IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PROVIDENCE WASHINGTON INSURANCE COMPANY	:	December Term, 2002
Plaintiff,	:	No. 03844
v.	:	
	:	Commerce Program
THE OHIO CASUALTY INSURANCE COMPANY	:	
	:	Control Nos. 100037
Defendant.	:	100061
	:	

ORDER and MEMORANDUM

AND NOW, this 17th day of March, 2004, upon consideration of the Motions for Summary Judgment of Providence Washington Insurance Company ("Providence")(Control No. 100037) and The Ohio Casualty Insurance Company ("Ohio Casualty")(Control No. 100061), all responses in opposition, the respective memoranda, all matters of record and in accordance with the contemporaneous memorandum opinion, it hereby is **ORDERED** and **DECREED** as follows:

1. The Motion for Partial Summary Judgment of Providence is **GRANTED.**

2. The Motion for Summary Judgment of the Ohio Casualty is **DENIED.**

3. It is further ordered that judgment be entered in favor of Providence and against Ohio Casualty. A hearing is hereby scheduled for 2004, at a.m. in Courtroom 676, City Hall regarding damages, including the fairness and reasonableness of the attorney's fees and costs incurred by Providence in connection with the underlying matter.

BY THE COURT:

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C. DARNELL JONES, J.

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MEMORANDUM OPINION

C. DARNELL JONES, J.

Before the Court are the Motions for Summary Judgment of Providence Washington Insurance Company ("Providence")(Control No. 100037) and The Ohio Casualty Insurance Company ("Ohio Casualty")(Control No. 100061). For the reasons fully set forth below, Providence's Motion is **granted** and Ohio Casualty's Motion is **denied**.

BACKGROUND

The parties in this case have filed cross-motions for summary judgment and are in agreement that no factual issues remain to be decided. The following facts are undisputed. On June 25, 1998, an employee of Edens Corp., Edens Tree Service and/or J. Edens Corp. (collectively "Edens"), illegally parked a 1991 GMC pick-up truck owned by Maintenance Operations Services, Inc. ("MOS") on the east side of Second Street, south of Spring Garden Street in Philadelphia, Pennsylvania. There were no MOS employees present at the job site at the time. While riding his bicycle, Anwar El Ali Kotaini (the "Decedent") tried to maneuver between the Edens' parked vehicle and

another vehicle traveling on Second Street which was owned by Billings Freight Systems. The Decedent was unsuccessful and was fatally injured by the moving truck on Second Street.

As a result of this accident, a third party liability action was filed in the Court of Common Pleas of Philadelphia County, June Term 2000, No. 2835 (the "Richardson Action"), naming Edens, MOS and Billings Freight Systems as Defendants.[1] The Richardson Action subsequently settled. Providence assumed all defense costs. The insurance companies for both Edens (Providence) and MOS (Ohio Casualty) each agreed to pay the sum of $7,500.00 towards settlement of the matter on behalf of Edens. This payment was made with each insurer reserving the right to proceed against the other at a later date. In connection therewith, Providence filed the instant lawsuit arguing that Ohio Casualty is responsible for $45,178.33 in defense costs and $7,500.00 in indemnification costs allegedly resulting from its defense and partial indemnity of Edens, Providence's insured. Ohio Casualty denies responsibility and argues that Providence is obligated to pay the claim.

At the time of the accident (June 25, 1998), the following agreements were in force:

1. The pick-up truck with which the Decedent originally made contact was owned by MOS and was being operated by Edens pursuant to a lease for monetary consideration (the "Truck Rental Agreement"). Def. Mtn., Exh. F. The Truck Rental Agreement states: "[MOS] assumes all risk of loss of or damage to the truck and must maintain in force liability and collision insurance on said vehicle…In the event that another vehicle is damaged by debris from said vehicle, [MOS's] insurance will cover

[1] MOS was ultimately dismissed from the Richardson Matter on Summary Judgment. Def. Resp. ¶ 2.G.

costs and [Edens] will repay owner the insurance deductible amount." Id. The Truck Rental Agreement is devoid of any specific language as to who would bear responsibility for bodily injury to third parties caused by the negligence of an Edens employee in connection with the use of the leased vehicle.

2. Ohio Casualty provided commercial automobile coverage to MOS for the vehicle in question (Policy Number BA052097016). The Ohio Casualty Policy provides that "…[a]nyone else while using with your permission a covered auto" qualifies as an insured under the policy. Pl. Mtn, Exh. C, Def. Mtn. Exh. C at Sec. II(a)(1)(b). The Ohio Casualty Policy further provided: "…for any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by the Coverage Form is excess over any other collectible insurance." Id. at Sec. IV(b)(5)(a). The Ohio Casualty Policy provided a liability limit of one million dollars ($1 million) for each occurrence. Id.

3. Providence provided business automobile coverage to Edens for its use of the truck owned by MOS (Policy Number l602161066). Pl. Mtn, Exh. D, Def. Mtn. Exh. D.[2] Providence's Policy similarly provided: "…for any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by the Coverage Form is excess over any other collectible insurance." Id. The Providence Policy insured any automobiles operated by Edens whether owned, leased, hired, rented or borrowed. Id. Providence's Policy further provided that, regardless of the above provisions, its coverage would be primary for any liability

[2] Edens also had a general liability policy with CNA Insurance ("CNA"), which excluded coverage for "'Bodily injury' or 'property damage' arising out of the ownership, use or entrustment to others of any …'auto'…owned or operated or rented or loaned to any insured." Pl. Mtn., Exh. E, Def. Mtn. Exh. E., Sec. I, " ¶ 2(g).

assumed under an 'insured contract.'" Id. at Sec. IV(a), ¶ 5(g). An "insured contract" is defined by the policy, in pertinent part as, *inter alia,* "[a]n obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality." Id. at Sec. V, ¶ G. It was also defined as follows:

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability means a liability that would be imposed by law in the absence of any contract or agreement.

