IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ERIE INSURANCE EXCHANGE	:	**APRIL TERM, 2012**
v.	:	**NO. 00220**
JOSEPH PALMER, IRENE PALMER, JENNIFER D. PALMER, JOSEPH D. PALMER AND IRENE O. PALMER TRUST, PALMER APARTMENTS AND LORNA BERNHOFT	:	**COMMERCE PROGRAM** **CONTROL NO. 13041428, 13041481, 13041480**

ORDER

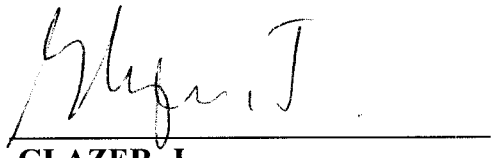
AND NOW, this 24th day of June, 2013, upon consideration of the cross-motions for summary judgment of Erie Insurance Exchange, Joseph Palmer, Irene Palmer, Jennifer D. Palmer, Joseph D. Palmer and Irene O. Palmer Trust, Palmer Apartments and Lorna Bernhoft, and any responses thereto, it is hereby

ORDERED

as follows:

1. Only a single limit of liability, in the amount of $1,000,000.00, under the dwelling property/liability policy issued to insure 326 S. 42nd Street, Philadelphia, PA, under policy number Q140102517A is available to Joseph and Irene Palmer;
2. Only a single limit of liability, in the amount of $1,000,000.00, under the business catastrophe liability policy, which includes punitive damages, issued to Joseph and Irene Palmer, under policy number Q260171052A is available to Joseph and Irene Palmer;
3. All other motions are denied.

BY THE COURT:



GLAZER, J.

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OPINION

GLAZER, J. June 24, 2013

Before the court are the cross-motions for summary judgment of Erie Insurance Exchange, Joseph Palmer, Irene Palmer, Jennifer D. Palmer, Joseph D. Palmer and Irene O. Palmer Trust, Palmer Apartments, and Lorna Bernhoft. For the reasons set for the below, plaintiff's motion for summary judgment is granted with respect to the dwelling property/liability insurance, under policy Q140102517A, and the business catastrophe liability policy. All other motions are denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Erie Insurance Exchange ("Erie"), commenced the present action on April 3, 2012, seeking declaratory judgment pursuant to 42 Pa. C.S.A. § 7531. This claim for declaratory judgment arises out of an underlying action in which defendant, Lorna Bernhoft ("Bernhoft"), was injured at 326 South 42nd Street, Philadelphia (the "property"). The property was owned and/or managed by defendants Joseph Palmer, Irene Palmer, Joseph D. Palmer and Irene O.

Palmer Trust, Jennifer Palmer, and Palmer Apartments ("Palmers"). Jennifer Palmer is the child of Joseph and Irene Palmer. Defendant Bernhoft alleges that when she attempted to sit on an abandoned skylight, a board shifted, and she fell through the skylight and resulting in paraplegia. It is undisputed that defendant Bernhoft's accident occurred on the property.

Subsequently, defendant Bernhoft filed a complaint against the Palmers in the Philadelphia Court of Common Pleas alleging negligence and negligence per se. At the time of the accident, it is undisputed that Erie had issued ten separate Property/Dwelling Liability Insurance policies ("DPL policies") to Joseph Palmer and Irene Palmer. All of the DPL policies issued to the Joseph and Irene Palmer were written on the same form and provide:

> A. Coverage L – Personal Liability
> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
> 1. Pay up to our limit of liability for the damages for which an "insured" is legally liable. Damages include prejudgment interest awarded against an "insured"; and
> 2. Provide a defense at our expense by counsel of our choice even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle any or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.

See plaintiff's motion for summary judgment, Exhibit I-R. Further, all of the DPL policies include an exclusion as follows:

> E. Coverage L – Personal Liability and Coverage M – Medical Payments To Others
> Coverages L and M do not apply to the following:
> ...
> 3. "Insured's" Premises Not an "Insured Location"
> "Bodily injury" or "property damage" arising out of a premises:
> a. Owned by an "insured";
> b. Rented to an "insured"; or

c. Rented to others by an "insured"
that is not an insured "location";

Id. Joseph and Irene Palmer did not reside in any of the insured properties and therefore Erie issued ten (10) Premise Liability endorsements. The Premise Liability endorsements schedule provides: "Insure [sic] location" is extended to include the premises shown in the Schedule above." Id. at Exhibit I-R. The space provided for "above" is left blank but an asterisk next to the title "Schedule" provides that "[e]ntries may be left blank if shown elsewhere in this policy for this coverage." Id. Moreover, "[M]edical Payments to others are restricted to apply only with respect to 'bodily injury' or 'property damage' arising out of the ownership, maintenance, occupancy or use of the premises shown below." Id. The space provided for "below" is also left blank.

Each one of the ten policies identifies one insured property on the declaration page. Id. On the declaration of policy Q14-0102517, it states, "the property insured by this policy is located at – 326 South 42nd St., Philadelphia, PA 19104." Id. at Exhibit I. Further, this policy provides for a $1,000,000.00 limit of liability coverage. Id.

In addition to the DPL policies, Erie issued a Business Catastrophe Liability ("BCL policy") insurance policy which is an umbrella policy. Id. at Exhibit S. The BCL policy has a description of operations being dwelling properties and the limit being $1,000,000.00 per occurrence. Id. The BCL policy extends coverage to the DPL policies insuring the different named locations.

Finally, Erie issued a HomeProtector policy of insurance ("JP policy") to defendant Jennifer Palmer. This policy was in effect at the time of the accident. The JP policy, "applies to bodily injury, property damage, and personal injury losses occurring anywhere in the world." Id. at Exhibit T. The JP policy also provides in its exclusions that the policy does not cover

"[b]odily injury, property damage or personal injury arising out of business pursuits of anyone we protect." Id. Moreover, the JP policy provides a limitation to the exclusion which states that the JP policy does cover, "business pursuits of salespersons, collectors, messengers and clerical office workers employed by others." Id. Further, the JP policy also does cover "occasional business activities of anyone we protect." Id. Plaintiff and defendants now bring cross-motions for summary judgment seeking declaratory judgment on the above policies. As explained below, plaintiff's motion for summary judgment as to the dwelling property/liability insurance, under policy Q140102517A, and the business catastrophe liability policy is granted. All other motions are denied.

DISCUSSION

I. Standard of Review

Once the relevant pleadings have closed, any party may move for summary judgment, "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa.R.C.P 1035.2(1). "Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law." Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001).

Declaratory judgment may be invoked to interpret the obligations under an insurance contract. General Accident Ins. Company of America v. Allen, 692 A.2d 1089, 1095 (Pa. 1997). The interpretation of an insurance contract regarding the existence or non-existence of coverage is generally performed by the court. Minnesota Fire & Cas. Co. v. Greenfield, 549 Pa. 333, 855 A.2d 854, 861 (2004) (quotation omitted). Moreover, the burden of proving the exclusion is

upon the insurer. Rothstein v. Aetna Insurance Company, 216 Pa. Super. 418, 423, 268 A.2d 233, 235 (1970).

II. The Dwelling Property/Liability Insurance Policy

Under Pennsylvania law, if "the language of the contract is clear and unambiguous, a court is required to give effect to that language." Prudential Prop. & Cas. Ins. Co. v. Sartno, 588 Pa. 205, 903 A.2d 1170, 1174 (2006) (citation omitted). Defendants' argue that they are entitled to $10,000,000.00 in coverage for the underlying action. However, this argument is flawed. The language of the policy is clear and unambiguous.[1] Under Coverage L in the policies, "[i]f a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will: pay up to our limit of liability for the damages for which an "insured" is legally liable." See plaintiff's motion for summary judgment, Exhibit I-R. While it is undisputed that a claim was brought because of bodily injury caused by an occurrence as to one of the properties in which coverage applies, defendants argue that because the Premise Liability endorsement schedule is left blank, all ten (10) of the DPL policies are triggered and the plaintiff's are legally liable to provide coverage in the amount of $10,000,000.

However, the exclusion in the DPL policies states that "Coverage L and M do not apply to the following... bodily injury or property damage arising out of a premises ... that is not an insured location." Id. at Exhibit I. An insured location is defined as:

> "Insured location" means:
>
> a. The "residence premises"
> b. The part of other premises, other structures and ground used by you as a residence; and

[1] Defendants' argue in the alternative that the language in the contract is ambiguous. This court finds defendants argument meritless.

1. Which is shown in the declaration; or
2. Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises described in a. and b. above.
d. Any part of a premises:
   1. Not owned by an "insured"; and
   2. Where an "insured" is temporarily residing;
e. Vacant land, other than farm land, owned by or rented to an "insured"
f. Land owned by or rented to an "insured" on which a one, two, three, or four family dwelling is being built as a residence for an "insured";
g. Individual or family cemetery plots or burial vaults of an "insured"; or
h. Any part of a premises occasionally rented to an "insured" for other than "business use."

As mentioned above, the insured did not reside at any of the locations. Therefore, a Premises Liability endorsement schedule was included in the policies to provide coverage to the rental properties. Defendants allege that the Premises Liability Endorsement Schedules, having been left blank, has the effect of expanding the coverage to include all ten (10) policies. However, the Premises Liability endorsement schedule, which is included in each and every one of the policies, confirms that the policy should not be extended because of the singular wording in the schedule. The schedule states, "[e]ntries may be left blank if shown elsewhere in ***this policy*** for this coverage." (emphasis added). Each policy, including the policy that specifically names 326 South 42nd St., Philadelphia PA, where the accident occurred, only references one property which is provided for on the declaration page. Given the clear language of the insurance contract, the court finds that coverage is triggered under the policy Q14-0102517 which states the property insured by this policy is located at – 326 South 42nd St., Philadelphia, PA 19104 – in the amount of $1,000,000.00 and not under the other nine policies.[2]

[2] Plaintiff concedes that a single limit of liability, in the amount of $1,000,000.00, under the business catastrophe liability policy issued to Joseph Palmer and Irene Palmer under Q260171052A is available to cover Joseph and Irene Palmer in the underlying litigation. Moreover, because the court finds that only one policy is triggered by the underlying action, the court further finds that a single limit of liability of $1,000,000.00 is available. Further, the

III. JP Policy of Insurance for Jennifer Palmer

Plaintiff argues that Jennifer Palmer is not covered under the JP policy because her conduct falls within an exclusion under the policy. Conversely, defendants argue that Jennifer Palmer is covered to the extent of $500,000.00. Defendants support this argument by reasoning that because Jennifer Palmer testified in the underlying action that her activities related to the property were not "business pursuits" and were clerical in nature that coverage is appropriate. While the policy does not cover "[b]odily injury, property damage or personal injury arising out of business pursuits of anyone we protect," it does cover, "business pursuits of salespersons, collectors, messengers and clerical office workers employed by others." Id. at Exhibit T. "Business" is defined by the JP policy as "as full-time, part-time or occasional activity in as a trade profession or occupation, including farming." Id.

A business pursuit contemplates two elements – continuity and profit motive. Old Guard Mut. Ins. Co. v. Quigley, 1990 WL 255912, (Pa.Com.Pl.1990). "As to the profit-motive element, one must show the activity as a means of livelihood, gainful employment, means of earning a living procuring subsistence or profit, or commercial transaction." Id. (citation omitted). The issue is motive and not actual compensation. Id. The only evidence that the plaintiff has offers to prove Jennifer Palmer had a profit motive is the fact that the subject property is held in a trust for the children of defendants Joseph Palmer and Irene Palmer. Plaintiff does not include the terms of the trust as to whether the trust is revocable, who receives income from the trust, or as to who the beneficiaries are. Moreover, defendants allege that Jennifer Palmer did not know about the trust or that the property was owned by a trust.

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court finds that the BCL policy applies to punitive damages. The exclusion that plaintiff identifies states, "[t]his insurance does not apply 'bodily injury' or 'property damage' specifically excluded by ..." See plaintiff motion for summary judgment, Exhibit S. Given the plain meaning of the exclusion, which does not mention excluding damages but only bodily injury or property damage, the court finds plaintiff's argument meritless.

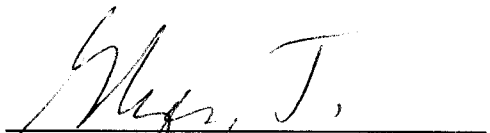
Therefore, because of the lack of evidence, this court finds that plaintiff has not satisfied its burden of proof that there was a profit motive and thus plaintiff's motion for summary judgment is denied.

Further, "[o]ral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact." See note Pa. R.C.P. 1035.2 (citing Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932); Penn Center House, Inc. v. Hoffman, 520 Pa. 171, 553 A.2d 900 (1989)). The only evidence that the Palmer defendants provide is the self serving testimony of Jennifer Palmer and Joseph Palmer. Therefore, defendants' motion for summary judgment as to coverage of Jennifer Palmer is also denied.

CONCLUSION

Based on the foregoing, plaintiff's motion for summary judgment is partially granted in respect to the dwelling property/liability insurance, under policy Q140102517A, in the amount of $1,000,000.00 and the business catastrophe liability policy, in the amount of $1,000,000.00. All other motions are denied.

BY THE COURT:



GLAZER, J.