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

SAN CARLO RESTAURANT a/k/a RISTORANTE SAN CARLO; MARGARET J. BAKER; and JOHN A. BAKER	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 04-CV-4624
ST. PAUL FIRE & MARINE INSURANCE COMPANY; THE ST. PAUL COMPANIES, INC.; and THE ST. PAUL TRAVELERS COMPANIES, INC.	:	

SURRICK, J. **SEPTEMBER 27, 2005**

MEMORANDUM & ORDER

Presently before the Court is the Motion Of Defendants St. Paul Fire & Marine Insurance Company, The St. Paul Companies, Inc., And The St. Paul Travelers Companies, Inc. For Judgment On The Pleadings (Doc. No. 4). For the following reasons, Defendants' Motion will be denied.

I. BACKGROUND

The instant Declaratory Judgment Complaint alleges that on January 19, 2001, an automobile accident occurred in Lower Merion Township, Pennsylvania. (Compl. ¶ 8.) While attempting to cross Montgomery Avenue near Schoolhouse Lane, Plaintiff Margaret J. Baker was struck by a motor vehicle being operated by Cornelius Gerald Walsh. (*Id.*) As a result of the accident, Mrs. Baker suffered "severe, painful and permanent injuries." (*Id.*)

At the time of the collision, Mr. Walsh was in an intoxicated condition caused by drinking alcoholic beverages. (*Id.* ¶ 9.) Mr. Walsh consumed these beverages on the premises of Plaintiff San Carlo Restaurant ("San Carlo"), where he had attended a wine tasting event. (*Id.* ¶

13.) The beverages were likely brought into the restaurant by Mr. Walsh and other guests of the event, who then purchased food from San Carlo. (*Id.* ¶¶ 13-14.) After dining at San Carlo, Mr. Walsh is alleged to have left the restaurant in a "frank, visible state of intoxication." (*Id.* ¶ 18.)

On March 20, 2002, Mrs. Baker and her husband, Plaintiff John Baker, filed a Complaint in the underlying lawsuit in the Court of Common Pleas of Philadelphia County, naming Mr. Walsh and San Carlo as defendants. (*Id.* ¶ 10.) In that Complaint, the Bakers alleged that San Carlo "was a licensee of the Pennsylvania Liquor Control Board and engaged in the sale and service of alcoholic beverages" to "guests for consumption on its premises." (*Id.* at Ex. B ¶¶ 6, 33.) The Bakers also alleged that San Carlo caused the auto accident, in that they "sold, furnished or gave or permitted to be sold, furnished or given intoxicating beverages to . . . [Mr.] Walsh" while he was "visibly intoxicated." (*Id.* at Ex. B¶¶ 37, 38, 41.) In its Answer to the Bakers' Complaint, San Carlo disputed this claim, alleging that it had not sold, furnished, or given Mr. Walsh alcohol on the evening in question and that any alcohol consumed by Mr. Walsh had been brought into the restaurant by Mr. Walsh and other patrons. (*Id.* ¶¶ 11, 12.)

As of January 19, 2001, San Carlo was insured under a policy issued by Defendant St. Paul Fire & Marine Insurance ("St. Paul").[1] (*Id.* ¶ 7.) This insurance policy is titled "Package Accounts for Commercial Enterprises Commercial General Liability Protection." (*Id.*) After the underlying lawsuit was filed, San Carlo notified St. Paul of the claims being made against it. (*Id.*

[1] The St. Paul Companies, Inc. ("The St. Paul Companies") is the sole shareholder and parent company of St. Paul Fire & Marine Insurance Company ("St. Paul"). (Compl. ¶ 6.) The St. Paul Travelers Companies, Inc. ("St. Paul Travelers") is the successor in interest to The St. Paul Companies in that it is the surviving entity of a merger between The St. Paul Companies and Travelers Property Casualty Corp. (*Id.*)

¶ 19.) St. Paul refused to provide a defense or liability coverage based on the Bakers' claim, relying on the "Liquor Liability" provision in San Carlo's policy.[2] (*Id.* ¶ 20.)

On August 30, 2004, the Bakers entered into an Assignment Agreement with San Carlo, whereby the latter assigned its right to sue St. Paul for failing to cover the Bakers' claim. (*Id.* ¶ 26.) Plaintiffs filed the instant Complaint in the Court of Common Pleas the following day. (*Id.*) Defendants removed the case to federal court on September 30, 2004. (Doc No. 1.) In the Complaint, Plaintiffs allege that St. Paul's failure to provide a defense and liability coverage to San Carlo constitutes a "material breach of the insurance contract" and that Defendant "has breached the duty of good faith and fair dealing." (Compl. ¶¶ 30, 35, 38.) Plaintiffs also seek a declaratory judgment determining that St. Paul has a duty to provide coverage under the liability

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[2] According to the policy held by San Carlo:

> ***Liquor Liability.*** We won't cover bodily injury, property damage, or medical expenses that result from any protected person:
>
> - causing or contributing to the intoxication of any person;
> - selling, serving, or furnishing alcoholic beverages to any person under the legal drinking age or under the influence of alcohol;
> - or violating any law or regulation applying the sale, gift, distribution or use of alcoholic beverages.
>
> However, we'll apply this exclusion only if you're in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages. For example:
>
> You manufacture office equipment. Each year you host an awards banquet with an open bar for your sales representatives. After this year's banquet an intoxicated guest is involved in an auto accident. The guest and several others are injured. If someone sues you, alleging that your serving of liquor caused the guest's intoxication and involvement in the accident, we won't apply the liquor liability exclusion because you're not in the business of serving liquor.

