

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

R.R. DONNELLEY & SONS CO., ET AL. : CIVIL ACTION
: :
v. : NO. 03-6412
: :
FIREMAN’S FUND INSURANCE :
CO., ET AL. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J

December 6, 2004

This is a dispute over which insurance company has a duty to defend and indemnify R.R. Donnelley & Sons Company (“Donnelley”) in an underlying civil action pending in the United States District Court for the Eastern District of Pennsylvania. Plaintiff, Donnelley, claims Fireman’s Fund Insurance Company (“Fireman’s Fund”) must defend and indemnify it because Donnelley is an additional insured on a Fireman’s Fund policy. Fireman’s Fund argues it has no duty to defend and indemnify Donnelley because Donnelley was negligent. Fireman’s Fund argues Donnelley’s own insurer, Zurich American Insurance Company (“Zurich”), must defend and indemnify Donnelley. For the reasons that follow, we conclude Fireman’s Fund has a duty to defend and indemnify Donnelley.

FACTS

Sherman Taylor (“Taylor”) filed an action in federal court seeking damages for injuries he sustained when he was struck by a bale of paper on March 19, 2002 at R.R. Donnelley & Sons Company (“Donnelley”). At the time of the accident, Taylor, a tractor trailer operator for Harris &

Son Trucking (“Harris”), was picking up a load of paper at the Donnelley facility in Lancaster Pennsylvania for transport to a third party. Taylor was making room on his truck for the load of paper, when a bale of paper rolled off a forklift a Donnelley employee was operating and crushed Taylor. Taylor sued Donnelley for negligence and Harris intervened in the action¹. Before the Taylor litigation can proceed however, this Court must determine who has the duty to defend and indemnify Donnelley in the action.

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving no genuine issue of material fact is in dispute and the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348 (1986). Once the moving party has carried its initial burden, the nonmoving party must then "come forward with specific facts showing there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (citing Fed.R.Civ.P. 56(e)). A motion for summary judgment will not be denied because of the mere existence of some evidence in support of the nonmoving party. The nonmoving party must present sufficient evidence for a jury to reasonably find for them on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Before we can consider the merits of this motion for summary judgment, we must decide what state’s law applies to the dispute. The Fireman’s Fund Insurance policy was delivered to Harris in Lynchburg, Virginia and was endorsed and amended there. The underlying tort claim occurred

¹*Sherman Taylor et al. v. R. R. Donnelley and Sons Company*, at case No. 03-4667

in Pennsylvania and the suit was filed in Pennsylvania.² We must decide whether Pennsylvania or Virginia law applies. “A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state.” *Echols v. Pelullo*, 377 F.3d 272, 275 (3d Cir. 2004)(citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941)). We will apply Pennsylvania choice of law rules as established by the Pennsylvania Supreme Court. The Pennsylvania Supreme Court’s choice of law test is a hybrid of the most significant relationship test of the Restatement (Second) of Conflicts and the governmental interest analysis. This approach calls for a two-step analysis, first, the court looks to see whether a false conflict exists. *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996). “Under general conflict of laws principles, where

² Fireman’s Fund argues there is a possibility the insurance policy was delivered to a third party located in Iowa. The mere possibility Iowa law might apply is not enough to prevent the court from considering a Motion for Summary Judgment. An opponent will not survive a Motion for Summary Judgment “merely by discrediting the credibility of the movant’s evidence; it must produce some affirmative evidence.” *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). “[T]he opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . [h]owever, the opponent need not match, item for item, each piece of evidence proffered by the movant.” *Id.* (citations omitted). Fireman’s Fund has failed to provide any affirmative evidence that the policy was delivered in Iowa. Because Fireman’s Fund issued the policy itself, it is reasonable to assume that Fireman’s Fund could present affirmative evidence on the state where the policy was delivered if it chose to do so.

Even if Fireman’s Fund’s did offer evidence that the policy was delivered in Iowa, the outcome of this Courts analysis would remain unchanged. Iowa law is identical to Pennsylvania and Virginia law and therefore this is a false conflict situation. *See First Newton Nat’l Bank v. General Casualty Co.*, 426 N.W.2d 618, 623 (Iowa 1988)(stating “[a]n insurer has a duty to defend whenever there is potential or possible liability to indemnify the insured based on the facts appearing at the outset of the case”); *Employers Mut. Cas. Co. v. Cedar Rapids TV Co.*, 552 N.W.2d 639, 642 (Iowa 1996)(deciding whether an insurer has a duty to defend, requires the court to see if the pleadings state facts which bring the claim within the liability covered by the policy. The court must compare the policy language with the facts pled to determine if the claim falls within the express terms of the policy).

the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a ‘false conflict,’ and the Court should avoid the choice-of-law question.” *Williams v. Stone*, 109 F.3d 890, 893 (3d Cir. 1997)(citing *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir. 1994)). If a true conflict of laws exists, Pennsylvania choice-of-law rules “call for the application of the law of the state having the most significant contacts or relationships with the particular issue.” *In re Estate of Agostini*, 311 Pa. Super. 233, 252, 457 A.2d 861, 871 (1983).

Pennsylvania and Virginia laws are substantively identical and application of either would produce the same result. In both states, an insurer’s duty to defend arises “whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy.” *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 413 (4th Cir. 2004)(citations omitted); *Air Prods. & Chems. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 179 (3d Cir. 1994). This is a false conflict situation because the outcome is the same regardless of whether Pennsylvania or Virginia law applies. We will apply Pennsylvania law.

Having determined Pennsylvania law applies, we now consider whether Fireman’s Fund has a duty to defend and indemnify Donnelley in the Taylor litigation, or whether Donnelley’s own liability insurer, (Zurich) is responsible for Donnelley’s defense and indemnification. This decision turns on 1) whether Donnelley is an endorsed additional insured under Harris’s policy and 2) whether Donnelley’s coverage under Harris’s policy is primary to Donnelley’s own liability coverage with Zurich. We look first to the relevant portions of the insurance policies.

Fireman’s Fund Insurance Company provided Harris with primary commercial general liability insurance and trucker’s liability insurance. Harris’s policy contained an additional insured endorsement, which extended commercial general liability insurance coverage to Donnelley. The

additional insurance endorsement stated:

Who is an Insured (Section II) is amended to include as an insured the person or organization shown in the schedule as an insured but only with respect to liability arising out of your operations or premises owned by or rented to you.

See Fireman's Fund Policy No. CG 20 26 11 85. Donnelley is identified as an additional insured on the Certificate of Liability Insurance issued by Fireman's Fund. See Certificate of Liability Insurance.

Donnelley also had its own general liability insurance through Zurich, its primary liability insurance carrier. Donnelley's policy with Zurich contained an "other insurance" clause which stated:

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:

a. Primary Insurance.

This insurance is primary except when b. below applies. If this insurance is primary our obligations are not affected unless any of the other insurance is also primary.

b. Excess Insurance.

This insurance is excess over:

(1) Any of the other insurance, whether primary, excess, contingent or on any other basis . . .

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement. When this insurance is excess we will have no duty . . . to defend the insured against any suit if any other insurer has a duty to defend the insured against that suit.

Zurich Policy No. CG 0001 (7/98 Ed.) at 9.

It is undisputed Fireman's Fund issued Harris a general liability insurance policy naming

Donnelley as an additional insured. What is disputed is whether Donnelley's status as an additional insured gives rise to a duty to defend. The duty to defend is a question of law the court decides by examining the policy language and the allegations in the complaint. *Gene's Restaurant, Inc. v. Nationwide Ins. Co.*, 519 Pa. 306, 548 A.2d 246, 246-47 (Pa. 1988)); *see also Westport Ins. Corp. v. Bayer*, 284 F.3d 489, 496 (3d Cir. 2002). "Under Pennsylvania law, the issuer of a general liability insurance policy has a duty to defend its insured when the allegations in the complaint against it could potentially fall within the coverage of the policy." *Air Prods. & Chems.*, 25 F.3d at 179. "An insurer's duty to defend an insured in litigation is broader than the duty to indemnify, in that the former duty arises whenever an underlying complaint may 'potentially' come within the insurance coverage." *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999)(citing *Erie Ins. Exch. v. Claypoole*, 449 Pa. Super. 142, 673 A.2d 348, 355 (Pa. Super. 1996)).

General rules of insurance contract construction require the court to read the policy as a whole and give the language its plain and ordinary meaning. *Frog, Switch & Mfg. Co.*, 193 F.3d at 746 (citing *Atlantic Mut. Ins. Co. v. Brotech Corp.*, 857 F. Supp. 423, 427 (E.D. Pa. 1994), *aff'd*, 60 F.3d 813 (3d Cir. 1995)). "Ambiguities must be construed in favor of the insured because the insurer writes the contract, but a provision is ambiguous only if reasonable people could, in the context of the entire policy, fairly ascribe differing meanings to it." *Frog, Switch & Mfg. Co.* 193 F.3d at 746.

Fireman's Fund argues under *Harbor Insurance Company v. Lewis*, it has no duty to defend Donnelley, despite Donnelley's status as an additional insured. 562 F. Supp. 800 (E.D. Pa 1983). In *Harbor*, a child was severely injured after he climbed through a fence that was negligently maintained by the City and was struck by Reading Railroad train. *Id.* at 801. The City and Reading Railroad were found jointly and severally liable. *Id.* at 802. The City was an additional insured on Reading

Railroad's insurance policy with Harbor Insurance. The City claimed the Harbor Insurance Company was obligated to indemnify it for the losses arising from the action. *Id.* To decide the case the court relied on the plain language of the insurance policy. The additional insured provision in the Harbor policy stated:

It is agreed that the insurance afforded by this policy shall apply to the following additional insureds but only to the extent of liability resulting from occurrences arising out of negligence of Reading Company and/or its wholly owned subsidiaries.

Id. The court held Harbor was not required to indemnify the City because the additional insured provision protected the City from the negligence of Reading Railroad, but it did not protect the City from liability caused by its own negligent acts. *Id.*

Relying on *Harbor*, Fireman's Fund argues it is only obligated to indemnify additional insureds for liability arising from the named insured's acts of omissions. It claims its policy protects Donnelley from the negligence of a Harris employee and argues it has no duty to defend Donnelley when the injury resulted from the alleged negligence of a Donnelley employee. The plain language of the insurance policy defeats Fireman's Fund's argument. In *Harbor*, the additional insured provision expressly limited coverage to liability arising out of the negligence of the holder of the policy. The policy stated "this policy shall apply to the following additional insureds *but only to the extent of liability resulting from occurrences arising out of negligence of* [the insured]." *Harbor Ins. Co.*, 562 F. Supp. at 802 (*emphasis added*); *see also Philadelphia Electric Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740, 742 (E.D. Pa. 1989). The language in Fireman's Fund's policy does not limit coverage solely to acts of negligence by the insured. The policy covers additional insureds "with respect to liability arising out of your operations or premises owned by or rented to you." *See* Fireman's Fund Policy No. CG 20 26 11 85.

Courts in Pennsylvania have uniformly held that “arising out of means causally connected with, not promixately caused by. But for causation, i.e., a cause and result relationship, is enough to satisfy this provision of the policy.” *Forum Ins. Co. v. Allied Secur. Inc.*, 866 F.2d 80, 82 (3d Cir. 1989)(citations omitted); see also *Maryland Cas. Co. v. Regis Ins. Co.*, 1997 U.S. Dist. LEXIS 4359 (E.D. Pa. 1997)(“courts have uniformly interpreted ‘arising out of’ as providing liability if the alleged injuries would not have occurred ‘but for’ the operations or negligence of the named insured”); *Rust Eng’g & Constr. v. J.C. Zampell Constr.*, 1997 U.S. Dist. LEXIS 19783 (E.D. Pa. 1997)(“in Pennsylvania, the phrase ‘arising out of’ has been broadly interpreted to mean but-for causation, not proximate cause”).

In *Township of Springfield v. Ersek*, a factually similar case, a Pennsylvania court considered whether an insurer was required to indemnify the township, an additional insured, for negligent acts “arising out of operations performed by the named insured.” 660 A.2d 672, 676 (Pa. Commw. Ct. 1995), *alloc. denied*, 67 A.2d 1254 (Pa. 1996). The court held the insurer had a duty to defend and indemnify the township because “[the] policy clearly provide[d] coverage to the [t]ownship where an injury occur[ed] on the [insured’s] premises as a result of the [insured’s] operations, regardless of whether the negligence which [gave] rise to the claim rests with [the insured] or with the [t]ownship.” *Id.* The court stated, “[h]ad the [insurer] sought to restrict coverage to only claims arising from the negligence of [the insured], it could have clearly so stated in the additional insured endorsement language” *Id.* *Township of Springfield* is persuasive and is consistent with Pennsylvania law. This Court therefore, holds Donnelley is an additional insured under Fireman’s Fund policy and Fireman’s Fund has a duty to defend Donnelley in the underlying Taylor litigation.

The last issue is whether Donnelley’s coverage under Fireman’s Fund policy is primary to

Donnelley's own liability insurance with Zurich. This issue turns on whether the competing other insurance clauses in the Fireman's Fund and Zurich policy can be reconciled. "Other insurance exists where there are two or more insurance policies covering the same subject matter, the same interest, and against the same risk." *Harstead v. Diamond State Ins. Co.*, 555 Pa. 159, 165 (Pa. 1999). Courts must reconcile competing other insurance clauses when it is possible to do so. *Nationwide Ins. Co. v. Horace Mann Ins. Co.*, 759 A.2d 9 (Pa. Super. 2000). Such clauses are irreconcilable only when they are mutually exclusive; "that is, following the express terms of one policy would be in direct conflict with the express dictates of another policy." *Id.* (citing *American Casualty Co. v. PHICO Ins. Co.*, 702 A.2d 1050, 1053-54 (Pa. 1997)). The Zurich policy and the Fireman's Fund policy cover the same subject matter, however they are not mutually exclusive. The Zurich policy's other insurance clause states:

b. Excess Insurance.

This insurance is excess over:

...

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

Zurich Policy No. CG 0001 (7/98 Ed.) at 9. The Fireman's Fund policy has an other insurance provision which contains the same clause relieving it of liability if Harris is an endorsed additional insured on another primary policy. Harris however, is not an endorsed additional insured on Donnelley's policy. The two insurance provisions, therefore, are not irreconcilable. The Zurich policy is excess and should be given its plain meaning and affect. Accordingly, we enter the following:

ORDER

And now this 6th day of December, 2004, it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is Granted (Doc. 16). Fireman's Fund Insurance Company is obligated to defend Donnelley in the civil action pending in the United States District Court for the Eastern District of Pennsylvania (styled as Taylor, et ux. v. R.R. Donnelley & Sons Company) and indemnify Donnelley & Sons Company for any resulting liability pursuant to Fireman's Fund's Insurance Policy.

BY THE COURT:

\s\ Juan R.Sánchez

Juan R. Sánchez, J.