

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,
Justice.

In the Matter of the Application of
ALLSTATE INSURANCE COMPANY,

Petitioner,

- against -

DENNIS CHU, GARY TAMES, PETER BONSIGNORE
and JASON BATTLE,

Respondents,

Trial/IAS Part 19
Index No. 19556/2000
Motion No. 001
Motion Date Jan. 31, 2001

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Papers Numbered

Notice of Petition, Petition, Affirmation & Exhibits Annexed	1
Affidavit in Opposition	2
Affirmation in Reply	3

Upon the foregoing papers and for the following reasons, the motion by Petitioner Allstate Insurance Company, for summary judgment, is granted.

On or about January 30, 1998, Respondent Jason Battle sustained serious injuries as a result of a physical altercation and assault between himself and Respondents Gary Tames, Peter Bonsignore and Dennis Chu which occurred on a street of Albany, New York. As a result of the assault, criminal proceedings were instituted against all the Respondents and, relevantly herein, Respondent Chu eventually pled guilty to third degree reckless assault against Mr. Battle before the State of New York, Albany City Court, Criminal Part (Herrick, J.). In 1999, Mr. Battle commenced a civil action in Albany County Supreme Court, entitled *Battle v Tames* (Index no. 191/1999), to recover damages against all the Respondents for the personal injuries

sustained from the intentional physical assault.

Since Allstate had issued a Condominium Owners Policy insuring Chu's mother, Sonia Chu, for certain eventualities at the time of the incident, the Chus sought insurance coverage for their defense in the above referenced matter. Allstate provided legal representation to Mr. Chu in order to avoid a default judgment but subject to a reservation of its right to decline coverage following a more thorough investigation. By Notice of Petition and Petition, returnable January 31, 2001, Allstate commenced the instant special proceeding for an order granting summary judgment in its favor, pursuant to CPLR 3001 and 3212, and declaring that it has no duty to defend and/or indemnify Respondent Chu in the underlying Albany action. Allstate argues that the results of the intentional acts by Chu are expressly excluded by the policy provisions. This Court agrees.

When faced with a claim by a policyholder, an insurance company's "broad and heavy duty" to provide a defense must be determined from the allegations in the underlying complaint; if it "contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (Incorporated Vil. of Cedarhurst v Hanover Ins. Co., 89 NY2d 293, 298 [quoting Technicon Elecs. Corp. v American Home Assur. Co., 74 NY2d 66, 73]; see, Fitzpatrick v American Honda Motor Co., 78 NY2d 61, 63). To "negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640, 652; see, Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 311; Simply Lite Food Corp. v Aetna Cas. & Sur. Co. of Am., 245 AD2d 500). Usually, insurers do not provide coverage for bodily injuries which are expected or intended by the insured, such as by the commission of criminal acts (see, Allstate Ins. Co. v Mugavero, 79 NY2d 153, 161; Utica Fire Ins. Co. of Oneida County v Shelton, 226 AD2d 705, 706; Metropolitan Prop. & Cas. Ins. Co. v Pangilinan, 215 AD2d 543).

Applying the foregoing principles to the matter at bar, Allstate appears entitled to summary judgment in its favor declaring that it has no duty to defend or indemnify Mr. Chu in the *Battle* action. Although the Allstate policy covers an insured person, like Chu here, who “becomes legally obligated to pay [damages] because of bodily injury or property damage arising from an occurrence” or accident during the policy period, it specifically excludes:

any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, an insured person. This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

As Allstate asserts and the record corroborates, it cannot be seriously disputed that this clear and unambiguous policy exclusion applies to the circumstances involving the assault on Mr. Battle since Mr. Chu not only was involved in what apparently was an intentional gang assault on a single individual, but pled guilty to a criminal act against Mr. Battle in Criminal Court. As such, the physical acts performed by Chu clearly constituted “intentional or criminal acts or omissions of an insured person” against a third party for which coverage is specifically excluded by the Allstate policy. Thus, Allstate appears to have no obligation to defend or indemnify Mr. Chu here (see, Massachusetts Bay Ins. Co. v National Sur. Corp., 215 AD2d 456, 459).

Accordingly, Allstate’s application is granted, and it is hereby declared that Allstate has no duty to defend or indemnify Respondent Chu for any claims arising out of the physical assault on Mr. Battle on January 30, 1998, including the *Battle* action currently pending in Albany County Supreme Court. This constitutes the decision, order and judgment of the Court.

ENTER:

Dated: Mineola, New York
March 1, 2001



J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**