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United States District Court,
C.D. California.

ALTERRA EXCESS & SURPLUS INSURANCE COMPANY, A Markel Company
v.
GOTAMA BUILDING ENGINEERS, INC., et al.

No. CV 14–2969–JFW (ASx). | Signed July 24, 2014.

Attorneys and Law Firms

Michael F. Perlis, Richard Ray Johnson, Locke Lord LLP, Los Angeles, CA, for Plaintiff.

Robert J. Lynch, McMahon Law Firm, Inc., Corona, CA, for Gotama Building Engineers, Inc., et al.

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING PLAINTIFF ALTERRA EXCESS & SURETY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT [filed 6/10/14; Docket No. 14]

JOHN F. WALTER, District Judge.

***1** Shannon Reilly, Courtroom Deputy.

On June 14, 2014, Plaintiff Alterra Excess & Surety Insurance Company ("Alterra") filed a Motion for Summary Judgment ("Motion"). On June 23, 2014, Defendants Gotama Building Engineers, Inc. ("GBE") and Caecilia Gotama ("Gotama") (collectively, "Defendants") filed their Opposition. On June 30, 2014, Alterra filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7–15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's July 14, 2014 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background

This case concerns a coverage dispute regarding an insurance policy issued by Alterra to GBE. Specifically, Alterra issued two contracts of insurance, Architects and Engineers Professional Liability, Architects, Engineers and Contractors Pollution Liability, Technology Based Services, and Computer Network Security Insurance Policy Nos. MAX7PL0000814, covering the period of June 1, 2013 to June 1, 2014 (the "2013 Policy"), and MAX7PL0000387, covering the period June 1, 2012 to June 1, 2013 (the "2012 Policy") (collectively, the "Policies"). Both GBE and Gotama were Insureds under the Policies.

On April 17, 2014, Alterra filed a Complaint in this action alleging that there is no coverage for defense and indemnity for a claim that GBE submitted to Alterra under the 2013 Policy.[1] GBE's claim for coverage arises out of plumbing and mechanical engineering consultant services that it provided to the DLR Group WWCOT ("DLR") in connection with the Eisenberg Village of the Los Angeles Jewish Home for the Aged ("Eisenberg Village"). DLR, which is not an Insured under the Policies, provided design and architecture services to Eisenberg Village. Sometime before April 24, 2013, Eisenberg Village notified DLR of the existence of and need to correct certain alleged plumbing and mechanical design deficiencies for which DLR contends GBE was responsible (the "DLR Claim").

[1] Even though GBE filed a claim under the 2013 Policy, Alterra also evaluated coverage under the 2012 Policy.

On April 24, 2013, Steven H. Schwartz ("Schwartz"), counsel for DLR, sent a letter to Robert J. Lynch ("Lynch"), counsel for GBE, enclosing a CD containing repair plans regarding the alleged Eisenberg Village design deficiencies (the "April 24, 2013 Demand Letter").[2] In the April 24, 2013 Demand Letter, Schwartz asserted that "if the repair plans ... are implemented, the cost may well reach seven figures" and that "[i]f it is proven that there are design deficiencies, the cost to repair these design deficiencies would be entirely the responsibility of Gotama Building Engineers, Inc. and Caecilia Gotama, individually." The April 24, 2013 Demand Letter further stated: "Again, at the risk of sounding like a broken record, DLR ... demands that [GBE] acknowledge its responsibility for all MEP related issues on this project. DLR ... again demands that [GBE] put its carriers on notice of these claims."

[2] With respect to Defendants' objections to the April 24, 2013 Demand Letter, the Court has considered and overrules those objections. Defendants admitted in their

> Answer that they provided the April 24, 2013 Demand Letter to Alterra in their March 27, 2014 response to Alterra's February 27, 2014 reservation of rights letter.

***2** On May 21, 2013, GBE completed, and forwarded to Alterra, a Renewal Application for the issuance of the 2013 Policy. The Renewal Application, which was signed by Gotama, contained Question 21, which asked: "Does any person to be Insured have any knowledge or information of any act, error or omission which might reasonably be expected to give rise to a claim against him/her?" Gotama checked the box marked "NO." The Renewal Application also contained Question 22, which asked whether any claims against any proposed insured(s) had been made within the last five years and, if so, directed that Gotama complete a supplemental claims information form for each such claim. Gotama did not disclose or even mention the contents of the April 24, 2013 Demand Letter in response to Question 22. The Renewal Application also contains an exclusionary clause (the "Application Exclusion") in a prominent location a few lines below Questions 21 and 22 and a few lines above the signature line, which provides that "[i]t is understood and agreed that with respect to questions 20, 21, and 22, that if such knowledge or information exists any claim or action arising there from is excluded from this proposed coverage."

The claims referred to in the April 24, 2013 Demand Letter for which DLR contended GBE was responsible were incorporated in a lawsuit which was filed on June 20, 2013 by Eisenberg Village in a matter captioned, *Eisenberg Village of the Los Angeles Jewish Home for the Aging v. DLR Group/DLR Group WWCOT v. Gotama Building Engineers, Inc.*, Los Angeles Super. Ct. Case No. LC100462 ("*Eisenberg Village* Action"). On August 23, 2013, DLR filed a Cross–Complaint against GBE in the *Eisenberg Action* for implied indemnity, contribution, breach of contract/failure to defend, and declaratory relief (the "DLR Cross–Complaint"). The DLR Cross–Complaint alleges in large part the same claims and demands the same relief as the April 24, 2013 Demand Letter.

GBE did not report the claims made in the April 24, 2013 Demand Letter or the DLR CrossComplaint in the *Eisenberg Village* Action to Alterra until January 13, 2014, which was well after the expiration of the 2012 Policy and five months after the DLR Cross–Complaint was filed. On February 27, 2014, Alterra sent GBE a reservation of rights letter wherein it requested, pursuant to section XVII of the Policies, that GBE provide it with certain documents and information so that it could make its coverage determination:

> It is our understanding that [GBE]'s personal counsel received written communications from Steve Schwartz, counsel for Cross–Complainant, DLR ..., regarding the above-captioned matter at least as early as April of 2013. [Alterra] requests copies of all such communications. [Alterra] would also like to understand why [GBE] waited until January 13, 2014, to provide notice to [Alterra] of the DLR Cross–Complaint that was filed on August 23, 2013. Once [Alterra] receives the requested information, it will be in a better position to advise you regarding the coverage (if any) available under the Policies, or either of them, for the DLR Cross–Complaint. Please be advised that [Alterra] continues to reserve all of its rights, under the Policies, at law, and in equity.

***3** On March 27, 2014, Alterra received GBE's letter dated March 25, 2014 enclosing four CDs containing documents in response to its February 27, 2014 request for information. However, GBE's letter did not respond to Alterra's question regarding "why [GBE] waited until January 13, 2014, to provide notice to [Alterra] of the" DLR Claim. The April 24, 2013 Demand Letter was among the documents GBE provided to Alterra.

In the Motion, Plaintiff seeks summary judgment on the grounds that there is no coverage under Policy Nos. MAX7PL0000814 or MAX7PL0000387 for any of the claims alleged against GBE in the *Eisenberg Village* Action, or any related matter.[3]

[3] Although Alterra contends that the Application Exclusion precludes coverage for the Cross–Complaint under the 2013 Policy, it is currently defending GBE subject to a complete reservation of rights (including the right to seek reimbursement of any Claims Expenses or other sums advanced), and has filed this action and this Motion to seek judicial confirmation of the propriety of a declination of coverage under the Policies for the Cross–Complaint.

II. Legal Standard

Summary judgment is proper where "the movant shows 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). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed.R.Civ.P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir.1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir.1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir.1992). However, where circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249–50; *TIN Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631–32 (9th Cir.1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836–37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.' " *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir.1997).

III. Discussion

A. Standard for Interpreting an Insurance Policy

***4** "Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation." *MacKinnon v. Truck Ins. Exchange*, 31 Cal.4th 635, 647, 3 Cal.Rptr.3d 228, 73 P.3d 1205 (Cal.2003).[4] "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ.Code § 1636. "Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 822, 274 Cal.Rptr. 820, 799 P.2d 1253 (Cal.1990) (internal citations omitted).

[4] The parties agree that California law governs the interpretation of the Policies.

"The determination of ambiguity is a question of law" for the Court to decide. *City of Chino v. Jackson*, 97 Cal.App.4th 377, 385, 118 Cal.Rptr.2d 349 (2002). "When interpreting a contract, even when the document is unambiguous on its face, a judge is required to give 'at least a preliminary consideration [to] all credible evidence offered to prove the intention of the parties.' " *JonesHamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 692 (9th Cir.1992) (quoting *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 40–41, 69 Cal.Rptr. 561, 442 P.2d 641 (1968)). "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. Courts will not strain to create an ambiguity where none exists." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18–19, 44 Cal.Rptr.2d 370, 900 P.2d 619 (Cal.1995) (internal citations omitted).

B. Relevant Provisions of The Policies

The Policies provide coverage, in pertinent part, for "Damages and Claims Expenses, in excess of the

Deductible, which the Insured shall become legally obligated to pay because of any Claim first made against the Insured during the Policy Period ... and reported to the Underwriters either during the Policy Period [or] within sixty (60) days after the expiration of the Policy Period."[5] Declaration of Chris Butler in Support of Motion for Summary Judgment ("Butler Decl."), Exh. A (Section I(A)). The coverage potentially available under either of the Policies is subject to a $50,000 per Claim Deductible and a $1,000,000.00 per Claim Limit of Liability. *Id.* (Declarations).

[5] Because the Policies are Claims-made-and-reported policies, coverage could only be available, if at all, under one policy or the other, but not under both.

The Policies define Claim to mean, in pertinent part, "[a] written demand for monetary damages, services or non-monetary relief [or a] civil proceeding commenced by service of a complaint, indictment or similar proceeding." *Id.* (Section VIII(D)). The Policies further provide that "[i]f any Claim is made against an Insured, the Insured shall forward as soon as practicable to the Underwriters through the persons named in Item 8 of the Declarations written or electronic notice of such Claim, but in no event later than sixty (60) days after the expiration of the Policy Period." *Id.* (Section XII(A)).

***5** The Policies also provide a mechanism by which an Insured can obtain coverage for postPolicy Period Claims arising out of "Circumstances" of which the Insured first becomes aware and provides to the Underwriters during the Policy Period the type of detailed written Notice of Circumstance specified in the Policies. The Policies define "Circumstance" to mean "any fact, event or situation that could reasonably be the basis for a Claim." *Id.* (Section VIII(C)). In order to be eligible for coverage, the Insured must give written notice to the Underwriters when the Insured first becomes aware of the Circumstance of: (1) the specific details of the act, error, or omission that gave rise to the Circumstance; (2) the injury or damage which may result or has resulted from the Circumstance; and (3) facts by which the Insured became aware of the act, error, or omission. *Id.* (Section XII(B)). If the Insured gives the requisite notice "then any subsequent Claim made against the Insured arising out of such Circumstance which is the subject of the written notice will be deemed to have been made at the time written notice complying with the above requirements was first given to the Underwriters." *Id.*

C. There Is No Coverage Under the Policies.

In this case, the Court has reviewed the Policies and concludes that, as a matter of law, the provisions at issue are unambiguous, and there is no coverage under the Policies. Accordingly, Alterra is entitled to summary judgment.

1. The April 24, 2013 Demand Letter Constitutes a Claim.

The first issue to be resolved in this Motion is whether the April 24, 2013 Demand Letter constitutes a Claim. It is undisputed that the April 24, 2013 Demand Letter came from a lawyer for DLR, enclosed a CD containing repair plans regarding the alleged Eisenberg Village design deficiencies, and specifically warned GBE that "[i]f it is proven that there are design deficiencies, the cost to repair these design deficiencies would be entirely the responsibility of Gotama Building Engineers, Inc. and Caecilia Gotama, individually." The April 24, 2013 Demand Letter also specifically advised that "DLR Group again demands that GBE put its carriers on notice of these claims." Thus, as Alterra argues in its Motion, the April 24, 2013 Demand Letter specifically demanded non-monetary relief for an alleged wrongful act on the part of GBE and also demanded "that GBE put its carriers on notice of these claims." Accordingly, the Court concludes that the April 24, 2013 Demand Letter easily satisfies the definition of a Claim in the Policies, which require a "written demand for monetary damages, services or non-monetary relief."[6]

[6] GBE's contention that the April 24, 2013 Demand Letter does not constitute a Claim because GBE, in fact, did not make any design errors on the Eisenberg Village project, and, therefore, the claim was without merit is unpersuasive. *See, e.g., Quanta Specialty Lines Ins. Co. v. Investors Capital Corp.,* 2009 WL 4884096, * 14 (S.D.N.Y. Dec.17, 2009) (holding that the term "claim" includes demands received by the Insured even when the allegations are proven false and the demand is subsequently withdrawn).

2. There Is No Coverage Under the 2012 Policy.

It is undisputed that GBE did not report its receipt of the April 24, 2013 Demand Letter during, or within 60 days after, the 2012 Policy Period. In light of the Court's conclusion that the April 24, 2013 Demand Letter constitutes a Claim, there is no coverage under the 2012 Policy, and Alterra is entitled to summary judgment. *See, e.g., Feldman v. Illinois Union Ins. Co.,* 198 Cal.App.4th

1495, 1501, fn. 6, 130 Cal.Rptr.3d 770 (2011); *see, also, Montrose Chemical Corp. of California v. Admiral Ins. Co.*, 10 Cal.4th 645, 688, 42 Cal.Rptr.2d 324, 913 P.2d 878 (1995) (holding that it is important to uphold and enforce the Claims-made-and-reported insurance policies because such policies "were specifically developed to limit an insurer's risk by restricting coverage to the single policy in effect at the time a claim was asserted against the insured, without regard to the timing of the damage or injury, thus permitting the carrier to establish reserves without regard to possibilities of inflation, upward-spiraling jury awards, or enlargements of tort liability after the policy period"); *Helfand v. National Union Fire Ins. Co. .*, 10 Cal.App.4th 869, 888, 13 Cal.Rptr.2d 295 (1992) (discussing how the greater certainty obtained by insurers in gauging potential liability leads to more accurate calculation of both reserves and premiums, enabling insurers to provide lower rates than under occurrence policies).

***6** The only other argument that might support Defendants' claim for coverage under the 2012 Policy would be the provisions related to Circumstances. However, even if the April 24, 2013 Demand Letter could be construed as a Circumstance which later gave rise to the DLR CrossComplaint, there is no coverage because Defendants did not comply with the express provisions in the 2012 Policy governing notice of such potential claims. *See, e.g., Friedman Professional Mgmt. Co., Inc. v. Norcal Mut. Ins. Co.*, 120 Cal.App.4th 17, 34, 15 Cal.Rptr.3d 359 (2004). As previously stated, in order to qualify for coverage under the Circumstances provision, the 2012 Policy required Defendants to give notice of, among other things, the specific details of the act, error, or omission that gave rise to the Circumstance when they, as the Insureds, first became aware of the Circumstance. As discussed above, Defendants failed to immediately give any notice that they had received the April 24, 2013 Demand Letter, and instead waited nearly nine months to provide any type of notice to Alterra.

3. There Is No Coverage Under the 2013 Policy.

In their Opposition, Defendants argue that there is coverage for the DLR Cross–Complaint under the 2013 Policy because a notice of Claim was received during the policy period, specifically when GBE notified Alterra of the DLR Cross–Complaint on January 13, 2014. However, because Defendants failed to include any information regarding the April 24, 2013 Demand Letter or the DLR Claim in response to the relevant questions in the Renewal Application for the 2013 Policy, the Court concludes that coverage is excluded under the Application Exclusion. As discussed above, the Application Exclusion provides that "[i]t is understood and agreed that with respect to questions 20, 21, and 22, that if such knowledge or information [*e.g.*, any Insured's "knowledge or information of any act, error or omission which might reasonably be expected to give rise to a claim against him/her"] exists any claim or action **arising there from** is excluded from this proposed coverage." (emphasis added). Courts have held that this type of exclusion is unambiguous and may be applied in favor of an insurer on summary judgment. *See, e.g., The Upper Deck Co. v. Endurance American Specialty Ins. Co.*, 2011 WL 6396413, (S.D.Cal. Dec.15, 2011); *Gluck v. Executive Risk Indem., Inc.*, 680 F.Supp.2d 406, 413–24 (E.D.N.Y.2010). In addition, when the term "arising from" is read in conjunction with the phrase any "act, error, or omission," as it is here, courts have held that the exclusion applies to all proceedings sharing common facts and circumstances. *Zunenshine v. Executive Risk Indem. Inc.*, 1998 WL 483475, *4–5 (S.D.N.Y. Aug.17, 1998), *aff'd* 182 F.3d 902 (2d Cir.1999). For example, in *Zunenshine*, a district court compared the pleadings in two lawsuits-one filed before the policy was in effect and another filed during the policy period-and held that a notice exclusion similar to the one at issue in this case applied as a matter of law because both lawsuits shared common facts and circumstances, even though the two lawsuits involved different parties, legal theories, wrongful acts, and requests for relief. *Zunenshine*, 1998 WL 483475, *4–5. In this case, the DLR Cross–Complaint is simply the court-filed equivalent of the April 24, 2013 Demand Letter because it contains the same factual allegations and demands the same relief. Accordingly, there is no question that the Cross–Complaint "arose from" the April 24, 2013 Demand Letter. *See, e.g., Continental Cas. Co.* v. City of Richmond, 763 F.2d 1076, 1080 (9th Cir.1985) (holding that term "arising from" as it is used in a policy exclusion is ordinarily understood to mean "originating from," "having its origin in," "growing out of," "flowing from," or "incident to, or having connection with"). Therefore, the DLR Cross–Complaint is excluded from coverage under the 2013 Policy pursuant to the Application Exclusion.

IV. Conlusion

***7** For all the foregoing reasons, Alterra's Motion is **GRANTED.** The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with the Court's Order. The parties shall lodge the joint proposed Judgment with the Court on or before July 31, 2014. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment

along with a declaration outlining their objections to the opposing party's version no later than July 31, 2014.

IT IS SO ORDERED.

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