UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:15-CV-3094
MULTIFAMILY SERVICES, INC., *et al*,	§	
Defendants.	§	

ORDER

Before the Court are Plaintiff American Empire Surplus Lines Insurance Company's ("AE") Motion for Partial Summary Judgment (Doc. #31), Defendant Alliance Communities, LLC's ("Alliance") Response (Doc. #46); Defendant Alliance's Cross Motion for Partial Summary Judgment (Doc. #36), Plaintiff AE's Response (Doc. #43), Plaintiff-Intervenor Evanston Insurance Company's ("Evanston") Response (Doc #45); Plaintiff-Intervenor Evanston's Motion for Summary Judgment (Doc. #35), and Defendant Alliance's Response (Doc #48). Having considered counsels' arguments and the applicable legal authority, the Court grants Plaintiff AE's Motion for Partial Summary Judgment, denies Plaintiff-Intervenor Evanston's Motion for Summary Judgment, and denies Defendant Alliance's Cross Motion for Partial Summary Judgment as to AE and grants it as to Evanston.

I. Background

This declaratory judgment action arises from an underlying lawsuit in the 80th District Court for Harris County, Texas, Cause No. 2015-14697 ("Underlying Lawsuit"), filed by Francisco Buchan ("Buchan") and Jose Ya Escun ("Escun"). Doc #1 at 3. Buchan seeks damages for injuries sustained while performing exterior maintenance work at an apartment complex.

Doc. #31, Ex. A at ¶ 5.3. In the Underlying Lawsuit are three defendants: (1) Front Range—the owner of Tierra at Piney Point ("the Property") (the apartment complex where the underlying injury occurred); (2) Alliance—real estate manager of the Property; and (3) Multi-Family Services ("MFS")—the contractor that was hired to maintain the Property. Doc. #31, Ex. A at ¶ 5.1. AE is an insurance company that insured MFS under a commercial general liability insurance policy. Doc #1 at 1. Evanston is an insurance company that insured Front Range. Doc #23 at 1. MFS subcontracted the Property exterior maintenance work to Rolando Garcia ("Garcia") who, in turn, hired Buchan as an independent contractor. Doc #31, Ex. A at ¶ 5.2. Buchan was not hired directly by MFS. *Id.*

On or about June 28, 2014, Buchan was seriously injured while performing exterior maintenance on the Property. Doc. #31, Ex. A at ¶ 5.3. In the Underlying Lawsuit, Buchan alleges he was instructed to work close to a high voltage powerline, but that those responsible for the Property never made arrangements to de-energize the powerline. *Id.* at ¶ 5.4. During maintenance near the powerline, Buchan was required to hold a ladder for Escun. *Id.* at ¶ 5.3. That ladder came in contact with the high voltage powerline, which caused Buchan to sustain serious electrical shocks. *Id.* at ¶ 5.4. As a result, Buchan lost both his arms and suffered burns all over his body. *Id.* at ¶ 5.5. Buchan asserts a cause of action for negligence against defendants in the Underlying Lawsuit based on sixteen enumerated acts and omissions. *Id.* at ¶ 6.1.

There were three petitions filed in the Underlying Lawsuit. The Original Petition was filed on March 13, 2015. On January 29, 2016, the Third Amended Petition was filed. Doc #31, Ex. A. In light of the Third Amended Petition, AE moves for partial summary judgment and Evanston moves for summary judgment. Both AE and Evanston are seeking declarations that they do not owe MFS, Alliance, or Front Range a duty to defend in the Underlying Lawsuit,

alleging Buchan's injuries fall within their respective policy exclusions. Alliance responded and filed a cross motion for partial summary judgment seeking a declaration that both AE and Evanston owe a duty to defend in the Underlying Lawsuit respectively.

A. American Empire Policy

AE issued a commercial general liability policy to MFS ("AE Policy") which provided additional insured coverage to "any person or organization for whom [MFS was] performing operations for when [MFS] and such person or organization [had] agreed in writing in a written agreement that such person or organization be added as an additional insured on [MFS'] policy." Doc #31, Ex. B-1 at 6. Essentially, AE agreed to insure any person or company that MFS entered into a contract with. On March 18, 2014, Alliance hired MFS to perform maintenance at the Property. Doc. #36 at 2. The contract was in writing and required MFS to name Alliance as an additional insured under its liability insurance policies. *Id.* at 4. AE Policy provides coverage for damages that arise from 'bodily injury' or 'property damage' so long as there is no applicable exclusion. *Id.*

AE Policy contains an exclusion titled "Exclusion – Injury To Independent Contractors and Temporary Workers" which provides: "this insurance does not apply to 'bodily injury' or 'personal injury and advertising injury' to "a contractor or subcontractor hired by you or working on your behalf or the 'employee' or temporary worker' of such contractor or sub-contractor." Doc. #36, Ex. A-2 at 21.

B. Evanston Policy

Evanston insured Front Range, owner of the Property under a commercial general liability policy ("Evanston Policy"). Evanston Policy lists insured as "Front Range Piney Point, L.P. c/o Alliance Residential." Doc #35, Ex. 1 at 8. Alliance is the property management

company for Front Range. Front Range entered into a property management agreement employing Alliance as "[m]anager for the leasing, operation, maintenance, management and supervision" of the Property. Doc #35, Ex. 2 at 6. Evanston Policy insures "[a]ny . . . organization while acting as [Front Range's] real estate manager" (i.e. Alliance). Doc #35, Ex. 1 at 18. Evanston Policy obligates Evanston with the duty to defend, except there is "no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply." Doc #35, Ex. 1 at 11.

Evanston Policy contains an exclusion titled "Employees of Independent Contractors Endorsement" which provides: "[t]he coverage under this policy does not apply to 'bodily injury,' 'property damage,' 'personal and advertising injury,' or any injury, loss, or damage sustained by any employee of an independent contractor contracted by you or on your behalf." Doc #35, Ex. 2 at 35.

Evanston Policy contains another exclusion titled "Exclusion–Business Code Violations" which provides "[t]his insurance does not apply to: Building Code Violations. An actual or alleged violation of any building code, ordinance, or statute." Doc #35, Ex. 2 at 48.

II. Legal Standards

A. Motion for Summary Judgment

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "The movant bears the burden of identifying those portions of the claim it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.,* 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-25 (1986)). "A fact is 'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law."

Sossamon v. Lone Star State of Tex., 560 F.3d 316, 326 (5th Cir. 2009) (quotation omitted). "If the moving party fails to meet [its] initial burden, the motion [for summary judgment] must be denied, regardless of the nonmovant's response." *United States v. $92,203.00 in U.S. Currency,* 537 F.3d 504, 507 (5th Cir. 2008) (quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)).

When the moving party has met its Rule 56 burden, the nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. *Baranowski v. Hart,* 486 F.3d 112, 119 (5th Cir. 2007). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" *Boudreaux v. Swift Transp., Co.,* 402 F .3d 536, 540 (5th Cir. 2005). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Connors v. Graves,* 538 F.3d 373, 376 (5th Cir. 2008).

B. Duty to Defend

In this diversity case, the substantive law of Texas controls the determination of a duty to defend. *Cleere Drilling Co. v. Dominion Exploration & Prod., Inc.*, 351 F.3d 642, 646 (5th Cir. 2003). Under Texas law, courts follow the "eight corners rule" to determine whether an insurer has a duty to defend. *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church,* 197 S.W.3d 305, 307 (Tex. 2006). The eight corners rule provides that "[a]n insurer's duty to defend is determined solely by the allegations in the pleadings and the language of the insurance policy." *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002). The alleged facts within the four corners of the latest amended pleading and the plain language within the four corners of the insurance policy are the focus of the court's inquiry in determining a duty to defend. *Northfield Ins. Co. v.*

Loving Home Care Inc., 363 F.3d 523, 528 (5th Cir. 2004). Texas strictly applies the eight corners rule and extrinsic evidence outside of the pleading and the policy is not considered absent a very narrow exception that the Texas Supreme Court has never recognized. *Id.* at 529; *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church,* 197 S.W.3d 305, 308 (Tex. 2006).

The insured bears the initial burden of showing that a claim against it is potentially covered by the insurance policy. *Northfield*, 363 F.3d at 528. "If a complaint potentially includes a covered claim, the insurer must defend the entire suit." *Zurich American Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008). If the insurer relies on a policy exclusion to deny coverage, "the insurer bears the burden of showing that the plain language of a policy exclusion or limitation allows the insurer to avoid coverage of all claims, also within the confines of the eight corners rule." *Northfield*, 363 F.3d at 528. To assess the applicability of policy exclusions, "a reviewing court must interpret the complaint liberally and construe the exclusion narrowly, resolving any ambiguity in favor of the insured." *City of Coll. Station, Tex. v. Star Ins. Co.* 735 F.3d 332, 337 (5th Cir. 2013) (citing *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008)).

Interpretation of an insurance policy is a question of law. *Guar. Nat'l Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 135 (5th Cir. 1990); *Data Specialties, Inc. v. Transcon. Ins. Co.*, 125 F.3d 909, 911 (5th Cir. 1997). "Under Texas law, the interpretation of insurance contracts is governed by the same rules that apply to contracts in general." *Id.* If the policy is ambiguous, it "must be strictly construed in favor of the insured to avoid the exclusion." *Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr.*, 468 F.3d 857, 859 (5th Cir. 2006). All doubts are resolved in favor of the duty to defend. *King v. Dallas Fire Ins. Co.,* 85 S.W.3d 185, 187 (Tex. 2002).

C. Duty to Indemnify

In Texas, the duty to defend and the duty to indemnify are distinct duties. *Farmers Texas*

Cnty. Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 82 (Tex. 1997). Generally, duty to indemnify questions are only justiciable after the underlying suit is concluded unless the same reasons that negate the duty to defend also negate the duty to indemnify. *Id.* at 84.

III. Analysis

All parties seek declaratory judgment as to whether AE and Evanston have a duty to defend in the Underlying Lawsuit. Additionally, Evanston asks the Court to determine the issue of duty to indemnify along with the issue of duty to defend.

A. Duty to Defend as to AE

AE concedes in its Motion for Partial Summary Judgment that Alliance is an additional insured under AE Policy. Doc. #31 at 9. That concession, combined with Alliance's unopposed prima facie showing of insured status, satisfies Alliance's initial burden of demonstrating that it is covered under AE Policy. The burden then shifts to AE to prove that the asserted policy exclusion applies. Exclusions are narrowly construed, and all reasonable inferences must be drawn in the insured's favor. *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co.*, 538 F.3d 365, 370 (5th. Cir. 2008).

AE argues it has no duty to defend because Buchan's injuries fall within its independent contractor exclusion. This exclusion purports to exclude bodily injury coverage to (1) "[a] contractor or subcontractor hired by [MFS] or working on [MFS'] behalf or (2) the 'employee' or 'temporary worker' of such contractor or subcontractor." Doc. #31, Ex. C.

Alliance concedes that the Third Amended Petition is the live pleading in the Underlying Lawsuit. Doc #36 at 5. The Third Amended Petition alleges that Buchan is an independent contractor hired by Garcia who was a contractor or subcontractor hired by MFS to perform exterior maintenance of the Property. Doc #31, Ex. A at ¶¶ 5.1–5.2. The work that Buchan did on

the Property was exterior maintenance work in the course of MFS's performance of its contract with Alliance. *Id.* The plain language of the exclusion reads as applying to either contractors or subcontractors hired directly by MFS, like Garcia, or to contractors or subcontractors "working on [MFS's] behalf" though not hired directly by MFS, like Buchan. By virtue of his employment to work on the Property as an independent contractor, through Garcia who was hired by MFS, Buchan was "working on behalf" of MFS. *See Burlington Ins. Co. v. JC Instride, Inc.*, 30 F.Supp.3d 587, 595 (S.D.Tex. Jul. 7, 2014) (finding that by virtue of employment through a subcontractor of the insured, the down the line contractor was "hired to do work for or on behalf of" the insured). Accordingly, Buchan falls squarely within the independent contractor exclusion which precludes AE's duty to defend. Accordingly, the Court grants AE's Motion for Partial Summary Judgment. For the same reasons, the Court denies Alliance's Cross Motion for Partial Summary Judgment as to AE's duty to defend.

B. Duty to Defend as to Evanston

Evanston does not argue that Buchan's claim in the Underlying Lawsuit precludes coverage but rather that policy exclusions apply relieving it of a duty to defend Alliance. Doc #35 at 4. Evanston asserts it has no duty to defend because Buchan's injuries fall within two policy exclusions. *Id.* The Court will address each of these exclusions in turn.

i. Employee of Independent Contractors Exclusion

Evanston's "Employees of Independent Contractors Endorsement" precludes coverage for bodily injury sustained by "any employee of an independent contractor contracted by [Front Range] or on [Front Range's] behalf." Doc #35, Ex. 2 at 35. Alliance contracted MFS to perform exterior maintenance to Front Range's Property. Doc #31, Ex. A at ¶ 5.1. Thus, MFS was contracted on behalf of Front Range by Alliance. According to the live pleading, Buchan worked

as an independent contractor of Garcia (thus as an independent contractor of a contractor hired on behalf of Front Range). *Id.* at ¶ 5.2. The pleading further states that "Buchan had considerable discretion regarding the details of his work and how to complete it, provided his own tools, [was] issued a 1099, and did not have social security or federal income taxes withheld." *Id.* Evanston Policy does not provide exclusions for independent contractors, rather an exclusion for "employee[s] of independent contractor[s]." Evanston's Policy definition of "employee" does not include independent contractor. Doc. #35 Ex. 2 at 21–23. Nowhere in the Evanston Policy language is bodily injury to independent contractors excluded from coverage.

Evanston urges the Court to entertain extrinsic evidence outside of the pleading and the policy to determine that the "employee of independent contractor" exclusion applies.[1] The Texas Supreme Court has never recognized an exception to the eight corners rule. *Northfield*, 363 F.3d at 529. Any narrow exception would only apply in very limited cases where "it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case." *Id.* at 531. The Court does not find it impossible to discern whether coverage is implicated, furthermore the Court will not engage in determining the truth or falsity of facts alleged in the Underlying Lawsuit. Thus, the Court will not entertain extrinsic evidence outside of the eight corners of the pleading and the policy. As such, the Court finds that the "Employees of Independent Contractors Endorsement" does not apply, thus Evanston is not excused of its duty to defend by this policy exclusion.

[1] Evanston urges the Court to consider Front Range's Hybrid Motion for Summary Judgment (granted as to one ground that "Front Range owed no duty to Buchan." Doc #35, Ex. 4 at 77–79, 94–96, 168) from the Underlying Lawsuit along with summary judgment evidence. Doc #35, Ex. 4 at 77–177.

ii. Violation of Building Code Exclusion

Evanston asserts a second policy exclusion which states "the insurance does not apply to Building Code Violations. An actual or alleged violation of any building code, ordinance, or statute." Doc #35, Ex. 1 at 48. Buchan alleges violations of "the Texas Health and Safety Code, the Texas Utilities Code, the National Electric Safety Code, and regulations promulgated by the Occupational Safety and Health Administration." Doc. #31, Ex. A at ¶ 5.6. Evanston argues that because Buchan alleges injuries resulting from a Building Code violation (energized powerlines) that this exclusion applies and precludes coverage. Doc. #35 at 14.

Alliance points out that "[i]t is hard to say what is encompassed by the "Building Code Violation" exclusion. Doc. #48 at 16. Policy exceptions are strictly construed against the insured. *Blaylock v. Am. Guar. Bank Liab. Ins. Co.*, 632 S.W.2d 719 (Tex. 1982). "Courts adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction by the insurer appears to be more reasonable." *Northfield*, 363 F.3d at 529. Alliance offers that this exclusion could mean that Evanston Policy precludes coverage for fines incurred from building code violations. Doc. #48 at 16. Alliance also distinguishes the "Building Code Violation" exclusion language from the language of other Evanston Policy exclusions all prefaced with "the coverage does not apply to 'bodily injury' or 'property damage . . ." Doc. #48 at 16. Even if this exclusion intends to exclude injuries arising from building code violations (though the language of the exclusion is not explicit nor does it conform with the language formation of other policy exclusions applying to bodily injury), Buchan does not plead statutory violations as the sole cause of his injuries. Doc. #31, Ex. A at 3–7. Within the confines of the eight corner rule, Evanston must show that the plain language of the policy exclusion allows Evanston to avoid coverage of *all claims*. *Northfield*, 363 F.3d at 528.

Evanston has not so shown. Accordingly, the Court denies Evanston's Motion for Summary Judgment as to the duty to defend.[2] For the same reasons, the Court grants Alliance's Cross Motion for Partial Summary Judgment as to Evanston's duty to defend.

C. Duty to Indemnify as to Evanston

Texas law only considers duty to indemnify questions justiciable after the underlying suit is concluded, unless "the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify." *Northfield*, 363 F.3d at 536 (citing *Griffin*, 955 S.W.2d at 84). Evanston has a duty to defend and the Underlying Lawsuit has not yet been resolved. The Court finds that the duty to indemnify is not justiciable at this time. Thus, Evanston's Motion for Summary Judgment as to the duty to indemnify is denied.[3]

Prior to the Court's ruling on the motions for summary judgment, Alliance filed a Motion to Abate (Doc. #34) on the issue of duty to indemnify and Evanston responded (Doc. #44). The arguments in the motion to abate and the response trace the same arguments that Evanston and Alliance made in their respective motions for summary judgment. Because the Court found that the duty to indemnify is not ripe, the Court denies the motion to abate as duty to indemnify is no longer an issue before the Court.

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[2] Evanston additionally asks the Court to find that even if it has a duty to defend that Evanston Policy is an excess policy to AE and Traveler's Insurance policies. Doc. #35 at 15. Travelers is not a party to this case before the Court. Evanston has a duty to defend and the Court will not decide duty to indemnify. Whether Evanston Policy is excess is an issue between Evanston and Travelers. The Court will not make inquiry concerning an entity's rights who is not before this Court.

[3] Evanston also filed an opposed Motion for Leave to File Supplemental Summary Judgment Evidence and Supplement Reply (Doc. #56). Pursuant to the Court's ruling that motion is denied.

IV. Conclusion

For the foregoing reasons, Plaintiff AE's Motion for Partial Summary Judgment (Doc. #31) is GRANTED, Plaintiff-Intervenor Evanston's Motion for Summary Judgment (Doc. #35) is DENIED, and Defendant Alliance's Motion for Partial Summary Judgment (Doc. #36) is GRANTED as to Evanston and DENIED as to AE. Accordingly, this case is DISMISSED.

It is so ORDERED.

SEP 27 2017

Date

The Honorable Alfred H. Bennett
United States District Judge