

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED

OCT 24 2014
CHRIS R. JOHNSON, CLERK
DEPUTY CLERK

ASSURANCE COMPANY OF AMERICA, INC.

PLAINTIFF

VS.

NO. 14-4139

FRANKLIN A POFF, JR. as the Administrator
of the Estate of JOSH BISHOP, Deceased;
ALLEN ROGERS;
LANE ROGERS;
SAMMIE TOWNES, and
CHUBBY CHEEKS LLC

DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT

Comes the Plaintiff, Assurance Company of America, Inc., and for its Complaint for Declaratory Judgment states:

JURISDICTION AND VENUE

1. That Plaintiff Assurance Company of American (hereinafter "Assurance") is a New York corporation engaged in the insurance business with a statutory home office located at One Liberty Plaza, 165 Broadway, 32nd Floor, New York 1006 and its principal place of business located at 1400 American Lane, Schaumburg, Illinois 61096. Assurance is authorized to transact business and has transacted business in the State of Arkansas.

2. That Defendant, Franklin A. Poff, Jr., is the duly appointed personal representative of the Estate of Josh Bishop, deceased. He is a resident of Miller County, Arkansas.

3. That the late Josh Bishop was a resident of Miller County at the time of his death.

4. That Chubby Cheeks, LLC , is an Arkansas limited liability company with its principal place of business in Miller County, Arkansas. Its agent for service is Allen E. Rogers, Jr. 720 Realtor Road, Texarkana, Arkansas 71854.

5. That Allen Rogers, Jr. is a resident of Bowie County, Texas.

6. That Lane Rogers is a resident of Miller County, Arkansas.

7. That Sammie Townes is a resident of Miller County, Arkansas.

8. That Plaintiff states that the amount in controversy, exclusive of interests and costs, is an amount in excess of the minimum jurisdictional limit for this Court in diversity cases. The "per occurrence" limits of the Commercial General Liability policy form at issue in this Declaratory Judgment action are \$1,000,000.00, plus there is an umbrella form in excess of these limits.

9. That complete diversity of citizenship exists between Plaintiff and all Defendants.

10. That venue is proper, not only due to the residence/principal place of business of four parties in Miller County, but all actions that gave rise to this Complaint occurred in Miller County, Arkansas.

11. This Court is authorized to declare the rights and obligations of parties to an insurance policy pursuant to 28 U.S.C. §2201 et seq.

FACTUAL SUMMARY

12. That Chubby Cheeks LLC (henceforth "Chubby Cheeks") operates a commercial liquor store on Realtor Road, in or near Texarkana, Arkansas. Allen and

Lane Rogers, father and son, own said liquor store. On information and belief, Sammie Townes was an employee of the liquor store.

12. That the Plaintiff wrote a policy of insurance to cover Chubby Cheeks. A certified copy of said policy (#PPS05344009) is attached hereto as Exhibit I. The policy included a commercial general liability form and a commercial umbrella form. The effective dates for said policy were from 09/08/13 to 09/08/14.

13. On or about January 25, 2014, while the aforesaid policy was in force, Josh Bishop and Wesley Attaway entered the premises of Chubby Cheeks, took one or more bottles of alcoholic beverages, then fled the premises without paying for these bottles. Mr. Bishop and Mr. Attaway went to a wooded area, and spent between two and two and one-half hours consuming the alcohol.

14. Shortly after the theft occurred, Allen Rogers, Lane Rogers, and Sammie Townes left the premises of Chubby Cheeks. They were armed with at least one firearm and at least one club or mallet. They undertook a search for Attaway and Bishop.

15. Approximately two and one half hours after the theft occurred, Allen Rogers, Lane Rogers and Sammie Townes located Bishop and Attaway on a road in Texarkana, about one-half mile from the premises of Chubby Cheeks.

16. That Lane and Allen Rogers and Sammie Towns seized Josh Bishop and Wesley Attaway, and handcuffed them.

17. That Josh Bishop and Wesley Attaway contend that they were beaten by Rogers, Rogers, and Towns, using a club or mallet, and that this beating occurred after being handcuffed and detained.

18. That, approximately one month after the beating, and on or about February 23, 2014, Bishop passed away (his Estate contends that his death was a consequence of the beating he received on January 25, 2014).

19. That Bishop, by the personal representative of his Estate, has instituted a civil complaint in Miller County, Arkansas. The Complaint is styled *Franklin A. Poff, Jr. As Administrator of the Estate of Josh Bishop v. Chubby Cheeks, LLC, Allen Rogers, Lane Rogers, and Sammie Townes*. It is assigned Miller County docket number 46-CV-14-261-3. The Complaint filed in Miller County is attached hereto as Exhibit II.

20. That the Miller County Complaint pleads causes of action for negligence, for the Tort of Outrage, for battery, and for false imprisonment against Allen Rogers, Lane Rogers, Sammie Townes, and Chubby Cheeks LLC. The Complaint contends that Bishop's death was a result of the beating that he received.

21. The Miller County Complaint seeks unspecified punitive and compensatory damages against the aforesaid Miller County Defendants. Plaintiff states, again, that the amount in controversy is \$1,000,000.00, the amount of "per occurrence" policy limits on the CGL policy form issued to Chubby Cheeks.

THE CGL POLICY FORM ONLY INSURES
BODILY INJURY CAUSED BY AN "OCCURRENCE"

22. Plaintiff restates paragraphs 1 to 21.

23. That the CGL policy form issued to Chubby Cheeks only covers an event that is an "occurrence." The policy defines what constitutes an "occurrence":

b. This insurance applies to "bodily injury" or "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the coverage territory."

The policy defines the term "occurrence" as:

Section V - Definitions:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

(See Exhibit I, form 9S2001 at page 1 and page 15).

24. That the events that transpired on or about January 25, 2014. did not constitute an "occurrence" as that term is used in the policy. The beating and battery of Plaintiff Bishop, and other intentional harms inflicted upon him, cannot be construed as an "accident." Plaintiff only agreed to provide coverage for, and was only paid a premium for, insuring acts that constituted an "occurrence" under the terms of the policy. Therefore, no coverage applies under the policy issued by Plaintiff to Chubby Cheeks for the events that transpired on or about January 25, 2014.

THE SCOPE OF COVERAGE FOR BODILY INJURY UNDER THE CGL FORM DOES NOT ENCOMPASS THIS INCIDENT

25. That Plaintiff restates paragraphs 1 to 24.

26. That the policy declarations list Chubby Cheeks as an "LLC." In regard to a limited liability company, the CGL policy form only provides insurance for described individuals, and only for their actions within the scope of their duties toward Chubby Cheeks. The CGL policy form provides:

Section II - Who is an Insured:

1. If you are designated in the Declarations as:
 - c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the

conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

2. Each of the following is also an insured:
 - a. Your "employees" other than either your executive officers (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for their acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" is an insured for: [several irrelevant provisions omitted].

Id. at pages 8 and 9.

27. That the actions of Allen Rogers, Lane Rogers and Sammie Townes were outside the scope of their duties to Chubby Cheeks, and were not a part of the conduct of the business of Chubby Cheeks as a retail liquor store. Plaintiff only agreed to provide coverage for, and was only paid a premium for, acts of employees of Chubby Cheeks which were within the scope of their duties to Chubby Cheeks, and which were within the conduct of the business of the retail liquor store. Therefore, no coverage applies to the events of January 25, 2014.

EXCLUSION UNDER THE CGL POLICY FORM FOR BODILY INJURY
COVERAGE CAUSED BY INTENTIONAL ACTS BAR COVERAGE

28. That the Plaintiff restates paragraphs 1 to 27.

29. That, for reasons previously presented, Plaintiff contends that the events of January 25, 2014, do not fall within the scope of coverage afforded under its CGL policy form to Chubby Cheeks, even before addressing and considering any applicable exclusion of coverage. In addition, and in the alternative, the CGL policy form issued by

Plaintiff to Chubby Cheeks includes several exclusions from coverage, and that one of these exclusions is applicable to the events of January 25, 2014.

30. That the CGL policy form contains an exclusion for "Expected or Intended Injury":

A. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property."

Id. at page 2.

31. That the beating (and other harms) inflicted upon Bishop involved multiple blows with a blunt instrument, and that the beating was expected or intended to inflict injury upon Bishop. Therefore, no coverage exists under the policy for these events.

PERSONAL AND ADVERTISING INJURY COVERAGE UNDER
THE CGL FORM DOES NOT APPLY

32. Paragraphs 1 to 31 are restated.

33. That the CGL policy form also affords coverage for "personal and advertising injury." Coverage for "personal and advertising injury" is limited to:

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

34. That the offense in question did not arise out of the business of Chubby Cheeks, so no coverage is afforded for this incident.

35. That the "personal and advertising injury" coverage afforded by the CGL policy form is further limited by the following exclusion:

2. Exclusions

This insurance does not apply to:

- a. "Personal and Advertising Injury":
 - (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

36. That the beating and other alleged harmful acts inflicted upon Bishop were undertaken with the knowledge that they would violate the rights of Bishop and would inflict "personal and advertising injury" upon him, so no coverage applies.

THERE IS NO COVERAGE UNDER THE UMBRELLA FORM

37. That paragraphs 1 to 36 are restated.

38. That, in addition, Assurance wrote a Commercial Umbrella Form for Chubby Cheeks. This form is only triggered by the exhaustion of the per occurrence limit of the CGL policy. The CU form is similar in its scope to the CGL form:

1.01 Coverage:

- (A) We will pay on behalf of the insured those sums in excess of the "retained limit" which the insured becomes legally obligated to pay as damages for:
 - 1. Bodily injury or "property damage" occurring during the policy period stated on the declarations page and caused by an "occurrence."
 - 2. "Personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed during the policy period.
- (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;

(Additional subparagraphs are omitted as not germane).

39. The beating and other harms inflicted upon Bishop did not arise out of the business of Chubby Cheeks.

40. The definition of an "occurrence" found in the CU form is identical to that used in the CGL form, and requires that an "occurrence" must be an "accident." The incident in which Bishop was injured did not qualify as an "accident" so cannot be covered as an "occurrence" under the CU form.

41. That the CU form, like the CGL form, has an exclusion for intentional acts:

Section 2: Exclusions:

This insurance does not apply to:

2.09 Expected or Intended Injury

"Bodily Injury or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force in protecting persons or property.

42. That the injuries to Bishop were expected or intended from the standpoint of the insured. The beating and other harms inflicted on Bishop were not "reasonable force" to protect persons or property.

43. That, therefore, there is no coverage under the Commercial Umbrella form for the incident of January 25, 2014, in which Bishop was injured. There is no duty to defend.

VIOLATION OF TERMS AND CONDITIONS OF THE POLICY

44. That paragraphs 1 to 43 are restated.

45. That, assuming that any applicable coverage might have existed under either the CGL policy form or the umbrella form, such coverage has been voided by the material breach of conditions of said policy forms.

46. That no notice of this incident was given to Assurance, by any person, until more than three months after the incident.

47. That, in the interim and on or about February 23, 2014, Mr. Bishop passed away.

48. That, due to the failure to provide Assurance with timely notice of the incident, Assurance was denied the opportunity to conduct a claims investigation which would have included taking a statement from Mr. Bishop.

49. That Assurance has been prejudiced by the delay in reporting this incident

50. That both the CGL policy form and the umbrella form require that “you must see to it that we are notified as soon as practicable of an occurrence or an offense, which may result in a claim.” Assurance denies that this incident constituted an “occurrence”, but, nevertheless, any potential for coverage was barred by the prejudicial failure of any person to give timely notice of this claim to Assurance.

51. That, because there is no coverage for the acts which form the basis for the underlying tort claim, Assurance has no duty to defend any person for any allegation in the tort case.


52. That Assurance respectfully demands trial by jury on all issues of fact.

WHEREFORE, Plaintiff, Assurance Company of America, Inc., prays that the Court find that it owes no coverage for any person for any of the alleged misconduct which forms the basis of the claims in *Bishop v. Chubby Cheeks et. al.*, Miller County,

Arkansas Circuit Court No.: 46Cv-14-261-3; that it would owe no coverage for any person upon any refiling or renewal of said claims under a new docket number or in a new lawsuit; that it has no duty to provide a defense to any person who is a defendant in, *Bishop v. Chubby Cheeks et. al.*, Miller County, Arkansas Circuit Court docket No. 46Cv-14-261-3; that it has no duty to provide a defense to any person who is a defendant in *Bishop* should such claims be renewed under a new docket number or refiled in a new lawsuit; and for all other proper relief to which it may be entitled.

Respectfully submitted,

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BY: 

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