SHORT FORM ORDER

INDEX No. 14-19940

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-14-15
ADJ. DATE 10-13-15
Mot. Seq. #001- MotD

STATE FARM FIRE AND CASUALTY COMPANY,

Plaintiff,

- against -

ROBERT J. GLORIA, TODD DARRELL and TOMMY'S PLACE,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated August 12, 2015 and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the defendant Robert Gloria, dated September 20, 2015 and supporting papers; (4) Reply Affirmation by the plaintiff , dated October 6, 2015 and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the plaintiff State Farm Fire and Casualty Company for an order pursuant to CPLR 3212 granting it summary judgment against all defendants and declaring that it has no duty to afford coverage, defend or indemnify the defendants is denied; and it is further

ORDERED that the complaint as asserted against Todd Darrell and Tommy's Place is dismissed.

Plaintiff commenced this action for an order declaring that State Farm is not obligated to defend or indemnify Robert Gloria in an underlying action, *Todd Darrell v Robert J. Gloria and Tommy's Place*, filed in the Supreme Court, Suffolk County, under index No. 13704/2012 on March 29, 2012. Darrell alleges that Gloria struck him on May 8, 2011, outside of Tommy's Place at approximately 3:30 a.m. Darrell maintains that he was injured wholly by reason of the intentional, carelessness, recklessness and negligence of Gloria and Tommy's Place. A second cause of action alleges that Tommy's Place sold alcohol to Gloria causing his intoxication and resulting in severe physical injury to Darrell.

State Farm commenced this declaratory judgment action on October 6, 2014. Gloria answered on November 13, 2014. Darrell and Tommy's Place have not appeared, and State Farm alleges that they are in default, although the complaint alleges no cause of action against them and seeks no relief against them. The complaint alleges that two State Farm policies are at issue. The first is a homeowner's policy issued to Gloria's parents, Robert and Ellen Gloria, under policy number 56-BB-Y490-1. State Farm concedes the policy was in effect but maintains that coverage is excluded based upon "expected or intended" or "willful and malicious acts of an insured." The second policy is a personal liability umbrella policy issued by State farm to Gloria's father, Robert C. Gloria, under policy number 56-BK-K520-7. State Farm concedes the policy was in effect on May 8, 2011, but alleges the same exclusion for intentional acts by Gloria.

In support of its motion, State Farm submits, among other things, the pleadings in both actions, an affidavit of Theresa O'Connor, a disclaimer letter dated May 24, 2012, the policies, a certificate of disposition, the transcript of Gloria's plea and sentence, transcripts of examinations before trial of Todd Darrell, and Robert J. Gloria. In opposition, Gloria submits, among other things, the pleadings, the transcript of the examination before trial of Todd Darrell, Robert J. Gloria, the plea and sentencing minutes of December 2, 2011, and his own affidavit.

The 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

It is undisputed that State Farm issued two policies, number 56-BB-Y490-1 and 56-BK-K520-7, a homeowner's policy and a personal liability umbrella policy, both in effect on the date of the incident. State Farm contends that it denied and disclaimed all coverage, liability and responsibility under the policies on the grounds the allegations in the complaint served in the underlying action do not constitute an "occurrence" as defined in the State Farm policy, and coverage is barred by the exclusion in the policies for intentional acts. State Farm has not established its entitlement to summary judgment for an order declaring that it is not obligated to defend or indemnify Gloria.

The State Farm homeowner's policy contains the following relevant language:

SECTION II - LIABILITY COVERAGES

COVERAGE L - PERSONAL LIABILITY

If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage to which coverage applies, caused by an occurrence, we will:

1. Pay up to our limit of liability for the damages For which the insured is legally liable; and

2. Provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim or suit that we decide is appropriate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from the occurrence, equals our limit of liability.

SECTION II - EXCLUSIONS

1. Coverage L and M do not apply to:

a. bodily injury or property damage:

(1) which is either expected or intended by an insured; or

(2) to any person or property which is the result of willful and malicious acts of an insured.

DEFINITIONS

7. "occurrence", when used in Section II of this policy, means an accident, including exposure to conditions, which result in :

a. bodily injury; or

b. property damage;

during the policy period. Repeated or continuous exposure is considered to be one occurrence.

