

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

WEINSTEIN SUPPLY CORPORATION	:	
	:	
v.	:	CIVIL ACTION
	:	
HOME INSURANCE COMPANIES,	:	
THE HOME INDEMNITY COMPANY,	:	No. 97-7195
THE HOME INSURANCE COMPANY,	:	
ZURICH INSURANCE COMPANY,	:	
RISK ENTERPRISE MANAGEMENT, INC.,	:	
CRUM & FORSTER INSURANCE	:	
ORGANIZATIONS AND UNITED STATES	:	
FIRE INSURANCE COMPANY	:	

MEMORANDUM-ORDER

GREEN, S.J.

May , 1999

Presently before the court are cross-motions for partial summary judgment by Plaintiff Weinstein (“Weinstein”) and summary judgment by Defendants Home Insurance Companies, The Home Indemnity Company, The Home Insurance Company, and Risk Enterprise Management (collectively referred to as “Home”) and the responses from both parties thereto. For the following reasons, Weinstein’s Motion for Partial Summary Judgment will be denied and Home’s Motion for Summary Judgment will be granted.

I. FACTUAL BACKGROUND

Weinstein commenced this action against Home seeking a declaratory judgment that Home is obligated to defend and indemnify Weinstein against claims asserted in an action that was originally filed by George Borrell in Northampton County, Pennsylvania under the caption George Borrell v. Weinstein Supply Corporation and Miles Hallman Jr., CCP Northampton County, No. 1993-C-7954. Subsequent to the filing of the state action, Borrell filed another lawsuit based on the same allegations in the United States District Court for the Eastern District

of Pennsylvania under the caption George Borrell v. Weinstein Supply Corporation and Miles Hallman Jr., U.S.D.C. (E.D. Pa.) 94-2857 (“Borrell underlying action”). Borrell brought his federal action under the Age Discrimination in Employment Act and included, among other claims, a claim for defamation.

In the Borrell underlying action, Borrell alleged in Count I that his employment with Weinstein was terminated on the basis of his age and that after he filed a complaint with the Allentown Human Relations Commission, Weinstein engaged in a “widespread intentional false, malicious, scheme to defame and otherwise injure [him] by telling [his] customers and associates that [he] accepted bribes and kickbacks and was guilty of theft against [Weinstein].” (See ¶¶ 13, 19 of Borrell underlying action, Def’s. Ex. D.) Borrell alleged that Weinstein defamed him “in retaliation against [him] for filing the age discrimination complaint and to cover up [Weinstein’s] illegal age discrimination.” (See ¶ 20 Borrell underlying action, Def’s. Ex. D.)

In Count II of the Borrell underlying action, Borrell sets forth the alleged defamatory statements which include statements made to Borrell’s customers that Borrell was “on the take” and “had stolen money and material” from Weinstein. Weinstein also allegedly made a statement to a plumber/customer of Weinstein that “Borrell was stealing considerable amounts of money from Weinstein.” Borrell also alleged that statements were published at the June 17, 1993 Allentown Master Plumbers Association meeting that “money was missing from envelopes at the Bradford Water Heater meeting and that Borrell was the thief.” Other alleged statements made by Weinstein include statements that Weinstein “fired Borrell because of missing envelopes containing money due Borrell’s customers” and statements made to Borrell’s new employer that referred to him as “a criminal”, “a wolf in sheep’s clothing” and “a weasel in your henhouse.”

(See ¶¶ 31-34, 72 of Borrell underlying action, Def's. Ex. D.) Borrell alleged that the defamatory statements were made "to cover up the true invidiously discriminatory reasons for discharge and/or in retaliation against [Borrell] based upon [Borrell's] charge of employment discrimination." (See ¶ 27 of Borrell underlying action, Def's. Ex. D.)

In Count III of the Borrell underlying action, Borrell alleges that in retaliation against him for filing charges of employment discrimination, Weinstein "refused to reinstate [him] to his employment position and maliciously instituted a widespread campaign of defamation against [him]." In Counts IV and V, Borrell sets forth a claim for breach of an employment agreement and seeks monies allegedly not paid pursuant to the agreement. Finally, in Count VI, Borrell alleges that the defamatory statements made by Weinstein caused him to lose his new employment.

