

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

ZAZA ABUTIDZE AND	:	CIVIL ACTION
YELENA MASHKEVICH, H/W	:	
	:	04-1578
v.	:	
	:	
HAROLD FISHER & SONDS, INC, d/b/a	:	
"DELANCO TARPS" and ENTERPRISE	:	
RUBBER, INC.	:	
	:	
v.	:	
	:	
ALERT MOTOR FREIGHT, INC.	:	
	:	
v.	:	
	:	
UNITED STATES LIABILITY INSURANCE	:	
GROUP, CONTINENTAL CASUALTY COMPANY:	:	
(CNA), TRAVELERS PROPERTY CASUALTY	:	
INSURANCE COMPANY and REPUBLIC	:	
WESTERN INSURANCE CO., jointly,	:	
severally and in the alternative.	:	

MEMORANDUM AND ORDER

Joyner, J.

September 20, 2006

Presently before the Court is Third Party Defendants Continental Casualty Company ("CNA") and Travelers Property Casualty Company's¹ ("Travelers") (collectively "Defendants") Motion for Summary Judgment (Doc. No. 49), Third Party Plaintiff Alert Motor Freight, Inc.'s ("Alert Motor") opposition (Doc. Nos. 50, 51), and Defendants' reply thereto (Doc. No. 52). Defendants

¹ Defendants assert that Alert Motor Freight, Inc. ("Alert Motor") misidentified Defendant Travelers as the Travelers Property Casualty Company in its complaint. Defendants seek an amendment to the pleadings to reflect that the proper name of Defendant Travelers is "The Travelers Indemnity Corporation." Alert Motor does not oppose this motion. Therefore, the Court ORDERS that the pleadings are hereby amended to reflect the proper name of Defendant Travelers.

are moving to dismiss Alert Motor's declaratory judgment action that they owe a duty to defend and/or indemnify Alert Motor for claims arising out of an injury to Plaintiff Zaza Abutidze ("Abutidze"). For the reasons below, the Court GRANTS Defendants' Motion for Summary Judgment and DISMISSES WITH PREJUDICE Alert Motor's Joinder Complaint (Declaratory Judgment action) against Defendants. The Court further ORDERS that Defendants CNA and Travelers are hereby DISMISSED from this action.²

Background³

More than four years ago, a rubber strap struck Abutidze's left eye while he checked to see that the loads of coil he was transporting were secure.⁴ He (along with his wife) then sued Harold Fisher & Sons, Inc. (d/b/a Delanco Tarps) and Enterprise

² Third Party Defendants United States Liability Insurance Group ("Mount Vernon") and Republic Western Insurance Co. have also filed motions for summary judgment seeking resolution of their respective duties, if any, to defend and/or indemnify Alert Motor in this litigation. The Court will address the respective duties of those Defendants in a separate Memorandum and Order.

³ Except where noted, the parties are in substantial agreement as to the basic facts underlying this motion. See Alert Motor's Memorandum of Law in Opposition to Motion for Summary Judgment ("Pl. Memo.") at 1. ("Alert Motor Freight, Inc. does not dispute the general statement of facts as recited by the moving party CNA in its memorandum of law.").

⁴ The parties do not dispute that Abutidze was transporting coils on behalf of Alert Motor. This fact alone does not support the conclusion that Alert Motor was Abutidze's employer, however. Indeed, this point is vigorously contested by the parties and is the principal basis for Allied Motor's opposition to summary judgment.

Rubber, Inc., the respective manufacturers of the leather tarps and straps that were used to secure the coils, alleging product liability claims and negligence. Discovery commenced under the assumption that Alert Motor employed Abutidze. See CNA's Memorandum of Law in Support of Motion for Summary Judgment ("CNA Memo.") at 1. Before long, however, it became apparent to all involved that Omni Financial Services, Inc. ("Omni"), and not Alert Motor, might be Abutidze's actual employer. Because of this uncertainty, the Court granted leave to allow a joinder complaint to be filed against Alert Motor (Doc. No. 14). Alert Motor, in turn, filed a Joinder Complaint against four insurance companies seeking a defense and indemnification against all claims it faces in this litigation. See CNA Memo., Ex. A ("Alert Compl.").

