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

CLEMONS CONSTRUCTION COMPANY, INC.,	:	October Term 2007
Plaintiff,	:	No. 1232
v.	:	
EUREKA METAL and GLASS SERVICES, INC., ERIE INSURANCE GROUP, PNC BANK, N.A., PNC FINANCIAL SERVICES, INC. and ALFRED HELLER and KAREN HELLER, H/W,	:	COMMERCE PROGRAM
	:	Control Number 121444
Defendants.	:	

ORDER

AND NOW, this 20TH day of July, 2008, upon consideration of Defendant Erie Insurance Exchange, misidentified as Erie Insurance Group's, Motion for Judgment on the Pleadings, all responses in opposition, Memoranda and all matters of record, it hereby is **ORDERED** that said motion is **Denied.**

BY THE COURT,

_____
HOWLAND W. ABRAMSON, J.

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OPINION

This is an insurance coverage dispute. On September 7, 2005, defendant Alfred Heller (hereinafter "Heller") was employed by defendant Eureka Metal and Glass Service Inc. (hereinafter "Eureka") and working at a construction site of a PNC Bank. Clemens Construction Company, Inc. (hereinafter "Clemens") was the general contractor/construction manager under contract with PNC Bank, NA to construct new bank branch locations. Clemens entered into a subcontract with Eureka as part of the construction of the new bank branch locations to install pre-glazed store front panels, doors, hardware and flashing at the PNC Bank.

The contract states in pertinent part:

> To the fullest extent permitted by law, subcontractor (Eureka Metal & Glass Services, Inc.) shall indemnify and hold harmless the Owner, the Architect and Clemens, the agents and employees of each of them, and each person or entity whom Clemens is required to indemnify under the Prime Contract, from and against the full and entire amount of all claims, damages, losses, and expenses, including, without limitation, attorneys fees, arising out of or resulting from the performance of the work caused in whole or in part by any act or omission of the subcontractor, its subcontractors, vendors, suppliers, or the agents or employees of any of them, or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not, or to the extent to which, such claim, damage, loss or expense is

caused against a party indemnified under this Section by an employee or subcontractor, it subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligations of subcontractor under this Section shall not be limited in a in any way by any limitation on the amount or type of damages, compensation acts, disability benefits or other employee benefit acts.

At all times during the performance of Work, and continuing for a period of two years following Owner's final acceptance of the project, Subcontractor shall procure and maintain, at its sole cost and expense, the following insurance: commercial general liability insurance…(Subcontractor (Eureka Metal & Glass Services, Inc.) shall cause the following to be named as "additional insureds" on all policies of liability insurance (except workers' or workmen's compensation): Clemens, the Owner, the Architect, such parties as may be required by the subcontract documents, the Prime Contract and such parties as Clemens may from time to time require…All any applicable insurance carried by Clemens or the Owner, which insurance shall be deemed secondary or excess to Subcontractor's insurance.

Eureka purchased a policy of insurance from defendant Erie Insurance Exchange (hereinafter "Erie") and identified Clemens as an additional insured under the policy of insurance.

On September 5, 2005, Heller, while in the course and scope of his employment with Eureka, fell off a wall while unloading glass materials from a truck. Heller instituted suit against Clemens and other defendants. Clemens submitted the claim to Erie. Erie denied coverage for Heller's injuries. Clemens instituted this action against Erie Insurance Group for coverage in the underlying action. Erie has now filed the instant motion for judgment on the pleadings relying on the Employer Liability Exclusion to deny Clemens' coverage.

Entry of judgment on the pleadings is permitted under Pa. R. Civ. P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings will be granted where "the moving

party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise."[1]

Here, Erie asks the court to determine whether Clemens claims are barred by the Employee Exclusion. Interpretation of an insurance contract is a matter of law and is a matter for the court.[2] When an insurer relies on a policy of exclusion as the basis for its denial of coverage, it has asserted an affirmative defense and thus bears the burden of proving such a defense.[3] To prevail, the insurer must prove that language of the insurance contract is clear and unambiguous; otherwise, the provision will be construed in favor of the insured. Contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.[4]

After reviewing the applicable policy provisions, the court finds that Clemens' claim is not barred by the "Employee Exclusion". The exclusion at issue provides the following:

> A. Bodily Injury and Property Damage Liability
>
> 2. Exclusions. This insurance does not apply …
>
> e. Employer's Liability.
>
> "Bodily Injury" to:
>
> 1) An employee of the insured arising out of and in the course of :
>
> (a) Employment by the insure; or
>
> (b) Performing duties related to the conduct of the insured's business; or

[1] Conrad v. Bundy, 777 A.2d 108 (Pa. Super. 2001).
[2] Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986).

[3] White v. Keystone Insurance Company, 2001 Pa. Super. 124, 775 A.2d 812 (2001).

[4] Wagner v. Erie Ins. Co., 801 A.2d 1226, 1231 (2002).

2) The spouse, child, parent, brother or sister of that employee as a consequence of paragraph 1 above.

This exclusion applies:

1) Whether the insured may be liable as an employer or in any other capacity; and
2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract"

Although this court is bound by the holding of the Pennsylvania Supreme Court Pennsylvania Mfrs' Assoc. Ins. Co. v. Aetna Casualty & Surety Ins. Co. [5] and its interpretation of the severability clause contained therein[6], the "employer's liability" exclusion contains an exception for "insured contract." An "insured contract" is defined under the policy as

f. 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 party to pay for "bodily injury" or "property damage" to a third person or organization . Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Given this exception, if an employer, in this case Eureka, enters into an agreement to insure another party for its tort liability, in this case Clemens, then the "employer's liability" exclusion, which exempts coverage of bodily injury to an employee arising from actions undertaken during the course of employment, is rendered inapplicable.

Here, in the Subcontract Agreement, Eureka contracted to assume Clemens' tort

[5] 426 Pa. 453, 233 A.2d 548 (1967).

[6] The Supreme Court interpreted the severability clause to include the named insured in the definition of inured thus precluding any coverage for claims made by the named insured's employee against the additional insured.

liability from claims like those made by Heller in the underlying action. Eureka clearly intended to purchase a commercial general liability insurance policy to cover the potential indemnity liability it had under the Subcontract Agreement with Clemens.[7] As such, the court finds that the Subcontract Agreement is an "insured contract" and the "employer liability" exclusion does not exclude coverage. Consequently, Erie's Motion for Judgment on the Pleadings is denied.

BY THE COURT,

HOWLAND W. ABRAMSON, J.

[7] Subcontract Agreement ¶ 17.