

## COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 08-00828

HAYDEN BUILDING MOVERS, INC.

vs.

AMERICAN INTERNATIONAL GROUP, INC. & others<sup>1</sup>  
(and a companion case<sup>2</sup>)MEMORANDUM OF DECISION AND ORDER ON DEFENDANT HANOVER  
INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF  
HAYDEN BUILDING MOVERS, INC.'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT

Hayden Building Movers, Inc. ("Hayden") brought this declaratory judgment action seeking defense, indemnification, and damages from three insurance companies for a law suit defendant Clyde McEnroe ("McEnroe") brought against Hayden. Defendant Hanover Insurance Company<sup>3</sup> ("Hanover") now moves for summary judgment as to all counts against it. Hayden now moves for partial summary judgment in its favor. For the foregoing reasons, Hanover's motion for summary judgment is **ALLOWED** and Hayden's motion for partial summary judgment is **ALLOWED** in part and **DENIED** in part.

**BACKGROUND**

The following facts are undisputed or are facts that this court accepts as true for purposes of the motions.

On August 30, 2007, Hayden hired McEnroe to drive a commercial truck from a worksite in Lincoln to Hayden's place of business in Marstons Mills. While McEnroe waited at the Lincoln worksite, Hayden was in the process of moving steel beams using a 1990 International

<sup>1</sup> Travelers Insurance Co., The Hanover Insurance Group, and Clyde McEnroe.

<sup>2</sup> Clyde McEnroe vs. Hayden Building Movers, Inc., BACV 08-252.

<sup>3</sup> Although the Complaint improperly calls this defendant the Hanover Insurance Group, the court will use its proper name, Hanover Insurance Company.

truck with a permanently attached boom crane. Before returning the truck to Marstons Mills, McEnroe was injured when the boom crane moved through some trees and dislodged a branch that struck him (the "Incident").

Hayden purchased insurance from three different companies. It had workers' compensation coverage from Granite State Insurance Company, a member of American International Group ("AIG"), business automobile coverage from Hanover, and comprehensive general liability coverage, including coverage for injuries resulting from the use of mobile equipment, from Traveler's Insurance Company ("Travelers"). After the Incident, Hayden notified its insurance carriers of McEnroe's potential claims. AIG initially agreed to defend the claim insofar as it was a workers' compensation issue.

In March 2008, however, McEnroe initiated a legal action against Hayden for damages from the Incident (the "Underlying Action"). Hayden subsequently notified its insurance carriers of the pending suit and requested defense and indemnification. Each carrier initially denied coverage. AIG denied Hayden's request claiming the workers' compensation insurance did not cover such legal actions. Travelers denied the request claiming the truck was classified as an auto. Hanover initially agreed to defend Hayden, but then, after investigation, denied Hayden's request claiming the truck was not an auto but mobile equipment.

The parties do not dispute that the Hanover policy covers autos. It states: "'Auto' means a land motor vehicle, 'trailer' or semitrailer designed for travel on public roads but does not include 'mobile equipment.'" The Hanover policy covers specifically designated autos as well as any auto bearing Hayden's owner-contractor plate ("O-C plate").<sup>4</sup> The policy includes an

<sup>4</sup> "Owner-contractor" is defined in G. L. c. 90, § 1 as: "any person who is not a manufacturer, dealer or repairman who owns a fleet of ten or more vehicles, trailers, special mobile equipment, mobile construction cranes or combination thereof, which is used or leased exclusively by him in his principal business and who maintains an establishment with facilities for the repair, alteration or equipment of such vehicles or trailers." St. 1989, c. 653, § 53 substituted the term "owner-

endorsement for such registration plates not issued for a specific auto. That endorsement limits coverage for owner-repairman plates<sup>5</sup> only while “1. Being repaired, altered or equipped or 2. Being transferred from one location to another.” According to the Hanover policy, “‘Mobile equipment’ means any of the following types of land vehicles, including any attached machinery or equipment: 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads; . . . 4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted: a. Power cranes, shovels, loaders, diggers or drills . . . .”

The parties also do not dispute that Travelers’s general liability insurance covers injuries resulting from mobile equipment. The Travelers policy’s definition of mobile equipment is, in relevant sections, identical to Hanover’s.

After the insurance companies declined to defend Hayden against McEnroc’s action, Hayden initiated the present action for declaratory judgment against all three insurance companies, seeking defense and indemnification as well as damages for violations of G. L. c. 93A and G. L. c. 176D. The court (Nickerson, J.) granted AIG’s motion to dismiss in August 2009 because AIG’s coverage was only for workers’ compensation claims, and did not cover personal injury actions in the Superior Court.

Both Travelers and Hanover have compensated Hayden for part of its defense costs. Neither company, however, has compensated Hayden for its costs in litigating the instant matter.

Currently before this court is Hanover’s Motion for Summary Judgment seeking dismissal of the counts against it, and Hayden’s Motion for Partial Summary Judgment seeking

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contractor” for “owner-repairman.” See also G. L. c. 90, § 5.

<sup>5</sup> Because the General Laws do not define “owner-repairman” but only “owner-contractor,” and because the definition of the latter was substituted for the former, this court will reasonably infer this provision to apply to the latter.

an order that Travelers and Hanover owed it a duty to defend. Hayden also seeks declaratory judgment that Travelers, or alternatively Hanover, must defend and indemnify Hayden.

## DISCUSSION

### I. Standard of Review

Pursuant to Mass. R. Civ. P. 56, the court shall grant summary judgment where no genuine issue of material fact exists and where, viewing the record in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party bears the burden of affirmatively demonstrating that no genuine issue exists as to any central or material fact to the case and that the law mandates judgment for him. Id. The moving party may satisfy this burden by submitting affirmative evidence that negates an essential element of the opposing party's case or, if the party opposing summary judgment has the burden of proof at trial, by demonstrating that the party opposing the motion has no reasonable expectation of proving an essential element of his case at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). If the moving party sustains this initial burden, the burden shifts to the non-moving party to present affidavits or other evidentiary material that set forth specific facts that establish a genuine issue for trial. Pederson, 404 Mass. at 17.

Interpreting a contract whose terms are unambiguous is a question of law appropriate for summary judgment. Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002). If the contract's terms are ambiguous, however, the parties' intent is a question of fact appropriate for determination at trial. Id. Whether a contract's terms are ambiguous is a question of law for the court. Berkowitz v. President & Fellows of Harvard Coll., 58 Mass. App. Ct. 262, 270 (2003).

### II. Hanover's Motion for Summary Judgment

Hanover has moved for summary judgment claiming that its policy does not cover the truck in question because it is mobile equipment and not an auto and that Hanover is not liable to Hayden under G. L. c. 93A or c. 176D.

A. The Crane is Mobile Equipment and not an Auto

At issue before the court is whether the 1990 International truck with a permanently attached boom crane is an auto or mobile equipment. Hanover argues that this vehicle fits within its policy's definition of mobile equipment and is excluded from coverage. Courts outside Massachusetts have come down on both sides of this question. Some courts have found that this type of equipment is not an automobile. See, e.g., Parent v. United States Fidelity & Guaranty Co., 233 A.2d 435, 437 (Me. 1967) (excluding construction equipment from automobile insurance because it was not primarily used to transport passengers); Blankenship v. CRT Tree, No. 80907, 2002 Ohio App. LEXIS 5374, at \*43 (Ohio Ct. App. Oct. 3, 2002) (finding that when a similar crane was being used as a crane, it was mobile equipment and not an auto). Others have held the opposite. See, e.g., Scottsdale Ins. Co. v. National Security Fire & Cas. Ins. Co., 741 So. 2d 424, 427 (Ala. Civ. App. 1999) (rejecting an argument that a similar vehicle should be considered an auto when driven and mobile equipment when used as a crane instead finding it was always covered as an auto); American States Ins. Co. v. Broeckelman, 957 S.W.2d 461, 465 (Mo. Ct. App. 1997) (construing a similar auto insurance contract against the insurance company to cover injuries caused by a crane permanently attached to a truck because the policy, as a whole, was ambiguous as to whether it covered the truck).

Although Massachusetts has no binding precedent on this issue, at least two cases have addressed this question. In United States Fidelity & Guaranty Co. v. Hicks, 5 Mass. L. Rptr. 149, 150 (1996) (McHugh, J.), the court found that a Ford F250 truck which had no permanently

attached equipment but was used to transport people and equipment was an auto rather than mobile equipment. The court considered the truck an auto even though it was used primarily to help service other vehicles. *Id.* In Angelo Todesca Corp. v. Crum & Forster Ins. Co., No. 05-P-1186, 67 Mass. App. Ct. 1114 (Nov. 14, 2006) (unpublished decision), the Appeals Court affirmed a Superior Court holding that a self-propelled backhoe was mobile equipment and not an auto.

In this case, when the accident occurred, the 1990 International truck was stationary, its stabilizer pads, or outriggers, were extended, and it was operated solely as a crane. Thus, applying a functional approach to this question, based on the truck's use at the time of the accident, it was not an auto under Hanover's definition. That is, it could not be driven because its stabilizer pads were extended. Even if a functional approach is not appropriate, this truck fits squarely within the policy's definition of mobile equipment; it is a self-propelled vehicle maintained to provide mobility to a permanently mounted power crane. Under either approach, the truck was not an auto under this policy.

In its briefs, Hayden concedes that the vehicle is mobile equipment, but claims instead that the O-C plate insurance provides coverage regardless of use. Hayden argues that denying coverage of the vehicle for this purpose would have rendered its payments to Hanover worthless. For purposes of this motion, the parties do not dispute that the purpose of the O-C plate was to allow the truck to be driven on public ways between job sites.

The specific language of the Hanover policy requires a functional approach for analyzing whether there is coverage when the O-C plate is in use. The policy provides coverage when a vehicle with the O-C plate is being repaired and when it is being transferred between locations.<sup>6</sup>

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<sup>6</sup> Hayden and Travelers argue that the Hanover policy does not apply because it refers to the now non-existent category of "owner-repairman" plates. This court finds that argument unpersuasive. While this may be an example of poor policy drafting, the intention of the parties is sufficiently

Therefore, because at the time of the incident, the crane was in use and the truck was not driving, the Hanover policy does not cover injuries resulting from the accident.

B. Defense vs. Indemnification

Hayden argues that Hanover's motion should be denied because Hayden is entitled to defense based on McEnroe's allegations in the underlying action. An insured is entitled to defense from its insurer when the allegations in the complaint against it are within the policy's coverage. Liberty Mut. Ins. Co. v. SCA Servs. Inc., 412 Mass. 330, 331-332 (1992). Put differently, if "losses may be proved as lying within the range of the allegations of the complaint, and . . . [if] any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy," then the insurance company must provide a defense. Sterilite Corp. v. Cont'l Cas. Co., 17 Mass. App. Ct. 316, 318 (1983), cited with approval in SCA Servs. Inc., 412 Mass. at 332. "It is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify. An insurer must indemnify its insured when a judgment within the policy coverage is rendered against that insured. The duty to defend, however, is antecedent to, and independent of, the duty to indemnify." Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 10-11 (1989). The determination of whether to defend must be made in light of the "facts alleged in the complaint and those facts which are known by the insurer." Id. at 11. Thus, at times, denial of a defense is appropriate if there is an undisputed fact that takes the claim outside of the insurance coverage. Farm Family Mut. Ins. Co. v. Whepley, 54 Mass. App. Ct. 743, 747 (2002).

Here, Hayden argues that based on the complaint in the underlying action alone, Hanover was required to provide it a defense. There is no dispute, however, that McEnroe alleged that the crane attached to the 1990 International truck came into contact with trees and that a branch fell clear. See supra note 5.

from the trees striking McEnroe. Hanover was entitled to deny Hayden a defense when the underlying injury was caused by an instrumentality that it did not cover.

Hayden suggests that the proper approach for an insurance company seeking to deny a defense is to commence a declaratory judgment action against the insured. See National Cas. Co. v. Bennett, No. 97-5917 (Mass. Sup. Ct. 1998) (Brassard, J.) (“An insurance company which contests a duty to defend should bring a declaratory judgment action, as National has done here, and seek to determine facts which show that the claim is not covered.”), citing Sterilite Corp., 17 Mass. App. Ct. at 323; see also Boston Symphony Orchestra, Inc., 406 Mass. at 15-16 (“[T]he availability of an action for declaratory relief should not be ignored by insurance companies. The existence of the duty to defend can be established quickly and efficiently in such an action when there is a question as to the applicability of an insurance policy.”). While this approach is certainly advisable, it is not required. Hanover was within its rights to deny a defense to Hayden after investigating McEnroe’s complaint and determining that it alleged no circumstance under which Hanover would be responsible for insurance coverage.

Travelers also opposes Hanover’s motion for summary judgment on the grounds that there are genuine issues of fact concerning whether the truck was an auto or mobile equipment and whether McEnroe’s injuries resulted from its use. Simply stating disagreement with a legal conclusion does not create a genuine issue of fact sufficient to overcome summary judgment, and as discussed above, this court has resolved the question of the truck’s status for the purposes of these insurance policies. While the question of whether use of the crane caused the injury remains unanswered for purposes of determining liability, it is irrelevant to the question of insurance coverage. Because this court has determined that the Hanover policy did not cover the

truck, Hanover has neither a duty to defend nor indemnify Hayden. Whether the truck caused the injury is not a factor in this determination.

C. Violations of G. L. c. 93A and c. 176D

Hanover has also moved for summary judgment seeking to dismiss Hayden's claims that it committed unfair and deceptive practices in violation of G. L. c. 93A and c. 176D. Because Hanover had no duty to defend or indemnify Hayden in the underlying action, it cannot have committed unfair and deceptive practices for failing to do so. For the aforementioned reasons, Hayden's c. 93A and c. 176D claims against Hanover cannot survive and Hanover's motion for summary judgment is allowed.

III. Hayden's Motion for Summary Judgment

Hayden has moved for summary judgment against both Hanover and Travelers. Hayden first requests that this court find, as a matter of law, that both insurance companies had an initial duty to defend it. Second, Hayden requests that this court grant summary judgment in the declaratory action against Travelers finding that Travelers has both a duty to defend and a duty to indemnify Hayden. Finally, Hayden seeks summary judgment ordering damages against Travelers for attorney's fees in the underlying action, reimbursement for loss of money used to defend the underlying action, indemnification for any damages or settlement in the underlying action, statutory interest dating back to Travelers's denial of defense and indemnification, and attorney's fees and costs associated with this action.

A. Hayden's Motion Against Hanover

As discussed above, Hanover has no duty to defend or indemnify Hayden in the underlying action. Therefore Hayden's motion for summary judgment against Hanover is denied.

B. Hayden's Motion Against Travelers

1. Defense

Hayden first claims that there is no genuine issue of material fact as to whether Travelers must defend it in the underlying action. The parties do not dispute that the Travelers insurance policy covers bodily injury resulting from the use of mobile equipment. The parties also do not dispute that the complaint in the underlying action alleges that McEnroe sustained injuries resulting from use of the 1990 International truck. As discussed above, this truck is mobile equipment and not an auto. Therefore, injuries caused by the truck are covered by the Travelers policy, and Hayden is entitled to defense in matters that allege injuries from that mobile equipment. Travelers must defend Hayden in the underlying action in accordance with its insurance policy.

2. Indemnification

As discussed above, the duty to defend is broader than the duty to indemnify. See Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 762 (1993). While a duty to defend arises based on allegations, SCA Servs. Inc., 412 Mass. at 331-332, the duty to indemnify arises out of established facts. Newell-Blais Post No. 443 v. Shelby Mut. Ins. Co., 396 Mass. 633, 638 (1986). Until liability is established in the underlying action, ordering Travelers to indemnify Hayden is premature. As Travelers argued in its brief, there are questions that must be resolved in the underlying action, most notably McEnroe's status as an employee or independent contractor, that could preclude indemnification by Travelers. Because genuine issues of material fact exist about any damages for which Hayden will be liable and for which Travelers must indemnify, summary judgment for Hayden requiring Travelers to indemnify it is inappropriate.

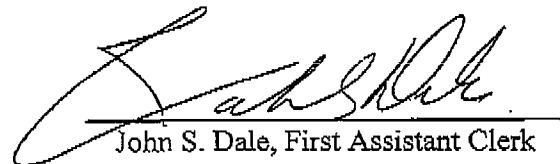
3. Attorney's Fees

Although not argued in its supporting brief, in its motion for partial summary judgment, Hayden requests that Travelers be ordered to pay attorney's fees and costs for prosecuting this declaratory judgment action. "[I]f an action for declaratory relief concerning an insurer's duty to defend under a liability insurance policy is resolved in favor of the insured, then the insured is entitled to recover attorney's fees . . ." Hanover Ins. Co. v. Golden, 436 Mass. 584, 584 (2002). Here, Hayden seeks a declaratory judgment against Travelers and has prevailed in establishing its entitlement to a defense. Although Travelers previously agreed to provide Hayden a partial defense in the underlying matter, Hayden is nonetheless entitled to compensation for reasonable attorney's fees spent in this action securing a full defense from Travelers. The amount of these fees is not before the court on this motion.

**ORDER**

It is therefore **ORDERED** that defendant Hanover Insurance Company's Motion for Summary Judgment be **ALLOWED**. It is further **ORDERED** that Hayden Building Movers Inc.'s Motion for Summary Judgment be **PARTIALLY ALLOWED** to the extent that Travelers Insurance Company must provide Hayden a defense in the underlying action and that Travelers is liable to Hayden for reasonable costs and attorney's fees in prosecuting the present action against it. The remainder of Hayden's Motion for Summary Judgment is **DENIED**.

By the court (Quinlan, J.)

  
John S. Dale, First Assistant Clerk

Date: October 28, 2010