COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-874

THOMAS W. EAGAR

vs.

SAFETY INSURANCE COMPANY & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Thomas W. Eagar, brought this action to determine whether the defendants, his insurers (collectively, Safety), had a duty to defend and indemnify him against (1) a deposition subpoena and (2) an unfiled supplemental complaint that, among other things, sought damages against Eager for canceling his deposition.[2] Safety brought a motion to dismiss, arguing that it had no duty to defend or indemnify Eager, and Eager moved to amend his complaint. A Superior Court judge concluded that the deposition subpoena and the unfiled supplemental complaint were not claims, that Safety did not have

[1] Safety Indemnity Insurance Company and Safety Property and Casualty Insurance Company.

[2] Eager's complaint against Safety also asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, and violation of G. L. c. 93A, all of which turned on whether Safety had a duty to defend and indemnify Eager.

a duty to defend or indemnify Eager, and that amendment would be futile.[3] The judge allowed the motion to dismiss and denied the motion to amend. Eager appeals. We affirm, but for different reasons in some respects.

Background. For purposes of reviewing the allowance of Safety's motion to dismiss, we assume that the following factual allegations, taken from the complaint and the attached exhibits, are true. See Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 538 (2022).

Eagar was a professional engineer and a member of the faculty at the Massachusetts Institute of Technology. In July 2017, Eagar was contacted by Attorney Andrew Shalaby, who represented Kurtis M. Bailey in a lawsuit alleging that Bailey was injured by defective gas cylinders manufactured by Worthington Cylinder Corporation (Worthington). Eagar knew nothing about the matter; had nothing to do with the design, manufacture, sale, or distribution of the gas cylinders; and never examined or inspected them. Nonetheless, Shalaby asked Eager to testify as a percipient witness. At some point in time, Eager agreed to sit for a deposition but then canceled the deposition. When Eager resisted testifying in a case he knew

[3] As a second basis for her decision, the judge stated that Safety had no duty to defend or indemnify Eager where any claims against Eager were not made because of bodily injury.

nothing about, Shalaby brought a motion to compel Eagar's deposition and subpoenaed him.

Shalaby also threatened to sue Eagar personally by making him a party to Bailey's lawsuit and by alleging that Eagar was a Worthington employee, even though Shalaby knew that was false. On August 3, 2017, Shalaby sent Eagar's attorney a supplemental complaint. The supplemental complaint asserted two causes of action. The first cause of action falsely alleged that Eager performed tests on the gas cylinders for Worthington and sought an order finding that Eagar's actions were attributable to Worthington through the doctrine of respondeat superior. The second cause of action sought damages for Eager's alleged "obstruction" in canceling his deposition. Bailey never filed the supplemental complaint against Eager.

Eager sought a defense and indemnification from Safety, which had issued two policies to Eager: a homeowners policy effective from October 10, 2016, to October 10, 2017, and an umbrella policy effective from November 19, 2016, to November 19, 2017. Safety disclaimed coverage, and this lawsuit followed.

Discussion. Eager argues that Safety had a duty to defend and indemnify him against the deposition subpoena and the

unfiled supplemental complaint.[4] "We focus principally on the duty to defend, because '[i]t is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify.'" Marculetiu v. Safety Ins. Co., 98 Mass. App. Ct. 553, 560 (2020), quoting Boston Symphony Orch., Inc. v. Commercial Union Ins. Co., 406 Mass. 7, 10 (1989).

Safety had a duty to defend Eager if the underlying allegations against Eager were "reasonably susceptible of an interpretation that state[d] or roughly sketche[d] a claim covered by the policy terms." Billings v. Commerce Ins. Co., 458 Mass. 194, 200 (2010). However, if the underlying allegations against Eager were "expressly outside the policy coverage and its purpose," Safety had no duty to defend Eager. Id., quoting Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 394-395 (2003). Whether Safety had a duty to defend Eager presents a question of law that we review de novo. See Marculetiu, 98 Mass. App. Ct. at 560.

1. Homeowners policy. In relevant part, the homeowners policy provided that there was personal liability coverage "[i]f a claim [was] made or a suit [was] brought against an 'insured'

[4] It appears that the sole reason Shalaby sought Eager's deposition was his professional expertise in the field. We note, however, that Safety argues that it did not have a duty to defend or indemnify Eager for a variety of reasons, including a business exclusion. We do not reach the business exclusion.

for damages because of 'bodily injury' or 'property damage' caused by an 'occurrence.'" We assume for purposes of our review that the deposition subpoena and the unfiled supplemental complaint presented claims for damages. In addition, Eager raises no argument that there was property damage. This leaves the question whether any claims made against Eager were because of "bodily injury" caused by an "occurrence."[5]

The deposition subpoena and the second cause of action in the unfiled supplemental complaint were lodged against Eager because he resisted testifying in a case he knew nothing about, not because of "bodily injury" caused by an "occurrence."[6] The remaining claim, the first cause of action in the unfiled supplemental complaint, requested a finding that Eager's

---

[5] The homeowners policy defined "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death that results." "Occurrence" meant "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. '[b]odily injury'; or b. '[p]roperty damage.'"

[6] We are not persuaded by Eager's argument, made without citation to legal authority, that the deposition subpoena and the second cause of action related all the way back to Bailey's alleged bodily injury. Under the homeowners policy, there was personal liability coverage if a claim was made for damages against an insured "because of" bodily injury caused by an occurrence. Even if we interpret "because of" broadly to mean "arising out of," there still must have been a "reasonably apparent causal connection" between the claim and the bodily injury. American Home Assur. Co. v. First Specialty Ins. Corp., 73 Mass. App. Ct. 1, 6 (2008). Here, any claims made against Eager had a wholly independent source, his reluctance to testify, and did not turn on whether Bailey was, in fact, injured.

actions, to the extent they contributed to Bailey's alleged injuries, were attributable to Worthington through the doctrine of respondeat superior. This claim was not a claim against Eager, as it sought to hold Worthington, not Eager, responsible for Bailey's alleged bodily injury. Where any claims against Eager were made because he resisted testifying, not because of bodily injury caused by an occurrence, there was no personal liability coverage for the deposition subpoena or the unfiled supplemental complaint under the homeowners policy.

2. Umbrella policy. The umbrella policy provided, "This is a liability policy. It covers only somebody else's claim against you or your family because you . . . were negligent." Assuming again that the deposition subpoena and the unfiled supplemental complaint presented claims, we must decide whether any claims made against Eager were predicated on Eager's negligence.

Shalaby subpoenaed Eager after Eager resisted testifying in a case he knew nothing about. While Eager may have had good cause for his conduct, the fact remains that Eager's conduct was intentional, not negligent. Similarly, the second cause of action in the unfiled supplemental complaint asserted intentional conduct, specifically that Eager canceled his

deposition.[7] And, as previously discussed, the first cause of action in the unfiled supplemental complaint was not a claim against Eager. Where any claims made against Eager were not predicated on negligence, there was no personal liability coverage for the deposition subpoena or the unfiled supplemental complaint under the umbrella policy.

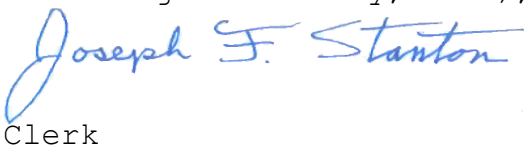
3. Motion to amend. Eagar argues that he should have been allowed to amend his complaint to cure deficiencies. Eager argues that his amended complaint would have (1) shown that the unfiled supplemental complaint was a claim or suit and (2) set forth language in the umbrella policy showing that the umbrella policy did not require there to be bodily injury. Where we have concluded that Safety did not have a duty to defend or indemnify Eager for alternative reasons, however, Eager's proposed amendments would have been futile. See Chang v. Winklevoss, 95 Mass. App. Ct. 202, 212 (2019). Accordingly, the judge did not

[7] We note that the second cause of action asserted that Eager's acts were "acts of negligence." This assertion of a theory of liability does not alter our analysis. See New England Mut. Life Ins. Co. v. Liberty Mut. Ins. Co., 40 Mass. App. Ct. 722, 727 (1996) ("It is the source from which the plaintiff's personal injury originates rather than the specific theories of liability alleged in the complaint which determines the insurer's duty to defend").

abuse her discretion in denying Eager's motion to amend. See id.

Judgment affirmed.

By the Court (Green, C.J., Wolohojian & Henry, JJ.[8]),



Clerk

Entered: August 30, 2022.

[8] The panelists are listed in order of seniority.