

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CONCORD GENERAL MUTUAL)	
INSURANCE COMPANY,)	
)	
Plaintiff)	
)	
v.)	Civil No. 95-355-P-C
)	
GEORGE ANDERSON , et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

In this declaratory judgment action, the plaintiff, Concord General Mutual Insurance Company (“Concord”), seeks construction of a homeowner’s insurance policy issued to defendant George Anderson (“Anderson”) in the light of allegations raised by defendant Brenda Reeves (“Reeves”) in a wrongful death action brought in the Maine Superior Court. The plaintiff and defendant Reeves have filed cross-motions for summary judgment. For the reasons set forth below, I recommend that summary judgment be entered in favor of Reeves on the issue of the duty to defend and that the matter otherwise be stayed pending the final outcome of the underlying state court action.

I. SUMMARY JUDGMENT STANDARDS

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). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). “Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial.” *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is “material” if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

Presented with cross-motions for summary judgment, as opposed to motions for judgment on a stipulated record, a court may not decide issues of material fact. *Boston Five Cents Sav. Bank v. Secretary of the Dep’t of Housing and Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985). The mere fact that both parties seek summary judgment does not render summary judgment appropriate. 10A *C. Wright, A. Miller & M. Kane, Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 19. The court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there is any genuine issue of material fact, both motions must be denied; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720 at 24-25.

II. FACTS AND PROCEDURAL HISTORY

The summary judgment record reveals the following undisputed facts. Anderson is a licensed

plumber and has been working in the field of plumbing and heating since 1961. Deposition of George E. Anderson (“Anderson Dep.”) at 8-9. He has also been an active parachutist and has made over 4,000 jumps since 1961. *Id.* at 9, 11. He owns a Cessna 180 airplane, which he uses for parachute jumping. *Id.* at 11. Anderson was a member of a group of parachute jumpers who called themselves the Thunderbird Sky Divers. *Id.* at 13, 16, 18. This group regularly gave jumping demonstrations, without charge, and offered instruction to novice and inexperienced parachute jumpers. *Id.* at 14-15, 18-22.

Thunderbird Sky Divers offered its instruction program six months of the year, on weekends. *Id.* at 20- 21. The course involved three or four hours of instruction, followed by a parachute jump. *Id.* at 22. Students were charged \$120 for this program. *Id.* The parachutes and the airplane used in the course were owned by Anderson. *Id.* at 28-30, 50. The money paid by students for the course was paid to Anderson, who used it to pay expenses of the airplane and the course. *Id.* at 24. Annual income from the program was \$3,000 to \$4,000. *Id.* at 25. Thunderbird also collected \$25 per jump from repeat divers. *Id.* It paid for a listing in the yellow pages of the local telephone directory. *Id.* at 32-33 & Exh. 2. Anderson never made a profit from this income and never relied on it for his personal living expenses. *Id.* at 24, 55, 59, 63. Thunderbird was not incorporated, nor was it a legal entity. *Id.* at 13, 16, 18.

On June 5, 1994 Seebren Patrick Reeves, Jr. paid \$120 and took the Thunderbird course. Complaint (Docket No. 1) ¶ 7; Anderson Dep. at 38-39. After signing a release presented by Anderson, he went up in Anderson’s plane with two other novice jumpers for his first jump. *Id.* at 39, 42 & Exh. 3. Anderson served as “jump master.” Anderson Dep. at 43. Seebren Reeves jumped out of the plane, but neither his main parachute nor his reserve parachute deployed properly, and he was killed. *Id.* at 43-44, 46. Defendant Reeves, widow of Seebren Reeves, subsequently brought a wrongful death action against Anderson and two other individuals in the Maine Superior Court. Exh. 2 to Complaint. Anderson has no liability insurance coverage for his parachuting activities, nor those of Thunderbird,

although such insurance is available. Anderson Dep. at 36-37. Anderson is a named insured in homeowner's insurance policy No. H193668-9 from Concord, covering the relevant time period. Exh. 1 to Complaint. Concord has been providing Anderson with a defense in the state court action, but asks this court to declare that it has no duty to indemnify or defend Anderson due to two exclusions in the policy: a "business pursuits" exclusion and an exclusion for injury arising out of the ownership, maintenance, use, loading or unloading of an airplane. Reeves asks this court to declare that Concord has a duty to defend Anderson, based on the language of the state court complaint, and to defer ruling on the duty-to-indemnify issue.

III. LEGAL ANALYSIS

In this action based upon diversity jurisdiction, this court applies Maine law. *See State Farm Mut. Auto. Ins. Co. v. Lucca*, 838 F. Supp. 670, 671 (D. Me. 1993). Reeves relies on a line of Maine cases which holds that a court asked in a declaratory judgment action to construe an insurance policy that may cover the defendant in an underlying action must limit its review to the duty of the insurer to defend its insured in the underlying action, and that that determination must be based solely upon a comparison of the allegations in the complaint in the underlying action and the terms of the policy. *E.g., Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 227 (Me. 1980). "In order for the duty of defense to arise, the underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage." *Union Mut. Fire Ins. Co. v. Inhabitants of the Town of Topsham*, 441 A.2d 1012, 1015 (Me. 1982). If the insurer must defend its insured under this comparison test, it must defend "regardless of the actual facts or the ultimate grounds on which [the insured's] liability to the injured parties may be predicated." *American Policyholders' Ins. Co. v. Cumberland Cold Storage Co.*, 373 A.2d 247, 249 (Me. 1977).

Thus, the comparison test may require the insurer to defend when there may be no ultimate duty to indemnify. *Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079, 1080 (Me. 1991). “Wise use of judicial resources dictates that an insurer may not litigate its duty to indemnify until the insured has had a chance to defend against any liability.” *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991). The comparison test is based solely “on the facts as *alleged* rather than on the facts as they actually are.” *Merrimack Mut. Fire Ins. Co. v. Brennan*, 534 A.2d 353, 354 (Me. 1987) (emphasis in original; citation omitted). “Even when evidence could conclusively establish the absence of a duty to indemnify, ordinarily that evidence is irrelevant to the determination of the duty to defend.” *Northern Sec. Ins. Co. v. Dolley*, 669 A.2d 1320, 1323 (Me. 1996).

Here, the parties agree that the general allegations of the complaint in the underlying action raise a “*potential . . . that the facts ultimately proved may come within the [terms of] coverage*” of the Concord policy. *Worcester Ins. Co. v. Dairyland Ins. Co.*, 555 A.2d 1050, 1053 (Me. 1989) (emphasis in original). Reeves has not waived the duty-to-defend issue, even though she has briefed the duty to indemnify under the policy in response to Concord’s motion, because she has not agreed to submit the ultimate coverage issue to this court. *United States Fidelity & Guar. Co. v. Rosso*, 521 A.2d 301, 303 (Me. 1987); *American Policyholders’ Ins. Co. v. Kyes*, 483 A.2d 337, 340 (Me. 1984). The Law Court has recognized two exceptions to the exclusion of consideration of duty to indemnify from declaratory judgment actions brought before resolution of the underlying action: (1) intentional acts established by previous court action, *Perreault v. Maine Bonding & Casualty Co.*, 568 A.2d 1100, 1101 (Me. 1990), and (2) extrinsic facts rendering the policy void, *American Home Assurance Co. v. Ingeneri*, 479 A.2d 897, 899 (Me. 1984). Neither exception is applicable here. Under the authority cited above, it would thus appear that Reeves is entitled to summary judgment on the issue of the duty of Concord to defend Anderson in the underlying action, and that resolution of the indemnification issue must await the

outcome of that proceeding.

However, Concord relies on three opinions of the Law Court which suggest that it may be appropriate to consider the indemnification issue at this time. In *Worcester* the Law Court entertained an appeal from a summary judgment in a declaratory judgment action filed before resolution of the underlying tort action in which the declaratory judgment court found no duty to indemnify under the policy at issue and correspondingly no duty to further defend the insured in the underlying action. While acknowledging the comparison test rule for the duty to defend, the Law Court said, “Facts known to an insurer by investigation or otherwise which prove noncoverage ‘do not relieve the insurer of its obligation to defend, unless the duty is discharged by means of a declaratory judgment action.’” 555 A.2d at 1053, quoting 7C J. Appleman, *Insurance Law and Practice* § 4683 at 52 (1979) (emphasis added). In *Commercial Union Ins. Co. v. Royal Ins. Co.*, 658 A.2d 1081 (Me. 1995), the Law Court stated that “Extrinsic facts known to the insurer may properly form the basis for a declaratory judgment action.” 658 A.2d at 1083. And in *Dolley* the Law Court suggested that where the facts preclude any litigation over the issue to which the policy exclusion applies, it is permissible to decide the duty to indemnify before the underlying action is decided. 669 A.2d at 1322 n.3.

Concord suggests that the undisputed facts in the record preclude any litigation over the application of its business use and aircraft exclusions to the claims brought against its insured by Reeves, and that the quoted language from *Worcester* and *Royal* allows this court to proceed to decide the indemnity issue. However, the language from both *Worcester* and *Royal* may be construed to refer only to declaratory judgment actions limited to the duty to defend. The *Worcester* opinion does not even refer to the language of the complaint in the underlying action. At most, *Worcester* represents a departure from the consistent line of case law preceding and following it that requires use of the comparison test to determine only the duty to defend until the underlying action is resolved.

The *Dolley* footnote only refers to the *Bragg* and *Perreault* exceptions and simply does not provide sufficient authority to allow this court to ignore a consistent earlier body of case law. In addition, *Dolley* was decided on a set of stipulated facts, with the apparent agreement of both parties that the indemnification issue should be resolved. Neither of these factors is present here.

IV. CONCLUSION

For the foregoing reasons, I recommend that partial summary judgment be entered in favor of defendant Reeves, declaring that the plaintiff has a duty to defend defendant Anderson in the state court action; that further action in this matter be stayed pending final resolution of the state court action; and that counsel for defendant Anderson be required to report to this court in writing every three months on the status of the state court action.

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) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with 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.

Dated at Portland, Maine this 25th day of November, 1996.

*David M. Cohen
United States Magistrate Judge*