

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

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DIAMOND STATE INSURANCE CO.,	:	April Term, 2000
Plaintiff,	:	
v.	:	No. 0395
	:	
NUFAB CORP. d/b/a	:	Commerce Case Program
GOTHUM NIGHTCLUB, and	:	
	:	Control No. 082145
EIGHTH FLOOR, INC. t/d/b/a	:	
THE EIGHTH FLOOR NIGHT CLUB	:	
Defendants.	:	

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**ORDER**

AND NOW, this 25th day of October, 2001, upon consideration of the Motion for Summary Judgment of Plaintiff Diamond State Insurance Co., (“Diamond”), any response thereto, all other matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that plaintiff’s Motion is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.

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**MEMORANDUM OPINION**

Plaintiff Diamond State Insurance Co., (“Diamond”) filed this Motion for Summary Judgment in a declaratory judgment action filed against its insured Nufab Corp. t/d/b/a/ Gothum Nightclub (“Gothum”) and Eighth Floor, Inc. t/d/b/a The Eighth Floor Night Club (“Eighth Floor”). For the reasons set forth below, the plaintiff’s Motion is denied.

**BACKGROUND**

The present matter arises from a 1997 action filed by the Eighth Floor against Gothum based on a cause of action of nuisance. Diamond, Gothum’s insurance provider for the period of September 26, 1996 to December 19, 1996, filed this declaratory action claiming that it has no duty to defend or indemnify its insured Gothum against the 1997 action brought by the Eighth Floor. On August 31, 2001, Diamond timely filed this motion for summary judgment.

**DISCUSSION**

“Summary judgment is proper when the pleadings, depositions, answers to interrogatories,

admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Further, “in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non- moving party.” Id. Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.” Id. (citations omitted). Finally, a court must grant a motion for summary judgment when a non-moving party fails to “adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor.” Ertel v. Patriot News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996).

Here, the motion for summary judgment is denied because there exists a “genuine issue of a material fact as to a necessary element of the cause of action,” namely whether the nuisance and the incidents alleged by the Eighth Floor’s complaint took place during Diamond’s coverage period. Diamond argues that insurance policies apply only to conduct occurring during the policy period. Pl’s Mem. of Law at 15. Here, the specific shootings and assaults cited to in the Eighth Floor’s complaint occurred before and after the duration of the policy. Id. Since “none of the specific incidents alleged by the Eighth Floor complaint took place during the policy period,” Diamond argues that there is no coverage for conduct occurring outside the effective dates of the policy. Id.

The Eighth Floor directly disputes this material fact. The nuisance complained about, argues the Eighth Floor, began “in 1995 and w[as] ongoing and continuous in nature through 1998.” Def’s Reply Mem of Law at §4. “The injury suffered by Eighth Floor did not cease to exist on September 26, 1996 and then reassert itself on December 19, 1996.” Id. Specifically, in support of its claim that the nuisance

was ongoing and continuous during Diamond's coverage, the Eighth Floor directs this court to the depositions of both Michael and Steven Sipio, the owners of the Eighth Floor. Steven Sipio stated that "once a week [Gothum] had overcrowding there, at least once or twice a week we would have problems." Def's Reply Mem of Law, Exh B at 172. "At least once a month for the time that they were opened" Gothum had artists come in and they would oversell their venue causing more overcrowding. Id at 173. Steven Sipio attested to the fact that there was gunfire on a weekly basis which would adversely affect the Eighth Floor. Id at 175. Furthermore, Michael Sipio also testified that these problems were ongoing each week since early May 1995. Def's Reply Mem of Law, Exh A at 18-19.

As a result of the nuisance, the Eighth Floor was forced to change and limit its operations, resulting in an economic damages. In 1994, Steven Sipio testified that the Eighth Floor was open four nights a week. Def's Mem of Law, Exh B at 15. However, in 1996, during the ongoing nuisance, "[Gothum] put us in a position where our budget was crunched" so the Eighth Floor "delete[ed] Wednesday and Thursday" nights. Id at 20. Moreover, the Eighth Floor argues that it suffered damages as a result of Gothum's actions specifically during Diamond's period of coverage. The expert report of Rick Ectkovitz lists the specific economic losses suffered by the Eighth Floor, during not only Diamond's period of coverage in 1996, but also for years 1995 through and including 1999. Def's Reply Mem of Law, Exh C.

This court finds that since a genuine issue of a material fact as to a necessary element of the cause of action exists, the motion for summary judgment is denied. Based on the evidentiary record, the Eighth Floor successfully adduces sufficient evidence on whether Gothum's alleged nuisance occurred during Diamond's coverage. This issue is essential to this case as Diamond would only have a duty to defend and indemnify Gothum during the September to December 1996 policy period. However, since

it is not clear and free from doubt that Diamond is entitled to judgment as a matter of law, and both parties dispute the necessary element of whether the incidents alleged contributing to the Eighth Floor's nuisance claim occurred during the policy period, this court, pursuant to Pa.R.C.P. 1035.2, denies this motion for summary judgment.

**CONCLUSION**

For the reasons stated above, this court denies Diamond's Motion for Summary Judgment.

BY THE COURT:

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JOHN W. HERRON, J.

DATE:           October 25, 2001