SHORT FORM ORDER

INDEX NO. 13748/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MERRIMACK MUTUAL FIRE INSURANCE COMPANY,

Plaintiff,

-against-

LOUIS M. LIPIRA, CHRISTOPHER MATYAS and LARYSA MATYAS,

Defendants.

ORIG. RETURN DATE: APRIL 28. 2008
FINAL SUBMISSION DATE: MAY 29, 2008
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: APRIL 28. 2008
FINAL SUBMISSION DATE: MAY 29, 2008
MTN. SEQ. #: 002
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 8 read on this motion and cross-motion FOR SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Notice of Cross-motion and supporting papers 5-7; Memorandum of Law 8; it is,

ORDERED that this motion by plaintiff for an Order granting summary judgment in favor of plaintiff and against defendant LOUIS M. LIPIRA

("LIPIRA") on the grounds that plaintiff: (a) is not obligated to defend LIPIRA in a certain action pending against him in the Supreme Court, Suffolk County; (b) may withdraw the defense currently being provided to LIPIRA in said action; and (c) is not obligated to indemnify LIPIRA should a verdict or judgment be rendered against him in said action, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant CHRISTOPHER J. MATYAS ("MATYAS") for an Order granting summary judgment dismissing plaintiff's complaint, is hereby **DENIED** for the reasons set forth hereinafter. The Court has not received opposition to the instant cross-motion.

Plaintiff insurance company filed this declaratory judgment action on or about May 16, 2006, seeking a declaration that plaintiff is not obligated to defend LIPIRA in an action pending against him in Supreme Court, Suffolk County, entitled *Christopher J. Matyas and Larysa Matyas v. Louis M. Lipira*, under Index No. 4443/2006; that it may withdraw the defense currently being provided to LIPIRA in said action; and that it is not obligated to indemnify LIPIRA should a verdict or judgment be rendered against him in said action.

Plaintiff informs the Court that prior to August 13, 2004, LIPIRA purchased a policy of homeowners' insurance from plaintiff. Plaintiff alleges that the policy was in full force and effect on August 13, 2004. Plaintiff further alleges that the subject policy contained a "Homeowners 3 Special Form" excluding liability resulting from bodily injury "which is expected or intended by the insured."

Plaintiff alerts the Court that on or about February 8, 2006, MATYAS and his wife commenced the above-referenced action against LIPIRA stemming from an incident that occurred on August 13, 2004, wherein LIPIRA allegedly assaulted MATYAS, causing personal injuries. The plaintiffs therein have asserted causes of action against LIPIRA sounding in negligence, battery, unintended result of an intentional act, and loss of consortium. Upon receipt of the summons and complaint in that action, plaintiff alleges that it retained attorneys to defend LIPIRA, and continue to represent him to date. Plaintiff further alleges that at approximately the same time, it commenced the instant declaratory judgment action seeking the relief discussed above, arguing that the subject incident falls within the purview of the exclusion set forth in the homeowners' insurance policy.

Plaintiff alleges that as a result of the subject incident, LIPIRA was charged with the felony crime of assault in the second degree (Penal Law § 120.05 [3]), to which he pleaded guilty on December 16, 2005. Plaintiff indicates that LIPIRA's plea was amended and reduced to assault in the third degree, a misdemeanor, after one year of probation and one hundred forty hours of community service. In support thereof, plaintiff has submitted the transcript of LIPIRA's plea allocution conducted on December 16, 2005. Plaintiff argues that at the plea allocution, LIPIRA admitted to committing intentional acts against MATYAS, whom he thought at the time was a medical service technician assisting a motor vehicle accident victim, including pushing and "chest bumping" MATYAS. MATYAS suffered an injury to his back during the incident. In actuality, MATYAS is a Suffolk County police officer, who was on plain clothes assignment and was called to assist at the accident scene. In view of the foregoing, plaintiff argues that the subject incident falls within the exclusion of the insurance policy issued by plaintiff for liability resulting from bodily injury "which is expected or intended by the insured." As such, plaintiff seeks summary judgment declaring that plaintiff is not obligated to defend LIPIRA in the action pending against him, that it may withdraw the defense currently being provided to LIPIRA in the action, and that it is not obligated to indemnify LIPIRA should a verdict or judgment be rendered against him in said action.

MATYAS has filed the instant cross-motion seeking summary judgment dismissing plaintiff's complaint on the grounds that: (1) plaintiff failed to give timely notice of disclaimer to the defendants herein in violation of Insurance Law § 3420 (d); and (2) the injury to MATYAS was not inherent in the acts of LIPIRA during the subject incident.

MATYAS argues that plaintiff failed to give timely notice of disclaimer in violation of Insurance Law § 3420 (d). MATYAS alleges that on or about January 11, 2006, counsel for LIPIRA sent a letter to LIPIRA's insurance agency advising of a potential claim against LIPIRA arising out of the incident. MATYAS alleges that plaintiff had written notice of the claim on January 13, 2006, when the insurance agent forwarded the correspondence to plaintiff's parent company, and had notice of the underlying action prior to March 16, 2006, when plaintiff retained counsel to represent LIPIRA in that action. MATYAS alleges that the first attempt by plaintiff to disclaim was by filing the instant action on or about May 16, 2006, approximately sixty (60) days thereafter, in violation of Insurance Law § 3420 (d).

