

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

DOCKETED

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CIVIL DIVISION

NIC INSURANCE COMPANY, : November 2010
Plaintiff, :
v. : No. 4286
PJP CONSULTING, LLC t/a CAVANAUGH'S :
RIVER DECK and DZARNYI PUKUMA, : COMMERCE PROGRAM
Defendants. :
Control Number 11080224

ORDER

AND NOW, this 15th day of February 2012, upon consideration of Plaintiff NIC Insurance Company's Motion for Summary Judgment, Defendant PJP Consulting, LLC t/a Cavanaugh's River Deck Cross Motion for Summary Judgment and all responses in opposition, it hereby is **ORDERED** that Plaintiff NIC's Motion for Summary Judgment is **GRANTED** and Defendant PJP Consulting, LLC's Cross Motion for Summary Judgment is **DENIED**.
The complaint is dismissed.

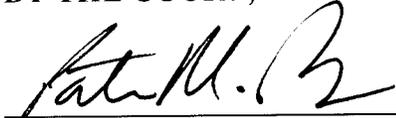
Plaintiff NIC Insurance Company's duty to defend or indemnify Defendant PJP Consulting, LLC t/a Cavanaugh's River Deck ("Cavanaugh") or any other Defendant, person, firm, corporation, entity or organizing in connection with the action of Dzarnyi Pukuma v. PJP Consulting, Inc., March Term 2008 No. 1228 is limited to the \$50,000 sublimit of insurance provided by the Assault and Battery Limits of Liability Endorsement to Commercial Lines Policy Number CH06CGL00226-002. The sublimit of liability provided by the Assault and Battery Limits of Liability Endorsement is eroded by claims expenses incurred by NIC and

Nic Insurance Company V-ORDOP



NIC has no duty to indemnify PJP Consulting, LLC t/a Cavanaugh's River Deck for any punitive damage awarded against Cavanaugh in the underlying action.

BY THE COURT,



PATRICIA A. McINERNEY, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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NIC INSURANCE COMPANY,	:	November 2010
Plaintiff,	:	
v.	:	No. 4286
PJP CONSULTING, LLC t/a CAVANAUGH’S	:	
RIVER DECK and DZARNYI PUKUMA,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 11080224
	:	

OPINION

Presently pending before the court are cross motions for summary judgment filed by Plaintiff NIC Insurance Company (“NIC”) and PJP Consulting, LLC t/a Cavanaugh’s River Deck (“Cavanaugh”). This is a declaratory judgment action filed by NIC against Cavanaugh’s and Dzarnyi Pukuma (“Pukuma”) seeking a declaration that NIC’s duty to defend Cavanaugh in the action captioned *Dzarnyi Pukuma v. PJP Consulting, LLC P/A Cavanaugh’s River Deck*, September Term, 2008 No. 1228 is limited to a \$50,000 sublimit of insurance provided by an Assault and Battery Limit of Liability Endorsement (“A&B Endorsement”). Additionally, NIC seeks a declaration that the \$50,000 limit is eroded by legal fees and other expenses related to Cavanaugh’s claim for defense and indemnity and that NIC has no duty to indemnify Cavanaugh for any punitive damages awarded against Cavanaugh in the underlying action.

Factual and Procedural Background

Cavanaugh’s is a bar/breakfast restaurant at 417 North Columbus Boulevard in Philadelphia, Pa. On September 6, 2006, while Pukuma was a patron at Cavanaugh’s he was attacked by four visibly intoxicated patrons. The initial confrontation occurred inside Cavanaugh’s where Pukuma was beat, struck on the head with a bottle and had his face slashed. Employees of Cavanaugh’s removed the four attackers from the bar but failed to call the police.

Thereafter, employees of Cavanaugh's also removed Pukuma from the bar while his attackers were still outside. Once outside and while Pukuma was still "restrained" by Cavanaugh employees, Pukuma was beaten and stabbed in the chest by the four ejected patrons. The four assailants fled the scene. Pukuma suffered injuries including but not limited to a collapsed lung, stab wound in the left side, lacerations, cerebral concussion and post concussion syndrome.

In March 2008, Pukuma filed suit against PJP Consulting, LLC. On October 1, 2008 Pukuma filed an amended complaint and subsequently filed a second amended complaint. The second amended complaint alleges as follows:

14. The four drunken Patrons were taken out of Cavanaugh's by Cavanaugh's agents or employees, without additional monitoring but no police were called at that time, even though Plaintiff was bleeding and injured by the assault and battery.

15. At the aforesaid time and place, Plaintiff [Mr. Pukuma] was also taken out of Cavanaugh's by an agent, servant or employee of Cavanaugh's.

