

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

_____	:	
FIRST MERCURY INSURANCE	:	MARCH TERM, 2013
COMPANY	:	
	:	NO. 02600
Plaintiff	:	COMMERCE PROGRAM
v.	:	CONTROL NO. 13120487
BLEU MARTINI, et al.	:	
Defendants	:	
_____	:	

DOCKETED
FEB 25 2014
C. HART
CIVIL ADMINISTRATION

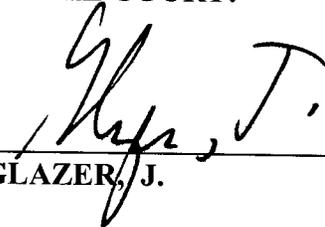
ORDER

AND NOW, this 28th day of February, 2014, upon consideration of the motion for summary judgment of plaintiff, First Mercury Insurance Company, and any reply thereto, it is hereby

ORDERED

that said motion is **GRANTED**.

BY THE COURT:



GLAZER, J.

First Mercury Insurance-ORDOP



13030260000056

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

FIRST MERCURY INSURANCE COMPANY	:	
	:	MARCH TERM, 2013
Plaintiff	:	
	:	NO. 02600
v.	:	
	:	COMMERCE PROGRAM
BLEU MARTINI, et al.	:	
	:	CONTROL NO. 13120487
Defendants	:	

OPINION

GLAZER, J.

February 26, 2014

Before the court is the motion for summary judgment of plaintiff, First Mercury Insurance Company. For the reasons set forth below, plaintiff's motion is granted.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, First Mercury Insurance Company ("First Mercury"), commenced the current action on March 19, 2013 seeking declaratory judgment pursuant to 42 Pa. C.S.A. § 7531. Plaintiff now brings the instant motion for summary judgment to determine that its duty to defend or indemnify defendants Foodtek, Inc., Meir Cohen, Michael Cohen and Jill Rappaport d/b/a Bleu Martini (hereinafter referred to as "insureds") in the following suits: Jermaine Potter v. Foodtek, et al., Case No. 130103795 and Estate of Scoey Potter v. Foodtek et al., Case No. 130201688, (hereinafter referred to as the "underlying actions") is limited to \$250,000 less the amounts paid to defend and settle James Prester v. Food Tek et al., Case No 120202394.

I. Underlying Actions

The underlying actions arose out of an incident that occurred on February 20, 2011 when several patrons of the Bleu Martini restaurant/bar were shot outside the premises. The shooting resulted in serious injuries to one patron, Jermaine Potter, and the death of his brother, Scoey Potter. Jermaine Potter filed suit against the Bleu Martini and others on January 31, 2013. Linda Potter, as Executrix of the Estate of Scoey K. Potter, also filed suit on February 18, 2013. These actions are referred to as the “Jermaine Potter complaint” and the “Estate of Potter complaint” respectively.

The Jermaine Potter complaint alleges assault and battery against James Thompson for shooting Jermaine Potter three times, and several counts of negligence against the insureds for: failing to provide adequate security; failing to provide customers either a safe premises or protection from a reasonably foreseeable risk of criminal activity; negligent hiring and retention of employees; failure to engage in adequate screening measures for weapons; failure to contact law enforcement authorities; and failure to remove James Thompson from the premises. See Plaintiff’s Motion for Summary Judgment, Exhibit A. Jermaine Potter suffered serious injuries, including three gunshot wounds, bowel and spinal cord injuries, and bullet fragments in his body. See id. Similarly, the Estate of Potter complaint alleges that Scoey Potter died after being shot by James Thompson, and asserts multiple claims of negligence against the insured.

Roughly a week prior to the shooting incident, on February 11, 2011, James Prester was involved in a separate incident at the Bleu Martini in which he sustained injuries to the head and arms after being assaulted by other patrons. See id., Exhibit C. Prester filed suit against the insureds on May 22, 2012 asserting claims of negligence comparable to those alleged in the Jermaine Potter complaint and Estate of Potter complaint. The case ultimately settled for a

\$37,000 payment by First Mercury on behalf of the insureds and the defense costs associated with it amounted to \$4,232. See Plaintiff’s Memorandum in Support of Its Motion for Summary Judgment.

II. Insurance Provisions

The insureds obtained insurance coverage from First Mercury, Policy FMPT155752, that was effective between October 18, 2010 to October 18, 2011. The Commercial General Liability Coverage provides in part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damages”, caused by an “occurrence”, to which this insurance applies....

1. The amount we will pay for damages and claim expenses is limited as described in Section III – Limits of Insurance;

4. We have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply;

Exhibit D to Plaintiff’s Motion for Summary Judgment.

The policy also contains a section entitled “Assault and Battery Endorsement – Limits of Insurance – Defense Within The Limits” that states:

Schedule of Limits of Insurance – Assault and Battery	
Assault and Battery Aggregate Limit.....	\$250,000
Assault and Battery Limit.....	\$250,000

The following exclusion is added to SECTION I-COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, Paragraph 2. Exclusions:

1. “**Claims**” or “**suits**” to recover damages for “**bodily injury**” or “**property damage**” based upon, related to, arising out of, directly or indirectly resulting from, in consequence of, in any way connected to, or in the

sequence of events involving any actual or alleged
“**assault**” and/or “**battery**”....

Id.

The exclusions were subject to the following terms:

Section III – Limits of Insurance is amended by adding the following additional paragraphs:

If a “**claim**” or “**suit**” is excluded from coverage by operation of the Assault and Battery Exclusion, the Company hereby agrees to waive the Assault and Battery Exclusion, but only to the extent of the limits shown in the Schedule of Limits of Insurance set forth in the Assault and Battery Coverage Endorsement and incorporated herein.

The Assault and Battery Limit is the most we will pay for all damages and claim expenses for any “**claim**” or “**suit**” based upon, relating to, arising out of, directly or indirectly resulting from, in consequence of, in any way connected to, or in the sequence of events involving any “**assault**” or “**battery**”.

The Assault and Battery Aggregated Limit is the most we will pay for all damages and claim expenses for all “**claims**” or “**suits**” based upon, related to, arising out of, directly or indirectly resulting from, in consequence of, in any way connected to, or in the sequence of events involving any “**assault**” or “**battery**”.

The incurrence of claim expenses serves to reduce and may exhaust the Limits of Insurance available to pay for damages because of an “**assault**” and/or “**battery**”.

Id.

Moreover, the policy provides the following definitions:

“**Assault**” means the apprehension of harmful or offensive contact by a person or thing, or the apprehension of harmful or offensive contact between or among two or more persons, by threats through words or deed.

“**Battery**” means a harmful or offensive contact by a person or thing, or a harmful or offensive contact between or among two or more persons.

Id.

DISCUSSION

I. Standard of Review

The court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. Note to Pa.R.C.P. 1035.2. When considering the merits for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001). Further, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

Interpretation of an insurance contract is generally performed by a court rather than by a jury. See Gonzalez v. United States Steel Corp., 484 Pa. 277, 398 A.2d 1378 (Pa. 1979). A court's "purpose in interpreting insurance contracts is to ascertain the intent of the parties as manifested by the terms used in the written insurance policy." Donegal Mut. Ins. Co. Baumhammers, 595 Pa. 147, 938 A.2d 286, 290 (Pa. 2007) (quoting 401 Fourth St., Inc., V. Investors Ins. Group, 583 Pa. 445, 879 A.2d 166, 171 (Pa. 2005)). "When the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, which will be given its commonly accepted and plain meaning. LJL Transp., Inc. v. Pilot Air Freight Corp., 599 Pa. 546, 962 A.2d 639, 647 (Pa. 2009).

II. Application of Policy Limitations

Plaintiff asserts that the claims in the underlying actions fall under the policy's "Assault and Battery Endorsement" section that provides limited coverage for assault and battery claims up to an aggregate limit of \$250,000. First Mercury argues that the limit should apply because the injuries sustained in the underlying actions were a result of the actions of James Thompson, and the policy includes coverage for claims of negligence arising out of an assault and/or battery. The language of the endorsement is broad in scope as it incorporates claims that are "based upon, related to, arising out of, directly or indirectly resulting from, in consequence of, in any way connected to, or in the sequence of events involving any actual or alleged 'assault' and/or 'battery'." Plaintiff's Motion for Summary Judgment, Exhibit D. Moreover, the endorsement addresses the types of negligence claims asserted in the underlying actions as follows:

1. ...Pursuant to this exclusion, the Company is under NO duty to defend or indemnify any insured regardless of the degree of culpability or intent and without regard to:
 - a. Whether the acts are alleged to be by or at the instruction or at the direction of any insured, its/her/his officers, employers, agents or servants; or by any other person lawfully or otherwise on, at or near premises owned or occupied by any insured; or by any other person;
 - b. Whether the acts are alleged to be the legal or proximate or but for cause of "**bodily injury**" or "**property damages**" or to have concurrently caused or independently caused said "**bodily injury**" or "**property damages**";
 - c. The actual or alleged failure or fault of any insured, or its/her/his officers, employees, agents or servants, in the hiring, supervision, retention or control of any person, whether or not an officer, employee, agent or servant of any insured;
 - d. The actual or alleged failure or fault of any insured, or its/her/his officers, employees, agents or servants, to attempt to suppress, prevent, bar, manage or halt any

such acts which may constitute an “**assault**” and/or “**battery**”;

- e. The actual or alleged failure or fault of any insured, or its/her/his officers, employees, agents or servants, to maintain a safe or secure environment or place of business; or
- f. Any act, error or omission by any insured, or its/her/his officers, employees, agents or servants, in rendering or failure to render aid or assistance to any person; or
- g. The theory of or basis for liability, recovery or relief, or the manner in which such theory of or basis for liability, recovery or relief is alleged, asserted or pleaded (including, but not limited to, “**claims**” or “**suits**” which allege, assert or plead negligence in whole or in part) where the operative acts and/or underlying events constitute an “**assault**” and/or “**battery**”....

Id. Defendants argue that the claims of negligence are central to the underlying actions alongside the shooting itself. They aver that the following alleged acts proximately caused the injuries: failing to locate and remove James Thomas’s firearm; failing to contact law enforcement; failing to detain and/or restrain Thomas. However, these allegations fall within the various provisions of the endorsement as provided above. Any harm suffered due to the insureds alleged negligence arises out of, directly or indirectly, from the shooting. The shooting is the critical component of the negligence claims, because if the shooting did not occur, then Jermaine and Scoey Potter would not have suffered any harm due to any actual or alleged acts of negligence. This is evidenced in the Jermaine Potter complaint as the in-depth list of injuries points directly to the gun shot wounds. Because the broad terms of the Assault and Battery Coverage Endorsement include the negligence claims alleged in the underlying actions, the limitation applies.

Defendants also claim that if the Assault and Battery Endorsement is to apply, then the limitation should be applied to the cases separately, whereby each defendant has the ability to receive the maximum benefit of \$250,000 without respect to other cases or settlements. However, the language of the policy, specifically the “Assault and Battery Aggregate Limit”, shows that the parties intended otherwise. The terms state that the \$250,000 aggregate limit “is the most [First Mercury] will pay for all damages and claim expenses for all ‘claims’ or ‘suits’” based upon any assault or battery. Plaintiff’s Motion for Summary Judgment, Exhibit D. In order to calculate amounts in the aggregate, one must look at the whole picture, and not examine each case in a vacuum. There is no doubt that the Prester suit, the Jermaine Potter complaint, and the Estate of Potter complaint, are all separate suits from each other, but that does not impact the application of the aggregate limit. All three cases are based upon claims of assault and battery, so any resulting damages and costs from each of them will be applied towards the \$250,000 aggregate limit. Therefore, the previous settlement arising out of the Prester complaint will erode the remaining portion of the limit by the appropriate amount.

Of those previously disbursed amounts, defendants aver that the policy’s language in regards to “claim expenses” is ambiguous, and therefore the defense costs from the Prester complaint should not be included. Even though the endorsement does not provide its own definition, the term is still defined within the overall General Liability section. There, the definition is as follows:

CLAIM EXPENSES – COVERAGES A AND B

We will pay, with respect to any “Claim” we investigate or settle,
or any “suit”

1. All expenses we incur

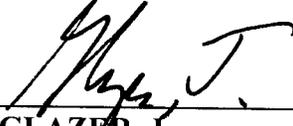
4. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the “claim” or “suit”....

Plaintiff’s Motion for Summary Judgment, Exhibit D. The language cannot be interpreted as being ambiguous; the aggregate limit encompasses “claim expenses”, which includes reasonable expenses to defend a claim. The aggregate limit is to be reduced by the defense costs incurred in the Prester settlement.

CONCLUSION

In light of the evidence, plaintiff’s motion for declaratory judgment is granted. To the extent any coverage is owed, the limit of liability applicable to all insureds is \$250,000 less the Prester settlement and defense costs.

BY THE COURT:



GLAZER, J.