STATE OF MAINE

Cumberland, ss.

BUSINESS AND CONSUMER COURT
Location: Portland

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiff,

v.

Docket No. BCD-CV-11-06

JOSHUAH FARRINGTON,

Defendant

ORDER AND JUDGMENT

Defendant Joshuah Farrington has filed a Motion for Summary Judgment upon a Stipulated Record. Plaintiff Philadelphia Indemnity Insurance Company (Philadelphia) opposes the motion and requests summary judgment in its favor. *See* M.R. Civ. P. 56(c).

M.R. Civ. P. 56(c) provides that summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The same rule also permits summary judgment to be granted against the moving party if the non-moving party is entitled to judgment as a matter of law.

Because the parties have presented the court with a stipulated record, "there can be no question about unresolved issues of material fact" and the only question is which party is entitled to judgment as a matter of law.[1] *See Luker v. State Tax Assessor*, 2011 ME 52, ¶ 7, 17 A.3d 1198, ——.

[1] At oral argument on the motion, the parties confirmed that there was no need for additional fact-finding by the court and that based on the undisputed record, one of the parties was entitled to judgment as a matter of law.

The only issue of law presented to the court is whether Farrington is an "insured" under the physical damage coverage of the Philadelphia policy for purposes of the anti-subrogation rule that prevents an insurer from maintaining a subrogation claim against its own insured.

STIPULATIONS OF FACT AND PROCEDURE

Darling's is a Volkswagen dealer and certified Volkswagen repair shop in Bangor. (Stip. Facts ¶ 1.) Philadelphia is Darling's subrogated insurer. (Compl. ¶ 3.) Farrington purchased a Jetta from Darling's in October of 2009. (Stip. Facts ¶ 2.) Farrington brought the car in for repairs on May 11, 2010, and Darling's loaned Farrington a Passat for him to use while his car was being repaired. (Stip. Facts ¶¶ 3-4.) Farrington signed a rental agreement containing the terms and conditions applicable to the Passat loaner. (Stip. Facts ¶ 5.) The rental agreement does not expressly make Farrington liable to Philadelphia in the event of damage to the vehicle, only to Darling's.[2]

On May 14, 2010, Farrington struck a moose while operating the Passat, resulting in damage to the car in the amount of $6,005.10. (Stip. Facts ¶¶ 7-8.) At the time of the accident, the Passat was covered by Darling's commercial lines policy, policy number PHPR20024 issued by Philadelphia (the "Philadelphia policy"). (Stip. Facts ¶ 9.) At the time of the accident, State Farm insured Farrington under an automobile liability insurance policy, policy number 0404-642-19A (the "State Farm policy"). (Stip. Facts ¶ 11.) Philadelphia paid Darling's the amount of $5,005.10—the damage to the Passat less Darling's $1,000 deductible. (Stip. Facts. ¶ 13.) State Farm tendered payment of $900 to Darling's ($1,000 less a $100 deductible), and Darling's authorized Philadelphia to seek recovery of the remaining $100. (Stip. Facts ¶ 14.)

[2] The agreement made Farrington "responsible for all damage to, or loss of, the Vehicle, Loss of Use, diminished value of the Vehicle caused by damage to it or repair of it, missing equipment, and a reasonable charge to cover [Darling's] administrative expenses incurred processing any damage claim," whether or not Farrington was at fault. (Ex. A at 2, ¶ 4.) Farrington declined the comprehensive and collision damage waiver. (Ex. A at 1.)

Philadelphia filed suit against Farrington in Bangor District Court on December 22, 2010 for breach of the rental agreement and seeking $6,005.10 in damages. Farrington removed the case to Superior Court pursuant to M.R. Civ. P. 76C in December of 2010, and the case was approved for transfer to the Business and Consumer Court on January 26, 2011. The court heard oral argument on this motion on June 27, 2011, and the parties submitted post-argument briefing and proposed judgments.

DISCUSSION

The parties assert, and the court agrees, that it is the language of the Philadelphia policy that controls this case. When evaluating an insurance contract,

> the long-standing rule in Maine requires an evaluation of the instrument as a whole. All parts and clauses [of an insurance policy] must be considered together that it may be seen if and how far one clause is explained, modified, limited or controlled by the others. The meaning of language in an insurance policy is a question of law. Contractual language is ambiguous if it is reasonably susceptible of different interpretations. Ambiguities in insurance contracts are to be construed in favor of the insured.

Jipson v. Liberty Mut. Fire Ins. Co., 2008 ME 57, ¶ 10, 942 A.2d 1213, 1216-17 (citations and quotation marks omitted); *accord Ryder v. USAA Gen. Indem. Co.*, 2007 ME 146, ¶ 11, 938 A.2d 4, 7 (stating that "[a]ny ambiguity in an insurance policy must be resolved against the insurer and in favor of coverage" (quotation marks omitted)). "Exclusions and exceptions in insurance policies are disfavored and are construed strictly against the insurer." *Pease v. State Farm Mut. Auto. Ins. Co.*, 2007 ME 134, ¶ 7, 931 A.2d 1072, 1075 (quotation marks omitted).

The Philadelphia policy consists of a series of documents, including the Business Auto Coverage Form, Common Policy Conditions, and numerous addendums and endorsements. The pertinent language is in the Business Auto Coverage Form, which consists of seven sections: I) Covered Autos, II) Liability Coverage, III) Physical Damage Coverage, IV)

Business Auto Conditions, V) Definitions, VI) Truth in Lending Coverage, and VII) Federal Odometer Act Coverage.

The named insured of the policy is Darling's, and all references in the policy to "you" or your" refer to Darling's. (Ex. B, Declarations; Ex. B, Business Auto Coverage Former, Prefatory Language.) The Philadelphia Policy contains two types of coverage: liability coverage and physical damage coverage. (Ex. B, Business Auto Coverage Form, Sections II, III.) The policy defines an "insured" as "any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage." (Ex. B, Business Auto Coverage Form, Section V(G).)

The liability coverage includes a "Who Is An Insured" provision that covers Darling's, the named insured, and also delineates those individuals who will be considered "insured" for purposes of the liability coverage under the policy. (Ex. B, Business Auto Coverage Form, Sections II(A)(1).) The physical damage coverage, however, does not contain a "Who Is An Insured" provision. (Ex. B, Business Auto Coverage Form, Sections III.) The physical damage coverage simply states that Philadelphia "will pay for 'loss' to a covered 'auto' or its equipment" under either "comprehensive coverage," "specified causes of loss," or "collision coverage," under the specified circumstances. (Ex. B, Business Auto Coverage Form, Section III(A)(1).) Later in the agreement, a "No Benefit to Bailee" clause excludes physical damage coverage "for the benefit of any person or organization holding, storing or transporting property for a fee." (Ex. B, Business Auto Coverage Form, Section IV(B)(4).)

Both parties agree that if Farrington is an "insured" under the policy, the anti-subrogation rule prevents Philadelphia from pursuing its claim against him.[3] *See North River Ins. Co. v. Snyder*, 2002 ME 146, ¶ 1, 804 A.2d 399.

[3] Subrogation is the

Farrington contends that he is an insured under the Philadelphia policy because the language in Section III regarding physical damage coverage does not provide any definition—and therefore any limitation—on who is an insured for purposes of Section III. Farrington points to the bailee for hire exclusion, asserting that the "exclusion implies that bailees for hire would otherwise be insureds for purposes of collision coverage." Because he is not a bailee for hire, Farrington concludes that he must be an insured under the physical damage coverage. In the alternative, Farrington argues that the policy is ambiguous as to who is an insured under the policy, and because any ambiguity must resolved in favor of coverage, he should be treated as an insured.

Philadelphia, on the other hand, asserts that only the vehicles are insured for physical damage under Section III, because Section III does not define any person as an insured. Farrington counters that Philadelphia's position "has the effect of eviscerating the coverage" because under its interpretation, "*no one* is insured under its policy for purposes of collision coverage." Farrington's argument is essentially that because there must be someone entitled to coverage for any covered event, any driver of a covered vehicle would be an insured under Section III.

> substitution of one person in the place of another with reference to a lawful claim. It is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it. It may arise from agreement between the parties or by operation of law where one person has been compelled to pay a debt which ought to have been paid by another, thus becoming entitled to exercise the remedies which the creditor possessed against the other.

Unity Tel. Co. v. Design Service Co., 160 Me. 188, 192 (Me. 1964). The anti-subrogation rule, however, prevents an insurer from suing

> its insured for a risk covered by the insurance policy. An insurer may only assert subrogation rights against third parties to whom it owes no duty of care. To allow subrogation against the insured would be to pass the risk of loss onto the insured and avoid the coverage that the insured had purchased.

22-141 APPLEMAN ON INSURANCE § 141.2[2] (LEXIS 2011).

Viewing the policy as a whole, *see Jipson*, 2008 ME 57, ¶ 10, 942 A.2d at 1216-17, the court cannot accept that interpretation of the policy. Farrington's argument overlooks the fact that the policy, by its plain language, always covers Darling's, the named insured, for any covered event within the policy. Thus, despite the absence of any definition of insured in the policy section on physical damage coverage, it would be Darling's, as the owner of the vehicle involved in Farrington's collision, that would receive payment for covered physical damage, as indeed Darling's did.

Thus, this court concludes that the policy is unambiguous in all pertinent respects—specifically, the physical damage coverage section simply defines coverage for damage to designated vehicles and does not create coverage for any person or entity.

The court agrees with the Supreme Court of Kansas, which addressed a nearly identical situation and policy in *Western Motor Co. v. Koehn*, 748 P.2d 851 (Kan. 1988). In *Western Motor*, a dealership allowed Koehn to test drive a new vehicle; Koehn got into an accident during the test drive and caused around $2,000 worth of damage to the vehicle. *Id.* at 851. The issue there was the same as in the present case[4]: whether Koehn was considered an insured under the coverage for auto physical damage, "which provide[d] insurance against any loss of or to a covered auto from any cause except as excluded." *See id.* at 854-55.

Like the policy in the present case, the policy in *Western Motor* included "a definition section but [did] not define 'Insured' or include a 'Who is an Insured' provision. Payment for damage to a covered vehicle [went] to the insured owner of the vehicle—Western Motor." *Id.* at 854-55. Based on these provisions the court held that "there is no reason to conclude the insurer and insured intended individuals in [Koehn]'s position to receive the protection of the

[4] The court determined that the Basic Auto Insurance and Garage Insurance portions of the policy were not applicable, and thus turned to the coverage for "Auto Physical Damage." *See Western Motor Co. v. Koehn*, 748 P.2d 851, 854-55 (Kan. 1988).

insurance. The coverage protects specific covered property rather than applying to the action of a particular individual who could be characterized as an 'insured.'" *Id.* at 855 (quoting *Western Motor Co. v. Koehn*, 738 P.2d 466, 469 (Kan. Ct. App. 1987)).

The policy in *Western Motor* also contained a no benefit to bailee clause applicable to the physical damage coverage, but that clause was broader than the clause applicable here: "This insurance will not benefit, directly or indirectly, any carrier or bailee." *See id.* at 855. The clause in the instant case applies only to bailees for hire. (*See* Ex. B, Business Auto Coverage Form, Section IV(B)(4).) Although the *Western Motor* court buttressed its interpretation of the contract with the bailee clause, this court finds the policy language within Section III to be controlling, just as the *Western Motor* court did. 748 P.2d at 855. In other words, in the face of the unambiguous terms of the physical damage coverage section, defining coverage in terms of damage to covered vehicles, the provision excluding coverage of bailees for hire cannot be converted, by negative inference, into an affirmative grant of coverage to everyone who drives a covered vehicle.

The court is cognizant that other courts have reached a different conclusion in similar situations. *See, e.g., Frontier Ford, Inc. v. Carabba*, 747 P.2d 1099, 1103 (Wash. Ct. App. 1987). The court, however, bases its conclusion on the policy as a whole. The policy unambiguously insures Darling's for each type of coverage of the policy, and any payments made for covered events are made to Darling's. Thus, contrary to Farrington's position, there is an insured under the physical damage section: the named insured, Darling's. The court concludes that Farrington is not an insured under the Philadelphia policy for purposes of physical damage and therefore that Philadelphia's claim does not violate the anti-subrogation rule. Therefore,

Plaintiff Philadelphia is entitled to judgment as a matter of law on its complaint pursuant to M.R. Civ. P. 56(c) for the stipulated dollar damages.[5]

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Defendant Joshuah Farrington's Motion for Summary Judgment is denied. Plaintiff Philadelphia Indemnity Insurance Company is entitled to judgment as a matter of law.

2. Judgment is hereby granted to Plaintiff Philadelphia Indemnity Insurance Company in the amount of $5,105.10, with interest and costs.

Pursuant to M.R. Civ. P. 79(b), the clerk is hereby directed to incorporate this Order and Judgment by incorporation in the docket.

Dated 11 July 2011

A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 7.11.2011
Copies sent via Mail __ Electronically ✓

[5] A factor in this ruling is that this case does not present considerations of economic waste of the kind that support the Law Court decision in *North River Ins. Co. v. Snyder, supra*, 2002 ME 146, 804 A.2d 399, in which the court applied the anti-subrogation rule to a residential tenancy. In that case, the court held that

> a residential tenant may not be held liable in subrogation to the insurer of the landlord for damages paid as a result of a fire, absent an . . . express agreement in the written lease that the tenant is liable in subrogation for fire damage to the apartment complex.

Id. ¶ 1, 804 A.2d at 399. The Law Court based its anti-subrogation holding on the economic waste rationale explained in *DiLullo v. Joseph*, 792 A.2d 819 (Conn. 2002). *See Snyder*, 2002 ME 146, ¶¶ 15-16, 804 A.2d at 403-04. Under the economic waste rationale, allocating responsibility to a tenant to maintain insurance in anticipation of subrogation claims would force tenants "to carry liability insurance in an amount necessary to compensate for the value, or perhaps even the replacement cost, *of the entire building*, irrespective of the portion of the building occupied by the tenant." *Id.* ¶ 15, 804 A.2d at 403 (quoting *DiLullo*, 792 A.2d at 822-23). Because Farrington was using the entire vehicle, not part of it, this case does not raise the economic waste issue.