MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

ACE Property and Casualty Insurance Company,

Appellant,

v.

Liberty Mutual Insurance Company, Liberty Insurance Corporation, Liberty Mutual Group, Inc., David Burow-Flak, Christopher P. Meyer, and Paul P. Pobereyko, Gateway Arthur, Inc.

Appellees.

August 29, 2022

Court of Appeals Case No. 21A-CT-2467

Appeal from the Lake Superior Court

The Honorable John M. Sedia, Judge

Trial Court Cause No. 45D01-2005-CT-473

Bailey, Judge.

Case Summary

[1] This is a legal malpractice and insurance case arising out of an underlying personal injury lawsuit against Gateway Arthur, Inc. ("Gateway") that resulted in a damages award of approximately $1.4 million. ACE Property and Casualty Insurance Co. ("ACE"), with whom Gateway had an umbrella policy, denied Gateway's claim for payment of the damages award in excess of the amount covered by Gateway's primary insurance policy with Liberty Mutual Insurance Co. and/or Liberty Insurance Corp. ("Liberty").[1] ACE denied Gateway's claim on the ground that it had not received timely notice of the underlying lawsuit as required under the umbrella policy.

[2] Gateway subsequently sued Liberty for, among other things, malpractice for failing to provide notice of the underlying lawsuit to ACE. Gateway also sued ACE for breach of contract for failing to pay the excess damages award pursuant to the umbrella policy. Liberty filed a motion for summary judgment against ACE, asserting that Liberty did provide timely notice of the underlying lawsuit to ACE by serving ACE's broker and/or agent. The trial court granted Liberty's motion for summary judgment and ACE now appeals that judgment.

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[1] Appellees Liberty Mutual Insurance Company and Liberty Insurance Corporation are affiliated companies of Appellee Liberty Mutual Group, Inc. Appellees David Burow-Flak, Christopher Meyer, and Paul Pobereyko are attorneys who are employed by Liberty Mutual Group and who represented Gateway in the underlying lawsuit. For ease of reference—and because any distinction between the three entities and the attorneys is irrelevant to our decision on appeal—we refer to all three entities and the attorneys collectively as "Liberty."

We restate the dispositive issue on appeal[2] as follows: Whether the trial court erred in granting summary judgment to Liberty because there are disputed genuine issues of material fact.

[3] We reverse and remand.

Facts and Procedural History

[4] The designated undisputed material facts are as follows.

[5] On May 6, 2015, Jane Jones ("Jones") filed a lawsuit against several defendants, including Gateway, the owner of the commercial real estate on which Jones had allegedly fallen and suffered personal injuries. At that time, Gateway had a primary insurance policy with Liberty ("the Liberty policy"), with a policy limit of approximately $1 million. The Liberty policy had been procured for Gateway by "PG Genatt Group, LLC" (hereinafter, "PG Genatt"), a limited liability company that was formed under New York law in September of 2011. App. v. II at 54; App. v. V at 121. Gateway also had an umbrella insurance policy with ACE ("the ACE policy") in the amount of $25 million. The ACE policy had been procured for Gateway by "Genatt

[2] The trial court applied Indiana law to this case. Although both parties brief the issue of the applicable state law on appeal, both agree that Indiana law applies because there is no case-determinative conflict between the applicable Indiana and New York laws. Appellant's Br. at 18; Appellee's Br. at 22. Because there is no controversy on the issue of the applicable state law, we do not address the issue on appeal. *See, e.g.*, *Matter of Lawrence*, 579 N.E.2d 32, 37 (Ind. 1991) (noting we do not decide issues that have been "settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved").

Associates, Inc." (hereinafter, "Genatt Assoc.").[3] Genatt Assoc. is a corporation that was incorporated under New York law in April of 1967 under the name "Steven A. Genatt Associates, Inc." and changed to the name "Genatt Associates, Inc." in April of 1974. App. v. V at 123. Genatt Assoc. is listed in the ACE policy as the "Broker/Agent." App. v. IV at 191. PG Genatt and Genatt Assoc. are "separate entities," but they have the same address, i.e., 3333 New Hyde Park Road, New York, New York, 11042. Appellee's Br. at 26.

