

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

CONTINENTAL CASUALTY
COMPANY

v.

ERIE INSURANCE EXCHANGE
and ERIE INSURANCE COMPANY

AUGUST TERM, 2013

NO. 02094

COMMERCE PROGRAM

CONTROL NO. 14052985

DOCKETED

JUL 11 2014

C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this

11th day of

July

, 2014, upon

consideration of the motion for partial summary judgment of plaintiff, Continental Casualty Company, and any response thereto, it is hereby

ORDERED

that the said motion is **GRANTED**.

BY THE COURT:

Continental Casualty Co-ORDOP



13080209400024



GLAZER, J.

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

CONTINENTAL CASUALTY COMPANY	:	AUGUST TERM, 2013
	:	
	:	NO. 02094
v.	:	
	:	COMMERCE PROGRAM
ERIE INSURANCE EXCHANGE and ERIE INSURANCE COMPANY	:	CONTROL NO. 14052985
	:	
	:	

OPINION

GLAZER, J.

July 11, 2014

Before the court is the motion for partial summary judgment of plaintiff, Continental Casualty Company. For the reasons set forth below, plaintiff's motion for partial summary judgment is granted.

FACTS AND PROCEDURAL BACKGROUND

On August 21, 2013, plaintiff, Continental Casualty Company (hereinafter "CCC"), commenced the current action and asserted claims for breach of contract, equitable contribution, and declaratory judgment. This case arises out of an underlying action, Wray v. Doylestown Hospital, et al., Phila Cty. C.C.P., October Term 2010, No. 2941 (hereinafter "underlying action"), in which George Wray (hereinafter "Wray") sustained personal injuries in the course of his employment with United States Roofing Corporation (hereinafter "U.S. Roofing"). While working on a hospital expansion at the Doylestown Hospital (hereinafter "the project"), Wray "was carrying a full five gallon bucket of rubber waterproofing material from a staging area to the location where the waterproofing was being applied to the new concrete foundation. As he

was walking his pant leg caught on a piece of rebar, which extended from the concrete footings.”
See CCC motion for summary judgment, Exhibit B, ¶ 11. As a result, Wray sustained injuries.

Norwood McManus a Joint Venture, LLC (hereinafter “NMJV”) was hired as the general contractor for the project. Further, NMJV entered into a subcontract with U.S. Roofing. Pursuant to the subcontract, U.S. Roofing was required to obtain “additional insured” coverage on the behalf of NMJV. U.S. Roofing obtained general liability insurance through CCC.¹ Additionally, NMJV also entered into a subcontract with Louis Dolente & Sons, Inc. (hereinafter “Dolente”) to “furnish all labor, services, materials, tools, equipment, supplies, engineering and any other items necessary.” Id. at Exhibit C. The subcontract contained the following provision:

SUBCONTRACTOR [Dolente] shall procure and maintain, at its own expense, the insurance required per the attached Exhibit B and such other or additional limits of insurance, or in such amounts as Owner may require of CONTRACTOR [NMJV] under PRIME CONTACT, and/or as CONTRACTOR may require hereunder...

Id. Exhibit B of the subcontract required “Norwood-McManus, a Joint Venture, LLC, The Norwood Company, John S. McManus Inc., Doylestown Hospital, and Freeman White, Inc. ... to be named Additional Insured.” Id. at Exhibit D.

Dolente obtained an Untraflex package policy insurance (hereinafter “the policy”) with Erie Insurance Exchange and Erie Insurance Company (improperly named party) (hereinafter and collectively “Erie”) which was entitled “Additional Insured – Owners, Lessees, or Contractors – Automatic Status When Required In Construction Agreement With You”. The policy provides:

- A. Section II – Who is Insured is amended to include as an additional insured any person or organization for whom you are performing operation when you and such person or organization

¹ As CCC accepted tender and participated in the defense of NMJV in the Underlying Action, the details of the subject contract and policy are omitted as irrelevant.

have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect for 'bodily injury', 'property damage', or 'personal and advertising injury' caused in whole or in part, by:

1. Your acts or omission; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured.

Id. at Exhibit F.

After Wray incurred injuries on the project, he commenced the underlying action against Doylestown Hospital, Norwood Company, John S. McManus, Inc., NMJV, Pennoni Associates, Dolente, and Delaware Valley Concrete, Inc. Specifically, in separate counts, Wray alleges that the negligence of NMJV and Dolente caused the resulting injuries. Id. at Exhibit B at ¶¶ 25(a)-(n) and 33(a)-(n). NMJV demanded Erie assume the defense and indemnity of NMJV which Erie rejected. Subsequently, as CCC had accepted the tender of defense, NMJV settled the claims advanced by Wray and CCC, on behalf of NMJV, paid out that sum. Erie alleges that partial summary judgment is not appropriate as discovery is not yet complete and further that, because Wray alleged negligence against NMJV and Dolente in separate counts, coverage is not triggered.

DISCUSSION

The court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. See note to Pa.R.C.P. 1035.2. When considering the merits for summary judgment, a court views the record in the light most

favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001). Further, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

“An insurer’s duty to defend is broader than its duty to indemnify.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 606 Pa. 584, 608-611, 2 A.3d 526, 540-542 (2010). “The duty to defend is a distinct obligation, separate and apart from the insurer’s duty to provide coverage.” Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc., 948 A.2d 834, 845 (Pa. Super. 2008). In Pennsylvania, an insurer’s duty to defend is determined by comparing the four corners of the complaint with the relevant policy of insurance. Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 589 Pa. 317, 908 A.2d 888, 896 (2006). An insurer is obligated to defend its insured if the factual allegation of the [pleading] on its face encompass an injury that is actually or potentially within the scope of the policy.” Am. & Foreign Ins. Co., 948 A.2d at 608-611. It is clear to this court that the issue of whether Erie owes a duty to defend NMJV is ripe.

Pursuant to the contract between NMJV and Dolente, Dolente was required to procure insurance on behalf of NMJV. NMJV procured insurance through Erie and the policy stated that “[w]ho is Insured is amended to include as an additional insured any person or organization for whom you are performing operation when you and such person or organization have agreed in writing in a contract... to be added as an additional insured on your policy.” See CCC motion for summary judgment, Exhibit F. Here, Dolente contracted with NMJV to “furnish all labor, services, materials, tools, equipment, supplies, engineering and any other items necessary” and agreed to “procure and maintain, at its own expense, the insurance required per attached Exhibit

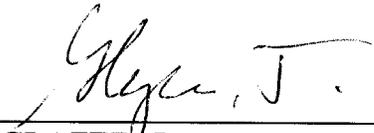
B.” Id. at Exhibit C. The subject Exhibit B requires, “Norwood-McManus, a Joint Venture, LLC, The Norwood Company, John S. McManus Inc., Doylestown Hospital, and Freeman White, Inc. ... to be named Additional Insured.” Id. at Exhibit D.

Also, coverage is triggered for the additional insured “only with respect for ‘bodily injury’, ‘property damage’ ... caused in whole or in part, by: your acts or omission.” Id. at Exhibit F. The underlying complaint alleges in Count Two that NMJV was negligent and in Count Four that Dolente was negligent and as a result of that negligence, Wray sustained injuries. Erie argues that because the allegations of negligence are in separate counts that coverage is not triggered. Further, Erie alleges that the ways in which NMJV and Dolente are negligent are wholly separate. However, this argument is meritless. The standard in Pennsylvania for when an insurer is required to defend its insured is whether the pleadings encompass an injury that may be potentially within the scope of the policy. Am. & Foreign Ins. Co., 948 A.2d at 608-611. In the instant action, Dolente, as a defendant, may potentially have been negligent and responsible for entire injury. Moreover, paragraphs 25(a)-(n) and 33(a)-(n) of the underlying complaint, where Wray identifies the negligent conduct, are identical. See CCC motion for summary judgment, Exhibit B at ¶¶ 25(a)-(n) and 33(a)-(n). Therefore, this court finds that Erie had a duty to defend NMJV in the underlying action.

CONCLUSION

In light of the evidence, plaintiff’s motion for partial summary judgment is granted and this court finds that defendant, Erie Insurance Exchange and Erie Insurance Company, had a duty to defend NMJV in the underlying action.

BY THE COURT:



GLAZER, J.