IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

1930-34 ASSOCIATES, L.P.,	:	SEPTEMBER TERM, 2005
Plaintiff,	:	
v.	:	No. 908
BVF CONSTRUCTION CO., *et al.*	:	
Defendants.	:	(Commerce Program)
	:	
	:	Control Number 111380

O R D E R

AND NOW, this 6TH day of June 2007, upon consideration of defendants', Burns Mechanical and Pennsylvania Manufacturers Association, Motion for Summary Judgment, plaintiff's response in opposition, the respective Memoranda, all matters of record and after oral argument and in accord with the contemporaneous Opinion, it is **ORDERED** that said motion is **Denied**.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ……...…….. June 6, 2007

This action arises from injuries sustained by an employee of BVF Construction Co. at a construction site where Burns Mechanical, Inc. ("Burns") contracted to install the HVAC system. 1930-34 Associates, L.P., the general contractor, seeks reimbursement of defense costs from Burns and other subcontractors on the project. Presently before the court is Burns and Pennsylvania Manufacturer's Insurance Company's Motion for Summary Judgment. For the reasons discussed, the Motion will be denied.

FACTUAL BACKGROUND

1930-34 Associates and Burns entered into a subcontract agreement, ("Subcontract"). The Subcontract contains an indemnification provision which states in part:

> **4.6 INDEMNIFICATION**
>
> 4.6.1 To the fullest extent permitted by law, the Subcontractor (Burns Mechanical, Inc.) shall indemnify and hold harmless the Owner (1930-34 Associates, L.P.) …from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omission of the Subcontractor, the Subcontractor's Sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder…[1]

The Subcontract also provided for 1930-34 Associates to be named as an additional insured on Burns' policy of general liability insurance written by Pennsylvania Manufacturer's Association ("PMA").[2]

On May 21, 2003, Raymond Flaville, while working in the course of his employment with BVF Construction Co. at a property located at 1930 Chestnut Street in Philadelphia, fell from scaffolding causing him injuries. As a result, Flaville instituted an action against the owner and the various subcontractors on the project.[3] The Complaint in the underlying action alleges three counts: (1) negligence against the owner/construction manager, (2) negligence against all the subcontractors, and (3) loss of consortium against all the defendants.

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[1] Subcontractor Agreement.

[2] Exhibit "A" to the Subcontractor Agreement.

[3] The underlying action is captioned Flaville v. Turchi, 0505-2216.

Here, 1930-34 Associates seek to have Burns and PMA pay the defense costs in connection with the Flaville action.

DISCUSSION

Under Pennsylvania law, an insurer agrees to defend the insured against any suits arising under the policy even if such suit is groundless, false or fraudulent. Since the insurer agrees to relieve the insured of the burden of defending those suits which have no basis in fact, the cases have held that the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy. [4] Moreover, it is the duty of the insurer to defend a claim that would support recovery until such time as it is determined that the claim is not covered under the policy.[5]

The first step in a declaratory judgment is to determine the scope of the policy's coverage. In determining that scope, the court must determine if 1930-34 Associates is an insured under the policy. After determining the scope of the coverage, the court must examine the Complaint in the underlying action to ascertain if it triggers coverage.[6]

[4] American States Insurance v. State Auto Insurance, 721 A.2d 56, 59 (Pa. Super. 1998).

[5] Erie Insurance Exchange v. Transamerica Insurance, 533 A.2d 1363 (Pa. Super. 1987).

[6] American States Insurance v. State Auto Insurance, 721 A.2d at 59 (Pa. Super. 1998).

At issue here is the Additional Insured endorsement contained within the PMA policy which provides:

> **Section II- Who Is An Insured** is amended to include as an insured any person(s) (hereinafter "Additional Insureds") with who you agree in a written construction contract to name as an insured with respect to liability arising out of ongoing operations performed by you or on your behalf on the project specified in the written construction contract, including acts or omissions of the Additional Insured in connection with the general supervision of such operations. This insurance is on an excess basis unless the written construction contract requires that this insurance apply on a primary basis.

PMA contracted to defend 1930-34 Associates with respect to liability arising out of ongoing operations performed by Burns on the project specified in the written construction contract including acts or omissions of 1930-34 Associates associated with supervising project operations. 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 the phrase. [7]

The Complaint in the underlying action alleges that Flaville while in the course of his employment was working on a scaffold when due to the negligence and wrongdoing of the respective defendants, including Burns, caused Flaville to fall and suffer injury.[8] The Complaint further alleges that Burns leased, sub-contracted, possessed, inspected, managed, maintained and/or controlled the premises which was engaged in a construction project to construct and/or rehab and/or renovate certain buildings/apartments located at 1930 Chestnut Street in Philadelphia.[9] Count II of the Complaint alleges *inter alia* that Burns failed to ensure that all water leaks in the building

[7] Mfrs. Cas. Ins. Co. v. Goodville Mut. Co. 403 Pa. 603, 170 A.2d 571, 573 (Pa. 1961).

[8] Complaint p. 20.

[9] Complaint p. 16.

were corrected in accordance with its responsibilities under the subcontract, failed to ensure that all roof and or pipe and or ceiling and or other leaks were corrected, failed to place tarpaulin over the area where leaks occurred during the construction process, damaging the plumbing and or pipe while performing its obligations under the subcontract thereby creating water leaks without creating or mitigating the leaks and creating slippery conditions to exist.[10] It is clear from the facts alleged in the Complaint that Flaville's injuries arose from Burns' conduct. The court realizes that other subcontractors and insurers are also identified in the underlying Complaint as the cause of Flaville's injury. The existence of other causes of Flaville's injuries does not foreclose a finding that 1930-34 Associates is an insured under the policy.

After having determined that 1930-34 Associates is an insured under the policy, the court must now determine whether the language of the underlying Complaint triggers PMA's duty to defend. A carrier's duty to defend and indemnify an insured in a suit brought by a third party depends upon a determination of whether the third party's complaint triggers coverage.[11] A duty to defend is broader than the duty to indemnify.[12] An insurer's duty to defend is to be determined solely from the language of the complaint against the insured.[13] Here, the underlying Complaint triggered a duty to defend. The

[10] Complaint p. 37.

[11] Mutual Benefit Insurance Co. v. Haver, 555 Pa. 534, 725 A.2d 743, 745 (1999) (citing General Accident Insurance Co v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (1997).

[12] General Accident Insurance Co. v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (1997).

[13] Allen, 692 A.2d at 1095.

underlying Complaint alleges that Flaville's injuries were caused by Burns.[14] As such, PMA has a duty to pay the defense costs in the underlying action.

CONCLUSION

For these reasons, Motion for Summary Judgment filed by Burns Mechanical, Inc. and the Pennsylvania Manufacturers Association shall be Denied. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

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ALBERT W. SHEPPARD, JR., J.

[14] See Complaint p. 37.