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

MARKEL INTERNATIONAL INSURANCE COMPANY, LTD., f/k/a TERRA NOVA INSURANCE COMPANY c/o UNDERWRITING MANAGEMENT, INC.	:	**CIVIL ACTION**
	:	**NO. 04-CV-1549**
v.	:	
BANKS MANAGEMENT COMPANY, DANIEL BANKS t/a LANTERN PLAZA APARTMENTS DANIEL BANKS t/a BANKS REALTY CO., DANIEL BANKS and JACQUELYN BANKS, h/w and EUGENE BANKS	:	

Norma L. Shapiro, S.J. **July 6, 2005**

MEMORANDUM AND ORDER

Plaintiff, Markel International Insurance Company, Ltd., f/k/a Terra Nova Insurance Company c/o Underwriting Management, Inc. ("Markel"), a surplus line insurer, filed a complaint for a declaratory judgment that it does not have a duty to defend and indemnify defendants, Banks Management Company, Daniel Banks t/a Lantern Plaza Apartments, Daniel Banks t/a Banks Realty Company, Daniel Banks and Jacquelyn Banks, h/w and Eugene Banks (together "Banks") in an underlying action. Markel is organized under the laws of Great Britain and its principal place of business is London, England. Markel's principal place of business in the United States is Virginia, and it is registered in Pennsylvania.[1] Banks Management

[1]Markel is authorized to do business in Pennsylvania by 40 P.S. § 991.1601, pertaining to surplus line insurers.

Company, Lantern Plaza Apartments and Banks Realty Company are all organized under the laws of Pennsylvania with their principal places of business in Pennsylvania; the individual defendants are all citizens of Pennsylvania, and the amount in controversy exceeds $75,000. There is diversity jurisdiction under 28 U.S.C. § 1332.

Markel issued a commercial general lines insurance policy to Banks; the insurance policy was in force from February 7, 2001 to February 7, 2002. Banks procured the insurance contract in Pennsylvania and Pennsylvania law governs.

The underlying action was instituted by Tiffany James against Banks for bodily injuries suffered by her on Banks' property on August 24, 2001. James alleges an unknown third party sexually assaulted her. That action is currently stayed in the Philadelphia Court of Common Pleas.

Presently before the court are cross-motions for summary judgment. Markel contends it has no duty to defend and indemnify Banks because James' action results from a sexual assault and it is excluded from coverage by the "Assault and/or Battery Exclusion" (the "exclusion") of the policy. Markel argues the exclusion also excludes coverage for the claim that Banks' negligent failure to maintain the premises led to the sexual assault. There is no issue that the sexual assault on James is an "Assault and Battery" under the Banks' policy. Banks contends the exclusion is ambiguous and can be read to apply only to assaults by employees. The individual defendants claim they never received a portion of the policy. Jacqueline Banks, the principal insured, also claims that because she had failed to read the policy, the defendants had not provided adequate notice of the exclusion.

Discussion:

On a motion for summary judgment, "the judgment shall be rendered forthwith 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). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Cross-motions for summary judgment are "no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement." Transportes Ferreos de Venezuela II CA v. NKK Corp., 239 F.3d 555, 560 (3d Cir. 2001).

Under Pennsylvania law, an exclusion is effective when it is written in a clear and conspicuous manner. Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983). In Venetian Blind, the court held if the exclusion is written in a clear and conspicuous manner, the insured's claim she failed to read the limitation or did not understand it is not a defense. Id. at 567. A term or clause is conspicuous when it is written so that a reasonable person against whom it is to operate would have noticed it. 13 Pa. Cons. Stat. § 1201 (2004). The language in the body form is conspicuous if it is in larger or other contrasting type or color. 13 Pa. Cons. Stat. § 1201 (2004).

The exclusion found in the "Exclusion" section of the policy, provides:

ASSAULT AND/OR BATTERY EXCLUSION

This endorsement modifies insurance provided under:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to and no duty to defend is provided by us for any claim arising out of:

1) Assault and/or battery committed by any person whosoever regardless of degree of culpability or intent and regardless of whether the acts are alleged to have been committed by the insured or any officer, agent, servant, or employee of the insured or by any other person.

2) Any actual or alleged negligent act or omission in the:

i) Employment;
ii) Investigation;
iii) Supervision;
iv) Reporting to the proper authorities or failure to so report or
v) Retention

of a person for whom the insured is or ever was legally responsible, which arises from any actual or alleged assault and/or battery.

2) Any actual or alleged negligent act or omission in the prevention or suppression of any act of assault and/or battery.

All the titles in this section are capitalized, underlined, center justified, and printed in a highlighted type face. All titles are a larger font size than the general body of the policy. The exclusion was conspicuously displayed.

Defendants' argue the placement of the "Assault and/or Battery Exclusion" clause below an "Employment Related Practices" caption, suggests the exclusion pertains only to actions of employees and not third parties. However, the "Employment Related Practices" clause is in the same format as the "Assault and/or Battery Exclusion" clause. This suggests each clause is meant to operate as a separate and distinct provision of the policy. Subsection

one of the exclusion states "by any person whosoever" and "by any other person." This language leaves no doubt that the exclusion applies to an assault by a third party.

On January 16, 2002, Markel amended the policy to add endorsements including "Coverage A. Bodily Injury and Property Damage Liability." This amendment was applied retroactively starting from February 7, 2001, and it provided that "all other terms and conditions remain unchanged." This section provides coverage when:

> (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and (2) the "bodily injury" or "property damage" occurs during the policy period. (Commercial General Liability Policy at 1).

The individual defendants claim they did not receive this endorsement until January 16, 2002, and this affected their notice of the policy exclusions. That argument is immaterial because the January 16th amendment did not modify the "Assault and/or Battery Exclusion" and this exclusion was part of the original policy issued February 20, 2001.

Jacqueline Banks claims she did not read the policy before the plaintiff instituted this action, but since the exclusion in the policy is clearly worded and conspicuously displayed, it is no defense that the insured failed to read the policy or did not understand it. Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 567 (Pa. 1983).

The underlying action alleges negligence of the defendants, but coverage for negligent failure to maintain premises in an assault and battery action is specifically excluded. The exclusion here is similar to the exclusion in St. Paul Surplus Lines Ins. Co. v. 1401 Dixon's Inc., 582 F. Supp. 865, 868 (E.D. Pa. 1984), which applied to "any act or omission in

connection with the prevention or suppression of an assault and battery." Id. at 868. The court held this clause excluded negligence by the defendant. Id. Here, the exclusion extends to "any actual or alleged negligent act or omission in the prevention or suppression of any act of assault and/or battery." The exclusion clearly extends to negligent acts or omissions by the insured in failing to prevent the assault. Banks' alleged negligence is excluded from coverage under the policy.

Conclusion:

Summary judgment is granted in favor of Markel because the "Assault and/or Battery Exclusion" applies. It is included in the policy in a clear and conspicuous manner. The exclusion extends to any negligence of Banks in failing to maintain a safe environment. Markel has no duty to defend and indemnify Banks in the underlying action. Banks' motion for summary judgment is denied because the policy exclusion applies to preclude coverage in the action initiated by Tiffany James.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARKEL INTERNATIONAL INSURANCE	**:**	
COMPANY, LTD., f/k/a TERRA NOVA	**:**	
INSURANCE COMPANY c/o UNDERWRITING	**:**	
MANAGEMENT, INC.	**:**	**CIVIL ACTION**
	:	
	:	**NO. 04-CV-1549**
v.	**:**	
	:	
BANKS MANAGEMENT COMPANY, DANIEL	**:**	
BANKS t/a LANTERN PLAZA APARTMENTS	**:**	
DANIEL BANKS t/a BANKS REALTY CO.,	**:**	
DANIEL BANKS and JACQUELYN BANKS, h/w	**:**	
and EUGENE BANKS	**:**	

ORDER

AND NOW, this 6th day of July, 2005, upon consideration of the plaintiff's Motion

for Summary Judgment (Paper #9), defendants' Cross-Motion for Summary Judgment (Paper #10), and Oral Argument heard on February 17, 2005, it is **ORDERED** that plaintiff's Motion is **GRANTED** and defendants' Motion is **DENIED** for the reasons stated in the attached Memorandum.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARKEL INTERNATIONAL INSURANCE	**:**	
COMPANY, LTD., f/k/a TERRA NOVA	**:**	
INSURANCE COMPANY c/o UNDERWRITING	**:**	
MANAGEMENT, INC.	**:**	**CIVIL ACTION**
	:	
	:	**NO. 04-CV-1549**
v.	**:**	
	:	
BANKS MANAGEMENT COMPANY, DANIEL	**:**	
BANKS t/a LANTERN PLAZA APARTMENTS	**:**	
DANIEL BANKS t/a BANKS REALTY CO.,	**:**	
DANIEL BANKS and JACQUELYN BANKS, h/w	**:**	
and EUGENE BANKS	**:**	

JUDGMENT

AND NOW, this 6th day of July, 2005, upon consideration of the plaintiff's Motion

for Declaratory Judgment, it is the Judgment of the court that plaintiff, Markel International Insurance Company, Ltd., f/k/a Terra Nova Insurance Company c/o Underwriting Management, Inc. is under no duty to defend and indemnify defendants, Banks Management Company, Daniel Banks t/a Lantern Plaza Apartments, Daniel Banks t/a Banks Realty Company, Daniel Banks and Jacquelyn Banks, h/w and Eugene Banks, against any claim by Tiffany James in her action against defendants in the Court of Common Pleas of Philadelphia County captioned, Tiffany James v. Lantern Plaza Apartments, et al, August Term 2003, No. 3536.

/s/ Norma L. Shapiro

Norma L. Shapiro, S.J.