NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2357-08T1

JOSEPH COTUGNO,

Plaintiff-Respondent,

v.

EURO LOUNGE, EURO LOUNGE CAFÉ,
a New Jersey Corporation,

Defendant/Third-Party
Plaintiff/Respondent,

v.

QBE INSURANCE CORPORATION,

Third-Party Defendant/
Appellant.

Argued October 1, 2009 - Decided October 30, 2009

Before Judges Stern and Newman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-8804-04.

Michael J. Palma argued the cause for appellant QBE Insurance Corporation (Nowell Amoroso Klein Bierman, P.A., attorneys; Mr. Palma, of counsel and on the brief).

Donald J. Rinaldi argued the cause for respondent Joseph Cotugno (DiBiasi & Rinaldi, L.L.C., attorneys; Mr. Rinaldi, on the brief).

Anthony J. Riposta argued the cause for respondent Euro Lounge Café.

PER CURIAM

Third-party defendant, QBE Insurance Corporation (QBE), appeals from an order in a declaratory judgment, as well as an earlier order denying a motion for summary judgment. The issue involves whether coverage for defendant Euro Lounge existed when plaintiff Joseph Cotugno was escorted out of the lounge by security personnel and accidentally tripped over a parking block. We agree with the ruling of the trial court that coverage was available to Euro Lounge and affirm.

Viewing the facts in a light most favorable to QBE, they may be summarized as follows. Plaintiff was a patron at the lounge on December 20, 2003. He was with two friends. They had a round of drinks and plaintiff went to the bar to order more drinks. A person told plaintiff that he could not get a drink here, "this is a private bar." Plaintiff's friend, John, came over and indicated they were "not looking for any trouble and were here with [John's] fiancée." Another person came over and "went right into the fact that he was going to kick [plaintiff's] ass." This other person then sucker punched

plaintiff. At that point, the security personnel came over. Plaintiff did not retaliate against the patron who hit him.

The security personnel, commonly known as bouncers, escorted plaintiff out a side exit door. Each bouncer held underneath one of plaintiff's arms and walked him backward out of the lounge. In the parking lot, plaintiff, still in that position, tripped over a parking block, fracturing his ankle.

In a non-jury trial, Judge Vichness found for plaintiff and awarded him $62,880 damages against Euro Lounge, plus pre-judgment interest of $7,702.80 for a total judgment of $70,582.80. The amount of the award for the fractured fibular sustained in the tripping incident is not contested. The issue is whether coverage was available to Euro Lounge under the liability policy.

In addressing the policy, the trial court noted that bodily injury is or is not covered, as a general proposition, depending on the circumstances. It recognized that where bodily injury or property damage is expected or intended, it is not excluded from coverage if the bodily injury results from the use of reasonable force to protect persons or property. The trial court determined that the means of removing plaintiff from the lounge after he was punched was a reasonable use of force by the security personnel. Stated another way, the court noted that

they removed plaintiff in a manner that was "a reasonable exercise of their job."

The trial court then addressed the assault and battery exclusion, which was an added exclusion to the policy. The policy itself, as the trial court noted, does not contain a definition of assault and battery. The court determined that the actions of the bouncers could not constitute an assault or battery because they did not possess the required intent to cause bodily injury; therefore, the court rejected the notion that the security personnel had committed an assault on plaintiff.

QBE took the position that plaintiff was assaulted by somebody else and the bouncers acted to prevent him from being further assaulted or to suppress the action so there was no further assault, which tracked into the language of the exclusion. The trial court rejected this argument and had this to say:

> [Plaintiff] got hurt not because they were trying to prevent or suppress the fight. He was out of the fight, as a matter of fact, he was out of the building already. He got hurt as a result of their actions in removing him from the building. In doing so, certainly at least for purposes of this motion, negligently. So, I find the . . . exclusion does not apply.

The commercial general liability coverage policy in question provides for exclusions in the main portion of the policy. The policy indicates under Section 1, Paragraph 2, *Exclusions* that the insurance does not apply to:

> a. **Expected Or Intended Injury**
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

An exclusion by endorsement is added to Paragraph 2 relating to the coverage for bodily injury and property damage. It reads in pertinent part as follows:

> A. This insurance does not apply to actions and proceedings to recover damages for 'bodily injury,' 'property damage' or 'personal and advertising injury' arising from the following and the Company is under no duty to defend or to indemnify an insured in any action or proceeding alleging such damages:
>
> 1. Assault and Battery or any act or omission in connection with the prevention or suppression of such acts . . . .

The exclusion also refers to:

> 2. Harmful or offensive contact between or among two or more persons;
>
> 3. Apprehension of harmful or offensive contact between or among two or more persons . . . .

On appeal, QBE argues that the injury was either caused by the bouncers attempting to prevent a physical altercation from taking place on the premises, which is excluded under the assault and battery exclusion, or the injury was caused by the bouncers when plaintiff was harmfully escorted out the side exit door for reasons unrelated to the prevention of an assault, resulting in him tripping over the parking block. Under either scenario, QBE contends that the exclusion under endorsement A.1. or A.2. would be applicable.

Our view of the pertinent quoted policy provision convinces us that QBE ignores the basic policy provision which indicates that "bodily injury" resulting from the use of reasonable force to protect persons is not excluded from coverage. The use of reasonable force contemplates physical contact. Indeed, it would be expected that security personnel, whether it be bouncers, a bartender, or a member of the wait staff, could be put in a position of having to remove an individual from the premises for misconduct. The line that cannot be crossed is the use of unreasonable force to do so.

The exclusions contained in the endorsement to Paragraph 2 of Section 1 is an exclusion added to Paragraph 2 of Section 1 of the policy. The added endorsement reinforces the use of reasonable force which is covered under the policy where the

force used in connection with the prevention or suppression of assault and battery is reasonable. The coverage is not available to an assault and battery which takes place on the premises between patrons of the establishment. The effort to stop a fight between patrons or suppress whatever may ensue is not covered where unreasonable force has been deployed by security personnel or those in charge of maintaining order on the premises.

In reading the main exclusion in the policy with this added exclusion together, as we have here, shows how the provisions work together and are consistent with each other. Moreover, it gives primary consideration to the coverage provided where reasonable force is used by those responsible for maintaining order. Under QBE's interpretation, coverage by the use of reasonable force would be usurped by the assault and battery exclusion, which is not a replacement of any policy provision.

The contention that the touching by the bouncers in escorting plaintiff out of the tavern was harmful and, therefore, excludable under Section 2, Paragraph 2 of the endorsement is subject to the same misreading of the policy as the exclusion of Section 2, Paragraph 1 of the endorsement. A touching of an individual is contemplated by the reasonable use of force coverage provided under the policy. Once again, the

added endorsement was not inserted or designed to trump the policy provision which provides coverage for those exercising the reasonable use of force in controlling patron behavior in an establishment serving alcoholic beverages.

We are convinced that this is the proper interpretation of the policy's provisions and comports with the common sense of the situation that prevails on premises where alcoholic beverages are served. Proprietors of such establishments are required, under regulation, adopted under N.J.S.A. 53:1-11.9, not to "allow, permit or suffer on or about the licensed premises . . . . [a]ny brawl, act of violence, disturbance or unnecessary noise." N.J.A.C. 13:2-23.6. Indeed, "every licensee shall operate its business in an orderly and lawful fashion so as not to constitute a nuisance." N.J.A.C. 13:2-23.6(b). Security personnel are utilized for this very purpose of maintaining order. Indeed, proprietors would anticipate coverage under these circumstances, and polices are to be read with deference to the policyholder's expectations. Ohio Cas. Ins. Co. v. Estate of Wittkopp, 326 N.J. Super. 407, 414 (App. Div. 1999). A premium is put on using reasonable force to deal with problems when patrons become unruly. Where the bouncers become overzealous and cross the line, exercising unreasonable force in an effort to control a disturbance, coverage may be

unavailable. Under the facts as found by the trial court, the provisions of the policy were properly applied and coverage was available to Euro Lounge.

Under the factual scenario presented, we need not elaborate upon the motion denying summary judgment because Judge Vichness heard plaintiff testify before deciding the declaratory judgment aspects of the case. The court made findings based on his testimony and found plaintiff credible in his version of how he was guided out of the tavern and was injured. The force used was reasonable, but that did not mean that the security personnel were absolved from negligence in removing plaintiff from the lounge.

No counsel fees were awarded at the time of trial, and counsel for QBE does not dispute that attorney fees would be available under Rule 4:42-9(a)(6) should Euro Lounge succeed on this appeal. QBE would also be liable to Euro Lounge for attorney fees on this appeal under Rule 2:11-4. Since the application for fees before the trial court has to be entertained, the trial court can also address the award of fees in connection with the appeal as well. R. 2:11-4.

Affirmed and remanded to the trial court for award of attorneys' fees at trial and on appeal.