Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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HONORATO ALARCO, ROSEMARY ALARCO and MICHAEL ALARCO,

Plaintiff(s),

Index No. 2273/07

Motion Submitted: 1/2/08
Motion Sequence: 001, 002

-against-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motion by plaintiffs, Honorato Alarco, Rosemary Alarco and Michael Alarco, pursuant to CPLR §3212, granting summary judgment in their underlying declaratory judgment action; and, cross motion by defendant, New York Central Mutual Fire Insurance Company, pursuant to CPLR §3212, for a judgment declaring that it is not obligated to indemnify the plaintiffs from and against the claims being asserted by Daniel Kelly and Christina DeFilippo; the motions are determined as follows:

Plaintiffs bring this action pursuant to CPLR §3001 for a judgment declaring that a homeowners' liability insurance policy obligates the defendant, New York Central Mutual Fire Insurance Company ("NYCM") to indemnify plaintiffs from and against all injuries and

damages arising from an action entitled ***Daniel Kelly, an infant over the age of fourteen years, by his Mother and Natural Guardian, Christina DiFilippo, and Christina DiFilippo individually v. Michael Alarco, an infant over the age of fourteen years, by his parents and natural guardians, Honorato Alarco and Rosemary Alarco; Honorato Alarco, individually, Rosemary Alarco, individually, Vincent Buscemi and Gladys Buscemi***, Index Number 002969/05, Supreme Court, Nassau County (hereinafter referred to as the "Kelly Lawsuit").

On March 9, 2004, defendant, NYCM issued and delivered to the plaintiffs a homeowners' general liability insurance policy, policy number Z771866, by which defendant agreed to insure the real property commonly known as 68 Park Avenue, Franklin Square, New York.

The insurance policy notes, in pertinent part, as follows:

SECTION II - LIABILITY COVERAGES

A. Coverage E - Personal Liability

If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

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SECTION II - EXCLUSIONS

* * *

E. Coverage E – Personal Liability And Coverage F – Medical Payments To Others

Coverages E and F do no apply to the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" which is expected or intended by an "insured" even if the resulting "bodily injury" or "property damage":

a. Is of a different kind, quality or degree than initially expected or intended; or

b. Is sustained by a different person, entity, real or personal property, than initially expected or intended.

However, this Exclusion **E.1.** does not apply to "bodily injury" resulting from the use of reasonable force by an "insured" to protect persons or property. ***

The term "Occurrence" is defined in the insurance policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in (a) 'bodily injury'; or, (b) 'property damage'."

On October 31, 2004, the infant plaintiff, Michael Alarco, allegedly recklessly caused serious physical injury to the infant plaintiff in the underlying suit, Daniel Kelly. Specifically, Michael allegedly shot a paint ball gun at the vehicle in which Daniel Kelly was a passenger, hitting and causing serious damage to Kelly's eye.

Following this incident, plaintiffs submitted a demand to the defendant, NYCM, that it defend the action and indemnify the plaintiff in accordance with the terms and conditions of the homeowners' insurance policy.

On December 16, 2004, NYCM issued a letter to the plaintiffs in which it informed them that with regards to the civil claims arising from the incident, it would continue to investigate the matter but under a reservation of rights. NYCM also stated that although it was not denying coverage, it was investigating the matter.

In February 2005, the Kelly lawsuit was commenced against the Alarcos. In their complaint, the Kellys pleaded two causes of action against the homeowners, Honorato and Rosemary Alarco; and one cause of action against Michael Alarco. In the first, plaintiffs alleged that the accident was "[c]aused solely and wholly by reason of the negligence, carelessness and recklessness of the defendants . . . in their negligent entrustment of the paintball gun to their son"; in the second, that the defendants Honorato and Rosemary Alarco were negligent, careless and reckless "[i]n failing to use and exercise reasonable care to restrain their son"; and in the third, that Michael Alarco was negligent, careless and reckless "[i]n his ownership, operation, management and control of the paint ball gun; in aiming the

gun at a person; in firing at a person; in firing at a person who was not wearing proper protection; . . . in assaulting the plaintiff; in recklessly and carelessly assaulting the plaintiff; in violation of the Penal Law of the State of New York §§ 120.00, 120.05 and 265.05."

