

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

U.S. UNDERWRITERS INSURANCE
COMPANY,

Plaintiff,

v.

GEORGE H. IMHOF POST 153 OF
THE AMERICAN LEGION STATE OF
PA, LLC, DAVID V. BOGDAN,
ADMINISTRATOR of the ESTATE of
LUKE ELLINGTON, DECEASED,
AMERICAN LEGION POST 153
HOME ASSOCIATION d/b/a, a/k/a
GEORGE H. IMHOF POST NO. 153 OF
THE AMERICAN LEGION OF THE
STATE OF PENNSYLVANIA d/b/a,
a/k/a CLUB 153 d/b/a, a/k/a POST 153,
AMERICAN LEGION DEPARTMENT
OF PENNSYLVANIA, INC. and THE
AMERICAN LEGION,

Defendants.

MARCH TERM, 2020

No. 2803

COMMERCE PROGRAM


CONTROL NUMBER 21021101

ORDER

AND NOW, this 30th day of June 2021, upon consideration of the Motion for Summary Judgment of Plaintiff, U.S. Underwriters Insurance Company, defendant's response thereto, and in accord with the attached Opinion, it is hereby **ORDERED AND DECREED** that the Motion for Summary Judgment is **GRANTED**. Plaintiff U.S. Underwriters Insurance Company does not have a duty to defend or indemnify its insured, George H. Imhof Post No. 153 of The American Legion of the State of Pennsylvania, for the claims asserted in the civil action captioned David V. Bogdan, Adm. of Estate of Luke Ellington v. American Legion Post 153 et al, PCCP No. November Term 2017, No. 02643 ("the Underlying Action").

It is further **ORDERED** that U.S. Underwriters may terminate the proffered legal defense of Post 153 in the *Bogdan* action.

BY THE COURT



NINA W. RADILLA, S.J.

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OPINION

Plaintiff, U.S. Underwriters Insurance Company (“Underwriters”) initiated this declaratory judgment action seeking a declaration that it has no duty to defend or indemnify its insured, George H. Imhof Post No. 153 of the American Legion of the State of Pennsylvania (“Post 153”), in the action captioned, David V. Bodgan, Adm. of the Estate of Luke Ellington v. American Legion Post 153 Home Association, dba George H. Imhof Post No. 153, et al., PCCP No. November Term, 2017, No. 02643. For the reasons discussed below, Underwriters’ motion for summary judgment is granted.

BACKGROUND

I. Underlying Complaint

On Friday evening, July 29, 2016, Luke Ellington, the decedent, traveled from his home in South Philadelphia to American Legion Post 153 Home Association (“Post 153”).¹ Post 153 is located at 2514-18 S 24th Street, Fl 2 and is in the business of selling, supplying, providing and serving alcoholic beverages to members, customers and patrons.² In the early hours of Saturday, July 30, 2016, Sovranna Sem (hereinafter “Mr. Sem”), entered Post 153 visibly intoxicated and continued to consume alcoholic beverages sold to him by Post 153 employees.³ Mr. Sem exhibited signs of visible intoxication including an altered gait, stumbling, bloodshot eyes, and unwanted and violent physical behavior: pushing and shoving other customers in Post 153, forcing other patrons off of barstools, and picking up male and female patrons.⁴ Mr. Sem while visibly intoxicated approached Luke Ellington, the decedent, and began punching him in the face.⁵ After the assault, Post 153 employees ejected both Mr. Sem and Mr. Ellington from the establishment and did not call the police.⁶ Immediately upon departing Post 153, Mr. Sem fatally shot Mr. Ellington multiple times in the chest.⁷ Mr. Ellington was transported to the hospital where he died as a result of his injuries.⁸

On November 28, 2017, decedent’s estate filed a wrongful death and survival action against Post 153 and various other defendants in the Court of Common Pleas of Philadelphia County seeking damages for the bodily injury suffered by decedent related to Post 153’s service

¹ See Underlying Complaint ¶ 37.

² See *id.* ¶ 12.

³ See *id.* ¶¶ 39-41, 42, 46.

⁴ See *id.* ¶ 44.

⁵ See *id.* ¶ 47.

⁶ See *id.* ¶¶ 48-49.

⁷ See *id.* ¶ 54.

⁸ See *id.* ¶ 55.

of alcohol. Underwriters is currently providing a defense to Post 153 in the underlying action under a reservation of rights. Since the filing of the complaint by decedent's estate, the complaint has been amended on two occasions, discovery is completed, expert reports have been exchanged and the parties have attempted to mediate the case. Additionally on September 17, 2019, Underwriters filed a petition to intervene in the underlying action in order to participate in drafting of the verdict sheet to ensure that the claims were properly separated for jury deliberation. The petition to intervene was denied and Underwriters appealed. On June 23, 2021, the Superior Court reversed the trial court and ordered that Underwriters be permitted to intervene.

II. Policy

Underwriters issued a Liquor Liability Coverage Policy ("Policy") to Post 153, No. CL 3569672A, for the coverage period of January 27, 2016, through January 27, 2017.⁹ The policy provides as follows:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "injury" to which this insurance does not apply.¹⁰ (

The Policy contains an endorsement with an Absolute Firearms Exclusion ("AFE") which provides in pertinent part as follows:

⁹ See Decl. J. Compl. Ex. B.

¹⁰ Exhibit "E" to Underwriter's motion for summary judgment- Underwriters policy at 1 of 16.

This insurance does not apply to “injury”¹¹, including cost of defense, for any claim or “suit”¹² arising or resulting from directly, or indirectly, the use of firearms of any kind.

This exclusion applies to any “injury”, claim or “suit” regardless of whether the use of firearms is a direct cause, a contributing cause or a concurrent cause of any loss.¹³

On April 1, 2020, Underwriters filed this action for declaratory judgment against its insured, Post 153 and various other defendants including the Estate of Luke Ellington seeking a declaration that it does not have a duty to defend or indemnify Post 153 in the underlying action. On January 19, 2021, Underwriters filed a judgment by default against Post 153 for failure to file an answer to the complaint. On February 9, 2021, Underwriters filed a motion for summary judgment seeking a declaration that it does not have a duty to defend or indemnify Post 153 in the underlying action. The Estate of Luke Ellington filed a response to the motion on March 18, 2021, and the motion is now ripe for decision.

DISCUSSION

The standard for summary judgment is well established in Pennsylvania:

We view the record 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. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered.¹⁴

¹¹ The policy defines “injury” as damages because of bodily injury...” See Exhibit “B” to Underwriter’s motion for summary judgment, page 5 of 6.

¹² The policy defines “suit” as a civil proceeding in which damages because of “injury” to which this insurance applies are alleged. See Exhibit “B” to Underwriter’s motion for summary judgment, page 5 of 6.

¹³ Exhibit “C” to Underwriters’ motion for summary judgement.

¹⁴ *Pappas v. Asbel*, 768 A.2d 1089, 1985 (Pa. 2001).

Pa. R.C.P. 1035.2 sets forth the principle that a motion for summary judgment is based on the evidentiary record which entitles the moving party to judgment as a matter of law.¹⁵

The standard applied in reviewing insurance contracts is also well settled. Insurance policies are contracts, and the rules of contract interpretation provide that the mutual intention of the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract.¹⁶ As it pertains to the duty to defend, it is a distinct obligation, separate and apart from the insurer's duty to provide coverage.¹⁷ An insurer has a duty to defend the insured against any suits arising under the policy "even if such suit is groundless, false, or fraudulent."¹⁸ The duty to defend is present whenever the complaint filed by the injured party may potentially come within the coverage of the policy.¹⁹ An insurer may not justifiably refuse to defend a claim against its insured 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. The "factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured."²⁰ "Accordingly, even 'if there are multiple causes of action and one would potentially constitute a

¹⁵ Pa. R.C.P. 1035.2.

¹⁶ *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa.584, 2 A.3d 526, 540 (2010). See also *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888, 893 (2006)

¹⁷ *Id.* at 540.

¹⁸ See *Britamco Underwriters Inc. v. Weiner*, 636 A.2d 649, 651 (quoting *Gedeon v. State Farm Mutual Automobile Ins. Co.*, 188 A.2d 320, 321 (Pa. 1961)).

¹⁹ *Id.*

²⁰ *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, *supra* at 540.

claim within the scope of the policy's coverage, the insurer would have a duty to defend until it could confine the claim to a recovery excluded from the policy.”²¹

When an insurer relies upon an exclusion to deny coverage, the insurer must bear the burden of proof to show that the exclusion is unambiguous under the circumstances so as to comport with the reasonable expectations of the insured.²² Where a policy limitation is ambiguous the limitation will be construed in favor of the insured.²³ When the policy language is clear and unambiguous effect will be given to the language of the contract.²⁴ Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. However, a contract provision is not ambiguous merely because the parties disagree on the construction of the provision.²⁵ Here, a comparison of the underlying complaint to the controlling language of the instant policy indisputably reveals that Underwriters does not have a duty to defend Post 153 in the underlying action.

In the case *sub judice*, this court is presented with an issue of first impression, the interpretation and application of the Absolute Firearms Exclusion. To date, there have been no reported Pennsylvania state court cases addressing the application of this exclusion. Underwriters argues that the AFE exclusion plainly and unambiguously removes coverage for any injury, claim or suit arising directly or indirectly from the use of firearms. Accordingly, Underwriters

²¹ *Jerry's Sport Center I*, 948 A.2d, 834, 846(Pa. Super. 2008) (quoting *Sclabassi v. Nationwide Mut. Fire Ins. Co.*, 789 A.2d 699, 703 n. 2 (Pa.Super.2001)). *See also Jerry's Sport Center II*, 2 A.3d at 541 (“As long as the complaint ‘might or might not’ fall within the policy's coverage, the insurance company is obliged to defend.”)

²² *Bishops, Inc. v. Penn Nat. Ins.*, 984 A.2d 982, 991 (Pa.Super. 2009).

²³ *See Bateman v. Motorists Mut. Ins. Co.*, 590 A.2d 281, 283 (Pa. 1991).

²⁴ *Id.*

²⁵ *See Weisman v. Green Tree Ins. Co.*, 670 A.2d 160, 161 (Pa. Super. Ct. 1996).

argues that since Mr. Sem shot the decedent causing his death the AFE exclusion bars any defense and coverage in the underlying action. (Underwriters brief p. 15). After reviewing the underlying complaint, policy language and the limited authority on AFE exclusion, this court agrees.

The AFE exclusion, while broad, is clear and unambiguous. The exclusion bars any claim for defense costs and coverage in any claim or suit where a firearm is used. The exclusion provides that any “injury, including defense costs, for any ‘claim’ or ‘suit’ arising or resulting from directly or indirectly the use of firearms of any kind” is not covered by the policy. The exclusion further extends this exclusion to apply to any “‘injury’, claim or ‘suit’ regardless of whether the use of the firearms is a direct cause, a contributing cause or a concurrent cause of any loss.” The AFE exclusion removes coverage irrespective of the theory of liability described in the underlying action including counts III, IV and V of the underlying complaint which allege claims sounding in Dram Shop liability. Based on the clear and unambiguous language of the AFE exclusion, no coverage exists for the underlying action since the decedent’s estate is bringing an action for decedent’s death which was caused by the use of a firearm.

The decedent’s estate argues that coverage exists under the policy because Underwriters has admitted that pre- shooting injuries are covered.²⁶ The pre- shooting injuries refer to the averment in the underlying complaint that Mr. Sem prior to shooting the decedent, punched the decedent in the face violently. The pre-shooting allegations do not exist in a vacuum and are

²⁶ Defendant argues that Underwriters made certain admissions in the Petition to Intervene and that said admissions require the denial of the instant motion. The alleged admissions do not qualify as a judicial admission because they are not admissions of fact but rather amount to legal theories or conclusions of law. *See, John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 714 (Pa.Super.,2003).

joined in the underlying complaint with allegations that immediately following the assault and battery, Mr. Sem shot decedent causing his death. The AFE exclusion is an absolute bar to Post 153's claim for defense and coverage because the exclusion applies when any "injury, claim or suit regardless of whether the firearm use was a direct, contributing or concurrent cause or whether the use of firearm is a direct or indirect cause of the injury, claim or suit". The only requirement for the exclusion to apply is that the "injury, suit or claim" be factually connected to the use of a firearm. The focus of the exclusion is on the instrumentality of the harm and what caused the injury.²⁷ Since one of the instruments used to cause decedent harm was a firearm, the exclusion applies and there is no coverage for the underlying claim. In reaching this determination, the court is taking the factual allegations of the underlying complaint as a whole in consideration to determine whether a duty to defend exists and the AFE exclusion applies. In doing so, the court is unable to ignore the allegation that a firearm was used.

Decedent's estate also argues that the AFE exclusion is ambiguous because the Underwriters policy provides coverage for assault and battery.²⁸ The existence of coverage for assault and battery does not create an ambiguity. While the policy at issue may provide coverage for assault and battery, the AFE exclusion carves out an exception to coverage for assault and battery claims – that is those that involve the use of firearms. Hence, the assault and battery and the AFE exclusion can coexist. The use of the firearm is what triggers the AFE exclusion.²⁹

²⁷ See *Wolf v. Ross*, 115 A.3d 880 (2015) citing *Pulleyn v. Cavalier Insurance Corporation*, 351 Pa. Super. 347, 505 A.2d 1020 (1986) (The insurer had no duty to defend a negligent entrustment claim against an employer under a casualty policy which contained an exclusion for personal injury arising from maintenance or use of an automobile operated by an employee in the course of his employment because it was the use of the vehicle that caused by the harm and not the negligent entrustment.)

²⁸ The dram shop causes of action allege an assault and battery.

²⁹ *Markel Intern. Ins. Co. v. 2421 Salam, Inc.*, 2009 WL 1220557 (March 31, 2009).

Underwriters need only establish that the use of the firearm was the “but for” cause of the fatal bodily injuries alleged in the underlying complaint for the AFE exclusion to apply.³⁰ Here, the underlying complaint does allege use of firearm and as a result, the AFE exclusion applies.

The court finds the reasoning in *Markel International Insurance Company v. 2421 Salam, Inc*³¹ instructive. In *Markel*, the court examined a firearm exclusion in relation to a shooting at a bar where two persons were shot and killed. The estates of the two victims filed lawsuits in state court alleging that the bar owners should have known about prior incidents of violence at the bar and should have taken reasonable precautions to protect those at the bar. The decedents' estates further claimed that the negligence and recklessness of the bar owners caused the decedents' death. Markel, which provided general commercial insurance to the bar, sought a declaratory judgment that it had no duty to defend or indemnify the bar due to a firearms exclusion as well as other exclusions within the policy.³²

The court in analyzing the language of the exclusion, stated that in order to preclude coverage, Markel must only establish that the “use or misuse of [a] firearm was a ‘but for’ cause of the fatal bodily injuries” alleged in the underlying state court complaints.³³ Since the use of the firearm was clear from the face of the complaint, the court held that Markel satisfied its burden of establishing the applicability of the exclusion. The court went on to hold that

³⁰ *Id.*

³¹ 2009 WL1220557. While *Markel* is not authoritative, it is persuasive especially since the parties have not directed the court nor has the court independently found any cases in Pennsylvania that address the Absolute Firearm Exclusion.

³² The existence of an assault and battery exclusion in the Markel policy is of no consequence given the absolute and blanket exclusion of the AFE exclusion.

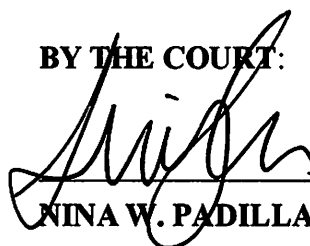
³³ *Id.* at *9.

“Notwithstanding the applicability of any other Policy exclusion” the firearms exclusion alleviated Markel of any duty to defendant or indemnify the owners of the bar against the underlying action.³⁴ While the language of the AFE exclusion is not exactly the same as the firearms exclusion in *Markel*, the reasoning of the court applies nonetheless and is persuasive in that the use of the firearm and resultant injury need not be the only cause of injury for the AFE exclusion to apply. Based on the foregoing reasons, Underwriters does not have a duty to defend or indemnify Post 153 in the matter captioned David V. Bodgan, Adm. of the Estate of Luke Ellington v. American Legion Post 153 Home Association, dba George H. Imhof Post No. 153, et al., PCCP No. November Term, 2017, No. 02643.³⁵

CONCLUSION

For the foregoing reasons, plaintiff’s motion for summary judgment is granted.

BY THE COURT:



NINA W. PADILLA, S.J.

³⁴ *Id.* at *9.

³⁵ Since this court finds that the AFE exclusion alleviates Underwriters duty to defend and indemnify Post 153 against the underlying action, there is no need to address the other exclusions discussed in Underwriter’s motion for summary judgment.