[6] Shortly after the Jones lawsuit was filed, Gateway notified PG Genatt of the lawsuit. On June 3, 2015, PG Genatt notified Liberty of Jones's lawsuit. Upon receiving such notice, Liberty appointed its attorneys to defend Gateway in the lawsuit. The Jones lawsuit proceeded to a jury trial, and the jury issued a verdict for Jones and against Gateway in the amount of $1,473,187.50 in damages. On January 3, 2020, PG Ganett sent to ACE by electronic mail a claim notice for the amount of the Jones lawsuit judgment in excess of the $1 million limit in the Liberty policy.

[7] ACE denied Gateway's claim for the amount of the judgment not covered by the Liberty policy—i.e., $473,187.50—on the grounds that ACE was not timely informed of the Jones lawsuit per the ACE policy with Gateway. The ACE

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[3] Although there was some dispute during summary judgment briefing as to which entity procured the ACE policy, all parties agree on appeal that the policy was procured by Genatt Assoc. *See* Appellant's Br. at 8; Appellee's Br. at 11. That fact is supported by the designated, undisputed evidence. App. v. II at 172 (the ACE policy); App. v. V at 110 (Affidavit of ACE Vice President Sean F. Gornell).

policy stated, in relevant part: "If a claim is made or 'suit' is brought against any 'insured' that is reasonably likely to involve this policy, you must … [n]otify us in writing as soon as practicable." App. v. IV at 140. The policy further provided: "You and any other involved 'insured' must: [i]mmediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit.'" *Id.*

[8] Liberty paid the $1 million limit of its policy to indemnify Gateway, in part, for the judgment, and Gateway paid the remaining outstanding judgment. On May 1, 2020, Gateway filed a lawsuit for indemnification against ACE and for breach of fiduciary duty and malpractice against Liberty. On July 13, 2021, Liberty filed a motion for summary judgment in which it asserted that neither it nor its attorneys were at fault for an alleged failure to notify ACE of a potential judgment. Specifically, Liberty contended that the notice Gateway provided to "Genatt" within one month of the filing of the Jones lawsuit was effective notice to ACE because "Genatt" was ACE's "broker/agent." App. v. III at 74. Liberty's documents in support of its motion for summary judgment indicated no distinction between PG Genatt and Genatt Assoc. and instead referred generally to "Genatt." *Id.*

[9] In its response to Liberty's summary judgment motion, ACE pointed out that the notice Gateway provided within one month of the filing of the Jones lawsuit was a notice to PG Gennat. ACE noted that Liberty had failed to designate any evidence establishing that PG Gennat had any relationship at all with ACE such that notice to PG Gennat could be considered notice to ACE. ACE

designated evidence establishing that the ACE policy was procured by "Genatt Associates, Inc." App. v. II at 172 (the ACE policy); App. v. V at 110 (Affidavit of ACE Vice President Sean F. Gornell). ACE further asserted that Genatt Associates is a "different legal entity" than PG Genatt and noted that Liberty had not designated any evidence to establish otherwise. ACE designated evidence showing that it had an agreement with Genatt Assoc. ("the Producer Agreement") under which Genatt Assoc. acted as ACE's "insurance *broker*." App. v. IV at 112 (emphasis in original). ACE asserted that notice of the Jones lawsuit sent in May or June of 2015 to PG Genatt was not notice to Genatt Assoc., ACE's broker. Therefore, ACE maintained, there is no designated evidence establishing that ACE had notice of the Jones lawsuit at any time before January 3, 2020, when PG Ganett sent notice of the judgment to ACE by electronic mail.[4]

[10] Following briefing and a hearing, the trial court issued an October 23, 2021, order granting Liberty's motion for summary judgment. The court found that the June 3, 2015, written notice of the Jones lawsuit "was sent" to a claims analyst at "P.G. Genatt Group, LLC," which "as ACE's broker/agent, procured the umbrella insurance policy issued by ACE on behalf of Gateway." Appealed Order at 2. The trial court pointed to a provision in the Producer Agreement requiring "The Producer" to notify ACE "in writing upon receipt of

[4] Liberty does not contend that the January 2, 2020, notice was, alone, timely notice to ACE of the Jones lawsuit.

notice of any claims, suits or losses under [ACE's] policies…." *Id*. at 3. The trial court further noted ACE's contention that the Producer Agreement was between ACE and Genatt Assoc., not between ACE and PG Genatt. However, the trial court found: "The fact that both entities share the name 'Genatt' and have the same address demonstrates the notice was sent to both." *Id*. at 3 n.2. The trial court found, in relevant part, that the notice provision of the Producer Agreement, "coupled with the undisputed facts that Genatt procured the umbrella insurance policy issued by ACE on behalf of Gateway, … implicates Genatt, not Liberty Group or its member attorneys, for any failure to notify ACE of the Jones lawsuit." *Id*. at 3. The trial court ordered, "As a matter of law, timely notice of the Jones litigation was provided to ACE Property and Casualty Insurance Company." ACE now appeals that judgment.

Discussion and Decision

[11] ACE challenges the grant of summary judgment to Liberty. We review a grant or denial of a motion for summary judgment under the same standard used by the trial court; that is,

> [t]he moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the movant fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. In determining whether summary judgment is proper, the reviewing court considers only the evidentiary matter the parties have specifically designated to the trial court. *See* Ind. Trial R.

> 56(C), (H). We construe all factual inferences in the non-moving party's favor and resolve all doubts as to the existence of a material issue against the moving party.

Reed v. Reid, 980 N.E.2d 277, 285 (Ind. 2012) (case quotations and citations omitted). In reviewing a summary judgment, we "consciously err on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014).

[12] It is undisputed that the notice of the Jones lawsuit that Gateway sent approximately one month after the lawsuit was filed was a notice to PG Genatt at 3333 New Hyde Park, NY, 11042. It is also undisputed on appeal and established by the designated evidence that, contrary to the trial court's finding, Genatt Assoc.—not PG Genatt—was the entity that procured the ACE policy for Gateway and was ACE's "broker."[5] App. v. III at 74. Thus, the only question on appeal is whether the designated evidence was sufficient to show as a matter of law that the notice to PG Genatt constituted notice to ACE through

[5] ACE also asserts Genatt Assoc. is only its broker, not its agent, and is not authorized to accept claim notices on behalf of ACE. However, that alleged fact is not material as it is undisputed that the May or June 2015 notice was never addressed to "Genatt Assoc."—only "PG Genatt Group, LLC"—and there is no evidence of any relationship at all between PG Genatt and ACE, much less a fiduciary relationship. App. v. III at 214. Moreover, even assuming solely for argument's sake that an agency relationship existed between ACE and Genatt Assoc., as we discuss below, there is no designated evidence establishing that Genatt Assoc. and PG Genatt are the same entity such that notice to PG Genatt was notice to ACE's alleged agent, Genatt Assoc.

its broker and/or agent, Genatt Assoc.[6] The answer to that question depends upon whether the designated evidence established that PG Genatt and Genatt Assoc. are the same entity such that notice to one is notice to the other. The parties agree that PG Genatt and Genatt Assoc. are "separate entities" as shown by PG Genatt's articles of organization and Genatt Assoc.'s articles of incorporation. Appellee's Br. at 26. Nevertheless, Liberty argues—and the trial court found—that the two entities are the same for purposes of receiving notice of a pending lawsuit because they have the same mailing address and both include "Genatt" in their names.

[13] As our Indiana Supreme Court has noted, "distinct corporations, even parent and subsidiary corporations, are presumed separate." *Greater Hammond Cmty. Serv., Inc. v. Mutka*, 735 N.E.2d 780, 784 (Ind. 2000); *see also Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S.Ct. 2082, 2087 (2020) ("[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations."). Moreover, corporations are distinct business entities from limited liability companies ("LLC"s). *See* Ind. Code § 23-0.5-1.5-3 and § 23-1-20-5 (defining a corporation as an entity that has been incorporated); I.C. § 23-0.5-1.5-20 and § 23-18-1-11 (defining an LLC as an entity that is an unincorporated association).