The State Farm umbrella policy contains the following relevant language:

COVERAGES

1. Coverage L - Personal Liability. If you are legally obligated to pay damages for a loss, we will pay your net loss minus the retained limit. Our payment will not exceed the amount shown on the Declaration of policy Limits - Coverage L - Personal Liability.

EXCLUSIONS

2. for bodily injury or property damage:

   a. which is either expected or intended by you; or

   b. to any person or property which is the result of your willful and malicious act, no matter at whom the act was directed.

16. for personal injury when you act with specific intent to cause harm or injury.

DEFINITIONS

6. "loss" means an accident that results in personal injury or property damage during the policy period. This includes injurious exposure to conditions.

State Farm has demonstrated that Gloria's acts were intentional and therefore not an occurrence under the homeowner's policy as an intentional act is not an "accident." Under the umbrella policy, State Farm has also shown that an intentional act is not a "loss" as loss is defined as "an accident that results in personal injury or property damage during the policy period." Additionally, both policies exclude intentional acts. State Farm has established by certificate of disposition that Gloria pled guilty on December 2, 2011, to Penal Law § 120.00.1 Assault in the Third Degree (Intentional Assault) of Todd Darrell. While the court did not specifically allocute Gloria to the intentional aspect of the crime, the certificate of disposition is clear and unambiguous. Moreover, the requisite intent to cause physical injury can be readily inferred from Gloria's responses during the allocution (*see* ***People v McGowen***, 42 NY2d 905, 397 NYS2d 993 [1977]; *see also* ***People v Seeber***, 4 NY3d 780, 793 NYS2d 826 [2005]).

It is well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (***Raymond Corp. v National Union Fire Ins. Co.***, 5 NY3d 157, 800 NYS2d 89 [2005]; ***State of New York v Home Indem. Co.***, 66 NY2d 669, 495 NYS2d 969 [1985]). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (***Raymond Corp. v National Union Fire Ins. Co.***, *supra* at 162, quoting ***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (***Lavanant v General Acc. Ins. Co.***, 79 NY2d 623, 629, 584 NYS2d 744 [1992]) and ambiguous provisions are construed "against the insurer who drafted the contract" (***State Farm Mut. Auto Ins. Co. v Glinbizzi***, 9 AD3d 756, 757, 780 NYS2d 434 [3d Dept 2004]).

Here, the Court finds that the policy provisions are not ambiguous, and that the dispute between the parties turns on whether the alleged assault constitutes an occurrence or loss under the State Farm policies. In general, the party claiming the existence of insurance coverage has the burden of proving its

entitlement (***York Restoration Corp. v Solty's Const., Inc.***, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; ***Stillwater Cent. School Dist. v Great Am. E & S Ins. Co.***, 66 AD3d 1260, 887 NYS2d 719 [3d Dept 2009]; ***National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.***, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006]. It has been held that policies based on an accident or occurrence require a "fortuitous loss," and that the insured has the initial burden of proving that the damage was the result of an "accident" or "occurrence" to establish coverage (***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 746 NYS2d 622 [2002]; ***Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburg, Pa.***, 89 NY2d 621, 657 NYS2d 564 [1997]). A review of the complaint in *Darrell v Robert J.Gloria and Tommy's Place* reveals that the factual allegations involve intentional conduct and allegations of "reckless, careless or negligent acts." Both policies require "an accident" and exclude coverage for intended or expected harms (***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, *supra*).

