IN THE COURT OF APPEALS OF IOWA

FARM BUREAU MUTUAL INSURANCE COMPANY,	)	
	)	Filed February 5, 1980
Plaintiff-Appellant,	)	
vs.	)	
GEORGE C. SLOTA,	)	374 / 2-63574
Defendant-Appellee.	)	

Appeal from Cherokee District Court - James P. Kelley, Judge.

Plaintiff insurance company appeals adverse summary judgment in declaratory judgment action. - Affirmed in part and reversed in part.

J. R. Miller, of Miller, Miller & Miller, Cherokee, for plaintiff-appellant.

Larry C. Gipe, Marcus, for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Farm Bureau Mutual Insurance Company, appeals summary judgment for defendant, George C. Slota, in declaratory judgment action. We affirm in part and reverse in part.

Farm Bureau petitioned in equity for a declaratory judgment holding it free from any duty to defend Slota in a tort action brought against him by Robert Schulenberg or to indemnify him for any adverse judgment in that case. After hearing, the trial court granted Slota a partial summary judgment, found Farm Bureau had the duty to defend him, and, in a subsequent entry, dismissed Farm Bureau's petition. On appeal, Farm Bureau asserts genuine issues of material fact remained unresolved on its duties to defend Slota and, therefore, summary judgment was improper.

Initially, we note a declaratory judgment proceeding is proper to determine extent of coverage or obligations under an insurance contract. General Casualty Company v. Hines, 261 Iowa 738, 740, 156 N.W.2d 118, 120 (1968). Since the matter was tried below in equity, our review is de novo. Bjork v. Dairyland Insurance Company, 174 N.W.2d 379, 382 (Iowa 1970); Iowa R. App. P. 4.

I. Duty to Defend.

Farm Bureau asserts summary judgment on its duty to defend was inappropriate because genuine issues of material fact remained unresolved. See Steinbach v. Continental Western Insurance Company, 237 N.W.2d 780, 783 (Iowa 1976). Farm Bureau based its petition on two grounds: Slota's actions were intentional and not covered by the policy, and Slota failed to give notice of the tort lawsuit as required by the policy. No genuine material factual issue on either claim remained unresolved and, therefore, we find summary judgment on Farm Bureau's duty to defend was appropriate.

A. Intentional tort.

Farm Bureau's first ground for relief asserted it had no duty to defend Slota because he had acted intentionally. Farm Bureau's petition included allegations of Schulenberg's complaint and answers to interrogatories by Schulenberg stating Slota intentionally or negligently pulled a chair from under him. Farm Bureau claims summary judgment on its duty to defend Slota was improper because evidence showed Slota acted intentionally. None of the documents before the trial court on the summary judgment motion, however, demonstrated any issue of material fact on the intentional tort claim existed. Those documents only concerned the allegations and statements of Schulenberg that Slota acted negligently or intentionally by pulling out the chair. No facts on the underlying issue of the intentional tort were present; none concerned the manner in which Slota pulled the chair; none showed he had a duty not to pull the chair or was aware Schulenberg was going to sit in it. No facts were shown that Slota intended to harm Schulenberg. Schulenberg's answer to interrogatory recited only the alternative allegations of this petition; no factual allegations were made in either as they only asserted a conclusion in the alternative. Farm Bureau's resistance to the motion for summary judgment also failed to raise an issue of material fact; it merely restated the allegations and statement of Schulenberg.

When pleadings and filings fail to raise genuine issues of material fact, summary judgment is correct. See Graham v. Kuker, 246 N.W.2d 290, 292 (Iowa 1976). Here, summary judgment was warranted since no genuine factual issues were presented by Farm Bureau. In light of the general rule allegations in the third-party complaint are viewed to determine an insurer's duty to defend, we agree with the trial court and find Farm Bureau had the duty to defend Slota. See New Hampshire Insurance Company v. Christy, 200 N.W.2d 834, 838 (Iowa 1972) (quoting 50 A.L.R. 458, 465). Because we find the intentional tort claim was not raised to the level of a genuine issue of material fact, we need not discuss the public policy issue whether a factual question of negligent or intentional tort should preliminarily be litigated in a declaratory judgment proceeding.

B. Notice provisions.

Farm Bureau also claimed Slota breached the insurance contract by failing to meet its notice provisions. It claims summary judgment on that issue should have been denied. We find, however, the issue was one of law and summary judgment was proper.

The facts on the notice issue were uncontroverted. Those facts were reasonably susceptible of but one conclusion — that notice was timely given. Therefore, the question of compliance with the notice provisions was one of law. See Estate of Linderholm v. State Automobile & Casualty Underwriters, 169 N.W.2d 561, 564 (Iowa 1969) (quoting Parrish v. Phillips, 229 Wis. 439, 444, 282 N.W. 551, 553 (1938): "[T]he question whether timely notice was given . . . where the facts are not in dispute, and the inferences are certain, . . . is a question of law for the court.") Summary judgment on this issue was warranted and correctly rendered.

II. Duty to indemnify.

Farm Bureau also asserts the trial court improperly dismissed its petition for a declaratory judgment holding it free form any obligation to indemnify Slota. While we find the trial court correctly refused to enter an order in favor of Farm Bureau on that matter, we hold the trial court abused its discretion by dismissing the petition. The preclusive effect of that dismissal may bar future actions by Farm Bureau for relief from its duty to indemnify Slota. Thus, should Slota be found to have intentionally harmed Schulenberg, Farm Bureau would be prevented from seeking relief to which it would be entitled. Resolution of the duty to indemnify issue should have been delayed until resolution of the underlying tort claim. We hold the trial court erroneously dismissed that portion of Farm Bureau's petition since a continuance, pending resolution of the underlying suit, should have been entered.

For the reasons stated above, we reinstate Farm Bureau's petition for declaratory relief from its duty to indemnify Slota and remand that portion of the action to the trial court for appropriate action. We affirm the trial court's summarry judgment and order finding Farm Bureau had the duty to defend Slota in the underlying tort action.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.