

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

UNIONAMERICA INSURANCE CO. : CIVIL ACTION
 :
 v. :
 :
 KIENG S. LIM t/a OPENER DELI, :
 INC., et al. : NO. 99-4302

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

August 1, 2000

Plaintiff Unionamerica Insurance Company, Ltd. ("Unionamerica"), seeking a declaratory judgment on a general liability insurance policy, filed this action pursuant to 28 U.S.C. § 2201 et seq. Plaintiff filed a motion for judgment on the pleadings or, in the alternative, a motion for summary judgment; defendants Michelle Thomas, administratrix ad prosequendum of the estate of Raymond Thomas, and Tyrone Davis (collectively, "Thomas and Davis") filed a cross-motion for summary judgment. For the reasons set forth below, plaintiff's motion will be granted and defendants' motions will be denied.

BACKGROUND

On December 25, 1997, an unknown gunman shot Raymond Thomas and Tyrone Davis at the Opener Deli on West Allegheny avenue in Philadelphia. Mr. Thomas' wounds were fatal.

Mr. Thomas' estate and Mr. Davis filed a wrongful death, survival and negligence action in the Court of Common Pleas of Philadelphia County against Opener Deli, Inc. That complaint

states that Raymond Thomas and Tyrone Davis were "shot by an unknown third party assailant," (Thomas and Davis Cross-Mot. for Summ. J. Ex. A), and alleges Opener Deli, Inc. negligently permitted undesirable persons to "enter and be employed on and in their premises."

Plaintiff Unionamerica had issued a general liability insurance policy listing the named insured as Kieng S. Lim t/a Opener Deli. The policy was effective from December 6, 1997 through December 6, 1998. Unionamerica filed this action against Kieng S. Lim t/a Opener Deli ("Lim"), Thomas and Davis to obtain a declaration that Unionamerica owed no duty to defend Lim in the Thomas and Davis action or to indemnify him for any liability arising therefrom because of the policy's assault and battery exclusion.

The clerk entered a default against Lim on February 10, 2000. On February 17, 2000, Opener Deli, Inc. ("Opener"), filing a motion to intervene, claimed it, not Lim, was the insured under the policy and the proper defendant in this action. The court granted Opener's uncontested motion.

DISCUSSION

Unionamerica moves for either judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), or for summary judgment pursuant to Fed. R. Civ. P. 56. Fed. R. Civ. P. 12(c) allows any party to move for judgment on the pleadings "[a]fter the

pleadings are closed but within such time as not to delay the trial." Judgment on the pleadings can be granted if there are no issues of material fact and only questions of law exist. See Rogers v. Atowrk Corp., 863 F. Supp. 242, 244 (E.D. Pa. 1994). In addition to the allegations in the complaint, the court may consider documents attached to or specifically referenced in the complaint, and matters of public record. See Pittsburgh v. West Penn Power Co., 147 F.3d 256, 259 (3rd Cir. 1998).

The court may treat a motion for judgment on the pleadings as a motion for summary judgment under Fed. R. Civ. P. 56 if matters outside the pleadings are presented to and not excluded by the court. Because all of the documents relied upon by the plaintiff in its motion were attached to the complaint, and all responses to that motion and the cross-motion of defendants Thomas and Davis rely on those same documents,¹ we consider plaintiff's motion as a motion for judgment on the pleadings.

Unionamerica makes two arguments in its motion: 1) The underlying action by Thomas and Davis is based on an assault and battery in Opener Deli and falls within the assault and battery exclusion; and 2) intervenor Opener Deli, Inc. is not the name insured on the policy.

Under Pennsylvania law, "an insurer is obligated to defend

¹Opener Deli, Inc. attaches to its response deposition testimony and other documents pertaining to the issue of whether it is a named insured under the policy, but because we do not reach that issue we need not consider those documents.

an insured whenever the complaint against its insured potentially may come within the policy's coverage." First Oak Brook Corp. Syndicate v. Comly Holding Corp., 93 F.3d 92, 94 (3d Cir. 1996) (citation omitted). The burden of proving that the underlying action falls within the exclusion is on the insurer. Id. The court "should give unambiguous policy language its ordinary meaning." Id.

A court's determination of an insurer's duty to defend its insured must be based solely on the allegations in the pleadings of the plaintiff in the underlying action. See Nationwide Mutual Fire Insurance Co. of Columbus, Ohio v. Pipher, 140 F.3d 222, 225 (3d Cir. 1997). The court should first ascertain the scope of the insurance coverage and then analyze the allegations in the complaint to determine whether the insurer has a duty to defend. See Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 651 (Pa. Super. 1994), appeal denied, 655 A.2d 508 (Pa. 1994).

The insurance policy at issue contains the following exclusion:

Assault & Battery Exclusion:

1. Assault & Battery, whether caused by or at the instructions of, or at the direction of or negligence of the insured his employees, patrons, or any causes whatsoever; and

2. Allegations that the insured's negligent acts, errors or omissions in connection with the hiring, retention, supervision or control of employees, agents or representatives caused, contributed to, related to or accounted for the assault & battery.

This provision is unambiguous; it excludes coverage for both a direct assault and battery action and an action alleging the assault and battery was enabled by the negligence of the insured or its employees or agents. It also excludes coverage for an action alleging the assault and battery resulted from negligent hiring or supervision.

A significant number of courts have found this type of exclusion clause to be unambiguous and preclude coverage when the alleged injuries are caused by an intentional act. See, e.g., Certain Underwriters at Lloyd's, London v. Brownie's Plymouth, Inc., 24 F. Supp. 2d 403 (E.D. Pa. 1998); River Thames Ins. Co. v. 5329 West, Inc., No. 95-0751, 1996 WL 18812 (E.D. Pa. Jan 18, 1996); Britamco Underwriters, Inc. v. C.J.H., Inc., 845 F. Supp. 1090 (E.D. Pa. 1994), aff'd, 37 F.3d 1485 (3d Cir. 1994).

The complaint in this underlying action alleges an "unknown third party assailant" shot Raymond Thomas and Tyrone Davis in Opener Deli. (Pl.'s Mot. for J. on the Pleadings or, in the Alternative, for Summ. J. ("Pl.'s Mot.") Ex. H at ¶8.) The complaint further alleges that Opener Deli, Inc. was negligent for, inter alia, permitting "undesirable persons" to enter the store, failing to properly supervise the store, and failing to adequately train its employees to "prevent violent shootings" on the premises. (Pl.'s Mot. Ex. H at ¶10, 13.) In other words, Thomas and Davis alleged the negligence of the insured or someone under the insured's control resulted in the intentional shooting

that killed Thomas and injured Davis.

A negligent (as opposed to intentional) shooting, such as the accidental discharge of a gun, would not constitute an assault and battery, but the complaint alleges tortious conduct by an "unknown third-party assailant;" this does not suggest even the possibility of an unintentional shooting. To "assail" means "to attack physically and violently; assault." Webster's New World Dictionary 82 (3d College Ed. 1988). An assault occurs when an actor intends to cause an imminent apprehension of a harmful or offensive bodily contact. See Sides v. Cleland, 648 A.2d 793, 796 (Pa. Super. 1994). Intentional conduct is not merely negligent.

Thomas and Davis' state court complaint does not state a cause of action for negligence distinct from the assault and battery. This distinguishes it from the few shooting cases where courts have declined to apply an assault and battery exclusion. In Sphere Drake, P.L.C. v 101 Variety, Inc., 35 F. Supp. 2d 421 (E.D. Pa. 1999), plaintiffs in the underlying action were injured by bullets fired by a police officer responding to an altercation in a bar. See id. at 424-26. Plaintiffs alleged, inter alia, a padlock on the kitchen exit prevented their escape and subjected them to the accidental shooting. The assault and battery exclusion at issue was identical to the one in Unionamerica's policy. The court held that despite the assault and battery exclusion, the insurance company had a duty to defend and

indemnify because the injuries claimed in the complaint were alleged, in the alternative, to have been caused by the negligent conduct of the insured. See id. at 430, 433.

Raymond Thomas and Tyrone Davis were injured by the assailant himself, not a responding police officer or someone else who did not intend to shoot them, and the complaint states no distinct negligence claim equivalent to the Sphere Drake padlocked door allegation.

In Britamco Underwriters, Inc. v. Weiner, the court found that a bar patron's injuries, sustained when he was struck by an employee, "may have been caused by the negligent acts of [the insured] and not necessarily by the intentional acts of any individual." Id. at 652. The underlying complaint asserted various negligence theories of recovery and referred to the incident as an "accident." Id. No such language is found in Thomas and Davis' complaint.

Thomas and Davis alleged the negligence of the defendant, or the defendant's employees, enabled a third party to commit an intentional tort - an assault and battery - on the plaintiff. That action falls squarely within the assault and battery exception to the policy, and Unionamerica has no duty to defend its insured against it.

The duty to indemnify is narrower than the duty to defend and depends on whether the actual liability of the insured, when determined, falls within the scope of the policy. See Sphere

Drake, 35 F. Supp. 2d at 10. Because Unionamerica has no duty to defend the insured in the underlying action, it does not have a duty to indemnify.

We need not decide whether Opener Deli, Inc. is the named insured on the policy since no duty to defend exists regardless of the identity of the insured.

An appropriate Order follows.

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ORDER

AND NOW, this 1st day of August, 2000, upon consideration of the Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment of plaintiff Unionamerica Insurance Co. ("Unionamerica"), the Cross-motion for Summary Judgment of defendants Michelle Thomas, administratrix ad prosequendum of the estate of Raymond Thomas, and Tyrone Davis (collectively, "Thomas and Davis"), and all responses thereto, it is **ORDERED** that:

1. The Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment of plaintiff Unionamerica is **GRANTED**.

2. The Cross-motion for Summary Judgment of defendants Thomas and Davis is **DENIED**.

3. Judgment is **ENTERED** in favor of plaintiff Unionamerica and against defendants Kieng S. Lim, t/a Opener Deli, defendants Thomas and Davis, and intervening defendant Opener Deli, Inc.

4. Plaintiff Unionamerica does not owe a duty to defend or indemnify Kieng S. Lim t/a Opener Deli or Opener Deli, Inc., or to pay any judgment entered against the defendants in the underlying state court action filed by Thomas and Davis in the Court of Common Pleas, Philadelphia County, Civil Action No. 3598.

S.J.