

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

FIRST FINANCIAL INSURANCE	:	June Term 2009
COMPANY,	:	
	:	
Plaintiff,	:	No. 2231
	:	
v.	:	
LIBERTY OWNERS, LLC, SHIVAM	:	COMMERCE PROGRAM
HOTEL, LLC, and ERNEST JOHNSON,	:	
Defendants.	:	Control Number 10092289
	:	
	:	

ORDER

AND NOW, this 14th day of February 2011, upon consideration of Plaintiff's Motion for Summary Judgment, Defendants' response in opposition and all replies, it hereby is **ORDERED** that the Motion for Summary Judgment is **Denied**. Genuine issues of material fact exist as to whether Plaintiff First Financial Insurance Co. mailed and Defendant Liberty Owners, LLC and Shivam Hotel, LLC received Endorsement BG-G-042 0400. This court, however, finds the Assault or Battery Exclusion contained within Endorsement BG-G-042 0400 excludes from coverage Johnson's claim if Endorsement BG-G-042 0400 was mailed by Plaintiff and received by Defendants.

BY THE COURT,

ARNOLD L. NEW, J.

- c) failing to warn person in the position of plaintiff of the unsecured and dangerous condition of the premises;
- d) failing to perform proper and adequate inspection of the premises to determine the reasonableness of security under the circumstances;
- e) failing to provide a uniform level of security through the premises;
- f) negligence in hiring, training and/or supervising of its agents, workmen, employees and/or independent contractors;
- g) failing to fulfill its duty of protection owed to plaintiff;
- h) failing to maintain the premises in a safe condition;
- i) failing to take reasonable precaution against the reasonably foreseeable likelihood of an intrusion similar to that which took place herein;
- j) failing to provide adequate and proper security and/or supervision when it knew or should have known of the nature and quality of criminal and/or criminal-like activity in the area of the premises;
- k) failing to comply with or adhere to its own system and/or level of security in and around the premises; and
- l) negligence under Section 323, Restatement of Torts (Second).²

The underlying amended complaint also alleged defendants expressly and impliedly warranted the safety and/or security of the premises to Johnson.³

Defendants were insured by plaintiff at the time of the Johnson incident under policy number 512F000035. An endorsement changing the coverage provided by the policy was made.

The Endorsement provides in part as follows:

EXCLUSION-ASSAULT OR BATTERY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. Exclusion a. of COVERAGE A (section 1) is replaced by:

This insurance does not apply to:

- a. “Bodily injury”...

(2) Arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery.”...

² Johnson amended complaint ¶¶73, 80.

³ Johnson amended complaint ¶¶76,77, 83, 84.

Plaintiff initially denied coverage for the Johnson action but is currently defending defendants under a reservation of rights. In June 2009, Plaintiff instituted the instant action seeking a declaration that it did not owe defendants a duty to defend or indemnify for the Johnson action. Attached to the complaint was plaintiff's policy along with Endorsement BG-G-042 0400- Exclusion –Assault or Battery. Additionally, plaintiffs attached a document entitled "Certified Policy" which states:

This is a true copy of the policy as indicated by our records available as of 11-14-06. No representation or warranty is made that this copy is identical in all respects to the policy actually issued to the policy holder.

Initially, defendants failed to respond to the complaint and a default judgment was taken by plaintiff on February 3, 2010. Plaintiff subsequently stipulated to opening the default judgment. Defendants filed an amended answer to the complaint alleging that they were without sufficient knowledge or information to form a belief as to whether the Endorsement containing the exclusion for assault or battery was part of the insurance policy issued to them.

Plaintiff filed a motion for judgment on the pleadings which was denied by the court on May 3, 2010. Presently before the court is plaintiff's motion for summary judgment. In support of the motion, plaintiff attaches an affidavit from its wholesale agent avering that the version of the policy attached to the complaint was issued to defendants.

DISCUSSION

The interpretation of an insurance contract is a matter of law for the courts to decide. In interpreting an insurance contract, a court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, a court should give effect to the language of the contract.⁴

⁴ Paylor v. Hartford Ins. Co., 536 Pa. 583, 640 A.2d 1234, 1235 (Pa. 1994).

To determine whether coverage exists, the court must follow a two-step process. As our Supreme Court has explained, a "court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage." "After determining the scope of coverage," the court must then "examine the complaint in the underlying action to ascertain if it triggers coverage."⁵ Importantly, however, in comparing the underlying complaint to the policy, it must be remembered that "the particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. Instead it is necessary to look at the factual allegations contained in the complaint."⁶ The duty to defend is, thus, only triggered when the factual allegations of the complaint, taken as true, "would support a recovery covered by the policy."⁷

In the case *sub judice*, the language of the assault or battery exclusion plainly relieves plaintiff of its duty to defend or indemnify defendants against Johnson's claims. The factual allegations within the underlying complaint allege an assault against Johnson while a guest at defendants' hotel. Assault is an intentional attempt by force to do an injury to the person of another.⁸ The damages Johnson seeks to recover arise from the alleged assault, i.e. the alleged forced entry into Johnson's hotel room causing him to jump out of the window. Johnson also alleges that his damages were caused by defendants' alleged omissions in preventing and suppressing the assault, i.e. failure in supervising, maintaining, securing, warning, inspecting,

⁵ Gen. Accident Ins. Co. of Am. v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (Pa. 1997).

⁶ Mutual Benefit Ins. Co. v. Haver, 555 Pa. 534, 725 A.2d 743, 745 (Pa. 1999).

⁷ Allen, 692 A.2d at 1095.

⁸ Renk v. City of Pittsburgh, 537 Pa. 68, 76, 641 A.2d 289 (Pa. 1994). Assault is also defined as "Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm..." Black's Law Dictionary 6th Edition.

hiring, training and protecting the premises. Based on the foregoing allegations, plaintiff is under no duty to defend or indemnify defendants for the Johnson action.

Typically, the aforementioned analysis would end the matter, however, in this case, a question of fact exists as to whether plaintiff mailed and defendants received the endorsement for the assault or battery exclusion. The evidence produced by the plaintiff, the affidavit of Chris Testrake, vice president of CRC Services, is insufficient for this court to grant summary judgment as to whether the endorsement at issue was mailed and received by defendants. Accordingly, even though this court finds that the exclusion applies to deny coverage for Johnson's claim, plaintiff's motion is denied to determine the issue of mailing and receipt.

CONCLUSION

For the foregoing reasons, plaintiff First Financial Insurance Company's motion is denied to determine the issue of mailing and receipt of Endorsement BG-G-042 0400.

BY THE COURT,

ARNOLD L. NEW, J.

