

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

GLOBE INDEMNITY COMPANY,
Plaintiff,

v.

MOHENIS SERVICES, INC., LAUREL
LINEN SERVICES, INC., JERRY L.
ELLIS,
Defendants.

Civil Action
No. 97-3849

Gawthrop, J.

June , 1998

M E M O R A N D U M

Pending before this court are Plaintiff's Motion and Defendants' Cross-Motion for Summary Judgment on Plaintiff's Declaratory Judgment action and Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim. Plaintiff, Globe Indemnity Company (Globe) seeks a declaratory judgment that it is not obligated to defend or indemnify its insureds, defendants, Mohenis Services, Inc. and Laurel Linen Services, Inc. (Defendants), in a civil action instituted against them by co-defendant, Jerry L. Ellis (Ellis) a former employee. Defendants have counterclaimed against Globe, alleging bad faith and breach of contract based on its refusal to indemnify defendants. Because I find that the Big Shield Liability policy is ambiguous, I shall deny the parties' motions for summary judgment on the declaratory judgment action. Further, because I find that there does not exist a genuine issue of material fact as to whether

Globe engaged in bad faith in denying defendants' claim for coverage, I shall grant plaintiff's motion for summary judgment on defendants' counterclaim.

I. Background

A. The Underlying Action

Jerry L. Ellis alleges that defendants, his former employers, violated the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq., when they terminated him after he told them he had Hepatitis C. Additionally, he contends that his alleged unlawful discharge also wrongfully terminated his health coverage and disability benefits in violation of ERISA and COBRA.

The facts, as alleged in his Complaint, show that Ellis was hired by Mohenis, a commercial linen laundry business, in 1989, and worked there until March 16, 1996.¹ In early 1996, Ellis was diagnosed with Hepatitis C -- a viral infection that causes a progressive inflammation of the liver. His prescribed treatment consisted of injections of Interferon, which causes severe flu-like symptoms for two to three months. Ellis informed his General Manager at Laurel Linen of the diagnosis and the proposed treatment.

It was at this time that Ellis alleges his General Manager began to harass him by engaging in "an effort to demean, humiliate, inconvenience and embarrass Ellis." The discriminatory acts included, inter alia, demanding his

¹ Laurel Linen, the branch plant to which Ellis was transferred in 1995, is a wholly owned subsidiary of Mohenis.

resignation, accusing him that he was using his illness to work only part-time, informing him he would be made miserable unless he tendered his resignation, confiscating his company car, failing to inform him of his options for continued medical benefits, and withholding his disability insurance payments.

As a result of this treatment, on March 14, 1996, Ellis took leave from work under the company Family and Medical Leave Act policy. Ellis filed an EEOC complaint based on defendants' conduct, including their failure to make reasonable accommodation for his disability. During the pendency of the EEOC complaint, defendants offered Ellis a different job as a salesman without a company car, which Ellis rejected because he considered it a demotion. It was also during this time that Ellis's disability checks were interrupted. By letter dated June 14, 1996, Ellis was notified that he had been terminated and his health insurance had been canceled effective June 7, 1996. Ellis was not provided the forms necessary to exercise his COBRA rights to continued health insurance coverage.

On September 17, 1996, Ellis filed suit against both Mohenis and Laurel Linen. The initial Complaint contained two counts alleging violations of the American With Disabilities Act, ("ADA"), a count based on intentional infliction of emotional distress, and a count based on defendants' alleged reckless, wanton and/or negligent conduct. Ellis's First Amended Complaint added four ERISA counts. By Order dated June 18, 1997, this court dismissed the state common-law claims, holding that they

were preempted by Pennsylvania's Worker's Compensation Act.

B. The Insurance Policies and Claims for Coverage

_____ For the period beginning September 30, 1995 and ending September 30, 1996, Globe issued Mohenis a Workers Compensation and Employers Liability Policy, a Commercial General Liability Policy, and a Big Shield Liability Policy.² Each policy included Laurel Linen as an additional named insured.

