IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NABIL BATTIKHA, et al., Plaintiffs, v. COOPERATIVA DE SEGUROS MULTIPLES, et al., Defendants	Civil No.:11-1439 (DRD)

OPINION AND ORDER

Plaintiffs Nabil Battikha, Beatrice Battikha, and their conjugal partnership, filed suit against Cooperativa de Seguros Multiples ("Cooperativa"), Betancourt Insurance, Inc. ("Betancourt"), the Estate of Annie Leone ("Estate"), Annie Leone's daughter, Cheryl Forte ("Forte"), and Denise Russo under Articles 1802 and 1444 of the Puerto Rico Civil Code, P.R. Laws Ann. Tit. 31 § 5141 and § 4051, respectively.

On January 3, 2011, Plaintiff Nabil Battikha's ("Battikha") middle and ring finger of his left hand were severed as a result of an accident that occurred in the studio apartment, Apartment 1104, belonging to the Estate. The instant case constitutes a claim for damages suffered by the tenant, Battikha, while renting this unit from the Estate. Cooperativa alleges that that there is no insurance coverage under the applicable policy as the policy only covers Apartment 1106 and not the site of the

accident in Apartment 1104. The Estate alleges that coverage is proper as Apartment 1104 is part of Apartment 1106, the same property that was originally insured. Cooperativa maintains that they are two separate and independent units. The present controversy is one of coverage and if there is a specific exclusion clause that is applicable as the Estate rented the studio apartment.

There is a further controversy related to Cooperativa's duty to defend the Estate against Plaintiffs' claims. On the one hand, Coopertiva alleges that there is no coverage and hence, there should not be legal representation. On the other hand, the Estate alleges that Cooperative has a duty to defend based upon a liberal interpretation of the compliant and the insurance policy.

Pending before the Court is the Estate's *Motion for Partial Summary Judgment* (Docket No. 47) and Plaintiffs' and Betancourt's *Joint Motion for Partial Summary Judgment* (Docket No. 57).

I. Uncontested Material Facts

When analyzing a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party, in this case Cooperativa. *See* Vera v. McHugh, 622 F.3d 17, 26 (1st Cir. 2010)*; see also* Agusty-Reyes v. Dept. of Edu., 601 F.3d 45, 48 (1st Cir. 2010); *see also* Cadle Co. V,

Hayes, 116 F.3d 957, 959-60 (1st Cir. 1997). However, the Court will not "draw unreasonable inferences or credit bald assertions, empty conclusions, [or] rank conjecture." Caban-Hernandez v. Philip Morris USA, Inc., 486 F.3d 1, 8 (1st Cir. 2007) (emphasis in original). Similarly, "summary judgment may be appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996) (internal quotations omitted).

Furthermore, the Court will not consider hearsay statements nor allegations presented by parties that do not properly provide specific reference to the record. *See* Hannon v. Beard, 645 F.3d 45, 49 (1st Cir. 2011) ("It is black-letter law that hearsay evidence cannot be considered on summary judgment for the truth of the matter asserted.") (internal quotation marks omitted); Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment."); FED. R. CIV. P. 56(e)("The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall have no independent duty to search or consider any part of the record not specifically referenced."); *see also* Morales v. A.C. Orssleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001) (finding that,

where a party fails to buttress factual issues with proper record citations, judgment against that party may be appropriate).

Keeping these limitations firmly in mind, the Court proceeds to recite the following properly supported facts in the light most favorable to Cooperativa.

1) The apartment unit 1106 ("Apartment 1106") was originally sold as a combo unit which consisted of a one bedroom apartment and a studio apartment that were interconnected (Docket No. 66-5, p. 13).
2) The deed of Apartment 1106 describes Apartment 1106 as comprising a total area of approximately 1161.33 square feet (Docket No. 57-2, p. 4).
3) Apartment 1106 originally had only one entrance that gave access to the one bedroom apartment from the eleventh floor hallway (Docket No. 66-5, p. 27).
4) Apartment 1106 originally had a built-in door frame, which was sealed with a provisional wall. The wall that separated the studio apartment of Apartment 1106 from the eleventh floor hallway could be converted into a second entrance that would give access to the studio apartment from the eleventh floor hallway by tearing down the provisional wall and installing a door (Docket No. 66-5, p. 24).

5) On July 27, 1979, the Leones, as buyers, subscribed Deed of Sale Number Seventy Three, for the purchase of Apartment 1106 (Docket No. 57-2, p. 2).

6) Only Apartment 1106 is recognized and billed for common area fees by the Coral Beach Administration (Docket No. 66-10, p. 10).

7) There is no legal title to the studio apartment numbered 1104, nor has Apartment 1106 been segregated or legally divided into two different apartment units (Docket No. 47, ¶ 10).

8) There is no separate charge or bill for water for Apartment 1104 as it is part of the same water bill as Apartment 1106. Similarly, there is no separate charge or bill for electricity for Apartment 1104 as it is part of the same electric bill as Apartment 1106 (Docket No. 52-2, p. 2).

