2019 WL 5265360
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Orlando Division.

PRINCETON EXCESS AND SURPLUS LINES INSURANCE COMPANY, Plaintiff,
v.
HUB CITY ENTERPRISES, INC., Wall St. Enterprises of Orlando, Inc., and Robert Hunt, Defendants.

Case No: 6:18-cv-1608-Orl-41GJK
|
Signed 10/03/2019

Attorneys and Law Firms

Frederick W. Mohre, Pearson Doyle Mohre & Pastis LLP, Maitland, FL, Jordon S. Steinway, Pro Hac Vice, Bates Carey, LLP, Chicago, IL, for Plaintiff.

Kenneth Blair Rugh, Steven R. S. Main, Hill & Rugh, Keller & Main, PL, Orlando, FL, Christopher S. Reed, Law Offices of Michael B. Brehne, PA, Altamonte Springs, FL, for Defendants.

ORDER

CARLOS E. MENDOZA, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE is before the Court on Plaintiff's Motion for Judgment on the Pleadings (Doc. 27) and Defendant Hub City Enterprises, Inc.'s and Defendant Wall St. Enterprises of Orlando, Inc.'s ("Joint Defendants") Motion for Final Summary Judgment and Response to Plaintiff's Motion for Judgment on the Pleadings ("MSJ," Doc. 30). Plaintiff filed a Memorandum of Law in Opposition (Doc. 31) to the MSJ, and Defendants filed a Reply (Doc. 34). Plaintiff also filed an Agreed Motion to Clarify/Motion to Stay Pretrial and Trial Deadlines ("Agreed Motion," Doc. 36). For the reasons set forth herein, the Motion for Judgment on the Pleadings will be granted in part and denied in part, the MSJ will be denied, and the Agreed Motion will be denied as moot.

This is a declaratory judgment action involving whether Plaintiff has a duty to defend Joint Defendants in an underlying lawsuit brought by Defendant Robert Hunt arising out of injuries caused by a large inflatable beach ball. As a threshold matter, Joint Defendants contend that this Court should look to uncontroverted facts outside the underlying complaint regarding the large inflatable beach ball to determine that there is no duty to defend, citing, among other cases, *Composite Structures, Inc. v. Cont'l Ins. Co.*, 560 F. App'x 861, 865–66 (11th Cir. 2014) and *Victoria Select Ins. Co. v. Vrchota Corp.*, 805 F. Supp. 2d 1337, 1343 (S.D. Fla. 2011). However, "[t]o determine whether [the insurer] had a duty to defend [the insured], the Court looks *only to the allegations in the Underlying Complaint* and the terms of the Policy." *Evanston Ins. Co. v. Haven S. Beach, LLC*, 152 F. Supp. 3d 1370, 1374 (S.D. Fla. 2015) (emphasis added) (citing *Jones v. Fla. Ins. Guar. Ass'n*, 908 So. 2d 435, 442–43 (Fla. 2005)); *see also Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 143 F. Supp. 3d 1283, 1293 (S.D. Fla. 2015) ("[A]n insurer's duty to defend its insured against legal action depends solely on the facts and legal theories alleged in the pleadings and the claims against the insured" (citing *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995)).

In *Composite Structures*, the Court considered evidence of the date notice was provided to the insurer, which was not in the underlying complaint because the date of notice would not typically be alleged in a complaint, and the fact was uncontroverted. In this case, the parties dispute whether or not an inflatable beach ball was a decoration or an amusement device and the Joint Defendants seek to introduce "facts" outside the underlying complaint that the beach ball was used as a decoration. Those facts are not uncontroverted. In fact, it is the basis of Joint Defendants' MSJ argument for coverage and directly conflicts with Plaintiff's assertion that the ball was an amusement device.

Vrchota is similarly inapplicable. It holds that Courts may consider evidence beyond the underlying complaint and policy when an insured notifies the insurer of facts that would

potentially place the claim within the policy and the insurer fails to do a reasonable investigation of those facts. *Vrchota* is distinguishable, not binding on this Court, and cites no Florida cases in support. And, the Eleventh Circuit has since stated "such cases are best viewed 'as exceptional cases in which courts have crafted an equitable remedy when it is manifestly obvious to all involved that the actual facts placed the claims *outside the scope of coverage*.' " *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1323 (11th Cir. 2014) (quoting *First Specialty Ins. v. 633 Partners, *1324 Ltd.*, 300 F. App'x 777, 786 (11th Cir. 2008) (emphasis added). Joint Defendants wish to use outside evidence to place the claim within coverage, not outside of it. Thus, the consideration of evidence outside of the underlying complaint and departure from the general principle is not warranted here. Additionally, in light of this conclusion, and the fact that the underlying complaint was incorporated into the Complaint in this case, the filings relied on by the Court for both Plaintiff's Motion for Judgment on the Pleadings and for Joint Defendants' MSJ are the same.

I. BACKGROUND

***2** On May 21, 2018, Defendant Hunt brought an underlying tort suit against the Joint Defendants, seeking to recover for personal injuries he sustained while attending Joint Defendant's festival called "Rum Fest 2017." (*See generally* Hunt Compl., Doc. 1-1). Hunt's Complaint ("underlying complaint") alleges that during the party, a crowd gathered to listen to music and dance, and that "an extra-large, heavy inflatable beach ball" provided by Joint Defendants was "thrown into the crowd for people to push it around in the air." (*Id.* ¶ 8). Hunt further alleges that the ball was knocked towards him, and that he used his "outstretched arms and hands to push the extra-large beach ball away from him to prevent it from hitting him in the head," which resulted in "severe ligament and tendon injuries." (*Id.* ¶¶ 9–10).

Plaintiff issued a commercial general liability policy to Joint Defendants, which was in effect during the relevant time period. (Am. Compl. ¶ 21; *see also* Policy, Doc. 1-2, [1] at 2). The policy requires Plaintiff to defend and indemnify Joint Defendants against claims of bodily injury or property damage to which insurance applies. (Doc. 1-2 at 41). Plaintiff received notice of the underlying lawsuit in July 2018 and agreed to provide a defense. Thereafter, Plaintiff brought suit seeking declaratory judgment that Plaintiff owes no defense or indemnity obligation in the underlying tort suit. The parties dispute whether the endorsement to the policy exclusion labeled "Exclusion – Amusement Device" applies. (*Id.* at 19). Plaintiff also seeks an award of attorney's fees, which Joint Defendants argue should be denied.

II. LEGAL STANDARD

Rule 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings ... is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts." *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). For practical purposes, a Rule 12(c) motion is subject to the same standard of review as a Rule 12(b)(6) motion. *United States v. Halifax Hosp. Med. Ctr.*, 997 F. Supp. 2d 1272, 1274 (M.D. Fla. 2014). Under a Rule 12(b)(6) analysis, a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party. See *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1269 (11th Cir. 2009). Nonetheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

***3** However, once the moving party has discharged its burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

III. ANALYSIS

A. Insurance Contract Interpretation

It is undisputed that Florida law governs the interpretation of the insurance policy at issue. In Florida, "[s]ummary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001); *see also Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1538–39 (11th Cir. 1995) ("Under Florida law, interpretation of an insurance contract is a matter of law to be decided by the court."). "Florida law provides that insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Westport Ins. Corp. v. VN Hotel Grp., LLC*, No. 6:10-cv-222-Orl-28KRS, 2011 WL 4804896, at *2 (M.D. Fla. Oct. 11, 2011), *aff'd*, 513 F. App'x 927 (11th Cir. 2013) (quotation omitted). "The scope and extent of insurance coverage is determined by the language and terms of the policy." *Id.* (quotation omitted).

"[T]he Florida Supreme Court has made clear that the language of the policy is the most important factor." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (quotation omitted). Additionally, "insurance contracts are construed according to their plain meaning." *Id.* at 1274 (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc.*, 913 So. 2d at 532 (quotation omitted).

Where the "relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." *Westport Ins. Corp.*, 2011 WL 4804896, at *2 (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). In order for an insurance contract to be found ambiguous, "[t]here must be a genuine inconsistency, uncertainty, or ambiguity in meaning that remains after resort to the ordinary rules of construction." *Valiant Ins. Co. v. Evonosky*, 864 F. Supp. 1189, 1191 (11th Cir. 1994) (quotation omitted). "[A] court may *not* rewrite the policy or add meaning to create an ambiguity." *Id.* Additionally, the mere fact that policy language requires interpretation does not render the language ambiguous. *Id.* "Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Westport Ins. Corp.*, 2011 WL 4804896, at *2 (quoting *Auto-Owners Ins. Co.*, 756 So. 2d at 34). Moreover, "[e]xclusionary clauses are construed even more strictly against the insurer than coverage clauses," and the insurer has the burden of demonstrating that an exclusion in a policy applies. *Id.* (quotation omitted).

B. Duty to Defend

***4** "An insurer's duty to defend is distinct from and broader than the duty to indemnify." *Lime Tree Vill. Cmty. Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1405 (11th Cir. 1993) (quotation omitted). Whether an insurer has a duty to defend "is determined by examining the allegations in the complaint filed against the insured." *Id.* As a result, "[a]n insurer may be required to defend a suit even if the later facts show there is no coverage." *Orlando Nightclub Enters., Inc. v. James River Ins. Co.*, No. 6:07-cv-1121-Orl-19KRS, 2007 WL 4247875, at *9 (M.D. Fla. Nov. 30, 2007).

When the complaint "alleges facts which fairly and potentially bring the suit within policy coverage," the insurer must defend the suit on behalf of the insured. *Lime Tree Vill. Cmty. Club Ass'n*, 980 F.2d at 1405. "If the allegations of the complaint leave any doubt as to the duty to defend, the question must be resolved in favor of the insured." *Id.* However, "if the pleadings show that there is no coverage or that a policy exclusion applies to bar coverage, the insurer has no duty to defend." *Goldberg*, 143 F. Supp. 3d at 1293–94 (citing *Md. Cas. Co. v. Fla. Atl. Orthopedics, P.L.*, 771 F. Supp. 2d 1328, 1332 (S.D. Fla. 2011), *aff'd*, 469 F. App'x 722 (11th Cir. 2012)).

Plaintiff argues that the extra-large inflatable beach ball falls within the Amusement Device exclusion and thus Plaintiff has no duty to defend the underlying lawsuit. Joint Defendants argue first that even if the beach ball is an amusement device, the underlying suit is not excluded from coverage. Alternatively, Joint Defendants argue that the beach ball is not an amusement device. Finally, Joint Defendants argue that at the very least because the parties have different readings of the exclusion, a patent ambiguity exists and therefore it should be construed in favor of coverage. The portion of the exclusion which the parties disagree over states:

> This insurance does not apply to any loss, claim, 'suit' or any obligation of any 'insured' to indemnify, defend or contribute jointly or severally with another because of 'bodily injury', 'property damage', 'personal and advertising injury' or 'injury', actually or allegedly arising directly or indirectly based on, attributable to, arising out of, involving, as a consequence of, resulting from or in any way related to the ownership maintenance, operation, sponsorship, instruction, supervision, set-up or take-down or other use of an 'amusement device' ....

(Doc. 1-2 at 19).

Joint Defendants focus on the first part of the exclusion—that the insurance "does not apply to any loss, claim, 'suit' or any obligation of any 'insured' insured' to indemnify, defend or contribute jointly or severally ...." They argue that the clause "to indemnify, defend or contribute jointly or severally ..." modifies all four actions—"loss," "claim," " 'suit' " and "obligation." (Doc. 30 at 14–15). And therefore, for any of those actions to be covered, they must sound in indemnification or contribution. Following this logic, Joint Defendants conclude that because the underlying lawsuit is not a claim for indemnity or contribution, the exclusion does not apply. This reading is illogical. It ignores the term "defend" in the phrase "to indemnify, defend or contribute." Also, it makes the phrase "or any obligation" superfluous, which is impermissible.

***5** Plaintiff's interpretation is equally convoluted, arguing that the clause "to indemnify, defend or contribute jointly or severally" only modifies " 'suit' " and "obligation" but not "loss" or "claim." Plaintiff's application of its interpretation exemplifies the mental gymnastics required if the Court were to adopt its reading. Plaintiff argues that the underlying lawsuit is not only a suit, but it is also a claim and because claims—under Plaintiff's reading—are exempted from the indemnity/contribution limitation, the suit—construed as a claim—is exempted. Not to mention, Plaintiff's interpretation also ignores the term "defend." The Court disagrees with both interpretations.

The amusement device exclusion in its entirety presents a strong argument for use of the serial comma. Nevertheless, it is entirely common and accepted in American English for the final item in a list to not be preceded by a comma. The exclusion contains multiple such lists. And, when the

exclusion is read as a whole, it is clear that the final item on each list is meant as a final item and not as a modifier for the other items on each list. For the clause at issue here, the clearest reading is: "[t]his insurance does not apply to any loss, claim, 'suit[,]' or any obligation ...." In other words, the insurance does not apply to any: loss, or claim, or suit, or obligation. And, the phrase "to indemnify, defend or contribute" only modifies "obligation." Indeed, that very clause supports the Court's reading. Clearly, it would be appropriate for a comma to be placed in between "defend" and "or contribute" because contribute does not modify defend but is another obligation of any insured. Another clear example can be found at the bottom of the exclusion, which contains a list of things that are considered amusement devices and thus not covered. A subsection of the list states "[l]aser tag, bungee jumping, Sumo wrestling, human spheres, slides, water slides and similar games and devices." The clearest and most sensible reading of the list in this context is that "similar games and devices" is the final item in the list, not a modifier of "water slides." Accordingly, the Court does not find the amusement device exclusion to be ambiguous. The exclusion applies to the underlying suit if the beach ball constitutes an amusement device.

Under the policy, an " 'amusement device' shall include, but not be limited to:"

1. Any mechanical or non-mechanical ride;

2. Any device that requires the user to strike, punch, or kick;

3. Rock climbing walls, Velcro walls and similar scaling devices;

4. 'Moon Bounces', 'Moon Walks', 'Space Walks', and similar inflatable games and devices;

5. laser tag, bungee jumping, Sumo wrestling, human spheres, slides, water slides and similar games and devices;

6. Gymnastic equipment;

7. Mechanical bull, horse, surfboard, skateboard and similar devices;

8. Dunking booth or tank; and

9. Trampoline.

(Doc. 1-2 at 19).

This list is not exhaustive as evidenced by the language "shall include, but not be limited to." Just because an extra-large inflatable beach ball is not on the list of amusement devices does not mean the beach ball does not qualify as an amusement device. *See Witkin Design Grp., Inc. v. Travelers Prop. Cas. Co. of Am.*, 16-20484-CIV, 2016 WL 7670051, at *10 (S.D. Fla. Dec. 15, 2016), *report and recommendation adopted*, 16-20484-CIV, 2017 WL 105918 (S.D. Fla. Jan. 10, 2017), *aff'd*, 712 F. App'x 894 (11th Cir. 2017) (holding a professional services exclusion applied even though the service in question "d[id] not appear by itself in the non-exhaustive list of activities which constitute professional services"); *Travelers Indem. Co. v. Figg Bridge Engineers, Inc.*, 18-22585-CIV, 2019 WL 2723281, at *8 (S.D. Fla. June 24, 2019) (holding the same).

***6** The section of the exclusion applicable here is the section that states that an amusement device is "[a]ny device that requires the user to strike, punch, or kick." The underlying complaint alleges that Joint Defendants "provided an extra-large, heavy inflatable beach ball for, or allowed the extra-large beach ball to be thrown into the crowd for people to push it around in the air." (Doc. 1-1 ¶ 8). The underlying complaint also alleges that "[p]eople in the crowd knocked the extra large beach ball in the air toward Plaintiff who used his outstretched arms and hands to push the extra-large beach ball away from him to prevent it from hitting him in the head." (*Id.* ¶ 9). These allegations are sufficient to contend that the extra-large beach ball was a "device that requires the user to strike, punch, or kick" and that it was provided for the purpose of amusement. Clearly, the extra-large beach ball was provided for the amusement of the crowd—to be pushed around in the air. And strike, punch, kick, and push are all verbs describing actions involving the use of force against another object. Therefore, a push is sufficiently similar to a "strike, punch, or kick" such that the beach ball easily fits into this section of the exclusion. Thus, Hunt's claims in the underlying state court lawsuit are not covered by the policy, and Plaintiff has no duty to defend Defendants in connection with Hunt's suit.

C. Duty to Indemnify

It has been established that the underlying suit brought by Hunt is excluded from coverage based on the amusement device exclusion in Plaintiff's policy and that Plaintiff has no duty to defend. Therefore, it follows that Plaintiff has no duty to indemnify. *See* *Trailer Bridge, Inc. v. Ill. Nat. Ins. Co.*, 657 F.3d 1135, 1146 (11th Cir. 2011) ("A court's determination that the insurer has no duty to defend requires a finding that there is no duty to indemnify." (quotation omitted)).

D. Attorney's Fees

Plaintiff also seeks an award of attorney's fees, and Defendants' Motion for Summary Judgment argues that this request should be denied. Plaintiff provides no case law or authority to support an award of attorney's fees when an insurer sues an insured in a duty to defend context. Accordingly, Plaintiff's request for attorney's fees will be denied.

IV. CONCLUSION

Therefore, it is **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for Judgment on the Pleadings (Doc. 27) is **GRANTED in part and DENIED in part.**
   a. Plaintiff has no duty to defend or indemnify Defendant Hub City Enterprises, Inc. or Defendant Wall St. Enterprises of Orlando, Inc. in the underlying lawsuit.
   b. The remainder of the Motion for Judgement on the Pleadings is **DENIED.**
2. Defendant Hub City Enterprises, Inc.'s and Defendant Wall St. Enterprises of Orlando, Inc.'s Motion for Final Summary Judgment and Response to Plaintiff's Motion for Judgment on the Pleadings (Doc. 30) is **DENIED.**
3. Plaintiff's Agreed Motion to Clarify/Motion to Stay Pretrial and Trial Deadlines (Doc. 36) is **DENIED as moot.**
4. The Clerk is directed to enter judgment in favor of Plaintiff thereafter close this case.

DONE and **ORDERED** in Orlando, Florida on October 3, 2019.

All Citations

Slip Copy, 2019 WL 5265360

Footnotes

1 Plaintiff attached the underlying complaint and the policy to the original Complaint (Doc. 1) but it appears that Plaintiff failed to attach them to the Amended Complaint in error. The Court will consider the underlying complaint and the policy as if they were correctly attached to the Amended Complaint.