

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

RIVER DECK HOLDING CORP. a/k/a EDGE CLUB CHEMISTRY,	: JANUARY TERM, 2003
Plaintiff,	: No. 2306
v.	: COMMERCE PROGRAM
UNITED STATES LIABILITY INSURANCE CO., LANDMARK INSURANCE COMPANY, BOARDMAN HAMILTON COMPANY, ANTHONY CASSELLI, FRANCIS SHEERIN, and AAC OF MANYUNK ASSOCIATES,	: : : Control Numbers: 010036, 010162, 010227
Defendants.	:

ORDER

AND NOW, this 23rd day of March 2004, upon consideration of the three separate Summary Judgment Motions of defendants, Boardman Hamilton Company, United States Liability Insurance Company, and Landmark Insurance Company, the responses in opposition, the respective memoranda, all other matters of record, and in accord with the contemporaneous Opinion, it is **ORDERED** that the Motions are **GRANTED**. All claims raised in this action are **DISMISSED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. March 23, 2004

Before the court are Summary Judgment Motions of three defendants, Boardman Hamilton Company (“BHC”), United States Liability Company (“USLIC”), and Landmark Insurance Company (“LIC”).

I. Statement of Facts

Plaintiff, Riverdeck Holding Corp. (“Riverdeck”) operated a bar/restaurant in the Manayunk section of Philadelphia. BHC was the insurance broker for Riverdeck.

USLIC and LIC are insurance companies that issued Liquor Liability Insurance Policies to Riverdeck.

The LIC policy covered the period from December 9, 1998, through December 9, 1999, during which time defendant Anthony Casselli was allegedly assaulted and injured by employee-bouncers of Riverdeck. The USLIC policy covered the period from December 9, 1999, through December 9, 2000, during which time defendant Francis Sheerin was allegedly assaulted and injured by employee-bouncers of Riverdeck.

During that time period in which Riverdeck was insured by USLIC and LIC, Riverdeck was also insured under a General Liability Policy issued by a non-party, Regis Insurance Company (“Regis”). When Casselli and Sheerin filed their separate suits against Riverdeck based on the injuries they allegedly sustained, Regis initially agreed to defend Riverdeck. Subsequently, however, Regis refused to continue defending, and refused to indemnify, Riverdeck because the Regis General Liability Policy contained an exclusion for assault and battery. Based on that exclusion, the Pennsylvania Superior Court found that Regis had no duty to defend or indemnify Riverdeck for the Casselli and Sheerin claims. *See* LIC’s Summary Judgment Motion (“SJM”), Ex. H.

In the present action, Riverdeck demands that USLIC and LIC defend and indemnify Riverdeck with respect to the Casselli and Sheerin claims under their respective Liquor Liability Policies.¹ Those policies require USLIC and LIC to defend Riverdeck in suits seeking damages, and to indemnify Riverdeck for any damages Riverdeck becomes obligated to pay,

because of injury to which this insurance applies if liability for such injury is imposed on the insured by reason of the selling, serving, or furnishing of any alcoholic beverage at or from the insured premises.

USLIC's SJM, Ex. F; LIC's SJM, Ex. F.

Riverdeck asserts that Casselli's and Sheerin's claims for injuries are covered by the USLIC and LIC Liquor Liability Policies because they were assaulted by Riverdeck's employee-bouncers after Casselli and Sheerin had been drinking alcoholic beverages at Riverdeck's bar/restaurant. USLIC and LIC have denied coverage for the Casselli and Sheerin claims because the underlying Complaints against Riverdeck make no mention of alcohol as a reason for their injuries. *See* USLIC's SJM, Ex. F.

In the alternative, Riverdeck has asserted a claim against BHC for failure to obtain insurance for Riverdeck that would cover the nature of the claims raised by Casselli and Sheerin. BHC responds that it is not liable to Riverdeck because Riverdeck knowingly underinsured itself. BHC also maintains that it is entitled to summary judgment because Riverdeck failed to produce an expert report regarding the duties of an insurance broker to its bar/restaurant clients.

¹ Casselli, Sheerin and AAC of Manayunk were also named as defendants because they are parties in the underlying tort actions and are, therefore, interested in the outcome of this action. None of the parties in this action has asserted a claim against any of these defendants.

II. Legal Analysis.

“Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999).

In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Id.

In this case, there is no genuine issue of material fact relative to a determination whether the LIC and USLIC Liquor Liability Policies provide coverage for the Casselli and Sheerin claims. Furthermore, there are sufficient undisputed facts to determine whether BHC breached its duty to Riverdeck.

A. LIC’s and USLIC’s Liquor Liability Policies Do Not Require USLIC and LIC To Defend and Indemnify Riverdeck With Respect to the Underlying Claims.

In determining whether there is coverage here, the court first looks to the policies at issue. Interpretation of the terms of an insurance contract is a matter of law for the court. *See* Madison Const. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 606, 735 A.2d 100, 106 (1999). Liquor liability insurance policies are intended to cover an insured’s liability for wrongful acts under the Dram Shop Act,² which liability is often excluded under general commercial liability policies. *See* Curbee, Ltd. v. Rhubarb, 406 Pa. Super. 505, 511, 594 A.2d 733, 736 (1991) (as a result of the standard liquor liability exclusion,

² 47 P.S. §§ 4-493, 4-497.

the general liability policy “did not provide coverage to a licensee for liability arising from providing alcohol for consumption. The insureds evidently understood this exclusion because they procured a separate policy . . . which specifically covered liability arising from such activity.”); Britamco Underwriters, Inc. v. Logue’s Tavern, Inc., 1995 WL 710570 (E.D. Pa. Dec. 1, 1995) (Liquor Liability Exclusion in a Multi-Peril Policy prohibited insured from recovering from insurer with respect to dram shop claim brought against insured); State Automobile Ins. Assoc. v. Young Men’s Republican Club of Allegheny County, Inc., 663 F. Supp. 1077 (W.D. Pa. 1987) (Liquor Liability Exclusion “clearly and unambiguously excludes coverage for liability arising from the service of alcohol in violation of” the Dram Shop Act.)³

The Dram Shop Act does not impose liability on Riverdeck for physical harm to third persons caused by its employee-bouncers, unless the employees were “visibly intoxicated persons” to whom the licensee served additional alcohol. *See* 47 P.S. §§ 4-493, 4-497. Absent express provisions to the contrary, the court declines to read the USLIC and LIC Liquor Liability Policies expansively to hold that they provide coverage for additional acts not prohibited by the Dram Shop Act.

The question then becomes whether the wrongful acts alleged by Casselli and Sheerin constitute acts proscribed by the Dram Shop Act. In order to answer that question, the court must look to the allegations of their two underlying Complaints. *See* Scopel v. Donegal Mutual Ins. Co., 698 A.2d 602, 605 (Pa. Super. 1997) (“it has long

³ Because “Pennsylvania does not recognize common law liability for the service of alcohol to persons who become intoxicated and injure themselves or others,” there was no need to insure against such liability until the Dram Shop Act was enacted. *See* State Automobile Ins. Assoc. v. Young Men’s Republican Club of Allegheny County, Inc., 663 F. Supp. 1077, 1079, n. 1 (W.D. Pa. 1987).

been the law of our Commonwealth that the nature of the allegations contained in the [underlying] complaint control whether an insurer must defend a policyholder.”); Humphreys v. Niagara Fire Ins. Co., 404 Pa. Super. 347, 354, 590 A.2d 1267, 1271 (1991) (“In determining whether [insureds] had any potential basis for recovery under a duty to defend, the critical consideration is that the obligation of the insurer to defend an action is fixed solely by the allegations in the underlying complaint.”); D’Auria v. Zurich Ins. Co., 352 Pa. Super. 231, 234, 507 A.2d 857, 859 (1986) (“If the factual allegations of the complaint . . . state a claim to which the policy potentially applies, the insurer must defend.”) If the Casselli and Sheerin Complaints do not set forth any covered causes of action, then USLIC and LIC need not defend nor indemnify Riverdeck. *See* Scopel v. Donegal Mutual Ins. Co., 698 A.2d 602, 605 (Pa. Super. 1997).

Important here, the underlying Complaints in the Casselli and Sheerin actions do not contain Dram Shop Act claims, and make no mention of alcoholic beverages as a factor in causing Casselli’s and Sheerin’s injuries. *See* LIC’s SJM, Ex. G; USLIC’s SJM, Ex. E. The initial claims’ documents indicate that Casselli and Sheerin may have been inebriated and obstreperous, which led Riverdeck’s employee-bouncers to take an interest in them. *See* BHC’s Response to USLIC’s SJM, Ex. A, p. 2. However, according to the Complaints, it was the employee-bouncers’ alleged intentional acts in striking Casselli and Sheerin (and Riverdeck’s negligent hiring, training, and supervision of the employee-bouncers) that was the legal cause of Casselli’s and Sheerin’s injuries. There are no allegations that Casselli’s and Sheerin’s injuries were incurred by reason of Riverdeck’s selling, serving, or furnishing of any alcoholic beverage. Thus, USLIC and LIC need not

defend and indemnify Riverdeck with respect to Casselli's and Sheerin's personal injury actions.

Riverdeck's claims, and BHC's cross-claims, against USLIC and LIC should be dismissed.

B. Plaintiff Has Failed to Produce the Necessary Expert Report as to the Duties of an Insurance Agent.

Riverdeck has asserted negligence, breach of contract, and breach of fiduciary duty claims against BHC for failing to recommend and procure appropriate bar/restaurant insurance for Riverdeck. In order for Riverdeck to prevail on these claims for professional malpractice, the fact-finder must find that BHC breached its professional duty to Riverdeck. *See Storm v. Golden*, 371 Pa. Super. 368, 377-8, 538 A.2d 61, 65 (1988).

The court does not believe that BHC's alleged duty, to obtain appropriate insurance for a bar/restaurant,

is an elementary and non-technical transaction which requires only simple common sense . . . [In this case,] whether [the insurance broker] failed to exercise a reasonable degree of care and skill related to common professional practice in [obtaining sufficient insurance] is a question of fact outside the normal range of the ordinary experience of laypersons.

Storm v. Golden, 371 Pa. Super. 368, 377, 538 A.2d 61, 65 (1988). *See also Himmelreich v. Adams Abstract Assoc.*, 59 D&C 4th 382 (Adams Co. 2002) (expert report required to establish duty and breach of duty of title insurance agent). Therefore, Riverdeck's "failure to produce an expert witness as to the standard of care under which [BHC] should have conducted [it]self and as to any deviation from that standard that may have occurred makes [Riverdeck's] case defective as a matter of law," and justifies its dismissal. *Storm v. Golden*, 371 Pa. Super. 368, 378, 538 A.2d 61, 65 (1988). *See also*

Al's Café, Inc. v. Sanders Insurance Agency, 820 A.2d 745, 752 (Pa. Super. 2003) (court reversed summary judgment in insurance agent's favor where plaintiff's expert reports raised genuine issue of material fact as to whether agent deviated from "knowledge and skill required of an insurance agent or broker in procuring [liquor liability] insurance coverage for a client.")

In its response to USLIC's and LIC's Motions for Summary Judgment, Riverdeck relies on an expert report procured by BHC, which states:

It is the opinion of the author that Boardman Hamilton, and its producers, fully conformed to any and all generally accepted standards and practices in the industry, and fully met and exceeded any duties or obligations the agency may have had in its dealings with Riverdeck.

See Plaintiff's Response to USLIC's and LIC's SJMs, Ex. A, p. 12.

Riverdeck has offered no opposition to BHC's Motion for Summary Judgment.

Thus, Riverdeck's claims, and USLIC's and LIC's cross-claims, against BHC should be dismissed.

CONCLUSION

For these reasons, defendants' Motions for Summary Judgment are **granted** and all claims are dismissed. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.