

STATE OF MICHIGAN
COURT OF APPEALS

LOUIS LAHOOD SARKIS and PATRICIA
LAHOOD-SARKIS,

UNPUBLISHED
November 13, 2008

Plaintiffs,

and

ARUNDHATI UMESH,

Intervening Plaintiff-Appellant,

v

No. 280860
Oakland Circuit Court
LC No. 2006-075947-NZ

CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Intervening plaintiff Arundhati Umesh (“plaintiff”) appeals as of right an order granting summary disposition to defendant on plaintiff’s intervening claim. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case presents a classic example of poor facts leading to a poor outcome. It arises out of an underlying personal injury action brought by plaintiff and her husband, Umesh Chandran,¹ against Louis and Patrizia Sarkis (“Sarkis”).² The injury at issue took place on a crowded dance floor at the Blue Martini nightclub, where plaintiff and Sarkis were both dancing in close proximity to each other. They bumped into each other and engaged in some kind of physical altercation, after which Sarkis allegedly assaulted plaintiff. Specifically, the complaint alleges that Sarkis “threw the contents of her glass (a beverage) directly into Mrs. Umesh’s face” and “then threw and smashed her glass directly on Mrs. Umesh’s face from approximately one to two

¹ Umesh Chandran did not seek intervention in this case and is not a party to this appeal.

² The Sarkises are not parties to this appeal.

feet away.” However, Sarkis testified at her deposition that she had no idea what happened to her martini glass, except that it “obviously flew” out of her hand.³

The instant action was brought by the Sarkises against their insurer. The Sarkises sought a declaratory judgment under their homeowner’s insurance policy that defendant was required to defend the Sarkises in the underlying action. After granting plaintiff’s motion for intervention, the trial court granted defendant’s motion for summary disposition. The trial court held that defendant had no duty to defend or indemnify Sarkis because the Blue Martini incident was not a covered “occurrence” under the terms of the policy and, furthermore, it fell within the policy’s intentional-act exclusion.

We review a trial court’s grant or denial of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review de novo the construction and interpretation of an insurance contract. *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 288; 683 NW2d 656 (2004); *Allstate Ins Co v Muszynski*, 253 Mich App 138, 140; 655 NW2d 260 (2002). “An insurance policy must be enforced in accordance with its terms.” *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002) (“*McCarn I*”). The policy’s terms are given their commonly used meanings unless clearly defined in the policy. *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004).

The insurer’s duty to defend and its duty to indemnify are separate and distinct. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). The duty to defend is broader than the duty to indemnify. *St Paul Fire & Marine Ins Co v Michigan Mut Ins Co*, 469 Mich 905; 668 NW2d 903 (2003); *Citizens Ins Co v Secura Ins*, 279 Mich App 69, 74; 755 NW2d 563 (2008). The duty to defend depends on the allegations in the underlying complaint of the third party in his or her action against the insured. *Protective Nat Ins Co of Omaha v City of Woodhaven*, 438 Mich 154, 159; 476 NW2d 374 (1991), quoting *Detroit Edison Co v Michigan Mut Ins Co*, 102 Mich App 136, 141-142; 301 NW2d 832 (1980). The duty to defend exists even where the suit is groundless or fraudulent, so long as the allegations *even arguably* set forth *any* claim that would be covered by the policy. *City of Woodhaven, supra* at 159; *Detroit Edison Co, supra* at 141-142. Furthermore, an insurer must look beyond just the allegations to determine if there are any factual questions regarding whether coverage is “arguable;” any such questions must be resolved in the insured’s favor. *Polkow v Citizens Ins Co of America*, 438 Mich 174, 178-181; 476 NW2d 382 (1991); *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-452; 550 NW2d 475 (1996).

The insurance policy at issue provides coverage for an “occurrence,” which is defined as “an accident” that results in bodily injury, property damage, or personal injury. Where the term “accident” is undefined in a policy, as is the case here, the term is construed to mean “an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.” *McCarn I, supra*

³ Sarkis apparently pleaded nolo contendere to a criminal charge arising out of the incident, but this is not conclusive proof of any facts. *Akyan v Auto Club Ins Ass’n*, 207 Mich App 92, 97-98; 523 NW2d 838 (1994).

at 281 (citations and internal quotation marks omitted). Whether an event was an “accident” is evaluated from the standpoint of the insured, not the injured party. *Id.* at 282-283; *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114 n 6; 595 NW2d 832 (1999). An intentional act may constitute an “accident” if the consequences were unintended and if the insured could not reasonably have anticipated them. *McCairn I, supra* at 282-283.

When the complaint is viewed alone, it clearly sets forth only allegations of an intentional act. Plaintiff and Sarkis stipulated to the dismissal of all counts in the complaint other than one count of negligence. However, *all* counts were based on the same common factual allegations. Therefore, on the face of the complaint, plaintiff’s injuries were not the result of an “accident,” and defendant would have no duty to defend Sarkis. However, looking beyond the allegations, as we must, Sarkis’s deposition testimony raises – perhaps only barely – enough of a factual question whether coverage is “arguable” for summary disposition to be inappropriate. See *Polkow, supra* at 178. Defendant characterizes Sarkis’s testimony as “fictional” and “merely self-serving assertions without basis in fact or reality.” While defendant’s incredulity may be warranted, no credibility determinations may be made when deciding a motion for summary disposition under MCR 2.116(C)(10). See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). At this stage of factual development, and on the present procedural posture of this case, we are constrained to conclude that there is doubt in this case whether coverage is arguable. That doubt, slim though it might be, must be resolved in the insured’s favor; summary disposition was therefore inappropriate. *Polkow, supra* at 180-181.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis