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

MERIDIAN MUTUAL INSURANCE COMPANY, n/k/a STATE AUTO INSURANCE COMPANY, Plaintiff, v. CONTINENTAL BUSINESS CENTER, Defendant.	:	CIVIL ACTION NO. 04-1639

Memorandum and Order

YOHN, J. April ___, 2005

On May 15, 2001, a fire caused significant damage to buildings at the Continental Business Center ("CBC"), an industrial complex in Bridgeport, Pennsylvania and extending to the other side of the Schuylkill River. On that date, Little Souls, Inc. ("Little Souls"), a manufacturer of distinctive, handmade dolls, was one of over fifty tenants of CBC and the holder of an insurance policy ("the policy") issued by plaintiff Meridian Mutual Insurance Company ("Meridian"). Numerous parties have sued CBC (but not Little Souls) in connection with the fire, and in this suit, Meridian seeks a declaratory judgment that it owes neither a duty to defend nor a duty to indemnify CBC pursuant to the terms of the policy. CBC has filed a counterclaim against Meridian, asserting that Meridian owes both duties.

Currently pending before the court is Meridian's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). Meridian argues that neither the policy nor the lease agreement between Little Souls and CBC imposes a duty to defend or indemnify CBC. Meridian argues in the alternative that even if the court were to find that CBC had insurance coverage under the policy,

CBC is not entitled to coverage in this instance, because it has violated its duty to cooperate with Meridian.

For the reasons explained below, Meridian's motion will be granted.

FACTUAL & PROCEDURAL BACKGROUND

On May 15, 2001, a fire ravaged CBC, causing extensive damage to its buildings on both sides of the Schuylkill River and destroying the businesses of many of its fifty-plus tenants. One of those tenants was Little Souls, which held the policy, a Pacemaker Businessowner's Policy with a policy period running from September 1, 2000 to September 1, 2001. *See* Exh. B to Complaint, Form H1065 0806. The lease agreement with CBC required Little Souls to purchase such a policy. The lease agreement stated, in pertinent part:

> Lessee agrees that prior to occupancy of the demised premises, it shall submit to Lessor evidence of general liability insurance coverage in the sum of not less than One Million Dollars ($1,000,000.00). Said policy shall insure Lessee for any liability or injury caused by its agents, servants, workmen and/or employees, or anyone coming upon the demised premises. Said policy shall also cover damage caused to Lessor's property by reason of negligence and/or willful misconduct of Lessee or its agents, servants, workmen and/or employees. Said policy shall remain in full force and effect during the term of this Agreement or any renewals thereof. Lessee's failure to maintain such liability policy shall be deemed a default under the terms of this Agreement. Said policy shall name Continental Business Center as additional insured.

Exh. C to Complaint, at ¶ 37.

With regard to the policy itself, Little Souls was the "Named Insured." *See* Exh. B to Complaint, Form H1065 0806. Section "C" of the "Businessowner's Liability Coverage Form" further outlined "Who Is An Insured," adding to the definition Little Souls' employees, real

estate managers, and legal representatives. Exh. B to Complaint, Form BP 00 06 01 97, at 8-9. However, Form P266 07 00, the Pacemaker Businessowner's Liability Plus Endorsement ("the Endorsement"), added to the definition of "Who Is An Insured," "[a]ny person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement." Exh. B to Complaint, Form P266 07 00, at 3. This written contract or agreement must have been: "(1) [c]urrently in effect or becoming effective during the term of this policy; and (2) [e]xecuted prior to the 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury'" that triggers the policy. *Id.* In addition, under the Endorsement, the person or organization required to be named as an additional insured "is only an additional insured with respect to liability arising out of [r]eal [p]roperty [Little Souls] own[s], rent[s], lease[s], or occup[ies]." *Id.*

Since the fire, CBC has been named as a defendant in sixteen lawsuits brought in the Montgomery County Court of Common Pleas ("Court of Common Pleas Complaints"), and in one lawsuit in a Montgomery County District Court.[1] Pl. Motion at ¶ 16-17; Def. Resp. at ¶ 16-17. These lawsuits include allegations of negligence by CBC for, *inter alia*, having inoperable fire suppression equipment and inadequate fire breaks between the walls of the leased spaces, which allegedly allowed the fire to spread quickly throughout the complex. Def. Memo. at 2. However, none of these complaints names Little Souls as a defendant, alleges negligence on the part of Little Souls, asserts that the fire was caused or spread by Little Souls, or contends that the fire had anything to do with the Little Souls property.