9) From 1998 to April 28, 2001, Cooperativa provided a Homeowner insurance policy, policy number HO 08210711, that covered Apartment 1106 (Docket No. 57-8, p. 2).

10) On May 11, 2001, Cooperativa issued a personal liability insurance policy ("Policy") DL 1080592 for Apartment 1106 (Docket No. 57-8, p. 3). The Policy provided a limit of $300,000.00 per occurrence for personal liability and

$1,000.00 for medical payments per person (Docket No. 64-2, p. 1).

11) The Policy covers bodily injury which occurs at insured premises that are occasionally rented (Docket No. 64-2, p. 5).

12) The Policy was renewed every year until March of 2010 (Docket No. 57-8, pp. 3-5).

13) The Policy was in effect from May 21, 2010 to May 21, 2011 (Docket No. 64-2, p. 1).

14) The declaration page of the Policy states that the residence premises covered by the Policy is located at Coral Beach Condominium, 1106 II Carolina, PR 00979 (Docket No. 64-2, p. 1).

15) Sometime before January 3, 2011, the studio apartment was rented to a Mr. Joaquin Carranza and his wife, Patricia Cano (Docket No. 66-10, p. 54).

16) Before January 3, 2011, Cooperativa never inspected Apartment 1106 (Docket No. 64-2, p. 11).

17) As of January 3, 2011, the studio apartment and the one bedroom apartment were not interconnected; the passage had been previously replaced with an internal wall (Docket No. 66-5, p. 18).

18) On January 3, 2011, the studio apartment had an independent entrance from the eleventh floor hallway, and

was designated with the number 1104, (hereinafter, the "studio apartment" or "Apartment 1104") (Docket No. 66-5, p. 41)

19) On January 3, 2011, Plaintiffs were renting the studio apartment portion of Apartment 1106 (Docket No. 66-7, p. 48).

20) On January 3, 2011, while lying on a Murphy Bed in the studio apartment that Plaintiffs were renting, the Murphy Bed's frame broke sending pieces of the bed frame flying into the air. Upon coming down, the pieces of the bed frame permanently severed the middle and ring finger of Battikha's left hand (Docket No. 21, ¶ 43).

II. PROCEDURAL HISTORY

On January 10, 2012, the Estate moved the Court for partial summary judgment seeking a decree that the studio apartment is part of the Apartment 1106 and moving the Court to hold that the Policy covers the January 3, 2011 accident that occurred in the studio apartment (Docket No. 47). Additionally, the Estate advances that while the Policy does exclude from its coverage accidents that occur on premises that are rented, said exclusion does not apply when the secured premises are rented on an "occasional" basis. Moreover, in the event that the Court finds that the studio apartment is part of 1106, the Estate argues

that Cooperativa has the burden of proving that the studio apartment was indeed rented on more than an occasional basis.

On March 5, 2012, Plaintiffs, along with Betancourt, filed a joint motion for partial summary judgment also claiming that the studio apartment is part of apartment 1106 for insurance coverage purposes (Docket No. 57). In the alternative, Plaintiffs and Betancourt advance that if the Court were to find that the Policy is ambiguous with regards to the insured location, the Court must resolve the ambiguity in favor of the insured pursuant to local law. Plaintiffs and Betancourt also posit that the exclusion clause is not applicable because the owners, the Leones, did not rent the studio apartment more than occasionally.

On March 26, 2012, Cooperativa responded to the Estate's motion for partial summary judgment (Docket No. 66). Cooperativa argues that upon constructing an independent entrance for the studio apartment, eliminating the interior passage, and designating the studio apartment with the numbers 1104, a second, independent apartment was created. Cooperativa further avers that since there were two, independent apartments, the fact that Annie Leone informed Cooperativa that she wanted the Policy to cover Apartment 1106 indicates that she did not want to include the studio apartment numbered 1104 in the Policy.

Cooperativa also argues that since the Leones treated the studio apartment and the one bedroom apartment as two, distinct apartment units, they are now estopped from alleging that the studio apartment and the one bedroom apartment are in fact one apartment. Cooperativa also claims there is enough evidence to conclude that the studio apartment was rented more than on an occasional basis.

On March 29, 2012, Cooperativa opposed Plaintiff's and Betancourt's joint motion for summary judgment claiming that the studio apartment is a second, independent apartment not covered by the Policy (Docket No. 69). Also, Cooperativa posits that, as two distinct apartments existed at the time Annie Leone obtained the Policy, she excluded the studio apartment designated as 1104 from the coverage by only informing Cooperativa that she wanted Apartment 1106 to be covered by the Policy.

