IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

QC ENERGY RESOURCES, LLC,	:	DOCKET NO. 15-01,480
	:	
Plaintiff,	:	CIVIL ACTION
vs.	:	
	:	
TORUS SPECIALTY INSURANCE COMPANY,	:	
ECM ENERGY SERVICES, INC., t/d/b/a ECM and	:	
ENERGY CONSTRUCTION MANAGEMENT, LLC.,	:	
Defendants	:	SUMMARY JUDGMENT

O P I N I O N A N D O R D E R

Before the Court are cross-motions for summary judgment as to counts 1 and 2 of the complaint by QC Energy Resources, LLC (QC) against StarStone Specialty Insurance Company, f/k/a, Tours Specialty Insurance Company (Torus)[1] and cross-motions for summary judgment as to count 3 of the complaint against ECM Energy Service, Inc., t/d/b/a/ ECM and Energy Construction Management, LLC, (ECM).[2] Upon review of the motions, briefs, summary judgment record, and argument, the Court grants summary judgment in favor of QC and against Torus as to count 1, and dismisses the motions as to the remaining counts as moot. The Court provides the following in support of its decision.

FACTUAL-PROCEDURAL BACKGROUND.

This matter arises from the plight of Richard Shearer, an employee of ECM, who sustained significant injuries on September 10, 2011 during the course of his employment. ECM employed Shearer as a water truck driver. At the time of his injuries, Shearer was delivering water pursuant to a sub-hauler agreement between ECM and QC. On August 13, 2013, Shearer filed a lawsuit (Shearer lawsuit) against QC and other defendants related to his injuries. The Shearer lawsuit alleged that a QC employee, acting as a spotter, directed an ECM employee to back a truck owned by ECM into a boulder, trapping Mr. Shearer's legs between the rear of the

[1] Torus changed its name to "StarStone Specialty Insurance Company." To be consistent with the briefing in this matter, the Court will refer to this party as "Torus."

[2] Summary judgment has already been granted in favor of ECM and against QC as to Count 4.

truck and a boulder. That lawsuit did not include ECM as a defendant. The exclusivity provision of the Worker's Compensation Act barred any claims by Shearer against his employer ECM. The suit against QC related to QC's employee directing the truck. Torus refused to defend or indemnify QC. While the instant litigation was proceeding, the Shearer lawsuit concluded with a jury verdict in favor of the defendants.

On September 2, 2014, QC filed a declaratory judgment action asserting that section 8 of the sub-hauler agreement required ECM to defend and conditionally indemnify QC from Shearer's lawsuit. QC also asserted that it was entitled to common law indemnity and contribution from ECM for any judgment QC paid for Shearer's claims. On March 30, 2015, the Honorable Judge Dudley N. Anderson entered summary judgment against QC and in favor of ECM. No appeal followed.

On June 18, 2015, QC filed the instant declaratory judgment action against Torus and against ECM - this time based upon section 9 of the sub-hauler agreement. In counts 1 and 2 of the complaint, QC contends that Torus must defend and indemnify QC for the underlying Shearer lawsuit, as required by the insurance procured by ECM pursuant to section 9 of the sub-hauler agreement.[3]

QC and ECM entered the sub-hauler agreement on June 18, 2011. In that agreement, ECM (referred to in the agreement as "Carrier") agreed to provide transportation services to QC (referred to in the agreement as "Broker.") Section 9 of that agreement provides the following in pertinent part.

> 9. Insurance. Carrier (ECM) shall procure and maintain, at its sole cost and expense, all insurance coverage required by the U.S. Department of Transportation and any state or other jurisdiction in which Carrier (ECM) will operate, **along with such other insurance coverage as Broker (QC) may**

[3] In Count 3 of the complaint, as an alternative to the first two counts, QC avers that ECM breached section 9 of the sub-hauler agreement by failing to provide insurance for the circumstances giving rise to the Shearer lawsuit. In light of the Court's ruling, the facts related to Count 3 are not discussed in detail in this opinion.

reasonably require. Insurance coverage required of Carrier under this Section 8 **shall include**, without limitation:

(a) **Business Automobile Liability** / Public Liability Insurance **covering all vehicles used in Carrier (ECM)'s operations** under this Agreement, in an amount not less than $1,000,000.00 in combined single limits for bodily injury and property damage per occurrence; provided however that the minimum amount of coverage shall be increased to $5,000,000 and the policy properly endorsed to cover hazardous material transportation when so required.

(b) ***

(c) **Commercial General Liability Insurance** covering operations under this Agreement in an amount not less than $1,000,000.00 in combined single limits for bodily injury and property damage per occurrence. Such insurance also shall cover Carrier's contractual liability under this Agreement.

(d) ***

(e) ***

(f) In addition to the other requirements set forth in this Section 9, all insurance coverages / polices must: (i) be maintained with insurance companies qualified to do business in all applicable jurisdictions and holding a rating of B+ or better as set forth in the most current issue of Best's Insurance Guide; (ii) contain a waiver of subrogation against Broker, its parents, subsidiaries, and affiliated companies; and (iii) **name Broker as an additional insured** (except with respect to Workers' Compensation).

(g) Insurance required under this Section 9 shall be kept in force until all of Carrier's obligations under this Agreement have been fully discharged and fulfilled.

(h) Nothing contained in this Section 9 or elsewhere in this Agreement shall limit or be construed to limit, Carrier liability to the amounts of required insurance coverage. (emphasis added).

Pursuant to section 9 of the sub-hauler agreement, ECM purchased a business auto policy ("Auto Policy") and a commercial liability policy ("CGL Policy"). These policies were in force

and effect at the time of Mr. Shearer's injuries.[4] The Auto Policy contains a Who Is an Insured Provision of the Coverage Form identifying who is an insured. That provision states the following.

1. Who Is An Insured

   The following are "insureds":

   a. You for any covered "auto".
   b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
      (1) the owner of anyone else from whom you hire or borrow a covered "auto". This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.
      (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

      (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
      (4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company), or a lessee of borrower or any of their employees, while moving property to or from a covered "auto".
      (5) A partner (kif you are a partnership), or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
   c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

The Auto Policy also contained a "designated insured endorsement" identifying who are "insureds" under the Who Is An Insured Provision of the Coverage Form. The designated insured endorsement explicitly states that the designated insured endorsement modified the Who Is an Insured Provision of the policy. The endorsement of designated insureds lists the name of

[4] Since the Court ruled in favor of QC as to the Auto Policy, the Auto Policy provisions are set forth here but the full extent of the CGL Policy are not set forth in this opinion.

the designated insureds as: "As required by written contract." The written contract is the sub-hauler agreement requiring that QC be named as an additional insured.

The designated insured endorsement for the Auto Policy states the following.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED INSURED

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM ***

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by this endorsement.
This endorsement identifies person(s) or organization(s) who are "insureds" under the Who Is An Insured Provision of the Coverage Form. This endorsement does not alter coverage provided in the Coverage Form.
This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below. ***

SCHEDULE

Name of Person(s) or Organization(s):

As required by written contract

*** * ***
Each person or organization shown in the Schedule is an "insured" for Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is An Insured Provision contained in Section II of the Coverage form.

The Auto Policy covers "an accident from ownership, maintenance or use of covered auto." Specifically, the Auto Policy provides that it "will pay all sums an "insured" legally must pay as damages because of "bodily injury" … to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". The bodily injury at issue in this case arose from use of an ECM truck which is a covered vehicle under the Auto Policy.

DISCUSSION

"Generally, the proper construction of a policy of insurance is a matter of law which may properly be resolved by a court pursuant to a motion for summary judgment." Bishops, Inc. v. Penn Nat'l Ins., 2009 PA Super 225, 984 A.2d 982 (Pa. Super. 2009), *citing*, Nationwide Mut. Ins. Co. v. Nixon, 453 Pa. Super. 70, 682 A.2d 1310, 1313 (Pa. Super. 1996). The issue is whether "the policy's terms are clear and unambiguous so as to preclude any issue of material fact." Bishops, supra, *citing*, See Butterfield v. Giuntoli, 448 Pa. Super. 1, 670 A.2d 646, 651 (Pa. Super. 1995). The Court must "'ascertain the intent of the parties as manifested by the language of the written agreement.'" Belser v. Rockwood Cas. Ins. Co., 2002 PA Super 27, 791 A.2d 1216, 1219 (Pa. Super. 2002), *citing*, American States Insurance Co. v. Maryland Casualty Co., 427 Pa. Super. 170, 628 A.2d 880, 886 (Pa.Super. 1993) (quoting Standard Venetian Blind Co. v. American Empire Insurance Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)). Clear language must be given effect; ambiguous language must be construed against the drafter. Belser, *supra* (citations omitted).

When interpreting and analyzing an insurance policy, Pennsylvania Courts recognize "that most insurance transactions are not freely bargained between equals but are largely adhesive in nature." Bishops, supra, *citing*, See Betz v. Erie Ins. Exchange, 2008 PA Super 221, 957 A.2d 1244, 1252-53 (Pa. Super. 2008). Courts must consider the totality of the circumstances. Bishops, supra, *citing*, Universal Teleservices Arizona, LLC v. Zurich American Ins. Co., 2005 PA Super 234, 879 A.2d 230, 234 (Pa. Super. 2005). "The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured." Bishops, supra, *citing*, Bubis v. Prudential Prop. & Cas. Ins. Co., 718 A.2d 1270, 1272 (Pa. Super. 1998) (quoting Frain v. Keystone Ins. Co., 433 Pa. Super. 462, 640 A.2d 1352 (1994)).

In the present case, the Auto Policy covered the potential for liability arising from the underlying lawsuit because that matter involved bodily injury allegedly caused by use of a covered vehicle against an insured. The auto policy clearly provides that it "will pay all sums an "insured" legally must pay as damages because of "bodily injury" … to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto". Use in this context has been described to include a "but for" analysis with respect to the injury, or any nexus between the vehicle and the bodily injury. *See*, Lebanon Coach Co. v. Carolina Cas. Ins. Co., 450 Pa. Super. 1, 675 A.2d 279 (Pa. Super. 1996); State Automobile Insurance Association v. Kuhfahl, 527 A.2d 1039 (Pa. Super. 1987). The record is clear that the Shearer lawsuit arose from bodily injuries caused by an accident resulting from use of a covered auto.

The parties contest whether QC qualifies as an insured. Torus contends that QC does not qualify as an insured under the Who Is An Insured Provision.[5] Torus acknowledges that QC is listed in the designated insured endorsement by the language "as required by contract." However, Torus contends that there is an express limitation set forth in the designated insured endorsement which limits coverage to only include the person or organization who qualifies as an "insured" under the Who is An Insured Provision absent any modification by the designated insured endorsement. That express limitation purportedly arises from the last sentence appearing below the designation. That sentence states the following.

> Each person or organization shown in the Schedule is an "insured" for Liability Coverage, but only to the extent that person or organization qualifies as an "insured" under the Who Is An Insured Provision contained in Section II of the Coverage form.

In essence, Torus argues that what the policy provided by the designated insured endorsement was entirely taken away by the conditional dependent clause of the last sentence on the

[5] It is uncontested that QC does not qualify under ¶1 c because QC is not liable for the conduct of an insured.

endorsement. Under this analysis, QC could only qualify as an insured under the Who Is An Insured Provision if QC was a permissive user under ¶ 1 b of the Who Is An Insured Provision.

In addition to not qualifying as an insured by the designated insured endorsement, Torus also contends that QC does not qualify as an insured under ¶ 1 b of the Who Is An Insured Provision as a permissive user. That provision includes as an insured "[a]nyone else while using with your permission a covered "auto" you own, hire or borrow except" for five exceptions not applicable here. Torus contends QC does not qualify under ¶ 1 b because QC did not use the vehicle within the meaning of ¶ 1 b. Torus relies on Belser, supra, for support. In Besler, the Superior Court concluded that directing an insured's movement of a covered auto did not constitute permissive use under an identical provision to ¶ 1 b of the Who Is An Insured Provision. Thus, Torus argues that QC was not an insured warranting summary judgment in its favor as to the Auto Policy.

The Court disagrees. Torus's interpretation renders the designated insured endorsement completely illusory and inconsistent with the reasonable expectation of the insured given the totality of circumstances. The Court concludes that the designated insured endorsement unambiguously modified the Who Is Insured Provision to include the designated insured. The endorsement explicitly states the following. "This endorsement identifies person(s) or organization(s) **who are "insureds" under the Who Is An Insured Provision** of the Coverage Form." The designated insured endorsement modified the Who Is An Insured Provision so that QC either constituted "You" or an additional category of insured, ¶ 1 d, designated insured. As such, the requirements of the Auto Policy are met. It is clear that QC and ECM bargained for and expected to be covered for just the kind of event as occurred here.

Even if even if QC did not qualify as an insured by the designated endorsement, QC qualifies as an insured as a permissive user under ¶1 b (1) of the Who Is An Insured Provision.

Torus's reliance on Belser is unpersuasive. In Besler, the Superior Court concluded that directing an insured's movement of a covered auto did not constitute permissive use under an identical provision. However, the "use" alleged in the underlying Shearer lawsuit is more akin to the types of uses described as permissible uses and distinguished by the Court in Belser. In footnote 4 of Belser, the Superior Court distinguished cases "where the driver cannot see where he is going and completely trusts the guide to direct his movements with guides where the driver does not give up a significant degree of autonomy." In the underlying lawsuit, the Shearers alleged that a QC employee had complete control over the movement of the vehicles at the impoundment and that no vehicle could move without direction and a signal from the QC employee. Furthermore, the accident occurred at the rear of the truck while the truck backed into a spot entirely reliant on an "eyes on spotter" for direction. Therefore, the Court concludes that, in addition to qualifying as an insured by the designated endorsement, QC also qualifies as an insured as a permissive user under ¶1 b (1) of the Who Is An Insured Provision.

In light of the Court's ruling that the QC is covered under the Auto Policy, the motions with respect to the CGL policy and ECM's motion as to count 3 are moot.

Accordingly, the Court enters the following order.

ORDER

AND NOW this **30th** day of **June 2016**, upon consideration of the motions for summary judgment before the Court, it is ORDERED and DIRECTED as follows.

1. The motion for summary judgment filed by Torus as to count 1 of the complaint is DENIED and the cross-motion for summary judgment filed by QC as to count 1 is GRANTED. Summary judgment is entered in favor of QC. It is declared that Torus had a duty to defend and indemnify QC under the Auto Policy.

2. The motion for summary judgment filed by Torus as to count 2 of the complaint and the cross-motion for summary judgment filed by QC as to count 2 of the complaint are DISMISSED as MOOT.

3. The motion for summary judgment filed by ECM as to Count 3 and the cross-motion for summary judgment filed by QC as to Count 3 are DISMISSED as MOOT. The Court already granted the motion for summary judgment in favor of ECM and against QC with respect to Count 4.

BY THE COURT,

June 30, 2016
Date

Richard A. Gray, J.

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