

FILED
LORAIN COUNTY

2018 MAY 24 AM 11:15



To the Clerk: THIS IS A FINAL
APPEALABLE ORDER.
Please serve upon all parties not
in default for failure to appear;
Notice of the Judgment and its
date or entry upon the Journal

COURT OF COMMON PLEAS

LORAIN COUNTY COURT OF COMMON PLEAS

LORAIN COUNTY, OHIO

JOURNAL ENTRY

Hon. D. Chris Cook, Judge

Date May 24, 2018

Case No. 17CV192592

EVANSTON INS. CO., ET AL.

Plaintiff

Clifford Masch

Plaintiff's Attorney

VS

PROCENTURY INS. CO.

Defendant

David Lester

Defendant's Attorney

This matter is before the Court on Defendant, Procentury Insurance Co.'s ("Procentury"), Motion For Judgment On The Pleadings, filed December 12, 2017; Plaintiffs' Brief In Opposition, filed January 11, 2018; and Procentury's Reply Memorandum, filed January 29, 2018.

Oral hearing had May 9, 2018.

THE COURT RULES AS FOLLOWS: Procentury's Motion For Judgment on the pleadings is well-taken and hereby GRANTED.

See Judgment Entry.

IT IS SO ORDERED. No Record.

VOL _____ PAGE _____



JUDGE D. Chris Cook

cc: Masch, Esq.
Lester, Esq.



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JUDGMENT ENTRY
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FOR ORLANDO

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INTRODUCTION

This matter is before the Court on Defendant, Procentury Insurance Co.'s ("Procentury"), Motion For Judgment On The Pleadings, filed December 12, 2017; Plaintiffs' Brief In Opposition, filed January 11, 2018; and Procentury's Reply Memorandum, filed January 29, 2018.

Oral hearing had May 9, 2018.

ABBREVIATED STATEMENT OF FACTS

The facts in this matter, with one significant exception, are not materially contested.

A fellow by the name of Shannon Green ("Green") was injured while working near a guardrail ("The Accident") installed by Defendant, Veard Construction Co. ("Veard") at property known as Waterside Apartments ("Waterside") when the guardrail failed and Green fell two stories. Veard was retained by Waterside (and others) to complete repairs at Waterside after a fire ("The Project").

Veard hired Patrick Electric ("Patrick"), an independent contractor, to work on The Project at Waterside. Patrick retained Green to complete some electrical work near the guardrail.



It appears from the pleadings that Green, at the time he was injured at The Project, was an independent contractor of Patrick.¹

In any event, as a result of The Accident, Green sued Veard, Waterside, and others in 2013 and obtained a substantial judgment against them. ("Suit #1"). Suit #1 was eventually settled.

Significantly, in response to the claims in Suit #1, Veard, Waterside, and the other defendants sought insurance coverage and indemnification from Veard's insurance carrier, Procentury. Procentury declined to provide coverage on the basis that Green was not covered under Veard's policy.

As a result, Plaintiff, Evanston Insurance Co. ("Evanston"), the insurance company that provided coverage for Waterside agreed to defend and indemnify under a reservation of rights and ultimately settled all of Green's claims.

Thereafter, in 2016, Evanston sued Veard ("Suit #2") for the costs of settling Green's claims and received a stipulated judgment against Veard in the amount of \$766,171.00. In this suit, Veard again noticed Procentury and requested coverage – Procentury again declined to defend and indemnify Veard.

This case ("Suit #3"), followed where Evanston seeks to enforce the judgment it obtained in Suit #2 against Procentury wherein Veard alleges that Procentury breached its contract of insurance when it refused to provide coverage in Suit #1, Green's original action.

STANDARD OF REVIEW

The granting of a motion to dismiss filed under Civ.R. 12(B) or a motion for judgment on the pleadings filed under Civ.R. 12(C) is reviewed *de novo* by [a court of appeals]. *Savoy v. Kramer*, 9th Dist. Summit No. 27418, 2015-Ohio-437, ¶ 5. "[A] motion to dismiss filed after the pleadings have closed * * * is appropriately considered a motion for judgment on the pleadings pursuant to Civ.R. 12(C)." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569 (1996), quoting *Lin v. Gatehouse Constr. Co.*, 84 Ohio App.3d 96, 99 (8th Dist.1992). Because the appellees had already filed an answer when they filed their motion to dismiss, we must view the trial court's ruling as having granted a motion for judgment on the pleadings under Civ.R. 12(C). See *State ex rel. Mancino v. Tuscarawas Cty. Court of Common Pleas*, Slip Opinion No. 2017-Ohio-7528, ¶ 8, fn. 2. See: *Hall v. Crystal Clinic, Inc., et al.*, 9th Dist. Summit No. 28524, 2017-Ohio-8471, @ ¶ 5.

¹ Despite how this factual issue is plead, the parties at oral argument differed as to Green's status as an employee or an independent contractor.



"Civ.R. 12(C) * * * presents only questions of law, and determination of the motion for judgment on the pleadings is restricted solely to the allegations in the pleadings." *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166 (1973). "In ruling upon a motion under Civ.R. 12(C), the trial court is limited to the face of the pleadings on file with the court. It cannot be supported by facts outside those pleadings." *Epperly v. Medina City Bd. of Edn.*, 64 Ohio App.3d 74, 75-76 (9th Dist.1989). *Hall, supra*, @ ¶ 6.

ANALYSIS

The gravamen of Procentury's refusal to provide coverage² stems primarily from an exclusionary provision in the Procentury policy that excludes coverage for independent contractors.

Procentury issued a policy of general liability insurance to Veard ("The Policy"). The Policy provision at issue reads, in pertinent part:

EXCLUSION – BODILY INJURY TO INDEPENDENT CONTRACTORS

* * *

This insurance does not apply to:

Independent Contractors

"Bodily injury" to:

- (1) Any independent contractor or the "employee" of any independent contractor while such independent contractor or their "employee" is working on behalf of any insured;

* * *

Recall that as plead, Green was an independent contractor when he was injured at The Project. Evanston and Veard allege at Paragraph 14 of the Complaint the following, "In the furtherance of performing its electrical services, Patrick Electric retained the services **of independent contractor** Shannon Green, who performed work on behalf of Patrick Electric." (Emphasis added.)

In its answer, Procentury admits that Patrick "... hired or retained Shannon Green to perform work ..." but denies for want of information his status as an independent contractor.³

² In both Suit #1 and Suit #2.



Ultimately, this distinction is not significant.

The parties stipulated at the oral hearing that Patrick was clearly an independent contractor of Veard; that Patrick retained Green's services; that Veard had no knowledge or control over Patrick; and that Veard and Patrick were not in privity.

The second issue of contention argued by the parties is whether Green was ". . . working on behalf of any insured . . .", to wit: Veard, or whether Green was working for Patrick, the party that retained him.

Again, this distinction is irrelevant.

Clearly, as an independent contractor of Veard, Patrick and its employees were excluded from coverage under The Policy from any bodily injury. As such, the parties agree, as does this Court, that *if* Green was an "employee" of Patrick, an independent contractor hired by Veard, then there is no coverage for The Accident and Procentury was legally justified in refusing to provide a defense and indemnity to Veard in Suit #1 and Suit #2.

But, what if as alleged herein, Green was an independent contractor of Patrick? In other words, what if Green was an independent contractor *of an independent contractor*?

And, if Green was an independent contractor of Patrick and The Policy exclusion applies to him we still must ask - was Green ". . . working on behalf of any insured [Veard] . . ." or was Green working on behalf of Patrick? Put another way, even if Green was excluded from coverage under The Policy because of his status as an independent contractor, if he was working for Patrick, not an "insured" (Veard), does the exclusion apply?

The exact language of The Policy exclusion is dispositive.

This insurance does not apply to:

Independent Contractors

"Bodily injury" to:

³ At the oral hearing, the parties spent a considerable amount of time arguing that in Suit #1, Green alleged that he was *an employee* of Patrick.



- (1) **Any independent contractor** or the “employee” of any independent contractor while such independent contractor or their “employee” is working on behalf of any insured; (Emphasis added.)

* * *

This provision has three Boolean connective conjunctives. First, the provision exempts any independent contractor from coverage. Patrick is an independent contractor so it is excluded from coverage, but what about its independent contractors? If any independent contractor is excluded, and Green is an independent contractor, then Green is excluded as well.⁴

Second:

- (1) Any independent contractor or **the “employee” of any independent contractor** while such independent contractor or their “employee” is working on behalf of any insured; (Emphasis added.)

If Green was an “employee” of Patrick, he was the “employee of an independent contractor. But, was Green working for Patrick or on behalf of an insured (Veard)?

It does not matter.

- (1) Any independent contractor or the “employee” of any independent contractor **while such independent contractor or their “employee” is working on behalf of any insured;** (Emphasis added.)

Clearly, Patrick, an independent contractor, was working on behalf of an insured (Veard). Since “any independent contractor” or “their employee” working on behalf of an insured is exempt, Green’s status as an independent contractor or employee is irrelevant since Patrick was working on behalf of an insured.

Accordingly, it is also irrelevant if Green was working for Veard (the insured) or Patrick (his principal) as the exclusion applies regardless.

This result, enforcement of the exclusionary provision in favor of Procentury and against Green (and Veard) is consistent with what Procentury sought to accomplish. By issuing a general policy of insurance, Procentury agreed to insure Veard against certain risks, risks to Veard’s employees, business invitees, and other foreseeable parties. Procentury did not agree to insure people or entities, like independent contractors, who

⁴ Arguably, this analysis alone could end the inquiry and is presumptively dispositive.



were beyond the scope and control of its insured (Veard) or who could potentially create unforeseen, attenuated risk.

In any event, while the exclusionary provision in The Policy is upon first blush complex, in the final analysis, it is really quite simple. Independent contractors and their employees working on behalf of an insured are excluded from coverage, thus, the independent contractor of an independent contractor is also excluded from coverage.

This result is a logically intuitive tautology, for if independent contractors are excluded from coverage, it follows *ipso facto* that their independent contractors are also excluded.

Given this disposition, the Court need not address Procentury's argument that Lakeview and United are not insureds under The Policy.

CONCLUSION

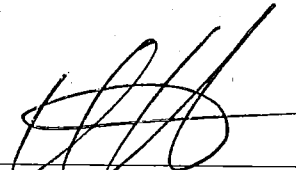
For the foregoing reasons, based upon the allegations solely in the pleadings when construing all material allegations in the complaint and all reasonable inferences drawn in favor of the non-moving parties, Plaintiffs Evanston and Veard, the Court finds that Plaintiffs can prove no set of facts in support of their claims that entitle them to relief.

Because no material fact issues exist, Defendant Procentury is entitled to judgment as a matter of law.

Case Dismissed. Costs to Plaintiffs.

IT IS SO ORDERED.

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JUDGE D. Chris Cook

TO THE CLERK: PURSUANT TO CIV.R. 58(B), THIS IS A FINAL APPEALABLE ORDER. PLEASE SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.