16. Defendant Cavanaugh's agent, servant or employee restrained Plaintiff as the four drunken Patrons again assaulted Plaintiff outside the building but still on Cavanaugh's premises.

17. While Cavanaugh's agent, servant or employee was still restraining Plaintiff, one of the four drunken Patrons stabbed Plaintiff in the chest, causing him to sustain severe injuries as will be set forth herein.

....
21. Defendant, by and through its security agents, had a duty to act with reasonable care in controlling the entry and exit of its patrons from Cavanaugh's premises.

22. Defendant, by and through its security agents, knew or should reasonably have known that after escorting the Drunken patrons to the exterior area of the premises that those patrons still had direct access to that area of the premises.

23. Defendant's security agents knew or should reasonably have known that plaintiff would be exposed to additional danger of physical harm at the hands of drunken Patrons if he were placed in an area where the drunken Patrons could gain immediate access to him.

32. Plaintiff's injury was a direct and proximate result of the carelessness and negligence of Defendant Cavanaugh's and Defendant's agents.

33. The negligence and carelessness of Defendant Cavanaugh's and Defendant's agents as set forth herein increased the risk of harm to Plaintiff.

34. The negligence and carelessness of Defendant Cavanaugh's and Defendant's agents consisted of but is not limited to:

....
(g) Escorting plaintiff to the exterior portion of the premises knowing or, in the exercise of due care under the circumstances, should have known that plaintiff would be exposed to further injury at the hands of the drunken Patrons.

(h) Failing to exercise reasonable care in restraining Plaintiff, which enabled the attacking drunken Defendants to attack and stab Plaintiff.¹

NIC is defending Cavanaugh's in the underlying action under the A&B Endorsement pursuant to a full reservation of rights. Pukuma's action is currently stayed pending resolution of the instant motion.

Insurance Provisions

NIC issued a Commercial General Liability Policy to Cavanaugh's River Deck and Kat Man Du Investors which was in effect from April 16, 2006 to April 16, 2007. The NIC policy provides general liability coverage with \$1 million dollar per occurrence and aggregate limit of liability for "damages because of 'bodily injury'² ... to which the insurance applies."³ The General Liability Coverage also included separate Liquor Liability Coverage that was also subject to a \$1 million dollar limit of liability for each common cause and in the aggregate for

¹ Exhibit "B" to Plaintiff's Motion for Summary Judgment – Second Amended Complaint.

² Bodily injury is defined by the policy as bodily injury, sickness or disease sustained by a person including death resulting from any of these at any time. Exhibit "B" to Plaintiff's Motion for Summary Judgment NIC000000024.

³ Exhibit "B" to Plaintiff's Motion for Summary Judgment NIC 000000012.

“damages because of ‘injury’ to which this insurance applies if liability for such ‘injury’⁴ was imposed on the insured by reason of the selling, serving, or furnishing of any alcoholic beverage.”⁵

In addition to the Commercial General Liability Policy and the Liquor Liability Policy, Cavanaugh also purchased from NIC an A&B Limits of Liability Endorsement which modified the general liability and liquor liability coverage policies. The A&B Endorsement provides a \$50,000 sublimit of liability and provides in relevant part as follows:

In consideration of the premium charge, and subject to all of the terms and conditions of this policy, we will pay those sums, which the insured becomes legally obligated to pay as damages, arising out of or resulting from “assault and/or battery” as set forth below:

A. The following provision is added to SECTION III-LIMITS OF INSURANCE of both the LIQUOR LIABILITY and the COMMERCIAL GENERAL LIABILITY COVERAGE PARTS:

The Assault and Battery⁶ Aggregate Limit is the most we will pay for all:

2. damages because of “bodily injury” or “property damage” and medical expenses attendant thereto, arising out of “assault and battery” as the result of all “occurrences” ...

⁴ Injury means all damages including damages because of “bodily injury” and “property damage” and including damages for care, loss of services or loss of support. Exhibit “B” Plaintiff’s Motion for Summary Judgment NIC000000046.

⁵ Exhibit “B” Plaintiff’s Motion for Summary Judgment NIC0000000 42.

⁶ The A&B Endorsement defines “assault and/or battery” as actual or threatened assault or battery whether caused by or at the instigation or direction of any insured, his “employees,” patrons or any other person; the failure of any insured or anyone else for whom any insured is legally responsible to prevent or suppress assault or battery; or the negligent employment; investigation; supervision; training; or retention of a person for whom any insured is or ever was legally responsible and whose conduct is described by 1. or 2. above. “Assault and battery” includes, but is not limited to, sexual assault and battery.

