UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TWIN CITY FIRE INSURANCE COMPANY,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:13-CV-1608-MHS
HARTMAN, SIMONS, & WOOD, LLP, et al.,	:	
Defendants.	:	

ORDER

This action is before the Court on defendants' motion to dismiss. For the following reasons, the Court grants the motion.

Background

This is an action for declaratory judgment and recoupment brought by Twin City Fire Insurance Company ("Twin City") against the law firm of Hartman, Simons & Wood, LLP; Gil Y. Burstiner, one of the firm's partners; and Stephanie B. Skidmore, one of the firm's associates (collectively, "Hartman Simons"). Hartman Simons was insured under two professional liability insurance policies issued by Twin City covering the periods from

December 31, 2008, to December 31, 2009, and December 31, 2009, to December 31, 2010, respectively. The policies provided $10 million of coverage per claim and in the aggregate, with a $100,000 deductible.

Each policy contained an "Awareness of Circumstances" provision, which required an insured to immediately notify Twin City in writing if the insured "becomes aware of any wrongful act, personal injury or other fact, circumstance or situation that he or she (i) believes might result in a claim or (ii) could reasonably have foreseen might result in a claim." Compl., Exs. 1 & 2, Section IIIA. Each policy also contained a "Protection for Innocent Insureds" provision, which stated that despite noncompliance with certain conditions, including the "Awareness of Circumstances" provision, an insured "who neither knew nor reasonably should have known that an insured had a duty to report the matter" would still be covered unless "a managing partner, risk manager, general counsel or other member of the management committee of the named insured became aware of the matter but failed to timely report it." Id., Section IIIC. Finally, each policy contained an "Allocation" provision, which stated that "[i]f a claim is made that includes both covered and non-covered matters, or a claim is made against covered and

non-covered parties, [Twin City] and the insureds shall use reasonable efforts to achieve a fair and reasonable allocation based upon such relative exposure of such covered and non-covered matters and/or the proportionate fault of such covered and non-covered parties." Id., Section IIIG.

According to the allegations of the complaint, in the fall of 2009, the Bank of North Georgia (the "Bank") hired Hartman Simons to represent it in connection with a real estate transaction with an affiliate of John Williams known as Northside Guaranty, LLC ("Northside"). Id. ¶ 20. As part of that transaction, the Bank agreed to release Northside from its guaranty on a loan on real estate known as Lost Creek through the execution of a Guaranty Release Agreement (the "Release"), which Hartman Simons assisted in drafting. Id. ¶¶ 20-21. On October 23, 2009, at the closing of the transaction, the Bank executed the Release. Id. ¶ 23. Thereafter, Mr. Williams and his affiliated companies contended that the Release applied not just to Northside's guaranty on the Lost Creek loan but to all of their financial obligations to the Bank. Id. ¶ 24. In all, at least 58 individuals and entities (the "Northside Releasees") claimed that their obligations to the Bank were extinguished by the Release. Id. ¶ 25.

On June 16, 2010, various Northside Releasees brought a declaratory judgment action in Georgia state court seeking a declaration that the Bank's and its affiliates' claims against them had been extinguished by the Release. Id. ¶ 28. On or about June 24, 2010, the Bank asserted a claim of malpractice against Hartman Simons and demanded indemnification for any losses it sustained as a result of the Northside Releasees' claims. Id. ¶ 29. On July 14, 2010, Hartman Simons notified Twin City of the Bank's malpractice claim. Id. ¶ 30.

On April 9, 2013, following entry of summary judgment in favor of the Northside Releasees in the state court action, the Bank sent a settlement demand to Twin City, claiming that Hartman Simons' errors in drafting the Release had cost the Bank more than $60 million. Id. ¶ 32; Decl. of Robert Simons, Ex. 1.[1] The Bank stated that it would settle its malpractice claim against Hartman Simons for $10 million, the amount of Twin City's policy limits, but only if Twin City made payment within 30 days. Simons Decl., Ex. 1. Hartman Simons asked Twin City to accept the Bank's settlement

[1] The Bank's demand letter refers to two lawsuits filed by the Northside Releasees, rather than only one as alleged in the complaint. This discrepancy is not material to the issues in this case.

demand but declined to contribute to the settlement beyond the $100,000 deductible. Compl. ¶ 32; Simons Decl., Ex. 2. Twin City disputed that it had any coverage obligations under the policies and informed Hartman Simons that it was accepting the settlement demand under a full reservation of rights regarding the coverage dispute. Id. On May 10, 2013, Twin City filed this action against Hartman Simons and then proceeded to fund the settlement with the Bank.

In its complaint, Twin City asserts three claims for relief. First, Twin City seeks a declaration that there is no coverage under the policies because Hartman Simons failed to provide timely notice of the alleged malpractice in accordance with policy requirements. Compl. ¶¶ 33-35. Second, in the alternative, to the extent the Court determines that Twin City has some coverage obligations to one or more of the defendants, Twin City seeks an appropriate allocation, as between Twin City and the defendants, of the defense and indemnity costs incurred in connection with the Bank's malpractice claim. Id. ¶¶ 36-39. Finally, to the extent that it has no coverage obligations to defendants, Twin City seeks recoupment of some or all of its payment of the Bank's settlement demand. Id. ¶¶ 40-43.

Hartman Simons has moved to dismiss Twin City's complaint. First, Hartman Simons contends that Twin City lacks standing to pursue declaratory relief because it is not threatened with any future injury. Second, Hartman Simons contends that the complaint fails to state a claim for allocation and recoupment because Twin City (1) waived any right to seek allocation or recoupment by failing to properly reserve its rights, (2) paid the Bank's settlement demand voluntarily, and (3) has no contractual right to recoupment or allocation of indemnity payments.

Discussion

I. Standing to Seek Declaratory Relief

Twin City's First Claim for Relief seeks a declaration that the Bank's malpractice claim was not covered under its policies because Hartman Simons failed to provide Twin City the required notice. Hartman Simons moves to dismiss this claim on the ground that Twin City lacks standing to seek declaratory relief because, by the time it filed this action seeking such relief, it had already agreed to pay the Bank's settlement demand. Consequently, Hartman Simons argues, there is no possibility that Twin City

will suffer any future harm if the coverage issue is not decided, and declaratory relief is therefore not available. The Court agrees.

"The federal courts are confined by Article III of the Constitution to adjudicating only actual 'cases' and 'controversies.'" Malowney v. Fed. Collection Deposit Grp., 193 F.3d 1342, 1346 (11th Cir. 1999). "The Declaratory Judgement Act, 28 U.S.C. § 2201, echoing the 'case or controversy' requirement of [A]rticle III of the Constitution, provides that a declaratory judgment may only be issued in the case of an 'actual controversy.'" Walden v. Ctrs. for Disease Control and Prevention, 669 F.3d 1277, 1284 (11th Cir. 2012) (quoting Emory v. Peeler, 756 F.2d 1547, 1551-52 (11th Cir. 1985)). "That is, under the facts alleged, there must be a substantial continuing controversy between parties having adverse legal interests." Id. (quoting Emory, 756 F.2d at 1552). In order to satisfy the case or controversy requirement when a plaintiff is seeking declaratory relief, "a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." Malowney, 193 F.3d at 1346. "Thus, in order for this Court to have jurisdiction to issue a declaratory judgment, which is the only redress sought" in Twin City's First Claim for

Relief, Twin City "must assert a reasonable expectation that the injury [it has] suffered will continue or be repeated in the future." Id. at 1347.

Here, the complaint does not contain any allegations that could reasonably support a finding that Twin City is likely to be subject to any future injury. Twin City has already paid out its policy limits to the Bank. Twin City is seeking a declaration as to past events, namely Hartman Simons' refusal to contribute to the settlement payment, and past injuries, namely Twin City's having to pay the full settlement amount. "Injury in the past, however, does not support a finding of an Article III case or controversy when the only relief sought is a declaratory judgment." Id. at 1348; see also Interstate Fire & Cas. Co. v. Kluger, Peretz, Kaplan & Berlin, P.L., 855 F. Supp. 2d 1376, 1380-81 (S.D. Fla. 2012) (finding no case or controversy where excess insurer had already paid out its policy limits and sought declaration as to propriety of primary insurer's and another excess insurer's past refusal of claim under earlier policies); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Int'l Wire Grp., Inc., No. 02 Civ. 10338(SAS), 2003 WL 21277114, at *5 (S.D. N.Y. June 2, 2003) (finding no basis for declaratory relief where insurer did "not seek a prospective determination of its rights and responsibilities under

