

<b>Zurich Am. Ins. Co. v Don Buchwald &amp; Assoc., Inc.</b>
2018 NY Slip Op 33325(U)
December 21, 2018
Supreme Court, New York County
Docket Number: 655533/16
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

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ZURICH AMERICAN INSURANCE COMPANY  
AMERICAN ZURICH INSURANCE COMPANY

Plaintiffs,

-against-

DON BUCHWALD & ASSOCIATES, INC. and  
BURTON,

Defendants

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**SHERWOOD, J.:**

This insurance coverage case arises out of an action by Bollea (Bollea), also known as the world-famous professional wrestler, against Don Buchwald & Associates (DBA), Tony Burton (Burton) and American Zurich Insurance Company (AZIC) and de

FAC

## I. Background and The Underlying Action

DBA is a talent and literary agency. Burton's clients is radio personality Michael Calta (Calta), and

On May 2, 2016, Bollea filed the original complaint in *Buchwald & Assoc.*, Case No. 16-002861-CI, venued in and For Pinellas County, Florida. In that action, Bollea sought damages from Gawker website *Gawker.com* (*Gawker*) and Calta, among others. The original Bollea complaint asserted seven causes of action, including defamation, invasion of privacy and intentional infliction of emotional distress.

The claims in the Bollea action arise from the publication of distinct portions of video and audio recordings recorded by Bollea's former best friend .

First, in October 2012, *Gawker* published footage of Bollea's intercourse with Heather Clem, Clem's then-wife (the *Clem* video). Bollea actively encouraged and permitted Bollea to have sex with Clem. In 2015, the *National Enquirer* (the *Enquirer*) published an article in which Bollea

DBA purchased four successive commercial policies on similar terms, for the periods from June 8, 2013 to June 8, 2014 (the First Primary Policy), June 8, 2014 to June 8, 2015 (the Second Primary Policy), June 8, 2015 to June 8, 2016 (the Third Primary Policy), and June 8, 2016 to June 8, 2017 (the Fourth Primary Policy). See amended complaint, exhibits C, D and F).

This motion seeks relief from AZIC based on the holding in *Farkas* (see amended complaint, exhibit D). The Third Primary Policy provides for a “discovery” or “occurrence” that takes place during the policy period. See amended complaint, exhibits 3; 54-55 ¶ A.1; 49 ¶ 13). The Third Primary Policy also provides that the insurer “shall defend the insured against any ‘suit’ seeking” damages. See amended complaint, exhibit 3. Insurance applies” (*id.* at 54-55, ¶ A.1). In addition to the First Primary Policy, DBA also insures DBA’s “Volunteer Workers” and “employees” under the Third Primary Policy.

**B. *The Umbrella Policies from ZAIC***

DBA purchased four successive commercial policies on similar terms, for the periods from June 8, 2013 to June 8, 2014 (the First Umbrella Policy), June 8, 2014 to June 8, 2015 (the Second Umbrella Policy), June 8, 2015 to June 8, 2016 (the Third Umbrella Policy), and June 8, 2016 to June 8, 2017 (the Fourth Umbrella Policy). See amended complaint, exhibits C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ.

coverage is afforded under this policy; or (2) Under (C) injury, property damage, personal and advertising injury Insurance applies” (*id.* at 46 ¶ B).

### **III. The Insurers’ Disclaimers**

In June 2016, DBA and Burton submitted no complaint to AZIC and ZAIC (amended complaint ¶¶ 1 and 2) and DBA, the insurers declined their defense and coverage and commenced this action (*see* Farkas aff, exhibits F and G).

In this action, the insurers seek a declaration that (1) the Primary Policies and the Umbrella Policies; (2) the Bollea action; and (3) they have no obligation to indemnify Burton imposed against them in the Bollea action.

On May 12, 2017, DBA and Burton were served with the complaint and then provided the insurers with the amended pleadings. Burton letters advising that they continued to disclaim coverage under the Primary Policies and the Umbrella Policies (*see* Farkas aff, exhibits H and I). “Position,” the insurers did not address the newly-alleged

Coverage A and B applied to bar coverage of the sixth  
934.10 (see exhibit H at 15-16; Exhibit I at 16-17).

**IV. The Counterclaims and the Instant Motion**

On August 24, 2017, DBA and Burton filed a  
defenses and amended counterclaims. The amended  
declaration that defendants are required to provide a  
under the Primary Policies and the Umbrella Policies  
their duty to defend.

As of December 2017, the plaintiffs have still

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“[T]he proponent of a summary judgment m  
entitlement to judgment as a matter of law, tendering  
any material issues of fact” (*Ayotte v Gervasio*, 81 N  
*v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).  
motion, regardless of the sufficiency of the opposing  
NY2d at 853; see also *Lesocovich v 180 Madison Ave*

The party opposing summary judgment has th

“[A]n insurer’s duty to defend is broader than the allegations in the complaint in the underlying action, the scope of coverage, or where the insurer has actual knowledge of the facts” (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2009]; *Ins. Group.*, 8 NY3d 708, 714 [2007]; *Automobile Ins. Co. v. [redacted]*). The determination as to whether the duty of an insurer to defend is based on “the facts which are pleaded” (*Allstate Ins. Co. v. Mugger*). This duty can be determined from the factual allegations that “the policy is stated in the complaint, [may a court] . . . summarize the facts” [citation omitted]; *Allstate Ins. Co. v. Zuk*, 78 NY2d 400, 403 [1996]). A refusal to defend where “as a matter of law . . . there is no possibility of coverage” eventually be obligated to indemnify the insured under the policy. (*v Olympic Plumbing & Heating Corp.*, 299 AD2d 270, 273 [2002]). The duty to defend where it failed to meet its heavy burden where the complaint cast the pleadings wholly within the exclusion.

Accordingly, summary judgment should be granted where the policy at issue and the underlying complaint, “the facts which are pleaded” (*Continental Cas. Co. v. [redacted]*).

and directing an inquest to ascertain the amount of such damages, including their attorneys' fees and costs incurred in connection with the underlying action.

Plaintiffs move for a declaration that they have a right to recover under the underlying action.

Application of the above principles to the underlying policies makes clear that plaintiffs are obligated to demonstrate that the allegations in the underlying complaint demonstrate that the First Policy and the Third Umbrella Policy, which triggers the

### **I. The Third Primary Policy**

To make a prima facie showing that AZIC has a duty under the Third Primary Policy, DBA and Burton must demonstrate that

(1) the Bollea action is a "suit" (i.e., "a civil action in which 'bodily injury' . . . are alleged") (Third Primary Policy)

(2) during the policy period, Bollea (a) suffered from a "sickness or disease sustained by a person, in whole or in part, at any time", and (b) that DBA and Burton did not



Bollea's bodily injury prior to the Third Primary Policy relieve it of its defense and coverage obligations. How defend DBA and Burton in the underlying action because an "occurrence," and that the "intentional acts" excluded amended Bollea complaint "solely allege[s]" that DBA "to cause harm" to Bollea (*see* opp mem at 7; plaintiff's

The court rejects this argument. In determining whether conduct falls within the "accident language" look at the casualty from the point of the view of the insured, "it was unexpected, unusual and unforeseen" (*Miller v. ...* [citation omitted]). In that context, New York courts focus on the harmful consequences, not whether the insured, as a general matter, *Ins. Co. v Cook*, 7 NY3d 131, 137-138 [2006] ["we have held that a life insurance policy, 'to pertain not only to an unintentional death, but will foreseeably bring on death, but equally to an intentional death, if the insured unexpectedly has that result'"] [citation omitted]; *Allstate v ...* [4th Dept 1998] ["Accidental results can flow from intentional acts, if the results are not intended or

(underlying) claims . . . did not require intent, (the ins [citation omitted]).

Here, the negligent retention and intentional action asserted in the amended Bollea complaint both Primary Policies.

In his negligent retention claim asserted against have known” that Burton was “predisposed to commi actions to investigate, prevent and/or avoid” the alleg retaining Burton as an employee and not terminating suffer damages, including “anxiety” and “severe emo 208-214). These allegations unambiguously trigger A Policy because, from DBA’s standpoint, Burton’s act the racist footage were unexpected, unusual and unfor

Indeed, New York courts routinely hold that against an insured-employer because, from the emplo employee are not intended or expected (*see e.g. RJC NY3d 158, 163-165 [2004]* [holding that for purposes

*National Union Fire Ins. Co. of Pittsburgh* (286 AD2d 386, 1977), *N.Y., Inc. v United States Fire Ins. Co.* (251 AD2d 386, 1998) (both cases involving insurers faced with negligence allegations) because the court in *Burton* “intended to harm Bollea” (opp mem at 5; pla

This argument fails. These outdated cases were distinguished in *RJC Realty Holding Corp.* (2 NY3d at 163-165), 14 years after the court to appeal in *RJC Realty*, the Appellate Division, using a dissenting memorandum, found in favor of the insurer, because the court in *salon’s employee assaulted a customer and therefore* *Holding Corp. v Republic Franklin Ins. Co.*, 303 AD2d 386, 1998, was reversed, clarifying that, in assessing whether a negligence claim is thus an “accident,” the question for courts to answer is whether, from the standpoint of the employer, the employee’s act was NY3d at 163). The Court of Appeals then ruled in favor of the plaintiff to defend because, from the employer’s standpoint, the employee’s act here, the negligent retention claim asserted against DBA occurred because, from DBA’s perspective, *Burton*

1991] [reciting “the elements of a cause of action for including “deliberate or reckless infliction of mental

Accordingly, because Bollea has alleged that and because it is possible for Bollea to succeed on his “intentional” conduct, the IIED claim alleges an occurrence exclusion does not apply (*see e.g. Cosser*, 15 AD3d at *Massachusetts Bay Ins. Co. v Penny Preville, Inc.*, 19 defend copyright infringement claim because, despite conduct,” “it is possible that under the statute [the ins . . . without being found to have acted knowingly, wi

Although AZIC argues that an intentional tort rejects this argument. It is well-settled that an “intentional” meaning of commercial liability policies, as long as the harmful results (*see Messersmith v American Fid. Co.* accidental or the opposite . . . according to the quality . A driver turns for a moment to the wrong side of the deviation safe. The act of deviation is willful, but no

(3) Bollea’s personal and advertising injury to DBA and Burton did not know prior to the personal and advertising injury had occurred, and that the personal and advertising injury was not Burton’s “business” (*id.* at 46 ¶ B.2; 12-13 ¶

(4) with regard to Burton, that he qualifies as one of DBA’s “volunteer workers” who was “personally engaged in [DBA’s] business” or one of DBA’s “employees” or “volunteer employment” (*id.* at 22 ¶ C.6.f and C.6.g; 22

Once DBA and Burton make a prima face showing, the allegations in the amended Bollea complaint “cast the burden of proof on exclusions, and, further, that the allegations, in toto, are sufficient to establish a *Paper*, 35 NY2d at 325).

In opposition to defendants’ motion, ZAIC covers the “underlying insurance” or “other insurance” within the Third Umbrella Policy period, and the injury took place during the Third Umbrella Policy period, and the injury prior to the Third Umbrella Policy period, and

abetted one another in connection with such public disclosure. Defendants,” “[t]he private facts . . . were in fact public.” The complaint also alleges that all of the defendants “conspired to obtain the footage, and that “[a]t all relevant times, the Defendants abetted one another” (*id.* ¶¶ 10, 37).

DBA and Burton are being sued for invasion of privacy, conspiracy, all based on Bollea’s allegations that DBA and Burton are liable on this issue – directly, as aiders and abettors, and/or as co-conspirators. Under the law, each aider and abettor is legally responsible for the acts of the conspirators and accomplices (*see e.g. Lorillard Tobacco Co. v. Thomas*, 2013) [“We also note that the law regarding conspiracy and aiding and abetting the pursuit of a conspiracy by one conspirator is an act for which the conspirator is severally liable”]; *Ray v Cutter Laboratories*, 744 F.2d 1011 (6th Cir. 1984) [“pursuance of a common plan or design to commit a tortious act, and who, by cooperation or request, or who lend aid or encouragement, or who knowingly do for their benefit, are equally liable with him”] [

Thus, contrary to ZAIC’s assertion, the amended

ZAIC contends that Exclusion 5 (a) applies to relieve Bollea complaint alleges that DBA and Burton “inter plaintiffs’ mem at 13). This contention is baseless.

The amended Bollea complaint does not allege “knowledge” that their acts would violate Bollea’s right of privacy (a). Rather, the amended Bollea complaint contains allegations that they acted negligently, and that they “knew or *should have known*” of a violation of Bollea’s right of privacy” (*see* amended complaint [added]). Indeed, the sole specific allegation against DBA and Burton is that they obtained information from Calta, *Gawker’s* public information, and then provided it to Calta, *Gawker’s* public information, ultimately resulted in the publications at issue and the publications are consistent with an interpretation that does not require knowledge to result in an invasion of Bollea’s privacy. As such, the allegations are not cast “solely and entirely” within Exclusion 5 (a).

In addition, it is clear that Bollea can succeed in its claim against DBA and Burton had “knowledge” that their acts would violate Bollea’s right of privacy. *See* *Boyle v. United Life Ins. Co.*, 732 F Supp 1145, 1148 [SD Fla 1990]). That all

Plaintiffs also argue that the issue of whether discovery is needed on this issue. The amended Bollea “[w]hile engaging in the misconduct alleged herein . . . employment as an agent for Buchwald, engaged in conduct within the time and space limits of his employment, and while “[DBA]” (*see* amended Bollea complaint, ¶ 224; *see also* while acting in his capacity as Calta’s talent agent at Calta account) to obtain a mailing address for his client Calta career of his client, and “to reap financial rewards” (*id.* dispute that the amended Bollea complaint expressly states his employment. Their sole argument is that a determination is premature because they require unidentified discovery.

The court rejects this argument. The alleged undisputed allegations of the amended Bollea complaint state as a fact that, under New York law, an insurer’s duty to defend the allegations in a complaint state a cause of action that is covered “under the policy” (*Fitzpatrick v American Honda Motor*



ADJUDGED AND DECLARED that Zurich American Insurance Company are obligated to defend Don Buchwald in the underlying action entitled *Bollea v Don Buchwald & Associates* in the Circuit Court of the Sixth Judicial Circuit In and For the State of Florida, for excess policies issued by them; and that defendants are liable for plaintiffs' breach of such policies, as well as the legal fees in this action; and it is further

ORDERED that the issue of the amount of money damages as a result of plaintiffs' breach of the insurance policies, and the costs have incurred in defending this action is referred to a Special Referee for recommendations, except that, in the event of and upon the request permitted by CPLR 4317, the Special Referee, or another designated referee, shall determine the aforesaid issues; and it is further

ORDERED that this portion of the motion is hereby denied based on the recommendations of the Special Referee and a motion for summary judgment determination of the Special Referee or the designated referee.

ORDERED that counsel for the party seeking summary judgment shall, within 30 days from the date of this order, file a written report of the Special Referee or the designated referee.