The Instant Action

NIC filed a declaratory judgment action against Cavanaugh's and Pukuma in the Eastern District of Pennsylvania. The Federal District Court declined to exercise jurisdiction and granted a motion to dismiss filed by Pukuma. NIC subsequently commenced this action seeking a declaration that Pukuma's claims were subject to the A&B Endorsement which provides a \$50,000 aggregate limit of liability subject to a \$1,000 deductible; that all claims under the NIC policy are subject to claims expense endorsement which provides that defense costs are included within and reduce the available limits of liability and NIC is not obligated to indemnify Cavanaugh's for punitive or exemplary damages. NIC filed the instant motion for summary judgment and Cavanaugh has crossed moved for summary judgment.

DISCUSSION

Under Pennsylvania law, the task of interpreting an insurance contract, including an analysis of coverage, is a question of law generally determined by the court. When the terms of the policy are unambiguous, they control, but when the terms are ambiguous they must be interpreted in favor of the insured.⁷

The duty to defend under an insurance policy is broader than a duty to indemnify, in that the duty to defend is triggered whenever the factual allegations in a complaint may potentially come within the insurance coverage. The insurer's duty to defend remains until the insurer is able to show that the factual allegations in the complaint, even if true, do not fall within the scope of the policy. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend

⁷ Donegal Mut. Ins. Co. v. Baumhammers, 595 Pa. 147, 938 A.2d 286, 291 (2007).

until such time as that claim is confined to a recovery that the policy does not cover.⁸ The insurer's obligation to defend an action against the insured is fixed solely by the factual allegations in the underlying complaint but not the cause of action pled.⁹

In determining whether a duty to defend exists, the Pennsylvania Supreme Court has held:

[a]n insurer's duty to defend an action against the insured is measured, in the first instance, by the allegations in the plaintiff's pleadings...In determining the duty to defend, the complaint claiming damages must be compared to the policy and a determination made as to whether, if the allegations are sustained, the insurer would be required to pay resulting judgmentThe language of the policy and the allegations of the complaint must be construed together to determine the insurers' obligation.¹⁰

The applicable section of the A&B Endorsement provides that NIC will pay damages because of bodily injury "arising out of 'assault and battery' as the result of all 'occurrences.'" Applicability of this portion of the endorsement to the matter at hand depends upon whether Pukuma's bodily injuries arose out of an assault and battery and, if so, whether the assault and battery was the result of an occurrence.

In the second amended complaint Pukuma alleges that he suffered a collapsed lung, stab wound in the left side pneumothorax, multiple lacerations and abrasions, cerebral concussion, post concussion syndrome, laceration of scalp, severe shock to nerve and nervous system, extreme mental and physical pain and suffering.¹¹ The second amended complaint also alleges that these injuries arose while a restrained Pukuma was assaulted and stabbed by in the chest by

⁸ Gen. Accident Ins. Co. of Am. v. Allen, 547 Pa. 693, 692 A.2d 1089, 1095 (1997).

⁹ *Id.* 893 A.2d at 811.

¹⁰ Donegal Mut. Ins. v. Baumhammers, 595 Pa. 147, 155, 938 A.2d 286, 290 (2007). , appeal granted, 589 Pa. 248, 908 A.2d 265 (Pa. Aug 29, 2006).

¹¹ See Second Amended Complaint p. 4.

four drunken patrons.¹² Based on the foregoing, it is clear that Pukuma's injuries arose from an assault and battery.

This assault and battery was also alleged to be the result of an occurrence. The NIC policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Supreme Court of Pennsylvania has established that the term "accident" within insurance policies refers to an unexpected and undesirable event occurring unintentionally and that the key term in the definition of the "accident" is "unexpected" which implies a degree of fortuity.¹³

According to the second amended complaint, Cavanaugh's agents carelessly and negligently removed Pukuma from the bar and negligently and carelessly restrained him exposing Pukuma to additional danger of physical harm from his assailants and allowed the assailants to further assault him. These allegations fall within the definition of an "occurrence" as that term is defined under the NIC policy of insurance and therefore constitute an occurrence under the A&B Endorsement. Since Pukuma's injuries arose out of an assault and battery and the assault and battery was alleged to be the result of an occurrence, the A&B Endorsement is triggered to provide coverage in the underlying action.

In support of their respective positions, the parties rely upon *Acceptance Ins. Co. v. Seybert*, 757 A.2d 380 (Pa. Super. 2000) and *QBE Ins. Co. v. M&S Landis Corp., t/d/b/a Fat Daddy's*, 915 A.2d 1222 (Pa. Super. 2007). Although instructive, the facts in *Seybert* and *QBE* are distinguishable from the case at hand.

¹² Id. Par. 16, 17.

¹³ *Mutual Insurance Co. v. Baumhammers*, 595 Pa. 147, 158, 938 A.2d 286, 292 (2007).

