

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

PENN-PATRIOT INSURANCE COMPANY, : June Term 2015
Plaintiff, :
v. : No. 3186
TERRENCE WILLIAMS, 5207 HO, INC., :
BRIDGE & PRATT CAFÉ, JIMMY HO and : Commerce Program
LAMAR HALL, :
Defendants. : Control Number 15111371

DOCKETED

MAY 10 2016

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this ¹²9 day of May 2016, upon consideration of the Penn-Patriot Insurance Company's Motion for Summary Judgment and Defendants 5207 Ho, Inc., Bridge & Pratt Café and Jimmy Ho's response in opposition, it hereby is **ORDERED** that the Motion for Summary Judgment is **Granted**. It is declared that the Penn-Patriot Insurance Company's policy provides no coverage, including no defense, to Defendants in the matter captioned *Terrence Williams v. Lamar Hall, et. al.*, Philadelphia, CCP December 2014 No. 1002.

It is further **ORDERED** that Defendants 5207 Ho, Inc., Bridge & Pratt Café and Jimmy Ho's counterclaims seeking coverage is dismissed.

Penn Patriot Insurance -ORDOP



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BY THE COURT,

RAMY I. DJERASSI, J.

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BRIDGE & PRATT CAFÉ, JIMMY HO and	:	Commerce Program
LAMAR HALL,	:	
Defendants.	:	Control Number 15111371

OPINION

This is a declaratory judgment action. Plaintiff Penn-Patriot Insurance Company (“Penn-Patriot”) seeks a ruling that it owed no coverage to, and no defense to, any person or corporation for any claims arising out of from the action captioned *Terrence Williams v. 5207 Ho, Inc., Bridge & Pratt Café, Jimmy Ho and Lamar Hall*, Court of Common Pleas of Philadelphia County, December 2014 No. 1002. Penn-Patriot issued policy PAC6973162 to named insured 5207 Ho, Inc. for the period April 30, 2012 to April 30, 2013. 5207 Ho, Inc. does business under the trade name Bridge & Pratt Café located at 5207 Frankford Avenue in Philadelphia. Jimmy Ho is the sole shareholder and owner of 5207 Ho, Inc. Lamar Hall (“Hall”) was an employee of Bridge & Pratt Café in December 2012. Bridge & Pratt Café, 5207 Ho, Inc., and Jimmy Ho are insureds under the Policy. The Penn-Patriot policy applies to “bodily injury” or “property damage” claims only if caused by an “occurrence”. An occurrence is defined by the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”.

Penn Patriot issued an endorsement entitled Assault or Battery General Liability Exclusion which provides as follows:

....In consideration of the premium charge, it is understood and agreed that this insurance does not apply to liability for damages because of “bodily injury”,

“property damage”, “personal and advertising injury”, medical expense arising out of an “assault”, “battery” or “physical altercation” that occurs in, or near or away from and insured’s premises:

- 1) Whether or not caused by, at the instigation of, or with the direct or indirect involvement of an insured, an insured’s employees, patrons or other person in, on, near or away from an insured’s premises, or
- 2) Whether or not caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in a safe condition, or
- 3) Whether or not caused by or arising out of any insured’s act or omission in connection with the prevention, suppression, failure to warn of the “assault”, “battery” or “physical altercation”, including but not limited to, negligent hiring, training and/or supervision.
- 4) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured’s employees, patrons or other persons.

The endorsement defined the terms “Assault”, “Battery” and “Physical Alteration” as follows:

“Assault” means any attempt or threat to inflict injury to another including any conduct that would reasonably place another in apprehension of such injury.

“Battery” means the intentional or reckless physical contact with or any use of force against a person without his or her consent that entails some injury or offensive touching whether or not the actual injury inflicted is intended or inflicted. The use of force includes but is not limited to the use of a weapon.

“Physical alteration” means a dispute between individuals in which one or more persons sustain bodily injury arising out of the dispute.

On December 6, 2012, at about 11:45 p.m., Terrence Williams (“Williams”) was a business invitee at Bridge & Pratt Café. While on the premises, Williams was punched by Lamar Hall (“Hall”), an employee of Bridge & Pratt Café, and potentially other employees, servants, workmen and/or agents of the defendants, with allegedly no prior warning or provocation. Williams was allegedly struck repeatedly by hands, fists, and with an object believed to be a bottle by Hall, and potentially other employees/agents of the Defendants, an assault and battery of many against one that lasted for some time.¹

¹ Complaint filed in *Williams v. Hall et. al.*, 1412-1002 ¶¶ 12-16.

On June 27, 2013, Penn-Patriot denied coverage for the December 6, 2012 incident because the policy excludes coverage for liability that arises out of an assault, battery, or physical altercation. On December 5, 2014, Williams filed a complaint against Lamar Hall, Bridge & Pratt Café, 5207 Ho, Inc. and Jimmy Ho in the court of Common Pleas Philadelphia County. The action is captioned *Williams v. Hall et. al*, 1410-1002 (‘underlying complaint’) and alleges two counts, one for assault/battery and negligence and one for punitive damages. In May 2016, Penn-Patriot filed this declaratory judgment action against Terrence Williams, 5207 Ho, Inc., Bridge & Pratt Café, Jimmy Ho, and Lamar Hall seeking a declaration of no coverage and no defense. Defendants 5207 Ho, Inc., Bridge & Pratt Café, Jimmy Ho filed an answer and counterclaim seeking coverage. Defendants Hall and Williams failed to answer the complaint and a default judgment was entered against them. Presently before the court is Penn-Patriot’s motion for summary judgment against remaining defendants 5207 Ho, Inc., Bridge & Pratt Café, Jimmy Ho.

DISCUSSION

It is well established that an insurer's duties to defend and indemnify an insured in a suit brought by a third party depends solely upon a determination of whether the third party's complaint triggers coverage.² In making a determination whether there is a duty to defend, a court must compare the four corners of the insurance contract to the four corners of the complaint.³ An insurer may not justifiably refuse to defend a claim against its insured unless it is clear from an examination of the allegations in the complaint and the language of the policy that

² *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 330, 908 A.2d 888, 896 (2006); *Mutual Benefit Insurance Co. v. Haver*, 555 Pa. 534, 725 A.2d 743, 745 (1999), citing *General Accident Insurance Co. v. Allen*, 547 Pa. 693, 692 A.2d 1089, 1095 (1997).

³ See *Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 290 (2007) (“The language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation.”).

the claim does not potentially come within the coverage of the policy.⁴ In making this determination, the “factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured.” “As long as the complaint ‘might or might not’ fall within the policy's coverage, the insurance company is obliged to defend.” That duty continues until the claim is confined to a recovery that the policy does not cover.⁵ The facts of the underlying complaint control this determination, not the cause of action pled.⁶ With these principles in mind, and after reviewing the Policy with its endorsements, specifically the Assault or Battery General Liability Exclusion, Penn-Patriot does not have a duty to defend defendants in the underlying action because based on the factual allegations in the Williams complaint coverage is not triggered.

The assault and battery exclusion in the Penn-Patriot policy excludes coverage for the bodily injury allegedly suffered by Williams. The Williams’ complaint alleges that his actual injuries were caused by the assault and battery instigated by Hall. Specifically, Williams’ alleges that he was accosted by Hall with no prior warning or provocation, violently struck repeatedly by hands, fists and a bottle and that the first physical blow was a punch struck by defendant Hall without provocation.⁷ These allegations unequivocally establish that Williams’ bodily injury arose from an assault and battery and not from negligence, an unintentional accidental act. Although, the Williams’ complaint alleges a count for negligence, the facts, not the cause of action, determine whether coverage exists. To allow the manner in which the complainant frames

⁴ *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc. (Jerry's Sport Center II)*, 606 Pa.584, 2 A.3d 526, 541 (2010).

⁵ *Id.*

⁶ *QBE Ins., Corp. v. M&S Landis Corp.*, 915 A.2d 1222, 1225 (Pa. Super. 2007).

⁷ Complaint filed in *Williams v. Hall et. al.*, 1412-1002 ¶¶ 12-16.

the request for redress to control in a case such as this one would encourage litigation through artful pleadings designed to avoid exclusions in liability insurance policies.⁸ In light of this precedent, the investigative reports of Curley Adjustment Bureau relied upon by defendants Bridge & Pratt Café, 5207 Ho, Inc. and Jimmy Ho's are not taken into consideration.

Additionally, the allegations of negligence in paragraph 17 of the underlying complaint and its subparts do not trigger coverage under the Penn-Patriot policy. Williams alleges his injuries and damages were “the direct and proximate result of the carelessness, recklessness and negligence” of defendants’ failure to warn, employ competent staff, train employees and supervise. This conduct is specifically excluded from coverage under the Assault or Battery General Liability Exclusion. The endorsement provides in relevant part that in consideration of the premium charge, it is understood and agreed that this insurance does not apply to liability for damages because of bodily injury which arise from an “assault”, “battery” or “physical altercation” that occurs in, or near or away from and insured’s premises:...

(2) Whether or not caused by or arising out of an insured’s failure to properly supervise or keep an insured’s premises in a safe condition, or

(3) Whether or not caused by or arising out of any insured’s act or omission in connection with the prevention, suppression, failure to warn of the “assault”, “battery” or “physical altercation”, including but not limited to, negligent hiring, training and/or supervision.

(4) Whether or not caused by or arising out of negligent, reckless, or wanton conduct by an insured, an insured’s employees, patrons or other persons.

Based on the foregoing, no coverage is triggered.

In a similar action, the Superior Court also barred coverage based upon an assault and battery endorsement in *Acceptance Insurance Company v. Seybert*, 757 A.2d 380 (Pa. Super. 2000). In *Seybert*, a bar patron was attacked in the parking lot by other bar patrons. In his

⁸ *Mutual Ben. Ins. Co. v. Haver*, 555 Pa. 534, 539, 725 A.2d 743, 745 (1999).

complaint, the victim alleged that the bar, knowing that the attackers were visibly intoxicated, nonetheless, continued to serve them alcohol, which contributed to the attack.⁹ The bar sought coverage from its insurer contending that because the complaint contained negligence counts, the insurer had an absolute duty to defend. The Superior Court disagreed. Relying on an assault and battery endorsement, the Superior Court said that coverage did not apply to “bodily injury ‘arising out of assault and/or battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person.’” The court reasoned that the complaint contained no allegation that the actual injury was an accident or caused by anything other than the assault and battery in the parking lot, and therefore, the exclusion applied.¹⁰ Similarly, the underlying Williams complaint contains to allegations that the actual injury was caused by anything other than an assault or battery.¹¹

Applying the above principles, the language of the underlying Williams complaint does not trigger coverage under the Penn-Patriot policy and therefore there is no duty for Penn-Patriot to defend defendants Bridge & Pratt Café, 5207 Ho, Inc. and Jimmy Ho.¹²

⁹ *Acceptance Insurance Company v. Seybert*, 757 A.2d 380, 383 (Pa. Super. 2000).

¹⁰ *Id.* at 383.

¹¹ The instant action is distinguishable from *QBE Insurance Corp. v. M & S Landis Corp.*, 915 A.2d 1222 (Pa. Super. 2007), where the Superior Court held that an assault and battery clause did not exclude coverage. In *QBE*, a patron was smothered to death when he was removed from a nightclub. Specifically, employees of the club wrestled the patron down the stairs, at times in a choke hold, and then, at the direction of the nightclub owners, threw him onto the ground outside. Thereafter, the employees lay on top of the patron, smothering him. After suit was brought against the nightclub, the nightclub's insurer denied coverage and filed a declaratory judgment action relying on an assault and battery exclusion. Unlike the case before this court and *Seybert*, the Superior Court reasoned that the patron in *QBE*'s death was not the result of an assault and battery but arose from the negligence of defendants.

¹² Penn-Patriot, in its motion for summary judgment also raised two other exclusions, the Expected or Intended Injury and the Punitive Damage Exclusion. These exclusions are not discussed since the Assault or Battery General Liability Exclusion applies.

CONCLUSION

For the foregoing reasons, Plaintiff Penn Patriot Insurance Company's Motion for Summary Judgment is granted. It is declared that the Penn-Patriot Insurance Company's policy provides no coverage, including no defense, to Defendants in the matter captioned *Terrence Williams v. Lamar Hall, et. al.*, Philadelphia, CCP December 2014 No. 1002. It is further **ORDERED** that Defendants 5207 Ho, Inc., Bridge & Pratt Café and Jimmy Ho's counterclaim seeking coverage is dismissed.

BY THE COURT,



RAMY I. DJERASSI, J.