

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

PRECISION UNDERGROUND PIPE SERVICES, INC.,	:	September Term 2017
	:	
Plaintiff,	:	No. 2368
v.	:	
PENN NATIONAL MUTUAL CASUALTY ET. AL.	:	COMMERCE PROGRAM
	:	
Defendants.	:	Control Nos. 18082402/18060095

DOCKETED
DEC - 3 2018
R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 3rd day of December, 2018, upon consideration of Defendant Penn National Mutual Casualty's Motion for Summary Judgment and Plaintiff's response in opposition and Plaintiff's Motion for Partial Summary Judgment and Defendant's response in opposition and as explained in the attached Opinion, it hereby is **ORDERED** as follows:

1. Defendant's Motion for Summary Judgment is **GRANTED** and Penn National Mutual Casualty does not have a duty to defend and indemnify Parkside Utility Construction, LLC and Verizon Pennsylvania, LLC in the action captioned *Hammell v. Pohlig Homes, LLC, et. al.*, 1701-2119. **DECLARATORY JUDGMENT** is entered in favor of defendant Penn National Mutual Casualty and against plaintiff Precision Underground Pipe Services, Inc.
2. Plaintiff's Partial Motion for Summary Judgment is **DENIED**.¹

Precision Underground P-ORDOP



BY THE COURT



RAMY I. DJERASSI, J.

¹ Plaintiff also sued as defendants in this action Verizon Pennsylvania, LLC, Parkside Utility Construction, LLC, Pohlig Builders, Inc., Christopher Hammell and Christine Hammell. On August 13, 2018, a Suggestion of Death was filed for Christopher Hammell. On the same date, the Estate of Christopher Hammell was substituted for Christopher Hammell. These defendants are nominal defendants joined as interested parties under the Declaratory Judgment Act, 42 Pa. C. S. § 7531-7541. Since these defendants are nominal defendants under the Declaratory Judgment Act, this order is dispositive of the case.

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OPINION

This is an action for declaratory judgment and breach of contract. Plaintiff Precision Underground Pipe Services, Inc. (“Precision”) seeks a declaration that defendants Verizon Pennsylvania, LLC (“Verizon”) and Parkside Utility Construction, LLC (“Parkside”) are entitled to a defense and indemnity by defendant Penn National Mutual Casualty (“Penn National”) in an action captioned *Hammell v. Pohlig Homes, LLC, et. al.*, 1701-2119 (“*Hammell*” or the “underlying action”). Presently before the court are two motions, Precision’s motion for partial summary judgment and Penn National’s motion for summary judgment. For the reasons set forth below, Penn National’s motion for summary judgment is granted and Precision’s motion for partial summary judgment is denied.

Verizon entered into a contract with Parkside (Verizon- Parkside Agreement) to install an underground conduit for Verizon’s fiber optic cable in connection with a real estate development on the Ardrossan Farm Development in Radnor Township, Villanova, Pa. The Verizon- Parkside Agreement required Parkside to name Verizon as an additional insured on its policies of insurance and to provide a defense and indemnity to Verizon. On October 28, 2014, Parkside entered into a subcontract and hired Precision to provide necessary labor under the Parkside- Precision Agreement. The subcontract required Precision to name Parkside and Verizon as

additional insureds on a Penn National the Policy under certain conditions. Pursuant to the subcontract, any insurance coverage provided to Parkside or Verizon under the Policy was to be primary and noncontributory with respect to any other insurance available to Parkside and/or Verizon. The Parkside-Precision Agreement also required Precision to “defend, indemnify, and hold harmless” Parkside and Verizon.

Penn National issued to Precision a policy of commercial general liability insurance with an effective date of January 4, 2016 to January 4, 2017, and a policy limit of \$1 million per occurrence and \$2 million in the aggregate. Critically, the policy contains an “Automatic Additional Insureds- Owners, Contractors, and Subcontractors” endorsement which provides in part:

SECTION II- WHO IS AN INSURED

1. Any person(s) or organization (s) (referred to below as additional insured) with whom you are required in a written contract or agreement to name as an additional insured, but only with respect to liability for “bodily injury,” “property damage” or “personal and advertising injury” caused, in whole or in part, by:

- (1) Your acts or omissions; or

- (2) The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured (s) at the location or project described in the contract or agreement. A person’s or organization’s status as an additional insured under this agreement ends when your operations for that additional insured are completed.

On April 8, 2016, Christopher Hammell, an employee of Precision, suffered injuries when he fell into a trench at a work site near Villanova, Pennsylvania. Mr. Hammell and his wife (“Hammell”) filed an action against Parkside and Verizon, as well as other defendants in the

Court of Common Pleas, Philadelphia.² The amended complaint in the underlying action alleges as follows:

1. Verizon and Parkside “owned, operated, maintained, managed, supervised, possessed and/or controlled the premises at or near Villanova, Pa.” (Hammell amended complaint ¶ 7).
2. At all times material hereto, “there was a dangerous and hazardous condition in the nature of a trench at the premises.” (Hammell amended complaint ¶8).
3. At all times relevant hereto, Verizon and Parkside “had a common law duty and/or a contractual duty to protect workers at the premises.” (Hammell amended complaint ¶9).
4. Verizon and Parkside had a duty to protect Precision’s workers “from unreasonably dangerous conditions caused by its conduct and/or failure to act.” (Hammell amended complaint ¶10).
5. At all times relevant hereto, Verizon and Parkside “acted and/or failed to act by and through their respective agents, servants, workmen and/or employees.” (Hammell amended complaint ¶11).
6. On April 8, 2016, at approximately 1:30 p.m., Hammell was working as an employee for Precision at or near Villanova, Pa. when a trench gave way and/or he fell in a trench, causing him to sustain serious injuries. (Hammell amended complaint ¶ 16).
7. The aforesaid act was caused as a direct and proximate result of the carelessness and negligence of defendants Verizon and Parkside, by and through their agents, servants,

² The action is captioned *Hammell v. Pohlig Homes, LLC, et. al.*, CP Phila 1701-2119. (“*Hammell*”). Precision is not an original party to this action; nor has Precision been joined or named in any pleading.

workmen and/or employees and their negligence. (Hammell amended complaint ¶ 28 a-i and ¶ 30 a-i).

On February 21, 2017, Parkside, claiming to be one of Precisions' named additional insureds, tendered demand that Penn National defend and indemnify Parkside. Parkside's tender was based on Precision's position, reflected in this declaratory judgment action, that both Parkside and Verizon are additional insureds under the policy issued to Precision. On April 7, 2017 and August 21, 2017, respectively, Penn National declined to provide additional insured coverage to Verizon and Parkside on grounds that the amended complaint in *Hammell*. does not allege that negligence by Precision caused Christopher Hammell's injury.

On September 20, 2017, Precision filed this action seeking declaratory relief and damages for breach of contract for failing to provide a defense and indemnity to alleged additional insureds. Now pending before the court are motions for summary judgment filed by both Precision and Penn National.

DISCUSSION

An insurer's duty to defend is broader than its duty to indemnify.³ It is a distinct obligation, separate and apart from an insurer's duty to provide coverage.⁴ An insurer is obligated to defend its insured when factual allegations on the face of a complaint encompass an injury that is actually or potentially within the scope of the policy.⁵ As long as the complaint

³*American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 2 A.3d 526, 540–41 (Pa. 2010) citing *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (2006); *General Acc. Inc. Co. of America v. Allen*, 547 Pa. 693, 692 A.2d 1089, 1095 (1997); *J.H. France Refractories v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502, 510 (1993).

⁴ *Id.*

⁵ *Id.*

“might or might not” fall within the policy's coverage, the insurance company is obliged to defend. Accordingly, it is potential not certainty that a claim falls within an insurance policy’s coverage that triggers the insurer's duty to defend.⁶

The question whether a claim against an insured must be defended is answered by comparing the four corners of the insurance contract to the four corners of the underlying complaint.⁷ An insurer may not justifiably refuse to defend a claim against its insured unless it is clear that the claim does not potentially come within the coverage of the policy.⁸ This can only be accomplished by examination of the allegations in the underlying complaint and the language of the insurance policy itself. In determining whether an insurer may justifiably refuse to defend, the “factual allegations of the underlying complaint against the insured are to be taken as true and liberally construed in favor of the insured.”⁹ Indeed, the duty to defend is not limited to meritorious actions; it may even extend to actions that are “groundless, false, or fraudulent,” as long as the possibility exists that the underlying complaint’s allegations are sufficient to expose the insured to the need to defend itself at law.¹⁰

Here, after applying the four corner rule to the amended complaint in *Hammell* and after liberally construing and accepting as true its factual allegations, we are clear that Verizon and

⁶ *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, supra.

⁷ See *Donegal Mut. Ins. Co. v. Baumhammers*, 595 Pa. 147, 938 A.2d 286, 290 (2007) (“The language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation.”)

⁸ See *General Acc. Inc. Co. of America v. Allen*, 547 Pa. 693, 692 A.2d 1089, 1095 (1997) ([T]he obligation to defend an action brought against the insured is to be determined solely by the allegations of the complaint in the action....”)

⁹ *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742 (3d Cir.1999) (citing *Biborosch v. Transamerica Ins. Co.*, 505, 603 A.2d 1050, 1052 (Pa. Super. 1992)

¹⁰ *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, supra.

Parkside are not entitled to coverage. There is simply no suggestion in the amended complaint or even in any other pleading, that Precision can be blamed for any act or omission that caused Christopher Hammell's injuries. Accordingly, there are no additional insureds as defined by the Penn National policy and no duty to defend.

To trigger additional insured coverage under the Penn National policy, the underlying complaint should allege, at least, that Christopher Hammell's bodily injuries were caused, in whole or in part, by Precision, or by someone acting on Precision's behalf---for example an agent. The amended complaint vaguely claims Parkside and Verizon had a duty to protect Christopher Hammell because he was an employee of an unnamed company which may have somehow been responsible for dangerous conditions. But plaintiff Hammell in the underlying case never names Precision or alleges anything specific about Precision's conduct. As a result, Penn Mutual's duty to defend is not triggered and neither Parkside nor Verizon is entitled to be defended by Penn Mutual in the underlying case.

Precision disagrees and argues that plaintiff Hammell's allegations in the underlying action do, in fact, trigger Penn National's duty to defend Parkside and Verizon. Precision relies on language at Paragraph Ten of the *Hammell* amended complaint that use of the pronoun "its" is sufficient to allege that Precision created a dangerous condition. In pertinent part, Paragraph 10 reads as follows: "...defendants...had a duty to protect workers of Precision Underground Pike Services from unreasonably dangerous conditions caused by *its* conduct and/or failure to act." (Italics added) While Paragraph 10 lays on "defendants" a duty to protect workers like Mr. Hammell from dangerous conditions caused by Precision, palpably missing is any allegation that Precision caused any dangerous conditions in the first place. Moreover, Precision cannot be one of the "defendants" described in Paragraph 10 as Precision is not a defendant party in *Hammell*.

In arguing that declaratory judgment be decided in its favor, Precision cites two federal cases within the jurisdiction of the U.S. Court of Appeals for the Third Circuit. These are *Ramara, Incorporated v. Westfield Insurance Company*, 814 F.3d 669 (3d Cir. 2016) and *Zurich American Insurance Company v. Indian Harbor Insurance Company*, 235 F. Supp. 699 (E.D. Pa. 2017). Both cases are distinguishable from *Hammell*.¹¹

In *Ramara*, as in *Hammell*, the underlying complaint includes no allegation that the employer was to blame for the dangerous condition that caused the worker's injury. However, the underlying complaint in *Ramara* specifically alleges that the injured worker's employer was an independent contractor who through its agents, "failed to adequately inspect and monitor the work performed". This specific agency and accusation were enough for the *Ramara* Court to find a duty to defend. In contrast, *Hammell* never averred either agency or accusation in its amended complaint in the underlying case.

The *Zurich American* decision is also distinguishable. As in *Ramara*, the underlying complaint in *Zurich American* contains allegations that could be construed to implicate employer liability. The Court found that a duty to defend was made out because there was an averment that the employee's injury was caused by the negligence of Rittenhouse [the owner] and its agents, who had allegedly failed to protect the injured worker from his own company's negligence. In contrast, the *Hammell* amended complaint does not allege specific agency between Precision and Parkside. The relevant averment states only that Parkside and Verizon "at all times acted and/or failed to act by and through their respective agents, servants, workmen and/or employees." Unlike "Rittenhouse" in *Zurich America*, Precision is never named as an agent.

¹¹ While federal court decisions are not binding, they may have persuasive authority. See *Chiropractic Nutritional Associates, Inc. v. Empire Blue Cross & Blue Shield*, 447 Pa. Super. 436, 669 A.2d 975 (1995).

It is not our province to speculate why Hammell specifically opted to keep Precision out of the underlying case. In this declaratory judgment action, however, the consequence is clear. Penn National does not have a duty to defend and indemnify Parkside or Verizon in *Hammell v. Puhlig Homes, LLC*.¹²

CONCLUSION

For the foregoing reasons, Defendant Penn National's Motion for Summary Judgment is GRANTED and Judgment is entered in favor of Defendant Penn National and against Plaintiff Precision Underground Pipe Services, Inc.

Precision Underground Pipe Services, Inc.'s Partial Motion for Summary Judgment is DENIED.

BY THE COURT



RAMY I. DJERASSI, J.

¹² Since this court finds that there is no duty to defend, the remaining claim for breach of contract also fails. Additionally, since this court has determined that there is no duty to defend, there can be no duty to indemnify. See, *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d, 605 (Pa. Super. 1997)(observing that if there is no duty to defend, there can be no duty to indemnify).