Id.

4. Edens had a service contract with PennDOT, whereby Edens agreed to service and maintain (hedging, mowing, cleaning) certain areas of land along different roadways for PennDOT (the "PennDOT Contract"). Under the PennDOT Contract, Edens was required to "[p]rovide adequate Contractor's Public Liability Insurance and Property Damage Insurance Coverage for any loss that may occur as a result of this operation." Def. Mtn., Exh. G. The PennDOT contract also included an indemnity provision. Id.

DISCUSSION

As previously indicated, the Truck Rental Agreement is devoid of any specific language as to who would bear responsibility for bodily injury to third parties caused by the negligence of an Edens employee in connection with the use of the leased vehicle. Thus, in the absence of an express agreement between the insureds, this court is required to look to the applicable insurance policies in order to determine which insurance company was obligated to defend and indemnify Edens. The priority of the two

insurance coverages is clearly set forth in both policies using identical language. Thus, the sole issue before the court is which policy is primary.

"Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035.2; Horne v. Haladay, 728 A.2d 954 (Pa. Super. 1999). At bar, there are no factual issues in dispute, so this matter may properly be decided on summary judgment. Interpretation of an insurance contract is a matter of law and is to be performed by the court. Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986); Osial v. Cook, 2002 Pa. Super. 214, 803 A.2d 209, (2002). It is a well settled tenet of contract law that "the intent of the parties to a written contract is contained in the writing itself." Tuthill v. Tuthill, 763 A.2d 417, 2000 Pa. Super. 35, 420 (2000). As a threshold inquiry, the Court must determine whether the language of the contract is ambiguous. Hutchison, 513 Pa. at 200-01, 519 A.2d at 390. A contract is ambiguous when the contract language is indefinite and reasonably susceptible to more than one meaning. Commonwealth v. Brozzetti, 684 A.2d 658, 663 (Pa. Commw. 1996).

This court finds that no conflict exists between the language of the two policies. Both policies unequivocally state that "…for any covered 'auto' you own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided by the Coverage Form is excess over any other collectible insurance." Pl. Mtn, Exh. C, Def. Mtn. Exh. C at Sec. IV(b)(5)(a), Pl. Mtn, Exh. D, Def. Mtn. Exh. D.[3] Thus,

[3] Edens also had a general liability policy with CNA Insurance ("CNA"), which excluded coverage for "'Bodily injury' or 'property damage' arising out of the ownership, use or entrustment to others of any …'auto'…owned or operated or rented or loaned to any insured." Pl. Mtn., Exh. E, Def. Mtn. Exh. E., Sec. I, " ¶ 2(g). As a result, the CNA Policy does not apply.

pursuant to the plain, unambiguous language of the applicable policies, Ohio Casualty, the insurer of the "owner" of the vehicle, is the primary insurer and is therefore solely liable for the costs and defense of the Richardson Action. Because Edens was expressly permitted to operate the vehicle in accordance with the Truck Rental Agreement, Edens clearly qualifies as "insured" under the Ohio Casualty Policy, and is therefore entitled to coverage. Moreover, because the settlement of the Richardson Action did not exhaust the available insurance under the Ohio Casualty Policy, the excess available under the Providence Policy was not triggered, rendering the obligation to pay the Edens claim and defense costs to be solely that of Ohio Casualty. See F.B. Washburn Candy Corp. v. Fireman's Fund, 373 Pa. Super. 479, 541 A.2d 771 (1988).

Ohio Casualty asserts that, regardless of the above provisions, the Providence Policy would be primary because the contract between Edens and PennDOT is an "insured contract." However, the court finds this argument unpersuasive and unsupported by the record, including the PennDOT Contract itself. By its very definition within the Providence Policy, this exception only applies to "liability **assumed** under an 'insured contract.'" Id. at Sec. IV(a), ¶ 5(g) (emphasis added). Here, Edens did not assume the liability of anyone else; all such liability was placed upon it as a result of the direct conduct of its own employees. The mere existence of Edens' contract with PennDOT does not relieve Ohio Casualty of its primary insurance obligation to Edens. Accordingly, the "insured contract" section is irrelevant here and in no way alters Providence's status as the excess carrier here.

Accordingly, Providence's Motion for Summary Judgment is **granted** and Ohio Casualty's Motion for Summary Judgment is **denied**.

CONCLUSION

For the above-stated reasons, this Court finds as follows:

1. The Motion for Partial Summary Judgment of Providence Washington Insurance Company ("Providence")(Control No. 100037) is **granted.**

2. The Motion for Summary Judgment of the Ohio Casualty Insurance Company ("Ohio Casualty")(Control No. 100061) is **denied.**

3. It is further ordered that judgment be entered in favor of Providence and against Ohio Casualty.

The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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C. DARNELL JONES, J.

Dated: March 17, 2004