SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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ZURICH AMERICAN INSURANCE COMPANY and AMERICAN ZURICH INSURANCE COMPANY,

Plaintiffs,

-against- Index No. 655533/16

DON BUCHWALD & ASSOCIATES, INC. and TONY BURTON,

Defendants.

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SHERWOOD, J.:

This insurance coverage case arises out of an underlying Florida action brought by Terry Gene Bollea (Bollea), also known as the world-famous professional wrestler Hulk Hogan, against Don Buchwald & Associates (DBA), Tony Burton (Burton) and other entities and individuals (the underlying action). In the action before this court, plaintiffs Zurich American Insurance Company (ZAIC) and American Zurich Insurance Company (AZIC) and defendants DBA and Burton both seek declaratory judgments with respect to whether plaintiffs have a duty to defend DBA and Burton in the underlying action.

Motion sequence nos. 002 and 003 are consolidated for disposition. In motion sequence no. 002, defendants move, pursuant to CPLR 3212, for an order awarding them partial summary judgment: (1) on their third counterclaim, and declaring that AZIC is obligated to defend them in the underlying action; (2) on their fourth counterclaim, and declaring that ZAIC is obligated to defend them in the underlying action; (3) on the first and second counterclaims, awarding monetary damages arising from defendants' breach of the insurance policies at issue, and directing an inquest to determine the amount of damages to be paid to defendants; (4) dismissing the first and second counts of the amended complaint; (5) awarding a default judgment to defendants on their counterclaim; and (6) awarding defendants the legal fees and costs they have incurred in defending this action, and directing an inquest to determine the amount of their reasonable legal fees and costs.

In motion sequence no. 003, plaintiffs move, pursuant to CPLR 3212, for an order awarding them summary judgment, and declaring that they have no duty to defend or indemnify defendants in the underlying action.

For the reasons set forth below, defendants' motion for partial summary judgment is granted, and plaintiffs' motion is denied.

FACTS

I. Background and The Underlying Action

DBA is a talent and literary agency. Burton is a talent agent employed by DBA. One of DBA's clients is radio personality Michael Calta (Calta), and Burton is his agent at DBA.

On May 2, 2016, Bollea filed the original complaint in the underlying action, *Bollea v Don Buchwald & Assoc.*, Case No. 16-002861-CI, venued in the Circuit Court of the Sixth Judicial Circuit In and For Pinellas County, Florida. In that action, Bollea asserted various claims against DBA, Burton, the website *Gawker*.com (*Gawker*) and Calta, among other defendants (*see* aff of Ilene S. Farkas, exhibit A). The original Bollea complaint asserted seven causes of action against DBA and Burton sounding in, inter alia, invasion of privacy and intentional infliction of emotional distress (*see id.*).

The claims in the Bollea action arise from the alleged dissemination and publication of two distinct portions of video and audio recordings recorded by Bubba the Love Sponge Clem (Clem), Bollea's former best friend .

First, in October 2012, *Gawker* published footage of Bollea engaged in consensual sexual intercourse with Heather Clem, Clem's then-wife (the sex footage). Clem, a famous radio personality, actively encouraged and permitted Bollea to have sexual intercourse with his then-wife. Second, in July 2015, the *National Enquirer* (the *Enquirer*) published another portion of footage recorded by Clem, in which Bollea used offensive racial epithets to describe African-Americans (the racist footage). Bollea asserts that Calta and Burton acted in concert to deliver the sex footage to *Gawker*, and that they had some involvement in the leakage of racist footage to the *Enquirer*. Bollea alleges that, as a consequence of the racist footage being published, all of his contracts were terminated.

On May 17, 2017, after settling with *Gawker*, Bollea filed an amended complaint in the underlying action (*see* Farkas aff, exhibit B). In the amended complaint, Bollea asserts two new claims against DBA sounding in negligence – one for "negligent retention" and the other for simple negligence. Specifically, Bollea alleges that DBA acted negligently by retaining Burton as an employee because DBA "knew or should have known" that Burton was "predisposed to committing wrongs." Bollea further alleges that DBA's "fail[ure] to take reasonable action to investigate, prevent and/or avoid [Burton's] misconduct" directly and proximately caused him to suffer damages, including "anxiety" and "severe emotional distress" (*see* amended Bollea complaint ¶¶ 208-214). In addition, unlike the original complaint, the amended Bollea complaint blamed DBA Burton, and the other remaining defendants (not *Gawker*, whom Bollea previously blamed), for the production and dissemination of the racist footage (*id.* ¶¶ 138-142).

II. The Insurance Policies

A. *The Primary Policies from AZIC*

DBA purchased four successive commercial general liability policies from AZIC, on the same or similar terms, for the periods from June 8, 2013 to June 8, 2014 (the First Primary Policy), June 8, 2014 to June 8, 2015 (the Second Primary Policy), June 8, 2015 to June 8, 2016 (the Third Primary Policy), and June 8, 2016 to June 8, 2017 (the Fourth Primary Policy, and collectively, the Primary Policies) (*see* amended complaint, exhibits C, D and F).

