

\$25,000 towards the counsel fees of *each* Kerbeck corporation asserting a remaining sum of \$50,000(+) to be paid. The Defendant Federated has filed a Motion for Summary Judgment seeking dismissal of the Complaint brought by the several Kerbeck corporations. The Court relies upon the following findings:

Facts and Procedural History

- 1) In 2002, F.C. Kerbeck & Sons Inc. purchased a commercial package policy including garage coverage for the three dealerships now appearing as plaintiffs in this matter: F.C. Kerbeck & Sons Inc., Kerbeck Cadillac Pontiac, Inc., and Kerbeck Motors Corp.
- 2) F.C. Kerbeck & Sons Inc. was the primary insured on the policy, and the other two plaintiff dealerships were listed as additional insureds. Coverage was provided from 1/1/03 to 1/1/04.
- 3) The “Extended Defense Protection” Endorsement of the Garage Coverage contains language regarding Federated’s duty to pay costs of suit on behalf of the Kerbeck dealerships covered by the policy. Subsection A provides “we will pay all defense costs incurred to defend a suit filed against you during the Coverage Part period by or on behalf of a customer arising out of the sale, service, lease, rental or repair of your product.”
- 4) The first sentence of Subsection C of the Endorsement provides “The most we will pay is \$25,000 for any one suit.” The Court deems this as a simple declaratory statement which does not lend itself to any ambiguity. Finally, the policy contains a \$1000 deductible for the garage coverage.
- 5) In May 2003, a class action suit, namely, the Cerbo Litigation, was filed naming FC Kerbeck & Sons, Inc., Kerbeck Cadillac Pontiac, Inc., and Kerbeck Motors Corp. as defendants, along with many other auto dealerships.
- 6) On January 17, 2005, Federated notified the Kerbeck dealerships that coverage under the policy would be limited to \$25,000, notwithstanding that all three dealerships were separately named defendants in the class action suit, and are separate legal and physical entities. As noted in Troy A. DeFouw’s letter of January 17, 2005, to Frank Kerbeck, coverage “for the entire complaint” (which included all three of the Kerbeck

Defendants) was limited to \$25,000. Oral argument revealed that Kerbeck did not protest Mr. DeFouw's letter within any reasonable time thereafter.

- 7) In October 2006, the Cerbo Litigation was "settled". There is no dispute that the settlement remains to be fully administered and that Kerbeck will likely incur additional counsel fees in connection with the administration of the settlement.
- 8) In January 2008, the Kerbeck plaintiffs filed a complaint seeking a judicial determination that Federated was obligated to provide \$25,000 in coverage under the garage policy to each of the Kerbeck defendants in the class action case – that is, it was obligated to provide \$75,000 in coverage in the aggregate. Federated filed an answer and counterclaim in March 2008, seeking a judicial determination that it was obligated to provide no more than \$25,000 regardless of the number of insured entities, and that the deductible was due and owing.
- 9) Federated asserts that it is only liable to provide \$25,000 of coverage regardless of the number of insureds, since only one suit was filed naming all three Kerbeck dealerships as defendants. The Kerbeck dealerships oppose, seeking a declaration that Federated must pay \$25,000 per dealership, and that they detrimentally relied on a reasonable belief that the policy covered each dealership separately when they decided to enter into the settlement.
- 10) Federated also seeks a declaration that the \$1000 deductible mandated by the policy is now due and owing. Kerbeck does not address the issue in its opposition.
- 11) Plaintiffs also cross-move to compel Federated to provide more specific answers to interrogatories, and to appoint a designated representative for deposition. Plaintiffs also move to extend the discovery end date. Federated has filed a cross-motion in opposition to plaintiff's discovery motions, seeking to quash same.

Standard for Summary Judgment

Rule 4:46-2 provides that Summary Judgment is appropriate where "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 challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against

the movant in favor of the opponent of the motion. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985).

As noted by our Supreme Court in Villa vs. Short, 195 N.J. 15, 23 (2008), “an insurance policy is a contract”. Any analysis must begin with the plain language of the policy. “If the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased.” President vs. Jenkins, 180 N.J. 550, 562 (2004).

Legal Analysis

As a threshold matter, the commercial package policy endorsement makes it clear that Federated wrote one policy for F.C. Kerbeck & Sons, Inc., and that the remaining Kerbeck dealerships were additional named insureds on this policy. While the 3rd Kerbeck plaintiff in the present suit– Kerbeck Motors Corp. – *is not* a named insured on the Federated policy, the policy does cover “Kerbeck Motors Inc.”. The Court assumes (and counsel confirmed at oral argument) that the caption simply mis-states the name of this entity as “Kerbeck Motors Corp.”

Federated relies on Suh v. Dennis, 260 N.J. Super. 26 (Law Div. 1992) in support of its argument. In Suh, two vehicles owned by the same auto dealership/repair shop were involved in an accident with a 3rd vehicle. The company was covered by a liability policy which contained a limit of insurance clause that essentially mirrors the one in the present case.

The drivers of those two vehicles, who were employees of the company who owned them, argued that the full liability limit of \$500,000 should be available to each of them. They argued that the policy was ambiguous – on the one hand the definition of “insured” provided that coverage was available to each insured and set coverage limits of \$500K per insured; on the other hand the limitation on liability clause set the total limit of coverage to \$500K regardless of the number of insured employees involved in the accident. The court then considered the remainder of plaintiff’s argument:

[p]laintiffs point out that it is a basic rule in the construction of an insurance policy that ambiguities in the writing must be strictly construed against the insurer, citing *Sparks v. St. Paul Insurance Company*, 100 N.J. 325, 495 A.2d 406 (1985) and where the controlling language of an insurance policy is susceptible of two interpretations, one favorable to the insured and the other to the insurer, the interpretation sustaining coverage should be applied and any ambiguity resolved in favor of the insured. *Great American Insurance Co v Lerman Motors Inc.*, 200 N.J. Super. 319, 491 A.2d 729 (App.Div.1984). Movants then conclude that, since there is an ambiguity, it must be construed against the insurer and they argue coverage of Palmer and Dennis should be \$ 500,000 each. Suh, 260 N.J. Super. at 32.

However, the court in Suh did not agree with plaintiffs, and ruled that defendant was only obligated to provide the amount stated in the “Limit of Insurance”, regardless of the number of plaintiffs. In comparing the two clauses, the court said:

An insured to whom coverage is provided is insured separately except "with respect to the Limit of Insurance". The Limit of Insurance clearly states ". . . the most we will pay for all damages resulting in any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations." It is therefore the clear intent of the policy to pay no more than \$ 500,000 for any one occurrence, regardless of the number of vehicles involved in the accident. The policy is not ambiguous. Id. at 35-36.

The present case is comparable to the situation presented in Suh and the policy language utilized. The first sentence of Section C of the endorsement reads, “The most we will pay is \$25,000 *for any one suit.*” In Suh the policy read, “The most we will pay for any one accident or loss is \$500,000.”

In the present case, one class action suit was filed naming three Kerbeck dealerships as defendants. There was one policy covering those dealerships, and all three were named insureds on that policy. Just as in Suh, the limit of insurance clause in the Kerbeck policy clearly states that Federated will pay up to \$25,000 for any one suit. This Court finds that the reasoning in Suh is equally applicable to the present case, because the Suh court specifically tied the coverage limit to the fact that only one *suit* was filed – the number of plaintiffs was irrelevant to the amount of coverage.

The commercial package policy endorsement contains two “Common Policy Conditions” that the court considers relevant to the analysis of defendant’s claims. Condition 1 states that “[t]he first Named Insureds (sic) shown in the Declarations is authorized to act for additional named insured(s) in all matters relating to this insurance.” Condition 5 states that “[t]he first Named Insured shown in the Declarations declares that all firms named in the policy (named insureds and additional named insureds) are owned or financially controlled by the same interests.”

Read in its entirety, the policy endorsement further supports Federated’s position that the Limit of Insurance clause applies equally to all three dealerships. Since all three dealerships essentially are to be considered one and the same under the common policy, inasmuch as they are controlled by the same interests and may be bound by the decisions of the principals of the

first named insured (F.C. Kerbeck & Sons), Federated intended the clause to limit its potential payout for costs of suit to \$25,000 irrespective of the number of Kerbeck dealerships that might be named defendants in a lawsuit.

Plaintiffs also bring an equitable promissory estoppel argument by way of the certifications of the insurance broker and Mr. Kerbeck that they reasonably believed the policy provided \$25,000 to each dealership, and that they relied on that belief when they agreed to join the settlement in the class action. Defense counsel disputes those certifications as self-serving, and urges the court to dismiss them, because even if true, they don't create a question of material fact that would survive a summary judgment motion. The Court can only interpret an insurance policy in light of an insured's expectations when there is an ambiguity in the policy. As the Court informed counsel during the oral argument, further efforts were made to find other case law that might be helpful. The Court receives guidance from Alwart vs. State Farm, 131 N.C. App. 538, at 540, where the North Carolina Court of Appeals citing Smith vs. State Farm, 109 N.C. App. 77 (1993) stated,

No ambiguity ... exists unless, in the opinion of the Court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the Court must enforce the contract as the parties have made it and not under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.

The Court agrees with defendant that the policy is not ambiguous. The limit of insurance clause in the Kerbeck-Federated contract, like the analogous clause considered in Suh v Dennis, *supra*, clearly operates to limit Federated's obligation to pay legal fees to \$25,000 *per suit* and \$250,000 in the aggregate. There is but one lawsuit at issue here – the class action lawsuit in which three Kerbeck dealerships were defendants. That each Kerbeck dealership is a separate taxable entity is of no moment in interpreting the limit of insurance clause.

Defendant's motion for summary judgment is GRANTED. Plaintiff's remaining motions and defendant's cross-motion in opposition are DENIED as moot. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.


NELSON C. JOHNSON, J.S.C.

Date of Decision: 10/24/08