(Compl. ¶ 20.)

policy. (*Id.* ¶ 35.) Plaintiffs allege that because San Carlo "was not in the business of serving or furnishing alcoholic beverages with respect to Mr. Walsh and his party," the policy's liquor liability exclusion does not apply. (*Id.* ¶¶ 21-22.)

II. STANDARD OF REVIEW

In reviewing a motion pursuant to Federal Rule of Civil Procedure 12(c), we apply the same standard used to review a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Constitution Bank v. DiMarco*, 815 F. Supp. 154, 157 (E.D. Pa. 1993). We may not grant a judgment on the pleadings under Rule 12(c) "'unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" *Corestates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 193 (3d Cir. 1999) (quoting *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)). We must "'view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.'" *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290 (3d Cir. 1988) (quoting *Soc'y Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)). Of course, to survive a motion for judgment on the pleadings, "the plaintiff must set forth facts, and not mere conclusions, that state a claim as a matter of law." *Allstate Transp. Co., Inc. v. Se. Pa. Transp. Auth.*, Civ. A. No. 97-1482, 1998 U.S. Dist. LEXIS 1740, at *4 (E.D. Pa. Feb. 13, 1998).

III. ANALYSIS

Under Pennsylvania law, an insurer's duty to defend attaches "whenever the allegations of the complaint filed against the insured comprehend an injury that is actually or potentially within the scope of the insurance policy." *Sorbee Int'l v. Travelers Ins. Co.*, 735 A.2d 712, 714 (Pa. Super. Ct. 1999). Generally, an insurer has no duty to defend an insured if the insurance

contract excludes coverage over the claims made in the underlying litigation. *Certain Underwriters at Lloyd's of London v. Lehigh Hoagie City, Inc.*, Civ. A. No. 96-CV-3282, 1997 U.S. Dist. LEXIS 1310, at *4 (E.D. Pa. Feb. 6, 1997) (citing *Gene's Rest. v. Nationwide Ins. Co.*, 548 A.2d 246, 246 (Pa. 1988)); *see also Keystone Spray Equip., Inc. v. Regis Ins. Co.*, 767 A.2d 572, 574 (Pa. Super. Ct. 2001) ("It is well established that an insurer need only defend an insured in a claim if the insurance contract provides coverage for a suit of that nature."). In order to determine whether an insured is entitled to coverage under an insurance policy, the allegations in the underlying litigation are compared with the provisions of the policy. *Keystone Spray Equip.*, 767 A.2d at 574.

Defendants contend that the underlying Complaint alone should determine whether their duty to defend is abrogated by the Liquor Liability exclusion. (Doc. No. 4 at 11); *see also Aetna Cas. & Sur. Co. v. Roe*, 650 A.2d 94, 98 (Pa. Super. Ct. 1994) ("The insurer's obligation to defend is fixed solely by the allegations in the underlying complaints."); *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 605 (Pa. Super. Ct. 1997) ("[T]he factual averments contained in a complaint determine whether an insurer must defend."). However, there is "a subset of exclusion cases" which has permitted the introduction of extrinsic evidence to resolve this issue. *See Air Prods. & Chems., Inc. v. Nat'l Union Fire Ins. Co.*, 25 F.3d 177, 180 (3d Cir. 1994) (citing *N. Ins. Co. v. Aardvark Assocs.*, 942 F.2d 189 (3d Cir. 1991); *Fischer & Porter Co. v. Liberty Mut. Ins. Co.*, 656 F. Supp. 132 (E.D. Pa. 1986)). These cases involve exceptions to liability exclusions and establish that in such situations, "the burden is on the *insured*, not the *insurer*, to introduce evidence to show that the exclusion which appears to be triggered does not apply after all." *Id.*; *Aardvark Assocs.*, 942 F.2d at 195 (finding the insured was "required to show . . . facts

that if proven at trial would establish" that the exclusion did not apply); *Fischer & Porter Co.*, 656 F. Supp. at 140 ("'[W]hen a policy contains an exception within an exception, the insurer need not negative the internal exception; rather the insured must show that the exception from the exemption from liability applies.'" (quoting 19 G. Couch, *Couch on Insurance 2d* § 79.385, at 338)). "If the insured is successful in demonstrating that coverage is not necessarily excluded by the fact averred in the complaint, the insurer is required to defend the underlying suit."[3] *Air Prods.*, 25 F.3d at 180.

In the underlying lawsuit, the Bakers alleged that "San Carlo was a licensee of the Pennsylvania Liquor Control Board"; that the restaurant "was . . . engaged in the sale and service of alcoholic beverages"; and that Mr. Walsh "was a customer of . . . San Carlo . . . when [San Carlo] . . . sold, furnished or gave or permitted to be sold, furnished or given intoxicating beverages to [Mr.] Walsh." (Compl. at Ex. B ¶¶ 6, 37.) If this is true, the Liquor Liability exclusion would appear to excuse St. Paul's duty to defend or indemnify. However, Plaintiffs allege different facts in the action currently before us. They now claim that "at no time did . . . San Carlo sell, furnish, or serve any intoxicating beverages to [Mr.] Walsh" and that the alcohol consumed by Mr. Walsh was brought by him and his party. (Compl. ¶¶ 11, 13.) This is, of course, consistent with the facts alleged by San Carlo in its Answer to the Bakers' original

[3] We recognize that "permitting the introduction of evidence to show that an exception to an exclusion applies, while disallowing evidence to show that an exclusion applies," both departs from the "general Pennsylvania duty to defend rule" and appears "one-sided." *Air Prods.*, 25 F.3d at 180. However, the Third Circuit has found that "[t]his construction against the insurer and in favor of the insured . . . is consistent with general insurance law principles and . . . the Pennsylvania rule that requires only a 'potential' of coverage of the allegations in the complaint for the duty to defend to be triggered." *Id.* In addition, this alternative interpretation applies only in the narrow circumstance where an exception to a policy exclusion is implicated. *Britamco Underwriters, Inc. v. Stokes*, 881 F. Supp. 196, 197 n.7 (E.D. Pa. 1995).

Complaint. (Doc. No. 11 at Ex. C ¶¶ 37-39.) Plaintiffs contend that, under the circumstances, the exception[4] to the exclusion should apply because San Carlo "was not in the business of serving or furnishing alcoholic beverages with respect to Mr. Walsh." (*Id.* ¶¶ 21, 22.) This contention persuades us to apply the rationale of *Air Products*. Accordingly, we will look beyond the allegations in the underlying Complaint and consider the complete record in our analysis.

A Rule 12(c) motion "will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved." *Soc'y Hill Civic Ass'n*, 632 F.3d at 1054 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1368, at 690 (1969)). When analyzing whether this standard has been met, we proceed with "the benefit of the pleadings alone." *Id.* In support of their Motion, Defendants rely on *Curbee, Ltd. v. Rhubart*, 594 A.2d 733 (Pa. Super. Ct. 1991), for the proposition that "the simple fact that alcohol was served was enough to invoke the exclusion." (Doc. No. 4 at 11 (emphasis omitted).) *Rhubart* is only marginally helpful. *Rhubart* establishes that a liquor liability exclusion will bar coverage where a Pennsylvania liquor licensee operating as a restaurant provides alcohol for consumption, without remuneration, away from its premises. 594 A.2d at 736. It does not address the situation where the alcohol was not sold, served, or furnished by the restaurant itself, as Plaintiffs allege. (Compl. ¶¶ 11, 13.) While Pennsylvania courts have found similarly-worded liquor liability clauses to be "clearly worded" and to "unambiguously exclude[]" coverage for similar claims,

[4] The exception states: "[W]e'll apply this exclusion only if you're in the business of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages." (Compl. ¶ 20.)

they provide little guidance in interpreting the *exceptions* to these exclusions. *U.S. Fid. & Guar. v. Griggs*, 491 A.2d 267, 269 (Pa. Super. Ct. 1984).

In considering this Motion, we must "accept as true all of the factual averments in the complaint and extend to the plaintiff the benefit of every favorable inference that can be drawn from those allegations." *Sterling v. Se. Pa. Transp. Auth.*, 897 F. Supp. 893, 895 (E.D. Pa. 1995) (citing *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991)). According to Plaintiffs, "[a]ll liquor provided and consumed by Mr. Walsh's party at San Carlo was brought into the restaurant by Mr. Walsh and his party"; "San Carlo was not in the business of serving or furnishing alcoholic beverages with respect to Mr. Walsh"; and "[t]he liquor liability exclusion of the St. Paul policy of insurance is therefore inapplicable." (Compl. ¶¶ 21, 22.) We cannot determine based upon the present record whether the exclusion applies or whether the exception to the exclusion comes into play. Once the factual record is more fully developed, the issue of the nature of San Carlo's operation on the night in question and whether San Carlo remained in the business of serving alcohol, despite the nature of Mr. Walsh's patronage, may be further assessed. For the purposes of the instant Motion, however, we cannot now conclude that Defendants are entitled to judgment as a matter of law. Accordingly, we will deny Defendants' Motion for Judgment on the Pleadings.

An appropriate Order follows.

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ORDER

AND NOW, this 27th day of September, 2005, upon consideration of the Motion Of Defendants St. Paul Fire & Marine Insurance Company, The St. Paul Companies, Inc., And The St. Paul Travelers Companies, Inc., For Judgment On The Pleadings (Doc. No. 4), and all documents filed in support thereof and in opposition thereto, it is ORDERED that Defendants' Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge