COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 96-0536

OLIVER YAHN, a minor[1]

vs.

ALVIN LEWIS

vs.

ROSEMARY YAHN, & others[2]

MEMORANDUM OF DECISION AND ORDER ON THE THIRD PARTY DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Rosemary Yahn brought this negligence action on behalf of her minor son, Oliver Yahn ("Yahn") against the defendant, Alvin Lewis ("Lewis"), after Yahn was injured when he fell from a radio tower owned by Lewis. Lewis brought a third party action against Graphic Arts Mutual Insurance Company ("GAMIC")[3], for failure to defend and indemnify him pursuant to G.L. c. 176D, § 3(9)(a)-(n) and G.L. c. 93A.[4] GAMIC subsequently brought a counterclaim against Lewis seeking declaratory relief.

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[1] ppa, Rosemary Yahn.

[2] Steven Yahn, Employers Insurance of Wausau, and Kennsington Insurance Ltd. a/k/a Utica National.

[3] GAMIC was erroneously identified in the pleadings as "Kennsington Insurance Ltd. a/k/a/ Utica National." Although GAMIC does not dispute that it is the proper third party defendant in this action, no motion has been brought to correct this error.

[4] Lewis also brought a third party action for negligent supervision against Yahn's parents and a third party action against Employers Insurance of Wausau for failure to defend him pursuant to G.L. c. 176D, § 3(9)(a)-(n) and G.L. c. 93A. The motion for summary judgment does not address these claims.

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GAMIC has moved for summary judgment on Lewis' third party complaint against it and a separate motion for summary judgment on it's counterclaim for declaratory judgment. For the reasons which follow, both of GAMIC's Motions for Summary Judgment are **ALLOWED**.

BACKGROUND

On September 5, 1995, Lewis entered into a written lease agreement (the "Lease") with Connecticut Radio Repeaters ("CRR") for the lease of a 26.5 foot portion of a radio tower owned by Lewis.[5] The Lease required that CRR purchase liability insurance that included Lewis as "an additional named insured." The Lease further required that CRR provide Lewis with a certificate of insurance.

CRR purchased a commercial general liability insurance policy (the "Policy") from GAMIC. However, CRR was the only "insured" designated on the Policy which was effective from July 10, 1995 to July 10, 1996. On October 2, 1995, GAMIC issued a certificate of insurance (the "Certificate") to Lewis. The Certificate identified CRR as the "Insured" and Lewis as the "Certificate Holder." The Certificate expressly stated, "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Lewis never requested nor received a copy of the Policy

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[5] The upper fifty feet of the tower were leased to another entity, which is not a party to this action.

which contained the terms of the insurance contract between CRR and GAMIC.

On September 24, 1995, the minor plaintiff, Yahn, fell from the top portion of the radio tower and was injured. Yahn's mother subsequently brought this negligence action alleging that Lewis, as the owner of the premises, created an attractive nuisance by failing to install perimeter fencing around the base of the tower. Lewis then filed a claim with GAMIC seeking indemnification and a defense to Yahn's claims. As proof of coverage, Lewis submitted a copy of the Certificate. GAMIC refused to indemnify or defend Lewis on the ground that Lewis was not an "additional named insured" in the Policy.

Consequently, Lewis filed a third party claim against GAMIC alleging it failed to indemnify and defend him against Yahn's claims in violation of G.L. c. 93A and G.L. c. 176D. GAMIC brought a counterclaim against Lewis, seeking a declaration that: (1) under the language of the Policy, GAMIC does not owe Lewis a duty to indemnify or defend him with respect to the claims asserted by Yahn; and (2) GAMIC did not violate G.L. c. 93A nor G.L. c. 176D by refusing to defend Lewis against Yahn's claims.

DISCUSSION

This court grants summary judgment where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Cassesso v. Commissioner of Correction, 390

Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. Pederson v. Time, 404 Mass. 14, 17 (1989). Once a moving party establishes the absence of a triable issue, the party opposing the motion must allege specific facts establishing the existence of a genuine issue of material fact. Id. at 17.

For clarity, the motion for summary judgment on the declaratory action will be discussed first. GAMIC maintains that it has no duty to indemnify or defend Lewis based on the terms of the Policy issued to CRR. Construing the language of an insurance contract is a question of law for the trial judge. Cody v. Connecticut General Life Ins. Co., 387 Mass. 142, 146 (1982). Where the language of the policy is clear and unambiguous, the words of the policy are construed according to the fair meaning of the language used. Andrade v. Aetna Life & Casualty Co., 35 Mass. App. Ct. 175, 177-178 (1993); Tartarian v. Commercial Union Ins., 41 Mass. App. Ct. 731, 733 (1996).

The Policy states, under Section I(A)(1)(a), "[w]e will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." An "insured" is defined in Section II of the Policy as a person or organization "designated in the Declarations." Lewis is not an "insured" as defined by the terms of the Policy because he is not named in the Declarations.

Nonetheless, Lewis claims GAMIC is obligated to defend and

indemnify him against Yahn's claims because GAMIC provides coverage in the Policy for the liability CRR assumed in the Lease. There is an exclusion in Section I(2) of the Policy under which GAMIC denies coverage for any liability for bodily injury that the insured assumes in a separate contract or agreement.[6] However, this contractual liability exclusion does not apply to "insured contracts," which are defined in Section V(8)(a) as "contract[s] for a lease of premises." Thus, the Lease between Lewis and CRR is an "insured contract" under the Policy.

The only way that Lewis would be entitled to coverage under the Lease, as an "insured contract," would be if CRR assumed liability on behalf of Lewis in the Lease. However, under the terms of the Lease, CRR did not assume any liability on behalf of Lewis that is relevant to this case.[7] In paragraph 9(d) of the Lease, CRR agreed to indemnify Lewis for damages arising out of its use and occupancy of the tower. However, Yahn's claim is

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[6] Section I(2) states that the insurance does not apply to the following:

> "b. Contractual Liability
> 'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> (1) Assumed in a contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the execution of the contract or agreement..."

[7] Paragraph 8(a) of the Lease required that CRR provide a release to "help and protect" Lewis from any claims by injured third parties. However, there is no release attached to the Lease nor anywhere in the record.

based on Lewis' failure to provide fencing around the tower, not on CRR's use and occupancy of the tower. Indeed, CRR is not a party to this action. Although GAMIC would have a duty to defend CRR based upon liability arising from its use and occupancy of the Tower, it is not obligated to indemnify Lewis, under the terms of the Lease, for Lewis' conduct. Therefore, Lewis is not entitled to any coverage under the Policy based on the terms of the Lease.

Lastly, Lewis claims that GAMIC had a duty to defend and indemnify him against Yahn's claims based on his status as a "certificate holder."[8] However, the Certificate expressly states, "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Thus, Lewis is not entitled to indemnification or defense based on his status as a certificate holder. McMartin v. Westlake, 36 Mass. App. Ct. 221, 232-233 (1994).

Because Lewis is not entitled to any defense or indemnification under the Policy, GAMIC made a legally correct disclaimer of coverage. Therefore, Lewis does not have a claim under G.L. c. 176D or G.L. c. 93A. "[A]n insurance company does not act unfairly or deceptively within the meaning of G.L. c.

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[8] Lewis also maintains that he was named as an "additional insured" in the Certificate. This is incorrect because the Certificate identifies CRR as the "Insured" and Lewis as the "Certificate Holder."

93A, § 2, with respect to a claim made under a policy of insurance simply by making a legally correct disclaimer of coverage." Jet Line Services, Inc. v. American Employers Ins. Co., 404 Mass. 706, 717 (1989). See Lumbermen's Mutual Casualty Co., v. Offices Unlimited, Inc., 419 Mass. 462, 468 (1995). Thus, Lewis' third party claim against GAMIC fails because, under the unambiguous terms of the Policy, GAMIC has no duty to indemnify or defend Lewis against Yahn's claims.

ORDER

For the foregoing reasons, it is **ORDERED** that:

(1) GAMIC's Motion for Summary Judgment on its counterclaim for declaratory judgment is **ALLOWED**;

(2) GAMIC's Motion for Summary Judgment on Lewis' third party claim is **ALLOWED**; and

(3) Judgment shall enter on the third party claim for GAMIC and judgment shall enter on the counterclaim declaring that GAMIC is not obligated to defend nor indemnify Lewis against Yahn's claims.

C. Brian McDonald
Justice of the Superior Court

DATED: August 11, 1998