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

LEXINGTON INSURANCE COMPANY, Plaintiff,	:	June Term, 2001
v.	:	No. 3213
TUNNEY'S HOLLYWOOD TAVERN, INC., and	:	Commerce Program
MICHAEL LIVEWELL, and	:	Control No. 102827
THOMAS ROGALSKI, Defendants.	:	

ORDER

AND NOW, this 14th day of January , 2002, upon consideration of the Motion for Summary Judgment of Lexington Insurance Company, any response thereto, and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the motion for summary judgment is GRANTED. It is, therefore, the declaration of this court that Lexington Insurance Company owes no duty to defend or indemnify Tunney's Hollwyood Tavern, Inc., in a civil action captioned Michael Livewell v. Tunney's Hollywood Tavern, Inc. and Thomas Rogalski, Jan. 2001, No. 2303 (C. P. Phila).

BY THE COURT:

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JOHN W. HERRON, J.

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MEMORANDUM OPINION

Plaintiff Lexington Insurance Company ("Lexington") filed this Motion for Summary Judgment on its declaratory judgment action against Tunney's Hollywood Tavern, Inc. ("Hollywood"), Michael Livewell ("Livewell"), and Thomas Rogalski ("Rogalski"). For the reasons stated below, the motion for summary judgment is granted.

BACKGROUND

The instant declaratory judgment action of Lexington arises from the alleged assault and battery of Livewell at Hollywood on January 29, 1999 by another patron of the tavern, Rogalski. On February 16, 2001, Livewell commenced an action for injuries resulting from the alleged assault and battery in

this court against both Hollywood and Rogalski.[1]

Hollywood sought a defense and indemnification from its general liability insurer, Lexington. However, on June 26, 2001, Lexington filed this declaratory judgment action claiming that it owes neither a duty to defend nor indemnify Hollywood for the underlying action by Livewell, because the claim of an alleged assault and battery is specifically excluded from the general liability policy ("the policy") it has with Hollywood. On November 1, 2001, Lexington filed this motion for summary judgment.

DISCUSSION

"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." Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Further, "in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in, a light most favorable to the non- moving party." Id. Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted). Finally, a court must grant a motion for summary judgment when a non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

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[1]The underlying action is captioned Michael Livewell v. Tunney's Hollywood Tavern, Inc. and Thomas Rogalski, Jan. 2001, No. 2303 (C. P. Phila).

I. The Motion for Summary Judgment is Granted

Lexington first argues that, here, there is no genuine issue of material fact and therefore it is entitled to judgment as a matter of law. Furthermore, Lexington argues that since Livewell's assault and battery claims are specifically excluded from the policy, there exists neither a duty to defend nor indemnify Hollywood in the underlying action. However, Livewell argues that since his claims against Hollywood and Rogalski are based in part on allegations of negligence, the motion for summary judgment should be denied.[2]

In Pennsylvania, the proper construction of an insurance policy is a matter of law, which a court may properly resolve when ruling on a motion for summary judgment. Fisher v. Harleysville Ins. Co., 423 Pa.Super. 362, 621 A.2d 158 (1993). In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court will give effect to the language of the contract. Paylor v. Hartford Ins. Co., 536 Pa. 583, 640 A.2d 1234 (1994) (citations omitted).

The duty to defend an insured is broader than the duty to indemnify. Snyder Heating Co. v. Pennsylvania Mnfr. Ass'n Ins. Co., 715 A.2d 483, 491 (Pa.Super Ct. 1998). "An insurer's duty to defend is dependant upon the derivative question of coverage. It is well established that while an insurer is not required to defend an insured in every claim brought against it, an insurer must defend in any suit in which there exists actual or potential coverage." Acceptance Ins. Co. v. Seybert, 757 A.2d 380, 382

[2] Although Livewell's answer describes in great detail the standard for reviewing a motion for summary judgment, no where in his answer does Livewell allege that a genuine issue of material fact exists. Therefore, this court need only discuss whether it is clear and free from doubt that Lexington is entitled to judgment as a matter of law. Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999).

(Pa.Super.Ct. 2000) (citing Hartford Mutual Ins. Co. v. Moorhead, 578 A.2d 492, 494 (1990)). In determining whether there exists a duty to defend, "the terms of the policy must be compared to the nature of the allegations of the complaint, and a determination made as to whether, if the allegations are sustained, the insurer would be obligated to incur the expense of the judgement." Id.

After a review of the policy and the nature of the allegations in Livewell's underlying complaint, this court concludes that Lexington does not have a duty to defend nor indemnify Hollywood. The relevant portions of the policy issued to Hollywood are as follows:

> **1. Insuring agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies...
>
> * * *
>
> b. This insurance applies to "bodily injury" or "property damage" only if:
>
> (1) The "bodily injury" or "property damages" is caused by an "occurrence"...
>
> * * *
>
> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Pl's Exh. A. The policy also contains the following exclusion provision:

> **EXCLUSION - ASSAULT AND BATTERY BY INSURED**
>
> ...[T]his policy excludes any and all claims arising out of any assault, battery, fight, altercation, misconduct or other similar incident or act of violence, whether caused by or at the instigation of, or at the direction of the insured, his/her employees, customers, patrons, guests or any cause whatsoever, including but not limited to claims of negligent or improper hiring practices, negligent, improper or nonexistent supervision of employees, patrons or guests and negligence in failing to protect customers, patrons or guests.

Id.

Here, Livewell argues that because his underlying complaint contains allegations of negligence

against Hollywood and Rogalski, Lexington has an absolute duty to defend Hollywood. Although Livewell cites to no authority supporting such a contention, Livewell does argue that the policy defines an "occurrence" as anything accidental and therefore, the assault by Rogalski on Livewell is "clearly an 'occurrence' as defined by the policy." Def.'s Mem. of Law at II.(B). Livewell also makes the unsupported assertion that "an accident is an event which is neither intended nor anticipated from the point of view of the insured." Id. Livewell argues that since the assault was an accident, as it was neither intended nor anticipated from Hollywood's point of view, the assault constitutes an occurrence under the policy. Id. Therefore, Livewell contends that Lexington owes a duty to defend and indemnify Hollywood.

Lexington argues that not only does Livewell's complaint not allege an "occurrence" because the injuries suffered resulted from non-accidental and intentional conduct by Rogalski, but, more importantly, that the policy specifically excludes intentional acts such as assault and battery from coverage. Lexington argues that "when the harm-producing event is clearly intentional, the law of Pennsylvania is that additional claims of negligence against an insured do not create an "occurrence," and therefore there is no coverage for an insured under the policy." Pl.'s Mem. of Law at 10. One of the many relevant cases Lexington cites in support of its position is Britamco Underwriters, Inc. v. Grzeskiewicz, 433 Pa.Super. 55, 639 A.2d 1208 (1994). There, a patron was intentionally injured with a beer bottle by another patron while in a tavern insured by Britamco Underwriters. Besides allegations of assault and battery, the plaintiff's complaint also alleged negligence by the tavern's employees. After a review of the policy, and in particular, the provision applying to assault and battery, the court held that even though the plaintiff pleaded negligence, the provision clearly and unambiguously excluded

intentional acts such as assault and battery from the tavern's coverage. Id. Therefore, Britamco Underwirters owed no duty to defend or indemnify. Id.

A review of the language in the assault and battery exclusion in Lexington's policy and of the factual allegations contained in Livewell's underlying complaint allows this court to reach a similar conclusion. As discussed above, the policy, in pertinent part, clearly, unambiguously and expressly excludes from coverage "...claims arising out of any assault [or] battery...whether caused by... the insured, his/her employees... or any cause whatsoever, including but not limited to claims of... negligent, improper or nonexistent supervision of employees, patrons or guests and negligence in failing to protect customers, patrons or guests." Pl.'s Exh. A (emphasis added). As in Grzeskiewicz, here, Livewell's complaint contains allegations of negligence, assault and battery. Specifically, Livewell alleges that Hollywood and its employees were negligent in failing to warn and protect its patrons from "intemperate and vicious" individuals. Livewell's Complaint at ¶8. However, since the policy here explicitly excludes "claims arising out of any assault [or] battery," Livewell's negligence claims against Hollywood arising out of Rogalski's alleged assault and battery are not covered by the policy.[3] Pl.'s Exh. A.(emphasis added). Furthermore, Livewell's complaint contains no allegations that Livewell's specific head and

[3] The instant matter is distinguishable from that of Britamco Underwriters, Inc v. Weiner, 431 Pa.Super. 276, 636 A.2d 649 (1994). In a similar declaratory judgment action as the one here, the court held that because the plaintiff, who had been hit in a tavern, alleged alternative theories of liability, including assault and battery, negligent infliction of emotional distress and claims of negligence, Britamco owed the tavern a duty defend. Moreover, the court ruled that since one count of the plaintiff's complaint described the incident as an "accident", there was a possibility of negligence and therefore implicated potential coverage. However, unlike in Weiner, here there is no suggestion in Livewell's complaint that his injuries were a result of an accident. Furthermore, there are no allegations that these injuries were caused in any other way other than the alleged assault and battery.

body injuries were caused in any way other than by the assault and battery by Rogalski. Therefore, to pepper the complaint with negligence claims in attempts to avoid the unambiguous policy exclusion would be misleading.

The Pennsylvania Supreme Court reached a similar conclusion in Mutual Benefit Ins. Co., v. Haver, 725 A.2d 743 (1999). In Haver, Mutual Benefit sought a declaratory judgment arguing that its policy did not cover an insured pharmacist's alleged liability for injuries resulting from distributing medications without prescriptions. The defendants argued that the policy provision excluding "knowing endangerment" from coverage was not implicated by the underlying complaint because the complaint did not contain allegations of "willful or knowing misconduct" as required by the policy. Instead, the defendants argued that the underlying complaint asserted claims of negligence in conduct that was below the standard of care required of a pharmacist. Therefore, the defendants argued that Mutual Benefit owed a duty to defend and indemnify its insured. However, the Supreme Court disagreed and held that the duty to defend and indemnify an insured was to be determined by factual allegations, and not the theory plead. Id. at 745. After reviewing the precise factual allegations in the underlying complaint, the Supreme Court concluded that even though the complaint alleges negligence, the pharmacist's alleged distribution of medications without prescriptions was "knowing endangerment" within the meaning of the exclusion provision. Therefore, since their was no coverage available, there resulted neither a duty to defend nor indemnify the defendants. Id.

Similarly, the factual allegations in this case clearly do not support Livewell's attempt to "paint his complaint" as one that alleges negligence, so as to place it within the policy's coverage. Id. at 747. Instead, the facts averred all arise from and are directly related to the alleged assault and battery

committed by Kogalski. No where in his complaint, does Livewell allege that the injuries suffered to his head, neck, back, body and limbs, were directly caused by anything other than the alleged assault and battery by Kogalski. As the Supreme Court held in Haver, "to allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies." Haver, 725 A.2d at 745. Therefore, having already determined that as a matter of law, Livewell's claims are clearly and unambiguously excluded from the policy, this court concludes that the motion for summary judgment is granted. As a result, Lexington has no duty to defend Hollywood's underlying action.[4]

[4] Because the court has determined that the claims in Livewell's underlying complaint are excluded from the policy as a matter of law, and, therefore, Lexington need not defend Hollywood against Livewell's complaint, Lexington would not have to indemnify Hollywood either. Mutual Benefit Ins. Co., v. Haver, 725 A.2d 743, 745 n.1 (1999)(citing General Accident Ins. Co. v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997)(recognizing that the duty to defend is separate from and broader than the duty to indemnify)).

CONCLUSION

For the reasons stated above, the motion for summary judgment is granted. Moreover, Lexington owes neither a duty to defend nor indemnify Hollywood in the underlying action captioned Michael Livewell v. Tunney's Hollywood Tavern, Inc. and Thomas Rogalski, Jan. 2001, No. 2303 (C. P. Phila).

BY THE COURT:

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JOHN W. HERRON, J.

DATED: January 14, 2002