

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

REGIS INSURANCE COMPANY,	:	JUNE TERM, 2011
	:	
Plaintiff,	:	NO. 01674
v.	:	
	:	COMMERCE PROGRAM
IPPOKRATIS FAZOS d/b/a SNYDER	:	
PIZZA, INC. and JOSE RUIZ,	:	Control No. 12052744

OPINION

This insurance coverage action was filed by the insurer, Regis Insurance Company (“Regis”), against its insured, Ippokratis Fazos d/b/a Snyder Pizza, Inc. (“Fazos”), and against Jose Ruiz, who filed two, now consolidated, personal injury actions against Fazos (the “Underlying Actions”). In his Complaints, Ruiz alleges:

On or about November 19, 2009, at or about 12:15 p.m., [Ruiz] was lawfully working in the kitchen area of Snyder Pizza when he was accidentally shot by Raymond McHugh who was working in the course and scope of his employment for [Fazos].¹

Based on this shooting incident, Ruiz asserted negligence claims against both Fazos and McHugh in the Underlying Actions.

Regis issued Special Multi-Peril Policy of Insurance No. RM-130616-03 (the “Policy”) to Fazos, which Policy was in effect at the time of the shooting. The Policy contains two relevant exclusions from coverage as follows:

This insurance does not apply:
(I) to bodily injury to any employee of the Insured arising out of and in the course of his employment by the Insured for which the Insured may be held liable as an employer or in any other capacity[.]²

* * *

¹ Case No. 101200910 Complaint, ¶ 11; Case No. 110303463, ¶ 10.

² Policy, Endorsement GL 00 32 (the “Employee Exclusion”).

Actions and proceedings to recover damages for “bodily injury” or “property damage” or “personal injury” arising, in whole or in part, from the following are excluded from coverage and the Company is under no duty to investigate, defend or to indemnify an insured in any action or proceeding alleging such causes of action and damages:

1. Assault and Battery or any act or omission in connection with the prevention, suppression or results of such acts[.]³

Regis claims that, as a result of these two exclusions, it has no duty either to defend or to indemnify Fazos in the Underlying Actions.

An insurer is obligated to defend its insured if the factual allegations of the [pleading] on its face encompass an injury that is actually or potentially within the scope of the policy. As long as the [claim] might or might not fall within the policy’s coverage, the insurance company is obliged to defend. Accordingly, it is the potential, rather than the certainty, of a claim falling within the insurance policy that triggers the insurer’s duty to defend. The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the [relevant pleading].

[Regis] may not justifiably refuse to defend [Ruiz’] claim against [Fazos] unless it is clear from an examination of the allegations in the Complaint and the language of the policy that the claim does not potentially come within the coverage of the policy. In making this determination, the factual allegations of the underlying Complaint are to be taken as true and liberally construed in favor of [Fazos].⁴

The Complaints in the Underlying Actions expressly state that Ruiz was working for, *i.e.*, employed by, Fazos at the time of the shooting, so the Employee Exclusion clearly applies. As a result, Regis has no duty to defend Fazos in the Underlying Actions. However, since Fazos

³ Policy, Endorsement RAB 3 (the “Assault and Battery Exclusion”).

⁴ Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 606 Pa. 584, 608-611, 2 A.3d 526, 540-542 (2010).

disputes that Ruiz was its employee and that issue has not yet been finally resolved,⁵ the court cannot yet rule whether the Employee Exclusion precludes indemnification in this case.⁶

Similarly, the court cannot rule whether the Assault and Battery Exclusion precludes indemnification. No one disputes that Ruiz was shot by McHugh, although the shooting is alleged to have been accidental, *i.e.*, negligent. “Assault” is defined as “the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact,” and is really an attempted battery.⁷ Since McHugh is not alleged to have merely threatened to shoot Ruiz, his actions were not simply an “Assault.”

“Battery” is defined as “[a]n intentional and offensive touching without lawful justification.”⁸ Because battery requires intent, an accidental shooting does not constitute a “Battery” within the meaning of the Assault and Battery Exclusion.⁹ If McHugh’s acts are proven to have been merely negligent, then coverage is not precluded by the Assault and Battery Exclusion of the Policy.

⁵The decision of the Workers’ Compensation Board holding that Ruiz was Fazos’ employee is presently on appeal, and the Underlying Actions are stayed pending the outcome of that proceeding.

⁶ “Unlike the duty to defend, the duty to indemnify cannot be determined merely on the basis of whether the factual allegations of the complaint potentially state a claim against the insured.” Regis Ins. Co. v. All Am. Rathskeller, Inc., 976 A.2d 1157, 1161 (Pa. Super. 2009).

⁷ Black’s Law Dictionary, p. 109 (7th Ed. 1999).

⁸ *Id.*, p. 146.

⁹ See Gene’s Restaurant, Inc. v. Nationwide Ins. Co., 519 Pa. 306, 310, 548 A.2d 246 (1988) (“the intentional torts of assault and battery are excluded from coverage and the insurer has no duty to defend.”) See also State Farm Mut. Auto. Ins. Co. v. Martin, 442 Pa. Super. 442, 446 (1995) (“while voluntary intoxication may so cloud the mind as to deprive it of the power of pre-meditation and deliberation it will not prevent the formation of the general intent necessary for the commission of an assault and battery”)

For all the foregoing reasons, Regis' Motion for Summary Judgment is granted in part because Regis has no duty to defend Fazos, and the Motion is denied in part because Regis may ultimately have to indemnify Fazos.

BY THE COURT:



PATRICIA A. McINERNEY, J.