

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

12 th STREET GYM, INC.	:	JULY TERM, 2005
<i>Plaintiff</i>	:	No. 03393
	:	(Commerce Program)
v.	:	
PHILADELPHIA INDEMNITY INSURANCE COMPANY and NIKOLE PAPAS	:	
<i>Defendants</i>	:	Motion Control No.031931

ORDER

AND NOW, this 12th day of June, 2006, upon consideration of the defendant Philadelphia Indemnity Insurance Company's Motion for Judgment on the Pleadings, plaintiff's response in opposition, the respective memoranda, all other matters of record, and in accord with the Opinion entered contemporaneously, it is **ORDERED** that defendant Philadelphia Indemnity Insurance Company's Motion for Judgment on the Pleadings is **GRANTED**.

BY THE COURT

ALBERT W. SHEPPARD, JR., J.

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

12 th STREET GYM, INC.	: JULY TERM, 2005
v.	: No. 3393
PHILADELPHIA INDEMNITY INSURANCE COMPANY and NIKOLE PAPAS	: (Commerce Program)
	: Control No. 031931

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OPINION

Albert W. Sheppard, Jr., J. June 12, 2006

Defendant Philadelphia Indemnity Insurance Company (“PIIC”) filed a Motion for Judgment on the Pleadings. The issue presented is whether PIIC owed a duty to defend the insured plaintiff, 12th Street Gym, Inc. (“the 12th Street Gym”), in an underlying action. For the reasons discussed, the Motion is granted.

Background

12th Street Gym, a health and fitness club located in center city Philadelphia, brought this action against PIIC, a Pennsylvania corporation located in Bala Cynwyd, PA. Count I of this Complaint seeks a declaratory judgment, Count II asserts a breach of insurance contract claim, and Count III asserts a bad faith claim. The Complaint alleges that PIIC refused to defend the 12th Street Gym in an underlying action, Nikole Papas v.

12th Street Gym., Inc., et al., Docket No. 0504-2169 (Phila. Ct. Com. Pl.)¹

The Complaint in the underlying action alleges that in May 2003, 12th Street Gym marketed, promoted and provided therapeutic massages inside the gym, and that Nikole Papas accepted an offer for a massage in exchange for a fee. The underlying Complaint alleges that on May 6, 2003, Ms. Papas was directed to a small massage room, and that once inside the room, the massage therapist, “Master Tony,” closed the door and “sexually and indecently” assaulted Ms. Papas.² The underlying Complaint alleges that the 12th Street Gym negligently exposed Ms. Papas to a foreseeable risk of harm; negligently failed to properly investigate Master Tony’s background, character and qualifications; negligently failed to properly hire, train and supervise him; and negligently failed to investigate rumors of Master Tony’s prior sexual misconduct.³

In April 2005, 12th Street Gym, requested that PIIC defend the Gym in the underlying Papas action.⁴ By letter dated May 11, 2005, PIIC denied coverage and refused to defend the 12th Street Gym in the Papas litigation. Among the arguments articulated in support of its decision, PIIC explained that the facts alleged in the underlying Papas Complaint, as matched against the provisions in the “Abuse and Molestation Exclusion,” denied insurance coverage and exempted the insurer from its

¹ Complaint at ¶ 22-25. The expected trial date for the underlying action is November 6, 2006. Previously, Papas had filed a “predecessor” suit which she later withdrew without prejudice: Nikole Papas v. 12th Street Gym., Inc et al., Docket No. 0411-3483 (Phila. Ct. Com. Pl.) The 12th Street Gym alleges that PIIC’s duty to defend extends to the present underlying action as well as to the “predecessor” case.

² Nikole Papas v. 12th Street Gym., Inc et al., Docket No. 0504-2169 (Phila. Ct. Com. Pl.) This underlying Complaint states that “Master Tony,” also known as Trung D. Ton, was arrested, charged and “sentenced to a prison term for sexually and indecently assaulting” Ms. Papas. Id. at ¶¶ 14, 20.

³ In Count I of the underlying Papas Complaint, Plaintiff lists twelve distinct allegations based on negligence. Id. at ¶ 27.

⁴ Policy No. PHPK 041696 for the period from 04/02/2003 to 04/02/2004. See Complaint, Exhibit E.

duty to defend.⁵ Following this denial, the 12th Street Gym filed this action against PIIC on July 29, 2005.

Discussion

In Pennsylvania, once “the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.” Pa. R.C. P. 1034(a). If the pleadings evidence that no disputed material facts exist, then judgment on the pleadings is appropriate, and trial by jury becomes unnecessary. Travelers Casualty & Surety Co. v. Castegnaro, 565 Pa. 246, 772 A.2d 456, 459 (2001).

In deciding the obligations of the parties under an insurance agreement, including whether an insurer has a duty to defend, courts follow a two-step procedure: first, they must “determine the scope of the policy’s coverage,” and second, they must “examine the complaint in the underlying action to ascertain if it triggers coverage.” General Accident Ins. Co. of America v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (1997). As to the first step, this court notes that the task of interpreting an insurance contract belongs to the bench and not to the jury:

[t]he task of interpreting an insurance contract is generally performed by a court rather than by a jury.... The purpose of that task is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy.... When the language of the policy is clear and unambiguous, a court is required to give effect to that language.... When a provision in the policy is ambiguous, however, the policy is to be construed in favor of the insured to further the contract’s prime purpose of indemnification and against the insurer, as the insurer drafts the policy and controls coverage.

401 Fourth Street, Inc. v. Investors Insurance Group, 538 Pa. 445; 879 A.2d 166, 171 (2005).

⁵ Complaint, Exhibit F.

As to the second step, this court notes that “the insurer's obligation to defend is fixed solely by the allegations in the underlying complaint.” Erie Insurance Exch. v. Muff, 2004 Pa. Super. 177, 851 A.2d 919, 926 (2004).

Here, PIIC argues that the claims in the underlying Papas Complaint are excluded from coverage under the policy’s Abuse or Molestation Exclusion. This court agrees. The pertinent exclusion provisions read:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

ABUSE OR MOLESTATION EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability and Paragraph 2., Exclusions of Section I – Coverage B – Personal and Advertising Injury Liability:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of:

1. The actual or threatened abuse or molestation by anyone or any person while in the care, custody and control of any insured, or
2. The negligent;
 - a. Employment;
 - b. Investigation;
 - c. Supervision;
 - d. Reporting to the proper authorities, or failure to so report; or
 - e. Retention;

of a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by Paragraph 1, above.

Comparing the factual allegations in the underlying Complaint to the exclusionary language above, this court concludes that PIIC had no duty to defend the 12th Street Gym in the Papas action under the exclusion.

As to Paragraph 1 of the exclusion, the contract language excludes from coverage the very conduct alleged. Specifically, the Complaint alleges that Master Tony, “[i]nstead of providing ... a therapeutic massage ... assaulted [Ms. Papas] within the massage room located at the 12th Street Gym.”⁶ Thus, the Complaint avers that Ms. Papas, while in the care, custody and control of the 12th Street Gym, was assaulted by “one of the massage therapists working within the Gym” and that, as a result of this assault, she “sustained severe physical an emotional injuries.”⁷ A parallel reading of Paragraph 1 of the Abuse or Molestation Exclusion with the averments in the underlying Papas Complaint, demonstrates that the negligence claims asserted by Ms. Papas against the 12th Street gym are excluded from coverage.

Turning to Paragraph 2 of the Abuse or Molestation Exclusion, the court notes that this provision excludes from coverage the (i) insured’s negligent employment, investigation, supervision, reporting or failure to report, or retention (ii) of a person for whom the insured is legally responsible, (iii) whose conduct amounts to abuse or molestation of any person under the care, custody and control of the insured. Based on this language and on the averments in the underlying Complaint, there can be no doubt that the negligence claims against 12th Street Gym are excluded from coverage. In fact, the underlying Complaint alleges that the 12th Street Gym negligently employed or held

⁶ The Papas Complaint, Exhibit A to Plaintiff 12th Street Gym’s Answer to Defendant Philadelphia Indemnity Insurance Company’s Motion for Judgment on the Pleadings, ¶¶ 18-19. See also the “predecessor” Papas Complaint, Docket No. 0411-3483 at ¶¶ 16-18.

⁷ Id. at ¶¶ 14, 22. See also the “predecessor” Papas Complaint, supra, at ¶¶ 13, 21.

out as its employee “a massage therapist who was not properly trained, educated, certified and qualified”; that the Gym negligently failed to “supervise and monitor the massage therapist”; that the Gym negligently hired, promoted or marketed “as a massage therapist, an individual not properly qualified”; and that the Gym “failed to properly investigate and/or act upon prior complaints and/or rumors of ‘Master Tony’ improperly touching women during massage sessions.”⁸ In short, a parallel reading of Paragraph 2 of the Abuse or Molestation Exclusion with the averments in the underlying Papas Complaint, demonstrates that the negligence claims asserted by Ms. Papas against the 12th Street gym are excluded from coverage.

In summary, since the Abuse or Molestation provisions exclude from coverage the allegations set forth in the underlying Papas Complaints, PIIC is under no duty to defend the 12th Street Gym.

Conclusion

For the reasons discussed, PIIC’s Motion for Judgment on the Pleadings should be granted. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

⁸ Id. at ¶ 27. See also the “predecessor” Papas Complaint, supra, at ¶ 26.