Defendants, seeking coverage for the defense of Ellis's claims under the various policies, forwarded Ellis's complaint to Globe. Globe received the complaint on November 14, 1996. By letter dated February 10, 1997, Globe denied coverage for Ellis's claims, but agreed to provide a defense under a reservation of rights. The fifteen-page letter also stated the specific grounds upon which Globe had concluded that coverage should not be provided, and further stated that Globe was "open to receiving any information or comments which [defendants] believe would warrant reconsideration of [Globe's] position." Globe further "invite[d] anyone authorized to speak for the insured to point out policy language which may be thought to provide coverage for the claims and damages described in Mr. Ellis' Complaint."

No response from defendants was forthcoming, and according to Globe, numerous attempts to discuss the matter with defendants' counsel were fruitless. Globe filed a declaratory

² In their briefs, the parties have agreed that the Worker's Compensation and Employment Liability Policy does not provide coverage for the claims at issue.

judgment action on June 4, 1997, seeking a declaration that the policies do not obligate it to defend and indemnify defendants against Ellis's claims.³ In their Answer to Globe's Declaratory Judgment Complaint, defendants counterclaimed for breach of contract and bad faith, alleging that the policies unambiguously provide coverage for Ellis's claims, and that, by denying coverage, Globe breached the express terms of the contract, as well as its implied covenant of good faith and fair dealing.

II. Standard of Review

Summary judgment is proper "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). Unless evidence in the record would permit a jury to return a verdict for the non-moving party, there are no issues for trial, and summary judgment becomes appropriate. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations, and must view facts and inferences in the light most favorable to the party opposing the motion. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1127 (3d Cir. 1995). The party opposing the summary

³ Globe has, to date, paid for the defense in the underlying action under the February 10, 1997 reservation-of-rights letter, which Globe supplemented after Ellis added the ERISA counts.

judgment motion must come forward with sufficient facts to show that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

III. Discussion

A. Review of Insurance Policies

The parties agree that the insurance contracts should be construed in accordance with Pennsylvania law. The task of construing an insurance policy is generally performed by a court rather than a jury, Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983), as the interpretation of the terms of an insurance contract is a question of law. Hamilton Bank v. Insurance Co. of N. America, 557 A.2d 747, 750 (Pa. Super. 1989)(citation omitted).

The first step in construing an insurance policy is the determination of whether an ambiguity exists, which is a question of law for the court. Pittston Co. Ultramar America Ltd. v. Allianz Ins. Co., 124 F.3d 508 (3d Cir. 1997). "[A] term is ambiguous only 'if reasonably intelligent men on considering it in the context of the entire policy would honestly differ as to its meaning.'" United Services Automobile Ass'n v. Elitzky, 517 A.2d 982, 986 (Pa. Super. 1986), alloc. denied, 528 A.2d 957 (Pa. 1987) (quoting Erie Insurance Exchange v. Transamerica Insurance Co., 507 A.2d 389, 392 (Pa. Super. 1986), rev'd on other grounds, 533 A.2d 1363 (Pa. 1987)). If the court finds that a provision of a policy is ambiguous, "the policy provision is to be construed against the insurer." Standard Venetian Blind, 469

A.2d at 566. "Unambiguous terms are to be given their 'plain and ordinary meaning.'" St. Paul Fire and Marine Ins. Co. v. Lewis, 935 F.2d 1428, 1431 (3d Cir. 1991)(citations omitted); O'Brien Energy Systems, Inc. v. American Employers' Ins. Co., 629 A.2d 957, 960 (Pa. Super. 1993). An overriding principle of policy interpretation is that "the parties' reasonable expectations are to be the touchstone of any inquiry into the meaning of an insurance policy." Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994).

B. Duty to Defend

Under Pennsylvania law, the duty of an insurer to defend its insured is separate and distinct from its duty to indemnify the insured. Scopel v. Donegal Mut. Ins. Co., 698 A.2d 602 (Pa. Super. 1997).⁴ Further, an insurer's duty to defend is "determined by comparing the allegations of the plaintiff's complaint with the language of the applicable policy." Erie Ins. Exchange v. Claypoole, 673 A.2d 348 (Pa. Super. 1996); Nationwide Property & Cas. Ins. Co. v. Feryo Hearing Aid Serv., Inc., 895 F. Supp. 85, 88 (E.D. Pa. 1995). If the allegations in the complaint against defendants can be interpreted as being covered by the terms of the insurance policy, then the insurer is deemed