Most relevant to this motion is Alert Motor's assertion that Defendants owe it a duty to defend because of Alert Motor's status as a co-employer (or joint employer) with Omni of Abutidze. See Alert Motor's Memorandum of Law in Opposition to Motion for Summary Judgment ("Pl. Memo.") (Doc. No. 50) at 2. Omni is a Professional Employee Organization ("PEO") or employee leasing company. See Alert Motor's Declaration in Opposition to Notice of Motion for Summary Judgment ("Pl. Decl.") (Doc. No. 51), Ex. A. PEOs contract with client companies to provide employees, as well as help manage a wide range of activities

relating to human resources. See Pl. Memo., Ex. D (attached printout from www.napeo.org). Typically both the PEO and client company are considered employers of a leased employee.

CNA admits that it issued a New Jersey only workers compensation policy to Omni.⁵ See CNA Memo. at 2. Travelers admits that it administered Omni's policy on behalf of CNA. Id. Travelers denies, however, that it ever issued a policy to either Omni or Alert Motor. Id. Alert Motor argues that it is covered by Omni's CNA policy by virtue of its status as a co-employer of Abutidze with Omni. CNA denies that it either had a policy with Alert Motor or that Alert Motor was insured under Omni's policy.

Discussion

A. Standard of Review

In deciding a motion for summary judgment under Fed. R. Civ. P. 56, a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Rule 56(c) provides that summary judgment is appropriate:

. . . 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

⁵ This policy was issued pursuant to the New Jersey Assigned Risk Plan. See CNA Memo. at 2.

is entitled to a judgment as a matter of law.

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

(1986). On a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587(1986).

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon such a showing, the burden shifts to the non-moving party to present "specific facts showing the existence of a genuine issue for trial." Fed. R. Civ. P. 56(e). In doing so, the party opposing summary judgment cannot simply rest on the allegations contained in its pleadings and must establish that there is more than a "mere scintilla of evidence in its favor." Anderson, 477 U.S. at 249. Showing "that there is some metaphysical doubt as to the material facts" is insufficient to defeat a motion for summary judgment. Matsushita Elec. Indus. Co., 475 U.S. at 586. If the non-moving party fails to create "sufficient disagreement to require submission [of the evidence] to a jury," the moving party is entitled to judgment as a matter of law. Anderson, 477 U.S. at 251-52.

B. Choice of Law

Abutidze's was injured in Pennsylvania. The parties agree, however, that New Jersey law governs the legal issues raised in this motion.

C. Analysis

Whether CNA and/or Travelers owes a duty to indemnify Alert Motor is largely a question of contract interpretation. Under New Jersey law, courts should give an insurance policy's words "their plain ordinary meaning." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 595 (2001). The New Jersey Supreme Court has observed, however, that when interpreting insurance policies courts must "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). But despite this and the further recognition that insurance contracts are 'contracts of adhesion,' New Jersey courts will not "write for the insured a better policy of insurance than the one purchased" in the absence of any ambiguities in the policy. Gibson v. Callaghan, 158 N.J. 662, 669 (1999)(quoting Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990)); see also Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1965) ("When the terms of an insurance contract are clear, it is the function of a court to enforce it as written and not to make a better contract for either of the parties."). Ambiguities, if found, are to be

interpreted in favor of the insured. See, e.g., Cruz-Mendez v. ISU/Ins. Servs., 156 N.J. 556, 571 (1999). Finally, "insurance policies must be construed to comport with the reasonable expectations of the insured." Gibson, 158 N.J. at 671 (citations omitted). It is only in exceptional circumstances that New Jersey courts will interpret an unambiguous contract in a manner contrary to its plain meaning in order "to fulfill the reasonable expectations of the insured." Werner Indus., Inc. v. First State Ins. Co., 112 N.J. 30, 35-36 (1988). CNA argues that applying these principles makes clear that Alert Motor is not insured under the policy it issued to Omni. The Court agrees.

