

July 6, 2023

Traub Lieberman Attorneys Brandt Allen and Danielle Kegley Win Motion to Dismiss in Favor of Insurer

Related Attorneys: Brandt W. Allen, Danielle K. Kegley

On April 21, 2023, Traub Lieberman Partner Brandt Allen and Associate Danielle Kegley won a motion to dismiss with prejudice in favor of Golden Bear Insurance Company (“Golden Bear”) in a matter brought before the Chancery Division of the Circuit Court of Cook County, Illinois.

Three professional models filed a lawsuit against Golden Bear’s insured on November 19, 2018, asserting claims for unauthorized use of their images in the promotion of the insured’s business and events. While counsel for the insured appeared in the case on February 18, 2019, the insured failed to provide Golden Bear with notice of the underlying lawsuit until over two years later on May 14, 2021, and ten days after a default judgment was entered against the insured. Golden Bear denied coverage to the insured for the original three plaintiffs’ claims. Subsequently, on October 5, 2021, the original plaintiffs sought, and were granted, leave to add six new plaintiffs to the lawsuit who were alleging similar claims against the insured. The insured never provided notice to Golden Bear of these new plaintiffs’ claims. The insured and the plaintiffs agreed to resolve the underlying lawsuit via a consent judgment and associated assignment of the insured’s rights against Golden Bear. The plaintiffs thereafter filed suit against Golden Bear seeking satisfaction of the consent judgment under the Golden Bear policy.

In response to the plaintiffs’ complaint in the coverage action, Golden Bear filed a motion to dismiss pursuant to 735 ILCS 5/2-606 and 2-619(a)(9). Specifically, Golden Bear argued plaintiffs’ claims should be dismissed under 2-606 for failing to attach the assignment document to the complaint, and should be dismissed with prejudice under 2-619(a)(9), in part, due to the insured’s violation of the notice conditions in the Golden Bear policy. Golden Bear argued the insured’s notice of the underlying lawsuit was late as a matter of law and that plaintiffs failed to establish, by affidavit or other proof, that the motion was unfounded or required the resolution of a material fact as required by 2-619(c).

Plaintiffs argued the complaint’s allegations were sufficient to defeat the 2-606 portion of the motion, claiming the court had to accept all well-pleaded facts, which obviated the need to recite the terms of the assignment in the complaint or attach a copy of the assignment document to the complaint. Further, plaintiffs argued that whether the insured provided notice required by the policy was a question of fact that could not be decided on a 2-619 motion, contending in their motion that the delayed notice was due to the insured’s lack of knowledge of the underlying lawsuit.

In granting Golden Bear's motion to dismiss with prejudice, the Court found the plaintiffs' complaint violated 2-606, which would require the filing of an amended complaint to attach the assignment document. However, notwithstanding that finding, the Court held that a pleading amendment would be futile because the insured breached the notice condition as a matter of law. The Court found that Golden Bear had sufficiently demonstrated a breach of the notice conditions in the policy and that plaintiffs, in contravention of 2-619(c), failed to offer any evidence or question of fact on the reasonableness of the notice. The Court rejected the plaintiffs' contention that the insured was not aware of the underlying lawsuit as demonstrated by the insured's counsel's appearance in the case, and that non-compliance with the affidavit or other proof requirement in 2-619(c) was fatal to the plaintiffs' claim. Thus, the Court granted Golden Bear's motion to dismiss with prejudice and no timely appeal was filed.