SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 18

NASSAU COUNTY

STATE FARM INSURANCE COMPANY,

Plaintiff,

-against-

MOTION DATE: 11/27/00

MOTION SEQ. NO.: 01&02

INDEX NO.: 28293-1999

EDWARD SKEWES, KEITH AMATO, DANIEL DECICCO, JOHN SIKALAS, JOSEPH INFRANCA, CRAIG SCHIAVETTA, BRIAN GAUCI, SHAWN BEECHER, JOSEPH S. STRAZZERI, FABIAN RUIZ, JR., KEITH BESHEARS AND BRIAN HERBERT.

Defendants.

The following papers read on this motion (numbered 1-4):

Order to Show Cause 1
Notice of Cross Motion 2
Affirmation if Support of Skewes Motion to Dismiss Declaratory Judgment Action in Opposition to State Farm Cross-Motion for Summary Judgment... 3
Reply Affirmation 4
Memorandum of Law. ..... A
Memorandum of Law. ..... B
Memorandum of Law in Opposition to State Farm's Motion for Summary Judgment and in Further Support of Skewes' Motion for Summary Judgment. ...C

Upon the foregoing papers, it is ordered that this motion by defendant Edward Skewes ("Skewes") made by Order to Show Cause, dated July 10, 2000, for an Order pursuant to CPLR 3212 dismissing the complaint of plaintiff, and entering a judgment pursuant to CPLR 3001 and 3017(b) declaring that plaintiff is obligated to defend and indemnify its insureds in the underlying action Skewes **v. Infranca, et al.**, together with costs and legal fees; and this cross-motion by plaintiff State Farm Fire & Casualty Company ("State Farm") made by Notice of Cross Motion dated September 8, 2000, for a judgment declaring that State Farm has no duty to defend its insureds and no duty to indemnify its

insureds or Skewes, in the underlying action; are determined as set forth below.

State Farm brought this declaratory judgment action to determine its obligation to defend and indemnify Keith Amato, Daniel DeCicco and John Sikalas (the "insureds") in the personal injury action of **Skewes v. Infranca, et al.**, Nassau County Index Number 15593/95 (the "underlying action"). The underlying action stems from a June 16, 1994 incident. Skewes maintains that the incident arose when a mob of young people, including the insureds, traveled to the parking lot of Island Recreational in Massapequa, New York, to find and take revenge on a person believed to be responsible for burning a friend's car. Under the mistaken belief that Skewes was the person they were seeking, members of the mob attacked and beat Skewes, leaving him with allegedly severe and permanent injuries. At least two of the insureds plead guilty to violations of the Penal Code in connection with the incident.

On May 19, 1995, Skewes commenced the underlying action, alleging, among other things, negligence on the part of the defendants who caused his injuries, and negligent supervision on the part of their parents. State Farm assigned counsel to defend each of its insureds in that action. By order dated April 17, 1998, Justice F. Dana Winslow granted summary judgment dismissing all claims sounding in negligence against the defendants, including the claims against the parents, but permitting Skewes to amend his complaint. Skewes filed an Amended Complaint on May 28, 1998 adding causes of action for assault and battery and concerted action. Subsequently, by order dated February 25, 2000, Justice Roy S. Mahon dismissed the assault and battery claims against all but two of the defendants, including the insureds, but did not dismiss the **concerted action** claims.

The parties agree that the declaratory judgment actions, both in the instant case and that of Allstate Insurance Company, in a related case arising out of the same attack on Skewes, were brought more than one year after service of the amended complaint. The Court notes, at the outset, that an insurance carrier must give timely and specific notice of its intention to refuse to defend or indemnify its insured but is not typically required to provide such notice if there was no coverage for the insured's liability arising out of the event.

The Court must first determine State Farm's obligations pursuant to **Insurance Law §3420** ("**Section 3420**"), which provides that an insurer must timely disclaim or deny coverage, by providing written notice "as soon as is reasonably possible." State Farm, as it must, maintains that disclaimer under **Section 3420** is not required when a claim falls outside the scope of a policy's coverage provisions. **Zappone v. Home Insurance Co.**, 55 N.Y.2d 131. No notice is mandated when there never was any insurance in effect. Id. Skewes maintains that disclaimer under **Section 3420** is required when denial of coverage is based on a policy exclusion, and failure to timely disclaim precludes denial of coverage. **Matter of Worcester Insurance Company v. Bettenhauser**, ___ N.Y.2d ___, 2 No. 81 (hereinafter "**Bettenhauser**"). Thus, this Court must consider whether the issues arise out of coverage, as maintained by State Farm, or exclusion, as maintained by Skewes.

The State Farm policies provide coverage for bodily injury caused by an "occurrence," which is

The Allstate policies provide coverage for bodily injury caused by an accident. The policies exclude from coverage any bodily injury that was "intended or expected" by the insured or that resulted from a "criminal act" of an insured.

Allstate contends that it has no duty to notify under **Section 3420** because its disclaimer is based on a lack of coverage at the outset, not on the application of an exclusion. **See, Zappone v. Home Insurance Co.** 55 NY2d 131, **supra.** In Allstate's view, there was never any insurance in effect because the policies extend liability coverage for bodily injury only when the bodily injury was caused by an accident.

Plaintiff Skewes argues, as he must, that the incident in question falls squarely within the policy exclusion; i.e., that Skewes' bodily injury was caused by the criminal acts of the insureds or was either intended or expected by the insureds. In furtherance of that argument, pursuant to **Bettenhauser,** Allstate was required to disclaim under Section 3420 and its failure to do so obligates it to defend and indemnify its insureds. If an exclusion exists which specifically describes the conduct in question, then the conduct would have been covered but for the exclusion, otherwise, the exclusion is superfluous. See **Handlesman v. Sea Insurance Company Ltd.,** 85 N.Y.2d 96. Skewes argues that the contracts provide coverage for bodily injury. He maintains that the language limiting coverage to accidents is actually a policy exclusion, regardless of whether it appears in the inclusion or exclusion portion of the policy. **See, Planet Insurance Co. v. Bright Bay Classic Vehicles, Inc.,** 75 N.Y.2d 394. Skewes concludes that the lack of clarity as to whether Allstate's obligations are governed by the coverage or the exclusion section renders the entire contract ambiguous. **See Handlesman, supra.**

The Court finds that the coverage provision determines Allstate's obligations. Any ambiguity in a contract of insurance must be resolved against the insurer. **Westview Associates et al. v. Guaranty National Insurance Co.,** ___ N.Y.2d ___, 1 No. 110, citing **Handlesman v. Sea Insurance Company Ltd.,** 85 N.Y.2d 96. Nonetheless, the language of the Allstate insurance policies is not ambiguous. The coverage portion of the policies provides insurance for bodily injury caused by an accident. The term "accident" is broad, including a wide variety of events, but its comprehensiveness is not ambiguous. Numerous courts have upheld an insurer's claim of no coverage based on virtually the same language. **See, e.g., Massachusetts Bay Ins. Co. v. Nat. Sur. Corp.,** 215 A.D. 2d 456; **John Hancock Property & Cas. Ins. Co. v. Warmuth,** 205 A.D.2d 587. It is not unusual for an insurance carrier to limit coverage to bodily injury caused by an accident. Such limitation need not be read as an exclusion in disguise. Rather, it may be a narrowing of the scope of coverage at the outset. **Compare Planet Insurance Co. v. Bright Bay Classic Vehicles, Inc.,** 75 N.Y.2d 394, **supra** (limitation of coverage to cars leased for less than 12 months was deemed an exclusion where the car involved in the accident was covered as part of a rental fleet but coverage dropped when leased for a period of 24 months).

Allstate's determination to carve out a further exclusion for intentional conduct does not mean that the limitation in the coverage portion to injury caused by accidents was unnecessary or that the exclusion was redundant. The exclusion provision can be viewed as a second filter used to weed out those incidents that fall within the broad definition of accident, but are not the kind of events for which

N.Y.2d 394, supra (limitation of coverage to cars leased for less than 12 months was deemed an exclusion where the car involved in the accident was covered as part of a rental fleet but coverage dropped when leased for a period of 24 months).

State Farm's determination to carve out a further exclusion for intentional conduct does not mean that the limitation in the coverage portion to injury caused by accidents was unnecessary or that the exclusion was redundant. The exclusion provision can be viewed as a second filter used to weed out those incidents that fall within the broad definition of accident, but are not the kind of events for which insurance coverage is contemplated. Even when bodily injury is caused by intentional or reckless conduct, the event may be deemed an accident from the point of view of the insured. See, e.g., **Allstate Ins. Co. v. Zuk**, 78 N.Y.2d 41 (death by discharge of shotgun was an accident that resulted from insured's reckless cleaning and loading of shotgun); **Sphere Drake Ins. Co. PLC v. Block 7206 Corp. d/b/a/ Hipps**, ___ A.D.2d ___, 705 N.Y.S.2d 623 (assault by nightclub patron in parking lot was an accident from the point of view of the nightclub owner; insurer's disclaimer was based on the policy's assault and battery exclusion). Under those circumstances, coverage would exist, but an exclusion provision might preclude coverage.

However, the presence of an applicable exclusion does not warrant the assumption that the event was covered in the first instance. There are circumstances in which the threshold of coverage has not been reached. Denial of coverage may be based on "no accident." See, e.g., **State Farm Fire and Cas. Co. v. Torio**, 250 A.D.2d 833 (insured fired 18 shots in direction of group of people); **Massachusetts Bay Ins. Co. v. Nat'l Surety Corp.**, 215 A.D.2d 456 (insured grabbed and hit police officer). In at least one instance, the court upheld a disclaimer on the grounds of no coverage even as it acknowledged that the conduct fell squarely within an exclusionary clause as well. See, **John Hancock Property & Cas. Ins. Co. v. Warmuth**, 205 A.D.2d 587. The application of either the coverage limitation or the exclusion yields the same result in some circumstances and does not render either provision unenforceable or the policies ambiguous.

Thus, State Farm's obligations under **Section 3420** hinge on whether or not the injuries alleged in the underlying action resulted from an accident. If they did not, then the policies do not afford coverage and State Farm had no duty under **Section 3420** to provide timely notice of disclaimer.

The term "accident" is broadly defined, and is construed according to the meaning understood by the average person. **Agoado Realty Corp. et al. v. United International Insurance Co.**, ___ N.Y.2d ___, 1 No. 78. In deciding whether an injury is the result of an accident, it must be determined whether the injury was "unexpected, unusual and unforeseen" from the insured's point of view. Id. There is no accident when the injuries were the expected or anticipated result of the alleged conduct. See, e.g., **State Farm Fire & Cas. Co. v. Torio**, 250 A.D.2d 833. The insureds need not have expected or intended the degree of injury ultimately sustained by the victim. It is sufficient that the injuries "flow[ed] directly and immediately from an intended act." Id. (citing **Continental Ins. Co. v. Colangione**, 107 A.D.2d 978, 979)

In the instant action, the issue of whether Skewes' injuries resulted from an accident is not ripe

for summary judgment. A question of fact remains as to the nature of the alleged incident. See CPLR §3212(b). Although Skewes' pleadings in the underlying action allege intentional conduct on the part of the insureds, his motion papers in the instant declaratory judgment action raise a question of fact as to whether the resultant injuries were sufficiently unexpected, unusual or unforeseen as to warrant a determination that they arose from an accident. A question is presented with respect to each insured as to whether his intent to congregate and threaten an individual escalated into unexpected violence as a result of mob influence or the intervening acts of other participants. In that event, the incident would be deemed an accident, from the insured's point of view, for purposes of determining insurance coverage. Skewes' contention that the incident was an accident because the defendants mistakenly attacked the wrong victim is without merit. If defendants intended or expected to inflict injury on some individual, it is irrelevant that they accomplished their objective upon the wrong individual.

Thus, the issue of coverage depends upon a finding that there was or was not an accident. Accordingly, it is

DETERMINED that Skewes' motion to dismiss the complaint in the instant declaratory judgment action and for summary judgment declaring that State Farm is obligated to defend and indemnify its insureds in the underlying action is hereby denied and it is further

DETERMINED that State Farm's cross-motion for a judgment declaring that it has no duty to defend or indemnify its insureds is hereby denied and it is further

ORDERED that a limited issue hearing will be held on the 16th day of January, 2001, at 9:30 a.m. in the Supreme Court of the State of New York, IAS Part 18, at the courthouse at 100 Supreme Court Drive, Mineola, New York. The issue of whether Skewes' injuries were caused by an accident shall be determined as a matter of fact by this Court, without a jury on consent of all counsel, or failing consent, by jury trial. A determination will be made with respect to each individual insured. If the Court determines that Skewes' injuries were expected or intended by an insured, i.e., that they flowed directly and immediately from the insured's intended acts, then there was no accident from the point of view of that insured. In that event, the incident is not covered under the State Farm policy and State Farm is relieved of its obligation to defend and indemnify that insured. If, however, the Court finds that the injuries were unexpected, unusual or unforeseen from the point of view of an insured, then the incident was an accident for which the State Farm policy provides coverage, and State Farm is precluded from denying coverage to that insured for failure to timely notify pursuant to Section 3420.

The Court notes that there is currently a declaratory judgment action pending before this Court between Allstate Insurance Company and the defendants named in the instant action, pertaining to the underlying action and involving the same issues as set forth herein. While it is beyond the power of this Court to sua sponte to order a joint or consolidated trial of two related matters (see CPLR 602; Singer v. Singer, 33 A.D.2d 1054), the Court finds that no such prohibition exists for joint or consolidated limited issue hearings. In order to fairly and effectively administer the Allstate and State Farm declaratory judgment actions and to avoid inconsistent verdicts, this Court, sua sponte,

ORDERS that State Farm Insurance Company v. Edward Skewes, et al., Index No. 28293-1999, and Allstate Insurance Company v. Keith Amato, et al., Index No. 7730-2000, be joined for the aforedescribed joint limited issue hearing.

Skewes shall serve a copy of the instant order within 5 days after entry thereof. The foregoing constitutes the Order of this Court.

Dated: January 2, 2001

J. S. C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE