IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHARLES A. BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE CHURCH INSURANCE COMPANY, HARLEYSVILLE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH,	)	C.A. No. 02C-06-196 RRC
	)	
Defendants.	)	

Submitted: September 25, 2003
Decided: November 17, 2003

Upon Plaintiff's Motion for Summary Judgment. DENIED.

ORDER

This 17th day of November, 2003, upon consideration of Motion for Summary Judgment ("Motion") filed by plaintiff Charles A. Brown ("Brown"), it appears to the Court that:

1. Brown filed the above-captioned action following a Superior Court trial against Capital Management Company ("Capital"), an entity apparently primarily insured by the Harleysville Insurance Company ("Harleysville"); Brown had settled pretrial with Cathedral Community Services, Inc. ("Cathedral"), an entity apparently primarily insured by the

Church Insurance Company ("Church"). (National Union Fire Insurance Company of Pittsburgh was the "excess" insurer to Capital and Harleysville.) Following trial against Capital alone, the jury returned a verdict in Brown's favor, which verdict was later affirmed by the Delaware Supreme Court. Brown thereafter filed this suit to pursue the judgment on the jury's verdict.

Through his Motion, Brown has moved for an order granting him summary judgment insofar as he contends that the balance of the Church insurance policy is do and forthcoming to him because Capital was allegedly an "other" insured under the $1,000,000 policy Church had issued to Cathedral and because the settlement between Brown and Cathedral, as it now stands, did not exhaust the amount of that policy. Discovery on these coverage issues is ongoing. Because the Court finds it desirable to inquire into the facts of this case more thoroughly in order to clarify the application of the law to the present circumstances, Brown's Motion is **DENIED**.

2. The relevant facts of the litigation underlying this current lawsuit are as follows, according to the Supreme Court's decision affirming the findings made by the jury and trial judge in the case of Charles Brown v. Cathedral Community Services and Capital Management Company, C.A. No. 99C-10-210 RRC:

> On August 23, 1999, the plaintiff, Charles Brown was standing underneath an exterior fire escape attached to the side of 2001 N. Market Street. Brown touched the bottom step of the fire escape ladder, and the ladder section fell striking Brown on the head. He suffered a compound, comminuted, depressed skull fracture. The ladder section fell because a supporting metal cable, which was severely corroded, broke, releasing the ladder and a counterweight.
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> On October 21, 1999, Brown filed a damage action against Cathedral and Capital.[1] Capital answered the complaint, and asserted a cross-claim against Cathedral for contribution and indemnification. Brown settled his claim against Cathedral and signed a joint tortfeasor release.[2] Although Capital continued to maintain its cross-claim against Cathedral, Cathedral chose not to contest the cross-claim, and ceased participating in the litigation. The case went to trial on September 10, 2001.
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> …
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> On September 14, 2001, the jury returned a verdict in favor of Brown. The jury apportioned liability 60% against Capital and 40% against Cathedral, and awarded Brown damages in the amount of $2,250,000.[3]

Also relevant for purposes of this Motion are these facts: 1) Church had issued a $1,000,000 commercial general liability policy to Cathedral (such policy containing no provision stating that any other insurance was to be considered "primary"); 2) Harleysville insured Capital in a manner not entirely clear from the present record except to the extent that its coverage of

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[1] "On June 1, 1994, Cathedral entered into a written contract with Capital, whereby Capital agreed to manage and maintain certain properties owned by Cathedral." Capital Mgmt. Co. v. Brown, 813 A.2d 1094, 1095 (Del. 2003) ("Capital v. Brown"). These properties included 2001 N. Market Street. Id. at 1095-1096. Furthermore, according to the Supreme Court, "[a]lthough the written contract expired in 1995, Capital continued to manage Cathedral's property…." Id. at 1096. As found by the jury, and affirmed by the Supreme Court, even after that contract had expired, "Capital had agreed to assume the duty to maintain the exterior of 2001 N. Market Street and…the Wilmington City Code required [Capital] to maintain the fire escape [for Cathedral]." Id. at 1098.

[2] Brown settled with Cathedral for $525,000.

[3] Capital v. Brown, 813 A.2d at 1096.

Capital apparently was "secondary" to any other insurance; and 3) National Union also insured Capital as an "excess" insurer.

3. Following the jury's rendering of its verdict (but before a Motion for New Trial filed by Capital had been determined), Capital filed and was granted a Motion to Compel, the result of which was the production by Church of its insurance policy naming Cathedral as the "named" insured. Notably, that policy also provided that "insured" under the policy included "any person or organization while acting as real estate managed for the [n]amed [i]nsured."[4]

4. Brown now moves this Court for an order granting summary judgment in his favor and against Church in the amount of $475,000 ($1,000,000—the limit of the Church insurance policy issued to Cathedral—less the $525,000 amount of Cathedral's settlement with Brown), plus interest.[5] Brown contends that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law in that Capital was an "other" insured under the Church policy and was also found to be liable to him at trial by a jury. Brown therefore contends that "[t]he balance of the

[4] Ex. "A" to Pl.'s Mot. at 6.

[5] The policy issued to Cathedral by Church includes a provision for the payment of interest "on the entire amount of any judgment…which accrues after entry of the judgment…." Pl.'s Mot. for Summ. J. ¶ 8.

Church policy is due and forthcoming…and this Court should enter an [o]rder that the balance…be paid…."[6]

With regard to any ultimate "allocation" of the $2,225,000 verdict among the various insurers named in this suit, Brown contends that the Church policy "must be exhausted prior to turning to the Harleysville…policy [because the Harleysville policy was apparently "secondary" to other coverage]."[7] Brown therefore argues that "[b]ecause the verdict against Capital…is in excess of the Harleysville [p]olicy, this Court may enter an [o]rder on the issue of…[Church]'s liability for the entirety of its policy without…determining the exact allocation for the balance of the policy."[8] Brown contends that the effect of granting his Motion "would be to greatly simplify the remaining issues…"[9]

5. In response, Church chiefly contends "the issue upon which plaintiff [Brown] seeks summary judgment (*i.e.*, the nature and extent of…[its] coverage obligation, if any, to Capital…) is perhaps the most factually-disputed and undeveloped-through-discovery of any issue among

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[6] Id. ¶ 9.

[7] Pl.'s Reply ¶ 2.c..

[8] Id. ¶ 6.

[9] Id. ¶ 8.

the parties…."[10] Relatedly, Church also points to the fact that it withdrew an earlier-filed Motion to Dismiss,[11] "[a]s a consequence of recent management conferences [convened by the Court] seeking to get…related, pending cases on one discovery track…."[12]

Substantively, Church argues that "among the defenses available to [it]…is Capital['s]…failure to comply with [a] [n]otice provision of the policy."[13] Church contends that because Capital claimed only "on the eve of trial" that it was entitled to protection as an "other" insured under Cathedral's policy, "the 'tender' of Capital's defense…was declined on grounds of [n]otice, [w]aiver and [e]stoppel."[14] Church maintains that Capital "knew or should have known" of its status as an "other" insured "at the outset of the underlying personal injury litigation";[15] Church therefore contends that it is entitled to discovery "on the information known or

[10] Def. Church's Resp. ¶ 1.

[11] That motion was predicated on Church's argument that Brown lacks standing and cannot bring a direct action against Church because there has not yet been a determination that Church owes any coverage to Capital.

[12] Def. Church's Resp. ¶ 10.

[13] Id. ¶ 12.

[14] Id. ¶ 14.

[15] Id. ¶ 16.

available to Capital or its insurer [Harleysville] prior to its eleventh-hour tender of its defense…."[16]

6. Harleysville has also filed a response to Brown's Motion, through which it "agrees with plaintiff [Brown] that Capital…was an insured under the Church [p]olicy."[17] Harleysville also agrees with Brown that the Church policy is "primary."[18] With regard to Church's argument that it has failed to comply with the relevant notice provision in its policy, Harleysville maintains "the notice provision is to put the insurance company [Church] on notice that it is defending a claim, not to put the insured [Capital] on notice[ ]"; Harleysville states that "[t]here is no prejudice to the insurance company [because in this case it knew of a claim against Capital]."[19] Harleysville disputes Church's "waiver" argument because, it contends, Church "kept it secret [that Capital was an "other" insured] and then…claim[ed] that it [wa]s too late to provide [a] defense."[20] Harleysville requests that an order be entered "stating that Capital…is an insured under

[16] Id. ¶ 17.

[17] Def. Harleysville's Resp. ¶ 1.

[18] Id. ¶ 4.

[19] Id. ¶ 5.

[20] Id. ¶ 7.

the Church [i]nsurance policy and that the policy is primary over any other insurance coverage."[21]

7. Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[22] The court must view the facts in a light most favorable to the non-moving party.[23] Summary judgment will not be granted if "upon examination of all the facts, it seems desirable to inquire [more] thoroughly into them in order to clarify the application of the law to the circumstances."[24]

8. As the Court understands the issues, in order for it to grant summary judgment in Brown's favor, it must determine as a matter of law that Capital was indeed an "other" insured under the policy Church had issued to Cathedral, that such coverage entitles Brown to the remainder of the $1,000,000 policy amount after discounting Brown's $525,000 settlement with Cathedral because coverage for the particular risk resulting in Brown's injury was in effect on August 23, 1999 and no defenses to such

[21] Id. ¶ 8.

[22] Super. Ct. Civ. R. 56(c); Burkhart v. Davies, 602 A.2d 56, 59 (Del. 1991).

[23] Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992).

[24] Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962) (reversing grant of summary judgment where the record failed to explain why a driver of a motor vehicle suddenly stopped his vehicle thereby causing a multiple-vehicle collision).

coverage exist, and that there are no genuine issues of material fact in making such a determination, looking at the facts in a light most favorable to Harleysville, National Union, and, most importantly, Church, as they are all the non-moving parties. On the present record, with no meaningful discovery having yet taken place, this Court declines to do so.

The Court is mindful of Brown's desire to collect on his $2,250,000 judgment, and the Court is also aware that the jury returned this verdict over two years ago. The Court is also mindful of the fact that Church had withdrawn an earlier-filed Motion to Dismiss in an effort to accommodate discovery efforts in this, and other pending cases related to this one.[25] The Court cannot rule in Brown's favor on the present state of the record; as one preeminent treatise has stated, "sorting out which insurers have primary, which secondary, and which tertiary or lesser responsibility for a loss can become exceedingly complex."[26]

It may turn out after some discovery has occurred that Capital was an "other" insured under the policy Church had issued to Cathedral and that the particular risk resulting in Brown's injury was covered under the policy with

[25] Brown v. Cathedral Community Services, C.A. No. 99C-10-210 RRC; Capital Management Co. v. Cathedral Community Services v. Church Insurance Co. and Charles Brown, C.A. No. 02C-04-032 RRC; Capital Management Co. v. Cathedral Community Services, 02C-04-038 RRC.

[26] 15 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 217:3 (3d ed. 1999).

no defenses precluding such a determination. This issue however does not appear to this Court to have been resolved in the Superior Court litigation leading to the jury's verdict, or on appeal to the Delaware Supreme Court. Without the discovery necessary to such a determination yet having taken place, this Court cannot now rule on the Motion; this ruling is of course without prejudice to Brown's refilling of the motion once discovery is concluded.

9. For all of the above reasons, Brown's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, J.

oc: Prothonotary
xc: Stephen B. Potter, Esquire and Jennifer-Kate Aaronson, Esquire, Attorneys for Plaintiff
Daniel A. Griffith, Esquire, Attorney for Cathedral Community Services and The Church Insurance Company
Stephen P. Casarino, Esquire, Attorney for Capital Management Company and Harleysville Insurance Company
Timothy Jay Houseal, Esquire, Anthony G. Flynn, Esquire, and John C. Sullivan, Esquire (*pro hac vice*), Attorneys for National Union Fire Insurance Company of Pittsburgh