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

ATLANTIC CASUALTY INSURANCE COMPANY,	:	May Term, 2012
Plaintiff	:	Case No. 01039
v.	:	
ADLER CONSTRUCTION, INC., JOSE CEVALLOS, BIL-JAX, INC., COAST TO COAST INTERNATIONAL MARINE SERVICES, INC. and LUIGI ADAMO	:	Commerce Program
Defendants	:	Control No. 12100750

ORDER

AND NOW, this 14th day of February, 2013, upon consideration of the Motion for Entry of an Order Upon Default Judgment filed by plaintiff Atlantic Casualty Insurance Company, the response in opposition of defendants Coast to Coast International Marine Services, Inc. and Luigi Adamo, the response in opposition of defendant Jose Cevallos, the respective memoranda of law, and plaintiff's reply brief, it is **ORDERED** that the motion is **GRANTED**. Plaintiff Atlantic Casualty Insurance Company has no duty to defend or indemnify Defendant Adler Construction, Inc. in the underlying action captioned Jose Cevallos v. Coast To Coast International Marine Services, Inc., Luigi Adamo, Adler Construction, Inc. and Bil-Jax, Inc., case No. 1112-03503, in the Court of Common Pleas, Philadelphia County.

BY THE COURT,

MCINERNEY, J.

Atlantic Casualty Insur-ORDOP

12050103900042

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

ATLANTIC CASUALTY INSURANCE COMPANY,	:	May Term, 2012
Plaintiff	:	Case No. 01039
v.	:	
ADLER CONSTRUCTION, INC., JOSE CEVALLOS, BIL-JAX, INC., COAST TO COAST INTERNATIONAL MARINE SERVICES, INC. and LUIGI ADAMO	:	Commerce Program
Defendants	:	Control No. 12100750

MEMORANDUM OPINION

Plaintiff's Motion for Entry of an Order On Default Judgment requires this court to determine whether Plaintiff has a duty to defend or indemnify an insured who is a defendant in the underlying action, where said insured has failed to file any pleadings upon a complaint filed in the instant declaratory judgment action. For the reasons below, this court finds that Plaintiff has no duty to defend or indemnify the insured in the underlying action.

BACKGROUND

Plaintiff, Atlantic Casualty Insurance Company ("ACIC" or "Plaintiff,") is an insurance company based in North Carolina. Defendant, Adler Construction, Inc. ("Adler,") is a New Jersey corporation engaged in the construction business. At all times relevant to this action, Adler was insured under a "Commercial Lines Policy," provided

by ACIC[1], and was performing work at a construction site located at 1314-16 South Howard Street, in Philadelphia, Pennsylvania (the "Project.") Defendant Jose Cevallos ("Cevallos,") is an individual residing in New Jersey. Allegedly, Cevallos was an employee of Lasso Carpentry, LLC ("Lasso Carpentry,") a non-party in this action. At all times relevant to this action, Cevallos and Lasso Carpentry were performing carpentry work at the Project. Defendant Coast to Coast International Marine Services, Inc. a/k/a Coast to Coast International Marine Services, Ltd. ("Coast-to-Coast,") is a Pennsylvania corporation with an address at 1314-16 Howard Street in Philadelphia, Pennsylvania. Allegedly, Coast-to-Coast owned the Project at all times relevant to this action. Defendant Luigi Adamo ("Adamo,") a resident of Philadelphia, Pennsylvania, allegedly acted as owner or manager of the Project. Defendant Bil-Jax, Inc. ("Bil-Jax,") an Ohio corporation, allegedly designed and manufactured the scaffolds used at the Project. Hereinafter, defendants Adler, Coast-to-Coast, Cevallos and Bill-Jax shall be collectively identified as "Defendants" whenever necessary.

On November 9, 2011, Cevallos was allegedly performing carpentry work at the Project when he fell from a scaffold. On December 29, 2011, Cevallos commenced an action in the Court of Common Pleas of Philadelphia County against Adler, Coast-to-Coast, Adamo and Bil-Jax (the "Underlying Action.") Subsequently, Cevallos filed a complaint on March 2, 2012 (the "Underlying Complaint.")[2] In the Underlying Complaint, Cevallos avers that Adler was general contractor of the Project and Lasso Carpentry was a subcontractor thereof.[3] Cevallos also avers that he suffered injury as a result of his fall from the scaffold, and that Adler, Coast-to-Coast, Adamo and Bil-Jax

[1] Commercial Line Policy No. L035008805, Exhibit A to the Complaint.
[2] Jose Cevallos v. Coast to Coast International Marine Services, LTD et al., Case No. 1112-03503.
[3] Underlying Complaint, ¶¶ 10-11, Attached as Exhibit B to the Response in Opposition to Plaintiff's Motion for Entry of an Order Upon Judgment of Default.

