

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

AMERICAN CASUALTY)
COMPANY OF READING,)
PENNSYLVANIA,)
)
Plaintiff,)
)
VS.)
)
AMSOUTH BANK and)
RICHARD CROWE,)
)
Defendants.)

No. 00-1338

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND PARTIALLY GRANTING AND PARTIALLY DENYING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff American Casualty Company of Reading, Pennsylvania, filed this action against Defendants AmSouth Bank¹ and Richard Crowe in the Chancery Court of McNairy County, Tennessee, seeking a declaration that Plaintiff did not have a duty to defend and/or indemnify in an action filed by Crowe against AmSouth Bank in the Circuit Court of McNairy County, Tennessee. The action was removed to this court by Defendant AmSouth with jurisdiction predicated on diversity of citizenship, 28 U.S.C. § 1332. Defendant AmSouth then filed a counter-claim against Plaintiff.

¹ AmSouth Bank is the successor to First American Corporation, the original purchaser of the insurance policy at issue.

Plaintiff has filed a motion for summary judgment, and Defendant AmSouth has filed a cross-motion for summary judgment. Plaintiff has filed a response to Defendant's motion. For the reasons set forth below, the motion for summary judgment of Plaintiff is PARTIALLY GRANTED and PARTIALLY DENIED, and Defendant's motion for summary judgment is PARTIALLY GRANTED and PARTIALLY DENIED.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.: Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary

judgment motion . . . is . . . ‘whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.’” Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970). The scope of insurance coverage and the insurer's duty to defend present questions of law that are particularly appropriate for summary judgment. Standard Fire Ins. Co. v. Chester-O'Donley & Assoc. Inc., 972 S.W.2d 1, 5 (Tenn. App.1998).

The facts of this case are as follows. Plaintiff issued to AmSouth’s predecessor in interest, First American Corporation (“First American”), a commercial general liability policy for the period July 1, 1997, through January 1, 1998. Section I of the policy entitled “COVERAGES” contains three coverage parts. Coverage Part A provides coverage and exclusionary provisions relative to “BODILY INJURY AND PROPERTY DAMAGE LIABILITY.” Coverage Part B provides coverage and exclusionary provisions relative to “PERSONAL AND ADVERTISING INJURY LIABILITY.” And, Coverage Part C provides coverage and exclusionary provisions relative to “MEDICAL PAYMENTS.”

On July 13, 2000, Defendant Crowe filed an action against First American in the Circuit Court of McNairy County, Tennessee, based on the events surrounding First American’s repossession and disposal of Crowe’s truck. The complaint alleged as follows:

The Plaintiff would further state and show unto the Court that as a direct result of the improper conduct and conversion on the part of the Defendant, and as

a further direct result of improper and/or incorrect reports to one or more credit bureaus or credit agencies, the Plaintiff has suffered the loss of his good credit history and good credit rating. Such loss has caused the Plaintiff significant monetary damage and economic duress because, among other things, he has had to obtain business and/or consumer financing at a significantly higher than market rate.

.....

WHEREFORE, the Plaintiff further sues the Defendant for the loss and damage resulting from the improper and/or misleading incorrect credit reporting on the part of the Defendant and for the economic duress imposed upon him in an additional amount not to exceed Seventy-Five Thousand Dollars (\$75,000.00).

Complaint at ¶ 9-10, Plaintiff's Exhibit 2. Crowe was allowed to amend his complaint to seek damages in the amount of \$150,000 for the alleged conversion and \$250,000 for the alleged incorrect credit reporting. Consent Order Allowing Amendment, Exhibit C to Montgomery Affidavit. Plaintiff defended First American in the state court action under a reservation of rights. Letter, Plaintiff's Exhibit 3. A jury returned a verdict in favor of Crowe, and judgment was entered against First American in the amount of \$250,000. Final Decree, Exhibit B to Montgomery Affidavit.

This action then ensued to determine if Plaintiff has a duty to defend and/or indemnify the claim filed by Crowe. Plaintiff contends that it has no duty to defend or indemnify because a claim for conversion is not covered by the policy.