[1] These actions have been consolidated into a class action in Montgomery County.

By letter dated January 8, 2003, CBC notified Meridian of six of the Court of Common Pleas Complaints and requested defense and indemnification under the policy.[2] Pl. Motion at ¶ 27; Def. Resp. at ¶ 27. In response to the request for coverage, Meridian began correspondence with CBC, which culminated in an October 14, 2003 letter from Meridian's counsel to CBC's counsel, offering "a defense to CBC through the services of Margolis Edelstein until such time as we procure from a court of competent jurisdiction a ruling that we have no duty to defend or indemnify you, or until such time as our investigation clearly reveals to us that no such duty exists." Exh. G to Complaint. However, just over two months later, by letter dated December 24, 2003, Meridian's counsel informed CBC's counsel that because CBC was already being provided a defense by its primary insurer, Scottsdale Insurance Company, Meridian owed CBC no duty to defend. Exh. H to Complaint.

Thereafter, on April 14, 2004, Meridian filed the present action, seeking a declaratory judgment that it owes no duty to defend or indemnify CBC in connection with the May 15, 2001 fire. CBC filed an answer to the complaint, asserting several affirmative defenses and a counterclaim seeking a declaratory judgment that CBC was an insured under the policy and is entitled to defense and indemnity from Meridian. Meridian then moved for summary judgment in this matter, CBC responded to the motion, Meridian filed a reply, CBC filed a surreply, and Meridian filed a sur-surreply.

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[2] While Meridian's motion and CBC's response indicate that four of the Court of Common Pleas Complaints were referenced in the January 8, 2003 letter, the letter itself actually references six. *See* Exh. E to Complaint. The six cases are *Prof'l Flooring Co., Inc. v. Bushar Corp.* [01-10504], *League Collegiate Wear v. Bushar Corp.* [01-19315], *Sweetzels, Inc. v.* CBC [02-02110], *George, Inc. v. Bushar Corp.* [02-08425], *Label Rite, Inc. v. CBC* [02-15511], and *XL Winterhur Int'l v. CBC* [02-27296].

SUMMARY JUDGMENT STANDARD

Either party to a lawsuit may file a motion for summary judgment, and it will be granted only "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). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the nonmoving party must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Ideal Dairy Farms, Inc. v. John Lebatt, Ltd.* 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). The non-movant must present concrete evidence supporting each essential element of its claim. *Celotex*, 477 U.S. at 322-23.

When a court evaluates a motion for summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Furthermore, "[a]ll justifiable inferences are to be drawn in [the non-movant's] favor." *Id*. "Summary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *Ideal Dairy Farms*, 90 F.3d at 744 (citation omitted). However, "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The non-movant must show more

than "[t]he mere existence of a scintilla of evidence" for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

DISCUSSION

Meridian contends that pursuant to the terms of the policy and the lease agreement between CBC and Little Souls, CBC is not entitled to defense or indemnity from Meridian in connection with the May 15, 2001 fire, because: (1) paragraph 37 of "[t]he lease states that CBC is an additional insured only for liability 'caused by Little Souls' agents, servants, workmen and/or employees,'" and none of the 17 complaints that have been filed against CBC alleges that the fire was the fault of Little Souls; (2) paragraph 37 of "the lease further states that CBC is only an additional insured for claims for 'negligence and/or willful misconduct of Lessee [Little Souls, Inc.] or its agents, servants, workmen and/or employees,'" and none of the 17 complaints against CBC alleges negligence on the part of Little Souls; (3) persuasive authority holds that "an additional insured endorsement as contained in Meridian's policy only protects parties who are not named insureds from exposure to vicarious liability for **acts of the named insured**, not for the additional insureds' own acts of negligence;" and (4) "[u]nder the policy, liability coverage is limited to claims arising out of real property **Little Souls** owns, rents, leases or occupies and for liability arising out of work Little Souls does for CBC," and CBC has offered no evidence that the property that Little Souls leased had anything to do with the fire.

In the alternative, Meridian argues that even if this court were to conclude that CBC was an additional insured under the policy, CBC is still not entitled to defense or indemnity, because it has failed to cooperate with Meridian.