This motion seeks relief from AZIC based on its alleged breach of the Third Primary Policy (*see* Farkas aff, exhibit D). The Third Primary Policy provides coverage for "bodily injury" caused by an "occurrence" that takes place during the policy period and within the "coverage territory" (*see id.* at 47 ¶ 3; 54-55 ¶ A.1; 49 ¶ 13). The Third Primary Policy also provides that AZIC "will have the right and duty to defend the insured against any 'suit' seeking" damages "because of 'bodily injury' . . . to which this Insurance applies" (*id.* at 54-55, ¶ A.1). In addition to insuring DBA, the Third Primary Policy also insures DBA's "Volunteer Workers" and "employees," i.e., Burton (*id.* at 44 ¶ 2.1; 47 ¶ 5, 50 ¶ 20).

B. *The Umbrella Policies from ZAIC*

DBA purchased four successive commercial umbrella liability policies from ZAIC, on the same or similar terms, for the periods from June 8, 2013 to June 8, 2014 (the First Umbrella Policy), June 8, 2014 to June 8, 2015 (the Second Umbrella Policy), June 8, 2015 to June 8, 2016 (the Third Umbrella Policy), and June 8, 2016 to June 8, 2017 (the Fourth Umbrella Policy, and collectively, the Umbrella Policies) (*see* amended complaint, exhibits G, H, I and J).

This motion seeks relief against ZAIC on its breach of the Third Umbrella Policy (*see* Farkas aff, exhibit E). Coverage A of the Third Umbrella Policy provides "excess" coverage. Specifically, under Coverage A, ZAIC agreed to "pay on behalf of the insured those damages covered by this insurance in excess of the total applicable limits of underlying insurance" (*see id.* at 12). Coverage B of the Third Umbrella Policy provides "umbrella" coverage (*id.*). Specifically, under Coverage B, ZAIC agreed to

> "pay on behalf of the insured those damages the insured becomes legally obligated to pay by reason of liability . . . [i]mposed by law because of bodily injury, property damage or personal and advertising Injury . . . covered by this Insurance but only if the injury, damage or offense arises out of your business, takes place during the policy period of this policy and is caused by an occurrence happening anywhere"

(*id.*). The Third Umbrella Policy further states that "Coverage B does not apply to any loss, claim or suit for which insurance is afforded under underlying insurance or would have been afforded except for the exhaustion of the Limits of Insurance of underlying insurance" (*id.*).

With respect to the duty to defend, the Third Umbrella Policy provides that ZAIC shall "have the right and duty to assume control of the Investigation and settlement of any claim, or defense or any suit against the insured for damages covered by this policy . . . (1) Under Coverage A, when the applicable limit of underlying insurance and other insurance has been exhausted by payment of claims for which

coverage is afforded under this policy; or (2) Under Coverage B, when damages are sought for bodily injury, property damage, personal and advertising injury to which no underlying Insurance or other Insurance applies" (*id.* at 46 ¶ B).

III. The Insurers' Disclaimers

In June 2016, DBA and Burton submitted notice of the Bollea action and the original Bollea complaint to AZIC and ZAIC (amended complaint ¶ 44). By letters dated October 16, 2016 to Burton and DBA, the insurers declined their defense and coverage obligations, and, on the same date, commenced this action (*see* Farkas aff, exhibits F and G).

In this action, the insurers seek a declaration that: (1) Burton does not qualify as an insured under the Primary Policies and the Umbrella Policies; (2) they have no duty to defend DBA and Burton in the Bollea action; and (3) they have no obligation to indemnify DBA and Burton for any potential damages imposed against them in the Bollea action.

On May 12, 2017, DBA and Burton were served with an amended complaint in the Bollea action, and then provided the insurers with the amended pleading. In July 2017, the insurers sent DBA and Burton letters advising that they continued to disclaim their defense and coverage obligations under the Primary Policies and the Umbrella Policies (*see* Farkas aff, exhibits H and I). In their "Coverage Position," the insurers did not address the newly-alleged claims sounding in negligence. Specifically, AZIC contended that: (1) the Primary Policies did not insure against claims for injunctive relief; (2) the amended Bollea complaint did not allege "bodily injury" caused by an "occurrence" since all of DBA's and Burton's actions were allegedly intentional and not accidental; (3) Exclusion 2 (a) applied to bar coverage since DBA and Burton "expected" or "intended" the "bodily injury" at issue; and (4) Exclusion 2 (q) applied to bar coverage of the sixth cause of action for violation of Florida Statute 934.10 (*see* Farkas aff, exhibit H at 14-15; exhibit I at 14-15).

