STATE OF SOUTH CAROLINA COUNTY OF HORRY	THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Catalina London Limited, f/k/a Alea London Limited, **Plaintiff,** **v.** **Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room** **Defendants**	**Civil Action No.: 2012-CP-26-3873** **ORDER DENYING DEFENDANTS' 59(e) MOTION FOR RECONSIDERATION**

On December 11, 2013 (filed December 13, 2013), this Court executed an Order granting Plaintiff Catalina London Limited ("Catalina") summary judgment on four distinct grounds: 1) the insurance policy's assault and battery exclusion precluded coverage; 2) the insured's, R.K.C.'s, failure to fulfill its duties under the policy; 3) the policy was canceled 11 days prior to the assault and battery; and 4) there was no "occurrence" necessary to trigger coverage under the policy.

Defendant Elisa Narruhn ("Narruhn") timely moved for the court to alter or amend the December 11, 2013 Order. In her motion, Narruhun cites 28 grounds on which she believes reconsideration is appropriate. After conducting a hearing and careful review of the grounds on which Narruhn seeks to alter or amend the Order, and for the reasons listed below, the Court denies Narruhn's motion for reconsideration.

As noted in Catalina's response to Narruhn's motion for reconsideration, each of the grounds upon which Narruhn seeks reconsideration was heard at the summary judgment hearing and ruled upon in the December 11, 2013 Order. The only exceptions are ground 23, which seeks to introduce evidence that was not presented at the summary judgment hearing, and ground 25, which seeks to raise an issue not raised at the summary judgment hearing. These issues cannot be considered for the first time in a motion to reconsider. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995).

Furthermore, the Court did not misunderstand or fail to consider any argument or issue Narruhn raised regarding the grounds upon which it granted summary judgment. The Court

allowed both parties substantial time to argue the summary judgment motion and both parties submitted substantial briefs in advance of the summary judgment hearing. All of this was carefully considered by the Court. The Court's Order is extensive and deals with all material issues of fact and law raised by either party at the summary judgment hearing. Narruhn's motion for reconsideration restates arguments she raised at the summary judgment hearing, but does not present any issue of fact or law that the Court misunderstood or failed to fully consider.

Therefore, the Court denies Defendants' motion to alter or amend.

IT IS SO ORDERED.

Larry B. Hyman, Jr.
JUDGE, FIFTEENTH CIRCUIT

CONWAY, SOUTH CAROLINA

MARCH 13, 2014

STATE OF SOUTH CAROLINA COUNTY OF HORRY	THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
Catalina London Limited, f/k/a Alea London Limited, Plaintiff, v. Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room Defendants	Civil Action No.: 2012-CP-26-3873 ORDER GRANTING CATALINA'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on October 3, 2013, on motion for summary judgment filed by Catalina London Limited, f/k/a Alea London Limited ("Catalina") in this declaratory judgment action.[1] This declaratory judgment action was brought by Catalina to establish its rights and obligations under an insurance policy Catalina issued to R.K.C. Entertainment, LLC d/b/a The Red Room ("R.K.C." or "The Red Room") regarding a shooting that occurred April 9, 2005 at The Red Room, a nightclub operated by R.K.C. After reviewing all motions, memoranda, and exhibits submitted by both parties, including Defendant Narruhn's notebook of submissions designated as Exhibit 1, and hearing extensive oral arguments and for the reasons stated below, summary judgment is appropriate, given the facts of this case, and is therefore granted to Catalina.

LEGAL STANDARD

[1] Catalina filed several documents in connection with this summary judgment motion: (1) a motion for summary judgment (filed April 5, 2013), (2) a supplemental motion for summary judgment (filed August 15, 2013), (3) a memorandum of law in support of its motion for summary judgment (filed August 22, 2013), (4) a memorandum of law in support of its supplemental motion for summary judgment (filed September 3, 2013), and (5) a supplemental memorandum of law in support of Catalina's first motion for summary judgment (filed October 3, 2013). Each of the four grounds for summary judgment argued at the hearing and ruled upon by this court is cited in Catalina's Memorandum filed August 13, 2013.

Summary Judgment is proper under Rule 56, SCRCP if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. In cases applying the preponderance of the evidence burden of proof, if the non-moving party provides "a mere scintilla" of evidence as to a genuine issue of material fact, summary judgment is not proper. Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, (Ct. App. 2013) *quoting* Hancock v. Mid-South Mgt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 807, 802 (2009). A party opposing a properly supported motion for summary judgment may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659, 661 (Ct. App. 1994).

ANALYSIS

Catalina London moved for summary judgment on four grounds: (1) the assault and battery exclusion in both the general liability and liquor liability policies purchased by R.K.C. excludes coverage and a defense under the facts of this case; (2) the insured's failure to comply with notice provisions of the policy substantially prejudiced Catalina and thus obviates coverage and a defense under the policy; (3) the policy was cancelled in accordance with the law of South Carolina eleven days prior to the shooting and thus no coverage existed at the time of the incident and no defense was due to R.K.C.; and (4) there was no "occurrence" to trigger coverage under the policy and thus no coverage applied nor was any defense due. For the reasons addressed below, the Court holds that Catalina is entitled to

summary judgment.

I. ASSAULT AND BATTERY EXCLUSION

It is uncontested that on April 9, 2005, Elisa Narruhn was shot and rendered a paraplegic in The Red Room by patron Ardon Percival Cato, II. Ms. Narruhn's Amended Complaint in the underlying Tort Action, CA 2005-CP-26-4134, filed August 26, 2005 ("The 2005 Tort Action") specifically alleges that she "was assaulted by Defendant Cato." Furthermore, the Order of Judgment against R.K.C. in the 2005 Tort Action held:

> On April 9, 2005, Elisa Narruhn was a customer at R.K.C. Entertainment, LLC d/b/a The Red Room when a shooting broke out in which Defendant Ardon Percival Cato, II shot Elisa Narruhn and other people.

In the instant action, Ms. Narruhn's Answer, filed on or about July 2, 2012, admitted that she was hit by a bullet while in The Red Room on April 9, 2005. Also, in response to Requests to Admit served by Catalina on or about April 2, 2013, Ms. Narruhn admitted that her Amended Complaint in the 2005 Tort Action "alleges that Ardon Percevial Cato, II assaulted her" and that "the assault perpetrated on Ms. Narruhn by Mr. Cato involved Mr. Cato shooting Ms. Narruhn with a firearm." Ms. Narruhn also admitted that "but for the alleged assault perpetrated upon Ms. Narruhn by Mr. Cato, Ms. Narruhn would not have sustained the injuries she complains of in [the 2005 Tort Action]." Finally, Catalina produced evidence, including Mr. Cato's arrest warrant and attached affidavit, indictment and true bill, and sentencing sheet, that Mr. Cato, was charged with, indicted for, and pled guilty to the crime of assault and battery with intent to kill Ms. Narruhn on April 9, 2005 at the Red Room. Mr. Cato is currently imprisoned for this crime.

Catalina's general liability and liquor liability policies issued to R.K.C. include a comprehensive, unambiguous exclusion for assault and battery, as follows:

> This insurance does not apply to any claim arising out of an assault and/or battery or out of any act or failure to act to prevent or suppress an assault and/or battery whether caused by the insured, an employee, a patron or any other person.
>
> This exclusion applies to all causes of action arising out of an assault and/or battery including, but not limited to, allegations of negligent hiring, placement, training, or supervision, or to any act, or omission relating to an assault and/or battery.

In seeking to avoid the application of the assault and battery exclusion, Ms. Narruhn relies on Mr. Cato's deposition testimony that he did not "intend" to shoot Ms. Narruhn, arguing that the issue of intention creates a question of fact for a jury. She cites a number of cases seeking to support her proposition. However, each of the cases relied upon by Narruhn concerns the application of an intentional acts exclusion, and not the application of an assault and battery exclusion. Catalina's argument is grounded in the policy's assault and battery exclusion. An intentional acts exclusion analysis is inapplicable to the instant case for the following reasons.

First, the intentional acts exclusion is entirely different than the assault and battery exclusion on which Catalina relies, because the assault and battery exclusion has no inherent requirement for intentionality. Second, the tort of battery has no requirement that the unauthorized contact with another person be intentional. Mellen v. Lane, 377 S.C. 261, 277, 659 S.E.2d 236, 245 (Ct. App. 2008). Third, even if intent was an element of battery, the assailant's guilty plea to assault and battery with intent to kill establishes, as a matter of law, that he had a specific intent to harm. Moreover, Mr. Cato's conviction for assault and battery with intent to kill via a guilty plea estops any later testimony to the effect that he did not intend to harm Ms. Narruhn. Doe v. Doe, 346 S.C. 145, 148-49, 551 S.E.2d 257, 258-59 (2001). The fact that his conviction came via a guilty plea rather than a jury determination in a contested trial makes no legal difference. Zurcher v. Bilton, 379 S.C. 132, 136, 666 S.E.2d

224, 226 (2008). Ms. Narruhn argues that estoppel is not applicable under the facts of this case, but cites no South Carolina case law to contradict the rules expressed in Doe and Zurcher.

The assault and battery exclusion at issue excludes coverage for the underlying claims. Catalina's motion for summary judgment is based upon the controlling decision of Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993). That case held that an exclusion in a commercial insurance policy for assault and battery operated to "exclude[] claims arising out of assault and battery, no matter what the cause." *Id.* at 473-74, 438 S.E.2d at 277.

The language of the assault and battery exclusion in *Sphere Drake* was as follows:

> Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes claims arising out of Assault and Battery, whether caused by or at the direction of, the insured, his employees, patrons of [sic] any cause whatsoever.

Id. at 473, 438 S.E.2d at 277.

The language of the assault and battery exclusion in this case is essentially identical:

> This insurance does not apply to any claims arising out of an assault and/or battery or out of any act or failure to act to prevent or suppress an assault and/or battery whether caused by the insured, an employee, a patron or any other person.

Because Catalina's assault and battery exclusion is comprehensive and unambiguous, and there is no genuine issue of material fact that the conditions for its enforcement have been met, the Court concludes that as a matter of law there is no coverage under the subject policy for the injuries Ms. Narruhn sustained at the Red Room on April 9, 2005. Catalina, therefore, had no duty to defend or indemnify R.K.C. for Ms. Narruhn's injury. Summary Judgment for Catalina based on this issue is, therefore, granted.

II. INSURED'S FAILURE TO COOPERATE UNDER THE POLICY

Catalina London seeks summary judgment on a second issue: the insured's violation of the duties required of an insured by the policy. Those duties are stated identically in the general liability and liquor liability coverage parts, as follows:

> 2. Duties In The Event Of Occurrence, Offense, Claim, Or Suit
>
> **a.** **You [the insured]** must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons and witnesses; and,
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.
>
> **b.** If a claim is made or "suit" is brought against any insured, **you [the insured]** must:
> (1) Immediately record the specifics of the claim or "suit" and the date received; and
> (2) Notify us as soon as practicable.
> **You [the insured]** must see to it that we receive written notice of the claim or "suit" as soon as practicable.
>
> **c.** **You [the insured]** and any other involved insured must:
> (1) Immediately send us copies of any demands, notices, summonses, or legal papers received in connection with the claim or "suit";
> (2) Authorize us to obtain records and other information;
> (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
> (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

Catalina Insurance Policy ALT 047106, p. 11 (emphasis added).

Under South Carolina law, for an insurer to decline coverage based on a violation of contractual duties, such as the notification duties outlined above, the insurer must show substantial prejudice. Vermont Mut. Ins. Co. v. Singleton by and through Singleton, 316 S.C. 5, 12, 446 S.E.2d 417, 421-22 (1994).

Catalina produced evidence in the form of an Affidavit of Mr. W. P. Pinson on behalf of Tapco Underwriters, Inc., ("Tapco") Catalina's managing general agent, stating, "R.K.C. never notified Tapco of Elisa Narruhn's 2005 suit against R.K.C., the entry of a default against R.K.C., or any supplemental proceedings against R.K.C." Thus, R.K.C. failed to notify Catalina of the shooting; failed to deliver the summons and complaint for the underlying Tort Action to Catalina; failed to answer Ms. Narruhn's complaint in the Tort Action and thereby went into default; failed to inform the insurer of the hearing for default judgment; failed to appear at the hearing for default judgment; failed to provide a copy or otherwise provide notice to Catalina of the Court's Order of Judgment against R.K.C. for $6,000,000.00; failed to provide Catalina any notice of the reference to a special referee for supplemental proceedings; and failed to attend the hearing before the special referee which resulted in the assignment to Ms. Narruhn of any claim R.K.C. might have against Catalina. R.K.C. thereby kept Catalina totally in the dark until Ms. Narruhn's 2010 suit against Catalina demanded payment of the $6,000,000.00 default judgment along with claims for punitive damages for failure to defend the 2005 Tort Action.

R.K.C.'s failure to notify Catalina of any event related to Ms. Narruhn's Tort Action denied Catalina the opportunity to investigate the shooting in a timely fashion; denied Catalina the opportunity to interview the principal member of R.K.C., Richard Cronce, prior to his subsequent death; denied Catalina the opportunity to answer the complaint in Ms. Narruhn's Tort Action; denied Catalina the opportunity to defend in any way during the process of the litigation and most particularly at the hearing for damages pursuant to Ms. Narruhn's motion for judgment by default, which awarded $6,000,000.00 against the insured; denied Catalina the opportunity to appeal the $6,000,000.00 award or start an immediate action for a declaratory

judgment; denied Catalina the opportunity to defend its special interests before the special referee; and denied Catalina the opportunity to appeal the decision of the special referee within the requisite time. For these reasons, this Court holds that R.K.C.'s failure to provide any notice to Catalina of the shooting, or of Ms. Narruhn's action constitutes substantial prejudice to Catalina.

Ms. Narruhn argues that Tapco was notified of Ms. Narruhn's 2005 Tort Action and of R.K.C.'s default by means of a facsimile and attached documentation sent to Tapco in October, 2008 by Ms. Narruhn's then-counsel, Mr. Dwight Hudson, Esq. Catalina does not concede the facsimile was received by Tapco or, if received, that it contained the documents alleged. Regardless of whether the fax was received, and taken in the light most favorable to the non-moving party, there is still no question of fact that the facsimile was not and could never be notice *from the insured*, as required by the cited clear language of the policy.

Furthermore, even when considering the facts and inferences in the light most favorable to the non-moving party, even if the facsimile was received by Tapco and contained the documents alleged, it would have been received two-and-one-half years *after* the R.K.C. default had been entered in April 2006, well beyond the time Catalina would have been permitted to seek to set aside the default under the South Carolina Rules of Civil Procedure. Therefore, even when the facts regarding reception of the facsimile are taken in the light most favorable to the non-moving party, there is still no question of fact as to whether Catalina was substantially prejudiced because as a matter of law, absent a showing of fraud, which has not been alleged by either party, Catalina would not have been able to set aside R.K.C.'s default.

Catalina is, therefore, entitled to deny coverage, a defense, and indemnity to R.K.C. for

Ms. Narruhn's shooting based on R.K.C.'s total failure to comply with the notice terms of the policy, which failure resulted in substantial prejudice to Catalina. Catalina is entitled to summary judgment based on that issue, and it is hereby granted.

III. CANCELLATION OF THE SUBJECT POLICY

The third basis on which Catalina seeks summary judgment is that the policy issued to R.K.C. was cancelled effective March 29, 2005, eleven days before Ms. Narruhn was shot.

Catalina has presented to the Court an Affidavit of Charleston Premium Finance Company and Tapco Underwriters which details how the policy, financed through a premium finance company, was cancelled. The cancellation was for failure to pay the premium. The Affidavit, sworn to and executed by W.P. Pinson, Jr., CPCU, ALSI, establishes that R.K.C. Entertainment, LLC, had a contract to make eight monthly payments of $339.84 after making a down payment of $959.51. R.K.C. made only two installment payments and, under the terms of the contract, was in default as of March 14, 2005. A 10-day notice of cancellation was sent to R.K.C. on that day, stating that $244.84 had to be received by Charleston Premium Finance Company before March 24, 2005. Charleston Premium Finance received no further payments from R.K.C. On March 24, it sent a Notice of Cancellation to R.K.C., at the last address listed in Charleston Premium Finance Company's records, stating that the policy would cancel effective March 27, 2005 at 12:01a.m. The policy was, therefore, cancelled effective that day by the premium service company which complied with the requirements of S.C. CODE ANN. § 38-39-90.

Ms. Narruhn argues that the policy was not properly cancelled because the principal of R.K.C., Mr. Richard Cronce, did not actually sign the application with the premium finance company and thus did not grant power of attorney to the premium finance company to cancel

the agreement. Furthermore Ms. Narruhn argues that R.K.C. did not know what dates the premium finance payments were due because the due date was crossed out on the application form. There is no dispute that the signature on the premium finance application, which contains power of attorney language authorizing cancellation, was signed by the producing insurance agent and not Mr. Cronce. However, there is also no dispute that the premium finance application expressly allows either the producing agent or the applicant to sign. Moreover, there is no dispute that R.K.C. made a substantial down payment and two premium payments based on the finance agreement, which as a matter of law constitutes ratification of the agreement, its obligations, and the power of attorney language. Catalina also produced uncontradicted deposition testimony of the producing agent stating that at the time the agreement was consummated, the producing agent clearly and specifically communicated the due dates of the finance payments to Mr. Cronce, despite the crossed out date on the premium finance application. The producing agent's testimony also indicated that Mr. Cronce would also have received a payment booklet stating the payment due dates and amounts. Furthermore, Ms. Narruhn has produced no evidence that R.K.C. or Mr. Cronce ever actually misunderstood the due date of the finance payments. Finally, Ms. Narruhn argues that the premium finance company failed to comply with the South Carolina premium finance company cancellation statue by failing to notify the insurance company of the cancellation. However, the Cancellation Notice states on its face that notice was provided to the insurance company through Tapco. The evidence shows that Tapco is the managing general agent for Catalina and is, therefore, authorized to receive such notice as the insurance company. See S.C. CODE ANN. §38-44-20 (3)(a).

Therefore, there is no genuine issue of material fact that the policy of insurance was

cancelled, in accordance with the applicable South Carolina statute governing cancellation of insurance by a premium finance company, on March 29, 2005, eleven days before the incident that resulted in Ms. Narruhn being shot at the Red Room. Because the policy of insurance was cancelled and of no effect prior to Ms. Narruhn's incident, Catalina could not have coverage or any duty to defend or indemnify. Therefore, Catalina is entitled to summary judgment based on this issue as well.

IV. NO OCCURRENCE UNDER THE POLICY

The fourth basis upon which Catalina seeks summary judgment is its claim that there was no coverage under the general liability policy because there was no "occurrence," defined by the policy essentially as "an accident." The insuring agreement of the policy states, "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'...to which this policy applies...only if: (1) The 'bodily injury' is caused by an 'occurrence'...."

Under South Carolina law, Mr. Cato's shooting of Ms. Narruhn would not be considered an accident. Assault and battery are both considered intentional torts. Furthermore, the analysis discussed above relating to Mr. Cato's conviction for assault and battery with intent to kill is applicable here also.

As our Court of Appeals has held, citing our Supreme Court, "[t]he intent to act, coupled with the intent to produce the consequences is not an 'accident' as defined by the Supreme Court of South Carolina." Manufacturers and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 161, 498 S.E.2d 222, 227 (Ct. App. 1998) *citing* Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937). In State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000), the Court held that allegations in a complaint of intentional torts "do not allege an

accidental occurrence." Barrett, 340 S.C. at 10, 530 S.E.2d at 137 citing Gattison v. South Carolina State College, 318 S.C. 148, 151, 456 S.E.2d 414, 416 (Ct. App. 1995); Prior v. South Carolina Med. Malpractice Liab. Ins., 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991); and Snakenburg v. Hartford Cas. Ins. Co., 299 S.C. 164, 171-2, 383 S.E.2d 2,5-6 (Ct. App. 1989). It is, therefore, well established in South Carolina law that allegations of intentional torts do not allege an "occurrence" under a liability insurance policy. Furthermore, the resulting conviction of Mr. Cato for assault and battery with the intent to kill Ms. Narruhn removes any doubt about whether the shooting was an accident and could constitute an occurrence under the policy. The Barrett case, supra., also makes the point that blending intentional torts and negligence is "unavailing because, in the context of a cause of action alleging an intentional tort, which by definition cannot be committed in a negligent manner, the allegation of negligence is surplusage." Barrett, 340 S.C. 1, 11, 530 S.E.2d 132, 137 (Ct. App. 1973).

Thus, Mr. Cato's shooting of Ms. Narruhn was not an "accident," so there was no "occurrence" necessary to trigger coverage under the general liability policy. Catalina London is, therefore, entitled to summary judgment based on this issue as well.

V. CONCLUSION

Based on the fact that there is no disputed genuine issue of material fact as to any of the four grounds upon which the Catalina seeks summary judgment and because Ms. Narruhn has not presented even a scintilla of probative evidence to contest the material facts of any of the four issues raised as grounds for summary judgment, Catalina is entitled to summary judgment in this declaratory action. Summary judgment is, therefore, granted to Catalina London to the effect that no coverage, or any duty to defend or indemnify, existed as to R.K.C. concerning the shooting of Ms. Elisa Narruhn's under the insurance policy issued to R.K.C.

IT IS SO ORDERED.

Larry B. Hyman, Jr.
JUDGE, FIFTEENTH CIRCUIT

CONWAY, SOUTH CAROLINA

December 11,2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-3873

Catalina London Limited f/k/a Alea London Limited..... Respondent

vs.

Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room..... Appellants

---

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served a **Notice of Appeal** on the Respondent, through attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

DATE OF MAILING: October 27, 2014

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 27th day of October, 2014.

Barbara A. Smith
Notary Public for South Carolina
My Commission Expires: 3-12-24