CBC, not surprisingly, has an entirely different view of the case. CBC asserts that paragraph 37 of the lease agreement between Little Souls and CBC is largely irrelevant to this case, because "the alleged limiting language contained within the lease is not part of the policy of insurance providing coverage to CBC," and because nothing in the policy provided for the incorporation of that language into the terms of the policy. In addition, CBC contends that a reading of the terms of the policy itself – especially the Endorsement – confirms that CBC was an additional insured and is entitled to defense and indemnification from Meridian. Finally, CBC asserts that Meridian has failed to establish as a matter of law that CBC has breached its duty to cooperate.

I. The Lease Agreement

Meridian relies heavily upon the terms of the lease agreement in arguing that CBC was not insured under the policy, because Meridian contends that the lease placed strict limits on the extent of coverage. Pl. Memo. at 7-8; Pl. Reply at 4-8. Meridian contends that paragraph 37 of the lease states that CBC was an additional insured under the policy only for liability "caused by Little Souls' agents, servants, workmen and/or employees," and that none of the complaints against CBC alleges that Little Souls was responsible for the fire. Pl. Memo. at 7 (emphasis omitted). In addition, Meridian contends that the same paragraph stated that "CBC is only an additional insured for claims for 'negligence and/or willful misconduct of Lessee [Little Souls, Inc.] or its agents, servants, workmen and/or employees,'" and that, similarly, none of the complaints against CBC alleges negligence or willful misconduct on the part of Little Souls. *Id.* at 7-8. Finally, Meridian argues that "the lease **does not** obligate Little Souls to provide a defense for liability of CBC or any of its agents." *Id.* at 8. Thus, the argument goes, pursuant to the above-described analysis, the lease agreement denied insurance coverage to CBC in this case.

Meridian's reliance on the terms of the lease agreement, however, is misplaced, because the lease agreement was not part of the insurance policy, and (except as to the issue of an additional insured) the policy did not incorporate the terms of the lease. In *Transport Indem. Co. v. Home Indem. Co.*, 535 F.2d 232 (3d Cir. 1976), Transport, the insurer of a lessee of a truck, sought a declaration that Home, the lessor's insurer, had the responsibility to indemnify the lessee for any judgment against the lessee stemming from an accident involving said truck and a passenger car. *Transport Indem*, 535 F.2d at 233. Transport based its argument on the terms of the respective insurance policies, but Home responded, at least in part, "that it was clear from the lease between [the lessor] and [the lessee] that [the lessee's] insurer was to provide primary insurance." *Id.* The court concluded that "[i]t is true that if the liability of the insurance carriers was governed by the contract between [the lessor] and [the lessee], there could be little doubt that Transport, who issued a policy to [the lessee], would be responsible for the liability . . . [h]owever, the insurance carriers were not parties to this contract [the lease] and their liabilities are governed by their contracts [insurance policies] with the insureds, and they cannot be held to anything beyond those contracted duties." *Id.* at 235 (citing *Carolina Cas. Ins. Co. v. Transport Indem. Co.*, 488 F.2d 790, 794 (10th Cir. 1973) (holding that "the primary insurer should be determined by looking to the insurance contracts and not by relying on terms and provisions found not in them but in a lease agreement between the named insureds")).

Meridian argues that because CBC "has no standing to claim to be an 'additional insured' without the existence of the lease," and because "[t]he undisputed plain and unambiguous language of the policy is that a 'written contract or agreement' must exist," the policy and the lease must be read together. Pl. Reply at 4. Thus, Meridian contends, CBC is not entitled to

coverage here because of the limiting language contained in paragraph 37 of the lease. However, the fact that the lease agreement required Little Souls to purchase insurance, and that CBC's status as an additional insured depended on a provision of the lease, does not mean that the lease in its entirety became part of the policy. CBC is correct when it states that "there is no policy language incorporating the lease provision." I conclude that the "limiting" language to which Meridian refers – requiring insurance for injuries or damage to CBC's premises caused by Little Souls' employees – set the minimum insurance required to be purchased by Little Souls under the lease but did not change the terms of the insurance policy itself. This is especially true because, like Home Indemnity in *Transport Indemnity*, Meridian was not a party to the lease agreement.

In short, paragraph 37 of the lease is irrelevant to the issue of the coverage limits of the insurance policy. The limits of the coverage are determined by the language of the policy, not the lease, because the policy did not incorporate paragraph 37 in its entirety.[3, 4]

II. CBC's Status Under the Terms of the Policy

As an insurer, Meridian's duty to defend its insureds is "a distinct obligation, different from and broader than its duty to indemnify." *Aetna Cas. & Sur. Co. v. Roe*, 650 A.2d 94, 98 (Pa. Super. 1994). However, an insurer has a duty to defend only those claims that are covered by the policy. *Id.* The insurer agrees to defend the insured against any suits no matter how groundless, false, or fraudulent, such that the obligation to defend arises any time the complaint

[3] As will be seen, language in the policy makes CBC an additional insured under the requirements of a separate sentence of the lease. However, nothing in the policy suggests that the lease, rather than the policy, determines the limits of the coverage.

[4] At oral argument, neither party contested this conclusion.

may potentially come within the policy's coverage. *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 651 (Pa. Super. 1994). That obligation is at least initially determined solely by the allegations that appear on the face of the underlying complaint. *Roe*, 650 A.2d at 98. "An insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff's pleadings." *Gene's Rest., Inc. v. Nationwide Ins. Co.*, 548 A.2d 246 (Pa. 1988) (citing 7C Appleman, Insurance Law and Practice § 4683 (W. Berdel ed., 1979)). "Therefore, the course and outcome of the underlying litigation is irrelevant in this context." *Roe*, 650 A.2d at 99. Furthermore, "where a claim is potentially within the scope of an insurance policy, the insurer who refuses to defend at the outset does so at its own peril." *Id.*

However, before I can consider whether Meridian has a duty to defend the specific claims against CBC, I must determine whether CBC was insured under Meridian's policy at the time of the fire. In Pennsylvania, when "the language of [a] contract is clear and unambiguous, a court is required to give effect to that language." *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983). "Furthermore, if possible, 'a court should interpret the policy so as to avoid ambiguities and give effect to all of its provisions.'" *Med. Protective Co. v. Watkins*, 198 F.3d 100, 103 (3d Cir. 1999) (quoting *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 793 (3d Cir. 1987)). However, "if the policy provision is reasonably susceptible to more than one interpretation, it is ambiguous." *McMillan v. State Mut. Life Assurance Co.*, 922 F.2d 1073, 1075 (3d Cir. 1990). "In determining whether a contract is ambiguous, the court must examine the questionable term or language in the context of the entire policy and decide whether the contract is 'reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997) (citing

Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 143-44 (Pa. Super. 1995) (quoting *Hutchinson v. Sunbeam Coal Corp.*, 519 A.2d 385, 390 (Pa. 1986))). However, "a court must refrain from torturing the language of a policy to create ambiguities where none exist." *McMillan*, 922 F.2d at 1075 (citing *Houghton v. Am. Guar. Life Ins. Co.*, 692 F.2d 289, 291 (3d Cir. 1982)). "[U]nder Pennsylvania law, ambiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a question of law." *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1011 n.10 (3d Cir. 1980) (citing *Brokers Title Co. v. St. Paul Fire and Marine Ins. Co.*, 610 F.2d 1174 (3d Cir. 1979)).

Hence, the court must look at the pertinent documents in this case and the alternative interpretations offered by the parties to determine if both are reasonable in light of the circumstances surrounding the formation and completion of the policy. If only one suggested meaning is reasonable, then the court will interpret the policy as a matter of law. Otherwise, interpretation will be left for a fact finder, making summary judgment inappropriate.

I conclude that the terms of the policy unambiguously rendered CBC an additional insured. The Endorsement clearly broadened the definition of an insured under the policy to include "[a]ny person or organization whom [Little Souls is] required to name as an additional insured on this policy under a written contract or agreement" that is: "(1) [c]urrently in effect or becoming effective during the term of this policy; and (2) [e]xecuted prior to the 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury.'" Exh. B to Complaint, Form P266 07 00, at 3. Little Souls was required by a specific sentence in paragraph 37 of the lease agreement to purchase a general liability insurance policy for the leased premises, naming CBC as an additional insured. Exh. C to Complaint, at ¶ 37. In addition, as CBC points out, it and

Little Souls executed the lease agreement in April of 1996, and it was set to terminate on August 31, 2001. Thus, because the term of the policy was September 1, 2000 to September 1, 2001, the lease was in effect during the term of the policy, and because the fire occurred on May 15, 2001, the lease was executed prior to the property damage at issue. Thus, pursuant to the Endorsement, and because of the existence of the lease agreement, CBC was an additional insured under the policy.