In *Seybert*, the victim alleged that five intoxicated men attacked him in a parking lot. The victim also alleged that the bar negligently contributed to the attack by furnishing alcohol to the individuals while they were visibly intoxicated. The bar sought coverage for Seybert's claim from Acceptance Insurance Company arguing that because Seybert's complaint contained counts based on negligence, the assault and battery exclusion in the liability policy did not apply. The liability policy excluded bodily injury "arising out of assault and/or battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of the insured, his employees..." The Superior Court noted that the underlying complaint contained no allegations that the plaintiff's injuries "were caused in any way other than by assault and battery by the five men in the [hotel] parking lot" and that there was "no suggestion" that the plaintiff's injuries were negligently caused by the bar's employees.¹⁴

In *QBE*, the underlying complaint involved allegations that bouncers from Fat Daddy's Nightclub wrestled with a man, threw him on the ground, and eventually smothered him to death. The complaint alleged that the death was the direct result of Fat Daddy's negligence and the negligence of its employees in improper restraining, lack of training, and inadequate staffing, along with other allegations of negligence. The Superior Court held that the assault and battery exclusion did not apply because, Fat Daddy's negligence led directly to the victim's death. The *QBE* court held: "it is not alleged that the Fact Daddy Defendants assaulted the decedent as the cause of death, but rather that, after eviction, they negligently restrained [him] or improperly restrained him causing his death."¹⁵

¹⁴ *Seybert*, 757 A.2d at 383.

¹⁵ *QBE Ins. Co.*, 915 A.2d at 1225-26.

The relevant distinction between *Seybert* and *QBE* is that in *Seybert* the complaint alleged that the bar's negligence contributed to the injuries caused by the attack, while the *QBE* complaint alleged that Fat Daddy's negligence directly caused the injuries. In the case at bar, the facts alleged in the second amended complaint demonstrate that the bar's conduct was not as direct of a cause of Pukuma's injuries as in *QBE*. Yet, the bar's conduct as alleged more than contributed to Pukuma's injuries as in *Seybert*. Pukuma's injuries, as alleged, were the result of concurrent causes, but injuries which nevertheless arose from "'assault and battery' as the result of [an] 'occurrence[.]'" As such the A&B Endorsement is applicable and the duty to defend and indemnify is limited to the \$50,000 sublimit of insurance provided by the A&B limits of liability endorsement.

Additionally, NIC argues that it is entitled to summary judgment declaring that the A&B sublimit is eroded by the payment of defense costs and that NIC has no duty to indemnify Cavanaugh's for punitive damages. The NIC policy is subject to a Claim Expense Endorsement which provides as follows:

"Claims Expense" incurred by the Company shall be included within the Limit(s) of Liability of the policy and shall not be paid in addition to the Limit(s) of Liability.

For the purpose of this endorsement, "Claims Expense" includes investigation, adjustment and legal expense, interest on judgments and fees, court costs and premiums on bonds but excludes all expense for salaried employees and counsel on retainer and all office expense of the Insured and of the Company.¹⁶

Based on the unambiguous policy language, the court finds that NIC is entitled to summary judgment declaring that the payment of claim expenses erodes the sublimit of insurance.

¹⁶ Exhibit "B" to Plaintiff's Motion for Summary Judgment NIC000000035.

Additionally, NIC is also entitled to summary judgment declaring that it has no duty to indemnify Cavanaugh's for punitive damages based on the clear language of the policy. NIC's Punitive Damages Exclusion¹⁷ unambiguously precludes indemnification for punitive damages.¹⁸

CONCLUSION

For the forgoing reasons, Plaintiff NIC's Motion for Summary Judgment is granted and Defendant PJP Consulting t/a Cavanaugh's River Deck Cross Motion for Summary Judgment is denied. Plaintiff NIC Insurance Company's duty to defend or indemnify Defendant PJP Consulting, LLC t/a Cavanaugh's River Deck ("Cavanaugh") or any other Defendant, person, firm, corporation, entity or organizing in connection with the action of Dzarnyi Pukuma v. PJP Consulting, Inc., March Term 2008 No. 1228 is limited to the \$50,000 sublimit of insurance provided by the Assault and Battery Limits of Liability Endorsement to Commercial Lines Policy Number CH06CGL00226-002. The sublimit of liability provided by the Assault and Battery Limits of Liability Endorsement is eroded by claims expenses incurred by NIC and NIC has no duty to indemnify Cavanaugh for any punitive damage awarded against Cavanaugh in the underlying action.

BY THE COURT,


PATRICIA A. McINERNEY, J.

¹⁷ Exhibit "B" to Plaintiff's Motion for Summary Judgment NIC000000055.

¹⁸ Defendants did not oppose the entry of summary judgment on the issue of Claim Expense Endorsement and the Punitive Damage Endorsement.