IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

MALLALIEU-GOLDER INSURANCE AGENCY, INC. and MARCIA BUTTERS CONFER,	:	
Plaintiffs	:	
v.	:	No. 98-01,573
UTICA MUTUAL INSURANCE COMPANY,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the motions for judgment on the pleadings filed by the plaintiffs and the defendant. Each party contends it is entitled to a declaratory judgment on the question of whether defendant Utica Mutual Insurance Company has a duty to defend the plaintiffs in an underlying action filed against them. All parties agree there are no genuine issues of material fact. They disagree, however, over whether the insurance policy issued by Utica to the plaintiffs excludes the actions that gave rise to the underlying suit and whether Utica's refusal to defend was made in bad faith. After briefing and argument the court finds Utica has a duty to defend the plaintiffs, but did not act in bad faith when it denied coverage.

Factual Background

The facts of the underlying case, as set forth in the pleadings and attached affidavits, indicate that on 25 January 1991 Jeffrey and Patrice Finke went to the office of Mallalieu-Golder for the purpose of signing the General Indemnity Agreement in favor of Colonial Surety Company. While the Mr. and Mrs. Finke were seated in the office of Mallalieu-

Golder President Lawrence Fiorini, Mr. Fiorini presented them with the Agreement to sign. Mr. Finke then asked Mr. Fiorini a question that required him to leave his desk and review records. When Mr. Fiorini returned the Agreement had been executed, bearing the purported signatures of Jeffrey and Patrice Finke. Mr. Fiorini then presented the Agreement to Marcia Confer, an Mallalieu-Golder employee who was commissioned as a notary. Ms. Confer notarized the document.

In reliance upon the Agreement, Colonial Surety Company issued numerous surety bonds to Finke Contracting Corporation, extending credit based on the joint assets of the Finkes. Subsequently, Finke Contracting Corporation experienced serious financial difficulties and Colonial sustained considerable damages. Colonial then attempted to obtain indemnification from Mallalieu-Golder but was thwarted when Mrs. Finke disclaimed her signature on the Agreement. An investigation unequivocally revealed that her signature was a forgery.

On 27 May 1997, Colonial Surety Company filed a complaint against Mallalieu-Golder and Ms. Confer, alleging that it sustained damages in reliance upon Ms. Confer's fraudulent notarization. The complaint was amended on 27 August 1998 to include a count of negligence, alleging that Ms. Confer had negligently permitted someone other than Mrs. Finke to execute the Agreement. The amended complaint also alleged that Mallalieu-Golder was negligent for allowing Ms. Confer's errors and was vicariously liable for her actions.

Mallalieu-Golder then requested coverage or defense from Utica based on the insurance policy Utica issued to Mallalieu-Golder. Utica refused, claiming that Ms.

Confer's actions were excluded from coverage. This refusal led to the motions for judgment on the pleadings currently before the court.

Discussion

A motion for judgment on the pleadings may be granted only when the pleadings demonstrate that no genuine issue of fact exists and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1034; Hammerstein v. Lindsay, 440, Pa. Super. 350, 655 A.2d 597, 600 (1995). The relevant facts are not in dispute and all parties agree it is appropriate for the court to enter judgment at this time, although they naturally disagree upon which party is entitled to judgment.

An insurance company has a duty to defend all claims when at least one claim in a complaint against the insured potentially falls within coverage of the policy. Gene's Restaurant v. Nationwide Insurance, 519 Pa. 306, 548 A.2d 246 (1988); Raymond Davis & Sons, Inc. v. Liberty Mutual Ins. Co., 467 F.Supp. 17, (E.D. Pa. 1979). The issue in this case is whether Ms. Confer's actions are excluded by the policy.

I. Interpretation of the Policy

Section II(1) of the Utica policy, entitled "Coverage," states that the policy covers losses that "arise out of negligent acts, errors, or omissions in the conduct of the insured's business" committed by the insured or any person for which the insured is legally liable. Section II(1) of the policy also states that it includes coverage for notarization provided as part of the insured's professional services.

The provision at issue is found under Section IV(1), entitled "Exclusions," where Utica disclaims coverage for any claim arising out of:

> The certification or acknowledgment of a signature by an insured acting as a notary without the physical appearance before the insured of the person whose signature is being notarized.

If the words of an insurance policy are clear and unambiguous, the court must give them their plain and ordinary meaning. Vogel v. National Grange Mut. Ins. Co., 332 Pa. Super. 384, 481 A.2d 668 (1984). We find the words "without the physical appearance before the insured" to be very clear. Utica admits that Patrice Finke was present in the office with Ms. Confer on the date she notarized the agreement. Therefore, the court holds that the exclusion does not apply.

Utica argues the exclusion means that the person whose signature is being notarized must execute the document in front of the notary. This court is not interested in what Utica *meant* when drafting the clause. We are interested in what Utica *said* in the policy. When interpreting an insurance policy, like all contracts, a court must ascertain the mutual intent of the parties *as manifested in the language of the agreement*. Nationwide Mut. Ins. Co. v. United States Fidelity and Guarantee Co., 529 F.Supp. 194 (E.D. Pa. 1981). If Utica wished to require notaries to witness the actual signatures, it should have said so.

While it is true that the policy does not state for certain exactly *when* the person signing must be present before the notary, this court will not allow Utica to add a limitation to the policy after the fact. As discussed above, this court finds the language of the policy to be clear. However, even if the court were to find the policy ambiguous on this point such a ruling would not benefit Utica. An ambiguous insurance policy, like all ambiguous contracts,

must be construed against the drafter. Pittsburgh Steel Co. v. Patterson-Emerson-Comstock, Inc., 404 Pa. 53, 171 A.2d 185, 189 (1961).

Moreover, it is well settled that insurance policy exclusions must be clearly expressed in the policy. Short v. Metropolitan Life Ins. Co., 339 Pa. Super. 124, 488 A.2d 341 (1985). The policy behind this principle is obvious: it is the insurance company's responsibility to clearly state what is covered by the policy and what is not. An insured person should not be left to guess which actions are included. When language in the policy can reasonably be interpreted more than one way the insurance company should not be able to pronounce–after the fact–what the policy means. Utica had a right to decide which of the plaintiffs' actions it would insure. But it also had a duty to make that choice clear to Mallalieu-Golder. The court will not penalize the plaintiffs for Utica's failure to clearly disclaim coverage.

Utica also contends that Ms. Confer violated the notary statute, which provides: "The officer taking the acknowledgment shall know or have satisfactory evidence that the person making the acknowledgment is the person described in and who executed the instrument." 21 P.S. 291.5. See also 57 P.S. § 147 et seq. Utica argues there was no acknowledgment here. The plaintiffs argue no violation occurred because Ms. Confer had "satisfactory evidence" that Patrice Finke had signed the document, since her supervisor indicated to Ms. Confer that she had signed it.

The existence of a notary law violation would be relevant if the court were deciding whether the person who relied on the notarized document could sue Ms. Confer. See Commonwealth v. Doak, 352 Pa. 380, 42 A.2d 826 (1945); Commonwealth v. Maryland

Casualty Company, 85 A.2d 83, 369 Pa. 300 (1952), *affirmed* 97 A.2d 46, 373 Pa. 602 (1953). However, it is irrelevant here, where we are concerned only with determining whether Utica must defend Ms. Confer in that action. The Utica policy covered notarization by Utica employees, except for notarizations falling under the exclusion. Violation of the notary law is something quite different from violation of the insurance policy. If Utica wished to exclude all notary law violations, it should have stated so.[1]

Finally, Utica contends that the underlying claim is nothing more than a fraudulent notarization allegation gussied up to look like a negligence claim in order to obtain coverage, which is not permitted. Agora Syndicate, Inc. v. Levin, 977 F.Supp. 713 (E.D. Pa. 1997). In support of this argument, Utica points out that the negligence count was added later, incorporating all the allegations in the original complaint.

Regardless of the motivation behind the amendment, the allegations in the underlying complaint support a claim for negligence. Ms. Confer violated her duty to ensure that Ms. Finke signed the Agreement. She may also be liable to Colonial under another legal theory, but that does not relieve Utica of its responsibility to defend the negligence count.

II. Bad Faith Refusal to Defend

The plaintiffs claim they are entitled to costs and attorney fees under 42 Pa.C.S.A. § 8371, which allows a court to make such an award when an insurer acts in bad faith. An insurance company acts in bad faith when it does not have a reasonable basis for denying

[1] The court finds it interesting that although Utica argues in its brief that Ms. Confer violated the notary law, when discussing whether Ms. Confer had satisfactory evidence, it states, "[T]he notary law is irrelevant to the consideration at hand in that it is the language of the Complaint and the language of the policy which govern."

benefits under a policy and knows or recklessly disregards that fact. Terletsky v. Prudential Property and Casualty, 437 Pa. Super. 108, 649 A.2d 680 (1994).

Although this court holds that Ms. Confer's actions do not fall within the exclusionary clause of the policy, Utica has advanced reasonable arguments to support its position that the exclusion applies. The court has rejected these arguments, as we have rejected countless reasonable arguments in the past. Our adversarial legal system encourages parties to advance all plausible positions in an attempt to prevail. In order for that system to function properly, courts must impose sanctions only when a party clearly abuses that system. That has not happened in this case.

O R D E R

AND NOW, this _____ day of March, 1999, the motion for judgment on the pleadings filed by the plaintiffs is granted in part and denied in part as follows. The portion of the motion pertaining to awarding costs and attorneys fees is denied. The portion relating to the declaratory judgment action is granted. The court finds in favor of the plaintiffs and holds:

1. Plaintiffs Mallalieu-Golder Insurance Agency, Inc. and Marcia Butters Confer are "Insureds" under the Utica Mutual Insurance policy;

2. Utica Mutual Insurance Company, under the terms of the policy, is obligated to both defend and indemnify Mallalieu-Golder Insurance Agency, Inc. and Marcia Butters Confer for any claims or losses arising out of the claims asserted in the Amended Complaint of Colonial Surety Company.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
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