SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

- v -

FRANTZ LEREBOURS, M.D., SCE GROUP INC., SIN CITY ENTERTAINMENT CORPORATION, and SIN CITY CABARET,

Defendant.

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INDEX NO. 651824/2021

MOTION DATE 08/11/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34

were read on this motion for SUMMARY JUDGMENT & DEFAULT JUDGMENT .

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion for summary judgment against defendant Frantz Lerebours, M.D. ("Lerebours"), and for default judgment, based on failure to appear, against defendants SCE Group Inc., Sin City Entertainment Corporation, and Sin City Cabaret (collectively, "Sin City"), is granted in part, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 6, 16, 26-27) and the exhibits attached thereto, in which the court concurs, as summarized herein.

In this declaratory judgment action, plaintiff seeks a declaration that its coverage for an underlying lawsuit filed by Lerebours against Sin City is limited by the terms of its policy with Sin City to $50,000. The policy includes an Assault and Battery coverage form (the "AB Coverage Form"), which provides, in relevant part, that "injury" and "bodily injury" arising from assault and battery committed by Sin City, its employees, or any other person, including failing to prevent assault and battery, serving alcohol leading to same, or negligent employment,

investigation, supervision, retention, or reporting, or failure to report an assault or battery to the "proper authorities," is covered only to the extent of $50,000 for each claim (AB Coverage Form, NYSCEF Doc. No. 9, Bates Nos. 0066-0068). In the underlying action, Lerebours asserts that he was assaulted by Sin City employees in the parking lot outside Sin City, which facts are not in dispute (tr of proceedings, NYSCEF Doc. No. 34 at 3).

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 NY2d 351, 355 [1978]). Provisions in a contract are not ambiguous merely because the parties interpret them differently (*Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 352 [1996]).

In a case based on almost identical facts, the Appellate Division, First Department, held that a nightclub's insurer was entitled to rely on the same AB Coverage sublimit of $50,000 when patrons of the nightclub were assaulted by nightclub employees (*Santa v Capitol Specialty Ins., Ltd.*, 96 AD3d 638 [1st Dept 2012]). *Santa* is binding on this court, and the court finds

Lerebours' various arguments as to why *Santa* is distinguishable to be unpersuasive. Lerebours also argues that even if the sublimit applies, plaintiff should be estopped from relying on the AB Coverage Form due to a failure to timely disclaim coverage based on the sublimit, pursuant to Insurance Law § 3420(d)(2). However, as the *Santa* court held, plaintiff was not obligated to disclaim reliance on the sublimit (*Santa*, 96 AD3d at 639).[1]

Lerebours relies on *Planet Ins. Co. v Bright Bay Classic Vehicles, Inc.*, for the proposition that the sublimit should nonetheless be more properly considered as an exclusion requiring a disclaimer. However, that case is inapposite. There, the plaintiff insured a fleet of cars leased to the public, so long as the lease was for less than 12 months; the plaintiff disclaimed coverage when the car involved in the accident giving rise to the complaint was leased for 24 months (*Planet Ins. Co. v Bright Bay Classic Vehicles, Inc.*, 75 NY2d 394, 401 [1985]). The Court held that the time limit operated as an exclusion, as the car in question was covered until the happening of a subsequent event, namely, that it was leased for 24 months (*id.*). The Court based its decision strongly on "the public policy that victims of automobile accidents should have recourse to a financially responsible defendant" (*id.*). Here, no such policy concerns apply. As the Court of Appeals itself said in a later decision declining to extend *Planet Ins. Co.*, "[c]ases involving auto insurance coverage—an area in which the contractual relationship and many of its terms are prescribed by law—provide a weak basis for generalization about the constraints public policy places upon other insurance contracts" (*Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 295 [2002]; *see also Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 403 [1st Dept 2016] ["We agree with Supreme Court that the subject policy's classification limitations of coverage merely define the activities that were included within the scope of

[1] Lerebours provides no authority for its related argument that plaintiff should be equitably estopped from limiting coverage this far into the case and this many years after the assault.

coverage in the first instance and do not constitute exclusions from coverage that would otherwise exist"]).

Lerebours lastly argues that if the AB Coverage Form controls the limit of coverage, then such coverage should be up to $300,000, as he suffered, by his recounting, three separate assaults and three separate batteries during the altercation outside Sin City. However, the unambiguous terms of the AB Coverage Form limit coverage to $50,000 per claim; not per instance of assault or battery (AB Coverage Form, NYSCEF Doc. No. 9, Bates Nos. 0066-0068). Because the policy provision has only one reasonable interpretation, the court declines to find it ambiguous in the manner Lerebours suggests (*Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC*, 202 AD3d 641, 641 [1st Dept 2022] ["A contract is ambiguous if on its face it is reasonably susceptible of more than one interpretation"] [internal citations and quotation marks omitted]).

Finally, with respect to that portion of the motion seeking a default judgment against Sin City, a plaintiff that seeks entry of a default judgment for a defendant's failure to answer must submit proof of service of the summons and complaint upon the defendant, proof of the facts constituting the claim, and proof of the defendant's default (CPLR 3215). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts" (*Feffer v Malpeso*, 210 AD2d 60, 61 [1st Dept 1994]). "[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Nevertheless, "CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear have been shown. Some proof of liability is also required to satisfy the court as to the prima facie validity of the uncontested cause of action" (*Guzetti v City of N.Y.*, 32 AD3d 234, 235 [1st Dept 2006] [internal quotations and citations omitted]).

Here, plaintiff submits the policy, affidavits of service, regular on their faces, showing service on SCE Group Inc. and Sin City Entertainment Corporation via the Secretary of State (affidavits of service, NYSCEF Doc. No. 12), and the affidavit of its counsel, Ann Odelson, Esq., establishing those parties' failure to appear (Odelson affirmation, NYSCEF Doc. No. 15, ¶ 16). Based on the discussion of the policy as set forth above, these submissions are sufficient to entitle plaintiff to a default judgment against defendants SCE Group Inc. and Sin City Entertainment Corporation. Because no proof of service was filed as to defendant Sin City Cabaret, no default judgment will issue against it.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted as to defendants Frantz Lerebours, M.D., SCE Group Inc., and Sin City Entertainment Corporation, and is denied as to defendant Sin City Cabaret; and it is further

ADJUDGED and DECLARED that plaintiff's coverage obligations as to defendants Frantz Lerebours, M.D., SCE Group Inc., and Sin City Entertainment Corporation, with respect to the underlying action captioned *Frantz Lerebours M.D. v Sin City Entertainment Corporation, et al.*, pending in the Supreme Court, Bronx County, under Index No. 21803/2014E, are limited to the $50,000 sublimit for assault and/or battery claims contained within the relevant policy, and that plaintiff is not precluded from relying on that sublimit pursuant to Insurance Law § 3420(d)(2); and it is further

ORDERED that the action is severed and continued as to defendant Sin City Cabaret.

This constitutes the decision and order of the court.

ENTER:

7/19/2023
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE