

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

Allstate Insurance Co. :
 Plaintiff :
 :
 v. :
 :
Theresa Grigaitis, et al. :
 Defendants :

CIVIL ACTION

96-4790

MEMORANDUM

Broderick, J.

January 8, 1998

Plaintiff Allstate Insurance Company ("Allstate") commenced the instant action, seeking a declaratory judgment that Allstate has no obligation or duty to defend or indemnify Theresa J. Grigaitis with respect to the causes of actions set forth against her in Miller v. Grigaitis, a civil action in the Court of Common Pleas of Delaware County (hereinafter the "underlying action"). Presently before the Court is Allstate's motion for summary judgment. For the reasons which follow, the Court will deny the motion.

On December 4, 1995, Eric Miller and Lea Miller, as Administrators of the Estate of Christian Royce Miller, deceased, commenced the underlying action against Theresa J. Grigaitis and her husband, Jeffrey M. Grigaitis. The complaint initially filed in the underlying action (the "underlying complaint") alleges that Theresa Grigaitis was "at all times material hereto, engaged in child care for the general public for a fee within Defendants' home." The underlying complaint further alleges that on the morning of May 8, 1995, Theresa J. Grigaitis, "in exchange for cash compensation, undertook the care of the Decedent Christian

Royce Miller," a three month old infant. The underlying complaint further alleges that, as a result of Mrs. Grigaitis' negligence, Christian Miller died on the morning of May 8, 1995, by choking on milk which Mrs. Grigaitis had fed him before placing him on his stomach for a nap.

At the time of the events giving rise to the underlying action, May 8, 1995, Theresa and Jeffrey Grigaitis were insured under a homeowner's insurance policy issued by Allstate. The policy contains the following exclusions: under the section titled "Family Liability Protection," the policy states that Allstate "do[es] not cover bodily injury or property damage arising out of the past or present business activities of an insured person." Under the section titled "Guest Medical Protection," the policy states that Allstate "do[es] not cover bodily injury arising out of the past or present business activities of an insured person." In the subject policy, "business" is defined in relevant part as:

(A) any full or part-time activity of any kind engaged in for economic gain and the use of any part of any premises for such purposes. **The providing of home day care services to other than an insured person or relative of an insured person for monetary or other compensation is also a business.** However the mutual exchange of home daycare services is not considered compensation... (emphasis added).

Allstate initially assumed the defense of Theresa and Jeffrey Grigaitis in the underlying action, on the basis of a reservation of rights letter stating that it was reserving its

"right to later disclaim any obligation under the policy and assert a defense of no coverage under the policy because of the exclusionary wording in your policy with relation to a business &/or business pursuits." Allstate then commenced the instant action, naming Theresa and Jeffrey Grigaitis and Lea and Eric Miller as Defendants in the instant action, and seeking a declaratory judgment that Allstate has no duty to defend or indemnify Theresa Grigaitis in the underlying action.

Allstate subsequently filed the instant motion for summary judgment presently before the Court. Allstate attached to its motion as exhibits the underlying complaint, and the answers filed in the instant action by the Grigaitis' and the Millers. Both parties admit in their answers that Allstate attached a true and correct copy of the underlying complaint, and Theresa and Jeffrey Grigaitis admit that Allstate accurately quoted the relevant provisions of the homeowners insurance policy issued to them. Both parties specifically deny Allstate's allegation of no coverage with respect to the underlying action.

Defendants Eric and Lea Miller filed a response in opposition to Allstate's summary judgment motion. In their response, the Millers contend that, in light of the deposition testimony given by Theresa Grigaitis, as well as the testimony given by the Millers themselves, they no longer believe that Theresa Grigaitis was engaged in a business when she undertook the care of Christian Miller. The Millers attached as exhibits to their response selected transcript pages from the depositions

of Theresa Grigaitis and Lea Miller, in which both women testify that they had not discussed a fee arrangement for the care of Christian Miller, and testified that there was no understanding whether Theresa Grigaitis would be paid for baby-sitting Christian Miller on May 8, 1995. The Millers also attached to their response a motion to amend their underlying complaint in the underlying action, which motion was apparently filed in the underlying action approximately one week after Allstate filed the instant Motion for Summary Judgment. Although the Millers did not attach a copy of their proposed amended complaint, their motion to amend the underlying complaint states that "Plaintiff [Eric and Lea Miller] simply wishes to delete any reference to 'compensation'" in the underlying complaint.

Following the Millers' response to Allstate's summary judgment motion, Allstate submitted to the Court full and complete copies of the deposition transcripts of Theresa and Jeffrey Grigaitis, as well as those of Lea and Eric Miller.

Rule 56 of the Federal Rules of Civil Procedure dictates that a court shall grant summary judgment "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 a judgment as a matter of law." Fed.R.Civ.P. 56(c).

For purposes of summary judgment, a fact is "material" if it

might affect the outcome of the case, and an issue is "genuine" if evidence is such that a reasonable fact finder could return a verdict in favor of the non-moving party. In re Headquarters Dodge, Inc., 13 F.3d 674, 679 (3d Cir. 1994). It is well-established that the court must draw any inferences from the underlying facts in favor of the non-moving party. Ideal Dairy Farms v. John Labatt, 90 F.3d 737, 744 (3d Cir. 1996). Summary judgment may not be granted if there is a disagreement over what inferences can be reasonably drawn from the facts, even if those facts are undisputed. Id.

The general rule in Pennsylvania is that "[a]n insurer's duty to defend an action against the insured is measured in the first instance, by the allegations in the plaintiff's pleadings." Gene's Restaurant v. Nationwide Insurance Co., 519 Pa. 306, 308, 548 A.2d 246 (1988). The court must compare the allegations of the underlying complaint to the policy and determine whether there exists a duty to defend and whether, "if the allegations are sustained, the insured would be required to pay resulting the judgment." Gene's Restaurant, 519 Pa. at 308, 248 A.2d at 246.

It is clear that if the Court were to consider only the underlying complaint initially filed in the underlying action, the Court could grant summary judgment in favor of Allstate and issue a declaratory judgment that Allstate has no duty to defend or indemnify Theresa Grigaitis with respect to the underlying action. The initial complaint alleges that, on the morning of May 8, 1995, Theresa Grigaitis undertook the care of Christian

Miller in exchange for compensation. If this allegation were proven, Christian Miller's death would clearly fall within the policy exclusion for bodily injury arising out of a home business activity.

In the instant case, however, the Millers' pending motion to amend the underlying complaint precludes the Court from granting summary judgment solely on the basis of the allegations of the underlying complaint. At this point, the Court can not discern the nature of the allegations of the underlying complaint with any certainty. Accordingly, in order to issue a declaratory judgment as to Allstate's duty to defend or indemnify Theresa Grigaitis, the Court must determine whether the policy exclusion for business activity actually applies in the instant case. In other words, the Court must itself determine whether the death of Christian Miller arose from Theresa Grigaitis' home business activities.

For the purpose of Allstate's summary judgment motion, there remains a genuine issue of material fact as to whether the death of Christian Miller arose from Theresa Grigaitis' home business activities. The depositions which both parties have produced indicate that Theresa Grigaitis did conduct business activities within her home, in that for several years she accepted compensation for the babysitting services she provided in her home. However, the depositions do not resolve the issue of whether Christian Miller's death arose out of those business activities. Mrs. Grigaitis has testified in her deposition that

there were occasions when she took care of a child without ever receiving compensation. She has further testified that she had no expectation of receiving compensation for baby-sitting Christian Miller on the morning of May 8, 1995. Admittedly, it strikes one as odd that Mrs. Grigaitis would have undertaken the care of Christian Miller without compensation, in light of the fact that she had never met the Millers before they arranged to have her care for their child. In determining a summary judgment motion, however, the Court can not consider the credibility of witnesses, or draw any inferences in favor of the moving party.

In the instant case, where Allstate bears the burden of proving that the relevant policy exclusion applies to preclude coverage, there remains a genuine issue of material fact with respect to whether Christian Miller's death arose from Theresa Grigaitis' home business activities. Accordingly, the Court must deny Allstate's motion for summary judgment.

An appropriate Order follows.