UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:98-CV-409-H

MARYLAND CASUALTY INSURANCE COMPANY PLAINTIFF

V.

BEST WESTERN GOLD VAULT INN, INC., et al. DEFENDANTS

MEMORANDUM OPINION

This case involves the scope of coverage of a commercial insurance policy. On February 12, 1997, an unknown person violently assaulted Edna Trent while she was on duty in the course of her employment for Defendant Best Western Gold Vault Inn, Inc. ("Gold Vault"). Alleging actionable damages from this attack, Trent and her husband sued, among others, Gold Vault and the owners of the land on which its business is conducted (collectively, the "Owners").[1] The Trents' suit, which alleges several common law claims, is pending before the state Circuit Court in Hardin County, Kentucky. *See Trent v. Best Western International, Inc. et al.*, No. 98-CI-00093 (Hardin Circuit Court, Div. II, filed Jan. 23, 1998).

At the time of Edna Trent's attack, Gold Vault had two insurance contracts with Plaintiff Maryland Casualty Insurance Company ("Maryland Casualty")—a commercial general liability

[1]The Owners are Earl L. Cato, Daurice D. Cato, William C. Powell, Ethel S. Powell, Barbara D. Cato, and Eddie L. Cato. Each of them is also a shareholder in Gold Vault.

The Trents also mistakenly alleged that Peter J. Sandknop and Lorraine Sandknop were Owners. According to the parties, Peter J. Sandknop and Lorraine Sandknop are no longer defendants in the *Trent* case. Since their defense and indemnification is not in actual controversy, the Court dismisses them as defendants in the instant action as well.

policy (the "Policy") and an umbrella policy.[2] Citing those policies, Gold Vault and the Owners requested that Maryland Casualty defend and indemnify them in the *Trent* case. Maryland Casualty refused, then filed this action seeking a declaratory judgment that it is not required to defend or indemnify Gold Vault or the Owners for any liabilities they may incur in the *Trent* suit.

Maryland Casualty and Defendants have filed cross-motions for summary judgment. Urging the Court to construe the Policy in its favor, each side claims that, since there is no genuine issue as to any material fact, it is entitled to a summary judgment as a matter of law. This Memorandum Opinion addresses the summary judgment motions and the proper construction of the Policy. The Court will consider Maryland Casualty's claims against Gold Vault separately from those against the Owners.[3]

I.

Under the Policy, Maryland Casualty agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies. CGL Policy, at § I, Coverage A, ¶ 1.a. However, the Policy specifically excluded coverage for employees:

2. Exclusions

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[2]Although Maryland Casualty originally sought declarations of its rights under the umbrella policy, neither party discussed that policy's terms in the motions for summary judgment. The parties seem to agree that Maryland Casualty's liability under the umbrella policy depends solely upon its liability under the commercial general liability policy. Absent argument to the contrary, this Memorandum Opinion will not separately consider the umbrella policy.

[3]Gold Vault and the Owners have asked the Court to delay ruling on Maryland Casualty's liability to defend and indemnify them until the Trent case is resolved. Aside from generic assertions that an immediate decision would be "patently unfair," Gold Vault and the Owners have alleged no specific prejudice flowing from a prompt determination of the parties' rights. Where an actual controversy exists between the parties, the Court finds no reason to delay resolution of this issue.

This insurance does not apply to:

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse . . . of that "employee" as a consequence of paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

CGL Policy, at § 1, Coverage A, ¶ 2. The policy also excludes any coverage for bodily injuries covered by Kentucky's workers' compensation system. *See* CGL Policy, at § 1, Coverage A, ¶ 2.d. Since both parties admit that Edna Trent was an employee and that her injury arose out of and in the course of her employment and the performance of her duties, Maryland Casualty has no duty to indemnify Gold Vault under the terms of the Policy.

Gold Vault urges the Court to construe the contract's ambiguities in its favor. However, the Court cannot create contractual ambiguity where none exists. *See United States Fire Insurance Co. v. Kentucky Truck Sales, Inc.*, 786 F.2d 736, 739 (6th Cir. 1986) ("It is . . . settled . . . that the court must give all terms their plain meanings and not rewrite an insurance contract to enlarge the risk."); *see also United States Fidelity and Guaranty Co. v. Star Fire Coals, Inc.*, 856 F.2d 31, 33 (6th Cir. 1988). The Court finds that the employee liability exclusion language is not ambiguous. Only one interpretation is logical here—that the Policy does not cover liabilities for injured employees, regardless of the nature of those liabilities.

Gold Vault argues that Maryland Casualty's duty to defend the *Trent* case is independent of its ultimate duty to indemnify Gold Vault for any liability determined there. While it is true

that the "insurer has a duty to defend if there is any allegation which potentially, possibly or might come within the coverage of the policy," *see James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991), there is no such allegation in the *Trent* case. Because of the unambiguous language of the employment liability exclusion, this is not a "suit in which the language of the complaint would bring it within the policy coverage." *Id.* at 279. Thus, no duty to defend Gold Vault arises under the facts presented.

II.

The Owners are admittedly not "insureds" under the contract's plain language. *See* CGL Policy, at § II, ¶ 1.d ("Who Is An Insured"). Though all of these individuals are shareholders of Gold Vault and some may be executive officers or directors of Gold Vault, the liability at issue is not "with respect to their duties as . . . officers or directors [or] stockholders." *Id.* They are defendants in the *Trent* suit solely in their capacity as Owners.

Although the Owners are not primary parties to the Policy, they argue that Maryland Casualty owes them duties of defense and indemnity under another provision of the Policy. When Gold Vault contracted to lease the property from the Owners, Gold Vault agreed, "at its expense . . . [to] maintain personal liability insurance against claims for bodily injury . . . occurring in or about the leased premises" for a minimum of $1,000,000.00. *See* Lease, July 1, 1984, at ¶ 9(b). Pursuant to the Policy, Maryland Casualty agreed to "pay those sums that [Gold Vault] becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies." CGL Policy, at § I, Coverage A, ¶ 1.a. The Owners argue that the lease agreement's liability insurance clause constitutes such a legal obligation.

As to Maryland Casualty's duty to indemnify, the Court finds that the language and

intent of the lease's liability insurance clause cannot support the Owners' claim. The Owners argue that this clause "amounts to a hold harmless clause by Gold Vault Inn, Inc. in favor of the landowners." This is far from evident in the clause's language. Gold Vault agreed only to maintain insurance—for whose benefit it is not clear. The Court concludes that this language is clearly inadequate to create a binding indemnity obligation.

Even if the Court could somehow construe this clause as *indemnifying* the Owners for bodily injuries on the premises, the Trents are claiming damages from the negligence, carelessness, and gross negligence *of the Owners themselves*. *See* Trent Complaint, ¶¶ 10–11. Under Kentucky law, Gold Vault has no legal obligation to indemnify the Owners for damage claims arising from the Owners' own negligence unless it is clear that such was the intention of the contracting parties. *See Fosson v. Ashland Oil & Refining Co.*, 309 S.W.2d 176, 178 (Ky. 1957) ("when there is a doubt as to the meaning of an indemnity clause the construction should be against the contention that the contract was meant to indemnify against the indemnitee's own negligence . . . . every assumption is against such intention"); *Employers Mutual Liability Ins. Co. of Wis. v. Griffin Constr. Co.*, 280 S.W.2d 179, 183 (Ky. 1955) ("a contract of indemnity will not be construed to indemnify a party against his own negligence unless such intention is clearly manifest and no other interpretation fairly may be ascribed to it"); *see also United States v. Seckinger*, 397 U.S. 203, 211–12 (1970); *Amerco Marketing Co. of Memphis, Inc. v. Myers*, 494 F.2d 904, 913–14 (6th Cir. 1974). Since there is no evidence of such an intent, the lease provision cannot apply to any liability accruing to the Owners in the *Trent* suit.

It is also clear from the Policy that Maryland Casualty has no duty to defend the Owners. Maryland Casualty has "the right and duty to defend the insured against any 'suit' seeking those

damages" to which the contract applies. CGL Policy, at § I, Coverage A, ¶ 1.a. The Owners, however, are not "the insured." *See supra*. Furthermore, the lease's insurance clause does not assume the costs of defending the Owners in a lawsuit; the lease provision merely mandates one million dollars in personal liability insurance. The Policy expressly disclaims the duty to defend or pay legal fees and costs arising from contractual liabilities assumed by Gold Vault in a lease unless the lease specifically includes a legal defense provision. *See* CGL Policy, at § I, Coverage A, ¶ 2.b(2)(a); *id.* at § I, Supplementary Payments—Coverages A and B, Condition c. Since no such provision exists in the lease, and since there is no underlying duty to indemnify, Maryland Casualty has no right or duty to defend the Owners in the *Trent* case.

Best Western International currently has claims pending against Gold Vault and Maryland Casualty. The Court is not certain whether this Memorandum applies to those claims in any way. The accompanying order asks the parties to advise the Court of a process to resolve the remaining claims.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN II
JUDGE., U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Plaintiff and Defendants have moved for a summary judgment. The Court has issued a Memorandum Opinion explaining its reasoning. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion for a summary judgment is GRANTED, and the Court declares that Plaintiff has no duty to defend or indemnify Defendants Best Western Gold Vault Inn, Inc., Earl L. Cato, Daurice D. Cato, William C. Powell, Ethel S. Powell, Barbara D. Cato, and Eddie L. Cato against the claims of Edna and Richard Trent now pending before the Hardin County Circuit Court.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that on or before **October 22, 1999**, the parties shall file memoranda suggesting the appropriate resolution of the remaining claims or shall file an agreed order for that purpose.

This _____ day of September, 1999.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record