

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

T.H.E. INSURANCE COMPANY : CIVIL ACTION
 :
 v. :
 :
 EMMANUEL AND ELIZABETH DeMUTIS :
 t/a MAINSTAY HOTEL/INN :
 a/k/a SPECTATOR, :
 NICOLE SHVEIMA AND :
 MELISSA MOYER : NO. 98-1683

M E M O R A N D U M

WALDMAN, J.

February 17, 1999

This is a declaratory judgment action. Plaintiff seeks a declaration that it has no duty to defend or indemnify its insureds in connection with a lawsuit arising from an assault and battery at their premises. Presently before the court is plaintiff's motion for summary judgment.

The pertinent facts are uncontested and are as follow. Defendants Emmanuel and Elizabeth DeMutis own a restaurant-bar called the Mainstay Inn, also known as Spectator, in Phoenixville, Pennsylvania. A patron struck and injured defendant Nicole Shveima. She filed suit against her assailant and the Mainstay in the Chester County Court of Common Pleas. Ms. Shveima alleges in her state court complaint that the Mainstay was causally negligent in serving alcoholic beverages to the assailant beyond the point of visible intoxication and in permitting the assailant to remain on and to reenter the premises

when she was intoxicated and rowdy. At the pertinent time the Mainstay was insured under a general commercial lines policy issued by plaintiff to the DeMutises.

The following quote succinctly summarizes an insurer's duty to defend and to indemnify its insured under Pennsylvania law:

The duty to defend is a distinct obligation separate and apart from the duty to indemnify. Erie Ins. Exchange v. Transamerica Ins. Co., 516 Pa. 574, 582, 533 A.2d 1363, 1368 (1987). The duty to defend arises whenever claims asserted by the injured party potentially come within the coverage of the policy, Gedeon v. State Farm Mutual Automobile Ins. Co., 410 Pa. 55, 56, 188 A.2d 320, 321 (1963), while the duty to indemnify arises only when the insured is determined to be liable for damages within the coverage of the policy. See, e.g., Employers Reinsurance Corp. v. Sarris, 746 F. Supp. 560, 566-68 (E.D. Pa. 1990). It follows then, that when the claims in the underlying action have not been adjudicated, the court entertaining the declaratory judgment action must focus on whether the underlying claims could potentially come within the coverage of the policy. Air Products and Chemicals, Inc. v. Hartford Accident and Indemnity Co., 25 F.3d 177, 179 (3d Cir. 1994). If there is a possibility that any of the underlying claims could be covered by the policy at issue, the insurer is obliged to provide a defense at least until such time as those facts are determined, and the claim is narrowed to one patently outside of coverage. C. Raymond Davis & Sons, Inc. v. Liberty Mut. Ins. Co., 467 F. Supp. 17, 19 (E.D. Pa. 1979). On the other hand, if there is no possibility that any of the underlying claims could be covered by the policy at issue, judgment in the insurer's favor with regard to the duty to defend and indemnification is appropriate. See, e.g., Germantown Ins. Co. v. Martin, 407 Pa. Super. 326, 595 A.2d 1172 (1992), alloc. denied, 531 Pa. 646, 612 A.2d 985 (1992).

Britamco Underwriters, Inc. v. Stokes, 881 F. Supp. 196, 198 (E.D. Pa. 1995).

An insurer's duty to defend is determined solely from the allegations in the underlying complaint giving rise to the claim against the insured. Lebanon Coach Co. v. Carolina Cas. Ins. Co., 675 A.2d 279, 286 (Pa. Super. 1996). Determining the duty to defend under an insurance policy is a question of law requiring only an examination of the language of the policy at issue and the allegations in the underlying complaint. Gene's Restaurant, Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246-47 (Pa. 1988). An insurance policy must be construed according to the plain meaning of its terms. C.H. Heist Caribe Corp. v. American Home Assur. Co., 640 F.2d 479, 481 (3d Cir. 1981); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 427 (E.D. Pa. 1994) aff'd, 60 F.3d 813 (1995). "Where the language of the contract is clear, a court is required to give the words their ordinary meaning." Id. See also Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs' Ass'n Ins. Co., 517 A.2d 910, 913 (Pa. 1986) (holding that courts should enforce the plain meaning of unambiguous policy language as a matter of law).

The burden is on the insured to establish coverage under an insurance policy. Erie Ins. Exch., 533 A.2d at 1366-67; Benjamin v. Allstate Ins. Co., 511 A.2d 866, 868 (Pa. Super. 1986). The burden of establishing the applicability of an

exclusion is on the insurer. Allstate Ins. Co., 834 F. Supp. at 857; Erie Ins. Exch., 533 A.2d at 1366.

The insurance policy at issue contains an exclusion with a large bold heading reading **ASSAULT AND BATTERY EXCLUSION**.

In consideration of the premium charged, it is agreed that **NO** coverage of any kind (including but not limited to cost of defense) is provided by this policy for Bodily Injury and/or Property Damage arising out of or caused by an assault and/or battery. Further, **NO** coverage is provided if the underlying operative facts constitute an assault and/or battery irrespective of whether the claim alleges negligent hiring, supervision and/or retention against the insured or any other negligent action.

In the event this endorsement is deemed inconsistent with any other provision of the policy, then this endorsement overrides and replaces that provision.

(emphasis in original.)

The DeMutises have filed no brief and presented no evidence in response to the instant motion. Defendant Shveima has filed a very short brief and has presented no evidence. The court will nevertheless evaluate the merits of the motion and determine whether plaintiff is entitled to judgment as a matter of law. See Custer v. Pan American Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993); Anchorage Assoc v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990).

Of course, a court also has an obligation to satisfy itself that it has subject matter jurisdiction. See Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995); American Policyholders Ins. v. Nyacol Products, 989 F.2d 1256, 1258 (1st cir. 1993). In that regard, the court notes the DeMutises denied in their answer that the amount-in-controversy exceeds \$75,000. The amount in controversy is generally measured by "a reasonable reading of the value of the rights being litigated." Suber v. Chrysler Corp., 104 F.3d 578, 586 (3d Cir. 1997) (quoting Angus v. Shiley, 989 F.2d 142, 146 (3d Cir. 1993)). "Where a liability policy is involved in proceedings for a declaratory judgment, the amount in controversy for jurisdictional purposes is the maximum amount for which the insurer could be held liable under the policy." Britamco Underwriters, Inc. v. Stone, 1992 WL 195378, *2 (E.D. Pa. Aug. 3, 1992). Ms. Shveima is seeking recovery for allegedly "severe external and internal injuries" as well as "facial scarring." The general liability limit for covered occurrences under the subject policy substantially exceeds \$75,000.

Explicit and unambiguous exclusions contained in insurance policies will be upheld. Riccio v. American Republic Ins. Co., 683 A.2d 1226, 1231 (Pa. Super. 1996), aff'd, 705 A.2d 422 (Pa. 1997). See also Certain Underwriters at Lloyd's, London v. Brownie's Plymouth, Ltd., 24 F. Supp.2d 403 (E.D. Pa. 1998)

(upholding assault and battery exclusion in connection with assault on one bar patron by another); Britamco Underwriters, Inc. v. C.J.H., Inc., 845 F. Supp. 1090, 1095-96 (E.D. Pa.), aff'd, 37 F.3d 1485 (3d Cir. 1994).

The Appellate Division of the New Jersey Superior Court has recently considered the same assault and battery exclusion at issue in the instant case and held that the language has "no ambiguity whatsoever" and clearly precludes coverage "no matter who commits the assault and battery," an insured's employee or a third party. See Stafford v. T.H.E. Ins. Co., 706 A.2d 785, 789 (N.J. Super. 1998). The Court in Stafford also rejected the plaintiffs' attempt to circumvent the exclusion by suing on a theory that the insureds were themselves negligent in permitting the assault to occur. Id. ("Regardless of how a 'claim' is framed, if the 'operative facts' constitute an assault and battery, the exclusion applies"). While one cannot predict with certainty that the Pennsylvania Supreme Court would agree with Stafford, it is soundly reasoned and highly persuasive.

In her brief, defendant Shveima makes four arguments.

First, she argues that "while there may not be a duty to pay" if the attack in question falls within the assault and battery exclusion, "there is most certainly a duty to defend." The language in the policy endorsement, however, expressly and clearly provides that plaintiff will not be obligated to defend

the insured in any litigation arising from an assault or battery regardless of whether the claim is premised on allegations of negligent conduct by the insured. The underlying state court claim is clearly excluded from and thus not potentially within the scope of coverage. As such, it is well-established that there is no duty to defend. See, e.g., Certain Underwriters at Lloyds, 24 F. Supp.2d at 406.

Second, Ms. Shveima observes that she did not assert the DeMutises are vicariously liable for the patron's assault but that they were themselves negligent in serving her and allowing her on the premises. Without explication, Ms. Shveima concludes that "[i]t is interesting to note that nowhere in dealing with such matters herein as matters herein [sic] do the Courts invoke terminology such as 'direct and proximate cause.'" The court cannot really discern what defendant is arguing here. As an insured's potential liability is assumed in a declaratory judgment action such as this, it is not altogether clear what the concept of proximate causation has to do with the task of comparing an underlying claim and the language of the policy at issue. If Ms. Shveima is implying that in adjudicating negligence claims, courts have dispensed with or ignored the requirement that a defendant's conduct was a proximate cause of the plaintiff's injuries, this is incorrect and, in any event,

the relevance of such a suggestion to the instant action is difficult to discern.

Third, Ms. Shveima rhetorically asks "might not the result in Stafford v. T.H.E. Insurance Company have been different if the insured had been guilty of actual negligent conduct therein?" The short answer is no. The court in Stafford held squarely that the same assault and battery exclusion barred coverage in connection with any claim arising from an assault or battery, including one predicated on the theory that the insureds negligently permitted the assault and battery to occur.

Finally, Ms. Shveima argues that, "as a matter of public policy, an insured must be afforded such immunity as only an insurance policy can provide" and that to exclude coverage in a case such as this one would in effect "render insurance coverage moot." Ms. Shveima appears to argue that by allowing an insurance company to exclude assault and battery from a general commercial liability policy, a victim may be unable to recover when she is attacked by an assailant who cannot satisfy a judgment at a culpable bar which is uninsured against such occurrences. This, however, is true with regard to virtually any policy exclusion or any business which elects to purchase a policy with exclusions. The assault and battery exclusion is not arcane or unusual. Such exclusions have routinely been enforced by the courts. The state Insurance Department has approved

policy forms with such exclusions and the state legislature has not acted to preclude them.

Generally "insurance companies are free to decide what risks to undertake and what risks to reject." Neil v. Allstate Ins. Co., 549 A.2d 1304, 1307 (Pa. Super. 1988), alloc. denied, 559 A.2d 38, (Pa. 1989). "[T]he power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law." Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941). "[P]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." Guardian Life Ins. Cop. v. Zerance, 479 A.2d 949, 954 (Pa. 1984). There is no basis in state law or legal precedents from which one remotely could conclude that the Pennsylvania Supreme Court would void an assault and battery exclusion as violative of public policy.

The underlying tort claim against the insured is expressly excluded from coverage by prominent and unambiguous language in the subject policy. There is thus no duty to defend or indemnify the insured and accordingly, plaintiff's motion will be granted.

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MELISSA MOYER	:	NO. 98-1683

O R D E R

AND NOW, this day of February, 1999, upon consideration of plaintiff's Motion for Summary Judgment (Doc. #10) and defendant Shveima's response thereto, and in the absence of any response by the other defendants herein, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT is ENTERED** in the above action for plaintiff and against defendants, and it is declared that plaintiff has no obligation to indemnify or defend the DeMutises or the Mainstay Inn a/k/a Spectator in connection with the lawsuit filed by Nicole Shveima in the Court of Common Pleas of Chester County at Civil Action No. 97-01568.

BY THE COURT:

JAY C. WALDMAN, J.