"knew or should have known of the hazardous, unstable, and/or unsafe condition of the scaffold."[4] In the Underlying Complaint, Cevallos asserts the claim of Negligence against Coast-to-Coast, Adamo, Adler and Bil-Jax, and the claims of strict liability, breach of warranty and failure-to-warn against Bil-Jax only. In the Underlying Action, Coast-to-Coast, Adamo and Bil-Jax have asserted cross-claims against Adler.

On May 14, 2012, ACIC filed the instant declaratory judgment action against Adler, Cevallos, Coast-to-Coast, Adamo and Bil-Jax. In the complaint, ACIC asks the court to declare that ACIC owes no duty to defend or indemnify Adler in the Underlying Action. Defendants Bil-Jax, Cevallos, Coast-to-Coast and Adamo timely filed their answers to the complaint of ACIC. However, defendant Adler filed no pleading in response to ACIC's complaint, and ACIC, on September 13, 2012, obtained judgment by default against Adler.[5] On October 4, 2012, ACIC filed the instant Motion For Entry Of Order Upon Default Judgment. In the motion, ACIC asks this court to "enter an Order on the Default Judgment against Defendant Adler ... [declaring] that ACIC has no duty to defend or indemnify Adler in the [Underlying Action.]"[6]

Defendants Coast-to-Coast, Adamo, Cevallos and Bil-Jax timely filed their responses in opposition to the Motion for Entry of Order Upon Default Judgment. The motion was fully briefed and is now ripe for a decision.

---

[4] Id. generally at ¶¶ 24-27.
[5] Docket, entry dated September 13, 2012.
[6] Motion for Entry of Order on Default Judgment, p. 1.

DISCUSSION

The Pennsylvania rules of Civil Procedures instruct that

> [t]he prothonotary, on praecipe of the plaintiff, shall enter judgment against the defendant for failure to file within the required time a pleading to the complaint....[7]
>
> In all cases in which equitable relief is sought, the court shall enter an appropriate order upon the judgment of default or admission and may take testimony to assist in its decision and in framing the order.[8]
>
> The indisputable plain meaning of this rule is that .... while the prothonotary may enter a default judgment in an action legal or equitable, only the court may grant equitable relief.[9]

Furthermore,

> [a] court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.[10]

Finally,

> The rule everywhere is that the obligation of a casualty insurance company to defend an action brought against the insured is to be determined **solely** by the allegations of the complaint in the action.[11]

---

[7] Pa. R.C.P. 1037(b).
[8] Pa. R.C.P. 1037(d).
[9] Gall v. Crawford, 2009 Pa. Super 187, P12; 982 A.2d 541, 545—5456 (Pa. Super. 2009) (explaining the meaning of Pa. R.C.P. 1037).
[10] General Accident Ins. Co. of America v. Allen, 547 Pa. 693, 706; 692 A.2d 1089, 1095 (Pa. 1997)
[11] Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317, 330 908 A.2d

I. The insurance policy issued by ACIC to Adler specifically excludes coverage for injuries suffered by contractors, subcontractors and employees thereof.

In its motion and memorandum of law, ACIC states that Cevallos was an employee of Lasso Construction, Lasso Construction was a contractor or subcontractor of defendant Adler, and defendant Adler was insured under the policy in question. ACIC concludes that under the terms of that policy, coverage is excluded for any bodily injury suffered by Adler's contractors, subcontractors, or any employee thereof.[12] To test the validity of ACIC's argument, this court shall examine the language in the policy and determine its scope of coverage.

Preliminarily,

> [t]he task of interpreting an insurance contract is generally performed by a court rather than by a jury. The purpose of that task is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy. When the language of the policy is clear and unambiguous, a court is required to give effect to that language. When a provision in a policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage. Contractual language is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.[13]

The insurance policy states in pertinent part:

> SECTION I—COVERAGES.
>
> COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY.
>
> 1. Insuring Agreement.

888, 896(Pa. 2006) (emphasis supplied).

[12] Memorandum of law in support of ACIC's Motion For Entry Of Order Upon Default Judgment, pp. 11—16.

[13] 401 Fourth St., Inc. v. Investors Ins. Group, 583 Pa. 445, 454-455; 879 A.2d 166, 171 (Pa. 2005).

a. We will pay those sums that the insured [Adler] becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.... We will have no duty to defend or indemnify the insured [Adler] against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....[14]

EXCLUSION OF INJURY TO EMPLOYEES, CONTRACTORS AND EMPLOYEES OF CONTRACTORS

Exclusion e. Employer's Liability of Coverage A. Bodily Injury and Property Damage Liability (Section I—Coverages) is replaced by the following:

This insurance **does not apply** to:

* * *

(ii) **"Bodily Injury" to any contractor** arising out of or in the course of rendering or performing services of any kind or nature whatsoever by such "contractor" for which any insurer may become liable in any capacity....[15]

* * *

As used in this endorsement, "contractor" shall include but is not limited to any independent contractor or subcontractor of any insured ... and any and all persons working for and or providing services and or materials of any kind for these persons or entities mentioned herein.[16]

LIMITATION—DUTY TO DEFEND

Where there is no coverage under this policy, there is no duty to defend any insured.[17]

---

[14] Commercial General Liability Coverage Form No. CG 00 01 01, Exhibit A to the Motion For Order Upon Default Judgment.
[15] Id. Endorsement AGL—055A 08/05 (emphasis supplied).
[16] Id. Endorsement AGL—055A 08/05 (emphasis supplied).
[17] Id. Endorsement AGL—056 10/10.

The language in this insurance policy clearly and unambiguously excludes from coverage any personal injury suffered by a contractor, a subcontractor, and any and all persons working for a contractor or subcontractor. Having thus determined the scope of the insurance policy, the court turns its attention to the Underlying Complaint to determine whether the allegations therein operate to exclude Cevallo's personal injury from coverage under the policy. The Underlying Complaint avers the following:

> 10 At all times relevant hereto, defendant, Adler, was the general contractor responsible for construction on the project.
>
> 11. At all times relevant hereto ... Lasso Carpentry ... was a subcontractor on the project.
>
> * * *
>
> 13 On November 9, 2011, plaintiff ... Cevallos, was working within the course and scope of his employment for ... Lasso Carpentry ... at the [Project].
>
> * * *
>
> 21 On or about November 9, 2011, plaintiff ... Cevallos, was working performing his usual duties as an employee of a framing and carpentry subcontractor when he fell several feet from the scaffolding the he was working on, as a result of which he sustained permanent and serious personal injuries....
>
> * * *
>
> 25 Plaintiff's fall from the scaffolding was caused by the insufficient, defective, inappropriate and/or absent fall protection devices ... designed to prevent plaintiff from falling.

> 26 Prior to November 9, 2011, defendants [including Adler] knew or should have known of the hazardous, unstable, and/or unsafe condition of the scaffold.[18]

These allegations assert that Adler was the Project's general contractor, Lasso Carpentry was a sub-contractor thereof, and Cevallos was an employee of Lasso Carpentry. These averments, together with the language in the policy, exclude from coverage the personal injury suffered by Cevallos as an employee of sub-contractor Lasso Carpentry.[19]

II. The Motion For Order On Default Judgment is procedurally proper.

Defendants argue that the Motion For Order On Default Judgment is procedurally improper because "even though ACIC has obtained a Default Judgment against Adler, disposition of the case on the merits is not appropriate where other parties to this litigation have filed an answer" to the complaint.[20] In support of this argument, Defendants rely on Joseph v. North Whitehall, No. 1500 C.D. 2009 (Pa. Commw. Dec. 21, 2009), an unpublished decision issued by the Commonwealth Court of Pennsylvania. Specifically, Defendants cite the following language from Whitehall: "... default judgment cannot be filed ... where ... the record indicates that there were

---

[18] Underlying Complaint, ¶¶ 10-11, 13, 21, 25-26.

[19] In the declaratory judgment complaint, Plaintiff ACIC avers as follows: "Cevallos has pleaded that he was Lasso [Carpentry's] employee acting within the course and scope of his employment, **and that Lasso [Carpentry] was a subcontractor of Adler.**" See complaint at ¶ 50 (emphasis supplied). Since Adler failed to file a responsive pleading to Plaintiff's complaint, said failure constituted an admission of the allegations contained in ¶ 50 thereof. See Pa. R.C.P. 1029(b): "[a]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication." Since it is admitted that Lasso Carpentry was a subcontractor of Adler, any bodily injury suffered by and employee of Adler's subcontractor is excluded from coverage.

[20] Memorandum of law in support of Defendants response in opposition to Plaintiff's Motion For Entry of Order Upon Default Judgment, p. 9.

pleadings filed in response to the complaint...."[21] Reliance on Whitehall is inappropriate.

In Whitehall, plaintiff initiated on March 4, 2008 an action (the "First Action,') against defendant Whitehall Township (the "Township.") In the complaint, plaintiff sought injunctive relief due to the Township's failure to disclose information pursuant to the Right-to-Know-Act. Plaintiff's complaint also prayed for recovery of litigation costs and attorney's fees, as contemplated by the Act. On March 7, 2008, the same plaintiff initiated a "Second Action." In the complaint thereof, plaintiff alleged the same facts as in the First Action, and also filed a petition for preliminary injunction and motion for peremptory judgment against the Township.[22] On March 11, 2008, the trial court issued an order calling for a hearing. On the following day, March 12, 2008, the trial court issued another order requiring the Township to disclose within twenty-four hours the information sought by plaintiff. The Township promptly disclosed the information pursuant to the order dated March 12, 2008.

On April 1, 2008, the Township filed preliminary objections to the complaint in the First Action. On April 15, 2008, the Township filed preliminary objections to the complaint in the Second Action. In the preliminary objections to the complaint in the Second Action, the Township argued that both actions should be dismissed because the information sought by plaintiff had been disclosed pursuant to an order of the court. On April 23, 2008 and May 6, 2008, the trial court issued two separate but identical orders upon the two sets of preliminary objections. Each order stated as follows:

---

[21] Memorandum of law in support of Defendants' response to Plaintiff's Motion for Entry On Default Judgment, p. 10.

[22] Joseph v. North Whitehall Township, No. 1500 C.D. 2009 at 2, (Pa. Commw. Dec. 21, 2009).

> It appearing that the [information has] ... been furnished to the Plaintiffs as directed in our Order ... it is Ordered that the Preliminary Objections filed April 1, 2008 and April 15, 2008 are Moot....
>
> *The case is now concluded, with the exception of the Plaintiff's request for costs of suit.... We did not rule that the [information is] governed by the Public Records Statute, and therefore the Plaintiffs are not entitled to the remedies of the Public Records Act.*[23]

After the trial court issued its two identical orders resolving the cases, plaintiff filed two notices of praecipe to enter judgment by default for failure to plead in either action. The Township responded by filing two motions to quash each action on grounds that a final order had been entered in both cases. Notwithstanding the disposition, the two cases were consolidated, and a single judgment by default was entered for failure to answer the complaints. The Township responded by filing two motions to strike the default judgment. Both motions argued that default judgment was improper because final orders had been entered.

On June 29, 2008, the trial court issued an order which stated: "[o]ur Orders of April 23, 2008 and May 6, 2008 clarified that the case was concluded as of those dates.... Accordingly, the consolidated cases were resolved."[24] After this order was issued, plaintiff appealed. However, the appeal was filed more than thirty days after the court had issued its final orders dated April 23, 2008 and May 6, 2008. Thus, affirming the trial court's decisions, the Commonwealth Court stated:

> Contrary to [plaintiff's] allegations, the April 23, 2008 and May 6, 2008 orders were final orders because the trial court stated that it resolved all matters. If [plaintiff] was unhappy with the orders, it was required to take timely appeals

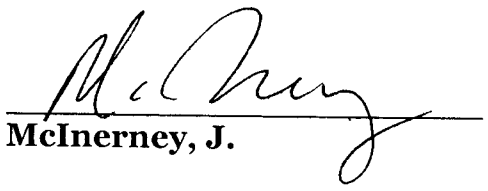
---

[23] Id. at 2-3.
[24] Id. at 5-6.

> pursuant to Pa. R.A.P. 903(a) ... within 30 days after the final dates of those orders.... **In any event, a default judgment cannot be filed ... where ... the record indicates that there were pleadings filed in response to the complaints.**[25]

Clearly, the latter pronouncement from the Commonwealth Court is mere *dicta* and Defendants in the Instant Action may not rely upon it in support of their argument. In Whitehall, the Commonwealth Court offered its *dicta* while affirming the lower court's order which had disposed of the case on grounds entirely different from the operative issue before this court. In Whitehall, the issue before the Commonwealth Court was whether the consolidated cases had been resolved after the Township disclosed specific information pursuant to court order; in this case, the issue is whether an order may be entered on default judgment where defendant has failed to file a responsive pleading to the complaint. Although other Defendants in the Instant Action did file responsive pleadings to ACIC's complaint, such Defendants may not rely on mere *dicta* to prevent entry of an order on default judgment against the non-responsive Defendant. Plaintiff's Motion for Entry of an Order Upon Default Judgment is procedurally proper. ACIC has no duty to defend or indemnify Adler in the Underlying Action because the policy covering Adler, together with the allegations contained in the underlying complaint, operate to exclude from coverage any bodily injury suffered by Cevallos as an employee of subcontractor Lasso Carpentry.

By The Court,



McInerney, J.

[25] Id. at 6 (emphasis supplied).