

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

HARLEYSVILLE MUTUAL INSURANCE COMPANY : FEBRUARY TERM, 2007

v. : No. 3801

RITE AID CORPORATION, : (Commerce Program)
RITE AID OF PENNSYLVANIA, INC.,

:

RITE AID OF PENNSYLVANIA, INC. : OCTOBER TERM, 2007

v. : No. 3816

HARLEYSVILLE MUTUAL INSURANCE COMPANY, :
and CHIP CONSTRUCTION COMPANY, LLC

: Superior Court Docket
No. 540 EDA 2008

OPINION

Albert W. Sheppard, Jr., J.....July 9, 2008

This Opinion is submitted relative to the appeal of Harleysville Mutual Insurance Company (“Harleysville”) from this court’s Order dated February 8, 2008, which held that Harleysville owed a duty to defend to Rite Aid in an underlying action. For the reasons discussed, this court respectfully submits that its decision should be affirmed.

Background

Harleysville Mutual Insurance Company issued a Commercial General Liability (“CGL”) insurance policy to Chip Construction Co., LLC, (Policy NO. MP1 0Y3463), in effect for the period of March 2, 2003 through March 2, 2004. The Harleysville CGL

policy contains an Additional Insured Endorsement form CG 2033 (10/01), stating, in pertinent part:

- A. Section II- Who is An Insured is amended to include as an insured any person or organization for whom you [Chip Construction] are performing operations when you and such person or organization have agreed in writing, in a contract or agreement, that such person or organization be added as an additional insured under your policy. Such person or organization is added as an additional insured only with respect to liability arising out of your ongoing operations performed for that insured. A person's or organization's status as an insured under this endorsement ends when your operations for that insured are completed.¹

In addition, Harleysville issued to Chip Construction Co., LLC a Commercial Umbrella Liability insurance policy, referenced as policy number BEC-OY3463, in effect from March 2, 2003 through March 2, 2004. The Commercial Umbrella policy includes as an insured any person or organization with which Chip Construction agreed in writing to provide insurance for operations it performed or facilities it owned or used.²

On September 30, 2003, Chip Construction entered into a contract with Rite Aid of Pennsylvania, Inc. The scope of Chip Construction's contract with Rite Aid included installing a new curb and sidewalk and demolishing an existing building.³ In addition, Chip Construction agreed to procure liability insurance coverage in connection with work it performed for Rite Aid of Pennsylvania, Inc.⁴

The liability insurance was to cover claims for damages of bodily injury.⁵ The contract between Chip Construction and Rite Aid required Chip Construction to provide Rite Aid with a Certificate of Insurance identifying Rite Aid of Pennsylvania as an

¹ See Harleysville's Compl., ¶ 13.

² Id. at ¶ 15.

³ Answer of Defs., Ex. B, Scope of Work, A1 and B1.

⁴ See Harleysville's Compl. at ¶ 18.

⁵ Id. at Ex. 2, Rite Aid Agreement for Construction, 7A (1)(b).

additional insured.⁶ A Certificate of Liability Insurance was issued on October 16, 2003, naming Rite Aid Corporation (not Rite Aid of PA) as an additional insured (on Harleysville Policy Number MP10Y3463 with excess coverage also afforded by Harleysville Mutual Insurance Company).⁷

On January 29, 2005 Dennis Helverson and his wife, Deborah Helverson, commenced a lawsuit against Rite Aid Corporation, Rite Aid of Pennsylvania, Inc., the City of Philadelphia, the Commonwealth of Pennsylvania, and the Pennsylvania Department of Transportation.⁸ The complaint stated that on or about February 20, 2004, the Helversons were “lawfully traversing the sidewalk of defendants’ property located on Levick Street when suddenly and without warning plaintiff was caused to trip and fall due to a defective and dangerous depression and cracked and/or broken cement, in the aforesaid sidewalk.”⁹ As a result of the aforesaid accident, the Helversons claimed to sustain serious personal injuries.¹⁰

On November 15, 2006, Rite Aid tendered its defense in the Helverson case to Chip Construction and Harleysville Mutual Insurance Company. After no response from either party, on January 15, 2007, Rite Aid again tendered its defense. On February 28, 2007, Harleysville denied Rite Aid’s tender for defense. On March 20, 2007, the Helversons settled their claim against Rite Aid.

⁶ Id. at Ex. 2, Rite Aid Agreement for Construction, 7A (4).

⁷ See Resp. of Rite Aid Corp. and Rite Aid of Pennsylvania, Inc., at B8. See also Id., at Exhibit C.

⁸ See Helversons’ Compl., Civil Cover Sheet.

⁹ See Helversons’ Compl., ¶ 8.

¹⁰ See Helversons’ Compl., ¶ 13-16 and 19-20.

