UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 08-23350-CIV-GRAHAM /TORRES

KING COLE CONDOMINIUM ASSOCIATION, INC., a Florida Nonprofit Organization,

Plaintiff,

vs.

QBE INSURANCE CORPORATION, a foreign corporation,

Defendant.
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OMNIBUS ORDER

THIS CAUSE comes before the Court upon the following: (i) Defendant's Motion to Dismiss Complaint [D.E. 8]; (ii) Defendant's Motion for Attorney's Fees and Costs and Motion to Stay Litigation [D.E. 9]; (iii) Plaintiff's Motions to Strike Defendant's Motion for Attorney's Fees and Costs [D.E. 20, 23]; (iv) Defendant's Motion to Strike Amended Complaint [D.E. 40]; and (v) Defendant's Motion for Summary Judgment [D.E. 43].

I. BACKGROUND

This case is one of several actions in this District related to damages resulting from Hurricane Wilma, which occurred in October 2005. The instant action was filed by King Cole Condominium Association against QBE Insurance Corporation for property damage to the condominium complex located at 900 Bay Drive, Miami Beach, Florida. This Omnibus Order addresses several

pending matters. For ease of discussion, the Court will first address the motions to dismiss. The case cannot be disposed of on the pending motions. Thus, it remains scheduled for the two-week trial period starting on January 4, 2010.

II. LAW AND DISCUSSION

A. Defendant's Motion to Dismiss Complaint [D.E. 8] and Defendant's Motion to Strike or Dismiss the Amended Complaint [D.E. 40]

It is important to first clarify that the operative complaint in the instant litigation is the Amended Complaint [D.E. 39]. While Defendant requests that the Court strike the Amended Complaint as having been filed without leave of court, pursuant to Federal Rule of Civil Procedure 15(a)(1)(A), a party may amend its pleading as a matter of course prior to being served with a responsive pleading. Fed. R. Civ. P. 15(a)(1)(A). Here, there being no responsive pleading, Plaintiff was entitled to amend its complaint as of right without leave of Court. Therefore, Defendant's motion to strike [D.E. 40] must be denied.

Because the Amended Complaint [D.E. 39] is the governing pleading, it follows that Defendant's motion to dismiss the initial complaint [D.E. 8] is denied as moot. The Court will focus on the arguments raised in the Defendant's motion to dismiss the Amended Complaint [D.E. 40].[1] Specifically, Defendant seeks dismissal of

[1] For all intents and purposes, with minor exceptions, Defendant's motion to dismiss the Amended Complaint [D.E. 40] contains virtually identical arguments to those made in Defendant's prior

the Amended Complaint on three grounds. Defendant first maintains that the action should be dismissed for failure to join USPlate Glass Insurance Company ("USPlate") as an indispensable party under Federal Rule of Civil Procedure 19. [See D.E. 40 at 4.] Defendant next argues that Count I of the Amended Complaint fails to state sufficient facts for a declatory judgment. Id. at 10. Lastly, Defendant contends that a determination as to Count IV for breach of implied warranty of good faith and fair dealing cannot be brought prior to the conclusion of the litigation concerning contractual insurance benefits. Id. at 15. On the later two issues, Defendant raised identical arguments in Isola Condominium v. QBE Insurance Corp., Case No. 08-21592-CIV-DLG at D.E. 11, 32, 50, concerning the Counts of declatory judgment and breach of implied warranty of good faith and fair dealing. Therefore, as discussed below, the Court's ruling is consistent with its prior Isola decision on those matters. The issue of an indispensable party, however, is specific to this action and is addressed below.

(i) Whether USPlate is an Indispensable Party

According to the pleadings, Plaintiff previously sued Defendant, USPlate and others in a prior state court action. [See D.E. 40.] Plaintiff dismissed Defendant from that state court action and filed suit exclusively against Defendant in federal

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pleadings. [Compare D.E. 8 and D.E. 40].

court.[2] In seeking dismissal for failure to join USPlate, Defendant avers, inter alia, that it and USPlate both insured the property against wind and rain damage. Id. According to Defendant, failure to join USPlate "leaves [Defendant] subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations." [D.E. 40 at 7.] Defendant acknowledges not knowing USPlate's citizenship such that it is uncertain whether, if necessary, joinder of USPlate would destroy diversity. [See D.E. 40 at 7.]

Plaintiff opposes the motion and maintains that the instant action involves solely claims against Defendant for breach of contract and breach of the implied warranty of good faith and fair dealing [D.E. 41]. Plaintiff further argues that it entered into an entirely separate insurance contact with USPlate as an additional or supplemental insurer. Id. at 4. Defendant does not dispute that USPlate is not a party to the relevant insurance policy between Plaintiff and Defendant in this case. Rather, Defendant alludes to the interest of judicial economy and the option of permitting the parties to resolve the matters in the state court action, which is presumably still pending. [See D.E. at 8-10.]

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[2] Plaintiff may have resolved the state court action with some of the parties, but may still be litigating against USPlate.

Whether an absent party is indispensable is governed by Federal Rule of Civil Procedure 19. In making the determination, the court first assesses whether the person in question fits the definition of those who should "be joined if feasible" under Rule 19(a). See Provident Tradesmen Bank v. Patterson, 390 U.S. 102, 118 (1968). Under this inquiry, a person should be joined, when feasible, if (A) in the person's absence complete relief cannot be accorded among those already parties, or (B) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a).

Second, if the court determines that the person is an indispensable party, but joinder of that party is not feasible, then the Court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue. Challenge Homes, Inc. v. Greater Naples Care Ctr., 669 F.2d 667, 669 (11th Cir.1982). "The court must determine whether, in equity and good conscience the action should proceed among the parties before it, or should be dismissed." Fed. R. Civ. P. 19(b). The court engages in this analysis by applying four factors: 1) to what extent a

judgment rendered in the person's absence might be prejudicial to the person or those already parties; 2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; 3) whether a judgment rendered in the person's absence will be adequate; and 4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Id. "In making the decision of whether a party is indispensable, pragmatic concerns, especially the effect on the parties and the litigation, control." Challenge, 667 F.2d, at 669 (internal citations and quotation marks omitted).

In this case, it is clear that complete relief can be afforded to the parties without the presence of USPlate. Specifically, Plaintiff alleges breach of contract and declaratory judgment claims under a specific insurance policy with Defendant. There is no evidence nor does Defendant allege that USPlate is a party to the relevant insurance contract. Furthermore, any declaration as to Plaintiff's rights or a finding on the breach of contract claims does not impact the interest of USPlate as a separate or additional insurer. Therefore, the Court finds that USPlate is not an indispensable party to this litigation under Rule 19(a). Other than its conclusory statement, Defendant has provided no evidence that it will be subject to substantial risk of incurring double, multiple or otherwise inconsistent obligations if USPlate is not

joined. On the contrary, in this case, the relevant issues concern Defendant's obligations to Plaintiff stemming from a specific insurance policy. Those obligations are not impacted by USPlate's absence from this case.

Having concluded that USPlate is not an indispensable party to this action under Rule 19(a), the Court need not consider the additional analysis under Rule 19(b). In that regard, the pleadings do not indicate USPlate's citizenship and it is unclear if USPlate could be joined to this proceeding without destroying diversity. Accordingly, the Court finds that dismissal for failure to join an USPlate unwarranted.

(ii) Motion to Dismiss Count I (Declatory Judgment) and Count IV (Breach of Implead Warranty of Good Faith and Fair Dealing)

As noted above, Defendant's request to dismiss Counts I and IV of the Amended Complaint raises similar issues as those matters litigated before the undersigned in the case of Isola Condominium v. QBE Insurance Corp., Case No. 08-21592-CIV-DLG. For example, Defendant here contends that there is no bona fide need for the declaration Plaintiff seeks in Count I because, inter alia, Defendant does not intend to rescind the policy nor does Florida statute § 627.701 provide for a private right of action. [See D.E. 40.] As with the Isola matter against the same Defendant, the Court herein disagrees. There is an actual dispute as to coverage under the policy in this case and Plaintiff has made

sufficient allegations in Count I to state a claim. Therefore, Defendant's motion to dismiss Count I of the Amended Complaint is denied.

Also as with the Isola case, Defendant here seeks to dismiss Count IV, which alleges a claim for breach of implied warranty of good faith and fair dealing. [See D.E. 40 at 15.] As previously determined by the undersigned, a claim for breach of the implied warranty of good faith and fair dealing must wait until the conclusion of the litigation with respect to insurance coverage. See Isola Condominium v. QBE Insurance Corp., Case No. 08-21592-CIV-DLG at D.E. 32, 50. Therefore, Count IV, asserting a claim for breach of implied good faith and fair dealing must be dismissed without leave to amend.

In sum, Defendant's Motion to Dismiss [D.E. 40] is granted, in part, and denied, part. The request to dismiss for failure to join an indispensable party is denied as is Defendant's motion to dismiss Count I of the Amended Complaint. However, Count IV of the Amended Complaint is dismissed without leave to amend.

B. Defendant's Motion for Attorney Fees and Costs and Motion to Stay Litigation [D.E. 9] and Plaintiff's Related Motions to Strike Defendant's Motion for Attorney's Fees and Costs [D.E. 20, 23]

As noted above, it is undisputed that, prior to the instant litigation, Plaintiff filed suit in state court asserting claims arising from the same facts and circumstances as the instant case. Plaintiff dismissed Defendant from the state court action and,

thereafter, filed suit solely against Defendant in this federal court. As a result, pursuant to Federal Rule of Civil Procedure 41(d), Defendant now seeks payment of attorney's fees and costs as well as a stay of the federal litigation. [See D.E. 9]. Plaintiff argues against the imposition of fees and costs on the facts of this case. [See D.E. 12.]

Federal Rule of Civil Procedure 41(d) provides, in relevant part,

> [i]f a plaintiff who previously dismissed an action in any court files an action based on or including the same claims against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

Fed. R. Civ. P. 41(d). As set forth in the Rule, the imposition of fees and costs is discretionary. Potenberg v. Boston Scientific Corp., 252 F3d 1253, 1256 n.2 (11th Cir. 2001). Although there appears to be no Eleventh Circuit precedent on the precise issue of whether Rule 41(d) allows for payment of fees, courts generally agree that Rule 41(d) is meant to prevent vexatious litigation and as a deterrent to forum shopping. See, e.g., Wishneski v. Old Republic Ins. Co., 2006 WL 4764424 (M.D. Fla. 2006) (granting motion for costs given stipulation of dismissal where Defendant was expressly authorized to file the motion if plaintiff re-filed case); Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 874 (6th Cir.

2000)(granting motion for costs where it appeared that plaintiff may have suffered set backs in state court and re-filed action to "try their luck somewhere else").

In this case, Plaintiff submits that because a resolution of the state court proceedings was "imminent" with the other parties, Plaintiff dismissed Defendant and filed a separate suit in federal court solely as against Defendant. [See D.E. 12] The parties do not indicate whether the prior dismissal was stipulated upon Defendant being able to later seek attorney's fees and costs under Rule 41(d). Defendant also does not dispute that it has filed a similar motion for attorney's fees and costs in state court. [See D.E. 12, Ex. A]. While, on the one hand, Defendant has filed pleadings from another case in this district where the District Judge has allowed fees and costs to be awarded [see D.E. 18, 22], in this case, Defendant concedes that "the state court would be the proper court to award the amount of such fees and costs as the case was initially brought in that court and the fees and costs were incurred there." [D.E. 15 at 6.]

Based on the posture of the case and the record before the Court, the undersigned declines to award attorney's fees and costs incurred in the prior state action. The Court also finds that a stay of the litigation is unwarranted. Similarly, Plaintiff's motion to strike Defendant's motion for attorney's fees and costs [D.E. 20, 23] is denied as moot.

C. Defendant's Motion for Summary Judgment [D.E. 43]

Defendant seeks summary judgment on the premise that Plaintiff has failed to submit a pre-suit proof of loss as required under the insurance policy. [See D.E. 43] Plaintiff maintains that proof of loss was not required as Defendant had sent a letter to Plaintiff which constituted a denial of the claim and had only requested a sworn proof of loss after Plaintiff had commenced the instant lawsuit. [See D.E. 45]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). That burden is discharged if the moving party shows the Court that there is "an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has discharged its burden, the nonmoving party must designate specific facts showing that there is a genuine issue of material fact. Id. at 324. Issues of fact are "genuine" only if a reasonable fact finder considering the evidence presented

could find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Material facts are those that will affect the outcome of the trial under the substantive law. Id. at 248. In determining whether a material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. Id. at 261 n.2.

The sole issue raised in Defendant's motion for summary judgment is whether Plaintiff's failure to submit a sworn proof of loss prior to commencing the litigation is a bar to the claim. Significantly, however, failure to comply with the notice requirement of a policy is not always fatal to recovery. Hartford Accident and Indemnity Co., 294 S.2d 362 (Fla. 1st. Dis. Ct. App. 1974). Under Florida law, when an insurer denies liability, the insured is no longer required to submit a proof of loss. Keel v. Independent Life and Accident Ins. Co., 99 S.2d 225, 227 (Fla. 1957).

In this case, Defendant's own pleadings demonstrate that, on November 21, 2006, Defendant's insurance adjuster, Sandy Siegel wrote a letter to Plaintiff advising that the claim fell below the deductible and regrettably "no payments would be made on the claim." [See D.E. 43-3.] Based on the language, Plaintiff reasonably interpreted Mr. Siegel's letter as a denial of the insurance claim. [See D.E. 45-4.] It therefore follows that having denied the claim, Defendant had effectively waived the policy's

requirement for filing a pre-suit proof of loss. Additionally, the record demonstrates that Defendant did not request a sworn statement of proof of loss until April 10, 2008, after Plaintiff had commenced the instant litigation. Based on the sequence of events and the record in this case, Plaintiff was not required to file a sworn proof of loss before commencing suit. Accordingly, Defendant's motion for summary judgment [D.E. 43] is denied.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Complaint [D.E. 8] is **DENIED AS MOOT**. It is further

ORDERED AND ADJUDGED that Defendant's Motion for Attorney's Fees and Costs and Motion to Stay Litigation [D.E. 9] is **DENIED**. It is further

ORDERED AND ADJUDGED that Plaintiff's Motions to Strike Defendant's Motion for Attorney's Fees and Costs [D.E. 20, 23] is **DENIED AS MOOT**. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Strike Amended Complaint and Motion to Dismiss Complaint [D.E. 40] is **GRANTED, IN PART AND DENIED IN PART** as set forth herein. Count IV of the Amended Complaint is dismissed without leave to amend It is further

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment [D.E. 43] is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 26th day of June, 2009.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Judge Torres
Counsel of Record