (count I) and engaged in deceptive practices (count II). National Union was a party to a separate appeal and is not a party in the present appeal. See *Gardner Denver, Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 2015 IL App (4th) 140848-U (unpublished order under Supreme Court Rule 23). In February 2014, National Indemnity and Resolute filed a motion to dismiss Gardner

Denver's complaint for failure to state a cause of action, which the trial court granted in June 2014.

¶ 3 Gardner Denver appeals, asserting the trial court erred in dismissing its complaint. Specifically, Gardner Denver argues it alleged sufficient facts to overcome National Indemnity's and Resolute's conditional agency privilege, thus stating a cause of action supporting its complaint. For the following reasons, we reverse.

¶ 4 I. BACKGROUND

¶ 5 Starting in 1978, National Union, an insurance company, entered into a series of indemnity agreements with Gardner Denver's predecessors in interest in which Gardner Denver paid certain fees to National Union in exchange for liability coverage. The indemnity agreements further outlined the parties' obligations to one another regarding products-liability actions.

¶ 6 In 2001, Gardner Denver instituted litigation against National Union, seeking a declaration that National Union was obligated to defend and indemnify Gardner Denver against claims arising under the various indemnity agreements. In 2003, the parties entered into a settlement agreement resolving National Union's obligation to Gardner Denver. In the years following, National Union performed its obligations pursuant to the settlement agreement.

¶ 7 However, in 2011, the relationship between Gardner Denver and National Union began to change. At that point, National Union entered into a "retroactive reinsurance" agreement with National Indemnity. Under a retroactive-reinsurance policy, an insurance company, such as National Union, pays a substantial sum to a more financially stable insurance company, such as National Indemnity, to "reinsure" its debt and liabilities. The reinsurer then assumes the obligations and liabilities of the reinsured company. Because many of the

obligations and liabilities are ongoing over the course of years or decades, in the interim, the reinsurer is free to invest the substantial sum paid by the reinsured company until such time that insurance claims become due.

¶ 8 Under the retroactive-reinsurance policy, Gardner Denver claims National Indemnity obtained total control over claims-handling decisions regarding National Union's asbestos and other mass tort liabilities. National Indemnity then delegated its control to Resolute Management. Because the interests and arguments of National Indemnity and Resolute are the same for purposes of this appeal, for simplicity's sake, we will refer to them collectively as NICO.

¶ 9 In 2012, shortly after National Union entered into its agreement with NICO, National Union ceased making payments to Gardner Denver under the 2003 settlement agreement. In October 2013, Gardner Denver filed a complaint against National Union and NICO. As to NICO, Gardner Denver asserted NICO engaged in (1) tortious interference with a contract by inducing National Union to breach the settlement agreement (count I); and (2) deceptive business practices (see 815 ILCS 505/1 to 505/12 (West 2012)) by, in part, asserting a new and frivolous defense to excuse its performance under the settlement agreement (count II).

¶ 10 In February 2014, NICO filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615 (West 2012)), asserting Gardner Denver failed to state a cause of action. Specifically, NICO argued the law provided it with a qualified privilege against claims of tortious interference with a contract where it acted as a representative of the principal—*i.e.*, National Union—and, therefore, Gardner Denver failed to state a claim for tortious interference with a contract. Additionally, NICO asserted Gardner

Denver's deceptive-practices claim was preempted by section 155 of the Insurance Code (215 ILCS 5/155 (West 2012)).

¶ 11 In June 2014, the trial court entered a written order dismissing Gardner Denver's complaint against NICO. As to the count of tortious interference with a contract, the court noted the allegations in the complaint were,

> "inconsistent with the necessary factual allegations that NICO was acting *solely* for its benefit and totally unrelated to the interests of [National Union]. *** Since the complaint does not adequately allege facts that NICO was acting solely for its own benefit, or solely to harm [Gardner Denver], the court finds that it would only state a cognizable action if the allegations establish the *methods or means* of the interference are malicious or unjustified." (Emphasis in original.)

Though Gardner Denver claimed NICO acted with "oppression, fraud, and malice" toward Gardner Denver, the court found insufficient facts to support those legal conclusions. Moreover, the court found the complaint failed to set forth factual allegations demonstrating NICO had committed a tort; thus, NICO could not be liable for tortious interference of a contract. Because the court found the complaint failed to set forth factual allegations demonstrating NICO had committed an independent tort, it dismissed the deceptive-practices count as being preempted by section 155 of the Insurance Code.

¶ 12 In August 2014, the trial court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), finding there was no just reason to delay the enforcement or appeal of the court's judgment.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Gardner Denver asserts the trial court erred in dismissing its complaint. Specifically, Gardner Denver argues it stated a claim for (1) tortious interference with a contract by alleging NICO acted without justification and with malice, thus defeating NICO's conditional agency privilege (count I); and (2) by stating a claim for tortious interference with a contract, it demonstrated sufficient facts to sustain its deceptive-business-practices claim (count II).

¶ 16 The trial court dismissed Gardner Denver's complaint pursuant to section 2-615(a) of the Civil Code (735 ILCS 5/2-615(a) (West 2012)), for failure to state a cause of action. The purpose of a section 2-615(a) motion to dismiss is to challenge the legal sufficiency of the complaint where defects are apparent on its face. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. The question is "whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Id.* In doing so, we accept all well-pleaded facts as true. *Id.* ¶ 26, 988 N.E.2d 984. "The complaint must be construed liberally and should only be dismissed when it appears that the plaintiff cannot recover under any set of facts." *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14, 13 N.E.3d 350.

¶ 17 With this standard in mind, we turn to the merits of Gardner Denver's appeal.

¶ 18 A. Tortious Interference with a Contract

¶ 19 Gardner Denver first contends the trial court erred by dismissing count I of its complaint because it pleaded sufficient facts to demonstrate NICO engaged in tortious

interference with the settlement agreement. To state a claim for tortious interference with a contract, the complaint must allege, "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages. [Citations.]" *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 154-55, 545 N.E.2d 672, 677 (1989). At issue here is whether it was Gardner Denver's burden to plead a lack of justification. See *id.* at 156, 545 N.E.2d at 677 (where a conditional privilege exists, the burden is on the plaintiff to demonstrate the defendant acted without justification). To answer this question, we first look to whether the complaint demonstrates NICO was acting as an agent for National Union.

¶ 20 1. *Was NICO Acting as an Agent for National Union?*

¶ 21 Entities exercising their business judgment for the benefit of a client are similar to agents or corporate officers who exercise their discretion for the benefit of their company. *Id.* at 157, 545 N.E.2d at 677. Parties serving in that capacity enjoy a conditional privilege against a claim that it interfered in a third party's contractual relationship with its client. *Id.* This privilege is afforded so long as the advice given is (1) requested, (2) within the scope of the request, and (3) honest, regardless of whether the agent profits from the advice. *In re Estate of Albergo*, 275 Ill. App. 3d 439, 447, 656 N.E.2d 97, 104 (1995) (quoting Restatement (Second) of Torts § 772 (1965)).

¶ 22 Before the trial court, Gardner Denver asserted NICO was not an agent of National Union and was therefore not entitled to the conditional agency privilege. However, on appeal, Gardner Denver appears to abandon this argument by focusing on whether NICO

engaged in unjustified actions that would defeat the privilege. Other than general statements of law, such as that agency determinations are questions of fact that cannot be resolved in a motion to dismiss (see *Amigo's Inn, Inc. v. License Appeal Comm'n of the City of Chicago*, 354 Ill. App. 3d 959, 965, 822 N.E.2d 107, 113 (2004)), Gardner Denver makes no specific arguments with regard to whether an agency relationship exists. Thus, we will accept the trial court's finding that an agency relationship exists between NICO and National Union. The burden was therefore upon Gardner Denver to sufficiently allege a lack of justification to state a cause of action for tortious interference with a contract. See *HPI Health Care Services*, 131 Ill. 2d at 156, 545 N.E.2d at 677.

¶ 23 2. *Did Gardner Denver Sufficiently Plead a Lack of Justification?*

¶ 24 Gardner Denver argues the complaint alleged sufficient facts demonstrating NICO's actions lacked justification, thus overcoming the motion to dismiss.

¶ 25 Where an agency relationship has been established, thereby creating a conditional privilege, the plaintiff bears the burden of pleading the defendant's conduct lacked justification or was done with malice. *HPI Health Care Services*, 131 Ill. 2d at 156, 545 N.E.2d at 677. "The term 'malicious,' in the context of interference with contractual relations cases, simply means that the interference must have been intentional and without justification." *Id.* at 156-57, 545 N.E.2d at 677. Additionally, the agency privilege does not extend to bad-faith conduct engaged in by the defendant solely for its own benefit or for the sole purpose of harming the plaintiff. *Id*. at 158-59, 545 N.E.2d at 678.

¶ 26 The parties make several arguments related to whether Gardner Denver's complaint alleged sufficient facts to show NICO's actions lacked justification. However, one particular issue stands out as precluding dismissal for failure to state a cause of action.

¶ 27 One allegation in the complaint is that NICO acted without justification and with malice by refusing to follow the terms of the settlement agreement, thus overcoming the conditional agency privilege. The following facts are alleged in the complaint with regard to this assertion. National Union and Gardner Denver fulfilled their respective obligations pursuant to the settlement agreement until NICO assumed control over National Union's claim-handling services in 2011. Shortly thereafter, NICO refused to pay claims arising under the settlement agreement. When Gardner Denver requested payment of the outstanding balance, NICO responded it would issue an invoice based on the indemnity agreements between Gardner Denver and National Union. In May 2013, Gardner Denver received a letter from NICO claiming Gardner Denver had failed to comply with the indemnity agreements, which it asserted were still in effect notwithstanding the settlement agreement. By its interpretation of the settlement and indemnity agreements, NICO asserted the settlement agreement did not release Gardner Denver from its obligations under the original indemnity agreements and, therefore, Gardner Denver owed defense costs as set forth in the indemnity agreements. After outlining these facts, Gardner Denver argued NICO's defense for failing to pay was frivolous and an unjustified and malicious attempt to reduce its liabilities in order to increase its profits.

¶ 28 In its written order, the trial court noted neither party cited cases directly on point to answer whether "the intentional interjection of alleged frivolous insurance defenses would constitute unjustified or improper methods of contract inference by a party conditionally protected to interfere." While no cases may directly answer the court's question, the ultimate issue remains the same—whether NICO's actions, as agents of National Union, in denying or refusing to pay claims were unjustified or malicious. Resolving such an inquiry first requires an interpretation of the settlement and indemnity agreements. In this matter, the case has not yet

proceeded to the stage in which the court will make that determination. Additionally, the court would need to know the extent to which National Union authorized or acquiesced to NICO's interpretation of the settlement and indemnity agreements—yet another factual inquiry beyond the bounds of a motion to dismiss. Thus, the issue is whether the complaint, on its face, and taking all facts and reasonable inferences in the light most favorable to Gardner Denver, states a cause of action. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. Until the court answers whether NICO's defense was frivolous, it could not determine whether NICO acted in good faith or, alternatively, acted without justification or malice, in its failure to pay claims pursuant to the settlement agreement. NICO devotes substantial space in its brief to explaining its interpretation of the settlement agreement. The fact that NICO felt the need to do so further supports our conclusion.

¶ 29 NICO also asserts Gardner Denver's complaint offered insufficient facts to support it was acting solely for its own benefit rather than that of National Union. However, interpreting the settlement agreement and determining the extent to which National Union endorsed NICO's actions would also resolve that issue. If, at a later stage in the proceedings, the trial court finds NICO's defense was frivolous, such a finding may impact the analysis of whether NICO lacked justification or acted with malice solely to further its interests. That factual determination is more appropriate for a future proceeding, not a motion to dismiss based on the face of the complaint. See *Sherman v. Field Clinic*, 74 Ill. App. 3d 21, 25, 392 N.E.2d 154, 157-58 (1979) (resolving agency questions "necessarily depends upon such facts as *** the extent to which the tortious conduct alleged was committed in the course of and in furtherance of the principal's business.").

