

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN INTERNATIONAL INSURANCE : CIVIL ACTION
COMPANY :
 :
v. :
 :
MARK MICHLO, et al. : NO. 99-845

MEMORANDUM AND ORDER

BECHTLE, J. JULY , 2000

Presently before the court is plaintiff American International Insurance Company's Motion for Summary Judgment and defendant Donna Killian's response thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

After drinking at a bar on March 14, 1998, Mark Michlo, driving a vehicle owned by Barbara Herbener, collided with a car driven by Paul Killian. As a result of this accident, Mr. Killian died. The American International Insurance Company ("Plaintiff") provided liability insurance for Barbara Herbener's vehicle under automobile policy number 109-03-42.

Following the fatal accident, Donna Killian ("Defendant"), the wife and administratrix of the estate of Paul Killian, brought suit against Mark Michlo, Barbara Herbener and the Phoenix Bar (the tavern that served Michlo alcohol). That suit is now pending in the Court of Common Pleas of Montgomery County. Plaintiff seeks a declaratory judgment that it owes no duty to defend or to indemnify Mark Michlo for claims arising out of the

March 14, 1998 automobile accident.¹

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

In its motion for summary judgment, Plaintiff asserts that it owes no duty to defend or to indemnify Mark Michlo for claims arising out of the March 14, 1998 automobile accident. Plaintiff

¹ This court has jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction).

concedes that Michlo was an "insured" under Barbara Herbener's policy because he was driving a covered automobile at the time of the accident.² (Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at unnumbered p. 3.) However, Plaintiff contends that Michlo is excluded from coverage under the policy because Michlo did not have "a reasonable belief" that he was entitled to use Barbara Herbener's car. Id. (citing American International Personal Auto Policy at Part A, Exclusions (A)(8)).

The burden of establishing the applicability of an exclusion is on the insurer. Ohio Cas. Ins. Co. v. Hillesland, No.CIV.A.99-722, 2000 WL 19757, at *1 (E.D. Pa. Jan. 12, 2000) (citations omitted). Explicit and unambiguous exclusions in insurance policies will be upheld. Id. (citations omitted). The exclusion applies only if the driver was without a reasonable belief that he had the owner's permission to drive the vehicle at the time of the accident. Id. (citations omitted). The exclusion is not automatically triggered by the absence of express permission, and permissive use may be implied from a course of conduct in which the parties have mutually acquiesced. Id. (citations omitted). Additionally, the fact that a driver is unlicensed does not, by itself, trigger the exclusion. American

² Under the terms of its policy, Plaintiff provided liability coverage for damages or bodily injury for which any "insured" became legally responsible because of an automobile accident. An "insured" under the policy includes "[a]ny person using" a covered automobile. (Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at unnumbered pp. 2-3; Def.'s Reply to Pl.'s Mot. for Summ. J. at 2.)

Fire and Cas. Co. v. Buckreis, No.Civ.A.95-6427, 1997 WL 164239, at *2 (E.D. Pa. April 2, 1997) (citations omitted) (recognizing that one could reasonably believe he was entitled to use insured's car even though he did not possess driver's license).

Michlo lived with Herbener in her home since October 1997. (Def.'s Reply to Pl.'s Mot. for Summ. J. at 3.) On the night of the accident, Michlo took Herbener's keys, which were hanging from a coat-rack, while she was sleeping. (Michlo Dep. at 9.) It is uncontested that Michlo did not ask Herbener's permission to use her van, nor did she know that he was going to the bar. Id.

Herbener knew that Michlo was not licensed to drive and that his license had been suspended. (Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at unnumbered p. 4; Herbener Dep. at 16 & 22; Michlo Dep. at 54.) Herbener gave Michlo rides, or he walked or rode a bike. (Herbener Dep. at 18 & 76.) Michlo never asked Herbener's permission to drive her van, and had never before driven it. (Herbener Dep. at 18-19 & 34; Michlo Dep. at 15.) Herbener did not have a specific conversation with Michlo in which she either expressly permitted or denied him permission to use her car. (Def.'s Reply to Pl.'s Mot. for Summ. J. at 2-3.) Rather, according to both Herbener and Michlo, it was "understood [between them] that he couldn't use" her van. (Herbener Dep. at 86; Michlo Dep. at 53-54.)

The evidence shows that, on the night of the accident, Michlo unilaterally decided to take Herbener's van. He neither

sought nor received Herbener's permission. In fact, Michlo testified that he did not ask for permission because Herbener would not have allowed him to use it. (Michlo Dep. at 52-53.) The uncontradicted testimony establishes that it was understood between Herbener and Michlo that he was not permitted to use her van. (Herbener Dep. at 86; Michlo Dep. at 53-54.) The evidence unequivocally demonstrates that Michlo did not have a reasonable belief that he was entitled to drive Herbener's van at the time of the accident. Where the insured owner and vehicle operator testify without contradiction to the absence of permission, courts have granted summary judgment to insurers seeking a declaration regarding a duty to defend and indemnify in the face of a permissive use exclusion. Ohio Cas. Ins. Co., 2000 WL 19757, at *2 (citations omitted) (granting summary judgment). In such circumstances, claims against the unauthorized driver are not covered under the insurance policy and, thus, Michlo is not entitled to indemnification or a defense from Plaintiff.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion for summary judgment will be granted.

An appropriate Order follows.

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ORDER

AND NOW, TO WIT, this day of July, 2000, upon consideration of plaintiff American International Insurance Company's motion for summary judgment and defendant Donna Killian's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of plaintiff American International Insurance Company and against defendant Donna Killian on all counts and IT IS DECLARED that the American International Insurance Company has no duty to defend or indemnify Mark Michlo based on claims arising from the March 14, 1998 collision of the vehicles operated by Mark Michlo and Paul Killian.

LOUIS C. BECHTLE, J.