

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

EMPIRE FIRE AND MARINE	:	CIVIL ACTION
INSURANCE COMPANY,	:	
Plaintiff,	:	
	:	
v.	:	NO. 98-2647
	:	
HARLEYSVILLE INSURANCE	:	
COMPANY OF NEW JERSEY,	:	
Defendant.	:	

MEMORANDUM

R.F. KELLY, J.

JULY 26, 1999

Presently before the Court in this declaratory judgment action are Cross-Motions for Summary Judgment. Plaintiff, Empire Fire and Marine Insurance Company ("Empire"), seeks a judgment supporting its claim that Defendant, Harleysville Insurance Company of New Jersey ("Harleysville NJ"), owes coverage and defense obligations both to Empire's insured, Kenneth W. Post ("Post"), and Harleysville NJ's insured, F&B Trucking, Inc. ("F&B Trucking") for an October 10, 1996 motor vehicle accident ("the accident"). Harleysville NJ, in its Motion for Summary Judgment, seeks a judgment by this Court that it has no obligation to defend or indemnify Post in claims arising from the accident. For the reasons which follow, Empire's Motion is denied and Harleysville NJ's Motion is granted.

I. FACTS.

Kenneth W. Post ("Post") is an owner/operator of a

tractor and resides in New Jersey. In 1992, Post entered into an ongoing oral lease agreement with F&B Trucking. Under the agreement, Post transported heating oil to F&B Trucking's premises in New Jersey. Post drove his personal tractor attached to F&B Trucking's tanker trailers. On October 10, 1996, while Post was en route to retrieve a second delivery of heating oil, the empty tanker trailer he was hauling hit an oncoming passenger car driven by Patricia Rouhan ("Rouhan"). Rouhan's vehicle was subsequently hit by another vehicle operated by Richard W. Smith ("Smith") traveling directly behind Rouhan. Rouhan died as a result of injuries she sustained in the accident.¹

F&B Trucking was insured by Harleysville NJ from May 13, 1996 through May 13, 1997 under Policy No. TP9A0131 with limits up to \$1,000,000.00. Post was insured by Empire from April 19, 1996 through April 19, 1997 under Commercial Lines Policy No. CL529922 with limits up to \$1,000,000.00.

This case involves the Harleysville NJ policy. Empire claims that Harleysville NJ's policy is a Trucker's Policy and that Harleysville NJ, under the terms of the standard Insurance

¹This motor vehicle accident spawned three pending state court lawsuits: Richard Smith v. Kenneth Post and F&B Trucking, Inc., et al., N.J. Super. Ct. Law Div., Morris County, Docket No. MRS-63144-98; Edward Rouhan, Adm'r of Estate of Patricia Rouhan v. Kenneth Post and F&B Trucking, Inc., et al., N.J. Super. Ct. Law Div., Morris County, Docket No. MRS-L-2957-98; and CNA Personal Ins. a/s/o Richard Smith v. F&B Trucking, Inc. and Kenneth Post, N.J. Super. Ct. Law Div., Passaic County, Docket No. L-2267-98.

Services Office ("ISO") Trucker's Coverage Form, owes coverage and defense obligations to both Post and F&B Trucking.

Harleysville NJ contends that its policy is a Business Auto Policy which covers only F&B Trucking and it has no obligation to defend or indemnify Post. The policy interpretation will govern the amounts paid by Harleysville NJ and Empire in the three pending New Jersey lawsuits. See supra note 1.

II. CHOICE OF LAW.

A federal court sitting in diversity applies the choice-of-law rules of its forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). Pennsylvania has developed a choice-of-law approach which combines the contacts analysis of the Restatement Second with the governmental interest analysis. Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991)(describing Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964)). Pennsylvania's approach to choice of law consists of two parts. LeJeune, 85 F.3d at 1071. First, the interests of the competing states must be compared to determine whether the conflict between them is "true" or "false". Id. Second, if the conflict is "true," the interests of both states must be compared and the law of the state with more significant interest applied. Id.

Comparison of the interests and contacts in this case

reveals that New Jersey law should apply to this matter. Empire is a Nebraska corporation licensed to do business in New Jersey and Harleysville NJ is a Pennsylvania corporation also licensed to do business in New Jersey. Both Post and F&B Trucking reside in New Jersey. The accident occurred in New Jersey and Post hauled fuel oil for F&B Trucking solely within the state of New Jersey. Because New Jersey has the most significant contacts, its law applies to this matter.

With respect to liability insurance contract controversies, the New Jersey Supreme Court has adopted a form of the "most significant relationship" analysis of the Restatement (Second) of Conflict of Laws which provides that:

[T]he law of the place of contract will govern the determination of the rights and liabilities of the parties under the insurance policy. This rule is to be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield.