In those same letters, ZAIC supported its denial of its defense and coverage obligations under the Umbrella Policies by contending that: (1) Coverage A did not apply because no coverage existed under the Primary Policies; (2) Coverage B did not apply because the amended Bollea complaint did not allege "bodily injury" or "personal and advertising injury"; (3) Exclusion 5 (a) of Coverage B applied since any personal and advertising injury that Bollea suffered allegedly was "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another"; (4) Exclusion 5 (c) of Coverage B applied to bar coverage for (1) injuries arising from the sex footage for each of the Umbrella Policies (since the sex footage was published before inception of the earliest Umbrella Policy) and (2) injuries arising from the racist footage for the Fourth Umbrella Policy (since the racist footage was published before its effective date) and (5) that Exclusion 5 (d) of the Coverage B and Exclusion 6 of

Coverage A and B applied to bar coverage of the sixth cause of action for violation of Florida Statute 934.10 (*see* exhibit H at 15-16; Exhibit I at 16-17).

IV. The Counterclaims and the Instant Motion

On August 24, 2017, DBA and Burton filed an answer to the amended complaint with affirmative defenses and amended counterclaims. The amended counterclaims seek, among other things, a declaration that defendants are required to provide a defense to DBA and Burton in the underlying action under the Primary Policies and the Umbrella Policies, and damages arising from the insurers' breach of their duty to defend.

As of December 2017, the plaintiffs have still not filed a reply to the counterclaims.

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

When analyzing a dispute over insurance coverage, courts should look first to the language of the policy (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). As with the construction of all contracts, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]; *see also Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). In the context of an insurance coverage dispute, "[g]enerally it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y., Inc.*, 98 NY2d at 218; *see York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862-863 [2d Dept 2010]).

"[A]n insurer's duty to defend is broader than its duty to indemnify and arises whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility" (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2d Dept 2009]; *accord BP A.C. Corp., v One Beacon Ins. Group.*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). The determination as to whether the duty of an insurer to defend under a policy is triggered "depends on the facts which are pleaded" (*Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 162 [1992]). "[Only] where it can be determined from the factual allegations that 'no basis for recovery within the coverage of the policy is stated in the complaint, [may a court] . . . sustain [the insurer's] refusal to defend'" (*id.* at 163 [citation omitted]; *Allstate Ins. Co. v Zuk*, 78 NY2d 41, 46 [1991] [court may only sustain insurer's refusal to defend where "as a matter of law . . . there is no possible factual or legal basis on which it might eventually be obligated to indemnify the insured under any policy provision"]; *see e.g. Morse Diesel Intl. v Olympic Plumbing & Heating Corp.*, 299 AD2d 276 [1st Dept 2002] [finding that an insurer owed a duty to defend where it failed to meet its heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within the exclusions of the additional insured endorsement]).

Accordingly, summary judgment should be granted to the insured where, upon a review of the policy at issue and the underlying complaint, "the four corners of the complaint suggest . . . a reasonable possibility of coverage" (*Continental Cas. Co. v Rapid -American Corp.*, 80 NY2d 640, 648 [1993] [citation omitted]; *see e.g. Axis Surplus Ins. Co. v GTJ Co.*, 139 AD3d 604, 604-605 [1st Dept 2016] [granting summary judgment to an insured on insurer's duty to defend]). "'If any of the claims against [an] insured arguably arise from covered events, the insurer is required to defend the entire action'" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443-444 [2002] [citation omitted]; *see also Fieldston Prop. Owners Assoc., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264-65 [2011]). That principle prevails even where the underlying complaint "'asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions'" (*Town of Massena*, 98 NY2d at 444 [citation omitted]; *see also QBE Ins.Corp. v Jinx-Proof Inc.*, 102 AD3d 508, 510 [1st Dept 2013], *affd* 22 NY3d 1105 [2014] ["QBE's duty to defend, while it was in effect, extended even to claims that fell within the () exclusion(s)"]).

Defendants' motion for summary judgment seeks: (1) a declaration that AZIC is required to provide a defense to DBA and Burton in the Bollea action under the Third Primary Policy; (2) a declaration that ZAIC is required to provide a defense to DBA and Burton in the Bollea action under the Third Umbrella Policy; (3) an award to DBA and Burton of their damages arising from plaintiffs' breach of their duty to defend DBA and Burton under the Third Primary Policy and the Third Umbrella Policy,

and directing an inquest to ascertain the amount of such damages; and (4) an award to DBA and Burton of their attorneys' fees and costs incurred in connection with the defense of this action.

Plaintiffs move for a declaration that they have no duty to defend or indemnify defendants in the underlying action.

Application of the above principles to the underlying complaint and the language of the insurance policies makes clear that plaintiffs are obligated to defend DBA and Burton in the underlying action. The allegations in the underlying complaint demonstrate the possibility of coverage under the Third Primary Policy and the Third Umbrella Policy, which triggers a duty to defend the entire action.

