IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff, v. FRANKLIN CENTER FOR GOVERNMENT AND PUBLIC INTEGRITY, *et al.*, Defendants.	)	Case No. 1:13-cv-957(AJT/TRJ)

ORDER

Plaintiff State Farm Fire and Casualty Company ("State Farm") has filed a Motion to Reinstate, Lift Stay and Reconsider, Revise, Alter or Amend Order, or, Alternatively, for Rule 54(b) Certification or Dismissal Without Prejudice of the Remaining Claims for Relief [Doc. No. 39] ("the Motion"). In it, plaintiff requests that the Court reinstate this action on the Court's active docket and lift the stay imposed by the Court's Order entered April 4, 2014 [Doc. 38], and then reconsider, revise, alter or amend the Memorandum Opinion [Doc. No. 37] and Order [Doc. No. 38] entered April 4, 2014. Alternatively, State Farm requests either that the Court enter a final judgment pursuant to Fed. R. Civ. P. 54(b) with respect to the Court's April 4, 2014 Order declaring that State Farm has a duty to defend[1] or dismiss without prejudice the remaining indemnity issue[2] so that State Farm may seek appellate review of the Court's April 4, 2014 Order. Upon consideration of plaintiff State Farm's Motion to Reinstate, Lift Stay and Reconsider, Revise, Alter or Amend Order, or, Alternatively, for Rule 54(b) Certification

[1] Specifically, the Court declared that "under the Policy, plaintiff has a duty to defend defendant against the claims asserted against it in the action styled 3:13-cv-00094-MPM-SAA, presently pending in U.S. District Court for the Northern District of Mississippi, Oxford Division ('the Suit')." Doc. No. 38 at 1.

[2] Specifically, that remaining issue is whether State Farm has an obligation under the Policy to indemnify defendants FCGPI and/or Kenric Ward for any judgment entered in the Suit.

or Dismissal Without Prejudice of the Remaining Claims for Relief [Doc. No. 39], the opposition thereto [Doc. No. 42] filed by defendant Franklin Center for Government and Public Integrity ("FCGPI"), and plaintiff's reply [Doc. No. 44], and for the reasons stated hereon, State Farm's request to enter final judgment pursuant to Rule 54(b) is GRANTED, and the Motion is otherwise DENIED.

A. State Farm's Motion for Reconsideration

Defendant FCGPI is the named insured on a State Farm Businessowners Policy (the "Policy") that was in full force and effect during the period relevant to the claims asserted against FCGPI in the underlying Suit. Pursuant to the parties' stipulations, coverage under the Policy rests on (1) the application of the term "personal and advertising injury" to the claims alleged in the Suit, using the eight-corners rule, and (2) the application of Section II – Exclusion ¶ 17(a), (b), (k), (h)(1) and (n) to the claims alleged in Suit, using the eight-corners rule, and considering the depositions and stipulated materials. In its Memorandum Opinion dated April 4, 2014 [Doc. No. 37], the Court found that the underlying claims in the Suit are within the Policy's coverage for "personal and advertising injury" and that none of the Policy's exclusions clearly and unambiguously applies to exclude coverage under the Policy. While noting its disagreement as to all of these findings, State Farm requests that the Court reconsider its decision with respect to Exclusion ¶ 17(h)(1) (the "Exclusion") on the grounds that the Exclusion is ambiguous and does not clearly apply to FCGPI, such that State Farm has a duty to defend FCGPI in the underlying suit.

In support of its motion for reconsideration, State Farm has not claimed any change in the law or brought forward any new evidence not previously available.[3] Rather, State Farm bases its Motion

[3] Since the Court did not decide all issues, its Order dated of April 4, 2014 [Doc. No. 38] was, in essence, a grant of partial summary judgment and is thus interlocutory in nature. In that regard, Fed. R. Civ. P. 54(b) provides that, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating

primarily on the premise that the Court did not cite, and therefore ignored, the Fourth Circuit's decision in *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249 (4th Cir. 2003), and that the Court's decision was in clear error in light of that decision.

State Farm has failed to establish a basis for reconsideration. The issue that forms the basis of State Farm's Motion is whether ¶ 17(h)(1) of the Policy is in fact ambiguous as applied to FCGPI. That issue in turn required the Court to consider whether FCGPI is "an insured whose business is publishing." That issue raises two further issues, the first is what is FCGPI's "business," and the second, whether that business "is" "publishing." Based on the undisputed facts, as stipulated to by the parties, FCGPI's business is the business of investigative reporting and posting articles based on that investigating reporting on its website with free public access.[4] The issue then becomes whether the posting of free

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all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). A motion for reconsideration under Rule 54 is not subject to the same "strict standards" applicable to motions for reconsideration of a final judgment under Rule 59. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003). Nevertheless, such a motion is appropriately granted only in those narrow circumstances where (1) the discovery of new evidence, (2) an intervening development or change in the controlling law, or (3) the need to correct a clear error or prevent manifest injustice. *Akeva, L.L.C. v. Adidas America, Inc.*, 385 F.Supp.2d 559, 565 (M.D.N.C. 2005); *Am. Canoe Ass'n* at 514.

[4] In that regard, the Court found that:

> It is undisputed that FCGPI is a non-profit corporation that posts news articles on its free, public access website and that GreenTech's claims against it are based in large part on two articles that were posted on that website....
>
> Here, FCGPI clearly does not engage in the traditional commercial publishing business. Nevertheless, there is no doubt, and FCGPI concedes, that it "publishes" information in the sense that it disseminates information to the public, although its activities are broader than what would be regarded as "publishing."
>
> Putting aside content, FCGPI's "publishing" activities would appear to be no different than that of any organization that posts informational content on a website it maintains to promote or accomplish its underlying organizational purposes or objectives.

Doc. No. 37 at 9, 11. These findings as to FCGPI's business is entirely consistent with the Joint Stipulation ("JS") [Doc. No. 17] and those portions relied upon by State farm in its Motion.

articles on a non-profit organization's website makes FCGPI "an insured whose business is publishing" for the purposes of the Exclusion.

The Court concluded that the Policy term "an insured whose business is publishing" did not unambiguously apply to FCGPI's activities. That conclusion was based on accepted definitions of the term "publishing," the inapplicability of other Policy terms that explicitly dealt with exclusions based on website usages, and the potential conflicts in the Policy that would be created based on State Farm's interpretation of ¶ 17(h)(1), all as discussed in the Court's Memorandum Opinion.[5] The Fourth Circuit in *State Auto* did not consider any of these issues and the definition of "business" adopted in that case is entirely consistent with the Court's evaluation of FCGPI's activities.[6] In any event, based on the Joint

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[5] The Court found the following with respect to the definition of "publishing":

> "Publishing" has been defined as "the business or profession of the commercial production and issuance of literature, information, musical scores or sometimes recordings, or art." Publishing Definition, Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/publishing (last visited March 31, 2014). Black's Law Dictionary defines "publisher" as "[o]ne who by himself or his agent makes a thing publicly known. One whose business is the manufacture and sale of books, pamphlets, magazines, newspapers, or other literary productions. One who publishes, especially one who issues, or causes to be issued, from the press, and offers for sale or circulation matter printed, engraved, or the like." Black's Law Dictionary 1109 (5th ed.1979). As these definitions suggest, the traditional "business of publishing" implies a commercial enterprise engaged in the production and sale of hard copy informational texts.

Doc. No. 37 at 11.

[6] In *State Auto,* the Fourth Circuit interpreted the same exclusion as it applied to "an insured whose business is advertising." *See id.* at 261 (interpreting an insurance provision that excluded coverage for an "offense committed by an 'insured' whose business is advertising"). The Court concluded that the coverage exclusion applicable to an entity "whose business is advertising" should be interpreted to "'appl[y] to insureds whose primary, essential, chief or principal business' is advertising." *Id.* (quoting *Am. Employers' Ins. Co. v. DeLorme Pub. Co., Inc.*, 39 F. Supp. 2d 64, 81 (D. Me. 1999). The court In *DeLorme,* as this Court, looked to dictionary definitions of the term "publishing" and concluded that DeLorme Publishing Company, the defendant in that case, was an entity whose "business is publishing" based on DeLorme's concession that "it is 'principally engaged in the design, printing, and sale of atlases and maps, in the development and sale of computer mapping software and databases, and

Stipulation, and as explained in the Court's decision, the relied upon Exclusion, even if unambiguous, would not, as a matter of law, "clearly apply" to FCGPI. *See Fuisz v. Selective Ins. Co. of Am.*, 61 F.3d 238, 242 (4th Cir. 1995) (finding that, not only must a policy exclusion unambiguously bring the particular act or omission within its scope, but also "the burden rests on the insurer to establish the clear applicability of a particular exclusion from coverage"). For these reasons, there is no basis upon which to reconsider the Court's decision, which the Court hereby reaffirms.

B. Final Judgment Pursuant to Fed. R. Civ. P. 54(b)

Fed. R. Civ. P. 54(b) states, in pertinent part, that "[w]hen an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

The Court concludes that certification is appropriate. In reaching this conclusion, the Court has determined that the Court's April 4, 2014 Order is a "final judgment" and that there is no just reason for the delay in the entry of judgment based on the following factors set forth in *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1335 (4th Cir. 1993):

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Id. at 1335-36 (citing *Allis–Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975)).

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recently in the design and sale of hardware that can be used in conjunction with its mapping software.'"). *See DeLorme Pub. Co., Inc.*, 39 F. Supp. 2d 64, 82. The definition of "publishing" adopted in DeLorme is not materially different than that used by the Court.

In *Lott v. Scottsdale Ins. Co.*, 827 F.Supp.2d 626 (E.D. Va. 2011) (Ellis, J.), the Court considered certification pursuant to Rule 54(b) in a very similar situation as that presented in this case. There, the Court concluded, after deciding the duty to defend issue, but not the indemnity issue, that its decision on the duty to defend issue was "an ultimate decision" and that there was no just reason for delay in the entry of judgment. *Id.* at 640 n. 24. In support of that decision, the Court recognized that "the consequences of delay counsel in favor of issuing final judgment at this time. An appellate ruling that [the insurer] is not obligated to defend would moot the indemnification issue, thus the interests of judicial economy are best served by Rule 54(b) certification. Equitable considerations also favor certification under Rule 54(b) because the duty to indemnify issue may not be resolved for a considerable period of time...." *Id.* The same considerations and reasons warrant certification here. While there may be only one overarching claim of coverage under the Policy, that claim has two distinct issues, the duty to defend, on which the Court has reached a final determination as to its merits, and the duty to indemnify, on which the Court has stayed further consideration pending the outcome of the underlying Suit. As this case will be stayed, there is no possibility that future developments in this Court would moot or otherwise affect the appellate court's determination of the duty to defend issue, nor is there any possibility that the appellate court would be required to review this issue again. There are no competing claims or counterclaims that might complicate appellate court review. Overall, the interests of justice are clearly served by certification of the present issue to the appellate court. *See Penn-Am. Ins. Co. v. Mapp*, 521 F.3d 290, 296 (4th Cir. 2008) (citing *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 (4th Cir.2005) (exercising jurisdiction based on Rule 54(b) certification by the district court based on its determination that "the interests of judicial economy would be best served by a Rule 54(b) certification, in that an appellate ruling that the insurer was not obliged to defend would 'end this coverage case,' mooting the indemnification and bad faith issues.") (*Res. Bankshares*

Corp. v. St. Paul Mercury Ins. Co., 323 F.Supp.2d 709, 723 (E.D.Va.2004)). For these reasons, the Court finds that its Order dated April 4, 2014 [Doc. No. 38] as to the duty to defend issue is final, there is no just reason for delay and Rule 54(b) certification is appropriate.

C. Dismissal of Remaining Claims Without Prejudice

The Court finds that, based on its determination in Section B that Rule 54(b) certification is appropriate, dismissal without prejudice is not appropriate or necessary.

For the reasons stated, it is hereby

ORDERED that plaintiff State Farm's Motion to Reinstate, Lift Stay and Reconsider, Revise, Alter or Amend Order, or, Alternatively, for Rule 54(b) Certification or Dismissal Without Prejudice of the Remaining Claims for Relief [Doc. No. 39] be, and the same hereby is, GRANTED as to certification under Rule 54(b) and is otherwise DENIED; and it is further

ORDERED that final judgment be entered pursuant to Fed. R. Civ. P. 54(b) with respect to the plaintiff's duty to defend, as set forth in the Court's Order dated April 4, 2014 [Doc. No. 38].

The Clerk is directed to enter final judgment pursuant to Fed. R. Civ. P. 54(b) and 58 in favor of defendant Franklin Center for Government and Public Integrity and against plaintiff State Farm Fire and Casualty Company with respect plaintiff's duty to defend, as set forth in the Court's Order dated April 4, 2014 [Doc. No. 38].

The Clerk is directed to forward copies of this Order to all counsel of record.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
May 16, 2014