IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ARVINDER KAKAR,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	**Case No. C-15-CV-24-001529**
	:	
PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE,	:	
	:	
Defendant.	:	
	:	

OPINION AND ORDER

This matter came before the court on Defendant Privilege Underwriters Reciprocal Exchange's ("PURE" or "Defendant") Motion to Dismiss the Complaint (filed May 3, 2024), opposed by Plaintiff Arvinder Kakar ("Plaintiff"), and the parties' oral cross-motions for summary judgment. For the reasons stated herein, it is this 25 day of February, 2025, by the Circuit Court for Montgomery County, Maryland, hereby:

ORDERED, that Plaintiff's Motion for Summary Judgment is **GRANTED**; and it is further

ORDERED, that as to Count I of the Complaint (Declaratory Judgment), it is hereby:

DECLARED, that Defendant is obligated to provide a defense to Plaintiff against the claims asserted in the Underlying Lawsuit, within policy limits; and it is further

ORDERED, that summary judgment is entered in favor of Plaintiff on Count II of the Complaint (Breach of Contract) on the basis that Defendant breached its contractual duty to defend Plaintiff in the Underlying Lawsuit, within policy limits; and it is further

ORDERED, that Defendant's Motion to Dismiss the Complaint is **DENIED**; and it is further

ORDERED, that Defendant's Motion for Summary Judgment is **DENIED**; and it is further

ORDERED, that the parties shall appear for a status conference on **April 10, 2025 at 8:45 a.m.** via Zoom, unless a joint stipulation of dismissal is filed prior to that date (with a copy emailed to chambers).

OPINION

In December 2020 Plaintiff sold his business to Knockout Holdings, LLC f/k/a Octo Platform Holdings, LLC ("Octo"), and then served for a time as an employee and Director of Octo pursuant to written agreements. Octo later brought a defamation action ("Underlying Lawsuit")[1] against him for, *inter alia*, alleged remarks he made to IBM in the midst of negotiations over the acquisition of Octo by IBM with the intent to tank the deal purely out of personal animosity. The allegedly defamatory statements were made approximately one year after his employment and fiduciary relationships with Octo ended. Upon Octo's filing of the Underlying Lawsuit in the United States District Court for the Eastern District of Virginia, Plaintiff sought defense coverage from PURE, his "High Value Homeowner's Policy" insurer.

The PURE policy ("Policy") requires the insurer to "provide a defense at our expense even if the suit is groundless, false or fraudulent" for litigation brought against the insured for an "occurrence," which in turn is defined as "an accident or offense which results in personal injury or property damage during the policy period." "Personal injury" includes "defamation, libel, or slander, caused by an occurrence."

PURE denied Plaintiff's coverage claim for his defense of the Underlying Lawsuit on grounds that: (1) there was no occurrence; and (2) several of the listed exclusions in the Policy foreclosed Plaintiff's right to coverage in the Underlying Lawsuit. Plaintiff thereafter filed the

[1] The original lawsuit was filed in July 2023 and a Second Amended Complaint, was filed February 14, 2024. All issues raised in the briefs relate to the allegations in the Second Amended Complaint.

instant suit against PURE seeking a declaratory judgment and for breach of contract. Sometime after that, the Underlying Lawsuit was dismissed without any liability finding. Accordingly, at issue exclusively is the question of whether PURE is obligated to provide a defense to the Underlying Lawsuit.

In Maryland, insurers owe a broad duty to defend. Indeed, in Maryland an insurer must provide a legal defense to its insured even where there is a mere potentiality for coverage. *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 850 (Md. 1975). As articulated by the Supreme Court of Maryland in *Brohawn*, "[e]ven if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy." *Id.* at 850 (citations omitted). The court looks to the allegations in the underlying pleading when resolving a defense coverage dispute. The duty to defend should be construed liberally, and all doubts in that regard inure to the benefit of the insured. *Walk v. Hartford Cas. Ins. Co.*, 852 A.2d 98, 106-7 (Md. 2005) (citation omitted). Insurance policies are construed according to contract principles, and the obligation to defend is a contractual one. *Mesmer v. MAIF*, 725 A.2d 1053, 1061 (Md. 1999). The terms of an insurance contract are accorded their customary, ordinary and accepted meanings unless there is an indication that the parties intended otherwise. *Walk, supra*, at 106 (citations omitted). To the extent facts extrinsic to the Underlying Lawsuit are referenced, such facts are not disputed.

Although PURE initially argued in its motion that there was no "occurrence" that would trigger its duty to defend, at the motions hearing it conceded that there was an "occurrence" while maintaining its position that several policy exclusions preclude coverage. Informed by the law above, so long as there is a single claim alleged in the Underlying Lawsuit that could potentially lead to a covered liability that is not excluded, PURE owes Plaintiff a duty to defend. PURE's

exclusions arguments are addressed in turn.

1. Business Exclusion

PURE first argues that the Business Exclusion applies. The Policy provides that PURE will not cover damages, defense costs or any other costs or expense for "[p]ersonal injury [including defamation] or property damage arising out of or in connection with an insured's... business pursuits." The term "business" is defined in the Policy as "a trade, occupation or profession engaged in on a full-time, part-time or occasional basis. Business also means any activity engaged in for money or other compensation. This does not include incidental business." "Arising out of" and "in connection with" are not defined in the Policy, but generally mean "causally connected with" or "originating from." *See Springer v. Erie Ins. Exch.*, 94 A.3d 75, 85-86 (2013). The definition of a "business pursuit" has been the subject of litigation in Maryland, and the Policy definition of "business" is generally consistent with Maryland case law. *See id.* In *Springer,* the Supreme Court of Maryland created a two-pronged test to determine if an activity qualifies as a business pursuit: is there (1) continuity and (2) a profit motive? *Id.* at 87. "Continuity," according to the high court, is "a continued or regular activity for the purpose of earning a livelihood." *Id.* A continuity analysis typically appears in the context of determining whether there is regularity in the activity, such as looking at a teenager occasionally babysitting versus a home-based childcare provider. "Profit motive" is demonstrated when "the activity was undertaken for a monetary gain." *Id.*

The language of the exclusion, including the definition of "business" and reference to "business pursuits," leaves open the possibility of coverage for an insured who is not actively or even recently engaged in an activity for money, regardless of his prior relationship with the target of his allegedly tortious conduct. The Policy could have (but does not) clarify that the exclusion

applies to "past or current" business pursuits. "Pursuit" is a noun that implies current or ongoing activity in common meaning and has as its first definition in Merriam-Webster, "the act of pursuing." At the very least, there is more than one inference that can be drawn. *See, Nationwide Mut. Fire Ins. Co. v. Tufts*, 702 A.2d 422, 426 (Md. App. 1997). As the Appellate Court of Maryland noted in *Tufts*, "[d]rafters of insurance policies have it within their power to draft policies without ambiguity, so that exclusions and coverage options are not open to more than one inference or interpretation." *Id.* PURE could have drafted a policy that closed the door on or limited coverage in this context.

The defamatory statements to IBM alleged in the Underlying Lawsuit were made approximately two years after he sold his company, almost a year after Plaintiff left his employment and approximately ten (10) months after he stepped down from the Octo Board. His much later allegedly vindictive and spiteful conduct took place when he had zero financial motive. Plaintiff was not pursuing a business opportunity or engaged in a professional or trade activity for money or other compensation, either full-time, part-time or occasionally, at the time he made the statements. The allegations in the Underlying Lawsuit do not state, explicitly or implicitly, that Plaintiff's remarks to IBM were made for profit or for some other financial compensation. Indeed, the gist of Octo's allegations is that Plaintiff's defamatory statements to IBM were personal and spiteful acts against Octo.[2] In other words, he was motivated by animosity alone.

PURE argues that but for Plaintiff's prior business relationship with Octo he would not have defamed the company to IBM. While that may be so, no Maryland authority supports a "but for" analysis in this context, and PURE offers no Maryland caselaw supporting its position.

[2] Included is an allegation that Plaintiff acted "to thwart Octo's transaction for no reason other than to harm the company and decrease its value" and that he published "these statements in bad faith, with ill will and personal spite ... to harm [Octo] and undermine its business operations, value, and growth prospects."

For the reasons above, the Business Exclusion does not apply.

2. Directors Errors and Omissions Exclusion

PURE next argues that the Directors Errors or Omissions Exclusion applies. This provision precludes coverage for a "personal injury…arising out of an insured's actions, errors or omissions as a director or officer of any corporation or organization." In the Underlying Lawsuit, Octo alleged that the remarks made by Plaintiff giving rise to a claim for defamation occurred in November 2022 and were in relation to a potential acquisition of Octo by IBM. Plaintiff resigned from Octo's Board of Directors on January 13, 2022, ten months earlier. Plaintiff was not a Director when he made his remarks. His statements did not necessarily arise out of his actions as a Director (he wore other hats, including seller and employee), and the Underlying Lawsuit does not in any way limit the scope of the allegations to his actions taken as a Director. For these reasons, the Directors Errors or Omissions does not apply.

3. Contracts or Agreements Exclusion

PURE asserts as well that the Contracts or Agreements Exclusion, which precludes coverage for a "personal injury or property damages arising from any contract or agreement into by an insured," applies. The contracts upon which PURE bases its argument are non-disparagement clauses in Plaintiff's employment and Director agreements. The Underlying Lawsuit alleges defamation *per se* in addition to what might be considered breaches of the non-disparagement clauses in Plaintiff's contracts with Octo. Again, because there is the potentiality that Plaintiff's claims are covered, PURE must provide a defense.

4. Expected or Intended Injury Exclusion

PURE's final argument is that the Expected or Intended Injury Exclusion applies. Injuries "resulting from any criminal, willful, intentional, or malicious act or omission by any insured

which is intended to result in or would be expected by a reasonable person to cause personal injury or property damage" are not covered. PURE's argument is based on allegations in the Underlying Lawsuit (to which Virginia law applies) characterizing Plaintiff's defamatory remarks as "intentional" and "malicious." The Underlying Lawsuit, however, alleges reckless as well as intentional conduct. Furthermore, the intent requirement necessary to sustain a defamation action under Virginia law requires that a plaintiff "must show that the defendant knew that the statement was false or, believing that the statement was true, lacked a reasonable basis for such relief, or acted negligently in failing to determine the facts on which the publication was based." *Rosenthal v. R.W. Smith Company,* 260 F. Supp. 3d 588, 594 (W.D.Va. 2017) (quotations omitted). In Virginia, negligent defamation is subsumed within the proof of a claim for intentional defamation. *Fuisz v Selective Ins. Co.*, 61 F.3d 238, n. 3 (4th Cir. 1995).

The Underlying Lawsuit includes an allegation that Plaintiff "lacked any reasonable basis to believe that his defamatory statements were true," and Octo pled its defamation claims in such a way as to create the possibility that Plaintiff could be held liable for his defamatory statements, negligent and/or intentional. Because under Virginia law Octo could establish defamation by proving either knowing or negligent intent, because in Maryland an insurer owes a duty to defend when there is a mere potentiality for coverage, and because all doubts in this regard are resolved to the benefit of the insured, the Expected or Intended Injury Exclusion does not apply.

[redacted]

The Honorable Rachel T. McGuckian
Circuit Court for Montgomery County, Maryland

Entered: Clerk, Circuit Court for
Montgomery County, MD
March 5, 2025