

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WESTERN WORLD INSURANCE)
COMPANY,)
)
Plaintiff,)
)
v.)
)
WILMINGTON HOUSING)
PARTNERSHIP CORPORATION,)
)
Defendants.)

Civil Action No. 12-cv-583 (GMS)

ORDER

At Wilmington, this 17th day of June, 2013, having considered the Western World Insurance Co.'s ("Western World") Motion for Judgment on the Pleadings (D.I. 8), the defendant's Answering Brief in Opposition (D.I. 12), and Western World's Reply (D.I. 13);

IT IS HEREBY ORDERED that Western World's request for judgment on the pleadings (D.I. 8) is DENIED. The court finds that there are material issues of fact remaining which require discovery and the entry of a Scheduling Order in the matter;¹

¹ The court finds, based on its review of the parties' submissions and the cited record that material facts remain in dispute as to whether: (1) Casey was an employee of ACE Property Maintenance Solutions ("ACE"); or (2) a "business invitee" for purposes of determining the applicability of the exclusions found in the policy at issue. As a result, there is insufficient evidence at this stage to merit judgment on the pleadings.

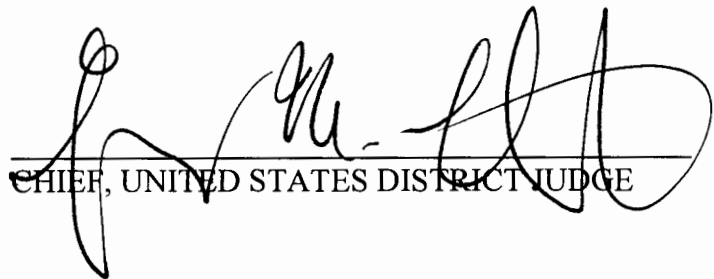
Western World "may be excused from its duty to defend a claim only if it can be determined, as a matter of law, that there is no possible factual or legal basis upon which the insurer might eventually be obligated to indemnify the insured." *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 1994 WL 721618 at *3 (Del. Super. 2009). The Delaware Supreme Court has set forth the test to determine whether an insurer is bound to defend an action against its insured:

The test is whether the underlying complaint, read as a whole, alleges a risk within the coverage of the policy. Determining whether an insurer is bound to defend an action against its insured requires adherence to the following principles: (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured; (2) any ambiguity in the pleadings should be resolved against the carrier; and (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.

DynCorp v. Certain Underwriters at Lloyds, London, 2009 WL 3764971 at *3 (Del. Super. 2009) (citations omitted).

The disputed issue requires a determination as to whether Casey, the plaintiff in the underlying dispute, was employed by subcontractor ACE within the terms of the policy such that Western World has no duty to defend. In

IT IS HEREBY FURTHER ORDERED that a Rule 16.2b Scheduling Teleconference has been set for Tuesday, July 2, 2013, at 9:30 a.m. The parties shall submit a Joint Status Report (see court website), including a Proposed Scheduling Order, by 5:00 p.m. on Wednesday, June 26, 2013. Counsel for plaintiff is directed to arrange the conference call and contact chambers at (302) 573-6470 once all parties are on the line.



CHIEF, UNITED STATES DISTRICT JUDGE

the underlying complaint, Casey refers to himself as a "business invitee." (D.I. 1-2 at ¶ 19.) While both parties recognize that a business invitee may also be properly deemed a subcontractor (*See* D.I. at 10; D.I. 12 at 10-11) it would be inappropriate at this stage to rule on the pleadings as there remain ambiguities requiring resolution of factual issues. The court notes that Western World does not oppose denial of judgment on the pleadings for the remaining indemnity claim. Thus, the court finds that granting judgment on the pleadings with respect to either issue is inappropriate at this stage.