SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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CASTLEPOINT INSURANCE COMPANY,

Plaintiff,

- v -

SCOTT TOLCHIN, NORMAN LITMAN, HEIDI LITMAN and ROBIN ARCHBOLD,

Defendants.

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HON. EILEEN A. RAKOWER

Index No. 157887/2014

DECISION and ORDER

Mot. Seq. 001

Plaintiff Castlepoint Insurance Company ("CastlePoint") commenced the instant action, seeking a declaration that it is not obligated to defend or indemnify defendants Scott Tolchin, Norman Litman, or Heidi Litman (collectively, "Defendants") in an action entitled *Robin Archbold v. Scott Tolchin, Norman Tolchin, Norman Litman and Heidi Litman*, pending in the Supreme Court of the State of New York, Nassau County, under Index No. 002205/14 (the "underlying action"), under a homeowner's policy CastlePoint issued to Norman Litman. In the underlying action, Robin Archbold seeks damages for personal injuries she allegedly sustained on March 8, 2013 at the insured premises located at 121 Brighton Way, Merrick, New York (the "premises").

The instant action involves an insurance policy issued by CastlePoint to Norman Litman for the premises, bearing policy number HOP974912 (the "Policy"), which was renewed for one year ensuring periods, including the relevant dates of December 9, 2012 to December 9, 2013. Heidi Litman and Scott Tolchin were added as additional insureds to the Policy prior to the aforementioned effective dates. Heidi Litman and Scott Tolchin are legally married. Norman Litman and Heidi Litman are resident relatives.

The Policy's personal liability coverage part covers those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" caused by an "occurrence" to which the coverage applies:

> 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 the "insured" is legally liable. Damages include prejudgment interest awarded against the "insured"; and
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> 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 the amount we pay for damages resulting from the "occurrence" equals our limit of liability.

"Bodily injury" and "occurrence" are defined in the Definitions section of policy form HO 00 03 04 91 as follows:

> "Bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.
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> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
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> a. "Bodily injury"; or
> b. "Property damage."

Additionally, the Policy's personal liability coverage is subject to certain exclusions. Pursuant to Section II – Exclusions, Paragraph E.1. ("Expected Or Intended Injury"), the Policy excludes coverage for "bodily injury" "which is expected or intended by an insured." An "insured" is defined by the Policy to include "you and residents of your household who are . . . your relatives[.]"

On March 8, 2013, Scott Tolchin allegedly assaulted Archbold. In a written statement dated February 14, 2015, Tolchin avers that, at around 10:00 p.m., Robin Archbold, a neighbor whom he did not know prior to the incident, appeared on the

sidewalk and was very upset about the noise from his daughter's birthday party. Tolchin had a video camera in his hand when he approached Archbold and informed her that the children were leaving. He states:

> She was just ranting and slurring her words. I told her that I have her on video and she should go home. That is when she lunged at me. I have night blindness. When she lunged at me to attack me I put my arm out to block her. She ended up against my chest. I wrapped my arm around her, putting her in a head lock. I then immediately let her go. She said "I can't believe you put me in a headlock."

Archbold filed the underlying action against Tolchin and the Litmans by complaint dated June 4, 2014, asserting three causes of action. As a result of the Defendants' actions—including but not limited to "assault, violent actions, harmful contact, and negligent maintenance, control, and supervision"—Archbold alleges she was "physically and mentally harmed thereby necessitating expenditures for medical treatment as a result of defendants' negligence." In the Verified Bill of Particulars, Archbold sets forth various injuries she sustained to her cervical region.

After receiving notice of the suit on June 9, 2014, CastlePoint disclaimed coverage in a letter to Tolchin and the Litmans, dated June 24, 2014, based on the Policy's exclusion for intentional acts. The June 24, 2014 letter states, in relevant part:

> Claims for assault and battery are not claims for "bodily injury" or "property damage" caused by an accident or "occurrence." To the extent that this matter does not involve a claim for "bodily injury" or "property damage" caused by an accident or "occurrence," no coverage is available under the policy as set forth in the above-cited provisions.
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> * * *
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> Claims for assault and battery inherently involve intended or expected injuries. The Named Insured on the policy is Norman Litman. As indicated in the above-quoted endorsements, Scott Tolchin and Heidi Litman, Scott's wife, qualify as "insureds" under the policy. To the extent, if any, this matter involves "bodily injury" or "property damage" caused by an "occurrence," no coverage is available under

> the policy for any injuries or damages intended or expected by an "insured" as set forth in the above-cited provision.

CastlePoint now moves for summary judgment, pursuant to CPLR 3212, against defendants Tolchin, Norman Litman, Heidi Litman, and Archbold, and seeks a declaration that it has no duty to defend or indemnify Tolchin, Norman Litman, and Heidi Litman in the underlying action.

CastlePoint submits the attorney affirmation of James Croteau, Esq., dated August 18, 2014; the affidavit of Robert Samuels, a Senior Claims Adjuster, sworn to on August 17, 2015; and the affidavit of Sean McCafferty, an investigator, sworn to on August 15, 2015. Annexed to Croteau's affirmation are the following exhibits: the Supplemental Verified Complaint in the underlying action; the Verified Bill of Particulars filed in the underlying action; and the pleadings in this action. Annexed to Samuels' affidavit are the following exhibits: (1) a copy of the Policy; (2) email from Heidi Litman, dated January 29, 2014, providing notice of the March 8, 2013 incident; (3) a letter, dated February 10, 2014, from CastlePoint to Tolchin; and (4) a letter, dated June 24, 2014, from CastlePoint to Norman Litman, Tolchin, and Heidi Litman disclaiming coverage for the Incident. Annexed to McCafferty's affidavit are copies of statements made by Tolchin and Heidi Litman on February 14, 2014 concerning the March 8, 2013 incident.

In opposition, Defendants submit the attorney affirmation of Jannine A. Gordineer, Esq., and the affidavit of Tolchin, dated September 17, 2015. In his affidavit, Tolchin states:

> I and Heidi Litman were added as additional Insureds on the homeowners' policy. On March 8, 2013, Robin Archbold, a neighbor who lives a few houses away from me, was allegedly injured on the premises after my daughter's fourteenth (14th) birthday party had ended. Said injuries, (if any), were unintentional, unexpected and resulted from an accident. No harm was expected or intended to occur to Robin Archbold. Although I was arrested and charged with assault because of the occurrences that took place on March 8, 2013, a court of law determined that I was not guilty of the offense(s) and exonerated me for any wrongdoing that had allegedly took place that day.

Defendants argue that there is no evidence that Tolchin or the Litmans intended or expected anyone to be injured on March 8, 2013. Defendants assert that Archbold's injuries were nothing more than the accidental result of Tolchin's actions, and therefore, the Policy provides coverage to Defendants for any alleged injuries sustained by Archbold as a result of the incident. Defendants assert that the statements of Tolchin and Heidi Litman obtained by investigator McCafferty and the affidavit of Tolchin "establish that Scott Tolchin suffers from 'night blindness' and that when Robin Archbold 'lunged' to attack him, he put his arm out simply 'to block her', and that any harm resulting therefrom was 'unintentional' and 'unexpected.'"

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 (1970); *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251–252 (1st Dept. 1989).

It is well established that the duty of an insurer to defend its insured is broader than the duty to indemnify, and that the duty to defend arises "whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy." *Fitzpatrick v. American Honda Motor Co., Inc.*, 78 N.Y.2d 61, 65 (1991). "If the allegations of the complaint are potentially within the language of the insurance policy, there is a duty to defend." *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 443 (2002). The duty to defend will arise "whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer . . . [and, it is immaterial] that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions." *Id.* at 443–44 (citation and internal quotations omitted). When determining whether there exists an obligation to defend, the court will examine the policy in question and look to "the status of the pleadings as they were at the time plaintiff called upon the insurer to defend in the underlying action and the insurer tendered its disclaimer." *George Muhlstock & Co. v. American Home*

Assur. Co., 117 A.D.2d 117, 123 (1st Dept. 1986). The court is to assume "that what is alleged actually happened." *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 159 (1992).

When interpreting an insurance policy, it is "fundamental" that it be read "in light of 'common speech' and the reasonable expectations of a business person." *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (citations omitted). Policy exclusions are to be given a "strict, narrow construction, with any ambiguity resolved against the insurer." *Id.* at 383 (citations omitted). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 652 (1993) (citations omitted).

Castlepoint denied coverage to Tolchin and the Litmans based on (1) the Policy's limitation of liability coverage to those sums that the insured becomes legally obligated to pay as damages because of "bodily injury . . . caused by an "occurrence", defined as "an accident" under the Policy, and (2) the Policy's exclusion for "bodily injury . . . which is expected or intended by an insured". Plaintiff contends that Archbold's assault and battery claims are not claims for "bodily injury" caused by an accident or "occurrence", and moreover, that such claims fall within the Policy's exclusion for bodily injury "expected or intended" by an insured. Defendants counter argue that the Policy provides liability coverage for the "occurrence" because it was an "accident" causing "bodily injury". Furthermore, Defendants argue that the exclusion does not apply because there is no evidence that Defendants "expected or intended" bodily injury to any person.

The Policy states that Plaintiff will cover sums that the insured becomes legally obligated to pay as damages "because of 'bodily injury' . . . caused by an 'occurrence' to which this coverage applies." The term "bodily injury" is defined as "any bodily harm sickness or disease," while "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, resulting in bodily injury or property damage during the term of the policy." If a claim is made or a suit is brought against any insured for damages because of "bodily injury" caused by an "occurrence", the policy represents that Castlepoint will provide a defense and pay—up to the policy limits—the damages for which the insured is legally liable, "even if the suit is groundless, false or fraudulent."