Cooperativa also claims that since the Apartment was modified, the physical reality, or extra-Registry of Property reality, of the Apartment 1106 does not correspond to the description that the registry provides. Therefore, under Puerto Rico law, the physical reality prevails over the description of the apartment that is recorded in the registry. Cooperativa also asserts that the insurance contract is not ambiguous as to the insured location. Finally, Cooperativa advances that pursuant to the Policy the insured location is "a two, three or four family

dwelling where the insured has his/her actual home in the sense of having no other home in at least one of the family units and which unit is shown as the 'residence premises'" in the endorsement certificate. Id.

On April 2, 2012, the Estate replied to Cooperativa's opposition arguing that without the execution of a deed of segregation, the studio apartment remains part of Apartment 1106 (Docket No. 70). The Estate also reiterates its argument regarding the exclusion clause.

On April 17, 2012, Cooperativa filed a sur-reply to the Estate's reply (Docket No. 75) echoing previously evinced arguments.

On April 23, 2012, Plaintiffs and Betancourt filed a reply (Docket No. 76) to Cooperativa's opposition reiterating their previous arguments as well. Additionally, Plaintiffs and Betancourt argue that as Apartment 1106 is controlled by the horizontal property regime, Apartment 1106, as described in the Registry of Property, prevails over the physical reality. Furthermore, Plaintiffs and Betancourt posit the definition of the insured location that Cooperativa provided in its response to the joint motion for summary judgment would exclude any claims from being filed as Puerto Rico was not the Leones only residence.

On May 1, 2012, Cooperativa filed a sur-reply (Docket No. 82). While repeating previously advanced arguments, Cooperativa states that if the Court were to find that the Registry of Property reality prevails over the extra-Registry of Property reality, said ruling would impose a heavy burden on the insurance industry.

III. SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be entered 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 and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see* Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986). Pursuant to the clear language of the rule, the moving party bears a two-fold burden: it must show that there is "no genuine issue as to any material facts;" as well as that it is "entitled to judgment as a matter of law." Veda-Rodriguez v. Puerto Rico, 110 F.3d 174, 179 (1st Cir. 1997). A fact is "material" where it has the potential to change the outcome of the suit under governing law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "genuine" where a reasonable jury could return a verdict for the nonmoving party based on the evidence. Id. Thus, it is well settled that "the

mere existence of a scintilla of evidence" is insufficient to defeat a properly supported motion for summary judgment. Id.

After the moving party meets this burden, the onus shifts to the non-moving party to show that there still exists "a trial worthy issue as to some material facts." Cortes-Irizarry v. Corporacion Insular, 11 F.3d 184, 187 (1st Cir. 1997).

At the summary judgment stage, the trial court examines the record "in the light most flattering to the non-movant and indulges in all reasonable references in that party's favor. Only if the record, viewed in this manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." Cadle Co. v. Hayes, 116 F.3d 957, 959-60 (1st Cir. 1997). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Prod., 530 U.S. 133, 150 (2000)(quoting Anderson, 477 U.S. at 250-51). Summary judgment is inappropriate where there are issues of motive and intent as related to material facts. *See* Poller v. Columbia Broad. Sys., 369 U.S. 470, 473 (1962)(summary judgment is to be issued "sparingly" in litigation "where motive and intent play leading roles"); *see also* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)("findings as to design, motive and intent with

which men act [are] peculiarly factual issues for the trier of fact."); *see also* Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 433 (1st Cir. 2000)(finding that "determinations of motive and intent . . . are questions better suited for the jury"). "As we have said many times, summary judgment is not a substitute for the trial of disputed factual issues." Rodríguez v. Municipality of San Juan, 659 F.3d 168, 178-179 (1st Cir. 2011)(internal quotations and citations omitted). Conversely, summary judgment is appropriate where the nonmoving party rests solely upon "conclusory allegations, improbable inferences and unsupported speculation." Ayala-Gerena, 85 F.3d at 95. However, while the Court "draw[s] all reasonable inferences in the light most favorable to [the non-moving party] . . . we will not draw *unreasonable* inferences or credit bald assertions, empty conclusions or rank conjecture." Vera v. McHugh, 622 F.3d 17, 26 (1st Cir. 2010)(internal quotations and citation omitted). Moreover, "we afford no evidentiary weight to conclusory allegations, empty rhetoric, unsupported speculation, or evidence which, in the aggregate, is less than significantly probative." Tropigas De P.R. v. Certain Underwriters at Lloyd's of London, 637 F.3d 53, 56 (1st Cir. 2011)(internal citations omitted).

Summary Judgment is proper as the instant matter centers upon the terms and conditions of the Policy, which is a matter of state law in this diversity proceeding. Lopez & Medina Co. v. Marsh USA, Inc., 667 F.3d 58, 65 (1st Cir. 2012).