State Farm Mut. Auto Ins. Co. v. Estate of Simmons, 84 N.J. 28, 37, 417 A.2d 488, 493 (1980). The State Farm court held that the law of the place of contract ordinarily governs the choice of law because this rule will generally reflect "the reasonable expectations of the parties concerning the principal situs of the insured risk during the term of the policy and will furnish needed certainty and consistency in the selection of the applicable law." Gen. Metalcraft, Inc. v. Liberty Mut. Ins. Co.,

796 F. Supp. 794, 796-797 (D.N.J. 1992)(citing State Farm, 84 N.J. at 37, 417 A.2d at 492).

III. STANDARD.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, Summary Judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat Summary Judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir.

1987).

IV. DISCUSSION.

A. Declaratory Judgment

This insurance coverage dispute may be decided as a declaratory judgment action since "[t]he extent of an insurer's liability under an insurance policy is an issue which may properly be resolved in a declaratory judgment action." Ideal Mut. Ins. Co. v. Limerick Aviation Co., 550 F. Supp. 437, 441 (E.D. Pa. 1982); Bird v. Penn Cent. Co., 351 F. Supp. 700, 701 (E.D. Pa. 1972)(citations omitted). The Federal Declaratory Judgment Act provides, in pertinent part:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Rule 57 of the Federal Rules of Civil Procedure further provides for use of the declaratory judgment remedy in the federal courts. FED. R. CIV. P. 57.

B. Harleysville NJ Policy: Business Auto or Trucker's Policy?

This case is unique because Empire requests an interpretation of another insurance company's policy to determine whether that policy provides Business Auto Coverage or Trucker's

Coverage. Empire contends that the Harleysville NJ policy, specifically the declarations page of the policy, is facially ambiguous, but should be construed as a Trucker's Policy. As counsel for Empire stated at a hearing held on July 8, 1999 ("the hearing"), if F&B Trucking's policy is interpreted as a Business Auto Policy, the ultimate amount for which Harleysville NJ may be liable is \$1,000,000.00 on behalf of F&B Trucking, or its policy limit. Any judgment or settlement over \$1,000,000.00 will then trigger Empire's insurance. If, however, the policy is a Trucker's Policy, Harleysville NJ may ultimately be liable for a total of \$2,000,000.00; \$1,000,000.00 on behalf of Post and \$1,000,000.00 on behalf of F&B Trucking.

Empire maintains that Harleysville NJ has a duty to issue an unambiguous policy and the policy must be construed according to the policy declarations page. To support its theory, Empire relies upon Lehrhoff v. Aetna, 271 N.J. Super. 340, 638 A.2d 889 (1994), in which the reasonable expectations of the insured raised by the declarations page were not defeated by express policy provisions to the contrary. In Lehrhoff, the disputing parties were an insured and its insurance company, unlike the present case involving one insurer disputing coverage of its insured by another insurer.

The declarations page in the instant case contains information pertaining to both Business Auto Policy coverage and

Trucker's Policy coverage. Empire argues that the following indicate the policy is a Trucker's Policy: (1) under the heading "THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE(S) FOR WHICH A PREMIUM IS INDICATED," the box next to Trucker's Coverage is checked whereas the box next to Business Auto Coverage is blank; (2) the policy number begins with the prefix "TP," indicating it is a Trucker's Policy; and (3) Thomas J. Loughery ("Loughery"), a Senior Underwriter for Harleysville NJ, handwrote a notation on the declarations page stating, "At renewal correct forms. Delete CA0001, add CA0012." (Dep. of Loughery at pp. 39-41.)²

Harleysville NJ directs attention to (1) the number CA0001, typed at the bottom of the declarations page, indicating that the policy is a Business Auto Policy; (2) Shelley Fredericks ("Fredericks"), F&B Trucking's office manager, required owners/operators to provide a certificate of insurance evidencing that they maintained insurance coverage on their tractors (Dep. of Fredericks at pp. 33-35.); (3) Loughery explained at deposition that normally Harleysville NJ would not issue a Business Auto Form to a trucking company, (Dep. of Loughery at p.50,) but the ISO Business Auto Policy Form CA0001 was issued and delivered with the policy in effect from May, 1996 through May, 1997 and contains the actual contractual provisions

²The code CA0012 denotes a Standard Trucker's Coverage Form published by the Insurance Services Office ("ISO") and CA0001 denotes the ISO Standard Business Auto Coverage Form.

of the policy. (Dep. of Loughery at pp. 52-53.)