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[6] As the parties agree, notice to an agent acting within the scope of his authority is notice to the principal. *See, e.g.*, *Hamilton v. Hamilton*, 132 N.E.3d 428, 433 (Ind. Ct. App. 2019) (noting, under the rule of imputed knowledge, "knowledge of material facts acquired by an agent in the course of the agent's employment and within the scope of his authority, is the knowledge of the principal" (quotation and citation omitted)).

[14] To overcome the presumption that distinct business entities are presumed to be separate,

> a plaintiff must show that one corporation dominated another to the extent that the subordinate was the mere instrumentality of the dominant corporation, that the dominant corporation employed the subordinate to perpetrate a fraud, or that the capital placed in the subordinate was illusory or trifling compared to the business to be done and the risks of loss.… The claimant must also demonstrate that the defalcation of the corporations, for example, fraud, was the proximate cause of the injury sustained.

Mutka, 735 N.E.2d at 784 (quotations and citations omitted); *see also Blackwell v. Superior Safe Rooms, LLC*, 174 N.E.3d 1082, 1092 n.7 (Ind. Ct. App. 2021) (noting the analysis applied to corporations when a party seeks to disregard the "corporate" form also applies to an LLC), *trans. denied*. However, Indiana courts are reluctant to disregard the corporate form and will do so only "to prevent fraud or unfairness to third parties." *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016, 1020 (Ind. 1995). "When such a claim is made, we place the burden on the party seeking to disregard the corporate form to show that the corporate form was misused to commit fraud or injustice." *Id*.

[15] Here, the parties agree that PG Genatt, an LLC, and Genatt Assoc., a corporation, are "separate entities." Appellant's Br. at 24; Appellee's Br. at 26. Therefore, PG Genatt and Genatt Assoc. are presumed to be "separate legal units with distinct legal rights and obligations." *See Agency for Int'l Dev.*, 140 S.Ct. at 2087. And Liberty has not carried its burden of overcoming that

presumption. The only evidence to which Liberty points is that the two entities have the same mailing address and use the name "Genatt" in the names of their businesses. That evidence, standing alone, does not establish that one of the two business entities dominated the other "to the extent that the subordinate was the mere instrumentality of the dominant corporation." *Mutka*, 735 N.E.2d at 784.[7] Moreover, Liberty has designated no evidence to establish that that the corporate form was misused to commit fraud or injustice. *Id*. Thus, there are disputed genuine issues of material fact in this case that make summary judgment inappropriate; specifically, whether PG Genatt and Genatt Assoc. are the same entity for purposes of receiving timely notice of the Jones lawsuit on behalf of ACE.[8]

Conclusion

[7] The two cases Liberty cites in support of its claim—one of which is a Georgia case—did not find that two separate business entities were the same for purposes of notice just because they shared an address and part of a name; rather, in each case, the courts relied upon the fact that—unlike in the instant case—notice was served upon an individual who was the representative agent for both business entities. *See Leary v. Perdue Farms, Inc.*, 359 Ga. App. 123, 127, 856 S.E.2d 772, 775 (2021); *Apartment Properties, Inc. v. Luley*, 252 Ind. 201, 205, 247 N.E.2d 71, 73 (1968). Here, there is no evidence that any representative agent was served with the May or June 2015 notice of the Jones lawsuit.

[8] Liberty also asserts that the fact that ACE "accepted" the January 3, 2020, email from PG Genatt regarding the judgment in the Jones lawsuit is somehow "a proverbial smoking gun" establishing that ACE "waived" any claim that PG Genatt is not ACE's agent for purposes of receiving notice. Appellee's Br. at 29-30. However, Liberty fails to provide cogent reasoning on this point and therefore waives the claim. *See* Ind. App. R. 46(A)(8)(a) and (B).

[16] Liberty failed to designate evidence establishing as an undisputed material fact that timely notice of the Jones lawsuit was sent to ACE's agent and, therefore, to ACE. The trial court erred in granting summary judgment to Liberty.

[17] Reversed and remanded.

Vaidik, J., and Bradford, C.J., concur.