Weinstein retained Edward Feege, an attorney with Duane, Morris and Hecksher in Allentown, Pennsylvania to represent it in the Borrell state action. The facts are in dispute whether Weinstein notified Home about the state action when it was first served with the Borrell state action. The Borrell state action was eventually dismissed, but Borrell proceeded to litigate the Borrell underlying action. The Borrell underlying action settled during trial for the sum of \$150,000.00 in December 1995.

Home issued a commercial general liability policy number PPPF891279 ("Home policy") to Weinstein for the policy period February 27, 1993 through February 29, 1994. (Def.'s Ex. E). On May 29, 1997, when Weinstein learned from a competitor, Duff Supply, that Duff Supply had a similar claim that was covered by insurance, he submitted the claim to Home's agent and forwarded a copy of the Borrell state action. On October 1, 1997, Home was forwarded a copy

of the Borrell underlying action, and after reviewing the request for coverage, Home denied coverage on the grounds that: (a) the defamation claims are excluded from coverage for personal injury because of the personnel practices exclusion and (b) Weinstein breached the conditions relating to its duties in the event of an occurrence.

II. DISCUSSION

Summary judgment shall be awarded “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 judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine “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, 106 S. Ct. 2505, 2510 (1986).

The parties do not dispute that the laws of Pennsylvania are applicable in the present matter. Under Pennsylvania law, the court rather than the jury interprets the language of an insurance contract. The court’s objective must be to ascertain the intent of the parties as manifested by the language of the written instrument. Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983). Where a provision of an insurance policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement. Id. Where, however, the language is clear and unambiguous, a court is required to give effect to that language. Id.

The obligation of the insured to defend an action is fixed solely by the allegations in the underlying complaint. Humphreys v. Niagara Fire Ins. Co., 590 A.2d 1267, 1271 (Pa. Super. 1991). The obligation to defend arises whenever the underlying complaint potentially may come

within the coverage of the policy. Id. Courts should read policies to avoid ambiguities and should not torture language to create them. Carpenter v. Federal Ins. Co., 637 A.2d 1008, 1011 (Pa. Super. 1994).

The Home policy issued to Weinstein states:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a.) We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this coverage part applies. . . .

b.) This insurance applies to:

(1) “Personal injury” caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(2) “Advertising injury” caused by an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the “coverage territory” during the policy period.

. . .

SECTION V -- DEFINITIONS

1. “Advertising injury” means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;

b. Oral or written publication or material that violates a person’s right of privacy;

. . .

10. “Personal injury” means injury, other than “bodily injury,” arising out of one or more of the following offenses:

. . .

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; . . .

The Home policy contains a Personnel Practices Exclusion which states the following:

This insurance does not apply to “bodily injury” or “personal injury” arising out of: (1) refusal to employ; (2) termination of employment; (3) coercion; (4) demotion; (5) reassignment; (6) discipline; (7) humiliation; (8) harassment; (9) discrimination; (10) evaluation; (11) defamation; or (12) any other employment-related practices, policies, acts or omissions. This exclusion applies regardless of whether the “insured” may be held liable as an employer or in any other capacity and to any obligation of the “insured” to indemnify or contribute with another because of damages arising out of the injury.

Home argues that it has no duty to defend or indemnify Weinstein because the Personnel Practices Exclusion precludes any of the personal injury claims alleged in the Borrell underlying action and there was no “advertising injury” caused by an offense committed in the course of Weinstein advertising its goods, products or services. Weinstein argues that coverage is provided for the Borrell underlying action under the provisions of the Home policy applying to personal injury and advertising injury and that the Personnel Practices Exclusion does not apply to the Borrell underlying action because Borrell claims that he was defamed in retaliation for a discrimination claim filed after his employment ended.

A. Personal Injury

The alleged defamatory statements would constitute “personal injury” under the Home policy as such statements constitute oral publication of material that slanders a person. The Personnel Practices Exclusion, however, precludes from coverage any personal injury arising out of termination of employment, discrimination, defamation, or any other employment-related practice. Weinstein concedes that the Personnel Practices Exclusion covers termination and discrimination of an employee, but argues that it does not cover the defamation claim in the present matter because it does not mention defamation in retaliation against former employees.

As the obligation of the insured to defend is fixed solely by the allegations in the underlying complaint, this court must look to the Borrell underlying action. In the Borrell underlying action, Borrell alleges that the defamatory statements were made “to cover up the true invidiously discriminatory reasons for discharge and/or in retaliation against Borrell based upon Borrell’s charge of employment discrimination.” (See ¶ 27 of Borrell underlying action, Def’s. Ex. D.) Based on the allegations in the Borrell underlying action, this court concludes that the language of the Personnel Practices Exclusion is clear and unambiguous and that the exclusion applies to the defamation claim because Borrell specifically alleges that the defamation arose from the termination of his employment and the alleged discrimination. Thus, any personal injury claims related to the alleged defamation are precluded from coverage under the Personnel Practices Exclusion.

B. Advertising Injury

Weinstein provides the court with the definition of “advertise” from Black’s Law Dictionary and argues that because the alleged disparagement of Borrell was made to customers of both Weinstein and Borrell, the injury potentially occurred in the course of “advertising” or “notifying” others of Borrell’s and Weinstein’s products or services. As the Pennsylvania Superior Court has instructed that courts should read policies to avoid ambiguities and should not torture language to create them, this court will not torture the word “advertise” to create an ambiguity where the language of the Home policy is clear and unambiguous. The policy states that the insurance applies to “advertising injury caused by an offense committed in the course of advertising the insured’s goods, products or services.” Nothing in the Borrell underlying action suggests that Weinstein made any of the alleged defamatory statements in the course of advertising its goods, product or services, and

Weinstein has not produced any evidence that it made the statements in the course of advertising its goods, products or services. The fact that the alleged defamatory statements were made to customers of Weinstein does not bring the statements within the “course of advertising goods, products or services.” Borrell does not allege that Weinstein was attempting to divert customers from him or that he lost business or profits as a result of the alleged defamation. Borrell does not allege that he was a “competitor” or in “competition” with Weinstein, and nowhere in the Borrell underlying action do the words “advertise,” “promote” or “market” appear with regard to Weinstein’s conduct. To the contrary, Borrell specifically alleges that the defamatory statements were made to cover up the discrimination and to retaliate against Borrell for filing a charge of employment discrimination. Therefore, based on the allegations in the Borrell underlying action, this court concludes that the alleged defamation does not constitute “advertising injury” as set forth in the Home policy.

III. CONCLUSION

Based on the allegations of the Borrell underlying action, this court concludes that the Personnel Practice Exclusion precludes coverage for Borrell’s defamation claim as it arose from Weinstein’s alleged discrimination against Borrell and termination of his employment. This court also concludes that the alleged defamation did not occur within the course of Weinstein advertising its goods, products or services, and thereby, cannot constitute “advertising injury” within the meaning of the Home policy. Accordingly, the Home policy does not provide coverage for the claims asserted in the Borrell underlying action, and Home has no duty to defend or indemnify Weinstein with respect to the Borrell underlying action. Weinstein’s Motion for Partial Summary Judgment will be denied, and Home’s Motion for Summary Judgment will be granted.

An appropriate Order follows.

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CRUM & FORSTER INSURANCE	:	
ORGANIZATIONS AND UNITED STATES :	:	
FIRE INSURANCE COMPANY	:	

ORDER

AND NOW, this day of May 1999, upon consideration of Plaintiff Weinstein's Motion for Partial Summary Judgment and Defendant Home's Motion for Summary Judgment, IT IS HEREBY ORDERED that:

1. Plaintiff Weinstein's Motion for Partial Summary Judgment is DENIED; and
2. Defendant Home's Motion for Summary Judgment is GRANTED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.