IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

COLONY NATIONAL INSURANCE COMPANY	§	
	§	
	§	
V.	§	**No. 5:14CV10-JRG-CMC**
	§	
UNITED FIRE & CASUALTY COMPANY	§	
	§	

MEMORANDUM ORDER

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. The Report of the Magistrate Judge which contains her proposed findings of fact and recommendations for the disposition of such action has been presented for consideration. Defendant United Fire & Casualty Company ("United") filed objections to the Report and Recommendation. Plaintiff Colony National Insurance Company ("Colony") filed a response to the objections. The Court conducted a *de novo* review of the Magistrate Judge's findings and conclusions.

BACKGROUND

This is an insurance coverage dispute. Colony seeks a declaration regarding United's duty to defend Carothers Construction, Inc. ("Carothers") in a lawsuit styled *Gordon Ray Bonner v. Joyce Steel Erection, Ltd.*, Cause No. 11C0822.202 in the 202nd District Court of Bowie County, Texas (the "underlying suit"). Carothers was the general contractor on a Red River Army Depot project near Texarkana, Texas. During the construction of the project, Carothers utilized subcontractor Self Concrete, LLC ("Self Concrete") to pour and form concrete tilt wall panels and subcontractor Premier Constructors, Inc. ("Premier") to perform steel erection work at the construction site. During

the course of the construction, one of Premier's workers, Ray Bonner, was injured when one of Self Concrete's tilt walls was being hoisted into place. According to Bonner, the panel swung out in an uncontrolled manner and pinned Bonner against a retaining wall. In the underlying suit, Bonner sued Carothers and Self Concrete (and Joyce Steel Erection, Ltd.).

United insured Self Concrete. Colony insured Bonner's employer, Premier. Carothers was an additional insured on both policies. Carothers tendered its defense to both United and Colony. Colony accepted the tender and provided a defense to Carothers. United declined.

In this case, Colony asserts breach of contract claims, including claims for subrogation and contribution, against United for its refusal to defend Carothers in the underlying suit. Colony requests the Court construe the Colony and United policies and declare that United is required to share Carothers' defense costs and fees equally with Colony. Colony seeks a judgment awarding Colony one-half of it its costs and fees in the underlying suit and ordering United to reimburse Colony for the attorney's fees that it has incurred prosecuting this suit based on the Texas Practice & Remedies Code § 38.001 and/or Texas Insurance Code §§ 541 and 542.

United does not dispute Carothers is an additional insured during the relevant time period. However, it asserts it did not owe Carothers a defense because Bonner did not allege facts in the underlying suit sufficient to impute any liability of Self Concrete to Carothers as required under the United policy. United also asserts Colony has waived its right of subrogation and recovery.

The parties filed cross motions for summary judgment.

REPORT AND RECOMMENDATION

In her Report and Recommendation dated March 2, 2016, the Magistrate Judge recommended Colony's motion for summary judgment be granted and United's motion for summary judgment be

denied. Specifically, the Magistrate Judge concluded Self Concrete was contractually obligated to provide insurance coverage to Carothers as an additional insured on its commercial general liability policy with United. According to the Magistrate Judge, the allegations in the underlying suit implicate Self Concrete, which triggers coverage for Carothers under the Self Concrete policy with United. The Magistrate Judge further found Colony, by its policy terms, did not waive any subrogation claims it has against United for Carothers' defense costs. Thus, the Magistrate Judge concluded United is responsible for one half of Carothers' defense costs, and Colony is entitled to recover $250,159.38, plus pre and post judgment interest, from United.

The Magistrate Judge did not make a recommendation as to whether Colony is entitled to recover attorney's fees, and if so, for what amount. Instead, the Magistrate Judge ordered Colony to file a separate motion for attorney's fees, setting forth its arguments pursuant to TEX. CIV. PRAC. & REM. CODE § 38.001, *et seq*., as well as the current amount of attorney's fees incurred in this suit to date. On March 16, 2016, Colony filed its Motion for Award of Attorneys' Fees (Dkt. No. 45). The Court will issue a separate order on that motion once it is ripe.

UNITED'S OBJECTIONS

United filed objections to the Magistrate Judge's Report and Recommendation, asserting in a nutshell as follows: (1) the underlying allegations do not state facts potentially bringing the claim against Carothers within the scope of coverage furnished by United's additional insured endorsement; (2) the additional insured coverage furnished to Carothers by United is excess to the additional insured coverage furnished to Carothers by Colony; and (3) a waiver of subrogation provision in Colony's policy eliminates Colony's right to recover from United. In response, Colony asserts the Magistrate Judge did a thorough job of analyzing and rejecting each of these arguments.

***DE NOVO* REVIEW**

This is a duty to defend case, not an indemnity case. Under the eight corners or complaint allegation rule, an insurer's duty to defend is determined by the plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of the allegations. *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). Courts applying the eight corners rule "give the allegations in the petition a liberal interpretation." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex.1997). If there is any doubt, there is a duty to defend. *Gore Design Completions, Ltd. v. Harford Fire Ins. Co.,* 538 F.3d 365 (5th Cir. 2008).

United's first objection basically concerns the Magistrate Judge's agreement with Colony it was "entirely possible" that there is a "chance" Self Concrete's acts may be imputed to Carothers under the allegations in the underlying suit. (Report and Recommendation at 27). Stated differently, the Magistrate Judge found the allegations in the underlying suit do not "clearly and unambiguously fall outside the scope" of the United policy's coverage. *Id*. (citing *Trinity Universal Co. Ins. v. Employers Mutual Casualty Co.*, 592 F.3d 687, 693 (5th Cir.2010)). According to United, the Magistrate Judge improperly shifted the burden of proof to United contrary to the Fifth Circuit's opinion in *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 FF.3d 589 (5th Cir. 2011). Colony argues this "weak argument confuses duty to defend issues with liability issues, and ignores the obvious difference between this case and *Gilbane*." (Dkt. No. 46 at 4).

In *Gilbane*, general contractor Gilbane sought defense and indemnification from Admiral Insurance Company based on a commercial general liability policy Admiral had issued to Empire Steel Erectors, a subcontractor. The district court found Admiral owed a duty to defend and

indemnify. *Gilbane*, 664 F.3d at 592. The policy provided coverage to additional insureds for their own or their agents' acts or omissions, "so long as Empire Steel had previously assumed the liability of the potential additional insured in a written contract." *Id.* at 593. Having determined Gilbane qualified as an additional insured, the Fifth Circuit considered whether the pleadings in the underlying suit sufficiently alleged that Empire, or someone acting on its behalf, caused the injuries of Empire's employee Parr. *Id.* at 596.

The policy at issue in *Gilbane* explicitly required that the injuries "be caused, in whole or in part, by" Empire. *Id.* at 598. As such, Admiral owed Gilbane a duty to defend only if the underlying pleadings alleged that Empire, or someone acting on its behalf, proximately caused Parr's injuries. *Id.* The Fifth Circuit reversed the district court, finding Admiral had no duty to defend additional insured Gilbane because the "allegations in the pleadings [did] not implicate" the fault of the insured Empire. *Id*. at 599.

According to the Fifth Circuit, in performing its eight-corners review, "a court may not read facts into the pleadings, look outside the pleadings, or speculate as to factual scenarios that might trigger coverage or create ambiguity." *Id.* at 596-97. In concluding the district court had imagined factual scenarios that could give rise to coverage,[1] the Fifth Circuit noted the district court had essentially shifted the burden of proof to the party disputing coverage to show that the pleadings did not support a covered claim. *Id.* at 599. The Fifth Circuit held the district court should only have

[1] In deciding that Admiral had a duty to defend, the district court characterized the petition as stating "the injuries occurred when Parr was walking down the ladder with muddy boots," which it considered sufficient to implicate Parr's contributory negligence. *Gilbane*, 664 F.3d at 598. According to the Fifth Circuit, the petition did not allege that Parr climbed down the ladder with "muddy boots." Rather, it alleged that Gilbane's negligence caused the work area to become "slippery and hazardous," causing Parr's injuries. *Id.*

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