

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL WHELPLEY,)
)
 Plaintiff)
)
 v.) Civil No. 98-0041-B
)
 GAN NORTH AMERICAN)
 INSURANCE COMPANY,)
)
 Defendant)

RECOMMENDED DECISION

This is a "reach and apply" action brought pursuant to 24-A M.R.S.A. section 2904. Plaintiff seeks to "reach" the proceeds of an insurance policy issued by Defendant to Allied Hydro-Blasters, Inc. ["ALLIED"], against which Plaintiff has obtained a state court default judgment in the amount of \$1,000,000 plus interest and costs. Pending before the Court are Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment. Defendant's Motion asserts that the incident giving rise to Plaintiff's state court action was not covered under the policy issued to Allied, as is required under section 2904, because Plaintiff was an "employee" as defined in the policy. It seeks judgment as a matter of law on the entirety of Plaintiffs' Complaint. Plaintiff argues that Defendant would nevertheless be required to pay under Maine's Reach and Apply statute if it were found to have breached its duty to defend Allied in the underlying state action. He seeks a declaration that his interpretation of Maine law is correct, and judgment on the limited issue whether Defendant had a duty to defend Allied.¹

¹ Plaintiff also seeks leave to conduct discovery on related factual issues prior to the entry of judgment. Such leave would not be necessary if Defendant's Motion were denied.

The Standard:

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Plaintiff does not dispute that he was an "employee" within the meaning of the insurance policy at issue, or that he was acting within the scope of his employment at the time of the accident giving rise to his claim. Nor does he dispute that the insurance policy did not cover employees who are injured in the course of their employment. Rather, he asserts that "under certain circumstances, an insured may be able to assert coverage in what would otherwise be a noncovered situation either because the insurer has waived the right to litigate the indemnification issue or is estopped to deny coverage." Pltf. Obj. at 3 (citing *Anderson v. Virginia Surety*, 985 F. Supp. 182 (D. Me. 1998); *Marston v. Merchant's Mut. Ins.*, 319 A.2d 111, 114 (Me. 1974)).

In *Marston*, plaintiff sought recovery through a 'reach and apply' action from the liability insurer of a tavern where plaintiff had been injured. The 'reach and apply' statute provides that a judgment creditor has a right of action directly against the judgment debtor's insurer "if when the right of action accrued, the judgment debtor was insured against such liability and if before the recovery of the judgment the insurer had had notice of such accident, injury or damage." 24-A

M.R.S.A. § 2904. The question facing the Law Court, as here, was whether the tavern owner/judgment debtor was actually insured against the occurrence for which the tavern owner was found liable. Because the plaintiff in *Marston* had obtained a general verdict, not specifying the grounds upon which liability was based, it was necessary for the Law Court to analyze whether the complaint could fairly be read to allege a basis for liability which would have been covered by the policy.² The court noted:

It is . . . well established that an insurer who had reasonable notice of the pendency of an action by the injured person against the insured and was requested to assume its defense but declined to do so electing to disclaim coverage, is bound by the judgment in that action as to issues which were or might have been litigated therein in a subsequent suit by the injured person for recourse to the policy.

Marston, 319 A.2d at 114 (citing *Howe v. Howe*, 87 N.H. 338, 179 A. 362 (1935)) (emphasis added).

This general rule has been applied in other cases, including *Anderson*, wherein the insurer was bound by a settlement in the underlying action after this Court found it had breached its duty to defend. *Anderson*, 985 F. Supp. at 190. However, the Maine Law Court has recently disavowed those cases which interpreted the rule first set forth in *Marston* to mean that insurers are automatically estopped from asserting lack of coverage when they breached the duty to defend. *Elliott v. The Hanover Ins. Co.*, 1998 Me. 138 (1998). However, the Law Court placed the burden on the breaching insurer to prove that the claim was not covered, and indicates that insurers are "bound by the default judgment as to any factual issues that might have been litigated in the underlying negligence action." *Id.* (citing *Marston*, 319 A.2d at 114).

² Plaintiff argued that his complaint alleged negligence, which was covered by the policy, but the Law Court concluded it only alleged a violation of the Dram Shop Act, which was not covered. (cite)

It is accordingly necessary to determine whether there was a duty to defend the underlying action, because Defendant will only bear the burden of proof and be bound by any factual findings if it breached that burden. The question is answered by a simple comparison between the allegations of the complaint and the provisions of the insurance policy at issue. *Anderson*, 985 F. Supp. at 187 (citations omitted). If the comparison reveals "any legal or factual basis, which could be developed at trial, which would obligate the insurers to pay under the policy", a duty to defend exists. *Id.* The question is one of law. *Id.*

Plaintiff argues that the allegation in his complaint that he was employed by "Allied and/or Suncoast" could lead to the factual finding that he was employed solely by Suncoast. Under that circumstance, he argues, he would not be subject to the policy provision excluding coverage for employees.

However, Plaintiff's argument ignores a separate allegation in his complaint; specifically, that his "injury and damages were caused by the negligent failure of *his employers*, Allied and/or Suncoast, and their employees, to provide Mr. Whelpley with a safe place of employment, including the negligent failure to provide a safe ladder on April 17, 1995 or to properly secure the ladder Mr. Whelpley was working with on that date." This is the only paragraph alleging liability on the part of Allied. Given this allegation, if Plaintiff was found to be solely a Suncoast employee, Allied would not be liable. Accordingly, there is no legal or factual basis upon which Defendant might be obligated to pay under the policy issued to Allied, and there is therefore no duty to defend on the basis of the underlying complaint.

Because the underlying complaint gave rise to no duty to defend on the part of Defendant, there is no basis for concluding Defendant breached that duty.³ Plaintiff does not dispute that he was in fact an employee of Allied within the meaning of the policy, nor does he dispute that employees were not covered by the policy. Plaintiff has therefore "fail[ed] to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), specifically that "when the right of action accrued, the judgment debtor was insured against such liability." 24-A M.R.S.A. § 2904. Defendant is entitled to judgment as a matter of law on the entirety of Plaintiff's Complaint.

Conclusion

For the foregoing reasons, I hereby recommend Defendant's Motion for Summary Judgment be GRANTED, and that judgment enter in favor of Defendant on Plaintiff's Complaint. I further recommend Plaintiff's Motion for Partial Summary Judgment and for an Enlargement of Time be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with

³ The Court notes that Defendant would prevail even if it had breached. Defendant has clearly proved that there was no coverage at the time of the incident. Further, an analysis similar to that conducted regarding the duty to defend leads also to the conclusion that the default judgment was necessarily based on a factual finding that Plaintiff was indeed an Allied employee, and this favorable factual finding is the one to which Defendant would be bound as the breaching insurer. *See, Colony Cadillac & Oldsmobile v. Yerdon*, 558 A.2d 364, 367 (Me. 1989) (citation omitted) (noting that the effect of an entry of default is to establish the averments of the complaint as findings of fact establishing liability).

a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated on June 10, 1998.