United States District Court
Southern District of Texas
ENTERED
June 26, 2024
Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GOLDEN BEAR INSURANCE CO.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. H-23-1933
	§	
34TH S&S, LLC *d/b/a* CONCRETE COWBOY *et al*,	§	
	§	
Defendants.	§	

ORDER

Pending before the Court are Plaintiff's Motion for Summary Judgment (Document No. 25), Plaintiff's Motion for Partial Summary Judgment (Document No. 26), Defendants' Motion for Judgment on the Pleadings (Document No. 27), and Defendants' Motion to Dismiss Counterclaims (Document No. 28). Having considered the motions, submissions, and applicable law, the Court determines that Plaintiff's motion for summary judgment and Defendants' motion to dismiss counterclaims should be granted, and the remaining motions should be denied.

I. BACKGROUND

This is an insurance dispute arising from a matter in state court. Plaintiff Golden Bear Insurance Co. ("Golden Bear") is the insurance provider of a commercial general liability policy (the "Policy") with a policy limit of $1 million,

issued to Defendant 34th S&S, LLC d/b/a Concrete Cowboy ("Concrete Cowboy") and Defendant Daniel Wierck ("Wierck"). In the underlying personal injury lawsuit, Defendant Kacy Clemens ("Clemens") and Defendant Conner Capel ("Capel"), sued Concrete Cowboy and its owner, Wierck, for injuries sustained during their patronage of the establishment. On October 11, 2019, counsel for Clemens and Capel sent a written offer of settlement to Concrete Cowboy requesting "payment of all policy limits of any and all insurance contracts,"[1] which was subsequently rejected. At trial, a jury returned a verdict totaling $3.2 million against Concrete Cowboy and Wierck. After entry of the judgment, Golden Bear tendered the balance of its policy limits, an amount insufficient to satisfy the final judgment.

Golden Bear does not dispute that indemnity is owed but disputes the amount of indemnity coverage Concrete Cowboy is entitled to. Clemens and Capel maintain that a proper *Stowers* demand was made against Concrete Cowboy, thus entitling Concrete Cowboy to be indemnified by Golden Bear in the full amount of the final judgment in excess of the Policy limits. Golden Bear contends that a proper *Stower* demand was never made.

[1] *Plaintiff's Motion for Summary Judgment*, Document No. 25, Exhibit F at 6 (*Clemens and Capel Demand Letter*).

Based on the foregoing, on May 25, 2023, Golden Bear filed this lawsuit against Concrete Cowboy, Wierck, Clemens, and Capel (collectively, the "Defendants") seeking declaratory judgment that it has no obligation under the Policy to further indemnify its insureds against the final judgment entered in favor of Clemens and Capel beyond the amount prescribed in the Policy. Golden Bear also seeks attorney's fees pursuant to Texas Civil Practice and Remedies Code §38.001 and 37.009. Defendants filed counterclaims against Golden Bear alleging: (1) a breach of the *Stowers* duty, and (2) violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act.

II. STANDARD OF REVIEW

A. Rule 12(c)

Motions made pursuant to Federal Rule of Civil Procedure 12(c) are "designed to dispose of cases where the material facts are not in dispute, and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) (citations and internal quotation marks omitted). "A motion for judgment on the pleadings under Rule 12© is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). Therefore, like a motion under Rule 12(b)(6), Rule 12(c) allows dismissal if a plaintiff fails to

state a claim upon which relief may be granted. *Id.* Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] formulaic recitation of the elements of A cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(c) motion, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the [non-movant].'" *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). As with a Rule 12(b)(6) motion, the Court is permitted to consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters which a court may take judicial notice." *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011). The motion "should be granted if there is no issue of material fact and if the pleadings show that the moving party is entitled to judgment as a matter of law." *Van Duzer v. U.S. Bank Nat'l Ass'n*, 995 F. Supp. 2d 673, 683 (S.D. Tex. 2014) (Lake, J.) (citing *Greenberg v. Gen. Mills Fun Grp., Inc.*, 478 F.2d 254, 256 (5th Cir. 1973)).

B. Rule 56

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the evidence in a light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the nonmovant will be unable to establish a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to come forward with specific facts showing there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

But the nonmoving party's bare allegations, standing alone, are insufficient to create a material dispute of fact and defeat a motion for summary. If a reasonable jury could not return a verdict for the nonmoving party, then summary judgment is appropriate. *Liberty Lobby, Inc.*, 477 U.S. at 248. The nonmovant's burden cannot be satisfied by "conclusory allegations, unsubstantiated assertions, or 'only a scintilla of evidence.'" *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d

337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)). Uncorroborated self-serving testimony cannot prevent summary judgment, especially if the overwhelming documentary evidence supports the opposite scenario. *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 294 (5th Cir. 2004). Furthermore, it is not the function of the Court to search the record on the nonmovant's behalf for evidence which may raise a fact issue. *Topalian v. Ehrman*, 954 F.2d 1125, 1137 n.30 (5th Cir. 1992). Therefore, "[a]lthough we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings but must respond by setting forth specific facts indicating a genuine issue for trial." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000).

III. LAW & ANALYSIS

Golden Bear moves for summary judgment, contending there is no material question of fact for a jury regarding whether Golden Bear was presented with a valid *Stowers* demand. Golden Bear also moves for partial summary judgment with respect to Defendants' counterclaims alleging violations of the Texas Insurance Code and Deceptive Trade Practices Act. Defendants move for a judgment on the pleadings, contending that Golden Bear's complaint does not state a valid claim under the Federal Declaratory Judgment Act ("FDJA") because it seeks

declarations of nonliability for a tort claim. The Defendants also move for their counterclaims to be dismissed without prejudice pursuant to Rule 41(A)(2). The Court first addresses Defendants' motion for judgment on the pleadings.

A. Defendants' Motion for Judgment on the Pleadings

Defendants contend that the FDJA precludes Golden Bear from obtaining a declaratory judgment in the present matter because "it is not the purpose of the federal Declaratory Judgment Act to enable prospective defendants in tort actions to obtain a declaration of non-liability."[2] Golden Bear contends that its complaint states a valid claim for declaratory relief and is appropriate under Federal Rule of Civil Procedure Rule 57 and the Declaratory Judgment Act.

In support of their argument, Defendants cite case law noting that the purpose of the FDJA is instead to "settle 'actual controversies' before they ripen into violations of law or a contractual duty."[3] *See Chevron U.S.A., Inc. v. Trailour Oil Company*, 987 F.2d 1138, 1154 (5th Cir. 1993) (citing *Hardware Mut. Cas. Co. v. Schantz*, 178 F.2d 779, 780 (5th Cir. 1949)). Golden Bear contends Defendants' reliance is misplaced, as no caselaw cited by Defendants supports the

[2] *Defendants' Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 27 at 5.

[3] *Defendants' Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 27 at 6.

assertion that an insuring entity is precluded from obtaining a declaratory judgment clarifying whether an obligation exists to pay sums in excess of policy limits.

The Fifth Circuit has affirmed several instances in which federal courts possessed the necessary subject matter jurisdiction over declaratory judgment actions in which an insurer sought to clarify their rights and obligations to their insured regarding a *Stowers* demand. *See Allstate Fire & Cas. Ins. Co. v. Love*, 71 F.4th 348, 350 (5th Cir. 2023) (affirming a district court's determination that it possessed the requisite subject matter jurisdiction to hear a declaratory judgment action concerning a *Stowers* demand); *Am. Guarantee & Liab. Ins. Co. v. ACE Am. Ins. Co.,* 990 F.3d 842, 846–52 (5th Cir. 2021) (affirming a district court's ruling concerning an insurer seeking clarification as to whether settlement demands made in an underlying wrongful deal action triggered a *Stowers* duty); *see also Travelers Indem. Co. v. Citgo Petroleum Corp*., 166 F.3d 761, 764 (5th Cir. 1999) (affirming a district court's grant of summary judgment in favor of an insurer seeking a declaratory judgment that no duty was owed to an insured franchisor after exhaustion of applicable policy limits). Accordingly, the Court finds Fifth Circuit precedent allows insurance providers to seek declaratory relief pursuant to the FDJA to clarify their rights and obligations under their insurance policies, and to determine whether a settlement demand in an underlying lawsuit satisfied the

Stowers duty.[4] Therefore the Court finds that the Defendants' motion for judgment on the pleadings should be denied. The Court now addresses Golden Bear's motion for summary judgment.

B. Golden Bear's Motion for Summary Judgment

Golden Bear moves for summary judgment, contending there is no material question of fact for a jury regarding whether Golden Bear was presented with a valid *Stowers* demand. Golden Bear supports this argument by contending that: (1) the *Stowers* demand was not within policy limits, and (2) the *Stowers* demand was not one that an ordinarily prudent insurer would accept. Defendants contend that: (1) the *Stowers* demand was within policy limits, and (2) Golden Bear's allegedly negligent rejection of the *Stowers* demand is a fact issue for the jury to consider.[5]

[4] Defendants also argue that a party is precluded from seeking a declaration of non-liability for a tort claim under the FDJA, citing non-binding case law that "granting a declaratory judgment of non-liability for past tortious activity would neither settle a controversy before it becomes a violation of the law, nor prevent or minimize the accrual of damages." *Defendants' Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 27 at 6–7; *MH Sub 1, LLC v. FPK Servs., LLC*, 2019 U.S. Dist. LEXIS 541522 at *14 (W.D. Tex. 2019). This argument is unpersuasive as Golden Bear is neither a tortfeasor nor seeking non-liability for a tortious activity. Rather, Golden Bear contends it merely seeks to establish its obligations to indemnify their insureds, and in turn, whether an obligation under the *Stowers* doctrine was triggered such to subject them to a payment in excess of their policy limits. *Plaintiff's Response in Opposition to Defendants' Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 34 at 4. Accordingly, based on the foregoing, the Court finds consideration of Golden Bear's request for declaratory judgment is appropriate in this case.

[5] Additionally, throughout the course of motion practice the parties make note that Wierck was not a party to the underlying litigation at the time of the October 2019 offer of settlement. However, given that the underlying final judgment held both Concrete

"Under *G.A. Stowers Furniture Co. v. American Indem. Co.,* 02 S.W.2d 544 (Tex. Comm'n. App. 1929, holding approved), Texas law imposes a 'basic tort duty,' known as the *Stowers* doctrine, under which insurers, 'when faced with a settlement offer within policy limits, must accept the offer … when an ordinarily prudent insurer would do so in light of the reasonably apparent likelihood and degree of that insured's potential exposure to a valid judgment in the suit in excess of policy limits.'" *Law Office of Rogelio Solis PLLC v. Curtis*, 83 F.4th 409, 411 n.1 (5th Cir. 2023) (quoting *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 761 (5th. Cir. 1999)). "When . . . the insurer's negligent failure to settle results in an excess judgment against the insured, the insurer is liable under the Stowers doctrine for the entire amount of the judgment*, including the part exceeding the insured's policy limits*." *G.A. Stowers Furniture Co.*, 15 S.W.2d at 548 (emphasis added).

Additionally, it should be noted that a duty under the *Stowers* doctrine is not activated by a settlement demand unless: "(1) the claim against the insured is within the scope of coverage, (2) there is a demand within policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it,

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Cowboy and Wierck jointly and severally liable for damages, The Court finds Wierck's status as a defendant in the underlying litigation is immaterial in determining whether Golden Bear is entitled to a declaratory judgment that it has no liability above the Policy's limits.

considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Am. Guarantee and Liability Ins. Co. v. ACE American Ins. Co.*, 990 F.3d 842, 847 (5th Cir. 2021). Most pertinent for the present matter, "*Stowers* applies only when the 'settlement's terms [are] clear and undisputed," and "must clearly state a sum certain." *Id*. (citing *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 77 S.W.3d 253, 262–63 (Tex. 2002)).

Here, Golden Bear maintains no duty under the *Stowers* doctrine because Clemens and Capel's monetary demand was unclear and ambiguous, failing to state a sum certain amount for settlement in accordance with Fifth Circuit precedent. Clemens and Capel's demand letter offered to settle all claims "in exchange for the payment of all policy limits of any and all insurance contracts."[6] In doing so, Clemens and Capel failed to provide any specificity regarding either Golden Bear's Policy, or the actual amount left within the Policy itself, let alone an eroding policy such as the one Golden Bear maintained. As held by the Fifth Circuit in *Am. Guarantee and Liability Ins. Co.*, a demand lacking the clear intent of a sum certain does not invoke *Stowers*. *See Am. Guarantee and Liability Ins. Co.*, 990 F.3d at 847. Because the demand simply requested "all policy limits of

[6] *Plaintiff's Motion for Summary Judgment*, Document No. 25, Exhibit F at 6 (*Clemens and Capel Demand Letter*).

any and all insurance contracts," it lacked the necessary specificity to invoke an obligation under *Stowers*.[7]

Both the Fifth Circuit and Texas Supreme Court have made clear that settlement offers must be unambiguous and demonstrative of a clear intent of a sum certain. *Id.* (finding that a settlement offer made within a range lacked the clear statement of a sum certain insufficient to invoke the *Stowers* duty); *Rocor Int'l, Inc.*, 77 S.W.3d at 262–63 (holding that "a proper settlement demand must clearly state a sum certain and propose to fully release the insured"). Accordingly, the Court finds Golden Bear never received a settlement offer providing an unambiguous and certain sum, and thus, received no demand triggering a *Stowers* obligation. Because the Court finds that the settlement offer received by Golden Bear did not constitute a valid *Stowers* demand, Golden Bear owes no further duty under Texas Law to its insureds. Therefore, based on the foregoing, the motion for summary judgment is granted as to Golden Bear's declaratory judgment claims.[8]

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[7] Additionally, Golden Bear argues Clemens and Capel's offer of settlement for Golden Bear's available policy limits was not of the variety an ordinarily prudent insurer would have accepted given: (1) the insured's potential exposure to an excess judgment and (2) how early in the underlying proceeding the settlement offer was made. Based on the foregoing analysis, the Court does not need to reach the merits of this contention, as the demand failed to state a sum certain, thus lacking a required element to invoke the *Stowers* duty.

[8] The Court notes that the Defendants contend in their motion for judgment on the pleadings that Golden Bear is ineligible to recover attorney's fees in this matter because: (1) the FDJA does not authorize an award of attorney's fees, and (2) Golden Bear's complaint does not allege any claims under Tex. Civ. Prac. & Rem. Code § 38.001 for

C. Defendants' Motion to Dismiss their Counterclaims

The Defendants also moved to voluntarily dismiss their counterclaims alleging violations of the Texas Insurance Code and Deceptive Trade Practices Act. Defendants contend that it is costly and inefficient to prosecute their counterclaims in both federal and state court and wish to "focus their resources on prosecuting these counterclaims in state court."[9] Golden Bear contends that Defendants' motion is an attempt to litigate in their preferred venue, and that "Defendants should not be permitted to waste a year of Plaintiff's and the Court's time and resources."[10] In the alternative, Golden Bear requests the court grant the Defendants' motion to dismiss with prejudice given the (1) resources Golden Bear has spent on discovery thus far in the proceeding and (2) the Defendants' delay in filing their motion.

The Fifth Circuit has made clear that "motions for voluntary dismissal should be freely granted unless the non-moving party will suffer some plain legal

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which attorney's fees may be recovered. *Defendants' Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 27, at 1. Golden Bear concedes in its response that it is not entitled to an award for attorneys' fees. *Plaintiff's Response in Opposition to Defendant's Rule 12(c) Motion for Judgment on the Pleadings*, Document No. 34, at 2. Having considered the submissions and applicable law, the Court determines no attorney's fees should be awarded in the present matter.

[9] *Defendants' Motion to Dismiss their Counterclaims*, Document No. 28 at 2.

[10] *Plaintiff's Response in Opposition to Defendants' Motion to Dismiss their Counterclaims*, Document No. 36 at 6.

prejudice other than the mere prospect of a second lawsuit." *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002). Here, Defendants contend that Golden Bear will not suffer plain legal prejudice in the event of dismissal because: (1) no written discovery or depositions have occurred, and (2) Golden Bear can freely contest the claims raised by Defendants in state court. In response, Golden Bear argues that they have been prejudiced given the late stage of the litigation and resources expended. On balance though, the Court finds that the mere fact that a motion for voluntary dismissal is filed during the summary judgment stage is not sufficient to establish plain legal prejudice. Having considered the motions, submissions, and applicable law, the Court determines that Defendants' motion to voluntarily dismiss their counterclaims should be granted without prejudice.

D. Golden Bear's Motion for Partial Summary Judgment

Golden Bear moves separately for partial summary judgment with regard to the Defendants' counterclaims. Because the Court grants the Defendants' motion to voluntarily dismiss its counterclaims on the basis offered above, Golden Bear's motion for partial summary judgment is denied.

IV. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Defendant's Motion for Judgment on the Pleadings (Document No. 27) is **DENIED**. the Court further

ORDERS that Plaintiff's Rule 56 Motion for Summary Judgment (Document No. 25) is **GRANTED**. The Court further

FINDS that Plaintiff, Golden Bear Insurance Company, has no duty to further indemnify Concrete Cowboy or Daniel Wierck under the terms of Policy Number GBL 10972 issued to Concrete Cowboy effective from September 28, 2018, to September 28, 2019, in connection with the following lawsuit:

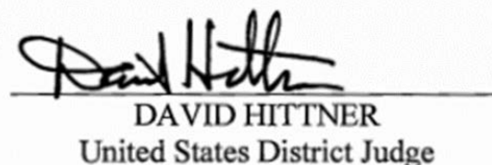
- Cause No. 2019-07278; *Kacy Clemens and Conner Capel v. 34th S&S, LLC d/b/a Concrete Cowboy, et al.*; in the 113th Judicial District Court of Harris County, Texas (the "Underlying Lawsuit"). The Court further

ORDERS that Defendant's Motion to Dismiss their Counterclaims Without Prejudice (Document No. 28) is **GRANTED**. The Court further

ORDERED that Plaintiff's Motion for Partial Summary Judgment (Document No. 26) is **DENIED**.

THIS IS A FINAL JUDGMENT

SIGNED at Houston, Texas, on this 26th day of June, 2024.



DAVID HITTNER
United States District Judge