I. The Third Primary Policy

To make a prima facie showing that AZIC has a duty to defend in the Bollea action under the Third Primary Policy, DBA and Burton must demonstrate that:

(1) the Bollea action is a "suit" (i.e., "a civil proceeding in which damages because of 'bodily injury' . . . are alleged") (Third Primary Policy at 50 ¶ 18; 54-55 ¶ A.1);

(2) during the policy period, Bollea (a) suffered "bodily injury" (i.e., "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time", and (b) that DBA and Burton did not know prior to the policy period that bodily injury occurred (*id.* at 47 ¶ 3; 54-55 ¶ A.1);

(3) at least one of the causes of action in the amended Bollea complaint alleges "bodily injury" caused by an "occurrence" (i.e., "an accident, including continuous or repeated exposure to substantially the same harmful conditions") (*id.*; *see also id.* at 49 ¶ 13); and

(4) with regard to Burton, that he qualified as an "insured" (i.e., that Burton is either one of DBA's "volunteer workers" who was "performing duties related to the conduct of [DBA's] business" or one of DBA's "employees" acting "within the scope of . . . employment or while performing duties related to the conduct of [DBA's] business) (*id.* at 44 ¶ 2.a; 47 ¶ 5; 50 ¶ 20).

Once DBA and Burton make a prima facie showing, the burden shifts to AZIC "to demonstrate that the allegations of the [amended Bollea complaint] cast that pleading solely and entirely within the policy exclusions, and further, that the allegations, in toto, are subject to no other interpretation" (*International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 325 [1974]).

In opposition to defendants' motion, AZIC concedes that the Bollea action is a "suit," that Bollea suffered "bodily injury" during the Third Primary Policy period, that DBA and Burton did not know of

Bollea's bodily injury prior to the Third Primary Policy period, and that Exclusion 2 (q) does not apply to relieve it of its defense and coverage obligations. However, AZIC argues that it has no obligation to defend DBA and Burton in the underlying action because the amended Bollea complaint does not allege an "occurrence," and that the "intentional acts" exclusion (Exclusion 2 [a]) otherwise applies, because the amended Bollea complaint "solely allege[s]" that DBA and Burton engaged in intentional acts "intended to cause harm" to Bollea (*see* opp mem at 7; plaintiffs' mem at 6-7).

The court rejects this argument. In determining whether "an occurrence" has been alleged and whether conduct falls within the "accident language" of a commercial liability policy, "'it is customary to look at the casualty from the point of the view of the insured to see whether or not, from his point of view, it was unexpected, unusual and unforeseen'" (*Miller v Continental Ins. Co.*, 40 NY2d 675, 677 [1976] [citation omitted]). In that context, New York courts assess whether the insured intended to cause harmful consequences, not whether the insured, as a general matter, intended to act (*see e.g. Automobile Ins. Co. v Cook*, 7 NY3d 131, 137-138 [2006] ["we have previously defined the term 'accident,' albeit in a life insurance policy, 'to pertain not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly has that result'"] [citation omitted]; *Allegany Co-op Ins. Co. v Kohorst*, 254 AD2d 744, 744 [4th Dept 1998] ["'Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional'"] [citation omitted]). Thus, even a murder committed by the tenant of an insured-landlord has been held to be a covered "occurrence" and an "accident" because "*from the insureds' standpoint*," it was "unexpected, unusual and unforeseeable" (*Agoado Realty Corp. v United Intl. Ins. Co.*, 95 NY2d 141, 145 [2000] [emphasis in original]).

Moreover, an otherwise "intentional" tort may still be "accidental," triggering a duty to defend, where the plaintiff in the underlying action can succeed on his or her intentional tort claim without actually proving intentional or knowing conduct – i.e., where something less than actual intent suffices to establish liability (*see e.g. Cosser v One Beacon Ins. Group*, 15 AD3d 871, 873 [4th Dept 2005] [insurer had duty to defend intentional tort claims for false advertising under the Lanham Act and for deceptive business practices in violation of GBL §§ 349 and 350 because the insured "'may be liable . . . in the underlying action without a showing of intentional or knowing conduct on their part'"] [citation omitted]; *The Andy Warhol Foundation For The Visual Arts, Inc. v Philadelphia Indem. Ins. Co.*, 37 Misc 3d 1229[A], 2012 NY Slip Op 52228[U], *6 [Sup Ct NY County 2012] [finding duty to defend despite allegations of knowing conduct because the plaintiffs "could have recovered without proving that (the insureds) had knowledge" of the false nature of the publication at issue"]; *see also Bridge Metal Indus., LLC v Travelers Indem. Co.*, 559 Fed Appx 15, 20 [2d Cir 2014] ["Because 'at least one of the

(underlying) claims . . . did not require intent, (the insurer) was required to defend the entire action'"] [citation omitted]).

Here, the negligent retention and intentional infliction of emotional distress (IIED) causes of action asserted in the amended Bollea complaint both allege an "occurrence" within the meaning of the Primary Policies.

In his negligent retention claim asserted against DBA, Bollea alleges that DBA "knew or should have known" that Burton was "predisposed to committing wrongs," that DBA "failed to take reasonable actions to investigate, prevent and/or avoid" the alleged misconduct of Burton, and that by negligently retaining Burton as an employee and not terminating him, DBA directly and proximately caused Bollea to suffer damages, including "anxiety" and "severe emotional distress" (*see* amended Bollea complaint ¶¶ 208-214). These allegations unambiguously trigger AZIC's duty to defend under the Third Primary Policy because, from DBA's standpoint, Burton's acts in allegedly aiding and abetting the publication of the racist footage were unexpected, unusual and unforeseeable.

Indeed, New York courts routinely hold that negligent retention claims allege an "occurrence" against an insured-employer because, from the employer's point of view, the intentional acts of its employee are not intended or expected (*see e.g. RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 163-165 [2004] [holding that for purposes of a negligent retention claim, the acts of a beauty salon employee could not be imputed to the employer and that the alleged sexual assault committed by the employee was an "accident" because, from the standpoint of the insured-employer, the acts were not "expected or intended"]; *NYAT Operating Corp. v GAN Natl. Ins. Co.*, 46 AD3d 287, 287 [1st Dept 2007] [citation omitted] ["because NYAT's liability in the underlying action was based on its negligent hiring and retention of the employee . . . the sexual assault [by the employee] was a covered 'accident' within the meaning of the policy, and the exclusion for injuries expected or intended from the standpoint of the insured does not apply"]; *ACE Fire Underwriters Ins. Co. v Orange-Ulster Bd. of Coop. Educ. Servs.*, 8 AD3d 593, 595 [2d Dept 2004] ["The alleged assault upon the mentally disabled plaintiff in the underlying action by the nonparty employee of the defendant . . . was 'unexpected, unusual and unforeseen,' from [the employers'] point of view, and therefore was an 'accident,' and did not fall within the 'expected or intended' exclusion of the general liability policies"] citation omitted]; *see also Agoado*, 95 NY2d at 145).

Accordingly, the negligent retention claim asserted against DBA alleges an "occurrence" within the meaning of the Primary Policies, triggering AZIC's duty to defend.

In opposition to defendants' motion, and in support of its own motion for summary judgment, AZIC contends that "[t]his case falls squarely within" *Green Chimneys School for Little Folk v National Union Fire Ins. Co of Pittsburgh* (244 AD2d 387 [2d Dept 1997]), *Watkins Glen Cent. School Dist. v*

National Union Fire Ins. Co. of Pittsburgh (286 AD2d 48 [2d Dept 2001] and *Mattress Discounters of N.Y., Inc. v United States Fire Ins. Co.*(251 AD2d 384 [2d Dept 1998]) (authorities that ruled in favor of insurers faced with negligence allegations) because the amended Bollea complaint alleges that DBA and Burton "intended to harm Bollea" (opp mem at 5; plaintiffs' mem at 5).

This argument fails. These outdated cases were overruled by the New York Court of Appeals in *RJC Realty Holding Corp.* (2 NY3d at 163-165), 14 years ago. Before the Court of Appeals granted leave to appeal in *RJC Realty*, the Appellate Division, using the same progeny of cases cited by AZIC in its memorandum, found in favor of the insurer, because the underlying complaint alleged that the beauty-salon's employee assaulted a customer and therefore committed an intentional act (*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 303 AD2d 573, 575 [2d Dept 2003]). The Court of Appeals reversed, clarifying that, in assessing whether a negligence retention claim alleged an "occurrence" and thus an "accident," the question for courts to answer is not whether the employee acted intentionally, but whether, from the standpoint of the employer, the employee's acts were unexpected and unforeseen (2 NY3d at 163). The Court of Appeals then ruled in favor the insured-employer, and found a duty to defend because, from the employer's standpoint, the assault was neither intended nor expected. Likewise, here, the negligent retention claim asserted against DBA in the amended Bollea complaint alleges an occurrence because, from DBA's perspective, Burton's acts were not expected or intended.

In making this argument, AZIC ignores the actual facts alleged as against DBA. Contrary to AZIC's argument, the negligent retention claim in the amended Bollea complaint does not allege that DBA "intended to harm" Bollea. Rather, it alleges that DBA "failed to take reasonable actions to investigate, prevent, and/or avoid" Burton's alleged misconduct (*see* amended Bollea complaint ¶¶ 208-214). It further alleges that "[a]s a direct and proximate result" of negligently retaining Burton as an employee and not terminating him, and by failing to "exercise[] due diligence," DBA unintentionally caused Bollea harm (*id.*). These allegations mirror those made in *RJC*, *NYAT* and *ACE*, and thus, are sufficient to allege an occurrence (*see Continental Cas. Co.*, 80 NY 2d at 648). Accordingly, the negligent retention claim squarely alleges an occurrence, and the "expected and intended acts" exclusion does not apply.

The IIED claim also alleges an occurrence. In his IIED claim asserted against DBA and Burton, Bollea alleges that DBA and Burton acted with "reckless disregard of Bollea's rights" and caused him to suffer "severe emotional distress" (*see* amended Bollea complaint ¶¶ 182-188). Under Florida law, Bollea can succeed on this claim in one of two ways – he can demonstrate "deliberate *or* reckless infliction of mental suffering" (*see Moore v Wendy's Intl., Inc.*, 1994 WL 874973, *2 [MD Fla 1994] [emphasis added]; *see also Williams v City of Minneola*, 575 So2d 683, 690-691 [Fla 5th DCA

1991] [reciting "the elements of a cause of action for intentional infliction of emotional distress" as including "deliberate or reckless infliction of mental suffering"]).

Accordingly, because Bollea has alleged that DBA and Burton recklessly disregarded his rights, and because it is possible for Bollea to succeed on his IIED claim without actually proving "deliberate" or "intentional" conduct, the IIED claim alleges an occurrence, and the "expected and intended acts" exclusion does not apply (*see e.g. Cosser*, 15 AD3d at 873; *Warhol Foundation*, 2012 WL 6097687 at *5; *Massachusetts Bay Ins. Co. v Penny Preville, Inc.*, 1996 WL 389266 *10 [SD NY 1996] [finding duty to defend copyright infringement claim because, despite allegations of "knowing, willful and intentional conduct," "it is possible that under the statute [the insured] could have been found liable for infringement . . . without being found to have acted knowingly, willfully and intentionally"]).

Although AZIC argues that an intentional tort is never "accidental" (opp mem at 5), the court rejects this argument. It is well-settled that an "intentional" tort can still be "accidental" within the meaning of commercial liability policies, as long as the actor did not intend to achieve the specific harmful results (*see Messersmith v American Fid. Co.*, 232 NY 161, 165-166 [1921] ["injuries are accidental or the opposite . . . according to the quality of the results rather than the quality of the causes . . . A driver turns for a moment to the wrong side of the road, in the belief that the path is clear and deviation safe. The act of deviation is willful, but not collision supervening"]; *Allegany Co-Op Ins. Co.*, 254 AD2d at 744 ["'Accidental results can flow from intentional acts. The damage in question may be unintended even though the original act or acts leading to the damage were intentional'"] [citation omitted]).

II. Third Umbrella Policy

To make a prima facie showing that ZAIC has a duty to defend them in Bollea action under Coverage B of the Third Umbrella Policy, DBA and Burton must demonstrate that:

(1) Bollea seeks damages for "personal and advertising injury" (i.e., "injury, including consequential bodily injury, arising out of . . . [o]ral or written publication, in any manner, of material that violates a person's right of privacy" that were caused by an "occurrence" (i.e., "a covered offense," which includes, among other things, "[o]ral or written publication, in any manner, of any material that violates a person's right of privacy" (Third Umbrella Policy at 23 ¶¶ C.11.b, C.12.e; 46 ¶ B.2);

(2) DBA and Burton do not have (a) "underlying insurance" or (b) "other insurance" that apply to the damages that Bollea seeks for personal and advertising injury (*id.* at 46 ¶ B.2; 21 ¶ A.7; 50 ¶ L);

(3) Bollea's personal and advertising injury took place "during the policy period," that DBA and Burton did not know prior to the policy period that the personal and advertising injury had occurred, and that the personal and advertising injury arose out of DBA's and Burton's "business" (*id.* at 46 ¶ B.2; 12-13 ¶ B); and

(4) with regard to Burton, that he qualifies as an "insured" (i.e., that Burton is either one of DBA's "volunteer workers" who was "performing duties related to the conduct of [DBA's] business" or one of DBA's "employees" acting "within the scope of [his] employment" (*id.* at 22 ¶ C.6.f and C.6.g; 22 ¶ C.4; 24 ¶ C.17).

Once DBA and Burton make a prima face showing, the burden shifts to ZAIC to demonstrate that the allegations in the amended Bollea complaint "cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation" (*International Paper*, 35 NY2d at 325).

In opposition to defendants' motion, ZAIC concedes that DBA and Burton do not have "underlying insurance" or "other insurance" within the meaning of the Umbrella Policies, that Bollea's injury took place during the Third Umbrella Policy period, that DBA and Burton did not know of Bollea's injury prior to the Third Umbrella Policy period, and that Bollea's injury arose out of DBA's and Burton's business. It also concedes that Exclusion 5 (d) and Exclusion 6 do not apply. Rather, ZAIC contends that: (1) the amended Bollea complaint does not allege "personal and advertising injury" because it does not allege that DBA or Burton themselves published the footage; and (2) that Exclusion 5 (a) applies because Bollea's injuries were "caused by or at the direction of" DBA and Burton "with the knowledge that the act would violate" his rights and "inflict personal and advertising injury."

The court rejects these arguments. Coverage B of the Umbrella Policies requires ZAIC to defend "any suit against the Insured[s] for damages" when "damages are sought for . . . personal and advertising injury," i.e., "injury . . . arising out of . . . [o]ral or written publication, in any manner, of material that violates a person's right of privacy" (Third Umbrella Policy at 24 ¶ C.12.3; 46 ¶ B.2). ZAIC contends that DBA and Burton do not qualify for coverage because they did not themselves "make" the publication at issue. The argument lacks merit because no such requirement is expressed in the policy. In any event, DBA and Burton are still alleged to have "made" the publications at issue because the amended Bollea complaint seeks to hold them liable as alleged co-conspirators and as aiders and abettors (*see e.g.* amended Bollea complaint ¶¶ 10, 37, 160, 163). For instance, the amended Bollea complaint alleges that all of the defendants, including DBA and Burton, "actively participated in," "provided substantial assistance to," and "aided and/or abetted the disclosure and dissemination of [the] Footage . . . to the public" (*id.*, ¶ 160). It further alleges that all of the defendants "acted in concert with," and "aided and

abetted one another in connection with such public disclosure," and that "as a result of the actions of the Defendants," "[t]he private facts . . . were in fact published" (*id.* ¶¶ 160, 163). The amended Bollea complaint also alleges that all of the defendants "conspired with one another to obtain and leak" the footage, and that "[a]t all relevant times, the Defendants," "were the agents" and "co-conspirators" of "one another" (*id.* ¶¶ 10, 37).

DBA and Burton are being sued for invasion of privacy, infliction of emotional distress and conspiracy, all based on Bollea's allegations that DBA and Burton are responsible for the publication at issue – directly, as aiders and abettors, and/or as co-conspirators. Under Florida law, each member of a conspiracy and each aider and abettor is legally responsible for all of the acts of his or her alleged co-conspirators and accomplices (*see e.g. Lorillard Tobacco Co. v Alexander*, 123 So3d 67, 80 [Fla 3d DCA 2013] ["We also note that the law regarding conspiracy is well-settled, and provides that an act done in pursuit of a conspiracy by one conspirator is an act for which each other conspirator is jointly and severally liable"]; *Ray v Cutter Laboratories*, 744 F Supp 1124, 1127 [MD Fla 1990] ["'All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify or adopt his acts done for their benefit, are equally liable with him'"] [citation omitted]).

Thus, contrary to ZAIC's assertion, the amended Bollea complaint alleges personal and advertising injury because it alleges that DBA and Burton conspired to publish the footage, and that they aided and abetted its publication. Each of the common law invasion of privacy claims set forth in the amended Bollea complaint (the first, second and third causes of action) alleges that DBA and Burton engaged in acts violating Bollea's right of privacy, and seeks damages for "personal and advertising injury" caused by an "occurrence" within the meaning of the Umbrella Policies (*see* amended Bollea complaint ¶¶ 147-181). Each claim seeks damages for "humiliation" and "emotional distress" (*id.* ¶¶ 156, 167, 169). In addition, each claim alleges that Bollea's damage were caused by the "disclosure" and "publication" of the written transcript containing excerpts of the racist footage, thus falling within the definition of an "occurrence." The Third Umbrella Policy specifically requires ZAIC to provide a defense for "personal and advertising injury" caused by "[o]ral or written publication, in any manner, of material that violates a person's right of privacy (Third Umbrella Policy at 46 ¶ B.2; 12 ¶ B; 24 ¶¶ C.11.b and C.12.e). Accordingly, ZAIC must provide a defense to DBA and Burton under the Third Umbrella Policy.

Exclusion 5 (a) of Coverage B provides that "this policy does not apply to . . . [p]ersonal and advertising injury . . . caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict personal and advertising injury" (Third Umbrella Policy at 19 ¶ C.5.a). In opposition to defendants' motion, and in support of its motion for summary judgment,

ZAIC contends that Exclusion 5 (a) applies to relieve it of its defense obligations because the amended Bollea complaint alleges that DBA and Burton "intended to cause injury to Bollea" (*see* opp mem at 12; plaintiffs' mem at 13). This contention is baseless.

The amended Bollea complaint does not allege that DBA and Burton acted solely "with knowledge" that their acts would violate Bollea's right, which is what is required to invoke Exclusion 5 (a). Rather, the amended Bollea complaint contains allegations that DBA and Burton acted recklessly, negligently, and that they "knew or *should have known*" that their actions "constitute[d] a substantial violation of Bollea's right of privacy" (*see* amended Bollea complaint ¶¶ 161, 188, 208-214 [emphasis added]). Indeed, the sole specific allegation against Burton and DBA involve Burton contacting *Gawker* to obtain, and then provide to Calta, *Gawker's* publicly available mailing address (which Bollea alleges ultimately resulted in the publications at issue and the alleged invasions of his privacy). These allegations are consistent with an interpretation that does not require "knowledge" that what Burton was doing would result in an invasion of Bollea's privacy. As such, the allegations in the amended Bollea complaint are not cast "solely and entirely" within Exclusion 5 (a) of Coverage B.

In addition, it is clear that Bollea can succeed on his privacy claims without proving that DBA and Burton had "knowledge" that their acts would violate his privacy rights (*see Heath v Playboy Enters., Inc.*, 732 F Supp 1145, 1148 [SD Fla 1990]). That also defeats application of the "with knowledge" exclusion (*see e.g GRE Ins. Grp. v GMA Accessories, Inc.*, 180 Misc 2d 927, 932 [Sup Ct NY County 1998] ["Since it is possible that defendant may be found liable for copyright infringement in the Federal Action without being found to have willfully and knowingly, plaintiff cannot establish that [the underlying plaintiff's] infringement claim against defendant falls solely and entirely within" the policy exclusion for acts performed with knowledge"]; *CGS Indus., Inc. v Charter Oak Fire Ins. Co.*, 751 F Supp 2d 444, 452 [ED NY 2010], *affd* 720 F3d 71 [2d Cir 2013] [rejecting attempted invocation of identical policy exclusion because the underlying claim did "not require intentional misconduct" and because "it has not been determined with any ascertainable degree of probability whether or not [the insured's] alleged misconduct was committed 'with the knowledge that the act would violate the rights of another'"]).

Accordingly, because DBA and Burton have established that at least two of the claims in the amended Bollea complaint arise from covered events, AZIC and ZAIC must defend the entire action (*Town of Massena*, 98 NY2d at 443-444; *Fieldston*, 16 NY3d at 264-265). This is true even if, as plaintiffs contend, the amended Bollea complaint "'asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions'" (*Town of Massena*, 98 NY2d at 444 [citation omitted]; *see also QBE Ins. Corp.*, 102 AD3d at 510).

Plaintiffs also argue that the issue of whether Burton qualifies as an insured is premature, and that discovery is needed on this issue. The amended Bollea complaint unequivocally alleges that Burton, "[w]hile engaging in the misconduct alleged herein . . . was acting within the course and scope of his employment as an agent for Buchwald, engaged in conduct of the kind he was hired to perform, within the time and space limits of his employment, and while motivated at least in part by a purpose to serve [DBA]" (*see* amended Bollea complaint, ¶ 224; *see also id.*, ¶ 29). Bollea further alleges that Burton, while acting in his capacity as Calta's talent agent at DBA, emailed *Gawker* (from his DBA email account) to obtain a mailing address for his client Calta to fulfill a request of his client, to further the career of his client, and "to reap financial rewards" (*id.*, ¶¶ 7, 89-103, 173). AZIC and ZAIC do not dispute that the amended Bollea complaint expressly alleges that Burton was acting within the scope of his employment. Their sole argument is that a determination regarding Burton's insured status is premature because they require unidentified discovery on this issue.

The court rejects this argument. The alleged need for discovery does not overcome the undisputed allegations of the amended Bollea complaint. In making this argument, the insurers ignore the fact that, under New York law, an insurer's duty to defend is exceedingly broad, and "arises whenever the allegations in a complaint state a cause of action that gives rise to the *reasonable possibility* of recovery under the policy" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991] [emphasis added]). The allegations in the amended Bollea complaint demonstrate that Burton acted within the scope of his employment, qualifying him as an insured. Moreover, the insurers fail to articulate what discovery they need, or how it could possibly affect whether Burton qualifies as an insured.

Finally, because they have demonstrated that AZIC and ZAIC must defend the Bollea action, and having "been cast in a defensive posture" by the commencement of this declaration judgment action against them, DBA and Burton are also entitled to their legal fees and costs incurred in connection with their defense of this case (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597-598 [2004]; *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]; *see also National Union Fire Ins. Co. of Pittsburgh,* 103 AD3d at 474 [citation omitted] ["'in the event of a breach of the insurer's duty to defend, the insured's damages are the expenses reasonably incurred by it in defending the action after the carrier's refusal to do so'"]). This court will direct an inquest to determine the reasonable amount of the fees and costs to be awarded.

The court has considered the remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that defendants' motion for partial summary judgment (motion sequence no. 002) is granted; and it is further

ADJUDGED AND DECLARED that Zurich American Insurance Company and American Zurich Insurance Company are obligated to defend Don Buchwald & Associates, Inc. and Tony Burton in the underlying action entitled *Bollea v Don Buchwald & Assoc.*, Case No. 16-002861-CI, venued in the Circuit Court of the Sixth Judicial Circuit In and For Pinellas County, Florida, under the primary and excess policies issued by them; and that defendants are entitled to monetary damages as a result of plaintiffs' breach of such policies, as well as the legal fees and costs that they have incurred in defending this action; and it is further

ORDERED that the issue of the amount of monetary damages to which defendants are entitled as a result of plaintiffs' breach of the insurance policies, as well as the legal fees and costs that defendants have incurred in defending this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[1] upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiffs' motion for summary judgment (motion sequence no. 003) is denied.

Dated: December 21, 2018

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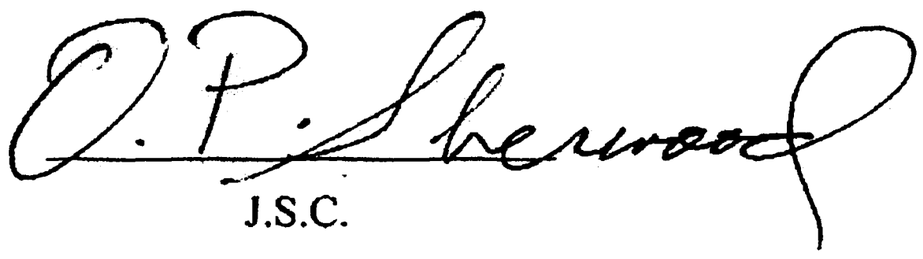

J.S.C.

[1]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.