IV. ANALYSIS

The outstanding controversy at the heart of the parties' dispute is whether the studio apartment 1104 is part of Apartment 1106, and, therefore, covered by the Policy. To properly resolve that query, the Court must evaluate the legitimacy and effect of the modifications of Apartment 1106 carried out by the Leones and analyze the Policy. After careful consideration, the Court finds that the modifications were invalid because they failed to meet the requirements established by the Horizontal Property Act and because, applying the principles of contract interpretation, the Policy is unambiguous on its face. Hence, the studio apartment never existed independently from Apartment 1106, and, at all times legally functioned as a single apartment unit. Accordingly, the Court finds that the Policy covers the tortuous conduct suffered by Plaintiffs.

i) Horizontal Property

In Puerto Rico, the Horizontal Property Act provides the applicable law as to condominiums that have been submitted to

the regime and their requirements as to the Registry of Property. Coral Beach Condominium is governed by the Horizontal Property Act.

a. Segregation and variances

The Horizontal Property Act allows for the segregation of apartment units, validly creating an independent property. Article 32-A of the Horizontal Property Act states that in order to segregate an apartment, or group multiple apartments, the owners must obtain the consent of the affected unit owners and the majority approval of the Association of Co-Owners. Additionally, the changes shall be set forth in a segregation deed and presented to the registry of property in order to be effective.[1] When alterations or modifications of apartments that fall within the "segregation" of the Horizontal Property Act, fail to meet the statutory requirements, those actions, by express mandate of the law and for all legal purposes, are nonexistent.

In the instant case, the Leones never submitted the division of their apartment before the Association of Co-Owners for a vote, obtained the approval of the affected unit owners or presented the changes to the Registry of Property as required by the Horizontal Property Act. Hence, the purported segregation of

[1]P.R. Laws Ann. Tit. 31, § 1292j-1 states that: "[t]he new description of the apartments affected, as well as the corresponding percentages, shall be set forth in the public deed of segregation or grouping that may be executed, which shall not take effect until it is recorded in the individual registry of each one of the filial properties affected, leaving a certified copy filed in the Registry of Property together with the matrix deed."

Apartment 1106 constituted an unauthorized variance. Such unauthorized variances are counter to the purpose of the Horizontal Property regime which aims for organized community living in condominiums. Pertaining to this manner, the Puerto Rico Supreme Court expressed:

> As a question of public policy, indiscriminate and unauthorized modification of apartments in a building subject to said regime cannot be encouraged. Said alterations put at risk not only said apartment owners' life and safety, but also that of the other co-owners. Also, the modification of an apartment may not only affect the aesthetics of a building but may also affect its very structural foundations. This is probably the most clear example of the principle that a persons rights cannot encroach upon another persons rights.

Garcia Larrinua v. Lichtig, 118 P.R. Dec. 120, 18 P.R. Offic. Trans. 145, 161 (1986); *see also* Bravman, Gonzalez v. Consejo de Titulares, 2011 P.R. 189, (stressing the adverse effect of unauthorized variations on the principles of the Horizontal Property regime).

Accordingly, the segregation made by the Leones was invalid, and therefore no new apartment unit was created. Hence, Cooperativa cannot rely upon an official segregation.

b. The Registry of Property

The Registry of Property, as to the Horizontal Property Regime functions as a cadastral system, meaning that the extra-registry reality of the condominium and each apartment must coincide with the description recorded at the Registry of

Property. Consequently, the registry of property guarantees the existence of the surface area of the apartment units and its limits as it appears in the Registry. The Puerto Rico Supreme Court has stated that:

> since the Registry, insofar as the Horizontal Property Act is concerned, has the characteristics of a cadastral system, the actual property must correspond to the Registry description of the property. Hence, the vendee of an apartment in a building governed by the Horizontal Property Act can be expected to know, by fiction of law, what is recorded in the Registry with regard to the title of the apartment . . . .

Garcia Larrinua, 18 P.R. Offic. Trans. at 159 (1986). The cadastral system goes along with the constitutive recordation trait of the Horizontal Property regime, requiring the presentation of the necessary documentation before the registry of property in order for that entry to have a legal existence.[2] Arce v. Caribbean, 108 P.R. Dec. 225, 256-257, 8 P.R. Offic. Trans. 231, 262. Thus, as to the Horizontal Property regime, the registry is both a cadastral system and operates as a constitutive recordation. Accordingly, variances or segregations

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[2]As the Puerto Rico Supreme Court has stated:

> Recordation is constitutive when it is a necessary or sine qua non requirement for effecting a transfer of property titles or the constitution or conveyance of a real property right . . . . When recordation is constitutive, it assumes the value of an indispensable factor, element or requirement so that the constitutive or conveyable title produces that conveyable or constitutive effect. The entry not only serves to evince the existence of a conveyance or lien, but it concurs as an ingredient or essential element to facilitate conveyance or constitutive recordation in a legal sense.

García Larruina, 18 Offic. Trans. at 157 n.1 (quoting Roca Sastre, Derecho Hipotecario 147 et seq., Barcelona, Ed. Bosch (5th ed. 1954)).

must be submitted before the registry of property in order to be valid and coincide with the extra-registry reality.

Cooperativa incorrectly argues that the Puerto Rico Registry of Property is voluntary and not obligatory; therefore it does not guarantee the extra-registry reality. Although Cooperativa's statement is true for most real property, the Horizontal Property regime constitutes an exception to the general rule. The Registry of Property for most real property is voluntary; therefore the Registry of Property does not create or take away property rights and property rights can be created outside of the registry. The registry's primary purpose is the publication of property rights to maintain the public faith.

However, an exception to this general rule exists for condominiums. As the Horizontal Property regime governing condominiums is constitutive, the presentation of property title before the registry is required and mandatory in order for the property right to be created. Noemi Rosado Figueroa & Andres L. Cordova, *Aspectos registrales de la Constitucion del Regimen de la Propiedad Horizontal y su caracter catastral*, 67 Rev. Jur. U.P.R. 857, 858-859 (1993). Property rights as to the apartments submitted to the regime require the presentation before the registry in order to be created. Consequently, for the Horizontal Property Regime, the registry of property does guarantee the area that appears in the registry, the actual

property must correspond to the Registry description of the property. Garcia Larrinua., 18 P.R. Offic. Trans. at 159.

Article 22 of the Horizontal Property Act establishes the requirements for the master deed when presented before the Registry, in order to submit the condominium to the Horizontal Property regime. Specifically, the master deed must be accompanied with the plans of each apartment and a detailed description and surface area of each unit. P.R. Laws Ann. Tit. 31, § 1292(e). The master deed is critical for the informed decision of the prospective buyers of the apartments. A prospective buyer utilizes the Registry description in order to make his purchasing decision.[3] Consequently, altering the composition of the building requires the amendment of the master deed. In the instant case, if the segregation of Apartment 1106 would have created a new unit, the master deed and the plans of that specific apartment would have been affected. Thus, the Leones would have needed to comply with the amendment process of the Horizontal Property Act.

[3]As stated by the Puerto Rico Supreme Court:

> [T]hrough [the master deed] the buyer can become fully acquainted with the building and with his unit, and this would enable him to exercise his rights. Therefore, the master deed cannot be the only source of obligations and rights between the parties. The plans consecrate graphically the rights of the interested parties thus, extending the scope of the public faith in the Registry so as to embrace, as a corollary, the material characteristics of a property, as they are described in said plans.

Arce, 8 P.R. Offic. Trans. at 262.

Cooperativa asserts that a valid segregation was made, thereby creating the studio apartment where the accident occurred and hence, the Policy's coverage does not apply. Cooperativa is incorrect. According to the Horizontal Property Act and its cadastral system, in order for the segregation to be sufficient to create a new apartment, the statutory requirements of Article 32-A must be followed. Those requirements include the majority approval of the Association of Co-Owners and the proper amendments to the master deed. Plaintiffs did not present any changes before the Registry of Property, request the approval of the Association of Co-Owners and the affected apartment owners, or set forth the changes in the appropriate documentation. The Court, therefore, must conclude that, as to the Registry of Property, at the moment of the incident, Apartment 1104 did not exist as a legal unit. Instead, Apartment 1106, which compromises a total of 1,361.33 square feet, includes the studio apartment in question (Docket No. 57-1). The deed of property for Apartment 1106 describes its boundary with apartment 1108, but no apartment is identified as 1104. At the moment of the incident, Cooperativa had issued the insurance policy number DL1080592 from May 21, 2010 to May 21, 2011 covering up to $300,000 for bodily injuries per occurrence for Apartment 1106 (Docket No. 57-5).

In accordance with the applicable provisions of the Horizontal Property Act, the segregation of Apartment 1106 made by Plaintiffs was invalid and thus nonexistent. The Court concludes that the tortuous conduct suffered by Plaintiff occurred within what the Policy defines as the premises of Apartment 1106. Simply, the area of the incident was indeed covered by Cooperativa's Policy. Accordingly, the Court hereby **DENIES** Cooperativa's claim as to the absence of policy coverage for the location of the accident.

ii) Interpretation of Insurance Policy

In accordance with Puerto Rico law, "the Insurance Code of Puerto Rico controls the interpretation of insurance contracts. Section 1125 of the Insurance Code provides that '[e]very insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any lawful rider, endorsement, or application attached to and made a part of the policy.'" Lopez & Medina, 677 F.3d at 65 (citing Nieves v. Intercontinental Life Ins. of Puerto Rico, 964 F.2d 60, 63 (1st Cir. 1992)) (internal citations omitted). "Where the Insurance Code of Puerto Rico fails to guide us in the construction of an insurance contract, we may look to the Civil Code of Puerto Rico as a supplemental source of law." Id.

