

**Market, Intl. Ins. Co., Ltd. v  
Musto**

2007 NY Slip Op 32156(U)

July 9, 2007

Supreme Court, New York County

Docket Number: 0106643/2005

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MARKET INTERNATIONAL INSURANCE COMPANY,  
 LTD.,  
 Plaintiff,

Index No.: 106643/05

Motion Date: 03/20/07

Motion Seq. No.: 01

- v -

MICHELLE MUSTO and THE GREY LAKE, INC.  
 t/a METRO 53,  
 Defendants.

Motion Cal. No.: 138

NYS SUPREME COURT  
 RECEIVED  
 JUL 17 2007  
 IAS MOTION  
 SUPPORT OFFICE

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	<u>1, 2</u>
Answering Affidavits - Exhibits	<u>3, 4</u>
Replying Affidavits - Exhibits	<u>5 -7</u>

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk  
 and notice of entry cannot be served based hereon. To  
 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room  
 41B)

Cross-Motion:  Yes

Upon the foregoing papers,

The court shall grant the plaintiff insurer's motion for summary judgment in this action declaring that the plaintiff owes no duty of defense and indemnification for the underlying claim by defendant Michelle Musto.

In February 2005, defendant Michelle Musto sued The Grey Lake, a restaurant/bar, in Supreme Court, Bronx County, (Index No.: 07348/2005) (the "underlying action") for injuries suffered as a result of an incident at restaurant on February 22, 2004. It is uncontroverted that plaintiff issued a CGL policy to Grey

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Lake that was in force at the time of the occurrence.

The policy contained an "Assault and Battery Exclusion" that provided in pertinent part that

The coverage under this policy does not apply to any claim, suit, cost or expense arising out of assault and/or battery, or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of any Insured or Insured's employees, patrons or any other person. Nor does this insurance apply with respect to any charges or allegations of negligent hiring, training, placement or supervision. Furthermore, assault and/or battery includes "bodily injury" resulting from the use of reasonable force to protect persons or property.

Plaintiff disclaimed coverage of defendant restaurant in the underlying suit alleging that the claims asserted therein were within this exclusion.<sup>1</sup> Defendant Grey Lake argues that the deposition testimony of Michelle Musto<sup>2</sup> and other witnesses raises an issue of fact as to cause of the incident and whether it is covered.

The Court of Appeals considered the interpretation of a similar assault and battery CGL insurance policy exclusion in U.S. Underwriters Ins. Co. v Val-Blue Corp., 85 NY2d 821 (1995).

The Court in pertinent part stated as follows:

Val-Blue employed Eugene DiSilvo, a retired New York City police officer, as a security guard in its nightclub. In

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<sup>1</sup> The plaintiff prior to oral argument abandoned its application for summary judgment on the grounds of late notice.

<sup>2</sup> Defendant Michelle Musto did not submit any papers in opposition to the motion.

the early morning hours of February 3, 1990, Hanley, an off-duty police officer, apprehended a suspect outside the nightclub and, with gun drawn, brought the suspect into the club in order to use the telephone. DiSilvo, in his capacity as the club's security guard, told Hanley to drop the gun and when Hanley did not do so, DiSilvo shot him twice. Hanley claims that he identified himself as a police officer prior to the shooting, but DiSilvo claims Hanley did so only after he was shot. In his suit for damages against Val-Blue and DiSilvo, Hanley alleged that DiSilvo "negligently, carelessly and recklessly" shot him. Hanley's complaint further charged respondeat superior, negligence in the hiring, supervision and training of employee DiSilvo, statutory violations and other claims.

\* \* \*

We agree with the Appellate Division that the language of the exclusion for suits "based on Assault and Battery" is unambiguous. Although respondents acknowledge the intentional nature of assault and battery under New York law, they claim the act of shooting Hanley--twice--was merely negligent, careless or reckless because there was no intention to shoot a police officer. The lack of DiSilvo's intent to cause the actual harm that resulted, however, is irrelevant in determining the intentional nature of his act. The injury being sued upon here is an assault and battery. The plethora of claims surrounding that injury, including those for "negligent shooting" and "negligent hiring and supervision" are all "based on" that assault and battery without which Hanley would have no cause of action.

Id. at 822 -823.

In a subsequent case, the Court further elaborated upon its decision in Val-Blue stating

The Val-Blue Court refused to separate the police officer's theory of liability, i.e., negligent hiring and supervision, from the operative act of assault excluded from coverage under the policy. We held that inasmuch as the negligence claim could not be established without proving the underlying assault the exclusion applied. Similarly, though Hunter's claim sounds in negligence, the theory she asserts has little to do with whether the injury sought to be compensated was based on an assault excluded under the policy. Instead, the language of the

policy controls this question and while the theory pleaded may be the insured's negligent failure to maintain safe premises, the operative act giving rise to any recovery is the assault. While the insured's negligence may have been a proximate cause of plaintiff's injuries, that only resolves its liability; it does not resolve the insured's right to coverage based on the language of the contract between him and the insurer. Merely because the insured might be found liable under some theory of negligence does not overcome the policy's exclusion for injury resulting from assault.

Mount Vernon Fire Ins. Co. v Creative Housing Ltd., 88 NY2d 347, 351-352 (1996).

Therefore, as stated by the First Department, "it is the act giving rise to liability that is determinative, not the theories of liability alleged." U.S. Fire Ins. Co. v New York Marine and General Ins. Co., 268 AD2d 19, 23 (1st Dept 2000).

In the underlying action, the complaint alleges that Michelle Musto "was caused to be negligently, intentionally, wrongfully, willfully, maliciously and with gross negligence, physically detained, assaulted, beaten and battered on the property owned by THE GREYLAKE, INC d/b/a METRO 53 and was caused to sustain sever and permanent injuries." The other causes of action allege intentional infliction of emotional harm resulting from the occurrence and negligent supervision.

The court agrees with plaintiff that the claims in the underlying action fall within the assault and battery policy exclusion. As in Val-Blue and Mount Vernon Fire, the "the operative act giving rise to any recovery is the assault." If the plaintiff in the underlying action was not assaulted, there

is no basis for recovery upon that complaint as pled. The act giving rise to defendant's liability in the underlying suit is the alleged assault upon Michelle Musto. While defendant may ultimately prove not to be liable for any assault or battery, such a finding merely absolves the defendant of liability; it does not create coverage under a policy that specifically excludes such risks. The flaw in defendant's argument is the focus on the evidence in the underlying action rather than the basis of the claims raised by the injured party. Val-Blue and Mount Vernon Fire make clear that it is the basis of liability as asserted in the complaint that governs the duty of the insurer, not the evidence produced during discovery.

Defendant's reliance upon the decision in Mumford v 854 Gerard Ave. Corp. (2005 NY Slip Op 52299(U), 820 NYS2d 844 [Sup Ct, Bronx County, Dec 19, 2005, Billings, J.]), is misplaced. In that case, the court held

A reasonable interpretation of plaintiff's claims is that plaintiff was injured by intoxicated persons handling a sharp instrument at Triangle Realty's premises. This injury is not necessarily "inherent in" the alleged conduct, in contrast to a sole allegation that persons affirmatively engaged in a physical altercation with plaintiff or allegation of child molestation.

In any event, plaintiff's first cause of action alone requires Sirius America's defense of her entire action. Absent assaultive conduct, plaintiff retains a cause of action for a negligently inflicted injury from the wielding of a sharp instrument that stabbed, sliced, or otherwise cut her.

Id. (citations omitted)

In contrast to Mumford, Michelle Musto's claim is based upon establishing that she was "physically detained, assaulted, beaten and battered." It is legally impossible for Musto to establish such facts without proving that assaultive conduct occurred. Therefore, unlike Mumford, absent assaultive conduct plaintiff in the underlying case has no claim and therefore the policy exclusion applies as a matter of law.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is GRANTED against all defendants and it is further

ORDERED, ADJUDGED and DECLARED that plaintiff MARKEL INTERNATIONAL INSURANCE COMPANY, LTD., has no duty to defend or indemnify MICHELLE MUSTO and THE GREY LAKE, INC. t/a METRO 53, in the action Musto v The Grey Lake, Inc., (Sup Ct, Bronx County, Index No.: 07348/2005) and the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: July 9, 2007

ENTER:

DEBRA A. JAMES S.C.  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).