While the term "occurrence" is defined in the Policy as an "accident", the Policy does not define "accident". Addressing a similar insurance policy provision in *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131 (2006), the Court of Appeals noted that the term "accident" has been interpreted "to pertain not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly has that result." *Id.* at 138 (quoting *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 678 (1976)). Thus, an "occurrence" may be considered an "accident" if, from the point of view of the insured, the incident causing injury was "unexpected, unusual and unforeseen." *Miller*, 40 N.Y.2d at 677; *Liberty Mut. Ins. Co. v. Ho*, 289 A.D.2d 1051, 1051 (4th Dep't 2001) ("[I]n deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual or unforeseen") (quoting *Agoado Realty Corp. v. United Intl. Ins. Co.*, 95 N.Y.2d 141, 145 (2000)); *Am. Ref-Fuel Co. of Hempstead v. Employers Ins. Co. of Wausau*, 265 A.D.2d 49, 53 (2d Dep't 2000).

Here, the first question is whether the pleadings in the underlying action allege a covered "occurrence" for which the Policy represents that CastlePoint will provide a defense. *See Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 63 (1991) (where the pleadings allege a covered occurrence, the duty to provide a defense in a pending lawsuit remains "even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered"). The complaint in the underlying action alleges that Tolchin, Heidi Litman, and Norman Litman negligently caused Archbold to sustain injuries. Specifically, Archbold alleges that Tolchin "did assault, batter and negligently strike the plaintiff causing the plaintiff to sustain serious and protracted personal injuries." Archbold further alleges that Norman Litman and Heidi Litman "were negligent in that they created a dangerous situation; failed to warn others of defendant Scott Tolchin's vicious, unruly and violent propensities; mental disabilities, and personality disorders, which they knew could cause harm to others and contributed directly in causing physical harm to [Archbold]." Tolchin attests that Archbold "lunged" at him and he "put [his] arm out to block her". Archbold "ended up against [his] chest" and Tolchin "wrapped [his] arm around her, putting her in a head lock" before "immediately let[ting] her go." Tolchin states that Archbold's injuries, if any, were "unintentional, unexpected and resulted from an accident" and that "[n]o harm was expected or intended to occur[.]" Because the evidence may support the conclusion that Archbold's alleged injuries were accidentally or negligently caused by

Defendants' acts, Plaintiff has not met its burden of "unequivocally" establishing that the harm caused was not within the coverage of the Policy. *See U.S. Underwriters Ins. Co. v. Falcon Const. Corp.*, No. 02 CV 4179 (BSJ), 2004 WL 1497563, at *5 (S.D.N.Y. July 1, 2004) (noting that, under New York law, an insurer's duty to defend will only end "if, and when, it is shown unequivocally that the damages alleged are not covered in the policy"); *Cook*, 7 N.Y.3d at 138 (explaining that the factfinder in the underlying action may ultimately reject the notion that the insured negligently caused the alleged injuries, but that "uncertain outcome" is "immaterial" to the issue whether the insurer has a duty to defend its insured).

The next inquiry is whether the Policy's exclusion applies. The Policy excludes coverage for "bodily injury . . . which is expected or intended by an insured." Where an insurer seeks to disclaim coverage on the basis of such an exclusion, "the insurer will be required 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." *Cook*, 7 N.Y.3d at 137 (internal quotations and citation omitted).

Here, the pleadings in the underlying action allege "negligence, carelessness and recklessness" in Defendants' conduct. Such allegations imply "an unintentional or unexpected event." *Cook*, 7 N.Y.3d at 138 (reasoning that "an allegation of negligence implies an unintentional or unexpected event", and therefore, the insurer "necessarily" failed to demonstrate that the allegations of the complaint were subject to no other interpretation than that the defendant "expected or intended" the harm). Thus, in light of the allegations of negligence in the complaint, and Tolchin's description of the events leading to Archbold's alleged injuries, Plaintiff has failed to demonstrate that the insured's acts are subject to no other interpretation than that the insured "expected or intended" the harm to Archbold, as Plaintiff is required to do in order to disclaim coverage on the basis of the exclusion. *See Barry v. Romanosky*, 147 A.D.2d 605, 606 (2d Dep't 1989) (holding that the plaintiff's injuries were covered by the policy because defendant "did not intend or expect to cause the injury" and there was "nothing in the record to support a conclusion other than that the plaintiff's injuries were the accidental result of [defendant's] intentional act"); *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 58 A.D.3d 990, 992 (3d Dep't 2009) (concluding that a policy's intentional acts exclusion did not apply because plaintiff's injuries were not "inherently likely to result from the nature and force of a defensive bear hug" under circumstances where the insured "intentionally placed his hands upon plaintiff . . . in an attempt

to subdue plaintiff or ward off an attack"); *compare Mugavero*, 79 N.Y.2d 153 (harm caused was "inherent" in the nature of the acts alleged to be committed by the insured—child sexual abuse—and fell within the homeowners' insurance policy's exclusion for intentional acts).

Wherefore it is hereby,

ORDERED the plaintiff CastlePoint Insurance Company's motion for summary judgment against Defendants Scott Tolchin, Norman Litman, Heidi Litman, and Robin Archbold is denied.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: AUGUST 10, 2016

EILEEN A. RAKOWER, J.S.C.

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