SUPREME COURT OF THE STATE OF NEW
COUNTY OF NEW YORK: PART 49

- -

ZURICH AMERICAN INSURANCE COMPAN
AMERICAN ZURICH INSURANCE COMPAN

Plaintiffs,

-against-

DON BUCHWALD & ASSOCIATES, INC. and
BURTON,

Defendants

- -

SHERWOOD, J.:

This insurance coverage case arises out of an
Bollea (Bollea), also known as the world-famous pro
Buchwald & Associates (DBA), Tony Burton (Burto
action). In the action before this court, plaintiffs Zuri
American Zurich Insurance Company (AZIC) and de

FAC

I. Background and The Underlying Action

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

On May 2, 2016, Bollea filed the original cor
Buchwald & Assoc., Case No. 16-002861-CI, venued
and For Pinellas County, Florida. In that action, Boll
website *Gawker*.com (*Gawker*) and Calta, among oth
The original Bollea complaint asserted seven causes
alia, invasion of privacy and intentional infliction of

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

First, in October 2012, *Gawker* published foo
intercourse with Heather Clem, Clem's then-wife (the
actively encouraged and permitted Bollea to have sex
2015, the *National Enquirer* (the *Enquirer*) published

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

This motion seeks relief from AZIC based o
Farkas aff, exhibit D). The Third Primary Policy pro
"occurrence" that takes place during the policy perio
3; 54-55 ¶ A.1; 49 ¶ 13). The Third Primary Policy a
to defend the insured against any 'suit' seeking" dam
Insurance applies" (*id.* at 54-55, ¶ A.1). In addition t
insures DBA's "Volunteer Workers" and "employee

B. *The Umbrella Policies from ZAIC*

DBA purchased four successive commercial
or similar terms, for the periods from June 8, 2013 to
2014 to June 8, 2015 (the Second Umbrella Policy),
Policy), and June 8, 2016 to June 8, 2017 (the Fourth

coverage is afforded under this policy; or (2) Under C
injury, property damage, personal and advertising inj
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 ¶
and DBA, the insurers declined their defense and cov
commenced this action (*see* Farkas aff, exhibits F and

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

On May 12, 2017, DBA and Burton were ser
and then provided the insurers with the amended plea
Burton letters advising that they continued to disclain
Primary Policies and the Umbrella Policies (*see* Fark
Position," the insurers did not address the newly-alle

Coverage A and B applied to bar coverage of the sixt
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 stil

DISCU

"'[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 t

"[A]n insurer's duty to defend is broader tha
allegations in the complaint in the underlying action,
of coverage, or where the insurer has actual knowled
(*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [
Ins. Group., 8 NY3d 708, 714 [2007]; *Automobile In*
The determination as to whether the duty of an insur
the facts which are pleaded" (*Allstate Ins. Co. v Mug*
can be determined from the factual allegations that 'r
policy is stated in the complaint, [may a court] . . . su
[citation omitted]; *Allstate Ins. Co. v Zuk*, 78 NY2d 4
refusal to defend where "as a matter of law . . . there
eventually be obligated to indemnify the insured und
v Olympic Plumbing & Heating Corp., 299 AD2d 27
duty to defend where it failed to meet its heavy burde
complaint cast the pleadings wholly within the exclu

Accordingly, summary judgment should be g
policy at issue and the underlying complaint, "the fou

and directing an inquest to ascertain the amount of su
their attorneys' fees and costs incurred in connection

Plaintiffs move for a declaration that they ha
underlying action.

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

I. The Third Primary Policy

To make a prima facie showing that AZIC ha
Third Primary Policy, DBA and Burton must demon

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

(2) during the policy period, Bollea (a) suffe
sickness or disease sustained by a person, in
any time", and (b) that DBA and Burton did

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

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

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

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

In his negligent retention claim asserted agai
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 unfo

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 purpose

National Union Fire Ins. Co. of Pittsburgh (286 AD2
N.Y., Inc. v United States Fire Ins. Co.(251 AD2d 38
insurers faced with negligence allegations) because t
Burton "intended to harm Bollea" (opp mem at 5; pla

This argument fails. These outdated cases w
RJC Realty Holding Corp. (2 NY3d at 163-165), 14
to appeal in *RJC Realty*, the Appellate Division, usin
memorandum, found in favor of the insurer, because
salon's employee assaulted a customer and therefore
Holding Corp. v Republic Franklin Ins. Co., 303 AD
reversed, clarifying that, in assessing whether a negli
thus an "accident," the question for courts to answer
whether, from the standpoint of the employer, the em
NY3d at 163). The Court of Appeals then ruled in fa
defend because, from the employer's standpoint, the
here, the negligent retention claim asserted against D
occurrence because, from DBA's perspective, Burto

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 occu
exclusion does not apply (*see e.g. Cosser*, 15 AD3d a
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 tor
rejects this argument. It is well-settled that an "intent
meaning of commercial liability policies, as long as t
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 t
DBA and Burton did not know prior to the p
injury had occurred, and that the personal an
Burton's "business" (*id.* at 46 ¶ B.2; 12-13 ¶

(4) with regard to Burton, that he qualifies as
of DBA's "volunteer workers" who was "per
[DBA's] business" or one of DBA's "employ
employment" (*id.* at 22 ¶ C.6.f and C.6.g; 22

Once DBA and Burton make a prima face showing, t
allegations in the amended Bollea complaint "cast th
exclusions, and, further, that the allegations, in toto, a
Paper, 35 NY2d at 325).

In opposition to defendants' motion, ZAIC c
"underlying insurance" or "other insurance" within t
injury took place during the Third Umbrella Policy p
injury prior to the Third Umbrella Policy period, and

abetted one another in connection with such public di
Defendants," "[t]he private facts . . . were in fact pub
complaint also alleges that all of the defendants "cons
footage, and that "[a]t all relevant times, the Defenda
"one another" (*id.* ¶¶ 10, 37).

DBA and Burton are being sued for invasion
conspiracy, all based on Bollea's allegations that DB
issue – directly, as aiders and abettors, and/or as co-c
conspiracy and each aider and abettor is legally respo
conspirators and accomplices (*see e.g. Lorillard Tob*
2013] ["We also note that the law regarding conspira
pursuit of a conspiracy by one conspirator is an act fo
severally liable"]; *Ray v Cutter Laboratories*, 744 F S
pursuance of a common plan or design to commit a to
cooperation or request, or who lend aid or encourage
done for their benefit, are equally liable with him'"] [

Thus, contrary to ZAIC's assertion, the amen

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 alle
knowledge" that their acts would violate Bollea's rig
(a). Rather, the amended Bollea complaint contains
negligently, and that they "knew or *should have know*
violation of Bollea's right of privacy" (*see* amended
added]). Indeed, the sole specific allegation against
to obtain, and then provide to Calta, *Gawker's* public
ultimately resulted in the publications at issue and th
are consistent with an interpretation that does not req
result in an invasion of Bollea's privacy. As such, th
not cast "solely and entirely" within Exclusion 5 (a)

In addition, it is clear that Bollea can succeed
and Burton had "knowledge" that their acts would vi
Inc., 732 F Supp 1145, 1148 [SD Fla 1990]). That al

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

The court rejects this argument. The alleged undisputed allegations of the amended Bollea compla fact that, under New York law, an insurer's duty to d allegations in a complaint state a cause of action that under the policy" (*Fitzpatrick v American Honda Mo*

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

ORDERED that the issue of the amount of mo
a result of plaintiffs' breach of the insurance policies, a
have incurred in defending this action is referred to a S
recommendations, except that, in the event of and upon
permitted by CPLR 4317, the Special Referee, or anoth
referee, shall determine the aforesaid issues; and it is fu

ORDERED that this portion of the motion is h
recommendations of the Special Referee and a motion
determination of the Special Referee or the designated

ORDERED that counsel for the party seeking t
plaintiff shall, within 30 days from the date of this orde