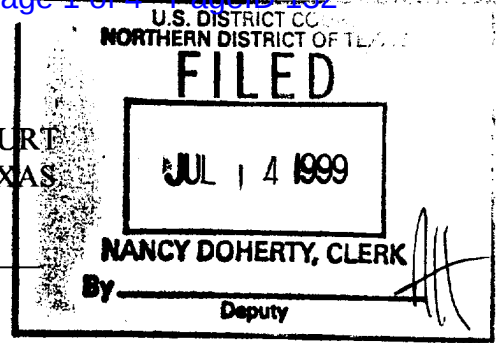


*de*  
**ORIGINAL**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



ALLIANCE GENERAL INSURANCE  
COMPANY,

Plaintiff

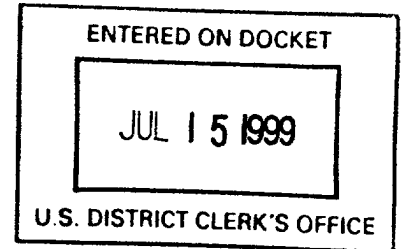
v.

Civil No. 3:97-CV-2448-H

CLUB HOSPITALITY, INC.  
NICK MEHMETI, INDIVIDUALLY,  
NICK MEHMETI D/B/A LIPSTICK,  
PT'S, NICK'S BAR & GRILL, AND  
NICK'S SPORTS GRILL,

Defendants.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*



**MEMORANDUM OPINION AND ORDER**

Before the Court are Plaintiff's Motion for Attorneys' Fees and Expenses, filed on March 30, 1999; Defendants' Response to Alliance General Insurance Company's Motion for Attorneys' Fees and Expenses, filed April 16, 1999; and Plaintiff's Reply to Response Motion for Attorney's Fees, filed May 3, 1999.

After considering the briefs of the parties and the relevant authorities, and for the reasons set forth below, the Court is of the opinion that Plaintiff's motion for attorneys' fees and expenses should be denied.

Plaintiff, Alliance General Insurance Company, seeks to recover the attorney's fees and expenses it paid to Ms. Ramona Martinez of the law firm Cowles & Thompson on behalf of the Defendants. It seeks these fees as consequential damages of Mehmeti's breach of the firearms warranties contained within the Commercial General Liability (CGL) and the Liquor Liability insurance policies at issue in this case.

Alliance did not explicitly reserve its right to seek reimbursement of the defense costs it was paying on behalf of the Defendants in the reservation of rights letter it sent to Mehmeti's attorney, Roger Albright, on October 6, 1997. (Ex. 17.) Texas courts have denied the right of an insurer to seek reimbursement of defense costs for uncovered claims unless the insurer's reservation of rights letter specifically notified the insured that reimbursement of defense costs would later be sought. *Matagorda County v. Tex. Assoc. of Counties County Gov. Risk Mgmt. Pool*, 975 S.W.2d 782, 784 (Tex. App. — Corpus Christi 1998, writ granted); *see also In re Hansel*, 160 B.R. 66, 70 (Bankr. S.D. Tex. 1993) (finding that under Texas law an insurer may not recover litigation costs absent "an agreement or understanding that the insured would reimburse if later it was determined there was no duty to defend."). Most, if not all, of the cases permitting an insurer to be reimbursed for the expenses it paid for the defense of the insured require the insurer to clearly state that the carrier reserved its right to recover attorney's fees paid for the defense upon a judicial determination of no coverage. Dennis J. Wall, *Insured's Reimbursement of Insurer's Defense Expenses: Some Practical Steps*, 65 DEF. COUNS. J. 68, 71 (1998). The mere judicial determination of no coverage is generally not sufficient for the insurer to recover attorney's fees and expenses. *Id.*

Alliance argues it was not necessary for it to have reserved the right to seek reimbursement of Ms. Martinez's fees in the reservation of rights letter since it gave Mehmeti notice of its intent to seek reimbursement through filing this suit the same day it sent Mr. Albright the reservation of rights letter. Alliance contends this suit was sufficient notice to Mehmeti, and it would be redundant to require it to reserve a right it was already asserting.

*Matagorda County* explicitly states that the insurer may not seek reimbursement of

defense costs unless the “reservation of rights letter specifically notified the insured that reimbursement of defense costs would later be sought.” *Matagorda County*, 975 S.W.2d at 784 (emphasis added). Additionally, the other courts that have considered the issue have required insurer to mention its intention to seek reimbursement of the costs of the defense the insurer was providing in the reservation of rights letter. The case law requires the insurer to place the insured on notice within the reservation of rights letter. Alliance failed to do this, and this failure precludes it from receiving reimbursement for Ms. Martinez’s fees and expenses.

Having determined that Plaintiff’s are not entitled to recover the defense fees and expenses paid on behalf of the Defendants because of its failure to notify the Defendants within the reservation of rights letter of its intention to seek reimbursement of these fees and expenses, the Court need not address Defendants’ other objections to Plaintiff’s motion.<sup>1</sup>

---

<sup>1</sup>The Court does want to respond to Defendants’ contention that “while the parties agreed in accordance with F.R.C.P. 54 that the question of attorney’s fees in the present declaratory judgment would be decided after the court rendered its decision, no such agreement existed concerning the fact issue of ‘damages’ claimed by Alliance in the underlying *Corona* claim.” (Def’s Resp. at 2) (emphasis in original).

Defendants’ lawyers apparently do not recall what they agreed to at the January 7, 1999 pretrial conference. Defendants’ counsel agreed to decide this issue of the reimbursement of Ms. Martinez’s fees and expenses in the manner in which the Court is currently proceeding. At the pretrial conference, the Court held the following discussion with the lawyers:

THE COURT: .... But in getting there, then you would want to ask a question about the costs of representation, but there’s nothing else to ask or is there?

MR. COOPER: Correct.

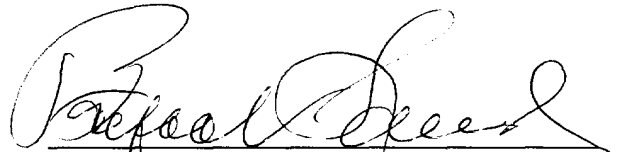
MR. COLLINS: I think that’s right, Your Honor.

MR. ALBRIGHT: I believe that’s correct.

Plaintiff's Motion for Attorneys' Fees and Expenses is **DENIED**.

SO ORDERED.

DATED: July 14, 1999

  
BAREFOOT SANDERS, SENIOR JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS

---

THE COURT: As long as we agree on that.

MR. COOPER: I know the federal courts as far as like attorney's fees, typically if it's attorney's fees for like this case, you take that up after the verdict?

THE COURT: Right.

MR. COOPER: Essentially Ramirez-Martinez [sic] fees that we're seeking. I don't know if you guys want to do that, take it up afterwards depending on the outcome.

MR. ALBRIGHT: That would be fine.

MR. COLLINS: That makes a lot of sense.

THE COURT: I think it simplifies matters and try to be reasonable on it. There's enough for the jury to say grace over without it having that in it, so we'll have that part of it in that fashion.

Transcript, January 7, 1999 Pretrial Conference.