Duty to Defend

The general rule in Tennessee is that an insurer's duty to defend an action against the

insured depends on the allegations in the underlying complaint against the insured.² First Nat'l Bank v. South Carolina Ins. Co., 341 S.W.2d 569, 570 (Tenn.1960); see also Drexel Chem. Co. v. Bituminous Ins. Co., 933 S.W.2d 471 (Tenn. App.1996); I. Appel Corp. v. St. Paul Fire & Marine Ins. Co., 930 S.W.2d 550 (Tenn. App.1996); Graves v. Liberty Mut. Fire Ins. Co., 745 S.W.2d 282 (Tenn. App.1987).

It is accepted in the overwhelming majority of jurisdictions that the obligation of a liability insurance company to defend an action brought against the insured by a third party is to be determined **solely** by the allegations contained in the complaint in [the underlying] action.... Accordingly, if the allegations ... are within the risk insured against and there is a potential basis for recovery, then [the insurer] must defend ... regardless of the actual facts or the ultimate grounds on which ... liability to the injured party is predicated.... **In any event, the pleading test for determination of the duty to defend is based exclusively on the facts as alleged rather than on the facts as they actually are....**

St. Paul Fire and Marine Ins. Co. v. Torpoco, 879 S.W.2d 831, 835 (Tenn. 1994) (quoting American Policyholders' Ins. Co. v. Cumberland Cold Storage Co., 373 A.2d 247 (Me.1977)) (emphases added). Likewise, if any of the allegations are covered under the policy, the insurer has a duty to defend the insured. Id. at 480 (citing U.S. Fidelity & Guar. Co. v. Murray Ohio Manuf. Co., 693 F. Supp. 617 (M.D. Tenn.1988)).

The commercial general liability policy of insurance at issue provided as follows:

SECTION 1 - COVERAGES

² Because jurisdiction is predicated on diversity of citizenship, the court will apply Tennessee law. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (Federal courts sitting in diversity apply state substantive law and federal procedural law.)

**COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies . . .

* * *

- b. This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an **occurrence**” that takes place in the “coverage territory” and

- (2) The “bodily injury” or “property damage” occurs during the policy period.

Insurance Policy, Plaintiff’s Exhibit 1 (emphasis added). “Occurrence” is defined in the policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Id. at Section IV - Definitions. Under Tennessee law, “accident” is defined as “an event that is unforeseen, unexpected, or fortuitous.” Gassaway v. Travelers Ins. Co., 439 S.W.2d 605, 608 (Tenn. 1969).

According to Plaintiff, the act of repossession or conversion of a vehicle does not constitute an “accident” for the purpose of triggering coverage under the liability insurance policy purchased by Defendant. In support of its argument, Plaintiff relies on Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116 (7th Cir. 1998), a Seventh Circuit

case which applied Tennessee law³ to determine that the claim of conversion alleged in a tort action was not an “accident” within the meaning of the insurance policy and also that the policy’s exclusion for expected or intended injury applied to a conversion claim.

In Massachusetts Bay, the plaintiff sought a declaratory judgment that it had no duty to defend its insured, Koenig, in an action arising out of Koenig's alleged wrongful repossession of an automobile. Id. at 1118. The district court found that the repossession did not constitute an accident within the meaning of the insurance policy and entered summary judgment in favor of the plaintiff; the Court of Appeals then affirmed that decision. Id.

The Court of Appeals looked to Tennessee's definition of the term “accident” as determined by the Tennessee Supreme Court.

[I]n Kroger Co. v. Johnson, 430 S.W.2d 130, 131 (Tenn. 1967), the Supreme Court of Tennessee explained that “the words ‘accident’ and ‘accidental’ ... imply that the injury must partake of the unusual, casual or fortuitous.” Id.; see also American Employers Ins. Co. v. Knox-Tenn Equip. Co., 377 S.W.2d 573, 576 (Tenn. 1963) (citations and quotations omitted) (“An accident as defined ... in our decisions defining accidental means as those words are used in insurance policies is an event not reasonably to be foreseen, unexpected, and fortuitous.”). “[T]here is an element of sudden, unforeseen and unexpected casualty and misfortune in the result.” Kroger Co., 221 Tenn. at 652, 430 S.W.2d at 132. Thus, Tennessee courts, like those of Illinois, recognize that the “the natural results of what [one] intend[s] to do,” id. at 654-55, 430 S.W.2d at 132-33, do not flow from accidents.

³ The underlying action had been brought in the Circuit Court of Davidson County, Tennessee, and the plaintiff was a Tennessee resident. The Court of Appeals determined that “these are significant enough contacts to justify the application of Tennessee substantive law under Illinois conflict-of-law principles.” 136 F.3d at 1121-22.

It is beyond dispute that Koenig's conversion of the car was an intentional act not falling within the meaning ascribed the term "accident"; namely, an event that is unforeseen and neither intended nor expected. Indeed, "[t]o be liable [for conversion], *the defendant need only have an intent to exercise dominion and control over the property that is in fact inconsistent with the plaintiff's rights.*" Mammoth Cave Prod. Credit Ass'n v. L.H. Oldham, 569 S.W.2d 833, 836 (Tenn. App.1977) (emphasis added); *see also* General Electric Credit Corp. of Tennessee v. Kelly & Dearing Aviation, 765 S.W.2d 750, 754 (Tenn. App.1988) (emphasis added) ("This *intentional act* by [defendant] constituted conversion."). Clearly, then, the intentional tort of conversion is at odds with a definition of "accident" which requires that the act at issue not be deliberate.

136 F.3d at 1124. The Court of Appeals relied, in part, on Red Ball Leasing, Inc., v. Hartford Accident & Indemnity Co., 915 F.2d 306 (7th Cir. 1990), which held that the improper repossession of a truck by an insured, who was in the leasing business, was an intentional act and, therefore, not an occurrence within the meaning of the insurance policy. 136 F.3d at 1124.⁴ Accord Adams v. Uuione Mediterranea Di Sicurta, 220 F.3d 659 (5th Cir. 2000).

As in the above cited cases, the actions of Defendant AmSouth's predecessor in interest in repossessing Crowe's truck were intentional and not "unusual, casual, or fortuitous." Because Crowe's claim of conversion does not fall within the policy's definition of "occurrence," Plaintiff had no duty to defend that particular claim.

Furthermore, the claim of conversion is excluded from coverage pursuant to the "expected or intended injury" exclusion of the policy. The policy states that coverage does not apply to "bodily injury" and "property damage" that is "expected or intended from the standpoint of the insured." Policy, Plaintiff's Exhibit 1. As noted in Massachusetts Bay,

⁴ The Massachusetts Bay court noted that Tennessee and Illinois law take a similar approach to an insurer's duty to defend. 136 F.3d at 1121 n. 5.

Koenig consciously acted to repossess the BMW automobile with both the intention and expectation that Film House would not be able to use it. *Thus, Film House's loss of use of the vehicle was both expected and intended from Koenig's standpoint*, and as such, it would be disingenuous to suggest that the above-quoted exclusionary language was inapplicable. Tennessee courts have enforced similar exclusionary provisions when an insurer refused to defend its insured. See, e.g., Graves v. Liberty Mut. Fire Ins. Co., 745 S.W.2d 282, 284 (Tenn. App.1987) (“We believe the exclusion is applicable if bodily injury is ‘intended or expected’ by the insured where the insured acts with the intent or expectation that bodily injury will result.”). Without elaborating any further, we conclude that the “expected or intended injury” exclusion also justified Massachusetts Bay's refusal to defend Koenig in the Film House suit.

136 F.3d at 1125-26 (emphasis in original). Consequently, Plaintiff had no duty to defend Crowe’s claim of conversion based on this exclusion.

Defendant AmSouth has cited no authority to the contrary and does not argue that Crowe’s claim of conversion is, in fact, covered under Coverage Part A of the policy. Instead, Defendant points out that, in the underlying suit, Crowe alleged two theories of recovery - conversion and inaccurate credit reporting. Defendant contends that Crowe’s allegations of inaccurate credit reporting are covered by Coverage Part B of the policy. This part of the policy provides as follows:

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. We may at our discretion investigate any “occurrence” or offense and settle any claim or “suit” that may result....

b. This insurance applies to:

(1) “Personal injury” caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you . . .but only if the offense was committed in the “coverage territory” during the policy period.

SECTION V-DEFINITIONS

13. “Personal injury” means injury, other than “bodily injury” arising out of one or more of the following offenses:

.....

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services, or

e. Oral or written publication of material that violates a person’s right of privacy.

Policy, Plaintiff’s Exhibit 1. According to Defendant, Crowe’s complaint alleged “oral or written publication of material that slanders or libels” him sufficiently to bring the claim within the purview of Coverage Part B.

Plaintiff argues that Crowe’s complaint does not allege a personal injury and that, even if it does, coverage is excluded for personal injury “arising out of oral or written publication of material, if done by or at the direction of the insured **with knowledge of its falsity.**” Policy, Coverage Part B, 2a.(1), Plaintiff’s Exhibit 1 (emphasis added). According to Plaintiff, the following allegation is tantamount to an allegation that the credit reporting was made with knowledge of its falsity.

The Plaintiff would further state and show unto the Court that he made a dutiful, determined and reasonable effort to persuade and convince the Defendant that its record-keeping was incorrect and inadequate concerning his account but that, notwithstanding such efforts, the Defendant refused to

recognize and correct its obvious mistakes and errors, and in all matters failed to exhibit any degree of good-faith cooperation with the Plaintiff.

Complaint at ¶ 4.

Defendant AmSouth correctly asserts that “[i]f even one of the allegations is covered by the policy, the insurer has a duty to defend, irrespective of the number of allegations that may be excluded by the policy.” Drexel Chemical Co. v. Bituminous Ins., 933 S.W.2d 471, 480 (Tenn. App.1996) (citing U.S. Fidelity & Guar. Co. v. Murray Ohio Manuf. Co., 693 F. Supp. 617 (M.D. Tenn. 1988)). Therefore, if Crowe made a claim of inaccurate credit reporting, i.e., slander or libel, and if that claim is not excluded by the policy, then the fact that his claim of conversion is excluded does not negate Plaintiff’s duty to defend the state court action.

As to Plaintiff’s argument that Crowe did not allege “libel, slander, the use or disparaging remarks or the invasion of privacy,” see Plaintiff’s Response at p. 5, Plaintiff is in error. Tennessee’s Rules of Civil Procedure contemplate notice pleading such that only a “short and plain statement of the claim showing that the pleader is entitled to relief” is required. See Tenn. R. Civ. P. 8.01. “Pleadings give notice to the parties and the trial court of the issues to be tried.” Castelli v. Lien, 910 S.W.2d 420, 429 (Tenn. App. 1995). “Tennessee’s notice pleading requires a complaint to contain only minimum general facts that would support a potential cause of action under Tennessee substantive law.” Prince v. Coffee County, 1996 WL 221863 (Tenn. App. 1996).

In the present case, Crowe’s complaint gave First American notice that it was being

sued for the “oral or written publication of material that slander[ed] or libel[ed]” him. See Complaint at ¶ 9 (“Plaintiff further sues the Defendant for the loss and damage resulting from the improper and/or misleading incorrect credit reporting on the part of the Defendant.”)

Next, Plaintiff argues that, if Crowe made a claim for slander or libel, then the claim is excluded from coverage because he also alleged that the publications were made by First American with knowledge of their falsity. According to Plaintiff, the “natural implication” of Crowe’s allegations that he informed First American of the error regarding his account and First American failed to correct the errors “is that the information held by the Defendant regarding his account was false.” Plaintiff’s Response at p. 7.

Plaintiff’s argument is without merit. Under Tennessee law, to establish a prima facie case of defamation, the plaintiff must prove that (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. Sullivan v. Baptist Mem’l Hosp., 995 S.W.2d 569, 571 (Tenn. 1999) (relying on *Restatement (Second) of Torts* § 580 B (1977)). Only public figures who are allegedly defamed must show that the defamer had knowledge that the statement was false. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) (A public figure must prove actual malice on the part of the defendant. Actual malice exists when a statement is made with knowledge that the statement is false, or with reckless disregard of whether it is false.)

Contracts of insurance which are ambiguous and susceptible to two reasonable

meanings must be construed in favor of the insured. See Boyd v. Peoples Protective Life Ins. Co., 345 S.W.2d 869, 872 (Tenn. 1961). Thus, when a “complaint does not state facts sufficient to clearly bring the case within or without the coverage, ... the insurer is obligated to defend if there is, potentially, a case under the complaint within the coverage of the policy.” Dempster Bros., Inc. v. United States Fidelity & Guar. Co., 388 S.W.2d 153, 156 (Tenn. App.1964).

Crowe’s state court complaint does not allege that Defendant knew that the information that was disseminated was false, but, instead, Crowe alleges that he tried to “persuade and convince” Defendant that the information was “incorrect and inaccurate” but “Defendant refused to recognize and correct its obvious mistakes.” Complaint at ¶ 4, Plaintiff’s Exhibit 2. Nowhere does the complaint allege that Crowe succeeded in convincing First American of its mistake such that First Tennessee could be said to “know” that the information was false. Since Crowe was not a public figure, to plead a claim for libel or slander he merely had to allege the publication of information that was defaming to him and that First American was negligent in ascertaining the truth of the information. Paragraph four of Crowe’s complaint alleges just such a claim.

An insurer may not properly refuse to defend an action against its insured unless “it is plain from the face of the complaint that the allegations fail to state facts that bring the case within or potentially within the policy’s coverage.” Glens Falls Ins. Co. v. Happy Day Laundry, Inc., 1989 WL 91082 (Tenn. App.). Consequently, Plaintiff was obligated to

defend First American in the state court action, and Plaintiff's motion for summary judgment on the duty to defend is DENIED, and Defendant AmSouth's motion for summary judgment on the duty to defend is GRANTED.

Duty to Indemnify

Next, the court must determine if Plaintiff has a duty to indemnify Defendant for the amount that the jury awarded Crowe in the state court action. In Tennessee, "[a]n insurer's duty to defend is separate and distinct from the insurer's obligation to pay claims under the policy." Drexel Chemical Co. v. Bituminous Ins. Co., 933 S.W.2d 471, 480 (Tenn. App.1996). An insurer's duty to defend its insured is determined by the allegations made in the complaint, while the duty to indemnify is determined by the outcome of the action. Id. Thus, the duty to defend is broader than the duty to indemnify. Id.

In the present case, although Crowe alleged claims of conversion and of inaccurate credit reporting or defamation, the jury was instructed only on the claim of conversion, and the jury returned a verdict on this claim.⁵ Transcript of Crowe v. First American National Bank, Exhibit to Plaintiff's Response. As discussed above, a claim of conversion is not within the coverage of the insurance policy at issue. Therefore, Plaintiff has no duty to indemnify the judgment that was entered against First American, and Plaintiff's motion for summary judgment on the duty to indemnify is GRANTED, and Defendant AmSouth's motion for summary judgment on the duty to indemnify is DENIED.

⁵ Defendant argues that the jury verdict form does not specify the basis of the verdict. However, since the jury was instructed only as to the conversion claim, that is the only claim on which the judgment could be based.

Conclusion

In summary, Plaintiff's motion for summary judgment is PARTIALLY GRANTED and PARTIALLY DENIED, and Defendant AmSouth Bank's motion for summary judgment is PARTIALLY GRANTED and PARTIALLY DENIED. Plaintiff had a duty to defend Defendant AmSouth Bank in the underlying action filed in the Circuit Court of McNairy County, Tennessee, docket number 4759. However, Plaintiff has no duty to indemnify Defendant for the judgment entered against it in the underlying action. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

DATE