

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

DOCKETED
DEC - 4 2017
R. POSTELL
COMMERCE PROGRAM

TEK GOOD LUCK, INC.	:	February Term, 2017
	:	Case No. 02444
<i>Plaintiff</i>	:	
	:	
v.	:	Commerce Program
	:	
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON	:	
SUBSCRIBING TO CERTIFICATE NO. BSA—42978	:	
and	:	Control No. 17081648
HENRY LEWIS	:	
	:	
<i>Defendants</i>	:	

ORDER

AND NOW, this 4th day of December, 2017, upon consideration of the motion for summary judgment of defendants, Certain Underwriters at Lloyd's London who subscribe to Certificate No. BSA—42978, the response of plaintiff, which is also styled as a cross-motion for summary judgment, the respective *memoranda* of law, and the reply of defendants to the response of plaintiff, it is **ORDERED** as follows:

- I. the motion for summary judgment of defendants is **GRANTED**;
- II. the cross-motion for summary judgment of plaintiff is **DENIED**;
- III. the complaint of plaintiff is **DISMISSED**.¹

BY THE COURT,



RAMY I. DJERASSI, J.

¹ The proposed Order supplied by the moving defendants asks this Court to dismiss “all ... cross-claims” against them. After a careful review of the record, this Court could not find any cross-claims asserted against such defendants.



MEMORANDUM OPINION

The motion and cross-motion for summary judgment require this Court to determine whether defendants/insurers owe a duty to defend plaintiff in an underlying action. For the reason below, the Court finds that defendants/insurers do not owe such a duty.

BACKGROUND

In this declaratory judgment action, plaintiff is Tek Good Luck, Inc. (the “Insured”), a Philadelphia corporation engaged in the food take-out business. Corporate defendants are Certain Underwriters at Lloyd’s of London Subscribing to Certificate No. BSA—42978 (the “Insurer”), an entity engaged in commercial underwriting. At all times relevant to this action, the Insurer provided the Insured with a commercial insurance policy, No. BSA—42978 (the “Policy”). An individual, nominal defendant Henry Lewis (“Lewis”), is the plaintiff in an underlying action captioned Henry Lewis v. TEK Good Luck, Inc. and Penn Steak, Inc., case No. 1602-05044, filed in the Court of Common Pleas of Philadelphia County.

On April 13, 2015, Lewis walked into the take-out premises of the Insured. Once inside the premises, Lewis realized that cash had dribbled out of his pocket and fallen to the floor. As Lewis attempted to retrieve the cash, he was told by an unknown individual that the money was no longer his.² Lewis tried to call the police with his portable telephone but the device “was knocked out of his hand.”³ Lewis then asked the owner, agent or employee behind the counter “to call 911 immediately”; however, the

² Henry Lewis v. Tek Good Luck, Inc. and Penn Steak, Inc., case No. 1602-05044, Exhibit C to the instant complaint, ¶ 5.

³ Id.

person behind the counter merely invited Lewis and his assailant to “take it outside.”⁴ Lewis claims that he “was ... verbally assaulted and then physically assaulted by [the] unknown assailants, knocked to the ground and sustained serious, if not permanent injuries.”⁵

On March 4, 2016, Lewis commenced a civil action by filing a complaint against the Insured (the “Underlying Action”).⁶ The Insured promptly asked the Insurer to defend the Underlying Action; however, on March 16, 2016, the Insurer denied coverage and refused to defend the Insured in the Underlying Action. Specifically, the Insured denied coverage on grounds that “the claims asserted by ... [Lewis] involved injuries precipitated by the tortious and possibly criminal acts of the alleged ‘unknown assailants,’ all of which falls [*sic*] within the assault and battery exclusion [of the insurance policy].”⁷

Subsequently, Lewis filed on December 22, 2016 an amended complaint in the Underlying Action. The amended complaint asserts against the Insured the claim of negligence. Under this claim, Lewis avers *inter alia* that the Insured failed to monitor the “activities and behavior” of its employees and “unknown assailants,” failed to “remove dangerous conditions and persons from the premises,” failed to “warn Lewis of the dangerous condition” therein, and “failed to maintain security cameras and personnel, and to notify the police.”⁸ Finally, the amended complaint in the Underlying Action also alleges that—

⁴ Id.

⁵ Id.

⁶ Henry Lewis v. Tek Good Luck, Inc. and Penn Steak, Inc., Case No. 1602-05044, Exhibit C to the Complaint.

⁷ Denial of Coverage dated March 16, 2016, found at Exhibit 3 to the motion for summary judgment of defendant/Insurer.

⁸ Id. at ¶ 16.

[o]n prior occasions police had been called to the scene of ... [the Insured's] place of business for various deeds of misconduct and for criminal and/or disorderly conduct requiring the police to be called to prevent harm and/or injury to other patrons so that ... [the Insured was] on alert and notice with respect to potential harm to be caused to their business invitees.⁹

At some point thereafter, the Insured tendered to the Insurer the amended complaint from the Underlying Action. Once again, the Insurer denied coverage by issuing a document named Reiteration of Denial of Coverage. This document specifically states that the insurance policy—

excludes coverage for the claims asserted by Mr. Lewis as all the claims asserted involve injuries out of assault and/or batter by the unknown assailants. Additionally, the Assault and Battery Exclusion specifically excludes claims arising out of any alleged negligent act or omission in the prevention or suppression of any act of assault and/or battery. The claim that ... [the Insured] was negligent in failing to provide a safe location despite knowledge of prior criminal acts falls directly within the exclusion. As such ... [the] Policy does not provide coverage for this loss and ... [the Insurer] again den[ies] any obligation exists to indemnify of defend [the Insured]....¹⁰

Subsequently, on February 8, 2017, the Insured commenced the instant “Declaratory Judgment Action” which names as defendants both the Insurer and Lewis.¹¹ Through this Declaratory Judgment Action, the Insured prays for an Order compelling the Insurer to defend and indemnify the Insured in the Underlying Action.

On August 14, 2017, the Insurer filed a motion for summary judgment asking the court to dismiss the instant Declaratory Judgment Action. On September 13, 2017, the

⁹ *Id.* at ¶ 7.

¹⁰ Reiteration of Denial of Coverage, Exhibit B to the instant complaint.

¹¹ As a nominal defendant, Lewis also filed an Answer to the complaint of the Insured. The Answer of Lewis agrees with the request for relief as articulated by the Insured, and contains no cross-claims asserted against Certain Underwriters at Lloyd's of London Subscribing to Certificate No. BSA--42978.

Insured filed a response in opposition, which is also styled as a cross-motion for summary judgment. On the following day, September 14, 2017, nominal defendant Lewis also filed a response to the motion for summary judgment of the Insured. In this response, Lewis “joins and incorporates by reference” the response of the Insured to the motion for summary judgment of the Insurer.¹²

DISCUSSION

In the motion for summary judgment, the Insurer argues that the claims asserted by Lewis in the Underlying Action are excluded from coverage pursuant to the assault and battery provision contained in the Policy.¹³ In the response in opposition, the Insured denies that the assault and battery provision precludes coverage; instead, the Insured argues that the claim of negligence asserted by Lewis in the Underlying Action is a covered occurrence under the Policy. The argument advanced by the Insured is rejected.

Preliminarily, the Court notes that to determine whether an insurer has a duty to defend an underlying action—

the factual allegations of the complaint are taken to be true and the complaint is to be liberally construed with all doubts as to whether the claims may fall within the coverage of the policy to be resolved in favor of the insured. Thus, [the court] ...**must look to two sources to decide whether a duty to defend exists.** [The court] ... **must interpret the insurance policy to determine the scope of coverage. Then, [the court] ... must analyze the complaint filed against the insured to determine whether the claims asserted potentially falls [sic] within that coverage.**¹⁴

¹² Response of nominal defendant Lewis to the motion for summary judgment of defendant Certain Underwriters at Lloyd’s of London Subscribing to Certificate No. BSA–42978.

¹³ Motion for summary judgment the Insured, ¶ 15.

¹⁴ Biborosch v. Transamerica Ins. Co., 603 A.2d 1050, 1052 (Pa. Super. 1992) (emphasis supplied).

Moreover,

the particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered.

[T]o allow the manner in which the complainant frames the request for redress ... would encourage litigation through the use of artful pleadings designed to avoid exclusions in liability insurance policies.¹⁵

Applying the two-source method articulated in Biborosch, supra, this Court first interprets the Policy to determine the scope of coverage, keeping in mind that “[t]he interpretation of an insurance policy is ... a question of law for the court.”¹⁶ The Court then analyzes the Underlying Complaint to determine whether the claim asserted therein by Lewis falls within coverage. The pertinent provision in the Policy states as follows:

LL0001

ASSAULT AND BATTERY EXCLUSION

Notwithstanding anything in the policy to the contrary, it is understood and agreed that this insurance excludes claims arising out of:

- A. Assault and/or Battery committed by any person
whosoever....
- B. Any actual or alleged act or omission in the:
 - 1. Employment;
 - 2. Investigation;
 - 3. Supervision;
 - 4. reporting to the proper authorities or failure to so report;

¹⁵ Mutual Benefit Insurance Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999) (emphasis supplied).

¹⁶ Adelman v. State Farm Mut. Auto. Ins. Co., 255 Pa. Super. 116, 123, 386 A.2d 535, 538 (1978).

- or
5. Retention;

Of a person for whom any insured is or ever was legally responsible, which results in Assault and/or Battery.

- C. Any Actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.¹⁷

The clear language of this provision leaves no doubt: any assault and/or battery committed by any person whosoever is excluded from coverage under the Policy. Next, the Court turns to the factual allegations in the Underlying Action to determine whether the claims asserted there are covered under the policy, or excluded. The amended complaint in the Underlying Action states in pertinent part that Lewis—

was ... physically assaulted by unknown assailants, knocked to the ground and sustained serious, if not permanent injuries....¹⁸

The factual allegations in the Underlying Action clearly show that although Lewis framed his request for redress in the style of a negligence claim, his injuries were the proximate result of an assault which an unknown assailant committed against him within the premises occupied by the Insured. Thus, the issue presented by the motion and cross-motion for summary judgment can be logically resolved as follows:

Major Premise: The instant Policy excludes assault and/or battery from coverage;

Minor Premise: The injury suffered by Lewis resulted from an assault and/or battery;

Conclusion: The injury suffered by Lewis is excluded from coverage.

¹⁷ Insurance Policy No. BSA—42978, Assault and Battery Exclusion, LLO001, Exhibit 1 to the motion for summary judgment of defendant Insured.

¹⁸ Amended complaint of Lewis in the Underlying Action, ¶ 5.

This conclusion is further justified after a straightforward reading of another section of the Assault and/or Battery provision contained in the Policy. The final paragraph therein states that “**this insurance [policy] excludes claims arising out of ... [a]ny actual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.**”¹⁹ In this case, Lewis alleges *inter alia* in the Underlying Action that the Insured—

[failed] to maintain employees security staff at the location where ... [the] incident occurred;

[allowed] unknown assailants to enter [the] establishment when [the Insured] Should have known of the violent tendencies attributable to these unknown assailants;

[failed] to properly police the area....;

[failed] to warn [Lewis] ... of the dangerous conditions which existed at the location where [the] ... incident occurred;

[failed] to properly protect ... [Lewis] as business invitee....²⁰

The additional comparison between the language of the Policy and the language found in the amended complaint of the Underlying Action reveals that the negligence claim asserted therein cannot trigger coverage under this Policy. The claim does not merit coverage because the pertinent section of the Assault and/or Battery provision in the Policy specifically excludes from coverage the type of claim asserted by Lewis in the

¹⁹ Insurance Policy No. BSA—42978, Assault and Battery Exclusion, LLO001, Exhibit 1 to the motion for summary judgment of defendant Insured, at ¶ C. (emphasis supplied).

²⁰ Amended complaint of Lewis in the Underlying Action, ¶ 16.

Underlying Action –that is, “[a]ny [a]ctual or alleged negligent act or omission in the prevention or suppression of any act of Assault and/or Battery.”²¹

For this additional reason, the motion for summary judgment filed by the Insurer is granted and the cross-motion for summary judgment filed by the Insured is denied.

BY THE COURT



RAMY I. DJERASSI, J.

²¹ Id., at § C (emphasis supplied).