[* 1]

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

PRESENT: SO ORDERED HON. CAROL EDMEAD PART 39

Index Number : 119044/2006

CHARTER OAK FIRE INSURANCE

VS

QBE INSURANCE CO

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/29/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
OCT 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion by defendant John Paterno, Inc. for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion by American Safety Insurance Co. for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for American Safety Insurance Co. shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

HON. CAROL EDMEAD

Dated: 10/16/07

J.S.C.

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

Check one: FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

---------- X

THE CHARTER OAK FIRE INSURANCE COMPANY and MEILMAN MANAGEMENT AND DEVELOPMENT, LLC,

Index No. 119044/06

Plaintiffs,

DECISION/ORDER

- against -

QBE INSURANCE COMPANY, G&P 418 CORP., AMERICAN SAFETY INSURANCE CO., PALENQUE, INC., JOHN PATERNO, INC., and SAMMY EL GAMAL,

Defendants.

---------- X

EDMEAD, CAROL, J.:

MEMORANDUM DECISION

This is an action for a declaratory judgment that defendant American Safety Insurance Co. (American) must defend and indemnify plaintiff Meilman Management and Development, LLC (Meilman) in an underlying action. Defendant John Paterno, Inc. (Paterno) is the insurance broker responsible for procuring the policy by American. Paterno moves and American cross-moves for summary judgment dismissing the causes of action pertaining to each.

Paterno was the insurance broker for defendant Palenque, Inc. (Palenque). Palenque operates a nightclub/bar in a building owned and/or managed by Meilman. Sammy El Gamal is a defendant in this action and the plaintiff in the underlying personal injury action against Meilman and Palenque, among others. Gamal alleges that he was assaulted in Meilman's building. After American, the insurer for Palenque, refused to defend and indemnify Meilman against Gamal's charges, Meilman and its insurer, plaintiff the Charter Oak Fire Insurance Company (Charter),

commenced this action.

The lease between Meilman and Palenque obligated Palenque to procure liability insurance naming Meilman as an additional insured. Plaintiffs allege that Meilman is an additional insured on the policy issued by American for Palenque. In the event of a determination that Meilman is not named as an additional insured on that policy, it is alleged that the omission is the fault of Paterno, Palenque's insurance broker.

The reasons given by American for its refusal to defend and indemnify Meilman were that the policy issued to Palenque did not name Meilman as an additional insured, and the policy did not cover damages caused by assault and battery. The first cause of action against American seeks a declaration that American is obligated to provide insurance coverage to Meilman in the underlying action and seeks attorneys' fees and related costs incurred in that action (Complaint,¶ ¶ 66-77). The second cause of action alleges that American must pay Charter, Meilman's insurer, for all damages that Charter may be obligated to pay in the underlying action (*id.*, ¶ ¶ 78-82).

The two causes of action against Paterno sound in breach of contract and negligent misrepresentation (*id.*, ¶ ¶ 99-114). Paterno allegedly failed in its duty to procure additional insured coverage for Meilman and led Meilman to believe that such insurance had been procured.

American's cross motion for summary judgment presents the argument that, even if Meilman were insured, it would not be entitled to defense and indemnity because of the policy exclusion for assault and battery. Pursuant to the policy:

> 'claims' or 'suits' to recover damages for 'bodily injury' ... arising from actual or alleged 'assault' and/or 'battery', as herein defined ... are excluded from coverage, and the Company is under no duty to defend or indemnify an insured regardless of

the degree of culpability or intent and without regard to:

a. Whether the acts are alleged to be by or at the instruction or at the direction of the insured, his officers, employees, agents or servants ...;

b. The alleged failure or fault of the insured, or his officers, employees, agents or servants, in the hiring, supervision, retention or control of any person ...;

c. The alleged failure or fault of the insured, or his officers, employees, agents, or servants, to attempt to prevent, bar or halt any such conduct"

(Notice of Cross Motion, Ex. C, at 4, 5).

The policy defines "assault" as "the apprehension of harmful or offensive contact" and "battery" as "harmful or offensive contact" (*id.*).

Gamal's complaint alleges that while on the premises, he "was grabbed, assaulted and struck about his head, body and limbs" by employees of defendants (Notice of Cross Motion, Ex. B, ¶ 15), and that he was "physically beat" by employees (*id.*, ¶ 19). The complaint also states that defendants were negligent in failing to properly instruct employees, in failing to exercise the proper caution and care required under the circumstances, and in failing to prevent and anticipate the incident.

It is well settled that an insurance company's duty to defend is broader than its duty to indemnify (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443 [2002]). The duty to defend does not depend on the insurer's ultimate duty to indemnify should the insured be found liable (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). Rather, the duty arises where the allegations of the complaint in the underlying action give rise to a reasonable possibility of coverage (*Frontier Insulation Contractors v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). The insurer will not be relieved of a duty to defend unless it

demonstrates that the allegations of an underlying complaint place that pleading solely and entirely within the exclusions of the policy and that the allegations are subject to no other interpretation (*Frontier Insulation Contractors,* 91 NY2d at 175; *Seaboard Sur. Co.*, 64 NY2d at 311; *Hotel des Artistes v General Acc. Ins. Co. of Am.*, 9 AD3d 181,187 [1st Dept 2004]).

"[I]f no cause of action would exist but for the assault, the claim is based on assault and the exclusion applies" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350 [1996]; *see U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821, 823 [1995]). Gamal's claims of negligence in the underlying action, including those alleging negligent training and supervision, arise out of the alleged assault and/or battery, and thus fall within the policy exclusion (*see Dudley's Rest. v United Natl. Ins. Co.*, 247 AD2d 425, 426 [2d Dept 1998]; *Tower Ins. Co. of N.Y. v Old N. Blvd. Rest. Corp.*, 245 AD2d 241, 242 [1st Dept 1997]). But for the alleged assault and battery, there would be no cause of action.

As Gamal's allegations fall squarely within the policy exclusion, American is not obligated to defend Meilman in Gamal's action. In addition, because of the policy exclusion, if Meilman were found liable for Gamal's injuries, American would not be obligated to provide indemnification. Resolution of American's motion does not require discussing whether Meilman is an additional insured under the policy. Even if Meilman were an additional insured, American would bear no duties towards it due to the exclusion. American's motion to dismiss the causes of action against it is granted.

Assuming that the allegations about Paterno are correct, Paterno is not liable toward plaintiffs. Even if Paterno had added Meilman to the policy, the policy would not cover Meilman in the Gamal case because of the exclusion. Therefore, Paterno's alleged failure to add

Meilman to the policy did not make any difference to Meilman.

Plaintiffs allege that Paterno misled Meilman through the certificate of insurance which names Meilman as an additional insured (Motion, Ex. C). The certificate of insurance provides that it is issued as a matter of information only, that it confers no rights upon the certificate holder, and that it does not amend, extend, or alter the coverage provided by the policies. A certificate of insurance is not a contract to insure and it is not conclusive proof that such a contract exists (*St. George v W. J. Barney Corp.*, 270 AD2d 171, 172 [1st Dept 2000]). The certificate did not provide Meilman with proof of coverage.

There is also the fact that the certificate of insurance, the only one produced as evidence in these motions, applies to the period ending June 28, 2002, while Gamal was injured in December 2002, after the policy period represented in the certificate ended. Meilman is seeking coverage for the following policy year. As the certificate does not apply to the policy period for which Meilman seeks coverage, Meilman was not entitled to rely on it as evidence of coverage.

The duty of an insurance broker runs to its customer and not to a third party, unless there is privity between the broker and the other party (*Arredondo v City of New York,* 6 AD3d 328, 329 [1st Dept 2004]; *see Federal Ins. Co. v Spectrum Ins. Brokerage Services,* 304 AD2d 316, 317 [1st Dept 2003]). Palenque was Paterno's customer. Plaintiffs allege nothing tending to support the idea of privity between Meilman and Paterno. They had no contractual relationship, and any contact between them that occurred in the course of Meilman obtaining the certificate of insurance did not give rise to the privity requisite to the imposition of liability for negligent misrepresentation (*see Benjamin Shapiro Realty Co. v Kemper Natl. Ins. Cos.*, 303 AD2d 245, 245-246 [1st Dept 2003]; *see also Parrott v Coopers & Lybrand, L.L.P.*, 95 NY2d 479, 483

[2000]). Additionally, where, as here, certificates of insurance contain disclaimers that they are for information only, they may not be used as predicates for a claim of negligent misrepresentation (*Benjamin Shapiro Realty Co.*, 303 AD2d at 246).

Plaintiffs present no triable issue as to whether Meilman has enforceable rights as a third-party beneficiary.

The movants have shown that they are entitled to summary judgment. Plaintiffs have not demonstrated the existence of any triable issues of fact. The motions for summary judgment dismissing the causes of action as against American and Paterno are granted.

In conclusion, it is

ORDERED that the motion by defendant John Paterno, Inc. for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion by American Safcty Insurance Co. for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action shall continue.

Dated: October 16, 2007

HON. CAROL EDMEAD

ENTER:

Carol Robinson Edmead, J..S.C.