CNA issued a workers' compensation policy to Omni on September 19, 2001. See CNA Memo., Ex. C ("Omni Policy") at 1.⁶ Part A of the General Section defines the policy as "a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page)." Omni Policy at 6. It further specifies that a party is insured under this policy "if you are the employer named in Item 1 of the Information Page." Omni Policy at 6 (General Section Pt. A). Item 1 on the Information Page lists a single insured party - Omni; and a single insurer - Continental Casualty Company (CNA). See Omni Policy at 1. In fact, Alert Motor is listed

⁶ Page references to the Omni Policy are based on the numbering from the electronically filed copy attached as Ex. C to CNA's Memorandum of Law (Doc. No. 49).

neither in the policy nor any of the attached endorsements.⁷

Not deterred by these undisputed facts, Alert Motor asserts that "CNA owes [it] a defense under the unambiguous policy language contained in Part Two - Employer [sic] Liability Insurance." Pl. Memo. at 2 (Omni Policy at 7). CNA's duty to defend Alert Motor allegedly arises from the provision in Part Two that obligates CNA to pay

. . . all sums you legally must pay your employees, provide the bodily injury is covered by this Employers Liability Insurance. The damages [CNA] will pay, where recovery is permitted by law, include damages: . . . (4) because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

Omni Policy at 7 (emphasis added); see also Pl. Decl. at 3-4. Alert Motor argues that this provision would require CNA to indemnify/defend it if the Court were to conclude that Alert Motor employed Abutidze. Because the issue of who employed Abutidze at the time of the accident is presently unresolved, Alert Motor argues that there exists a genuine issue of material fact that precludes dismissing CNA and Travelers from this case.

⁷ Defendant Travelers is not listed as an alternative insurer under this policy. Alert Motor has not advanced any evidence that Travelers issued a policy to either Omni or Alert Motor. Because Alert Motor has not proffered any evidence to raise a triable issue as to whether Travelers owed it a duty under the Omni Policy, this Court GRANTS Travelers' motion for summary judgment and DISMISSES it as a party from this action. Accordingly, the remainder of this analysis considers only CNA's potential duties to Alert Motor.

Why this is so is unclear. Whether or not Alert Motor was Abutidze's employer is irrelevant to Defendants' duty to indemnify and defend Alert Motor.

Alert Motor contends that as Abutidze's alleged co-employer the above quoted provision provides it coverage. It does no such thing. The provision provides that CNA will pay all damages that the insured party, i.e. "you," is obligated to pay. And it is unmistakably clear that the "you" insured by this policy is Omni, not Alert Motor. See Omni Policy at 1. Alert Motor does not identify any provisions in the policy that extends its coverage to parties who are Omni's co-employers. It also does not cite any modifications to the policy that would extend coverage to Alert Motor. Indeed, as Defendants aptly note, Alert Motor has not produced any evidence that it was issued any certificates of insurance or received any documentation from Omni suggesting that it was listed as an insured on the Omni Policy. See Reply Brief of Continental Casualty Company in Support of its Motion for Summary Judgment ("CNA Reply") (Doc. No. 52) at 5.

While acknowledging that the Omni Policy does not "specifically identify it as an insured," Alert Motor claims that "PEO's simply do not and cannot include the many names of client companies as co-insureds on the declaration pages." Pl. Memo. at 3-4. Alert Motor offers no legal or factual support for this contention. Because the plain and unambiguous language of the

Omni Policy does not identify Alert Motor as an insured, this Court may not simply ignore it and make Alert Motor a party to the policy in the absence of exceptional circumstances.

In any event, Alert Motor contends that not being listed as an insured is immaterial under New Jersey's workers' compensation laws. Alert Motor argues that New Jersey law provides that workers' compensation coverage obtained by a PEO extends to its client companies. See Pl. Memo. at 4 ("Indeed, logic and reason dictate that it is the client companies of [PEOs] . . . which are entitled to protection of the workers compensation policies issued to the PEO by the insurance industry with full understanding that both the PEO and the client are co-employers insured under these policies." (followed by citation to the relevant New Jersey statute, N.J. STAT. ANN. § 34:8-72 (West 2006)) (emphasis in original). In other words, because Omni is a PEO, the workers' compensation coverage it purchased for itself to cover its leased employees extends to Alert Motor as a co-employer (and client). If this were not the case, small business would not be encouraged to lease employees from PEOs because there would not be the attendant reduction in human resources costs, including the cost associated with procuring workers' compensation insurance. While this argument has a certain degree of intuitive appeal, New Jersey has not advanced this policy through its laws.

New Jersey addresses the duties and obligations of employee licensing companies by statute. See N.J. STAT. ANN. § 34:8-67, et seq. (West 2006). For example, N.J. STAT. ANN. § 34:8-70, outlines the registration and reporting requirements for a PEO. Alert Motor's argument relies on N.J. STAT. ANN. § 34:8-72 - "Co-employers; payment of wages of and other benefits due." It provides, in pertinent part, that:

a. An employee leasing company registered under this act and the respective client companies with which it has entered into employee leasing agreements shall be the co-employers of their covered employees for the payment of wages and other employment benefits due, including the obligation under the workers' compensation law, R.S. 34:15-1 et seq., to maintain insurance coverage for personal injuries to, or for the death of, those employees by accident arising out of and in the course of employment.

N.J. STAT. ANN. § 34:8-72. This provision does not do what Alert Motor hopes.⁸ Rather than obviating client companies from the responsibility of obtaining workers compensation insurance, the statute actually mandates that PEOs must comply with the workers' compensation laws by virtue of their status as a joint employer. Alert Motor does not identify any language in the statute or relevant legislative history that dictates an alternative

⁸ The Court notes that interpretation of N.J. STAT. ANN. § 34:8-72 is a matter of first impression.

interpretation.⁹

Therefore, the resolution of who Abutidze's employer was at the time of the accident is unnecessary to resolving the issue of Defendants' duties under the Omni Policy. Because the fact of who employed Abutidze is not material to determining Defendants' duty to defend and indemnify Alert Motor, there are no genuine issues of material fact in dispute and Defendants are entitled summary judgment as a matter of law. Defendants do not owe a duty to Alert Motor to defend and/or indemnify in this action.

Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Motion for Summary Judgment and DISMISSES WITH PREJUDICE Alert Motor's Complaint against Defendants. The Court further ORDERS

⁹ In contrast, California has enacted a statute that explicitly provides that client companies which enter into employee leasing agreement may benefit from the workers compensation insurance obtained by the PEO. See CAL. LAB. Code § 3602(d) ("an employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured the payment of compensation . . . Employers who have complied with this subdivision shall not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event of employee injury, but may, in the absence of compliance, be subject to all three.") (emphasis added); see also Diamond Woodworks, Inc. v. Argonaut Insurance Co., 109 Cal. Rptr. 2d 736, 748 (Ca. Ct. App. 2003) ("Labor Code section 3602, subdivision (d), acknowledges the existence of employee leasing arrangements and provides protection for the leasing employer and the client employer alike.").

that Defendants CNA and Travelers are hereby DISMISSED from this action. An appropriate Order follows.

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

ZAZA ABUTIDZE AND	:	CIVIL ACTION
YELENA MASHKEVICH, H/W	:	
	:	04-1578
v.	:	
	:	
HAROLD FISHER & SONDS, INC, d/b/a	:	
"DELANCO TARPS" and ENTERPRISE	:	
RUBBER, INC.	:	
	:	
v.	:	
	:	
ALERT MOTOR FREIGHT, INC.	:	
	:	
v.	:	
	:	
UNITED STATES LIABILITY INSURANCE	:	
GROUP, CONTINENTAL CASUALTY COMPANY:	:	
(CNA), TRAVELERS PROPERTY CASUALTY	:	
INSURANCE COMPANY and REPUBLIC	:	
WESTERN INSURANCE CO., jointly,	:	
severally and in the alternative.	:	

ORDER

AND NOW, this 20th day of September, 2006, upon consideration of Third Party Defendants' (Continental Casualty Company (CNA) and Travelers Property Casualty Insurance Company (Travelers)) Motion for Summary Judgment (Doc. No. 49), Third Party Plaintiff Alert Motor Freight, Inc.'s (Alert Motor) opposition (Doc. Nos. 50, 51), and Defendants' reply thereto (Doc. No. 52), it is hereby ORDERED as follows:

1. The pleadings are amended to reflect that the proper name of Defendant Travelers is "The Travelers Indemnity Corporation," and

2. Defendants' Motion for Summary Judgment is GRANTED,
and

3. Alert Motor's claims against Defendants seeking a
declaratory judgment are DISMISSED WITH PREJUDICE.

It is FURTHER ORDERED that JUDGMENT is ENTERED in favor of
Defendants CNA and Travelers that Defendants do not owe a duty to
indemnify and/or Alert Motor in the above captioned matter.
Defendants CNA and Travelers are therefore DISMISSED from this
matter.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.