¶ 30 On this count, in viewing the face of the complaint and all reasonable inferences to be drawn therefrom, we cannot conclude no set of facts exist under which Gardner Denver may recover. See *Hartmann Realtors*, 2014 IL App (5th) 130543, ¶ 14, 13 N.E.3d 350. Thus, we hold count I of Gardner Denver's complaint, on its face, alleges sufficient facts to state a claim for tortious interference with a contract. In reaching this conclusion, we offer no opinion regarding the merits of Gardner Denver's complaint.

¶ 31 B. Deceptive Business Practices

¶ 32 We next turn to Gardner Denver's assertion that it stated a cause of action sufficient to overcome a motion to dismiss as to its deceptive-business-practices claim (count II). As noted above, Gardner Denver's complaint, in part, alleged NICO engaged in deceptive business practices by improperly interfering in the settlement agreement between National Union and Gardner Denver by asserting a "new and frivolous" defense, which resulted in delayed or denied payments. On appeal, the parties dispute whether Gardner Denver alleged an independent tort that would permit recovery under this count.

¶ 33 NICO asserts Gardner Denver's claim is preempted by section 155 of the Insurance Code (215 ILCS 5/155 (West 2012)). Section 155 provides an extracontractual remedy in breach-of-contract actions that allows the plaintiff to collect attorneys fees, punitive damages, and other costs not ordinarily available in contract claims. See *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 526, 675 N.E.2d 897, 904 (1996); 215 ILCS 5/155 (West 2012). This "provides the remedy to policyholders for insurer misconduct that does not rise to the level of a well-established tort." *Cramer*, 174 Ill. 2d at 527, 675 N.E.2d at 904.

¶ 34 According to NICO, Gardner Denver's complaint merely alleges bad faith, which is not a separate and independent tort; therefore, NICO contends Gardner Denver is limited to seeking relief pursuant to section 155. We disagree.

¶ 35 "In cases where a plaintiff actually alleges and proves the elements of a separate tort, a plaintiff may bring an independent tort action, such as common law fraud, for insurer misconduct." *Id.* at 528, 675 N.E.2d at 904. "Mere allegations of bad faith or unreasonable and vexatious conduct, without more, however, do not constitute such a tort." *Id.* Rather, the plaintiff must properly allege malice, wantonness, or oppression. *Mucklow v. John Marshall Law School*, 176 Ill. App. 3d 886, 894-95, 531 N.E.2d 941, 946 (1988).

¶ 36 Here, we have already determined Gardner Denver stated a claim for tortious interference with a contract, which constitutes an independent tort. See, *e.g.*, *HPI Health Care Services*, 131 Ill. 2d at 154-55, 545 N.E.2d at 676; *Roy v. Coyne*, 259 Ill. App. 3d 269, 278, 630 N.E.2d 1024, 1030 (1994); *Guice v. Sentinel Technologies, Inc.*, 294 Ill. App. 3d 97, 102, 689 N.E.2d 355, 359 (1997); and *Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, 356, 751 N.E.2d 1187, 1197 (2001) (discussing the independent tort of intentional interference with a contract).

¶ 37 To support this independent tort, Gardner Denver alleges more than bad faith that would be preempted by section 155 of the Insurance Code. Rather, it alleges NICO engaged in intentional misconduct and acted with malice in its refusal to honor the settlement agreement. Accordingly, the complaint, on its face, has alleged sufficient facts to state a cause of action on the deceptive-business-practices count pending the resolution of the tortious-interference-with-a-contract claim. We therefore conclude the trial court erred in granting the motion to dismiss as to count II.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, we reverse the trial court's judgment.

¶ 40 Reversed.