

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Nell Jackson-Brown, Administrator of the :
Estate of Eugene Brown, deceased, :

Plaintiff-Appellant, :

v. :

Larue A. Monford et al., :

Defendants-Appellees. :

No. 12AP-542

(C.P.C. No. 09 CVC 661)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 21, 2013

Robert W. Kerpsack Co., L.P.A., and Robert W. Kerpsack, for appellant.

Reminger Co., L.P.A., and Nicole M. Koppitch, for appellee United States Liability Insurance Company.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The estate of Eugene Brown is appealing from the granting of summary judgment for United States Liability Insurance Company ("USLIC"). A single error is assigned for our consideration:

THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT NELL JACKSON-BROWN, ADMR., IN ORDERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE UNITED STATES LIABILITY INSURANCE COMPANY, ON APPELLEE JAMES WIMBUSH'S THIRD PARTY COMPLAINT.

{¶ 2} Eugene Brown was shot and killed while in a bar at 764 St. Clair Avenue in Columbus, Ohio. The man who shot Brown was convicted of murder and sent to prison.

{¶ 3} Brown's estate filed suit against Larue Monford, the killer, and also against James B. Wimbush who owned and ran the bar. Wimbush was sued on a theory that Wimbush failed to provide security at the bar and failed to maintain the bar in a reasonably safe condition. The complaint initiating the lawsuit alleged that Brown was shot and killed as a result of Wimbush's failings.

{¶ 4} Wimbush was served by certified mail. Over seven months later, an attorney filed an answer on his behalf. Counsel for Wimbush informed the court of his intention to file a third-party complaint against Wimbush's insurance company, USLIC. That complaint was in fact filed and service obtained on the company.

{¶ 5} An answer to the third-party complaint was filed and discovery pursued on behalf of the company, including interrogatories and a request for production of documents.

{¶ 6} Counsel for the estate attempted to pursue discovery from USLIC, with no apparent success.

{¶ 7} USLIC was permitted to file and did file a motion for summary judgment, alleging that its commercial liability policy with James Wimbush excluded liability under the facts of the lawsuit initiated on behalf of the Brown estate. Specifically, USLIC argued an assault or battery exclusion and that a firearm exclusion freed USLIC of both the duty to defend Wimbush in the lawsuit and the duty to indemnify Wimbush in the event damages were awarded against him.

{¶ 8} Counsel for the estate sought to prevent the trial court from granting summary judgment generally and especially to prevent the trial court from considering liability issues in conjunction with the trial court's consideration of the merits of the summary judgment motion. Counsel also sought to compel Wimbush to respond to the discovery sought from him, specifically a set of interrogatories. Counsel for the estate asserted that liability could not be addressed due to the discovery problems, but stated that USLIC's duty to defend and indemnify could be.

{¶ 9} Further, counsel for the estate filed a memorandum contra to USLIC's motion for summary judgment in the third-party claim and also filed a motion seeking summary judgment against USLIC.

{¶ 10} Nothing in the record on appeal indicates that the estate had any success in its attempts to obtain discovery from either Wimbush or from USLIC. Nevertheless, the trial judge proceeded to grant summary judgment for USLIC and both against Wimbush as a third-party plaintiff and against the estate.

{¶ 11} Eventually, the trial judge found no just cause for delay and this appeal proceeded.

{¶ 12} As a threshold issue, the fact the trial court proceeded to grant summary judgment while discovery issues remained should be addressed. Counsel for the estate asked only that the issues regarding the liability of Wimbush be delayed for consideration. The trial court did not address the issue of Wimbush's liability, but only the merits of the third-party complaint on the subject of USLIC's duty to defend and indemnify Wimbush. Since no delay was sought as to the duty to defend and/or indemnify, the trial court could proceed to address the motions for summary judgment. The trial court did not err in doing so.

{¶ 13} In its appellate brief, the estate tries to argue that the trial court erred in proceeding, but counsel affirmatively stated in his affidavit that USLIC's duty to defend and/or indemnify could then be addressed by affidavits. Counsel and the estate cannot successfully assign error they invited or fault the trial court for not doing something they did not ask the trial court to do. The third issue presented in appellant's brief, as part of the first assignment of error, reads:

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S CIV. R. 37(A)(2) AND 56(F) MOTION SEEKING DISCOVERY OF EVIDENCE OF THE FORESEEABILITY OF THE INJURY AND DEATH OF APPELLANT'S DECEDENT, AND THEN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE UNITED STATES LIABILITY INSURANCE COMPANY ON THE BASIS THAT APPELLANT FAILED TO PRODUCE ANY EVIDENCE OF FORESEEABILITY.

{¶ 14} This cannot be found to have merit based upon the affidavit submitted to the trial court indicating that indemnity could be addressed.

{¶ 15} The record on appeal contains only some of the details of the homicide in which Brown was killed. The killer was in prison. Wimbush personally resisted

participation in the litigation. The answer filed on behalf of Wimbush does not even acknowledge that Brown was shot in Wimbush's bar. The convicted killer was claiming he was innocent and was pursuing a petition for post-conviction relief. The third-party complaint filed on behalf of Wimbush incorporated all the allegations in the complaint, but also every denial, response and allegation set forth in Wimbush's answer. In its answer to the third-party complaint, USLIC admits no facts and alleges primarily that it has no duty to defend or indemnify.

{¶ 16} To the extent facts are alleged, they are to be found in the responses to USLIC's request for admission directed to Wimbush. Those admissions indicate that Brown was at Wimbush's bar where Brown was shot and killed by Larue Monford. The admissions also indicate that Monford was convicted of murder as a result.

{¶ 17} The facts, to the extent present in the record, squarely fall within the exclusion contained in USLIC's policy. The "Assault or Battery Exclusion" reads:

This insurance does not apply to:

Any claim, demand or "suit" based on "assault" or "battery", or out of any act or omission in connection with the prevention or suppression of any "assault" or "battery", including the use of reasonable force to protect persons or property, whether caused by or at the instigation or direction of an insured, its "employees", agents, officers or directors, patrons or any other person.

This exclusion applies to all "bodily injury" * * * sustained by any person, including emotional distress and mental anguish, arising out of assault or battery whether alleged, threatened or actual including but not limited to assault or battery arising out of negligence or other wrongdoing with respect to:

- a. Hiring, placement, employment, training, supervision or retention of a person for whom any insured is or ever was legally responsible; or**
- b. Investigation or reporting any assault or battery to the proper authorities, or**
- c. The failure to so report or the failure to protect any person while that person was in the care, custody or control of the insured, its "employees", agents, officers or directors.**

"Assault" means the threat or use of force on another that causes that person to have apprehension of imminent harmful

or offensive conduct, whether or not the threat or use of force is alleged to be negligent, intentional or criminal in nature.

"Battery" means negligent or intentional wrongful physical contact with another without consent that results in physical or emotional injury.

The "Firearm Exclusion" reads:

This policy does not insure against loss or expense, including but not limited to the cost of defense, as a result of "bodily injury" * * * arising out of firearms.

{¶ 18} We see no basis for finding that the shooting was independent of the excluded acts of the policy. Whether or not the shooting was an occurrence for purposes of the policy does not matter, given the exclusions.

{¶ 19} The sole assignment of error is overruled. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).