The complete eleven page ISO Business Auto Coverage Form CA0001 is attached to the declarations page, whereas only a two page index entitled "Quick Reference Commercial Auto Coverage Part Truckers Coverage Form" and a three page form entitled "Commercial Auto Part Truckers Coverage Form" are attached to the declarations page of the policy. The Business Auto Coverage Form attached to the declarations page unambiguously excludes coverage to owners of hired vehicles such as Post. Fredericks testified that it was F&B Trucking's expectation that Post, as an owner/operator, would be covered under his own insurance in the event of an accident. (Dep. of Fredericks at pp. 33-35.) F&B Trucking required each contract driver to produce a certificate of insurance as proof of their individual insurance coverage. (Id.)

At the hearing, Harleysville NJ argued that any revision of its policy is inappropriate. Harleysville NJ maintains that Post is unambiguously excluded from coverage because he is the owner of a hired vehicle. This exclusion, according to Harleysville NJ, reflects the intention and behavior of F&B Trucking and the trucking industry that owners of hired vehicles maintain their own insurance coverage.³ The course of

³Empire points out that correspondence renewing the Harleysville NJ policy, bills regarding premiums due, and certificates of insurance identify it as a Trucker's Policy.

performance between Post and F&B Trucking supports this statement. Post supplied a certificate of insurance to F&B Trucking indicating he maintained his own insurance.⁴

The Court finds persuasive Harleysville NJ's arguments regarding the parties' intentions evidenced by course of performance and payment of premiums. Harleysville NJ contends that the policy does not allow coverage to parties other than F&B Trucking. Harleysville NJ characterizes Empire as an "interloper," lacking standing to assert its coverage claim. F&B Trucking, unlike Empire, paid coverage premiums under the subject policy. Further, there is no evidence that F&B Trucking objects to Harleysville NJ's policy interpretation.

Empire argues that this Court should employ the doctrine of contra proferentum examined by the United States Supreme Court in United States v. Seckinger, 397 U.S. 203, 216 (1970). Seckinger involved a dispute over a negligence clause in a fixed price government construction contract between a private government contractor with an injured employee and the Government. In Seckinger, the United States Supreme Court stated that "as between two reasonable and practical constructions of an

⁴Despite providing a certificate of insurance to F&B Trucking evidencing his own insurance coverage from April 19, 1996 to April 19, 1997, Post executed an affidavit in support of Empire's Motion for Summary Judgment stating that he expected to be covered under F&B Trucking's insurance for the accident. (Post Aff. at ¶¶ 10-12.)

ambiguous contractual provision, . . . the provision should be construed less favorably to the party which selected the contractual language." Id. at 216.

Under New Jersey law, ambiguities in policies are resolved against insurance companies under the doctrine of contra proferentum when policies are not readily understood. Oritani Sav. & Loan Ass'n v. Fidelity & Dep. Co. of Md., 989 F.2d 635, 638 (3d Cir. 1993)(citing Sparks v. St. Paul Ins. Co., 100 N.J. 325, 495 A.2d 406, 414 (1985)). Even when insurance policies are not "patently or technically ambiguous," courts construe "[policies] in accordance with the reasonable expectations of the insured." Id. (citing Sparks, 495 A.2d at 412). Therefore, the parties' reasonable expectations must be examined when "the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Id. (citing State, Dep't of Env'tl. Protection v. Signo Trading Int'l, Inc., 130 N.J. 51, 612 A.2d 932, 938 (1992)(quoting Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 246-47, 405 A.2d 788, 795 (1979))). However, "[c]overage will be provided if policy language is insufficiently clear to justify depriving the insured of her reasonable expectation that coverage would be provided." Id. (citing Sparks, 495 A.2d at 413). This Court will not apply the doctrine of contra proferentum to the instant case because the reasonable coverage expectations of F&B Trucking are met

under the Business Auto Policy.

IV. CONCLUSION.

For the foregoing reasons, this Court construes the subject policy as a Business Auto Policy in favor of F&B Trucking and its insurer, Harleysville NJ. Empire's Motion for Summary Judgment is denied and Harleysville NJ's Motion for Summary Judgment is granted.

An Order follows.

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EMPIRE FIRE AND MARINE	:	
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	:	
HARLEYSVILLE INSURANCE	:	
COMPANY OF NEW JERSEY,	:	
Defendant.	:	
	:	

ORDER

AND NOW, this 26th day of July, 1999, after hearing and upon consideration of the Cross-Motions for Summary Judgment and all Responses and Replies thereto, it is ORDERED that Plaintiff Empire and Marine Insurance Company's Motion is DENIED and Defendant Harleysville Insurance Company of New Jersey's Motion is GRANTED.

The Clerk of Court is ORDERED to mark this file CLOSED.

BY THE COURT:

Robert F. Kelly, J.