Morever, MATYAS alleges that the injuries he suffered during the subject incident were not caused by LIPIRA's direct acts, but rather by the acts of other officers who intervened to assist MATYAS as LIPIRA was resisting arrest. As such, MATYAS argues that the insurance policy exclusion for bodily injury "which is expected or intended by the insured" does not apply herein. The Court notes, however, that MATYAS' position that the injuries he suffered were not caused by LIPIRA's direct acts is contrary to his cause of action alleging battery in the related action.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

An insurer is obligated by its policy to provide a defense unless it can demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153 [1992]; *Physicians' Reciprocal Insurers v Loeb*, 291 AD2d 541 [2d Dept 2002]). The homeowners' policy issued by plaintiff in this case provides that there is no coverage for bodily injuries which are "expected or intended by the insured." Thus, there is no insurance coverage under the terms of the policy if the resulting injury could reasonably be expected from the conduct (*Utica Fire Ins. Co. v Shelton*, 226 AD2d 705 [2d Dept 1996]).

"[P]ersonal injuries or property damages are expected if the actor knew or should have known there was a substantial probability that a certain result would take place" (*Utica Fire Ins. Co. v Shelton*, 226 AD2d 705, *supra*, quoting *County of Broome v Aetna Cas. & Sur. Co.*, 146 AD2d 337 [3d Dept 1989]). The question is whether the damages "flow directly and immediately from an intended act, thereby precluding coverage," or whether the damages "accidentally arise out of a chain of unintended though expected or foreseeable events that occurred after an intentional act" (*Continental Ins. Co. v Colangione*, 107 AD2d 978 [3d Dept 1985]; *see also State Farm Fire & Cas. Co. v Torio*, 250 AD2d 833 [2d Dept 1998]). The court must look at the transaction as a whole in determining whether an accident has occurred (*see McGroarty v Great Am. Ins. Co.*, 36 NY2d 358 [1975]).

Here, the Court finds that questions of fact exist which preclude the granting of summary judgment to either plaintiff or MATYAS. Triable issues of fact remain with respect to the happening of the subject incident. MATYAS avers that while LIPIRA was resisting arrest, the acts of the other responding officers caused him to fall to the ground and suffer injuries. LIPIRA, at his plea allocution, nevertheless admitted that there was a "scuffle" between himself and MATYAS, and that he pushed MATYAS during the incident.

In addition, triable issues of fact remain with respect to whether the acts of LIPIRA were intended or expected to cause the injuries suffered by MATYAS. As discussed, LIPIRA pleaded guilty to the felony of assault in the second degree (Penal Law § 120.05 [3]), which necessarily includes an element of intent. However, the intent element of Penal Law § 120.05 (3) speaks of the intent of a person to prevent a peace officer, a police officer, a firefighter, an emergency medical service paramedic or emergency medical service technician, and others, from performing a lawful duty, not of the intent to cause physical injury to another person. Moreover, during his allocution on December 16, 2005, LIPIRA did not admit an intent to cause bodily injury to MATYAS. Therefore, the Court finds that LIPIRA's guilty plea does not, in and of itself, relieve plaintiff from its obligation to defend LIPIRA.

Therefore, on this record, the Court cannot determine whether MATYAS' injuries were "expected or intended by the insured," or whether they were an accidental result of LIPIRA's intentional act (*see Miller v Continental Ins. Co.*, 40 NY2d 675, *supra*; *Barry v Romanosky*, 147 AD2d 605 [2d Dept 1989]). Moreover, as MATYAS has also alleged causes of action sounding in negligence,

it cannot be said that the allegations of the complaint cast it solely and entirely within the policy exclusions (see *Allstate Ins. Co. v Mugavero*, 79 NY2d 153, *supra*).

Furthermore, with respect to MATYAS' argument that plaintiff failed to timely disclaim in violation of Insurance Law § 3420 (d), where an insurer is entitled to deny a claim based on an absence of coverage, its failure to timely disclaim coverage does not preclude it from denying liability on that ground (*Perkins v Allstate Ins. Co.*, 51 AD3d 647 [2d Dept 2008]; *John Hancock Prop. & Cas. Ins. Co. v Warmuth*, 205 AD2d 587 [2d Dept 1994]; *Pawelek v Security Mut. Ins. Co.*, 143 AD2d 514 [4th Dept 1988]). Therefore, if it is determined that the homeowners' policy does not provide coverage for LIPIRA's conduct, the "failure to have earlier disclaimed does not create coverage which the policy does not provide" (*Sears Oil Co. v Merchants Ins. Group*, 88 AD2d 753 [4th Dept 1982]). In addition, the Court finds that LIPIRA has not suffered any prejudice from the alleged failure to timely disclaim, as plaintiff has been providing a defense to LIPIRA in the related action, and continues to date. Moreover, as MATYAS is a stranger to the insurance policy between plaintiff and LIPIRA, the Court questions MATYAS' standing to assert such an argument in the first instance. As such, MATYAS' argument that plaintiff failed to timely disclaim is unavailing.

Accordingly, for the foregoing reasons, this motion and cross-motion for summary judgment are both **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: September 29, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court