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SHORT FORM ORDER

INDEX No. 14-21632

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 5/14/15
ADJ. DATE 5/29/15
Mot. Seq. #002 - MotD

UNITRIN AUTO AND HOME INSURANCE COMPANY, Plaintiff, - against - BRIAN C. SULLIVAN, GERARD E. SULLIVAN, ROBERT HARFORD, PATRICIA HARFORD, DAVID McDOWELL, and GEORGE A. CIMINELLO, Defendants.	HURWITZ & FINE, P.C. Attorney for Plaintiff 535 Broad Hollow Road, Suite A-7 Melville, New York 11747 BRIAN C. & GERARD E. SULLIVAN 4 Acorn Avenue Farmingville, New York 11738 ROBERT & PATRICIA HARFORD 24 Neil Drive Farmingville, New York 11738 SCHONDEBARE & KORCZ, P.C. Attorney for Defendant David McDowell 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779 GRUENBERG KELLY DELLA, ESQS. Attorney for Defendant George A. Ciminello 700 Koehler Avenue Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 19 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 14-17 ; Replying Affidavits and supporting papers 18-19 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order granting summary judgment in its favor (i) declaring that it is not obligated to defend or indemnify defendants Brian C. Sullivan and Gerard E. Sullivan for injuries arising out of a July 29, 2005 incident and a related personal injury action entitled

Ciminello v Sullivan (Sup Ct, Suffolk County, Index No. 05-21023), and, upon the granting of such relief, (ii) permitting defense counsel assigned to represent Brian C. Sullivan and Gerard E. Sullivan to withdraw as counsel within 30 days after issuance of this court's order, is granted to the extent indicated below, and is otherwise denied.

In this declaratory judgment action, Unitrin Home and Auto Insurance Company seeks, *inter alia*, to avoid coverage under an insurance policy for claims arising out of a July 29, 2005 incident in which George A. Ciminello was injured when he was struck in the eye by a cup filled with urine thrown from the window of a moving motor vehicle. It appears that the vehicle was owned by Gerard E. Sullivan and operated by his son, Brian C. Sullivan; that the cup was thrown by Robert Harford, a passenger in the vehicle; and that while Brian C. Sullivan and Robert Harford intended to empty the contents of the cup onto George A. Ciminello as they drove by, they did not intend to hit him in the face with the cup itself, but that the cup slipped out of Robert Harford's hand.

At the time of the incident, Gerard E. Sullivan was a named insured under an "auto and home" policy issued by Unitrin. The policy provides, in relevant part, for personal liability coverage in the event of a claim made or a suit brought against an "insured" for damages because of bodily injury or property damage caused by an "occurrence," and for auto liability coverage for bodily injury or property damage for which an "insured" becomes legally responsible because of an "auto accident." "Occurrence" is defined as "an accident * * * which results, during the policy period, in bodily injury or property damage" [internal quotation marks omitted]. The policy also contains an exclusion from personal liability coverage for bodily injury or property damage which is "expected or intended by one or more 'insured's' [sic]," and an exclusion from auto liability coverage for any person "who intentionally causes, or directs another person to cause" bodily injury or property damage. It appears to be undisputed that Brian C. Sullivan is an "insured" within the meaning of both coverages.

Following the incident, on September 2, 2005, George A. Ciminello commenced the related personal injury action, alleging a single cause of action that Gerard E. Sullivan, Brian C. Sullivan, and Robert Harford, *et al.*, caused his injuries by their negligent and reckless conduct and by their use and operation of a motor vehicle in violation of the Vehicle and Traffic Law. By order dated March 17, 2008, this court (Doyle, J.) granted the parties' respective applications for summary judgment only to the extent of dismissing the complaint against Gerard E. Sullivan, finding that he was not vicariously liable because Ciminello's injuries did not arise out of the use or operation of a motor vehicle. Noting that Ciminello's injuries resulted from intentional conduct rather than mere negligent or reckless behavior, this court, in effect, also granted Ciminello leave to serve and file an amended complaint pleading causes of action predicated on intentional conduct within 30 days after entry of the order. The action was subsequently stayed by order of the Appellate Division dated June 23, 2008. By decision and order (one paper) dated September 8, 2009 (65 AD3d 1002, 885 NYS2d 118), the Appellate Division affirmed the March 17, 2008 order insofar as appealed and cross-appealed from. On or about October 5, 2009, but without seeking leave of court, Ciminello served and filed an amended complaint pleading four causes of action: the first, third, and fourth sounding in negligence, and the second sounding in intentional tort. By letter dated October 23, 2009, Unitrin acknowledged receipt of the amended complaint and issued a

disclaimer of coverage based, *inter alia*, on policy exclusions for expected or intended injury and for intentional acts. By order dated July 20, 2011, this court (Baisley, J.) granted separate motions by Harford and by the Sullivans to dismiss the amended complaint as having been filed without leave of court, and denied, as untimely, Ciminello's cross motion for leave to amend the complaint by adding a cause of action based on intentional tort. By decision and order (one paper) dated September 10, 2014 (120 AD3d 1176, 992 NYS2d 291), the Appellate Division modified the July 20, 2011 order by denying those portions of the motions by Harford and by the Sullivans which were to dismiss the cause of action sounding in intentional tort, and by granting Ciminello's cross motion for leave to amend the complaint, while noting that the causes of action in the amended complaint sounding in negligence "were palpably insufficient and patently devoid of merit" (*id.* at 1177, 992 NYS2d at 292). On or about September 15, 2014, Ciminello served and filed a second amended complaint virtually identical to the prior amended complaint. By letter dated September 25, 2014, Unitrin issued a second disclaimer of coverage based, *inter alia*, on policy exclusions for expected or intended injury and for intentional acts. By order dated January 13, 2015, this court (Baisley, J.) granted separate motions by Harford and by the Sullivans to dismiss the second amended complaint to the extent of dismissing all negligence claims pleaded, and further dismissing all claims asserted against Gerard E. Sullivan, Patricia Harford, and David McDowell. The related action is currently on the trial calendar for January 7, 2016.

On October 31, 2014, Unitrin commenced this action for judgment, *inter alia*, declaring that it is not obligated to defend or indemnify its insureds in the related action.

Now, issue having been joined in this (declaratory judgment) action by George A. Ciminello on or about February 9, 2015 and by David McDowell on or about May 22, 2015, and the defaults of Brian C. Sullivan, Gerard E. Sullivan, and Robert Harford in answering the complaint having been fixed and determined by orders dated May 8, 2015 and June 22, 2015, Unitrin moves for summary judgment, solely on the ground that the conduct of Brian C. Sullivan and Robert Harford was intentional and, therefore, that the claim does not fall within the ambit of coverage afforded by the policy.

On a motion for summary judgment, a liability insurer denying the duty to defend and indemnify has the burden "to establish that the injury complained of falls outside the coverage of the policy or is exempted by reason of an exclusionary clause * * *. If the insurer can establish, as a matter of law, that the claims against the assured are unambiguously excepted from coverage, summary judgment in favor of the insurer is proper" (***Smith Jean, Inc. v Royal Globe Ins. Cos.***, 139 AD2d 503, 504, 526 NYS2d 604, 605 [1988]; *accord* ***Seaboard Sur. Co. v Gillette Co.***, 64 NY2d 304, 486 NYS2d 873 [1984]).

Upon review of the relevant policy terms, the court is constrained to find, as a matter of law, that the Sullivans are not entitled to coverage. The policy provides that coverage is available if an action is brought against an insured for damages because of bodily injury or property damage caused by an "occurrence" or by an "auto accident"; it defines "occurrence" as "an accident" resulting in bodily injury or property damage. In deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual, and unforeseen (*see* ***Miller v Continental Ins. Co.***, 40 NY2d 675, 389 NYS2d 565 [1976]). Here, the only surviving cause of action

in the second amended complaint sounds in intentional tort, premised on the claim that the incident took place "due to the willful, wanton, and intentional acts" of Brian C. Sullivan and Robert Harford, constituting "intentional harm." Assuming, for purposes of determining coverage, that what is alleged actually happened (*see* ***Allstate Ins. Co. v Mugavero***, 79 NY2d 153, 581 NYS2d 142 [1992]), such an intentional assault by Brian C. Sullivan cannot be construed as an accident covered by the policy (*see* ***Desir v Nationwide Mut. Fire Ins. Co.***, 50 AD3d 942, 856 NYS2d 664 [2008]; ***Tangney v Burke***, 21 AD3d 367, 800 NYS2d 44 [2005]; ***Ward v Security Mut. Ins. Co.***, 192 AD2d 1000, 597 NYS2d 227, *lv denied* 82 NY2d 655, 602 NYS2d 803 [1993]; ***Royal Indem. Co. v Miller***, 187 AD2d 956, 591 NYS2d 652 [1992], *lv denied* 81 NY2d 707, 597 NYS2d 937 [1993]). Although Ciminello now argues, contrary to his pleading, that the injuries he sustained were the unexpected result of an intentional act and, therefore, within the coverage of the policy (*see generally* ***Allegany Co-op Ins. Co. v Kohorst***, 254 AD2d 744, 678 NYS2d 424 [1998]), the court finds his argument without merit. Where, as here, the harm to a victim flows directly from and is inherent in the nature of the act allegedly committed by the insured, the harm will be deemed to have been intentionally caused (***Allstate Ins. Co. v Mugavero***, *supra*; ***Pistolesi v Nationwide Mut. Fire Ins. Co.***, 223 AD2d 94, 644 NYS2d 819, *lv denied* 88 NY2d 816, 651 NYS2d 17 [1996]). Since physical harm to Ciminello was inherent in the nature of the conduct alleged, whatever physical injuries resulted from that conduct were intentional, irrespective of the insured's subjective intent and notwithstanding that the actual injuries may have been more extensive than he anticipated (*see* ***Empire Ins. Co. v Miguel***, 114 AD3d 539, 981 NYS2d 380, *lv denied* 23 NY3d 908, 992 NYS2d 797 [2014]; ***Salimbene v Merchants Mut. Ins. Co.***, 217 AD2d 991, 629 NYS2d 913 [1995], *appeal withdrawn* 88 NY2d 979, 648 NYS2d 879 [1996]; ***Monter v CNA Ins. Cos.***, 202 AD2d 405, 608 NYS2d 692 [1994]). As to Gerard E. Sullivan, it suffices to note that the second amended complaint, having been dismissed as against him, contains no facts or allegations of wrongdoing on his part, much less any which are potentially within the coverage of the policy (*see* ***City of New York v Safeco Ins. Co. of Am.***, 31 AD3d 478, 818 NYS2d 256 [2006]). And because disclaimer is unnecessary when a claim falls outside the scope of a policy's coverage (***Matter of Worcester Ins. Co. v Bettenhauser***, 95 NY2d 185, 712 NYS2d 433 [2000]), it is likewise unnecessary to address Ciminello's remaining argument concerning the timeliness of Unitrin's various disclaimers.

Accordingly, Unitrin is entitled to summary judgment declaring that it is not obligated to defend or indemnify Gerard E. Sullivan or Brian C. Sullivan in the related action, and its motion is granted to that extent.

Unitrin's further request that the attorney of record assigned to represent Brian C. Sullivan and Gerard E. Sullivan in the related action be permitted to withdraw as counsel is denied. When counsel is assigned to defend an insured, that attorney's relationship and allegiance is with and to the insured, not the insurer (***Feliberty v Damon***, 72 NY2d 112, 531 NYS2d 778 [1988]; ***Federal Ins. Co. v North Am. Specialty Ins. Co.***, 47 AD3d 52, 847 NYS2d 7 [2007]); that Unitrin has been relieved of its duty to defend and indemnify the Sullivans and, presumably, will no longer be paying assigned counsel's legal fees is not dispositive (*see* ***Pierre v Barry***, 2002 NY Slip Op 50660[U] [App Term, 2d & 11th Jud Dists 2002]). The record, moreover, is devoid of proof as to any agreement that would condition the attorney-client relationship on the insurer's duties, or as to any act or omission by the Sullivans that would

constitute a ground for terminating representation (*see* ***Findley v Floyd***, 20 Misc 3d 1113[A], 867 NYS2d 374 [2008]; Rules of Professional Conduct [22 NYCRR] rule 1.16 [c]).

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 1/4/16

THOMAS F. WHELAN, J.S.C.