

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

DAVID BARNES STILL : CIVIL ACTION
 : No. 07-339
v. :
 :
GREAT NORTHERN INSURANCE CO. :

O'NEILL, J. April , 2007

MEMORANDUM

This is a declaratory judgment action involving the interpretation of a homeowner's policy issued by defendant Great Northern Insurance Co. insuring plaintiff David Still.¹ Before me now are cross motions for summary judgment, Great Northern's response to Still's motion, and Still's response to Great Northern's motion.

BACKGROUND

Plaintiff and defendant agree to the key facts in this case. Still founded Regulus Group LLC in 1995 and served Regulus as the President, CEO and Chairman of the Board. In or around 2000, a dispute arose between Still and Regulus regarding Still's employment and investments at Regulus. Regulus removed, or attempted to remove, Still from his positions within Regulus and issued additional shares to others to dilute Still's interest in Regulus.

On or about November 29, 2000, Still commenced a lawsuit against Regulus and others

¹Still's complaint asserts that his insurance policy with Great Northern should cover his defense costs for an ongoing state court lawsuit and also asserts a bad faith claim against Great Northern.

in this Court.² In that suit, Still alleged that Regulus had breached its Operating and Member Agreements and alleged violations of Title VII, 42 U.S.C. § 1985(3) and the Pennsylvania Human Relations Act. The complaint was later amended to include claims for declaratory relief, accounting, constructive trust, breach of employment contract, and breach of fiduciary relations. After a jury trial and a verdict for defendant, the District Court entered a judgment in favor of Regulus and against Still. In his response to Great Northern's motion for summary judgment Still admits that "many or most of the claims in [his] Prior Federal Action against Regulus involved matters that occurred during [his] employment with Regulus."

In December 2005, Still filed a complaint against Regulus in state court. Regulus filed a counterclaim alleging that Still had violated Pennsylvania's statutory law of wrongful use of civil proceedings (also known as a Dragonetti action) in the prior federal action. In May 2006, Still's attorneys notified Great Northern of the Dragonetti action and requested coverage under the insurance policy issued by Great Northern to Still.

Great Northern acknowledges that the pertinent portion of its policy provided personal liability coverage for malicious prosecution, which includes claims for wrongful use of civil proceedings. It falls under "Personal Liability Coverage," and contains this description of the section: "We cover damages a covered person is legally obligated to pay for personal injury or property damage which take place anytime during the policy period and are caused by an occurrence, unless stated otherwise *or an exclusion applies*. Exclusions to this coverage are described in Exclusions." (emphasis added).

One listed exclusion is for "business pursuits." The policy provides: "We do not cover

²David Still v. Regulus Group, et al., Civil Action 00-6053.

any damages arising out of a covered person's business pursuits, investment or other for-profit activities, for the account of a covered person or others, or business property." The definitions section of the policy defines business as "any employment, trade, occupation, profession, or farm operation including the raising or care of animals."

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "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) (2007).

Under Pennsylvania law, a court must first look at the insurance policy and determine, as a matter of law, whether the language is ambiguous. Forum Ins. Co. v. Allied Sec., Inc., 866 F.2d 80, 81 (3d Cir. 1989). "Contractual language is ambiguous 'if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.'" Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999). "Contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts." Id. A court should not, however, "distort the meaning of language or resort to a strained contrivance in order to find an ambiguity. Id. Further, "exceptions to the general liability of the insurer are to be strictly construed against the insurance company." Frisch v. State Farm File & Casualty Co., 275 A.2d 849, 851 (Pa. 1975). The insurer bears the burden of proving that the exclusion applies to the particular case. See Myrtill v. Hartford Fire Ins. Co., 510 F. Supp. 1198, 1200-01 (E.D. Pa. 1981).

Still first seems to argue that the contract is unambiguous: because the policy expressly covers claims for wrongful use of civil proceedings, it must cover his state court action. I agree that the policy is unambiguous, but I disagree with Still's conclusion that his state action is covered. The policy clearly provides coverage for Dragonetti actions unless an exclusion applies--here, the exclusion covering damages arising out of business pursuits.³ The Pennsylvania Supreme Court has held that "arising out of" is not ambiguous; it is defined as "[b]ut for" causation, i.e., a cause and result relationship."⁴ Forum Ins., 866 F.2d at 82; see also McCabe v. Old Republic Insurance Co., 228 A.2d 901, 903 (Pa. 1967). Because the state action would not have occurred but for Still's employment with Regulus, it arose out of Still's business pursuits. Still's employment with Regulus, while not the only cause of the Dragonetti action,

³The Court of Appeals has discussed the propriety of the "business pursuits" exclusions before:

"Business use" and "business pursuits" exclusions are standard clauses in many insurance policies, including homeowners', personal umbrella, and other general liability policies. In a typical policy, the insurer states that personal liability coverage shall not apply to bodily injury or property damage arising out of business pursuits of any insured except activities therein which are ordinarily incident to nonbusiness pursuits. "The purpose of a "business pursuits" exclusion is to help the insurer keep premiums at a reasonable level by eliminating a type of coverage that (1) normally requires specialized underwriting and rating, (2) is not essential to most purchasers of the policy, and (3) is provided by other insurance contracts a business owner is likely to have.

Canal Ins. v. Underwriters, Lloyd's London, 435 F.3d 431, 437 (3d Cir. 2006) (citations and internal quotation marks omitted).

⁴In the negligence context, Pennsylvania courts have described "but for" causation as "if the harmful result would not have come about but for the negligent conduct then there is a direct causal connection between the negligence and the injury." Summers v. Giant Food Stores, Inc., 743 A.2d 498, 509 (Pa. Super. 1999). "But for" causation here, then, would be satisfied if the Dragonetti action would not have come about but for Still's business pursuits.

was certainly at least one direct cause of that action. Therefore, it falls squarely under the exclusions portion of the policy.

Still also seems to argue that the policy is ambiguous because Great Northern promotes, advertises and sells the “Masterpiece” policy as the best coverage available to an insured; therefore, it must cover his state court action. This, however, does not create an ambiguity. The policy contains multiple sections of coverage and a section of exclusions following each of those covered sections; it clearly does not cover all possible lawsuits that may arise in a covered person’s lifetime. Therefore, its description as a “Masterpiece” does not make the policy ambiguous.

There is also no question that Still’s dealings with Regulus fall under the business pursuits exception. “Activity encompassed within a ‘business pursuits’ exclusion in an insurance policy requires two elements: 1) continuity, and 2) a profit motive.” Travelers Indemnity Co. v. Fantozzi, 825 F. Supp. 80, 85 (E.D. Pa. 1993), citing Sun Alliance Ins. Co. v. Soto, 836 F.2d 834, 836 (3d Cir. 1987). Continuity is clearly satisfied in this case; Still was involved with Regulus in various leadership positions for approximately five years. A profit motive is also clearly satisfied in this case; Still founded Regulus as “a means of livelihood, a means of earning a living, procuring subsistence or profit, commercial transactions or engagements.” Id.

Still also argues that his reasonable expectations should govern the scope of the insurance policy’s coverage. He relies on the Court of Appeals’ decision in Canal Insurance v. Underwriters, Lloyd’s London, 435 F.3d 431 (3d Cir. 2006) to support his assertion. In that case, the Court noted:

Pennsylvania case law . . . dictates that the proper focus for determining issues of

insurance coverage is the reasonable expectations of the insured. In most cases, the language of the insurance policy will provide the best indication of the content of the parties' reasonable expectations. Courts, however, must examine the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured. As a result, even the most clearly written exclusion will not bind the insured where the insurer or its agent has created in the insured a reasonable expectation of coverage. However, this aspect of the doctrine is only applied "in very limited circumstances to protect non-commercial insured from policy terms *not readily apparent and from insurer deception*. Absent sufficient justification, however, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations that are clear and unambiguous.

Id. at 440 (emphasis added), citing Liberty Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330, 344 (3d Cir. 2005). The reasonable expectations exception does not apply here. The policy terms are readily apparent and the exclusions are clearly delineated. Further, Still does not assert and offers no evidence that the insurer or insurance agent deceived him as to the scope of the policy's coverage.

Accordingly, I will also dismiss Still's bad faith claim because Great Northern has no duty to defend him against the Dragonetti counterclaim.

An appropriate Order follows.

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ORDER

And now, this 27th day of April, 2007, upon consideration of plaintiff David Still and defendant Great Northern Insurance Co.'s cross motions for summary judgment, it is hereby ORDERED that plaintiff Still's motion is DENIED and defendant Great Northern Insurance's motion is GRANTED. Judgment is entered in favor of defendant and against plaintiff.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.