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

ERIE INSURANCE EXCHANGE	:	November Term, 2015
	:	Case No. 03959
Plaintiff	:	
	:	
v.	:	Commerce Program
	:	
GREENWICH INSURANCE COMPANY	:	
	:	Control Nos. 17073379,
Defendant	:	17083584

ORDER

AND NOW, this 26th day of December, 2017, upon consideration of the motion for summary judgment of defendant Greenwich Insurance Company on its counterclaim, the cross-motion for summary judgment of plaintiff Erie Insurance Exchange, the respective briefs in support and opposition thereto, and the respective reply briefs in further support of each motion, it is **ORDERED** as follows:

I. The cross-motion for summary judgment of plaintiff Erie Insurance Exchange is **DENIED**;

II. The motion for summary judgment of defendant Greenwich Insurance Company on its counterclaim is **GRANTED** and the first amended complaint of Erie Insurance Exchange is **DISMISSED**.

BY THE COURT,

RAMY I. DJERASSI, J.

Erie Insurance Exchange-ORDRC

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MEMORANDUM OPINION

In this declaratory judgment action, plaintiff is Erie Insurance Exchange ("Erie"), a "reciprocal insurance exchange" organized under the laws of Pennsylvania.[1] Defendant is Greenwich Insurance Company ("Greenwich"), a Connecticut company engaged in the insurance business.

On April 18, 2008, an individual named Jeremy J. André ("André"), a sanitation worker, was crushed to death in Phoenixville, Pennsylvania, by a trash-collection truck which he had been operating in the scope of his employment. His employer was a curbside recycling company known as Chesmont Disposal Company, LLC ("Chesmont"). Although the trash-collection truck was used by Chesmont in the course of its business, it was registered in the name of Stephen P. Koons ("Koons"), a part-owner of Chesmont.[2] Koons was also the owner of a concrete company, "Miller Concrete," also known as "Koons d/b/a/Miller Concrete." At the time of the accident, the trash-collection truck was insured by Chesmont under a policy from XL Insurance America, Inc., No. AEC—00—1995—301. Simultaneously, Chesmont was covered under a Commercial Excess Form and Umbrella Liability Policy issued by defendant Greenwich (the Greenwich Umbrella Policy"), No. UEC—00—1995—402.[3] Also at the time of the accident, Erie provided commercial insurance and automobile insurance coverage to Koons d/b/a/ Miller Concrete under policy No. Q01—0930220—A7 (the "Erie Policy").[4]

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[1] A reciprocal insurance exchange is defined as "[a] system whereby several individuals or businesses act through an agent to underwrite one another's risks, making each insured an insurer of the other members of the group. Also termed *inter-insurance*." BLACK'S LAW DICTIONARY 807 (7th ed. 1999).

[2] Erie's motion for summary judgment, ¶ 7, admission of Greenwich in its response in opposition, ¶ 7; See also Deposition of Koons dated September 16, 2011, Exhibit D to the motion for summary judgment of Erie at 24:1—7.

[3] Excess and Umbrella Policy issued by Greenwich Insurance Company, Exhibit D to the motion for summary judgment of Erie.

[4] Commercial Auto Policy issued by Erie Insurance Exchange, No. Q01-—0930220—A7, Exhibit B to the first amended complaint of Erie.

In addition, Erie provided Koons d/b/a/ Miller Concrete with a Business Catastrophe Liability Policy, No. Q25—0970047—A.[5]

On February 25, 2010, the Estate of André filed an action (the "Underlying Action") against the entities that owned the waste processing plant where André had died, and against Koons, d/b/a Miller Concrete.[6] In the amended complaint, the administratrix asserted the claim of negligence against Koons d/b/a Miller Concrete. Specifically, the amended complaint alleged that the trash-collection truck was equipped with a system (the "PTO System"), designed to keep the vehicle stationary while the transmission was engaged in the drive mode, and while the driver operated the trash loading and unloading controls which were housed on the exterior side of the truck.[7] The amended complaint alleged that the PTO System failed, the truck began to move, and André was crushed to death as he reached into the cabin in an effort to pull the brakes of the moving vehicle.[8] The amended complaint in the Underlying Action asserted the claim of negligence against Koons d/b/a Miller Concrete for his failure to keep the PTO system in proper working condition, and for his failure to keep the vehicle safe.[9]

Koons tendered a claim to Erie under the Erie Policy, and a claim to Greenwich under the Greenwich Umbrella Policy: Erie accepted the tender but Greenwich did not. Subsequently, Erie settled the Underlying Action on behalf of Koons d/b/a Miller

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[5] Catastrophe Liability Policy No. Q25—0970047—A, Exhibit C to the first amended complaint of Erie. issued by Erie

[6] Samantha L. André, individually and as administratrix of the Estate of Jeremy J. André, and on behalf of Minor Child, Logan André, v. Blue Mountain Recycling, LLC *et al.*, Case No. 1002-03525, Exhibit A to the first complaint of Erie. The docket shows that by Order of the Court of Common Pleas of Philadelphia County dated February 2, 2011, the Underlying Action was transferred to the Court of Common Pleas, Montgomery County. Chesmont was not a defendant in this action.

[7] Id. at ¶¶ 29—32.

[8] Id. at ¶¶ 45—48.

[9] Id. at ¶¶ 127—155.

Concrete, stepped into the shoes of Koons by way of subrogation, and filed the instant action seeking a declaratory judgment in its favor and against Greenwich. Specifically, Erie seeks to recover from Greenwich the attorney's fees, costs, and a pro-rata percentage of the indemnity payments which Erie expended in its defense of Koons.[10] On July 15, 2017, Greenwich filed its answer with new matter and a counterclaim. In the counterclaim, Greenwich avers that it had no duty to defend Koons in the Underlying Action, and no duty to indemnify Erie. Greenwich avers that it had no duty towards Erie because Koons was not an insured under the Greenwich Umbrella Policy. In addition, Greenwich avers that even if Koons had been an insured under its policy, no recovery stemming from his alleged negligence may be available pursuant to the requirements of the Pennsylvania Workers' Compensation Act, 77 P.S. § 411.

On July 26, 2017, Greenwich filed a motion for summary judgment on its counterclaim. On August 28, 2017, Erie file a cross-motion for summary judgment against Greenwich. In the cross-motion, Erie asserts that Koons is an insured under the Greenwich Umbrella Policy; therefore, Erie argues that Greenwich owed a duty to defend Koons in the Underlying Action, and owes a duty to indemnify Erie.

DISCUSSION[11]

Preliminarily, the Court notes that—

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[10] First amended complaint of Erie.

[11] "After completion of discovery relevant to the motion, a party may move for summary judgment when an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.... The moving party has the burden of proving the nonexistence of any genuine issue of material fact. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." Rapagnani v. Judas Co., 736 A.2d 666, 668 (Pa. Super. 1999).

> [t]he Declaratory Judgments Act may be invoked to interpret the obligations of the parties under an insurance contract, including the question of whether an insurer has a duty to defend and/or a duty to indemnify a party making a claim under the policy.[12]

I. Koons is not an insured in his individual capacity as the title holder of the trash-collection truck.

In the motion for summary judgment, Greenwich asserts that Koons was sued in the Underlying Action in his individual capacity –that is, as Koons d/b/a/ Miller Concrete, owner of the truck.[13] Consequently, Greenwich argues that it has no duty to defend Koons in the Underlying Action because Koons, in his individual capacity, is not an insured under the Greenwich Umbrella Policy.[14] In the response in opposition, Erie rejects this argument and asserts that under the Greenwich Umbrella Policy, Koons was an insured in his capacity as "president and manager" of Chesmont.[15] To test whether Koons was sued in his individual capacity as Koons d/b/a/ Miller Concrete, or in his capacity as the president and managing member of the "Named Insured," that is, Chesmont– this Court will rely on the well-settled legal principle stating that—

> **an insurer's duties under an insurance policy are triggered by the language of the complaint against the insured**. In determining whether an insurer's duties are triggered, the factual allegations in the underlying complaint are taken as true and liberally construed in favor of the insured....[16]
>
> The obligation of an insurer to defend an action against the insured **is fixed solely by the allegations in the**

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[12] Am. Nat. Prop. & Cas. Companies v. Hearn, 93 A.3d 880, 884 (Pa. Super. 2014).
[13] Motion for summary judgment of Greenwich, ¶ 45.
[14] Id. III. B at ¶¶ 44—45.
[15] Response of Erie in opposition to the motion for summary judgment of Greenwich, ¶¶ 44—45. See also Erie's cross-motion for summary judgment at ¶ 47, which Erie has incorporated by reference into its response in opposition to the motion for summary judgment of Greenwich.
[16] Am. Nat. Prop. & Cas. Companies v. Hearn, 93 A.3d 880, 884 (Pa. Super. 2014) (emphasis supplied).

underlying complaint.[17]

The analysis begins with a reading of the pertinent sections of the Greenwich Umbrella Policy. That policy states as follows:

> **I—INSURING AGREEMENTS**
> ***
> **Coverage B**—Umbrella Occurrence Based Liability Coverage Over Self Insured Retention.
>
> A. The Company [Greenwich] will pay on behalf of the **Insured** [Chesmont] those sums in excess of the Self-Insured Retention that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law ... because of Bodily Injury, Property Damage, Personal Injury or Advertising Injury....[18]

The foregoing language states unambiguously that Greenwich will pay certain sums which Chesmont would be obligated to pay in its capacity as the "**Insured**" under the Greenwich Umbrella Policy.[19] Next, to establish whether Koons is an "**Insured**" under the Greenwich Umbrella Policy, the Court turns to the section of that policy containing the pertinent definitions:

> **VI—DEFINITIONS**
> ***
> Insured under Coverage B Means:
>
> 1. the **Named Insured**;
>
> 2. ***;
>
> 3. **your partners, joint venture members, executive officers, employees, directors, stockholders, volunlears [*sic*] while acting in the scope of their duties as such**....[20]

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[17] Id. (emphasis supplied).
[18] Greenwich Umbrella Policy, Exhibit A to the complaint—Insuring Agreements, Coverage B, p. 2 (emphasis supplied).
[19] "The interpretation of an insurance policy is ... a question of law for the court." Adelman v. State Farm Mut. Auto. Ins. Co., 386 A.2d 535, 538 (Pa. Super. 1978).
[20] Id., p. 17 (emphasis supplied).

This language clearly and unambiguously states that the insureds under the Greenwich Umbrella Policy are the "Named Insured" –in this case Chesmont– and Chesmont's partners, joint venture members, executive officers, employees, directors, stockholders and [volunteers]. Thus Koons, in his capacity as the president and managing member of Chesmont, appears to qualify as an "Insured" under the Greenwich Umbrella Policy[21] However, the standards for declaratory judgment require the Court no only to—

> interpret the insurance policy to determine the scope of coverage ... [but also to] ... **analyze the complaint filed against the insured to determine whether the claims asserted potentially falls [*sic*] within that coverage.**[22]

In other words, it is not sufficient to rely merely on the language of the policy to determine whether Koons is an "Insured" under the Greenwich Umbrella Policy; rather, the Court must also examine the language of the underlying complaint to determine whether Koons was sued in his capacity as a businessman engaged in the activities of Miller Concrete, or whether he was sued in his capacity as a partner, joint venture member, executive officer, employee, director or stockholder of Chesmont. A reading of the first amended complaint shows that Mr. Koons is a "co-owner of Chesmont" and "the owner and lessor of the truck."[23] However, the first amended complaint specifically identifies Mr. Koons in the caption as "Koons d/b/a Miller Concrete."[24] In addition, the first amended complaint avers that Koons, d/b/a/ Miller Concrete, purchased the trash-

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[21] Koons has admitted being the president and managing member of Chesmont in his deposition dated June 7, 2011, Exhibit B to the cross—motion for summary judgment of Erie at 60: 5—24.
[22] Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1992).
[23] First amended complaint, ¶ 35, Samantha L. André, individually and as administratrix of the Estate of Jeremy J. André, and on behalf of Minor Child, Logan André, v. Blue Mountain Recycling, LLC *et al.*, Case No. 1002-03525, Exhibit D to the first complaint of Erie.
[24] Id.,

collection truck, received title thereto, was its registered owner at the time of the fatal accident, and negligently allowed André to use the defective truck.[25] Thus, even a most liberal reading of the factual allegations in the underlying complaint compels this Court to conclude that Mr. Koons was sued in his capacity as businessman engaged in the activities of Miller Concrete, not in his capacity as the president and managing member of Chesmont. Based on the foregoing, this Court concludes that the first amended complaint in the Underlying Action asserts its claim against Mr. Koons in his capacity as the person doing business as Miller Concrete only: for this reason, the Greenwich Umbrella Policy does not apply to Koons d/b/a/ Miller Concrete, and provides no coverage for Mr. Koons in the Underlying Action.

II. **Even if Koons is an insured in his capacity as the president and managing partner of Chesmont, the claim asserted against him by the Estate of André is excluded from coverage pursuant to the Workers' Compensation Act**.

In its motion for summary judgment, Greenwich asserts that the Workers' Compensation Exclusion within the Greenwich Umbrella Policy bars coverage for the claim asserted by André in the Underlying Acton.[26] In the response in opposition, Erie denies this assertion by stating that the claim advanced by André falls outside of the Workers' Compensation Act.[27] To determine whether or not the André claim is barred, this Court must first determine whether the Greenwich Umbrella Policy excludes from coverage any liability compensable under The Workers' Compensation Act. Thus, the Court turns its attention to the pertinent provison of the Greenwich Umbrella Policy,

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[25] Samantha L. André, individually and as administratrix of the Estate of Jeremy J. André, and on behalf of Minor Child, Logan André, v. Blue Mountain Recycling, LLC *et al.*, Case No. 1002-03525, Exhibit D to the first complaint of Erie.
[26] Motion for summary judgment of Greenwich, ¶ 48.
[27] Response of Erie in opposition to the motion for summary judgment of Greenwich, ¶ 48.

keeping in mind that "[t]he interpretation of an insurance policy is ... a question of law for the court."[28] The Greenwich Umbrella Policy states:

> IV. EXCLUSIONS
> ***
>
> B. Various Laws
>
> Under Coverages ... and B, **this insurance does not apply** to any liability under any of the following:
>
> ***
>
> 2. **any Workers' Compensation**, Unemployment Compensation, or Disability Benefits Law, or any similar **law**.[29]

This clear and unambiguous contractual provison shows that the Named Insurer –in this case Chesmont– agreed to exclude from coverage any liability falling within the ambit of **any** Workers' Compensation law. Having determined that any liability falling within the ambit of **any** Workers' Compensation law is excluded from coverage, the next task requires a careful reading of the pertinent Workers' Compensation law –in this case the Workers' Compensation Act, 77 P.S. § 481:

> **§ 481. Exclusiveness of remedy; actions by and against third party; contract indemnifying third party.**
>
> (a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, [*sic*] his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.
>
> (b) In the event injury or death to an employe [*sic*] is caused by a third party, then such employe, [*sic*] his legal

[28] Adelman v. State Farm Mut. Auto. Ins. Co., 255 Pa. Super. 116, 123, 386 A.2d 535, 538 (1978).
[29] Greenwich Umbrella Policy, Exhibit A to the complaint—IV. Exclusions, p. 4 (emphasis supplied).

> representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but **the employer, his insurance carrier, their servants and agents, employes, [*sic*] representatives acting on their behalf or at their request shall not be liable to a third party for damages, contribution, or indemnity in any action at law**, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.[30]

The foregoing language, when read in conjunction with numerous court decisions holding that the Workers' Compensation Act is the sole means of recovery from an employer, convinces this Court that the claim asserted by the Estate of André in the Underlying Action is barred. The claim of negligence against Koons in the Underlying Action is barred because the first amended complaint thereof averred that Mr. André was killed in the scope of his employment under Chesmont. This allegation triggers the Workers' Compensation Exclusion within the Greenwich Umbrella Policy, and the exclusion operates in turn as a bar to the claim of negligence asserted against Koons d/b/a/ Miller Concrete in the Underlying Action.

BY THE COURT,

RAMY I. DJERASSI, J.

[30] Workers' Compensation Act, 77 P.S. § 481 (2017). The Courts of this Commonwealth have explained that The Workers' Compensation Act "is the sole and exclusive means of recovery against employers for all injuries arising out of accidents occurring within the course of employment." Pollard v. Lord Corp., 664 A.2d 1032, 1033 (Pa. Super. 1995), aff'd, 548 Pa. 124, 695 A.2d 767 (1997). *See also*, Dennis v. Kravco Co.,761 A.2d 1204, 1205 (Pa. Super. 2000): "[a]s part of the quid pro quo of [the Act], an employee surrenders the right to sue an employer in tort for injuries received in the course of employment to obtain the benefit of strict liability.... If an injury is compensable under the Act, the compensation provided by th[e] Act is the employee's exclusive remedy.