On March 16, 2005, NYCM appointed counsel to defend the plaintiffs in the Kelly lawsuit.

At his oral examinations before trial, Michael Alarco testified that although he had used his paint ball gun prior to October 31, 2004 on several occasions, he always did so at a certified paint ball competition field. He stated that he owned a semi-automatic Tippman paint ball rifle, which has a hopper that holds 200 paint balls at a time. At the paint ball range, Michael wore protective equipment including a full face mask. He stated that he was fully aware of the risks of an unprotected individual and was aware that eye wear was necessary. He stated that if a fired paint ball hit skin it would leave either a welt or a bruise, depending upon the distance.

Michael Alarco testified that on October 31, 2004, he took his paint ball gun to his friend Erik Hernandez's house, which was hit with eggs almost every Halloween because of its proximity to the school. Between 9:00-10:00 p.m. he observed a "large mob" of unknown individuals that had formed across the street in the vicinity of a dark vehicle. He estimated that there were about seventy people, the majority of whom were in front of the house. Prior to firing that night, he had loaded his hopper, which held 200 paint balls. After eggs were thrown from the crowd, Michael took out the paint ball rifle from his knapsack and began firing. He fired about half the ammunition in his hopper, about 100 shots and of the 100 shots fired, he fired approximately six shots at the car containing Daniel Kelly. He observed a person hanging out of the back window of the car throwing eggs. He did not see if he hit anyone because it was dark. Michael testified that only three eggs were thrown from the car.

Michael testified that the crowd of people was initially surrounding the vehicle. The vehicle then made a U-turn and the crowd began to throw eggs. He began to fire into the crowd in the street before the car pulled to the curb. When the car pulled to the curb, Alarco saw an individual hanging out the back window throwing eggs. He stated that he hit the doors of the car a few times with paint balls.

This Court notes that Michael Alarco's deposition testimony of June 28, 2006 was signed by him and provides admissible evidence of the facts described. (cf ***Martinez v. 123-16 Liberty Avenue Realty Corp.***, 47 A.D.3d 901, 850 N.Y.S.2d 201 [2d Dept., 2008]).

Following the examinations before trial, defendant NYCM, on November 1, 2006, disclaimed coverage to the plaintiffs on the grounds that at his EBT, although Michael denied intending to injure Daniel Kelly, he admitted to having intentionally fired at the car containing the underlying plaintiff. Thus the basis provided for the denial of coverage was that the injury appeared to have resulted from the unintended consequences of an intentional act. Accordingly, NYCM denied coverage but stated that it would continue to provide a gratuitous defense in the Kelly lawsuit.

In bringing this declaratory judgment action, plaintiffs submit that according to the insurance policy issued by the defendant, the injury alleged in the Kelly lawsuit is within their coverage, as it was neither "expected" nor "intended" by plaintiff Michael Alarco. Therefore, plaintiff argues that defendant NYCM should be required to indemnify plaintiff for any settlement or judgment in connection with the Kelly lawsuit.

Defendant, in turn, maintains that its cross motion for a declaratory judgment that it is not obligated to indemnify the plaintiffs from and against the claims being asserted by Daniel Kelly and Christina DeFilippo should be granted.

Defendant maintains that the undisputed facts of this case fall squarely into the Expected or Intended Injury exclusion in the policy. Defendant argues that in this case, a nearsighted 14 year-old infant, has admitted to intentionally shooting dozens of rounds of paint palls into a crowd of people in the darkness on Halloween night, stopping only when he ran out of ammunition. The fact that one person in the crowd was injured could not be said to have been unexpected under any interpretation of the facts. Thus, the defendant argues that as a matter of law, the harm to Daniel Kelly, flowed directly and immediately from Michael Alarco's intentional acts, and his injuries were intentional and expected as a matter of law.

It is undisputed in this case that defendant is providing the plaintiffs with a defense in the Kelly lawsuit. Accordingly, to the extent that plaintiffs seek a declaratory judgment that NYCM owes them a defense in this Kelly Lawsuit, their motion is herewith denied as moot. The only issue remaining is whether NYCM's decision to disclaim indemnity coverage under the plaintiffs' homeowner policy is lawful. The critical question is whether the harm that resulted to Daniel Kelly from the acts committed on him by Michael Alarco could have been other than harm "intentionally caused" within the meaning of the policy exclusion.

It is well settled that the intentional/expected injury exclusion is "nothing more than a restatement of the requirement that the harm be the result of an accident for there to be coverage" (***Jubin v. St. Paul Fire and Marine Ins. Co.***, 236 A.D.2d 712, 653 N.Y.S.2d 454 [3dDept., 1997]; ***O'Connell v. State Farm Fire and Cas. Co.***, 2005 WL 1576793). "In

deciding whether a loss was the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen" (***Allegany Co-Op Ins. Co. v. Kohorst***, 254 A.D.2d 744, 678 N.Y.S.2d 424 (4th Dept., 1998) citing ***Miller v. Continental Ins. Co.***, 40 N.Y.2d 675, 677, 358 N.E.2d 258, 389 N.Y.S.2d 565 (1976); ***Agoado Realty Corp. v. United Int'l Ins. Co.***, 95 N.Y.2d 141, 145, 733 N.E.2d 213, 711 N.Y.S.2d 141 [2000]). The emphasis in this inquiry is not upon the intent to act, but upon the intent to cause harm. "Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional" (***Salimbene v. Merchants Mut. Ins. Co.***, 217 A.D.2d 991, 994, 629 N.Y.S.2d 913 (4th Dept., 1995); ***Allegany Co-Op Ins. Co. v. Kohorst*, supra** at 744; ***Continental Cas. Co. v. Rapid-American Corp.***, 80 N.Y.2d 640, 649, 609 N.E.2d 506, 593 N.Y.S.2d 966 [1993]). Thus the "critical question is whether the harm that resulted . . . could have been other than harm 'intentionally caused' within the meaning of the policy exclusion" (***Allstate Ins. Co. v. Mugavero***, 79 N.Y.2d 153, 159, 589 N.E.2d 365, 581 N.Y.S.2d 142 [1992]).

In this case, Michael Alarco admitted to firing approximately 100 paint ball rounds at night, into a large crowd of individuals at close range, who were not wearing protective equipment. Daniel Kelly was in an automobile at the time. Michael Alarco testified at deposition that he fired approximately six paint balls at the black BMW in which Kelly was a passenger. The other 94 or so paint balls were fired at the crowd of approximately 30 to 70 individuals. It is clear that Michael Alarco fired his paint ball rifle directly into the crowd where none of the individuals were wearing protective clothing or gear at that time.

Based upon this evidence, this Court finds that plaintiff's argument that he did not expect injury from anyone in the crowd is unreasonable and meritless. The injuries sustained by Daniel Kelly were inherent in the activity that Michael engaged in. Michael Alarco's "assault cannot be construed as an accident within the definition of 'occurrence' for which [the] policy affords coverage" (***Allstate Co. v. Mugavero*, supra** at 161; ***Utica Fire Ins. Co. of Oneida County, N.Y. v. Shelton***, 226 A.D.2d 705, 706, 641 N.Y.S.2d 864 (2d Dept., 1996); ***Pistolesi v. Nationwide Mut. Fire Ins. Co.***, 223 A.D.2d 94, 97, 644 N.Y.S.2d 819 (3d Dept., 1996); ***Allstate v. Ruggiero***, 239 A.D.2d 369, 658 N.Y.S.2d 321 (2d Dept., 1997); ***Hereford Ins. Co. v. Segal***, 40 A.D.3d 816, 835 N.Y.S.2d 741 [2d Dept., 2007]). The injury and harm that resulted to Daniel Kelly was inherent in the nature of Michael Alarco's wrongful act. The resulting injuries were intentional and expected as a matter of law. The Court reaches this conclusion without reliance upon any Family Court records.

Thus, the exclusion is applicable.

Accordingly, defendant's cross motion for a declaratory judgment that it is not obligated to indemnify the plaintiffs from and against the claims being asserted in the Kelly lawsuit is granted; and,

Plaintiffs' motion for summary judgment in the underlying declaratory judgment action is denied.

All motion papers and exhibits annexed hereto, submitted in connection with motion sequence 001 and 002 shall be sealed and not available for inspection without prior Court order.

The foregoing constitutes the Order of this Court. Settle judgment on notice.

Dated: March 18, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.