Although CBC was an additional insured under the terms of the policy, the court rejects Meridian's argument concerning vicarious liability. Meridian contends that CBC was not entitled to coverage under the policy because *Harbor Ins. Co. v. Lewis*, 562 F. Supp. 800 (E.D. Pa. 1983), stands for the proposition that "an additional insured endorsement as contained in Meridian's policy only protects parties who are not named insureds from exposure to vicarious liability for **acts of the named insured**, not for the additional insureds' own acts of negligence." Pl. Memo. at 8. Thus, the argument goes, because the complaints against CBC allege negligence against it, and do not allege any negligence on the part of Little Souls for which CBC would be vicariously liable, CBC is not entitled to coverage.

Meridian's reliance on *Harbor*, however, is misplaced, because the endorsement in that case differed from the one in the present case in one important respect. The endorsement in *Harbor* stated that "[i]t 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*." *Harbor Ins. Co.*, 562 F. Supp. at 802 (italics added). As CBC correctly points out, the terms of the *Harbor* endorsement specifically provided that the policy in that case covered the additional insured (the

City of Philadelphia) only for vicarious liability resulting from negligence on the part of the named insured (Reading Company). In fact, the court in *Phila. Elec. Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740 (E.D. Pa. 1989) ("*PECO*"), concluded that the *Harbor* decision was one interpreting specific contract language, and not "articulat[ing] a rule of law limiting the interest of an additional insured on a comprehensive general liability policy to those cases in which it is vicariously liable for the acts of the primary policyholder." *PECO*, 721 F. Supp. at 742. The *PECO* court stated that "the lesson of *Harbor*" is that if a party intends "coverage to be limited to the vicarious liability type . . . language clearly embodying that intention was available." *Id.*

In *PECO*, Nationwide Insurance Company ("Nationwide") issued a liability insurance policy to the Davey Tree Expert Company ("Davey Tree"), which was engaged by PECO to trim trees. *Id.* at 741. One of Davey Tree's employees was injured while doing the work, and he sued PECO and several other defendants. *Id.* PECO then sued Nationwide, arguing that it was entitled to a defense pursuant to the insurance policy, which stated, "The Philadelphia Electric Company, its officers, agents and employees are added as Additional Insureds for any work performed by The Davey Tree Expert Company on their behalf." *Id.* at 742. The court found that this language "contemplates a wider scope of coverage than the language in *Harbor*" because of the language at the end of the *Harbor* endorsement specifically limiting coverage to cases of vicarious liability. *PECO*, 721 F. Supp. at 742. Thus, the court ruled that the policy "should be read to include all liability arising in connection with Davey Tree's work, including PECO's own negligence." *Id.*

This court is persuaded by *PECO* that if Meridian had wanted to limit its coverage of additional insureds to only the vicarious liability type, it could have, and should have, included

language like that in the *Harbor* endorsement. Instead, the Endorsement contained no such language. In addition, the policy language in *PECO* was analogous to that in the Endorsement, in that the *PECO* language restricted additional insured coverage to liability connected with work done by Davey Tree, just as the Endorsement restricted additional insured coverage to liability "arising out of" the Little Souls property. Pursuant to the foregoing analysis, I reject Meridian's argument based on *Harbor* and vicarious liability.

However, concluding that CBC was an additional insured under the policy and that the Endorsement did not limit coverage to the vicarious liability type is not the end of the inquiry. The Endorsement also contained a provision that limited coverage for additional insureds to liability "arising out of" the property leased and occupied by Little Souls. Exh. B to Complaint, Form P266 07 00, at 3. The Pennsylvania Supreme Court has held that "'arising out of' means causally connected with, not proximately caused by. 'But for' causation, i.e., a cause and result relationship, is enough to satisfy" this phrase. Pl. Reply at 8; *Mfrs. Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571, 573 (Pa. 1961).

I conclude that based on the scant record in this case, CBC's liability in the underlying cases is not alleged to "arise out of" the property leased by Little Souls. CBC contends that its liability does arise out of Little Souls' property because the allegations in the complaints against CBC are based, at least in part, on the conditions common to all of the leased properties in the complex – i.e. violations of the fire code; inadequate fire protection, detection, alarm, suppression, and prevention systems; and inadequate firewalls and fire resistant materials. Def. Memo at 6-7. However, none of the underlying plaintiffs has alleged that Little Souls was responsible for any of these conditions. Moreover, CBC has presented no evidence that Little

Souls was responsible for any of these conditions – or even which entity owned, installed, operated, or maintained any of the various types of fire protection. Without a scintilla of evidence presented by CBC as to what fire protection materials or practices were the responsibility of Little Souls or how the lack of either could have caused the fire to spread, and without any of the underlying plaintiffs having made such a claim, the argument that a fire starting on the other side of the Schuylkill River and eventually spreading across the river to the Little Souls property "arose out of" that property is totally devoid of any arguable merit.

The alleged indirect connection between the Little Souls property and the fire is not supported by any evidence and is not enough to satisfy the "but for" causation required under *Manufacturers Casualty*. CBC has provided no evidence of any factual "causal connection" – any factual "cause and result relationship" – between the Little Souls property and the damage done by the fire. Taking CBC's argument to its logical conclusion, if every tenant had a policy identical to the Little Souls policy, CBC would be able to collect on each of them, because the fire would have "arisen out of" all of the properties at CBC, because the properties allegedly had common characteristics. I conclude that this argument is flawed, because CBC has provided no evidence with regard to the fire protection materials or practices in any of the units at CBC, including the Little Souls property, and because CBC has not shown that Little Souls or any of the other tenants was responsible for any of the alleged violations that are contained in the underlying complaints.

In short, I conclude that Meridian, as the moving party, has shown that on the face of the policy, it is entitled to judgment as a matter of law on the issue of CBC's entitlement to defense and indemnity, because the underlying plaintiffs have not alleged and CBC has presented no

evidence that CBC's liability "arises out of" the Little Souls property. CBC has submitted no evidence to show that there is a genuine issue of material fact on the issue of whether its liability "arose out of" the property. Thus, summary judgment will be granted to Meridian on this ground.[5]

CONCLUSION

For all of the foregoing reasons, Meridian's motion for summary judgment will be granted. An appropriate order follows.

[5] Because I am granting summary judgment to Meridian, there is no need to deal with the issue of whether CBC cooperated in the defense of the underlying actions. However, based on the evidence presented in connection with the pending motion, there are several issues of fact that would need to be resolved at trial, because: (1) the correspondence submitted by Meridian is insufficient to prove that CBC *substantially* failed to cooperate as a matter of law; and (2) Meridian has failed to prove as a matter of law that it has suffered prejudice as a result of CBC's alleged failure to cooperate. *See Forest City Grant Liberty Assocs. v. Genro II, Inc.*, 652 A.2d 948, 951 (Pa. Super. 1995) (stating that a breach of the duty to cooperate will relieve the insurer of liability only where the failure to cooperate is substantial and the insurer has suffered prejudice as a result of the breach).

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

MERIDIAN MUTUAL INSURANCE COMPANY, n/k/a STATE AUTO INSURANCE COMPANY, Plaintiff,	:	CIVIL ACTION NO. 04-1639
v.	:	
CONTINENTAL BUSINESS CENTER, Defendant.	:	

Order

And now, this _____ day of April 2005, upon consideration of plaintiff's motion for summary judgment (Document #7), defendant's response, plaintiff's reply, defendant's surreply, and plaintiff's sur-surreply, and after oral argument, it is hereby ORDERED that the motion is GRANTED. Judgment is entered in favor of plaintiff Meridian Mutual Insurance Company and against defendant Continental Business Center on the Third Claim for Relief contained in the complaint in this matter, because based on the facts presented in this action, insurance coverage is not available to defendant under policy number BO 7513271 issued to Little Souls, Inc. Plaintiff has no duty to defend or indemnify defendant in any lawsuit in connection with the fire which occurred on or about May 15, 2001.

The claims presented in the First, Second, Fourth, Fifth, Sixth, and Seventh Claims for Relief contained in the complaint in this matter are DISMISSED as moot.

The parties shall advise the court by letter within 10 days of the date of this order as to their joint or individual proposals to resolve defendant's counterclaim.

_____

William H. Yohn, Jr., Judge