STATE OF VERMONT
RUTLAND COUNTY

CONCORD GENERAL MUTUAL INSURANCE COMPANY,	)	**Rutland Superior Court Docket No. 816-12-07 Rdcv**
Plaintiffs,	)	
v.	)	
GRETA J. THOMAS, MICHAEL FALCON, Individually and as Fiduciary of the Estate of Adam Falcon, and CLARA FALCON, Individually and as Parent and Natural Guardian of BRITNEY FALCON	)	
Defendants	)	

DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED DECEMBER 31, 2008

This matter came on before the Court on plaintiff Concord General Mutual Insurance Company's Motion for Summary Judgment, filed December 31, 2008. On February 2, 2009, defendant Greta J. Thomas filed a Response and a Counter-Motion for Summary Judgment. On February 12, 2009, plaintiff filed a Reply to defendant's Response and an Opposition to defendant's Motion for Summary Judgment. A hearing was held on April 23, 2009.

Plaintiff Concord General Mutual Insurance Company ("Concord General") is represented by Robert A. Mello, Esq. Defendant Greta J. Thomas is represented by Kevin P. Candon, Esq.

On December 3, 2007, plaintiff Concord General filed a Complaint in which it prayed for a declaration that it had no duty to defend or indemnify the defendant Greta Thomas under her parent's homeowners insurance policy. In the Motion for Summary

Judgment now before the Court, plaintiff argues that the business pursuit exclusion of the policy applies.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs*, *Inc.,* 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397.

Background

Defendant Greta J. Thomas is the daughter of John and Gayla Thomas. On October 2, 2004, plaintiff Concord General issued to John and Gayla Thomas a homeowners policy of insurance number H318791 (the "Policy"). The policy provides:

> Coverage E – 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 the "insured" is legally liable….and
>
> 2. Provide a defense at our expense by counsel of our choice….

Plaintiff's Exhibit B, Form HO 00 03 04 91, p. 12.

The policy contains the following exclusion from coverage:

> Coverage E – Personal Liability…. [does] not apply to "bodily injury" or "property damage":
>
> * * *
>
> b. Arising out of "business" pursuits of an insured." This exclusion does not apply to activities which are usual to non-"business" pursuits.

Plaintiff's Exhibit B, Form HO 01 44 01 01, p. 4.

The policy defines the term "business" to include "trade, profession or occupation." Plaintiff's Exhibit B, Form HO 00 03 04 91, p. 1.

Defendant Greta J. Thomas was a full time student at St. Lawrence University. While in school, she held two part-time jobs.

One job was as a gallery attendant at the Richard F. Brush Art Gallery in Canton, New York. Defendant usually worked this job two days per week while in school. Each shift was three or four hours. She made about $10.00 per hour as a gallery attendant. Defendant worked this job all four years of college.

Defendant's other part-time job while in school was as a bartender at Tick Tock Tavern, also located in Canton, New York. Defendant worked one night per week from January to May of 2004, and from September to November 2004. There was no set schedule, as defendant's one night per week often differed. Sometimes she skipped a week. She only worked there while school was in session. Defendant received "informal training" from other bartenders at the Tick Tock Tavern. Her duties included setting up the bar for the night, tending bar, and helping to clean up. Her shifts were approximately

5 hours long and she was paid about $10.00 per hour. In addition, she made tips of about $80.00 to $100.00 per night. She was paid a total of $600.00 by the Tick Tock Tavern, not including tips. Defendant used the money from her part-time jobs to buy clothes, go out to dinner, and for other miscellaneous spending. In November 2004, defendant was 22 years of age.

It is alleged that on November 13, 2004, while working as a bartender at the Tick Tock Tavern, defendant unlawfully served alcoholic beverages to Adam Falcon, who was a minor. It is alleged that this service of alcoholic beverages by defendant Greta Thomas caused or contributed to Adam Falcon's injuries and death resulting from his intoxication.

On September 27, 2006, Michael and Carla Falcon filed a Verified Complaint in the Supreme Court of the State of New York, County of Ontario, seeking damages from Greta J. Thomas, and others, for the alleged wrongful death and conscious pain and suffering of Adam Falcon, who died on November 13, 2004.

Defendant Greta Thomas claims to be an insured under the policy that Concord General issued to her parents, John and Gayla Thomas, by virtue of having been a resident of their household at the time of the relevant events. Concord General argues that defendant Greta Thomas is excluded from coverage under her parent's homeowner's policy due to the "business pursuits" exclusion. In response, defendant argues that her bartending was not a "business pursuit." Defendant does not argue that the "usual to non-business pursuits" exception to the exclusion applies.

Discussion

Construction of the language of an insurance contract is a question of law, not of fact; accordingly a court makes its own inquiry into the legal effect of the contracts' terms and the relationships between them. *Fireman's Fund Ins. Co. v. CNA Ins. Co.*, 2004 VT 93, ¶ 8, 177 Vt. 215. Insurance contracts are to be interpreted according to their terms and the intent of the parties as expressed by the policies' language. *Id*. at ¶ 9.

Insurance contracts must be given a practical, reasonable, and fair interpretation, consonant with the apparent object and intent of the parties, and strained or forced constructions are to be avoided. *McAlister v. Vermont Property and Cas. Ins. Guar. Ass'n*, 2006 VT 85, ¶ 17, 180 Vt. 203.

Any ambiguities in insurance policies are construed in favor of finding coverage. *DeBartolo v. Underwriters at Lloyd's of London*, 2007 VT 31, ¶ 9, 181 Vt. 609. Ambiguity arises where insurance policy language can be reasonably or fairly susceptible of different constructions. *Chamberlain v. Metropolitan Property and Cas. Ins. Co.*, 171 Vt. 513, 515 (2000). If a disputed term is susceptible to two or more reasonable interpretations, the ambiguity must be resolved in favor of the insured. *Serecky v. National Grange Mut. Ins.*, 2004 VT 58, ¶ 17, 177 Vt. 58.

The Falcons allege that defendant failed to use reasonable care in her capacity as a bartender in serving alcohol to Adam Falcon. For the purposes of this Motion for Summary Judgment, it is undisputed that defendant was acting as a bartender when she served alcohol to Adam Falcon. Furthermore, it is undisputed that serving alcohol at a bar to patrons is a usual activity for a bartender. Defendant, therefore, does not argue that the exception to the "business pursuits" exclusion for activities usual to non-business

pursuits operates to restore coverage. Rather, defendant argues (1) that the "business pursuits" exclusion is ambiguous, and (2) that if the exclusion is unambiguous, her bartending job at the Tick Tock Tavern does not constitute a "business pursuit" under the policy.

Defendant's first argument is that the exclusion section in the insurance policy is ambiguous. The Court does not agree. The policy states that "[p]ersonal liability… [does] not apply to bodily injury or property damage…arising out of business pursuits of an insured." "Business" includes an insured's "trade, profession, or occupation."

The Vermont Supreme Court has interpreted the "business pursuits" provision on multiple occasions, determining whether the "usual to non-business pursuits" exception to the exclusion applied, and has never found this standard provision to be ambiguous. *Towns v. Northern Security Ins. Co.*, 2008 VT 98; *N. Sec. Ins. Co. v. Perron,* 172 Vt. 204 (2001); *Luneau v. Peerless Insurance Co.*, 170 Vt. 442 (2000).

Furthermore, numerous courts have interpreted the exclusion in the context of part-time work and have found the exclusion to be unambiguous. See, e.g., *Hanover Insur. Co. v. Ransom*, 448 A.2d 399, 401 (N.H. 1982) (holding that term "business pursuit" as used in the exclusionary clause is clear and unambiguous and must be given its natural and ordinary meaning); see also *Travelers Indem. Co.* v. *Fantozzi*, 825 F.Supp. 80, 85 (E.D.Pa. 1993) (finding provision unambiguous as it was couched in non-technical laymen's terminology for which insureds needed no explanation as to its meaning or effect).

In light of the clear language of the policy and prior case law concerning this exclusion, the Court finds that "business pursuits" exclusion is not ambiguous.

The Court now turns to defendant's argument that her bartending job was not a "business pursuit" as defined by the policy. The policy defines "business" to include an insured's "trade, profession or occupation." While the Vermont Supreme Court has addressed the "usual to non-business pursuits" exception to the "business pursuits" exclusion on multiple occasions, see *supra*, the Court has not addressed how to determine if an insured's activity is a "business pursuit" which falls within the exclusion.

The majority of jurisdictions follow a two-part inquiry when construing business pursuits exclusions. The first prong is continuity, or customary engagement in the activity. The second prong, profit motive, may be shown by such activity as a means of livelihood, a means of earning a living, procuring subsistence or profit, commercial transactions or engagements. See, e.g., *Fadden v. Cambridge Mut. Fire Ins. Co.*, 274 N.Y.S.2d 235, 241 (N.Y. Sup. Ct. 1966); *Frankenmuth Mut. Ins. Co. v. Kompus*, 354 N.W.2d 303, 307-08 (Mich. Ct. App. 1984); *Sun Alliance Ins. Co. of Puerto Rico, Inc. v. Soto*, 836 F.2d 834, 836 (3d Cir. 1988); *AMCO Ins. Co. v. Beck*, 929 P.2d 162, 170 (Kan. 1996); *Stuart v. American States Ins. Co.*, 953 P.2d 462, 466 (Wash. 1998); *Dwello v. American Reliance Ins. Co.*, 990 P.2d 190, 192 (Nev. 1999); *State Auto Property and Cas. Ins. Co. v. Raynolds*, 592 S.E.2d 633, 635-36 (S.C. 2004); *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 644 (Tex. 2005). Under this majority view, supplemental income derived from part-time activities may satisfy the profit motive element, provided that the part-time income is *capable* of significantly supplementing one's livelihood or subsistence and contributing to one's living requirements. *Beck*, 929 P.2d at 170.

The minority of jurisdictions limit the exclusion's application to those activities that constitute an insured's principal occupation. See, e.g., *Brown v. Peninsular Fire Ins.*

Co., 320 S.E.2d 208, 209 (Ga. Ct. App. 1984); *Asbury v. Ind. Union Mut. Ins. Co.,* 441 N.E.2d 232, 239 (Ind.Ct.App.1982).

This Court finds the majority view persuasive in light of the policy's terms and the intent of the parties as expressed by the policies' language. See *Fireman's Fund Ins. Co.*, 2004 VT 93, ¶ 9. As the Supreme Court of Texas stated in *Hallman*, "[b]ecause the policy's definition of business as 'including trade, profession or occupation' encompasses more than an insured's primary occupation, we conclude that the majority approach more accurately describes the exclusion's parameters." 159 S.W.3d at 644. Furthermore, limiting the exclusion to an insured's principal occupation would not be a "practical, reasonable, and fair interpretation, consonant with the apparent object and intent of the parties," see *McAlister*, 2006 VT 85, ¶ 17, as "numerous courts have recognized, the purpose of the business pursuits exclusion is to lower homeowners insurance premiums by removing coverage for activities that are not typically associated with the operation and maintenance of one's home." *Hallman*, 159 S.W.3d at 645.

Applying the two-prong test, the Court first looks at continuity or customary engagement in the activity. *Fadden*, 274 N.Y.S.2d at 241. Defendant was a professional bartender who had a weekly customary engagement at the Tick Tock Tavern. This job was continuous from January to May of 2004 and from September to November 2004, while defendant was in school. The fact that she sometimes skipped a week does not alter the fact that defendant's bartending job was a customary engagement. The Court finds this prong fulfilled.

Next, the Court looks at profit motive, which may be shown by such activity as a means of livelihood, a means of earning a living, procuring subsistence or profit,

commercial transactions or engagements. *Fadden*, 274 N.Y.S.2d at 241. Defendant stated that she worked as a bartender in order to buy clothing, go out for dinner, and other miscellaneous spending. Defendant earned $600 in wages while employed by the Tick Tock Tavern and reported this income to the IRS. Defendant also earned $80 to $100 per night in tips. There was certainly a profit motive for working this bartending job. Furthermore, the income derived from bartending was capable of significantly supplementing defendant's subsistence and contributing to her living requirements, see *Beck*, 929 P.2d at 170, as defendant worked as a bartender in order to earn money for clothing, food, and other miscellaneous spending. The second prong of the test is fulfilled.

The result of this two-prong test is consistent with the "apparent object and intent of the parties." See *McAlister*, 2006 VT 85, ¶ 17. To interpret a parents' homeowners' policy to provide coverage for a tort committed by their 22 year old daughter while in the employment of her weekly bartending job at a tavern located over 200 miles away from their home would be a "strained or forced construction," which is to be "avoided." See *Id*.

The undisputed facts set forth that while bartending at the Tick Tock Tavern, defendant Greta Thomas was engaged in a "business pursuit" as defined by the policy. Therefore, the "business pursuits" exclusion from the Thomas's homeowner's policy applies. Defendant does not argue that the "usual to non-business pursuits" exception to the exclusion applies. Accordingly, there is no genuine issue as to any material fact and plaintiff Concord General is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

ORDER

Plaintiff's Motion for Summary Judgment, filed December 31, 2008, is GRANTED.

Defendant's Motion for Summary Judgment, filed February 2, 2009, is DENIED.

Dated at Rutland, Vermont this _____ day of _____, 2009.

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Hon. William Cohen
Superior Court Judge