⁴ An insurer's duty to defend also carries with it a conditional obligation to indemnify its insured in the event the insured is held liable for a claim covered by the policy. General Accident Ins. Co. of Am. v. Allen, 692 A.2d 1089 (Pa. 1997).

to have a duty to defend. See International Inc. Co. v. St. Paul Fire & Marine Ins. Co., No. 86-4438, 1988 WL 113360, at *4 (E.D. Pa. Oct. 25, 1988) ("It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend."). Moreover, "[t]he duty to defend remains with the insurer until the insurer can confine the claim to a recovery that is not within the scope of the policy." American States Ins. Co. v. Maryland Cas. Co., 628 A.2d 880, 887 (Pa. Super. 1993).

1. ADA Claims

Globe claims that neither the Commercial General Liability policy ("CGL") nor the Big Shield policy provides coverage for Ellis's ADA claims, Counts I and II of the complaint. Defendants argue that coverage for Ellis's ADA claims is clearly provided by the language of the Big Shield policy, which states that Globe:

will pay on behalf of the Insured those sums . . . which the Insured becomes legally obligated to pay as damages to which this insurance applies because of: . . . (b) Personal Injury . . . caused by an offense committed during the policy period.

(App. 220 - Insuring Agreement § 1).⁵ The policy defines "personal injury" as "injury . . . arising out of . . . (f) discrimination." (App. 226-27).

Globe argues that this statement of coverage is nullified in large part by the employment-practices exclusion of the policy,

⁵ All citations are to the Appendix to Plaintiff's Globe Indemnity Company, Motion for Summary Judgment.

§ 4(b), which excludes coverage for personal injury that arises out of "[c]oercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or other employment related practices, policies, acts or omissions," (App. 221). The word "discrimination" is not mentioned in this laundry list of exclusions. But each of those terms, such as, for example, demotion, is but an example, or a possible actual consequence, of discrimination.

The policy also has an exclusion clause, 4(a)--not cited by any of the parties--that excludes coverage for personal injury that "arises from discrimination on the basis of race, creed, color, sex, age, disability, national origin." (App. 221). The court raised with counsel the question of whether this provision applies to these claims. Defendants responded that because the policy "contains two provisions with opposite conclusions, one providing coverage, the other precluding coverage," it is ambiguous. (Defs.' Resp. to Ct's May, 4, 1998 Ltr. at 2). Globe responded that it "did not base its coverage decision upon exclusion 4(a) to avoid the ambiguity contention which the insureds have set forth Globe based its coverage decision, in part, on the employment practices exclusion found in exclusion 4(b) to the Big Shield Policy." (5/20/98 Ltr.)

The policy giveth with one hand and taketh away with the other, whether one relies on exclusion 4(a) or 4(b). Because it reads both ways, I conclude that it is, if not duplicitous, at least ambiguous. Many is the policy that covers a general risk,

and then excludes little sub-risks within that broad universe. But for a policy to expressly include coverage on one page, and then turn around and expressly exclude all that same coverage on the next, is a different situation. If the definition of personal injury were more generic, in the traditional tort context, I would have no problem finding an exclusion for discrimination. But here, the definition of personal injury expressly includes discrimination. To the extent that Globe chose to use two diametric provisions in the same policy, one cannot discern from the face of the policy which time Globe meant what it said.

I find that reasonably intelligent people, looking at the provisions within the context of the entire contract, could honestly differ as to their meaning. With respect to the context of the entire policy, I observe that Globe "did not base its coverage decision upon exclusion 4(a) to avoid the ambiguity contention." But Globe may not pick and choose which provisions it proposes to assert in seeking to demonstrate the contract's meaning -- even if one of those provisions contains language that is inconvenient. Whether the company in fact based its decision on 4(b), only, is a question of fact, to be resolved by a jury. Globe, in its May 20, 1998 letter to the court, seems to admit that had 4(a) been the basis for their decision, then the specter of ambiguity would be raised.

Thus, under all the circumstances, considering the entire contract, there remains a jury question, and summary judgment

must be denied.

2. ERISA Claims

Defendants allege coverage for Ellis's ERISA claims, Counts V-VIII, solely under the provisions of the Employee Benefits Errors and Omissions Insurance Endorsement (Endorsement) to the CGL policy. Globe asserts that the Endorsement does not provide coverage for the ERISA claims because Ellis's complaint alleges only intentional conduct. The Endorsement provides coverage for

sums that the "insured" becomes legally obligated to pay as damages because of claims made against [insured] by an employee, former employee or the beneficiaries or legal representatives thereof and caused by any negligent act, error or omission of [insured's], or another person for whose act the "insured" is legally liable in the "administration" of [insured's] "Employee Benefits Program."

(App. 187) (emphasis added). Globe further contends that even if it were found that Ellis's ERISA counts include allegations of negligent conduct, the Endorsement's exclusions bar coverage for those counts.

The Endorsement's exclusions state:

This endorsement does not apply to:

(a) any dishonest, fraudulent, criminal or malicious act, libel, slander, discrimination or humiliation; . . .

(f) any liability of an insured as a fiduciary under the Employee Retirement Income Security Act of 1974 (PL93-406), as respects any employee benefit plan.

(App. 189). Generally, Globe asserts that exclusion (a) applies to the ERISA claims because they incorporate Ellis's allegations of discrimination. Globe additionally asserts that this

argument is directly applicable to Count V, which alleges that defendants wrongfully terminated Ellis and failed to provide him plan benefits. Globe makes additional arguments for Counts VI-VIII. As to Count VI, which alleges breach of fiduciary duties, Globe claims that exclusion (f) specifically excludes coverage for this claim. Globe contends that Count VII, which alleges that defendants "failed to provide Ellis with timely notice of his eligibility for continuation of coverage and failed to provide him the right to elect continuation coverage," (App. 51), is also not covered. Specifically, Globe argues that "[c]ivil penalties are the sole remedy for violation of reporting and disclosure requirements under ERISA," civil penalties are not synonymous with damages, and the Endorsement covers only "damages." Finally, Globe argues that Count VIII, which alleges that defendants discriminated against Ellis "for the purpose of interfering with Ellis's attainment of his rights under the [Benefits] Plan," (App. 53), clearly includes only allegations of intentional conduct, thus precluding coverage.

In response, defendants argue that Ellis's complaint includes allegations of negligent conduct in defendants' administration of the plan under ERISA, and thus, the Endorsement provides coverage. However, I find that Counts V and VIII can only be read as alleging intentional actions. Ellis's claims are firmly rooted in the belief that defendants, upon learning of his contraction of hepatitis, engaged in a course of discriminatory conduct intended to embarrass and harass him. Clearly, such

conduct is intentional. Thus, negligent conduct is not even a theoretical possibility under Ellis's complaint, as the allegations in these counts are not so general that an inference of negligence could be found.

The only ERISA counts that contain any factual allegations that are somewhat ambiguous as to intent are Counts VI and VII. I find that even if negligent conduct has been pled, the claim for breach of fiduciary duty, Count VI, is not covered by the Endorsement. Despite defendants' argument to the contrary, the allegations in Count VI allege only breach of fiduciary duties under ERISA and thus, exclusion (f), which unambiguously states that the Exclusion does not cover any claims against defendants as a fiduciary under ERISA, excludes coverage.

Further, I find that coverage is not afforded for the COBRA violation claim, Count VII. In their brief, defendants contend that the "extraordinary circumstances" in this case potentially entitle Ellis to more than civil penalties, thus bringing the claims for "damages" under the terms of the Endorsement. In support of this proposition defendants cite Ackerman v. Warnaco, Inc., 55 F.3d 117 (3d Cir. 1995), which gives such examples of "extraordinary circumstances" as "situations where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions." Id. at 125. In both of the circumstances, the employer has acted so as to intentionally deprive the employee of benefits. Thus, even if it

were determined that Ellis is entitled to damages by dint of extreme circumstances, this would require a showing of intentional conduct -- conduct that is not covered by the Endorsement. Thus, there is no basis upon which the Endorsement can be interpreted as covering the allegations in count VII; either defendants' conduct was negligent in which case, Ellis is only entitled to civil penalties, which are not covered by the Endorsement, or defendants' conduct was intentional, giving rise to potential damages, but excluding the claim from coverage.

3. State Common Law Claims

Defendants argue for coverage of Ellis's state law claims, Counts III and IV, under the Commercial General Liability Policy, the Employee Benefits and Omissions Policy, and the Big Shield Policy because the common law counts allege Ellis suffered damages because of bodily injury - namely, the exacerbation of Ellis's Hepatitis C, resulting from defendants' negligent failure to provide Ellis with COBRA notices and continued medical insurance. Moreover, Ellis claims that as a result of his deteriorating physical condition, he has suffered emotional distress.

Globe sets forth four reasons why none of the policies provide coverage. First, Globe argues that the policies do not cover intentional conduct, such as that pled by Ellis. Second, Globe contends that Ellis has suffered financial damages, not "bodily injury." Third, Globe asserts that the employment practices exclusions in the policies apply to the type of conduct

alleged in Counts III and IV of the Complaint. Fourth and finally, it argues that because both counts were dismissed by this court as pre-empted by Pennsylvania's Worker's Compensation Act, the exclusions for claims and obligations falling under worker's compensation laws, in both policies, and in the Endorsement, bar coverage for such claims.

Because I find that Globe's final argument is correct, I need not address the others. The court dismissed Counts III and IV of Ellis's complaint because the Worker's Compensation Act is "the exclusive remedy for injured employees, and thus, preempts Plaintiff's common law claims." Because Ellis had not alleged any claims that would qualify for an exception to this rule, the court concluded that "the WCA's remedial scheme preempt[ed] [his] legal action." Accordingly, it would be incongruous to find that Globe is required to defend these claims when its policies unambiguously exclude coverage for such actions. So to find would, in effect, require Globe to defend against claims that are expressly excluded under the terms of the policy merely because of the improper pleading of an entity not party to the contract.

B. Counterclaim

Under Pennsylvania law, to establish Globe's bad faith in handling defendants' claim for coverage, defendants must show: (1) that Globe lacked a reasonable basis for denying benefits, and (2) that Globe knew or recklessly disregarded its lack of a reasonable basis. Terletsky v. Prudential Property & Cas. Ins. Co., 649 A.2d 680 (Pa. Super. 1994). Globe moves for summary

judgment alleging that defendants have failed to present any facts in support of their charge of bad faith.

With little or no discovery having taken place, defendants argue that summary judgment is not appropriate at this time. Defendants' contend that their interpretation of Globe's actions raises a genuine, disputed fact issue as to Globe's motives in denying coverage, precluding entry of summary judgment in Globe's favor.

I find, however, that defendants have failed to set forth a genuine issue of material fact that would preclude the grant of summary judgment even at this juncture. As discussed at length above, coverage for Ellis's claims could potentially only be found under ambiguous policy provisions. Globe cannot be seen as acting in bad faith in denying coverage based on one reasonable interpretation of that ambiguous provision. See Imperial Casualty & Surety Co. v. High Concrete Structures, Inc., 678 F. Supp. 1138, 1144 (E.D. Pa. 1988) (holding where coverage is genuinely at issue it was not unreasonable for insurer to contest liability). Moreover, defendants have failed to set forth facts that would be in their possession, even at this early stage, and have not explained why they did not argue for coverage when Globe strongly urged their input at the time coverage was initially denied. Accordingly, summary judgment will be granted.

An order follows.

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

GLOBE INDEMNITY COMPANY,
Plaintiff,

v.

MOHENIS SERVICES, INC., LAUREL
LINEN SERVICES, INC., JERRY L.
ELLIS,
Defendants.

Civil Action
No. 97-3849

O R D E R

AND NOW, this day of June, 1998, in consideration of
the Motions for Summary Judgment from both parties, and the
responses thereto:

1. the Parties' Motions for Summary Judgment on
Plaintiff's Declaratory Judgment Action (Docs. Nos. 13
and 19) are DENIED;
2. Plaintiff's Motion for Summary Judgment on Defendants'
Counterclaim (No. 14) is GRANTED.

BY THE COURT

Robert S. Gawthrop, III, J.