Harleysville brought a declaratory judgment action seeking the court to declare that it had no duty to defend Rite Aid in the underlying claim of the Helversons. Rite Aid answered with a counterclaim asking the court to declare that Harleysville did have a duty to defend. Harleysville moved for Summary Judgment and Rite Aid filed a Cross-Motion for Partial Summary Judgment. On February 8, 2008, this court denied Harleysville's motion and granted Rite-Aid's motion, holding that Harleysville Mutual Insurance Company owed Rite Aid of Pennsylvania, Inc. a duty to defend with respect to the underlying claims of the Helversons. This timely appeal followed.

Discussion

After the relevant pleadings are closed, but within such time as to not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, 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. Pa.R.C.P. 1035.2. Summary judgment should be granted only where the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.¹¹

Under Pennsylvania law, if the factual allegations of the complaint against the insured state a claim which would potentially fall within the coverage of the policy, then

¹¹ The Peoples Natural Gas Co. v. Pennsylvania Pub. Util. Comm'n, 123 Pa. Commw. 481, 487 (1989).

the insurer has the duty to defend.¹² An insurer agrees to defend the insured against any suits arising under the policy even if such suit is groundless, false, or fraudulent.¹³

Because the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.¹⁴

When a court is deciding whether a duty to defend exists, it must compare the allegations in the complaint with the provisions of the insurance contract and determine whether, if the complaint allegations are proven, the insurer would have a duty to indemnify the insured.¹⁵ In the event that the complaint alleges a cause of action which may fall within the coverage of the policy, the insurer is obligated to defend.¹⁶ In making this determination, 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.¹⁷ The duty to defend remains with the insurer until it is clear that the claim has been narrowed to one beyond the terms of the policy.¹⁸

Under Chip Construction's insurance policy with Harleysville, two requirements must be satisfied in order for Rite Aid of Pennsylvania to be considered an additional insured. First, Chip Construction must have been performing work for Rite Aid of Pennsylvania. Second, Chip Construction and Rite Aid of Pennsylvania must have agreed in writing to add Rite Aid of Pennsylvania as an additional insured.

¹² Biboroch v. Transamerica Ins. Co., 412 Pa. Super. 505, 603 A.2d 1050, 1052 (1992).

¹³ Am. States Ins. Co. v. State Auto Ins. Co., 1998 Pa. Super. LEXIS 3687, 721 A.2d 56, 59 (1998).

¹⁴ Id.

¹⁵ UnionAmerica Insurance Company, Ltd. V. J.B. Johnson, et al., 2002 Pa. Super. 273, 806 A.2d 431, 433 (2002).

¹⁶ Id.

¹⁷ Id., at 434.

¹⁸ Id.

Chip Construction was performing work for Rite Aid of Pennsylvania. Rite Aid claims that the Agreement for Construction entered into between Chip Construction and Rite Aid of Pennsylvania, Inc. provided for the expansion of the existing store by the demolition of a recently acquired building at the rear of 4010 Levick Street and the erection of a new addition to the store in place of the demolished building. Rite Aid also claims that as part of that Agreement, the Scope of Work required Chip Construction Company to install new curbs and sidewalks around the property, including the sidewalk adjacent to the 4010 Levick Street property where Mr. Helverson claims he fell.¹⁹

Chip Construction and Rite Aid had an agreement in writing to add Rite Aid of Pennsylvania as an additional insured under Chip Construction's insurance policy with Harleysville. Rite Aid of Pennsylvania admits that Rite Aid Corporation was named on the Certificate of Liability Insurance as the additional insured despite the fact that the Agreement for Construction was between Chip Construction Company and Rite Aid of Pennsylvania, Inc. Yet, it claims that it is understood that Rite Aid of Pennsylvania was the additional insured and that the identification of Rite Aid Corporation on the Certificate of Liability Insurance was simply a clerical error. Rite Aid of Pennsylvania claims that the parties previously stipulated to the dismissal of Rite Aid Corporation and that steps are currently underway to correct the identification of the parties in the consolidated caption.²⁰

Accepting as true Rite Aid's claims regarding the scope of the work Chip Construction was performing, and that it is simply because of a clerical error that Rite Aid Corporation, instead of Rite Aid of Pennsylvania, is the additional insured named on

¹⁹ Answer of Defs., at ¶ 29.

²⁰ Resp. of Rite Aid Corp. and Rite Aid of Pennsylvania, Inc. at 14, n.1.

the Certificate of Liability insurance, the Court finds that the underlying action against Rite Aid may potentially come within its purported insurance policy with Harleysville as an additional insured of Chip Construction. Accordingly, Harleysville Mutual Insurance Company owed Rite Aid of Pennsylvania, Inc. a duty to defend with respect to the underlying action.

Conclusion

For these reasons, this court respectfully submits that its decision should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.