16-P-834 Appeals Court

VINCENT NGUYEN vs. ARBELLA INSURANCE GROUP.[1]

No. 16-P-834.

Middlesex. February 16, 2017. - May 23, 2017.

Present: Kafker, C.J., Wolohojian, & Sacks, JJ.

Insurance, Insurer's obligation to defend, Defense of proceedings against insured, Homeowner's insurance, Business exclusion. Contract, Insurance. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on April 11, 2014.

The case was heard by Bruce R. Henry, J., on motions for summary judgment, and a motion for reconsideration was considered by him.

Joseph A. Padolsky for the plaintiff.
Roberta R. Fitzpatrick (Kathryn Annbinder Covarrubias also present) for the defendant.

[1] Although, as is our practice, we identify the defendant as it was named in the complaint, the defendant's brief on appeal states that the plaintiff's homeowner's policy was issued by Arbella Mutual Insurance Company.

SACKS, J. The plaintiff, Vincent Nguyen, having been sued in Federal court on various tort, civil rights, and other theories by a former fellow employee of the Newton police department, requested that the defendant, Arbella Insurance Group (Arbella), as issuer of his homeowner's insurance policy, provide him a defense. After Arbella declined, citing the policy's "business pursuits" exclusion, Nguyen filed a Superior Court action seeking a declaration that Arbella was obligated to provide him a defense. On cross motions for summary judgment, a judge agreed with Arbella that the "business pursuits" exclusion applied. Nguyen appealed the resulting judgment in Arbella's favor and the order denying his motion for reconsideration. We affirm.

Background. a. The underlying suit. In the underlying Federal action, the plaintiff, Jeanne Sweeney Mooney, alleged that at all relevant times she was an employee of the Newton police department and most recently worked as the executive administrator for the chief of police. The defendants were the city of Newton, its mayor in his official capacity, and the then-chief of police, a police lieutenant, and Nguyen (a civilian employee in the chief's office), all in their individual capacities.

Mooney alleged that the chief, the lieutenant, and Nguyen conspired to coerce her into accepting additional duties in

violation of a union contract, as retaliation for Mooney's objecting to both the potential contract violation and the chief's improperly obtaining an "exceptional service" pay raise. She also alleged that the chief and Nguyen, in order to obtain leverage over Mooney, conspired to stage a false "I-Team Investigation" by a television station regarding her use of her break time; the ruse relied on photographs that Nguyen took, during working hours, of Mooney outside the police station and of Mooney's truck outside her home, thus allegedly violating her privacy rights. She further alleged that the chief, the lieutenant, and Nguyen conspired to stage a purported theft of police department funds and to falsely name her as the thief in order to have her terminated, in retaliation for her reporting to others the chief's alleged wrongdoing. As a result, she alleged, she was placed on administrative leave, and was criminally charged with and tried for the theft, only to be acquitted. Based on these factual allegations, Mooney's Federal action asserted thirteen claims, ten of which named Nguyen as a defendant along with the chief and, in some instances, the lieutenant and others.[2]

[2] The claims against Nguyen, as set forth in the amended Federal complaint, were for violations of Mooney's Federal constitutional and State statutory rights to privacy; civil conspiracy and conspiracy to violate her Federal civil rights; violation of her rights under the First Amendment to the United States Constitution; violation of the Massachusetts Civil Rights

b. The policy provisions. As relevant here, the homeowner's policy issued by Arbella entitles Nguyen to a defense against claims for "personal injury" caused by an "occurrence," but contains a so-called "business pursuits exclusion," see Preferred Mut. Ins. Co. v. Vermont Mut. Ins. Co., 87 Mass. App. Ct. 510, 512 (2015) (Preferred), which excludes coverage for:

> "[Injury a]rising out of or in connection with a 'business' engaged in by an 'insured.' This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the 'business.'"

The policy's definitions section states that "'[b]usiness' includes trade, profession or occupation."

Discussion. In reviewing the judge's determination that the business pursuits exclusion applies to Mooney's claims against Nguyen,[3] we view the record in the light most favorable

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Act, G. L. c. 12, § 11I; intentional infliction of emotional distress; intentional interference with contractual relations; interference with advantageous business relations; and defamation. The summary judgment record reflects that the Federal court later entered summary judgment for Nguyen on the Federal claims against him, and dismissed the State claims against him without prejudice, whereupon Mooney refiled the latter claims against Nguyen in Superior Court. Nguyen and Arbella agreed at oral argument that, for purposes of determining Arbella's duty to defend, we should treat the Federal amended complaint as the operative pleading.

[3] We assume without deciding that Mooney's claims were based on an "occurrence," and thus we focus solely on the exclusion.

to Nguyen as the nonmoving party, and we are guided by the following principles relevant to the duty to defend:

> "An insurer has a duty to defend an insured when the allegations in a complaint are reasonably susceptible of an interpretation that states or roughly sketches a claim covered by the policy terms. The duty to defend is determined based on the facts alleged in the complaint, and on facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint. In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage. However, when the allegations in the underlying complaint lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate or defend the claimant."

Preferred, 87 Mass. App. Ct. at 513, quoting from Billings v. Commerce Ins. Co., 458 Mass. 194, 200–201 (2010).

"It is the insurer who bears the burden of proving the applicability of an exclusion." Preferred, 87 Mass. App. Ct. at 515, quoting from Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants, Inc., 81 Mass. App. Ct. 40, 52 (2011). And "[e]xclusionary clauses must be strictly construed against the insurer so as not to defeat any intended coverage or diminish the protection purchased by the insured." Winbrook Communication Servs., Inc. v. United States Liab. Ins. Co., 89 Mass. App. Ct. 550, 556 (2016), quoting from City Fuel Corp. v. National Fire Ins. Co. of Hartford, 446 Mass. 638, 640 (2006).

But it is also settled that, in applying the business pursuits exclusion, "[t]he terms 'arising out of' and 'in connection with' are not . . . to be construed narrowly but are read expansively." Metropolitan Property & Cas. Ins. Co. v. Fitchburg Mut. Ins. Co., 58 Mass. App. Ct. 818, 820-821 (2003) (Metropolitan Property), citing Rischitelli v. Safety Ins. Co., 423 Mass. 703, 704 (1996). "'Arising out of' is ordinarily held to mean 'originating from, growing out of, flowing from, incident to or having connection with.'" Metropolitan Property, supra at 821, quoting from Murdock v. Dinsmoor, 892 F.2d 7, 8 (1st Cir. 1989). "'In connection with' is ordinarily held to have even a broader meaning than 'arising out of' and is defined as related to, linked to, or associated with." Metropolitan Property, supra at 821.

Reflecting the expansive construction given these terms, the courts have held that the business pursuits exclusion applied to a variety of claims based on insureds' actions that did not necessarily serve the interests of their business or employer. See Worcester Ins. Co. v. Fells Acres Day Sch., Inc., 408 Mass. 393, 397-398, 412 (1990) (Fells Acres) (insureds, who operated daycare center, faced tort claims after being convicted of rape and indecent assault and battery of children in center's care); Commerce Ins. Co. v. Finnell, 41 Mass. App. Ct. 701, 701-703 (1996) (insured, who regularly baby-sat in her home for pay,

left child momentarily unattended while preparing her own lunch, allowing child to burn himself); Metropolitan Property, 58 Mass. App. Ct. at 819-820 (insured, after performing job-related task on employer's premises, poked coworker to get her attention, startling coworker and causing her to fall and suffer injury).

Given these precedents, we have no difficulty concluding that all of Mooney's claims against Nguyen alleged injuries "[a]rising out of or in connection with [Nguyen's] 'business,'" which the policy defines as including his "trade, profession or occupation." Nguyen's occupation was as a clerical worker in the office of the chief of police; Mooney was his fellow employee in that office; all of the actions assertedly taken by Nguyen were, allegedly, a part of various conspiracies with the chief and in many instances a police lieutenant; and the conspiracies were all allegedly aimed at coercing or retaliating against Mooney in connection with her on-the-job conduct. Nothing in the complaint alleges any conduct by Nguyen that is unconnected to his work at the police department.

The decision in Preferred does not change our analysis here. There the court adopted a "two-prong functional test" for "determining when an activity arises out of or in connection with the insured's business," 87 Mass. App. Ct. at 514, but the test focused on what constitutes a "business" and did not alter the expansive construction given the phrases "arising out

of" or "in connection with" in the cases discussed above, all of which the court cited.[4] Id. at 514 n.5. And Nguyen's employment with the police department easily satisfies Preferred's two-prong test, which requires both "'continuity' -- that is, the activity in question must be one in which the insured regularly engages as a means of livelihood; [and] 'profit motive' -- that is, the purpose of the activity must be to obtain monetary gain." Id. at 514. The complaint indicates that Nguyen was an employee who worked for the police department "steadily" and for pay.

We reject Nguyen's argument that, because some of his alleged actions (such as photographing Mooney or reporting criminal conduct) were arguably outside the scope of his employment, they did not "[a]ris[e] out of or in connection with" that employment for purposes of the business pursuits exclusion. The actions for which the Fells Acres insureds were sued -- their rape and indecent assault and battery of children attending the daycare center they operated, 408 Mass. at 397-398

[4] The court also cited sections of three treatises on insurance law that discuss the two-prong test for what constitutes a "business" for purposes of the business pursuits exclusion. 87 Mass. App. Ct. at 514. None of the cited treatise sections explores the meaning of, let alone suggests a narrow construction of, the phrases "arising out of" or "in connection with." See 5 New Appleman on Insurance Law Library Edition § 53.06[2][d][i] (2014); 9A Couch on Insurance § 128.13 (3d ed. 2006); 3 Windt, Insurance Claims & Disputes § 11:15 (6th ed. 2013).

-- were held not within the scope of their employment, id. at 404-405, yet the court held that the business pursuits exclusion applied.[5] Id. at 412. See Metropolitan Property, 58 Mass. App. Ct. at 820 (determination of insurance coverage is "dependent upon the language of [the] insurance contract," not upon the "principles which govern the determination of vicarious liability of employers for the intentional torts of their employees").

Nor do we agree that because Nguyen may have photographed or videotaped[6] Mooney "[d]uring his lunch break, while on his own personal time," the exclusion does not apply. These are neither "facts alleged in the complaint" nor "facts known or readily knowable by the insurer that may aid in its interpretation of the allegations in the complaint" and therefore are not relevant in determining Arbella's duty to defend.[7] See Preferred, 87

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[5] We also reject Nguyen's argument that the city of Newton, in refusing to defend or indemnify him under G. L. c. 258, § 9, determined that he was acting outside the scope of his employment. The letter from the city solicitor on which Nguyen relies, says nothing about the scope of Nguyen's employment, and the plain words of G. L. c. 258, § 9, make indemnification discretionary even where a public employee has been sued for an act within the scope of his or her employment.

[6] Although Mooney's complaint alleged only that Nguyen photographed her, Nguyen has asserted that he videotaped rather than photographed her. The discrepancy is not material to our analysis.

[7] Nor is it clear that they are facts at all; Nguyen's statement of material facts cited, as support for his assertion,

Mass. App. Ct. at 513. In any event, the matters cited by Nguyen only reinforce the connection between his conduct and his occupation.[8]

Conclusion. The judge having correctly determined that the business pursuits exclusion relieved Arbella of any duty to defend, the judgment in Arbella's favor is affirmed. As Nguyen makes no separate argument regarding the order denying his motion for reconsideration, that order is likewise affirmed.

So ordered.

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only his own interrogatory answers in the underlying action, yet those answers are in the record and say no such thing. We thus pass over the question whether, given the range of facts to be considered by the insurer under Preferred in deciding whether to defend, such later-developed discovery responses in the underlying action are relevant.

[8] Nguyen stated in his deposition in the underlying action that he videotaped Mooney, while on his lunch break, in order to show human resources personnel that she was being paid overtime but not working overtime, or not at work when she was supposed to be working. Whether his purpose was to report wrongdoing by a fellow employee, or to obtain similar pay or worktime flexibility for himself, the connection to his employment, and thus the applicability of the business pursuits exclusion, is inarguable.