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June 1, 2023

VIA PACER

Hon. Evelyn Padin
United States District Judge

Re: *Barisone v. Farm Family Casualty Ins. Co. et al.*, 2:23-cv-02571

Defendant Great American Insurance Company of New York's Request For Pre-Motion Conference

Dear Judge Padin:

Pursuant to section II.E.i. of the Court's *General Pretrial and Trial Procedures*, defendant Great American Insurance Company of New York respectfully requests a pre-motion conference concerning Great American's anticipated motion to dismiss the plaintiff's complaint. This letter summarizes the background of the case, and the facts and legal authorities Great American intends to present in the motion.

A. The Present Action

Plaintiff Michael Barisone filed a complaint for declaratory judgment and other relief against Great American and other insurance companies in the Superior Court of New Jersey on April 10, 2023. Barisone filed an amended complaint on April 21, 2023. Great American timely removed the action to this court on May 11, 2023. The parties stipulated to extend Great American's time to answer or otherwise respond to June 1, 2023.

In this action, Barisone seeks a declaratory judgment that he was entitled to defense from Great American for a personal injury lawsuit against him involving a shooting. He contends that Great American wrongfully refused to defend him, and seeks an award of damages compensating him "for the debts he personally incurred to attorneys and other professionals involved in his legal defense."

B. The Great American Policy

Great American issued an AgriPak Farm & Ranch Policy to Barisone for the policy period May 2, 2019 to May 2, 2020. The policy provides in part that Great American will pay sums that

Barisone becomes legally obligated to pay as damages because of “bodily injury” to which the insurance applies. The insurance applies to bodily injury only if the injury was “caused by an ‘occurrence,’” and only if the injury occurred during the policy period. The policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

C. The Underlying Suit Against Barisone

On October 18, 2019, plaintiff Lauren Kanarek filed a complaint against Barisone and others in the Superior Court of New Jersey. Kanarek sought damages for bodily injury she suffered when Barisone shot her on August 17, 2019. The complaint alleges that Barisone confronted Kanarek on her porch following “an extended and protracted campaign by Barisone of harassment against plaintiff Kanarek and her fiancé.” During this confrontation, the complaint alleges that “Barisone shot Kanarek in the chest multiple times at point-blank range.” Barisone’s complaint in this action avers that the Kanarek suit was settled without any contribution from Barisone, but that he incurred expenses in defending the suit.

D. Great American’s Declination Of Coverage

After being served with Kanarek’s complaint, Barisone tendered his defense to Great American. On December 16, 2019, Great American sent a letter to Barisone declining to provide defense and indemnity for the Kanarek action. The letter stated in part: “We determined that Great American does not have a duty to defend you because the facts stated in the Lawsuit describe an intentional act expected to inflict serious, if not deadly, injuries, meaning Ms. Kanarek’s bodily injuries were not caused by an ‘occurrence.’” The letter also noted that the facts alleged in the Kanarek complaint were subject to an exclusion barring coverage for bodily injury “expected or intended from a standpoint of the ‘insured.’”

E. Grounds For Motion To Dismiss

Great American intends to move pursuant to F.R.C.P. Rule 12(b)(6) for an order dismissing Barisone’s complaint, on the ground that Great American had no duty to defend him in the Kanarek action. As a matter of law, the conduct described in the Kanarek complaint – that Barisone harassed Kanarek, came to her home with a gun, and shot her several times in the chest from point-blank range – does not describe an “occurrence” as required for the policy to provide coverage. Accordingly, Great American did not breach the insurance contract by declining to defend Barisone.

F. Legal Argument And Authority

As noted above, the policy provides that Great American will pay sums that Barisone becomes legally obligated to pay as damages because of “bodily injury” to which the insurance applies. The insurance applies to “bodily injury” only if the injury is caused by an “occurrence.” The policy further provides that Great American “will have the right and duty to defend the ‘insured’ against any ‘suit’ seeking those damages.” However, the policy specifies that “we have no duty to defend any ‘insured’ against a ‘suit’ seeking damages for ‘bodily injury’ ... to which this insurance does not apply.” Accordingly, there is no duty to defend the insured against a suit seeking damages for bodily injury that was not caused by an “occurrence,” that is, an “accident.”

The Great American policy was issued to Barisone in New Jersey, and the suit against him was filed in New Jersey, such that New Jersey law applies. Under New Jersey law, an insurer must

provide a defense “when the complaint raises allegations that fall within a risk covered by the insurance contract.” *Abouzaid v. Mansard Gardens Assocs., LLC*, 207 N.J. 67, 79 (2011). “The complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgment, and in reaching a conclusion, doubts should be resolved in favor of the insured.” *Id.* at 79-80 (citation and internal quotation marks omitted). Although matters outside the complaint may be considered in order to determine whether a duty to defend exists, “the insured being sued is responsible for promptly conveying to its insurance company the information that it believes will trigger coverage.” *SL Industries, Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 199-200 (1992). Great American’s December 16, 2019 letter stated that Great American “will consider any new information or documents that you believe may impact our coverage position.” There are no allegations in Barisone’s complaint suggesting that he provided information to Great American to indicate that Kanarek’s injuries were caused by an accidental “occurrence,” despite Great American’s invitation to do so.

New Jersey holds that “the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury.” *Cumberland Mut. Fire Ins. Co. v. Murphy*, 183 N.J. 344, 349 (2005) (citation and internal quotation marks omitted). Thus, an “accident” includes “the unintended consequences of an intentional act, but not an injury that is, itself, intended.” *Id.* Although the insured’s subjective intent to injure may raise a question of fact in some circumstances, New Jersey courts have generally found that an assault with an inherently dangerous object such as a gun or knife is not an “accident,” because injury is “an inherently probable consequence of the insured’s actions.” See *Harleysville Ins. Co. v. Garitta*, 170 N.J. 223, 231 (2001); *Cumberland Mut. Fire Ins. Co. v. Dahl*, 362 N.J. Super. 91 (App. Div. 2003). Here, the underlying complaint’s allegations that Barisone conducted a campaign of harassment against Kanarek, came to her home with a gun, and shot her in the chest at point blank range, eliminate the possibility that her bodily injury was caused by an “occurrence,” such that Great American had no duty to defend Barisone.

G. Conclusion

Based on the foregoing allegations and authorities, Great American believes it is entitled to dismissal of Barisone’s complaint as a matter of law, as the complaint fails to state a claim upon which relief can be granted. Great American appreciates the opportunity to address these matters in a pre-motion conference.

Very truly yours,

/s/ Ryan R. Westerfield

Alexander E. Potente (*pro hac vice* forthcoming)
Ryan R. Westerfield