the insurance contract (so that it can avoid future damages), but rather a finding that it is not liable for damages alleged to have already accrued"). Accordingly, this Court finds that Twin City's First Claim for Relief fails to satisfy the "case or controversy" requirement of Article III or the "actual controversy" requirement of 28 U.S.C. § 2201. Therefore, this claim is dismissed for lack of standing.

II. Viability of Claims for Allocation and Recoupment

In its Second Claim for Relief, to the extent that the Bank's malpractice claim included both covered and non-covered matters or was made against both covered and non-covered parties, Twin City seeks an appropriate allocation between it and defendants of the defense and indemnity costs incurred in connection with the claim. In its Third Claim for Relief, Twin City seeks to recoup from Hartman Simons all of the settlement payment it made to the Bank if there was no coverage or, if there was some coverage, the portion of the payment allocable to defendants. Hartman Simons moves to dismiss these claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that they fail to state a claim upon which relief can be granted. Hartman Simons contends that Twin City waived these claims

by failing to properly reserve its rights before agreeing to pay out its policy limits. The Court agrees.[2]

When reviewing a claim pursuant to a Rule 12(b)(6) motion, the Court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. Jackson v. BellSouth Telecomm., 372 F.3d 1250, 1262 (11th Cir. 2004). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Dismissal, however, is appropriate where, "on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993).[3]

---

[2] In light of this ruling, the Court need not address Hartman Simons' contentions that the claims are also barred by the voluntary payment doctrine and the absence of any contractual provision authorizing allocation or recoupment of an indemnity payment.

[3] Twin City contends that dismissal is improper because waiver is an (continued...)

In this case, the allegations of the complaint establish the following facts. On or about June 24, 2010, the Bank asserted a malpractice claim against Hartman Simons and demanded indemnification for any losses it suffered as a result of the Release. Compl. ¶ 29. On July 14, 2010, Hartman Simons tendered the malpractice claim to Twin City. Id. ¶ 30. Nearly three years later, on April 9, 2013, the Bank sent Twin City a time-limited settlement demand offering to settle its claim against Hartman Simons for Twin City's policy limits of $10 million, even though the Bank's actual losses as a result of the malpractice allegedly exceeded $60 million. Id. ¶ 31; Simons Decl., Ex. 1.[4] Hartman Simons asked Twin City to accept the demand. Compl. ¶ 32. On May 10, 2013, the deadline for acceptance, Twin

---

[3](...continued)
affirmative defense and Hartman Simons' "argument is based on alleged facts (indeed, potentially disputed alleged facts) that are not apparent from the face of the complaint, *i.e.*, the circumstances under which Twin City funded the settlement." Pl.'s Opp'n to Defs. Mot. to Dismiss at 6. Twin City, however, does not identify any potentially disputed facts or circumstances regarding its payment of the settlement that are not apparent from the face of the complaint. As discussed below, the Court finds that the allegations of the complaint are sufficient to establish waiver and thus require dismissal.

[4] The Court considers the demand letter and the email exchange attached to the Simons declaration to be part of the pleadings for purposes of Rule 12(b)(6) dismissal because they are referred to in the complaint and are central to Twin City's claims. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997).

City informed Hartman Simons that it intended to accept the demand and asked that Hartman Simons contribute to the settlement and/or execute a non-waiver agreement whereby Twin City could pursue a claim for recoupment of its settlement payment. Simons Decl., Ex. 2. When Hartman Simons declined, Twin City informed Hartman Simons that it intended "to accept the settlement under a full reservation of rights regarding the coverage disputes." Compl. ¶ 32. On the same day, Twin City filed this action and then funded the settlement.

It is well settled under Georgia law that "[a]n insurer may not give an insured a unilateral notice of reservation of rights and thereupon proceed with a complete defense of the main claim absent [the] insured's express or implied consent." Richmond v. Ga. Farm Bureau Mut. Ins. Co., 231 S.E.2d 245, 248 (Ga. Ct. App. 1976). Instead, "[u]pon learning of facts reasonably putting it on notice that there may be grounds for noncoverage and where the insured refuses to consent to a defense under a reservation of rights, the insurer *must* thereupon" take the following steps:

> (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise

> prejudiced, and (c) seek immediate declaratory relief including a stay of the main case pending final resolution of the declaratory judgment action.

Id. (emphasis in original). Thus, "[w]hen an insurer is presented with notice of a claim and demand for a defense, the 'proper and safe course of action . . . is to enter upon a defense after a reservation of rights and then proceed to seek a declaratory judgment in its favor.'" Hoover v. Maxum Indem. Co., 730 S.E.2d 413, 417 (Ga. Sup. Ct. 2012) (quoting Richmond, 231 S.E.2d at 247).

Twin City did not follow the "proper and safe course of action" in this case. Id. Hartman Simons presented it with the Bank's malpractice claim and demanded a defense on July 14, 2010. But Twin City did not "enter upon a defense after a reservation of rights and then proceed to seek a declaratory judgment in its favor." Id. Instead, Twin City waited nearly three years, until after the Bank had submitted a settlement demand with a 30-day time limit. Then, on the very day the settlement demand was to expire, and after it had already decided to pay the demand, Twin City for the first time sought to reserve its claimed right to seek allocation and recoupment. When Hartman Simons refused to agree to the reservation of rights, Twin City sought to do so unilaterally and filed this action seeking a declaration of non-

coverage. Later the same day, Twin City proceeded to pay the Bank's settlement demand.[5]

In a nearly identical situation, the Georgia Court of Appeals recently rejected an insurer's attempt to recover a portion of an indemnity payment from its insured. See Facility Investments, LP v. Homeland Ins. Co. of N.Y., 741 S.E.2d 228 (Ga. Ct. App. 2013) (physical precedent only).[6] In Facility Investments, the owner of a nursing home was sued for professional negligence arising from its care of a patient. 741 S.E.2d at 230. The owner's professional liability insurer agreed to defend the suit under a reservation of

---

[5] Twin City argues that it acted "in an exemplary manner" because, "with little time for investigation or negotiation," it paid the settlement in order to protect Hartman Simons, as well as itself, from significantly greater potential liability. Pl.'s Opp'n to Defs.' Mot. to Dismiss at 9. This argument, however, ignores the fact that Twin City was notified of the Bank's claim nearly three years earlier and thus had ample time to investigate any coverage issues and seek declaratory relief before being presented with the Bank's settlement demand.

[6] Two of the three judges in Facility Investments concurred in the judgment only; therefore, it is not binding precedent. See Ga. Ct. App. Rule 33(a) ("[A] judgment in which all three judges fully concur is a binding precedent; provided, however, an opinion is physical precedent only with respect to any Division of the opinion for which there is a concurrence in the judgment only or a special concurrence without a statement of agreement with all that is said.") Nevertheless, the case may still be cited as persuasive authority. See Pechin v. Lowder, 659 S.E.2d 430, 432 (Ga. Ct. App. 2008). This Court finds the reasoning in Facility Investments persuasive and believes that other Georgia courts would follow it.

rights with regard to losses or defense expenses arising out of allegations of fraud, malice, or violations of state and federal regulations, which the policy expressly excluded from coverage. Id. However, the insurer did not reserve any right to pursue claims for breach of contract, recoupment, allocation, or contribution. Id.

After developing evidence of fraud with respect to the patient's medical chart, the plaintiffs' counsel in the underlying suit sent the insurer a letter demanding payment of the $1 million policy limit within 30 days to settle the claims against the owner. Id. The owner asked the insurer to accept the demand, noting that if the case proceeded to trial the plaintiffs were likely to obtain a judgment in excess of the policy limit. Id. at 230-31. In response, the insurer offered to settle for an amount up to the policy limit and asked the owner to contribute 50% of the settlement amount based on the insurer's opinion that a significant portion of the loss was not covered due to the owner's fraudulent charting. Id. at 231. The insurer stated for the first time that it would pursue recoupment/contribution if the owner did not pay its share for the uncovered losses. Id.

On the day before expiration of the 30-day demand, the owner notified the insurer that it would not contribute to the settlement or otherwise allocate between covered and uncovered losses. Id. The insurer sent another letter unilaterally reserving its rights to pursue claims for breach of contract, recoupment, allocation, and contribution. Id. It then made the required payment to settle the underlying suit and thereafter sued the owner seeking to recover the portion of the settlement amount attributable to uncovered losses. Id. The trial court denied the owner's motion to dismiss, and the owner appealed. Id. at 230. The Georgia Court of Appeals, citing Richmond and Hoover, found that, after the owner refused to contribute to the settlement, the insurer "had only two options at that point: deny coverage or seek immediate declaratory relief." Id. at 233. By settling the case instead, the court held, the insurer "waived any right to seek reimbursement for uncovered amounts of the settlement." Id. at 234. Accordingly, the court reversed the trial court's denial of the owner's motion to dismiss. Id.

Twin City attempts to distinguish Facility Investments, but its efforts are unavailing. First, Twin City argues that Facility Investments is distinguishable because "it settled with the Bank before the filing of a

lawsuit." Pl.'s Opp'n to Defs.' Mot. to Dismiss at 12. However, even assuming this is true,[7] Twin City does not explain why this fact is material. The Bank had asserted a claim for malpractice and demanded indemnity for any losses it suffered as a result. Compl. ¶ 29. This constituted a "claim" within the meaning of the policies for which Twin City was obligated to provide a defense. See Compl., Exs. 1 & 2, Sections IA. ("[W]e will defend all insureds against whom a covered claim is made.") & IB.2.a. ("Claim means an allegation of a wrongful act or personal injury in connection with . . . [a] written demand received by an insured seeking damages against, or services from, an insured."). At the time it paid the settlement to the Bank, therefore, Twin City was in precisely the same position as the insurer in Facility Investments – defending its insured against a claim with knowledge of its coverage defense.

---

[7] In its complaint, Twin City alleges that the Bank filed a lawsuit. See Compl. ¶ 1 (referring to "a malpractice lawsuit filed against Defendants on or about July 28, 2010, by the Bank of North Georgia (the 'Underlying Suit')"). The Court finds it unnecessary to resolve this discrepancy since the analysis is the same regardless of whether a lawsuit had been filed.

Second, Twin City argues that, unlike the insurer in Facility Investments, "it did not fail to put Hartman Simons on notice it was reserving its rights." Pl.'s Opp'n to Defs.' Mot. to Dismiss at 12. There is, however, no difference between this case and Facility Investments in this regard. In both cases, the insurer attempted a last minute, unilateral reservation of rights after its insured had declined to contribute to a settlement. In Facility Investments, the unilateral reservation of rights came in a letter sent the day before the settlement deadline, 741 S.E.2d at 231, while in this case Twin City notified Hartman Simons that it was unilaterally reserving its right to seek recoupment on the very day the settlement demand was to expire. Compl. ¶ 32; Simons Decl., Ex. 2.

Finally, Twin City argues that, unlike the insurer in Facility Investments, "it filed for declaratory judgment before settling." Pl.'s Opp'n to Defs.' Mot. to Dismiss at 12. This, however, is a distinction without a difference. Contrary to Twin City's argument, there is nothing to suggest that the court's decision in Facility Investments turned on the fact that the insurer settled the case before, rather than after, filing suit. As the court explained, after the insured refused to contribute to the settlement, the

insurer's "only two options" were to "deny coverage or seek immediate declaratory relief." Facility Investments, 741 S.E.2d at 233. The insurer's options did not include settling the case, regardless of whether the settlement occurred before or after filing a declaratory judgment action. The purpose of filing a declaratory judgment action in this situation is to allow the insurer "to determine its obligations." Id. By proceeding to settle the underlying claim before obtaining a final judgment determining its obligations, Twin City, like the insurer in Facility Investments, short circuited the process and thereby waived any right to seek reimbursement from its insureds. Id. at 234.

Summary

For the foregoing reasons, the Court GRANTS defendants' motion to dismiss [#5] and this action is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED, this 25th day of November, 2013.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia