

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

B.M.J. INC.,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:99cv727 (PCD)
	:
WAUSAU BUSINESS INSURANCE	:
COMPANY,	:
Defendant.	:

RULING ON MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on plaintiff’s complaint seeking a declaratory judgment as to whether defendant is under a continuing duty to provide a defense against a negligence claim by plaintiff’s employee. For the reasons set forth herein, the motion is **granted**.

I. BACKGROUND

Plaintiff, a Connecticut company, is insured by a Commercial General Liability Policy (“CGSL”) issued by defendant, a Wisconsin company. On October 14, 1998, Matthew Ibbitson, plaintiff’s employee, brought a state court action (“negligence action”) against plaintiff allegedly for injuries incurred as a result of plaintiff’s negligence in a forklift accident. The CGSL excludes from coverage “[b]odily injury to . . . [a]n employee of the insured arising out of and in the course of . . . [e]mployment by the insured; or . . . [p]erforming duties related to the conduct of the insured’s business” In August 2000, defendant retained counsel for plaintiff subject to a reservation of rights. In February 2001, defendant concluded that the policy did not cover plaintiff’s potential liability and withdrew its defense after plaintiff had retained alternate counsel. Plaintiff then filed the present complaint seeking a declaratory judgment as to defendant’s duty to defend in the negligence action.

III. DISCUSSION

Defendant moves for summary judgment arguing that plaintiff is not entitled to the relief it seeks as a matter of law. Plaintiff responds that questions as to whether its employee acted in the course of its employment, thus whether the relevant exclusion of coverage applies, preclude summary judgment.¹

A. Standard of Review

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991).

B. Analysis

The present matter involves whether defendant has a duty to defend plaintiff in the negligence action. A duty to defend is established by the terms of the insurance policy, the interpretation of which

¹ Defendant argues that plaintiff, by failing to specify that Ibbitson's negligence would place his conduct outside the relevant exclusion and by failing to specify the same in the Report of Planning Conference filed pursuant to FED. R. CIV. P. 26(f), should be, in effect, estopped from making that argument now. Plaintiff's complaint refers to Ibbitson's negligence action and seeks a declaratory judgment as to defendant's duty to defend it in that action. Plaintiff's "short and plain statement of the claim," FED. R. CIV. P. 8(a)(2), sufficiently notifies defendant of this claim and defendant may not realistically claim surprise at plaintiff's attempt to raise the issue of whether Ibbitson's conduct placed his claim outside the exclusion. See *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961). Defendant's argument that plaintiff is either limited to responding directly to defendant's argument or is precluded from raising arguments in opposition not previously defined is without merit.

is governed by state law. *N.Y. v. Blank*, 27 F.3d 783, 788 (2d Cir. 1994). The interpretation of the CGSL is thus governed by Connecticut law.²

An insurer's duty to defend arises from the allegations in the injured party's complaint. *Imperial Cas. & Indem. Co. v. State*, 246 Conn. 313, 323, 714 A.2d 1230 (1998). If the complaint includes a cause of action within the terms of the policy coverage, then the insurer is obliged to defend its insured. *Id.* at 324. The allegations of the complaint are interpreted broadly, requiring the insurer to defend when the allegations fall "even possibly within the coverage." *Id.*

The allegation against plaintiff is by an employee for injuries sustained during the work day as a result of plaintiff's negligence in maintaining its equipment. Coverage for this allegation is excluded on its face as bodily injury sustained by an employee in the course of employment. "[I]f the complaint alleges a liability which the policy does not cover, the insurer is not required to defend." *Smedley Co. v. Employers Mut. Liab. Ins. Co.*, 143 Conn. 510, 517, 123 A.2d 755 (1956).

In support of its argument that a duty to defend exists, plaintiff provides the affidavit of Robert Finkeldey, the president of plaintiff company. He states that Matthew Ibbitson was not authorized to conduct the maintenance on the forklift as he did, thus he was not acting within the scope of his employment as required by the exclusion of coverage for bodily injury. The inquiry into whether a duty to defend exists is a legal inquiry limited to the text of the complaint and the insurance policy, not a fact-based inquiry. *Community Action For Greater Middlesex County, Inc. v. Am. Alliance Ins. Co.*, 254 Conn. 387, 395, 757 A.2d 1074 (2000). It is not appropriate to extend this inquiry beyond a

² Defendant argues that Connecticut law applies to the interpretation of its policy. Plaintiff makes no argument as to the appropriate choice of law. Connecticut and Wisconsin law do not differ in any significant respect as to whether a duty to defend exists, *see Radke v. Fireman's Fund Ins. Co.*, 577 N.W.2d 366, 369 (Wis. Ct. App. 1998), thus choice of law issues are of no moment. *See Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128 (2d Cir. 2001).

comparison of the complaint to the insurance policy provisions. *See id.* “The obligation of the insurer to defend . . . [depends] on whether [the injured party] has, in his complaint, stated facts which bring the injury within the coverage.” *Smedley Co.*, 143 Conn. at 516. As the allegations within Matthew Ibbitson’s complaint constitute bodily injury excluded from coverage by the CGSL, the motion for summary judgment is granted.³

IV. CONCLUSION

Defendant’s motion for summary judgment (Doc. 10) is **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March __, 2002.

Peter C. Dorsey
United States District Judge

³ Plaintiff may be arguing that defendant, by initially providing a defense before plaintiff retained separate counsel, assumed a duty to continue to provide a defense until it was relieved of that duty by a declaratory judgment that it had no such duty. An insurer presented with claims against its insured has two options: (1) it can refuse to defend or (2) it may defend under a reservation of right to contest the coverage. *Missionaries of the Co. of Mary, Inc. v. Aetna Cas. & Sur. Co.*, 155 Conn. 104, 113, 230 A.2d 21 (1967). Defendant elected to do neither or a hybrid of both. It is unlikely that by providing some defense rather than by providing no defense at all that an insurer would assume potential liability different from that if it elected not to defend at all. *See Black v. Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 160, 681 A.2d 293 (1996) (liability for refusal to defend when required to do so is consequential damages including amount of settlement). There is further no authority for the proposition that an insurer under the present circumstances would be required to defend plaintiff in the absence of a duty to do so. *Cf. Lockwood Int’l, B.V. v. Volm Bag Co.*, 273 F.3d 741, 744 (7th Cir. 2001) (applying Wisconsin law in concluding that insurer could withdraw defense in the absence of covered claims).