

IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE
AT KNOXVILLE

ACUITY, a Mutual Insurance Company,
Plaintiff,
v.
NAPLES LITTLE NAPOLI ITALIAN RESTAURANT, INC., ROBERT LUPER, REBECCA LUPER, TRACEY HAMDALLAH, and EAZY EATZ, INC.,
Defendants.

[Handwritten signature]
2011-07-13
11:07 AM

NO. 2-57-12

COMPLAINT FOR DECLARATORY JUDGMENT

Comes now Plaintiff, ACUITY, a Mutual Insurance Company, (hereinafter "ACUITY"), pursuant to T.C.A. §§ 29-14-102 and 29-14-103, and alleges as follows:

I. THE PARTIES

1. ACUITY is an insurance company incorporated under the laws of the State of Wisconsin.

2. That the Defendant, Naples Little Napoli Italian Restaurant, Inc., is a Tennessee Corporation located in Knox County, Tennessee, and may be served with process in care of its registered agent, Rebecca J. Luper, 5500 Kingston Pike, Knoxville, Tennessee, 37919.

3. That the Defendants, Robert Luper and Rebecca Luper, are individuals and may each be served with process at 5500 Kingston Pike, Knoxville, Tennessee, 37919.

4. That the Defendant, Tracey Hamdallah, is an individual and may be served with process at 1117 Park Hill Circle, Knoxville, Tennessee, 37919.

176
59

5. That the Defendant, Eazy Eat, Inc., is a Tennessee Corporation located in Knox County, Tennessee and may be served with process in care of its registered agent, Cindy Lay, 5211 Kingston Pike, Knoxville, Tennessee, 37919.

II. VENUE AND JURISDICTION

6. As we more fully set out below, ACUITY issued Commercial Umbrella and Bis-Pak Insurance Policy No. L32760 to Naples Little Napoli Italian Restaurant, Inc. (hereinafter "Naples") at its address of 5500 Kingston Pike, Knoxville, Tennessee, 37919. The policy had an effective date of January 1, 2008 to January 1, 2009. A claim against the policy has been submitted by Naples arising out of a Complaint filed against Naples by Eazy Eat, Inc. (hereinafter "Eazy Eat") under the style of Eazy Eat, Inc. v. Naples Little Napoli Italian Restaurant, Inc., Robert Luper, Rebecca Luper, Tracey Hamdallah, and Margaret Perry, (hereinafter "the Complaint"), in the Circuit Court for Knox County, Tennessee with Case No. 354309. Consequently, venue is proper and this Honorable Court has jurisdiction over the subject matter and the parties herein.

7. The acts and/or admissions giving rise to the submission of insurance claims under the policy of insurance referenced herein arose from the business relationship between Naples and Eazy Eat and arose for actions which occurred in Knox County, Tennessee. Consequently, venue is proper and this Honorable Court has jurisdiction over the subject matter and the parties herein.

8. ACUITY alleges and avers that an actual controversy exists between it and the Defendants within the meaning of the Tennessee Declaratory Judgment Act, and this Honorable Court is vested with the power in the instant case to declare and adjudicate the rights and legal relationships of ACUITY and the Defendants with

reference to the issues herein. Eazy Eatz has been joined as the Tennessee Declaratory Judgment Act requires that provides that:

When declaratory judgment is sought:

All persons **shall be** made parties who have a claim or any interest which would be affected by the declaration. . . .

T.C.A. § 29-14-104 (emphasis added). Thus, Eazy Eatz has been joined as required by the statute.

III. FACTS

9. On or about January 1, 2008, ACUITY issued Commercial Umbrella and Bis-Pak Policy No. L32760 to Naples at the address of 5500 Kingston Pike, Knoxville, Tennessee, 37919. A true and exact copy of the ACUITY policy is attached hereto as Exhibit 1, and is hereafter referred to as "the Policy". The applicable policy period was January 1, 2008 to January 1, 2009.

10. The Policy provides liability coverage only in accordance with the Policy terms, conditions, definitions and exclusions.

11. On or about October 30, 2009, Eazy Eatz filed a Complaint against Naples in the Knox County Circuit Court alleging that Naples misappropriated Eazy Eatz unique caramel cake recipe and sold the caramel cake at Naples Restaurants. Eazy Eatz also alleged Naples' employee, Tracey Hamdallah, worked previously at Eazy Eatz Bakery and learned how to make the caramel cake while working for Eazy Eatz.

12. Further, Eazy Eatz alleged Naples advertised it sold caramel cakes on its marquee/outdoor sign and that Mr. and Mrs. Luper "bragged" Naples' caramel cake was in fact "Eva's Caramel Cake". Finally, Eazy Eatz allege that these acts constituted a

violation of the Tennessee Uniform Trade Secrets Act (T.C.A. § 47-25-170 et. seq.) and common law conversion/theft of property.

13. The Complaint asserted that Eazy Eatz was seeking the following relief from the Defendants. First, that Eazy Eatz be awarded a judgment against Defendants, jointly and severally, and the appropriate amount not to exceed \$250,000.00 as and for compensatory damages. Further, Plaintiff be awarded a judgment against Defendants, jointly and severally, for treble damages pursuant to the Tennessee Uniform Trade Secrets Act (T.C.A. § 47-25-1701 et. seq.) or alternatively, the Plaintiff be awarded a judgment against Defendants jointly and severally in an amount not to exceed \$250,000.00 as and for punitive damages.

IV. DECLARATORY RELIEF SOUGHT

14. ACUITY avers that the Policy issued to Naples under Policy No. L32760, does not provide coverage for Naples and all other possible insureds under the Policy against the allegations found in the lawsuit Eazy Eatz filed against Naples in the Circuit Court for Knox County, Tennessee with Case No. 354309. This Policy includes commercial general liability coverage subject to each occurrence for bodily injury and property damage. The Policy Insurance Agreement states as follows:

1. Business Liability

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury, property damage or personal and advertising injury* to which this insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury, property damage or personal and advertising injury* to which this insurance does not apply. We may at our discretion investigate any *occurrence* or offense and settle any claim or *suit* that may result. But:

- (1) The amount we will pay for damages is limited as described in the Liability and Medical Expenses Limits of Insurance Section; and
- (2) Our right and duty to defend ends when we have used up the applicable Limit of Insurance in the payment of judgments, settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension – Supplementary Payments.

b. This insurance applies:

- (1) To *bodily injury or property damage* only if:
 - (a) The *bodily injury or property damage* is caused by an *occurrence* that takes place in the *coverage territory*; and
 - (b) The *bodily injury or property damage* occurs during the policy period.
 - (c) Prior to the policy period, no insured listed under item 1 of Who Is An Insured and no *employee* authorized by you to give or receive notice of an *occurrence* or claim, knew that the *bodily injury or property damage* had occurred, in whole or in part. If such a listed insured or authorized *employee* knew, prior to the policy period, that the *bodily injury or property damage* occurred, then any continuation, change or resumption of such *bodily injury or property damage* during or after the policy period will be deemed to have been known before the policy period.
- (2) To *personal and advertising injury* caused by an offense arising out of your business, but only if the offense was committed in the *coverage territory* during the policy period.

15. The Policy provides the following exclusions which are applicable to this case:

EXCLUSIONS

1. **Applicable to Business Liability Coverage**

This Insurance does not apply to:

a. Expected or Intended Injury

Bodily injury or *property damage* expected or intended from the standpoint of the insured. This exclusion does not apply to *bodily injury* resulting from the use of reasonable force to protect persons or property.

16. The Policy provides the following definitions for "Personal and Advertising Injury" as follows:

14. "*Personal and advertising injury*" means injury, including consequential *bodily injury*, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your *advertisement*; or
- g. Infringing upon another's copyright, trade dress or slogan in your *advertisement*.

17. The Policy defines "advertisement" as follows:

1. "*Advertisement*" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

18. In order for the coverage provided by the Policy to apply to the allegations contained in the Complaint there must be a covered "bodily injury or property damage, caused by an occurrence." Occurrence is defined by the Policy as "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Further, in order for this coverage to apply for "personal and advertising injury" there must be a covered personal and advertising injury caused by a covered offense arising out of Naples Little Napoli Italian Restaurant, Inc.'s business.

19. The act of common law conversion/theft of property requires intent by the insured to convert and/or take the property. This intentional act of conversion/theft of property is specifically excluded in the Policy as in "expected or intended injury". Therefore, there is no coverage obligation under the Policy for the allegations of common law conversion/theft of property.

20. Further, the allegations in the Complaint that Naples' misappropriation of the caramel cake recipe and the selling of the caramel cake at the restaurant is also excluded under expected or intended injury exclusion. The allegations of misappropriation in the Complaint allege an intentional act. Thus, the expected and intended injury "exclusion does apply and excludes coverage."

21. Further, even if the misappropriation of the recipe was not an intentional act, there would be no coverage under the Policy because there is no coverage under the "personal and advertising injury" provisions of the Policy. There is no coverage for misappropriation under this provision because misappropriation does not meet the definition of an offense which would cause a covered event under the Policy or a covered injury. Under the Policy's definition of "personal and advertising injury",

misappropriation is not defined as an offense which could cause a covered injury. If misappropriation is not a covered offense then there is no coverage. Therefore, the Policy does not provide coverage for the allegations of misappropriation of the caramel cake recipe.

21. ACUITY avers the Policy does not provide coverage to Naples and all insureds for the claims of Eazy Eatz as set forth in the Complaint.

WHEREFORE, premises considered, ACUITY prays as follows:

- (1) That the Defendants be required to answer and appear herein;
- (2) That the Court adjudicate and declare that ACUITY's Commercial Umbrella and Bis-Pak Insurance Policy No. L32760 provides no coverage whatsoever for any of the claims asserted against Defendants in the Complaint regarding the misappropriation and sale of the caramel cake recipe;
- (3) That the costs of this action be assessed against the Defendants; and
- (4) For such other and further legal and equitable relief as this Court deems just and proper.

Respectfully submitted,



GORDON C. AULGUR
Registration No. 019953
Attorney for Plaintiff

**BREWER, KRAUSE, BROOKS,
CHASTAIN & BURROW, PLLC**
P. O. Box 23890
Nashville, TN 37202-3890
(615) 256-8787