Article 1233 of the Puerto Rico Civil Code provides that "[i]f the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its stipulations shall be observed." P.R. Laws Ann. Tit. 31 § 3471. For Article 1233 purposes, "the only terms that can be catalogued as clear are those which in themselves are lucid enough to be understood in one sense alone, without leaving any room for doubt." Catullo v. Metzner, 834 F.2d 1075, 1079 (1st Cir. 1987). The Court is aware that "where a contract's wording is explicit and its language unambiguous, the parties are bound by its clearly stated terms and conditions with no room for further debate." Vulcan Tools of P.R. v. Makita., Inc., 23 F.3d. 564, 567 (1st Cir. 1994). On the other hand, "where a policy's language is unclear, we must construe the provisions against the insurer." Lopez & Medina, 677 F.3d at 64 (citing Great Am. Ins. Co. V. Riso, Inc., 479 F.3d 158, 162. (1st Cir. 2007). "We deem ambiguity present in a policy if a word or phrase is reasonably susceptible to more than one construction." Id. "To be ambiguous, an insurance policy must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. An insurance policy is ambiguous when it is fairly susceptible to two or more constructions." Lee R. Russ & Thomas F. Segalla, Coach on Insurance, 2 Couch on Insurance, § 21:14 Tests for

determining existence of ambiguity (3d ed. 2011). "The test to be applied by the court in determining whether there is ambiguity is not what the insurer intended its words to mean but what a reasonably prudent person applying for insurance would have understood them to mean." Id. To that effect, "plaintiff must allege facts which show that damages are covered within the policy coverage." Nahan v. Pan American Grain Mfg. Co., 62 F.Supp.2d. 419, 423 (D.P.R. 1999)(citing Rodriguez v. John Hancock Mut. Life, 110 P.R. Dec. 1, 10 P.R. Offic. Trans. 1 (1981). Vega v. Pepsi-Cola Bot. Co., 118 P.R. Dec. 661, 18 P.R. Offic. Trans. 763 (1993)). In the instant case, the parties are in disagreement as to the definition of "insured place."

"The Court is mindful of the fact that under Puerto Rican law, insurance contracts are considered adhesion contracts and, as such, insurance contracts are liberally construed in favor of the insured." Jimenez v. Triple S. Inc., 154 F.Supp.2d, 236, 239 (D.P.R. 2001) (citing Nieves, 964 F.2d at 63., Rosario v. Atlantic Southern Ins. Co. of P.R., 95 D.P.R. 759 (1968)). "[U]nder Puerto Rico law, insurance contracts, by virtue of being considered adhesion contracts, are liberally construed in favor of the insured. Likewise, exclusion clauses-not usually favored in an insurance contract-should be strictly construed against the insurer." Fajardo Shopping Center, S.E. v. Sun

Alliance Ins. Co., 167 F.3d 1, 7 (1st Cir. 1999)(internal quotations and citations omitted).

When confronted by an ambiguous term or condition, courts apply rules of interpretation designed to protect the insured party. Lee R. Russ & Thomas F. Segalla, Coach on Insurance, § 22:14 Statement of general rule and its application (3d ed. 2011). "If an insurer uses language that is uncertain, any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against, the amount of liability, or the person or persons protected, the language will be understood in its most inclusive sense, for the insured's benefit." Id. The court cannot consider extrinsic evidence if the terms of the contract are clear and unambiguous. *See* Executive Leasing Corp. v. Banco Popular de Puerto Rico, 48 F.3d 66, 69 (1st Cir. 1995) ("to consider the extrinsic evidence at all, the court must first find the relevant terms of the agreement unclear."). Accordingly, the Court must assess the language of the Policy and determine, as a matter of law, whether the pertinent terms are subject to multiple interpretations. Garcia v. Puerto Rico, 2011 WL 1258621 (D.P.R. 2011)(internal quotations omitted).

The instant issue arises as to the term "insured place"[4] to which the Policy denominates Apartment 1106 as such and whether the accident that led to the filing instant case occurred within the "insured place." Cooperativa asserts that the policy coverage does not extend to the area where the incident occurred because said area had been validly segregated, therefore, a new apartment was created.

When determining if a term is ambiguous, the Court must ask itself if the word or phrase in controversy is susceptible to more than one interpretation. Failure to define a term may render a contract ambiguous; however, the lack of a definition does not automatically establish an undefined term as ambiguous. Coach on Insurance, § 21:14. The parties' opposing viewpoints on

[4] Docket 57-5, Insurance Policy, Definitions:

4. "Insured Place" means:
a. "the residential premises"
b. the part of other premises, other structures and land uses by you as your residence and:
(1) as indicated in the Statement: or
(2) that you acquire during the policy period for use as a residence.
c. any premises that you use in relation to some if the premises in items 4a or 4b:
d. all parts of certain premises:
(1) that is not own by an "insured" and
(2) in which an insured lives temporarily;
e. vacant land, other than fields, owned by an insured or leased thereto;
f. land owned by an insured or leased thereto on which a family residence is being built of one to four living units for the "insured".
g. cemetery lots or individual or family crypts owned by an "insured".
h. any part of the premises occasionally leased to the insured for uses that do not involve "businesses".