However, it is well settled that an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured (*see* ***Automobile Ins. Co. of Hartford v Cook***, 7 NY3d 131, 818 NYS2d 176 [2006]; ***Global Constr. Co. v Essex Ins. Co.***, 52 AD3d 655, 860 NYS2d 614 [2d Dept 2008]; ***City of New York v Evanston Ins. Co.***, 39 AD3d 153, 157, 830 NYS2d 299 [2d Dept 2007]). An insurer's duty to defend arises whenever "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (***Worth Constr. Co. v Admiral Ins. Co.***, 10 NY3d 411, 415, 859 NYS2d 101 [2008], *quoting* ***Frontier Insulation Contrs. v Merchants Mut. Ins. Co.***, 91 NY2d 169, 175, 667 NYS2d 982 [1997]). Here, the complaint sets forth allegations giving rise to a potentially covered claim, that is reckless, careless or negligent acts by Gloria. In fact, State Farm's "disclaimer" letter correctly acknowledges that, "State Farm and Casualty Company is providing you with a defense, and if necessary, indemnification under your Homeowners Policy which pertains to the allegations of negligence found in the Summons and Complaint. However, there is no coverage under your policy for any finding due to intentional acts which are specifically excluded under your policy and/or they do not meet the definition of bodily injury, property damage, or occurrence." A disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy (*see* ***Markevics v Liberty Mut. Ins. Co.***, 97 NY2d 646 [2001]; ***Worcester Ins. Co v Bettenhauser***, 95 NY2d 185, 712 NYS2d 433 [2000]). Conversely, a timely disclaimer pursuant to Insurance Law § 3420(d) is required when a claim falls within the coverage terms but is denied based solely on a policy exclusion (*see* ***Markevics v Liberty Mut. Ins. Co.***, *supra*; ***Worcester Ins. Co v Bettenhauser***, *supra*). Here, State Farm is claiming that there is no coverage under the policy because the underlying incident was intentional and not an accident. Therefore, the timely disclaimer provisions of the Insurance Law are not applicable to this claim and State Farm is not precluded from asserting a lack of coverage (*see* ***CGU Ins v Guadagno***, 280 AD2d 509, 720 NYS2d 201 [2d Dept 2001]; ***Utica Fire Ins Co v Shelton***, 226 AD2d 705, 641 NYS2d 864 [2d Dept 1996]).

In opposition to the motion, Gloria contends that the certificate of disposition was entered in error, and that his conduct was "not only inappropriate, but criminal" but given his high level of intoxication was not intentional. In reading the entire complaint in *Todd Darrell v Robert J. Gloria and Tommy's Place* the Court finds that the factual allegations assert not only intentional conduct, but also reckless, careless and negligent acts on the part of Gloria. As State Farm's initial "disclaimer" correctly

pointed out, to the extent that Darrell seeks recovery for Gloria's reckless, careless or negligent conduct, Gloria is entitled to a defense, and State Farm has not established its entitlement to summary judgment herein (***Green Chimneys School for Little Folk v National Union Fire Ins. Co.***, 244 AD2d 387, 664 NYS2d 320 [2d Dept 1997]).

Under these circumstances, State Farm has an obligation to provide a defense in the underlying action to the Gloria (*see* ***Automobile Ins. Co of Hartford v Cook***, 7 NY3d 131, 818 NYS2d 176 [2006] ; ***Rhodes v Liberty Mut. Ins. Co.***, 67 AD3d 881, 892 NYS2d 403 [2d Dept 2009]; ***Medrano v State Farm Fire & Cas. Co.***, 54 AD3d 662, 863 NYS2d 480 [2d Dept 2008]; ***Deetjen v Nationwide Mut. Fire Ins. Co.***, 754 NYS2d 366 [2d Dept 2003]; ***Liberty Mut. Ins. Co v Ho***, 289 AD2d 1051, 735 NYS2d 846 [4th Dept 2001]). A determination as to indemnification should await the outcome of the underlying action (*see* ***Automobile Ins. Co of Hartford v Cook***, *supra*; ***Deetjen v Nationwide Mut. Fire Ins. Co.***, *supra*).

As to the remaining defendants in this declaratory judgment action, no relief is sought in the complaint against them, and therefore none can be granted. A Court is empowered to search the record and grant summary judgment in favor of a nonmoving party (CPLR 3212 [b]; ***1133 Taconic, LLC v Lartrym Serv., Inc.***, 85 AD3d 992, 925 NYS2d 840 [2d Dept 2011]; ***Shore Dev. Partners v Board of Assessors***, 82 AD3d 988, 918 NYS2d 566 [2d Dept 2011]; ***Masi v Kir Munsey Park 020 LLC***, 76 AD3d 514, 906 NYS2d 88 [2d Dept 2010]). However, this power applies only with respect to a cause of action or issue that is the subject of the motions before the Court (***Dunham v Hilco Const. Co.***, 89 NY2d 425, 654 NYS2d 335 [1996]; ***Masi v Kir Munsey Park 020 LLC***, *supra*; ***Lee v City of Rochester***, 254 AD2d 790, 677 NYS2d 848 [4th Dept 1998]). Upon reviewing the entirety of the records submitted on the motions for summary judgment, it is determined that as no cause of action is asserted against Todd Darrell or Tommy's Place, the complaint against them is dismissed.

Dated: March 14, 2016

PETER H. MAYER, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION