

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
NORTHERN DISTRICT

SUPERIOR COURT
2002

No. 01-C-100

Mill Steel Supply Corp.

v.

Acadia Insurance Co.,
Desmond & Payne, Inc.,
Sadler Insurance Agency, Inc.,
Royce M. Croft,
Dana Dresser,
Travelers Indemnity Co. of Illinois, and
Michael Keane

ORDER ON DEFENDANT TRAVELERS' MOTION FOR SUMMARY JUDGMENT [57]

The instant action arises out of defendants' refusal to provide coverage under two general liability insurance policies for costs incurred by the plaintiff, Mill Steel Supply Corp. ("Mill Steel"), in the settlement of counterclaims in an underlying suit. In January of 1998, Mill Steel terminated several employees and filed suit against them. Subsequent to the termination but prior to bringing the underlying suit, Mill Steel wrote a letter in which it allegedly defamed its former employees. The various defendants in the underlying action filed countersuits alleging wrongful termination, interference with advantageous business and employment relations, breach of contract, defamation by libel, and malicious prosecution. One defendant sought compensation under a theory of quantum meruit.

Travelers did not provide Mill Steel a defense to the counterclaims, nor did it reimburse Mill Steel's costs in defending against the counterclaims. Defendant Acadia Insurance Company also denied coverage. As a result, Mill Steel filed the

instant action.

Defendant Travelers Indemnity Co. of Illinois ("Travelers") now seeks summary judgment on the basis that the policy issued by Travelers does not provide coverage for any of the counterclaims. In the alternative, Travelers asserts that Mill Steel is not entitled to coverage because it failed to satisfy the subject policy's notice requirement. Mill Steel objects to Travelers' Motion for Summary Judgment and states that Mill Steel is the party entitled to summary judgment.

STATEMENT OF FACTS

The following facts are undisputed or, if disputed, are taken in the light most favorable to the non-moving party. For the period running from October 1, 1997 to October 1, 1998, Mill Steel was insured under a multi-part policy issued by Travelers, policy number Y-630-336X4869-TIL-97 ("the policy"). The instant case concerns the scope of the policy's Commercial General Liability Coverage Form.

The policy covers "bodily injury and property damage," as well as "personal and advertising injury." Policy at MS000079-82, SECTION I - COVERAGES, COVERAGE A and COVERAGE B. See Document 57, Exhibit A. The provisions at issue in this case fall under "personal and advertising injury." The policy defines "personal injury" as:

injury, other than bodily injury', arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;

- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room . . . ;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
- e. Oral or written publication of material that violates a person's right of privacy.

Policy at MS000088, SECTION V - DEFINITIONS. See Document 57, Exhibit A. Under the terms of the policy, "advertising injury" means:

injury arising out of one or more of the following offenses:

- a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- b. Oral or written publication of material that violates a person's right of privacy.
- c. Misappropriation of advertising of ideas or style of doing business; or
- d. Infringement of copyright, title or slogan.

Policy at MS000087, SECTION V - DEFINITIONS. See Document 57, Exhibit A.

COVERAGE B of the policy provides that Travelers must pay "those sums the insured becomes legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies." Policy at MS000082. See Document 57, Exhibit A. The policy expressly applies to "[p]ersonal injury caused by an offense arising out of [the insured's] business, excluding advertising, publishing, broadcasting or

telecasting done by or for [the insured]" and also covers "[a]dvertising injury caused by an offense committed in the course of advertising [the insured's own] goods, products or services. . . ." Policy at MS000082, SECTION I - COVERAGES, COVERAGE B, 1, b. See Document 57, Exhibit A. The policy excludes from coverage:

"Personal injury" to:

a. A person arising out of any:

(1) Refusal to employ that person;

(2) Termination of that person's employment;
or

(3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person;

Endorsement number CG21471093 to Policy at MS000092, "Employment-Related Practices Exclusion." The Employment-Related Practices Exclusion applies "[w]hether the insured may be liable as an employer or in any other capacity." Id.

On January 26, 1998, Mill Steel sued several recently terminated employees. Two days later, Mill Steel sent a letter to everyone on its mailing list, including Travelers, regarding the firings and the lawsuit. Subsequently, Joe Doucette of Mill Steel phoned Travelers representative Michael Keane and met with him to discuss the policy. Mr. Keane informed Mr. Doucette that the policy did not provide coverage for the lawsuit Mill Steel had filed, and further stated that it would not cover any

counterclaims that the former employees might bring.

Mill Steel then forwarded a copy of the writ in the underlying action to Anne Feters, a Travelers Claims Manager. At that time, Mill Steel indicated that it was sending Travelers the writ in case its former employees filed counterclaims. Travelers having denied coverage, Mill Steel obtained insurance from another provider, defendant Acadia Insurance Company ("Acadia"). While the underlying suit was pending, Acadia's agent, defendant Dana Dresser, continually assured Mill Steel that the Acadia policy would cover costs incurred in defending the counterclaims. Believing that it had coverage under its policy with Acadia, Mill Steel failed to notify Travelers when former employees Daniel Laurion and Kenneth Rust actually filed their counterclaims.¹ Ultimately, however, Acadia also denied coverage.

In the Fall of 1999, Suzanne Mandeville, another former employee, sued Mill Steel for malicious prosecution. Mill Steel notified Travelers of the suit and Travelers provided a defense, expressly reserving its rights. Travelers eventually settled the Mandeville case and indemnified Mill Steel. Mill Steel brought the instant action to recover costs it incurred in defending and

¹ Recently, Mill Steel has filed a Motion to Amend its writ, seeking to assert claims for defendants' failure to provide a defense and/or indemnity for malicious prosecution claims asserted against Mill Steel by former employees Kathy Houghton and Dawn Carreau. Because the Court must decide herein whether the subject policy provides coverage for malicious prosecution claims, the pending Motion to Amend does not change the Court's analysis. The Court will rule on the Motion to Amend in a separate order.

ultimately settling the counterclaims of its other former employees.

DISCUSSION

Summary judgment shall be rendered if the pleadings and affidavits filed "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a (1997). When the Court reviews the motion, it must consider all the evidence in the light most favorable to the nonmoving party and "take all reasonable inferences from the evidence in that party's favor." High Country Assocs. v. N.H. Ins. Co., 139 N.H. 39, 41 (1994) (citation omitted). A disputed fact is considered material if it affects the outcome of the litigation. Sandford v. Town of Wolfeboro, 143 N.H. 481, 484 (1999) (citation omitted). "The party opposing such a motion has the burden of contradicting the proving party's affidavit; otherwise the proponent's assertions of facts will be treated as admitted." Carbur's, Inc. v. A & S Office Concepts, Inc., 122 N.H. 421, 423 (1982) (citation omitted).

Travelers maintains that it was not obligated to cover or provide a defense against any of the counterclaims asserted against Mill Steel in the underlying litigation. Mill Steel responds that it was entitled to coverage and a defense against the counterclaims that alleged defamation, interference with advantageous business and employment relations, and malicious prosecution. The interpretation of insurance policy language is

a question of law for the Court to decide. Ross v. The Home Ins. Co., No. 98-200, slip op. at 3 (N.H. Supreme Ct. June 6, 2001) (citing Allen v. Sentry Insurance, 137 N.H. 579, 580-81 (1993)). The Court construes the policy language at issue as would a reasonable person in the position of the insured based on a more than casual reading of the policy as a whole. Id.

If the policy language is reasonably susceptible of more than one interpretation and one interpretation favors coverage, the Court will construe the policy in favor of the insured and against the insurer. Hudson v. Farm Family Mut. Ins. Co., 142 N.H. 144, 146 (1997) (citation omitted). The Court will not, however, create an ambiguity simply to resolve the issue of coverage against an insurer. Brouillard v. Prudential Prop. & Cas. Ins. Co., 141 N.H. 710, 712 (1997) (citations and quotations omitted). Policy terms create an ambiguity only when the parties reasonably may differ as to their interpretation. Funai v. Metro. Prop. and Cas. Co., 145 N.H. 642, 644 (2000) (citation and quotations omitted). "An insurance company remains free to limit its liability through clear and unambiguous policy language." Weeks v. St. Paul Fire & Marine Ins. Co., 140 N.H. 641, 643 (1996) (citation and quotations omitted).

Travelers asserts that defamation, although generally covered as "personal injury," is expressly excluded under the policy's Employment-Related Practices Exclusion. Mill Steel contends that the allegedly defamatory letter it sent regarding the defendants in the underlying suit could constitute

"advertising injury" rather than "personal injury." In Mill Steel's view, "advertising injury" is not subject to the Employment-Related Practices Exclusion. Travelers does not rebut Mill Steel's assertion that "advertising injury" is not subject to the exclusion, but maintains that the letter at issue could not possibly come within the scope of "advertising injury" as defined by the policy.

Mill Steel sent the allegedly defamatory letter regarding its former employees to everyone on its mailing list. Regardless of whether some people on the mailing list were customers of Mill Steel, the letter's purpose was not to advertise Mill Steel's products. Rather, Mill Steel sent the letter in order to explain its situation and assure existing customers and others associated with the company that all was well from an operational standpoint. Consequently, the letter does not constitute "advertising injury," which the policy defines as injury "caused by an offense committed in the course of advertising [the insured's] goods, products or services." Policy at MS000082, SECTION I - Coverages, Coverage B, 1, b(2). See Document 57, Exhibit A. In light of the foregoing, the Court finds the provisions concerning "advertising injury" inapplicable and analyzes the coverage issue as "personal injury," subject to the Employment-Related Practices Exclusion.

Upon analysis of the salient policy language, the Court finds and rules that the cited exclusion does not apply to the allegedly defamatory letter because Mill Steel sent the letter

after it had terminated the counterclaimants' employment. The Employment-Related Practices Exclusion excepts from coverage personal injury to a person arising out of "[e]mployment-related practices, policies, acts or omissions, such as . . . defamation . . . directed at that person." Endorsement number CG21471093 to Policy at MS000092. See Document 57, Exhibit A. The "personal injury" for which Mr. Laurion sought recovery through his defamation claim did not arise from his employment or termination. His "personal injury" in this context arose out of Mill Steel's subsequent action of writing and sending the letter.

"Read literally and broadly the terms arising out of and employment-related . . . acts or omissions would include any claim or injury connected in any way with employment termination, no matter how attenuated that connection." Zurich Ins. Co. v. Smart & Final, Inc., 996 F. Supp. 979, 988 (1998) (omission in original). Like the Zurich court, this Court concludes that the parties could not have "intended the exclusion to be read so expansively." Id. (citing HS Services, Inc. v. Nationwide Mut. Ins. Co., 109 F.3d 642, 645 (9th Cir. 1997)). "[T]o arise out of a termination of employment, the defamatory remark at issue must have been a part of or directly and proximately resulted from the termination." HS Services, Inc., 109 F.3d at 647 (quotations omitted).

Nor does Mr. Laurion's counterclaim for interference with advantageous business and employment relations come within the policy's exclusion for employment-related practices. Like the

defamation claim discussed *supra*, this claim arises out of Mill Steel's post-termination behavior regarding Mr. Laurion's attempts to attain alternate employment. The counterclaim alleged wrongs committed after termination of employment that caused new and distinct injury. It did not arise out of the termination itself, nor out of Mr. Laurion's prior employment with Mill Steel.

Travelers also disclaims any obligation to cover the various malicious prosecution counterclaims. Under the policy's express provisions, "personal injury" includes "malicious prosecution" by an insured. Policy at MS000088, SECTION V - DEFINITIONS, 13, b. See Document 57, Exhibit A. Despite the cited language, Travelers argues that it was not obligated to provide coverage for the former employees' malicious prosecution claims because such claims clearly lacked merit. In particular, Travelers asserts that the counterclaims for malicious prosecution failed to state a claim because the proceedings in the underlying litigation had not yet terminated in the employees' favor. See ERG, Inc. v. Barnes, 137 N.H. 186, 190 (1993).

Mill Steel maintains that the underlying proceedings had, in fact, terminated in Mr. Laurion's favor at the time he alleged his counterclaim for malicious prosecution. Mill Steel further asserts that Travelers must cover Mr. Laurion's counterclaim for malicious prosecution because it covered Ms. Mandeville's identical claim. The Court need not resolve the factual issue presented by the parties' assertions because it finds and rules

that the policy provides coverage for malicious prosecution claims whether or not such claims appear meritorious.

"It is well-settled law in New Hampshire that an insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy." Ross, *supra*, at 3 (citing Green Mt. Ins. Co. v. Foreman, 138 N.H. 440, 441-42 (1994)). "[T]he insurer's duty to defend extends only to those causes of action that would fall under the policy if they were proved true." White Mountain Cable Constr. Corp. v. Transamerica Ins. Co., 137 N.H. 478, 482 (1993). An insurer must defend an action coming within the policy's express terms "even though the suit may eventually be found to be without merit." Id. (citation and quotations omitted). "The duty of an insurer to defend is not necessarily coextensive with its duty to pay." Id. (citation and quotations omitted). As Travelers concedes, the applicable policy language clearly includes "malicious prosecution" under the coverage provisions for "personal injury." Policy at MS000088, SECTION V - DEFINITIONS, 13, b. See Document 57, Exhibit A. If proved true, the employees' counterclaims for malicious prosecution would clearly fall within the express provisions of the policy. Consequently, Travelers was obligated under the policy to provide coverage and defend against any such counterclaims in the underlying litigation. White Mountain Cable Constr. Corp., 137 N.H. at 482.

The Court finds and rules that the malicious prosecution

claims do not come within the scope of the Employment-Related Practices exclusion. The former employees sought recovery under a theory of malicious prosecution for Mill Steel's having wrongfully sued them, not for their terminations. Cf. Barnes v. Employers Mut. Cas. Co., 1999 WL 366587 (Tenn. App. 1999) (finding employment-related practices exclusion inapplicable to former employee's malicious prosecution claim based on employer's filing criminal charges against him).

Finally, Travelers contends that it is entitled to summary judgment on the basis that Mill Steel failed to provide adequate notice of the employees' counterclaims. Mill Steel concedes that it did not give Travelers actual notice of the counterclaims when brought, but asserts that Travelers was not prejudiced by the delay. Mill Steel further maintains that Travelers itself precipitated the delay by wrongfully denying coverage when initially presented with the writ in the underlying case.

In some instances, an insured's failure to provide notice as expressly required by the policy may be excusable. "An insured may be excused for a delay or failure to give the required notice where it appeared that he believed, acting as a reasonably prudent person, that the . . . injury was not covered by the liability policy." 44 AM. JUR. 2D *Insurance* § 1343 (1982) (citing 109 N.H. 464, 466-67 (1969)). The Court finds the application of this principle particularly appropriate here. Travelers itself indicated that it would not provide coverage for either the suit brought by Mill Steel, or any counterclaims arising from that

litigation. Having been so informed, Mill Steel did not persist in providing notice of counterclaims when actually filed because it believed Travelers would not act on that information. Cf. Dover Mills Partnership v. Comm. Union Ins. Cos., 144 N.H. 336, 338 (1999) (requiring consideration of reasons for delay in analyzing whether insured has breached policy's notice provisions); Abington Fire Ins. Co. v. Drew, 109 N.H. 464, 467 (1969) (stating trial court should consider reasons for delay in analyzing whether failure to notify insurer constitutes breach).

The Court cannot grant Travelers' Motion for Summary Judgment under these circumstances. There remain genuine issues of material fact pertaining to whether Mill Steel's alleged failure to abide by the policy's notice terms was reasonable and therefore excusable. Also inappropriate for summary judgment is the question as to whether Travelers was prejudiced by any delay. "Prejudice is generally a question of fact . . . and is central to a determination of whether the lack of notice constitutes a material breach of the insurance contract." Dover Mills Partnership, 144 N.H. at 339 (citation omitted).

Accordingly, Travelers' Motion for Summary Judgment [57] is DENIED.

Finally, Mill Steel stated in its Objection to Travelers' Motion for Summary Judgment [62] that the Court should grant summary judgment in Mill Steel's favor. To the extent that such statements could be construed as a motion for summary judgment, the motion is DENIED in light of the foregoing findings and

rulings. There exist genuine issues of material fact regarding notice in this case that preclude summary judgment in favor of either Travelers or Mill Steel.

So Ordered.

Dated: March 7, 2002

CAROL ANN CONBOY
PRESIDING JUSTICE