8. "Residential Premises"
a. residence for a family, other structures and land; or
b. that part of any building;
(1) in which you live and is indicated as the residential premises in the Statements
(2) Residential premises also mean a dwelling for two; three or four families in which you reside at least one of the family units as is indicated as the family premises in the Statements.

the insured premises arise out of the application of the Policy to the specific circumstances, rather than from the face of the wording of the Policy itself. The Court must resolve the ambiguity issue in order to decide the interpretation that will be enforced.

The term "insured premises" in accordance with the entirety of the terms set forth in the Policy is lucid and unambiguous on its face; the language is not unclear per se. Therefore, the parties are bound by the clearly stated terms. The insurance policy denominates Apartment 1106 as the "insured place." Accordingly, the clear literal interpretation of the "insured place" includes the area of the studio apartment, as it does not constitute an independent property as previously discussed in accordance with the Horizontal Property Act. Furthermore, no valid segregation was carried out, pursuant to the Horizontal Property Act; the deed of property for Apartment 1106 states that it is composed of 1,361.22 square feet which includes the area of the studio apartment (Docket No. 57-5). Accordingly, the Policy is clear and unambiguous on its face that it insures Apartment 1106, including the area of the studio apartment.[5]

[5]In the alternative, if the Court were to find that the Policy is ambiguous, as Cooperativa suggests, the result would be the same. As the Court construes the contract against the drafter, the insurance company, in situations of ambiguity, the Court would similarly conclude that the studio apartment is covered under the auspices of the Policy because there is sufficient evidence that the Leones did not treat Apartment 1106 as comprising two separate units as discussed infra (see page 28).

Consequently, the tortuous actions suffered by Plaintiffs are covered by the Policy issued by Cooperativa.

a) Occasional Rental

The insurance policy at issue excludes from its coverage premises rented by the insured. However, said exclusion does not apply to the rental of insured premises on an occasional basis. Exclusion (1)(b)(2) of the Insurance Policy reads:

> Coverage L-Personal Liability and Coverage M-Medical Payments to Others do not apply to "bodily injury" or "property damage:
>
> (b)(2) arising out of the rental or holding for rental of any part of any premises by an "insured", This exclusion does not apply to the rental or holding for rental of an "insured location:"
>
> (a) On an occasional basis if used only as a residence;
>
> (Docket No. 57-5a).

Said exclusion is limited, and, therefore, not applicable, to those insured premises "occasionally rented." "[A]ny doubts regarding the incontestability clauses or disability benefits exclusions in insurance policies must be resolved in favor of the insured. Nahan, 62 F.Supp.2d. at 423. *See* Ganapolsky v. Boston Mut. Life Ins. Co., 138 F.3d 446, 448 (1st Cir. 1998)("Under Puerto Rico law, an exclusion clause in an insurance contract is strictly construed and any ambiguity is resolved in favor of the insured."); Fajardo Shopping Center, S.E. 167 F.3d. 1 at 7 (exclusion clauses should be strictly construed against the insurer).

The Estate asserts that during the 30 year period that the apartment was owned by the Leones, the unit was rented only on two occasions prior to the accident that led to the filing of the instant suit. Cooperativa mentions that said argument is immaterial, furthering its contention that the accident occurred in an area excluded by the Policy coverage. Cooperativa argues, if the apartments were to be considered one unit, the above-mentioned exclusion is applicable because the insured premises were rented on more than an occasional basis, therefore, the Policy does not apply to the present claim. (Docket No. 66).

It is an undisputed fact that the Leones studio apartment had only been rented on two occasions in thirty years of ownership; no other evidence has been presented to demonstrate additional rental occasions. The studio apartment was rented once to Joaquin Carranza and once to Plaintiffs. The Court determines that two rentals in a thirty year period are not more than occasional; thus, the Court concludes that the exclusion of the policy coverage is not activated.

iii) Estoppel

Cooperativa argues that the Estate cannot validly argue that apartments 1106 and 1104 are one single apartment because they would be going against their own acts, which is prohibited by the estoppel doctrine. "Estoppel is an equitable doctrine whereby ones own acts or conduct prevent the claiming of a right

to the detriment of another party who was entitled to and did rely on the conduct." Romualdo P. Eclavea & Eric C. Surette, Estoppel and Waiver § 1, *Generally; basis, nature, and purpose of estoppel*, 28 Am. Jur. 2d (2012). Cooperativa relies on the "own acts" doctrine discussed by the Supreme Court of Puerto Rico in Intern'l General Electric v. Concrete Builders of P.R., Inc., 4 P.R. Offic. Trans. 1221 (1976).

"The Puerto Rico Supreme Court has unequivocally rejected application of the estoppel doctrine as developed in the common law to its local legal system." CMI Capital Market Investment, LLC. v. Municipality of Bayamon, 410 F.Supp.2d 61, 76. (2005). (citing Corraliza Rodriguez v. Bco Des. Eco., 2001 P.R. Dec. 2.). "Instead, it has utilized a similar equitable principle known as "doctrina de actos propios" which is loosely translated as the 'doctrine of one's own acts.'" Id. "The doctrine of one's own acts flows from Art. 7 of the Puerto Rico Civil Code, P.R. Laws Ann. Tit 31. § 7, which allows the court to interject equity principles in the absence of a specific applicable legal provision." Id. (citing Corraliza, 2001 P.R. Dec. at 6). "This principle is parallel to the doctrine of estoppel in English law." Id. (citing Int'l Gen. Elec. 4 P.R. Offic. Trans. 1221). Art. 7 clearly provides that courts must not decide cases based in equity unless there is no applicable statute. Noting the statutory authority applicable to the controversy at hand, as

previously discussed, the Court understands there is no need to decide the segregation issue on equity grounds.

Cooperativa's estoppel argument is unconvincing. The Leones' assertion that Apartment 1106 only constitutes one unit does not go against their own acts. After the modification of Apartment 1106, the Leones have considered the studio apartment and the one bedroom apartment as one property. The Leones paid taxes on Apartment 1106, which included the studio and one bedroom apartment; they did not connect the studio apartment to a separate water and electric meter; did not constitute a deed of segregation in order to formalize the division and the creation of studio apartment numbered 1104 from Apartment 1106 in the Property Registry; and they did not inform the Administration of the Condominium that they had segregated the studio apartment differentiated as 1104 from Apartment 1106.

After careful consideration, the Court **DENIES** Cooperativa's argument that the Estate is going against their own acts by arguing against the existence of a valid segregation.

iv) Duty to Defend

Finally, the Court easily determines the Estate is entitled to legal representation pursuant to the Policy. The matter is not a close one. The Court notes that the insured premises have remained basically the same from the time the Policy was executed by the parties to the time of the accident; the only

differences between those two time periods is the addition of a second entrance to the common hallway of the Coral Beach Condominium and the erection of a non-load bearing wall. Moreover, Puerto Rico law is clear that "the duty to defend is measured by the allegations in a plaintiff's complaint -- if any of these allegations, read liberally, state facts that would be covered by a liability policy if proven true, then the insurer must provide a defense for the insured defendant." Jewelers Mut. Ins. Co. v. N. Barquet, Inc., 410 F.3d 2, 15-16 (1st Cir. 2005)(citing Martinez Perez v. Universidad Central de Bayamon, Inc., 143 P.R. Dec. 554, 562, 1997 Juris P.R. 98 (1997) (Official Translation); Pagan Caraballo v. Silva Delgado, 22 P.R. Offic. Trans. 96, 102-03, 122 P.R. Dec. 105, 1988 Juris P.R. No. 92 (1988)). The allegations contained in Plaintiffs' complaint, if proven true, certainly implicate the provisions of the Policy especially as the Court has found that the studio apartment, Apartment 1104, is part of Apartment 1106. Hence, the Court must conclude that there is undoubtedly coverage to be provided by Cooperativa. Accordingly, legal coverage to the Estate is to be provided forthwith and the Estate is to be reimbursed for all reasonable legal expenses incurred to date.[6]

[6]The Estate is to provide to the Court a statement of fees and expenses paid to counsel to date. Further, counsel must, via a sworn statement, justify the hours spent and the fees incurred in compliance with Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331 (1st Cir. 1997).

V. CONCLUSION

In resolving the issue regarding the segregation of Apartment 1106, the Court concludes that, as a matter of law, the studio apartment, Apartment 1104, is part of Apartment 1106, because the modifications carried out by the Leones did not have the effect of validly creating a new apartment. Hence, the accident occurred within the premises of Apartment 1106, and, therefore the Policy did in fact cover the incident. Furthermore, when interpreting the insurance Policy, the Court deems the contract clear and unambiguous on its face, and, therefore, the Policy extends to the premises of Apartment 1106, including the studio apartment. Moreover, as to Cooperativa's claim on the exclusion of the Policy due to the rental of the insured premises, the Court finds that two previous rentals during a thirty-year period do not exceed occasional rental; therefore the Policy's exclusion clause does not apply. The Court also finds that Cooperativa's estoppel argument is without merit as the statutory authority available does not allow the Court to resolve on equity grounds. Accordingly, the Court concludes that the studio apartment is part of Apartment 1106, and, therefore was covered by the Policy at the time of Plaintiffs' unfortunate accident. Finally, the Court finds that Cooperativa has a duty to defend the Estate and that the Estate

is to be reimbursed for all reasonable legal expenses previously incurred in the instant litigation.

Accordingly, for the reasons set forth above, the Court hereby **GRANTS** both motions for partial summary judgment (Docket Nos. 47 and 57) finding that the Policy provides coverage for the accident in question and that the Leones are entitled to legal representation as a matter of law.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of September, 2012.

/s/ DANIEL R. DOMÍNGUEZ

DANIEL R. DOMÍNGUEZ
U.S. District Judge