UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Plaintiff,

v. CASE NO: 8:19-cv-466-JSM-AAS

OLD DOMINION INSURANCE COMPANY,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon Defendant's Amended Motion for Final Summary Judgment (Dkt. 61) and Plaintiff's Response in Opposition (Dkt. 67). The Court, having reviewed the motion, response, record evidence, and being otherwise advised in the premises, concludes that Defendant's motion should be granted because the insured did not obtain Old Dominion's consent to the settlement agreement pursuant to the insurance policy and Travelers did not preserve a cause of action against Old Dominion. Accordingly, final judgment will be entered in Defendant's favor.

FACTS

A. Introduction

Plaintiff The Travelers Indemnity Company of Connecticut filed the instant action against Defendant Old Dominion Insurance Company for equitable subrogation (Count I

of the Complaint) and an alternative claim for equitable contribution (Count II of the Complaint) related to Travelers' payment of $950,000 to settle the state court action, *Andrea M. Comacho, as parent and legal guardian of Cameron Scott, a minor, vs. James Michael Osteen, James Delmer Smith, Jr., Greg Carpenter Enterprises, Inc., Blue Rock Partners, LLC., and HCG Brandon, LLC*, Case Number 2015-CA-009686, which was pending in the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida (the "Underlying Action"). Travelers' payment settled the claims alleged against Greg Carpenter Enterprises, Inc., Travelers' and Old Dominion's mutual insured.

Notably, at the time of the subject accident, Carpenter was insured by Travelers under Business Auto policy BA-6878P208-15-SEL, which provided Carpenter coverage of $1 million per accident. Carpenter also had two policies with Old Dominion: a Businessowners Liability policy MPG47360 with a $1 million per occurrence limit and a $1 million Umbrella Policy.

B. The Underlying Action

The Underlying Action was initiated in October of 2015. The following facts are undisputed according to the pleadings filed in the Underlying Action as well as deposition testimony.

HCG Brandon LLC ("HCG") was the owner of an apartment complex in Brandon, Florida, located at 1002 Creekbridge Rd., Brandon, Fl 33511 (the "Apartment Complex").

Blue Rock Partners, LLC ("Blue Rock") managed the Apartment Complex. Blue Rock utilized the services of Carpenter for lawn maintenance on the Apartment Complex's grounds.

In April of 2015, Blue Rock asked Carpenter to perform tree trimming and stump grinding work throughout the Apartment Complex. Carpenter subcontracted this work to James Delmer Smith, Jr. d/b/a Pete's Tree Service ("Smith"). Smith's employees, James Michael Osteen and Gilbert Dees, were the employees performing the work on the premises at the time of the subject accident. Carpenter was not on the premises when the accident occurred. Pete's Tree Service, not Carpenter, owned the truck, trailer, and equipment. Carpenter did not earn any revenue as a result of the tree trimming and stump grinding job.

Osteen testified that after finishing the tree trimming and stump grinding work, he and Dees loaded the trailer with the stump grinding equipment and began backing up the vehicle in order to transport the debris out of the Apartment Complex for eventual disposal. While backing up the vehicle, the trailer struck Cameron Scott, a minor, who was riding his bicycle around the Apartment Complex. The collision resulted in significant injuries to Cameron Scott.

The Third Amended Complaint (the operative complaint at the time of settlement) filed in the Underlying Action alleged two theories of liability against Carpenter: 1)

Carpenter had a non-delegable duty to Cameron Scott based on the theory that the work performed by Osteen when the accident occurred constituted an inherently dangerous activity and therefore the duty to perform the work in a safe manner was non-delegable and 2) Carpenter was negligent in his selection and retention of Smith and Smith's employees.

Old Dominion was notified of the loss in approximately June of 2015. At some point during Old Dominion's investigation of the claim, a request was made to take Carpenter's deposition. At that time, Carpenter was not a party in the Underlying Action. Old Dominion hired attorney Joseph Metzger to defend Carpenter at the deposition. Metzger continued to defend Carpenter for the duration of the Underlying Action.

C. Travelers' Involvement

Travelers first became aware of the claim against Carpenter in April of 2018. On May 18, 2018, Kimberly Darling, Travelers' claims adjuster assigned to the claim, emailed Carpenter's insurance agent and informed him that Travelers was tendering a defense to Carpenter and Blue Rock. Darling stated in the email "we are not going to post an indemnity reserve at this time as we do not feel that there is any liability on (Carpenter)." Travelers hired attorney Roland Hermida as Carpenter's counsel. Travelers also hired Hermida to represent Blue Rock. With respect to Carpenter's representation, it was understood between Old Dominion and Travelers that Hermida would be appearing as co-counsel for Carpenter. At no time during the pendency of the Underlying Action, did

Travelers issue a reservation of rights to Carpenter or raise any coverage related issues in connection with Travelers' defense of Carpenter.

On May 14, 2018, Cameron Scott made a time limit demand on Blue Rock to settle the Underlying Action for $1,250,000. In response to said demand, Hermida requested a voluntary mediation conference, which occurred on July 23, 2018.

Prior to the mediation, Metzger sent a letter to Old Dominion dated July 16, 2018, that evaluated the claims against Carpenter. Metzger opined that Carpenter was the least culpable of all of the defendants. Metzger also stated that there was a "good probability of success" on obtaining summary judgment on the negligent selection claim. (Dkt. 61-10). Metzger further advised that Cameron Scott's damages could exceed $1,000,000 and recommended settlement authority of $75,000. The second mediation ended in an impasse.

D. Settlement of the Underlying Action

On July 27, 2018, Cameron Scott's counsel served a Proposal for Settlement ("PFS") on Carpenter. (Dkt. 61-11). The amount proposed was $1,000,000 to settle all claims asserted against Carpenter, Blue Rock, and HCG. Hermida obtained an extension of time to respond to the PFS through September 10, 2018.

On September 7, 2018, Travelers sent a letter to Old Dominion that demanded that Old Dominion accept the PFS prior to its expiration. The letter stated that if Old

Dominion failed to settle the case by accepting the PFS, "Travelers reserve[d] the right to do so." (Dkt. 61-12). The letter further stated that the obligation was primarily owed by Old Dominion but Travelers "ha[d] obligations that expose it as well and a duty to see the insured is protected." *Id.* The letter cautioned that if Old Dominion did not settle the case and Travelers accepted the PFS, Travelers would proceed against Old Dominion by all remedies available to Travelers "at law and equity to recover the payment." *Id.*

On September 10, 2018, Old Dominion responded to Travelers. Specifically, the September 10, 2018 letter (which was sent electronically) stated that "Old Dominion w[ould] continue to defend Greg Carpenter on the claim asserted against it [sic] in the above referenced action, subject to all terms of the subject policy, including those regarding admissions of liability, voluntary agreements to pay and the consent requirements for any settlement." (Dkt. 61-13). It is undisputed that Old Dominion never consented to settle the claims against Carpenter for $1,000,000.

Also on September 10, 2018, Hermida, on behalf of Carpenter, filed a notice of acceptance of the PFS. In connection with this settlement, Travelers tendered $950,000 and Sompo International Insurance, Blue Rock's insurer, tendered $50,000.

On October 3, 2018, before any settlement documents were executed, Carpenter and Travelers entered into a Loan Receipt and Assignment of Rights (Dkt. 61-14) that provided that Travelers would loan $950,000 to Carpenter for the indemnity payment and, in

exchange, Carpenter would assign any rights to Travelers to pursue subrogation or contribution against Old Dominion.

A Settlement Agreement was signed on December 11, 2018 (the "Settlement Agreement" (Dkt. 61-15). The parties to the Settlement Agreement were Andrea M. Comacho, for herself and as parent and legal guardian of Cameron Scott, a minor, Carpenter, and Travelers. Cameron Scott released all claims against Carpenter, Blue Rock, HCG, and Travelers as part of the Settlement Agreement. Old Dominion was not released in connection with the Settlement Agreement.

E. The Old Dominion Policies

Old Dominion issued a Business Owners Liability Policy to Carpenter (Policy No. MPG47360) that was in effect from June 15, 2014, to June 15, 2015, with a $1,000,000 policy limit. Carpenter was also insured under a Commercial Umbrella Policy issued by Old Dominion (Policy No. CUG4202F) during the relevant time, with a $1,000,000 policy limit.

The Business Owners Liability Policy contained the standard provision concerning the insured's duties in the event of a loss, which stated:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

…

c. You and any other involved insured must:

> **(1)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
> **(2)** Authorize us to obtain records and other information;
> **(3) Cooperate with us in the investigation, or settlement of the claim or defense against the "suit"; and**
> **(4)** Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.
>
> **d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.**

(emphasis added).

…

> **4. Legal Action Against Us**
>
> No person or organization has a right under this policy:
>
> **a.** To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
> **b.** To sue us on this policy unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

Now, Old Dominion moves for summary judgment on Travelers' claims for equitable subrogation and equitable contribution. Old Dominion argues, in relevant part,

that it has no legal obligation to indemnify Travelers because Carpenter breached the insurance policy with Old Dominion when he voluntarily made the settlement payment without Old Dominion's consent. Related to this argument, Old Dominion also contends that Travelers did not enter into an agreement with Old Dominion to later seek indemnity from Old Dominion, which is required under Florida law. The Court agrees that both of these arguments entitle Old Dominion to summary judgment.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (internal quotation marks omitted); Fed. R. Civ. P. 56(c). The existence of some factual disputes between the litigants will not defeat an otherwise properly supported summary judgment motion; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law applicable to the claimed causes of action will identify which facts are material. *Id.* Throughout this analysis, the court must examine the evidence in the light most favorable to the nonmovant and draw all justifiable inferences in its favor. *Id.* at 255.

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. The evidence must be significantly probative to support the claims. *Anderson*, 477 U.S. at 248–49.

This Court may not decide a genuine factual dispute at the summary judgment stage. *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir. 1990). "[I]f factual issues are present, the Court must deny the motion and proceed to trial." *Warrior Tombigbee Transp. Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248; *Hoffman v. Allied Corp.*, 912 F.2d 1379, 1383 (11th Cir.1990). However, there must exist a conflict in substantial evidence to pose a jury question. *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1045 (11th Cir. 1989).

DISCUSSION

Travelers seeks a judgment against Old Dominion on two theories of liability. First, Travelers argues that it is entitled to equitable subrogation for the indemnity payment made on behalf of Carpenter in the amount of $950,000 to settle the claims against Carpenter in the Underlying Action. Equitable subrogation "is based on the policy that no

person should benefit by another's loss, and it may be invoked wherever justice demands its application, irrespective of technical legal rules." *Zurich Am. Ins. Co. v. S.-Owners Ins. Co.*, 314 F. Supp. 3d 1284, 1297 (M.D. Fla. 2018) (vacated on other grounds). Equitable subrogation is generally appropriate where: "(1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt, (4) the subrogee paid off the entire debt, and (5) subrogation would not work any injustice to the rights of a third party." *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999); *Nova Info. Sys., Inc. v. Greenwich Ins. Co.*, 365 F.3d 996, 1005 (11th Cir. 2004).

"In the insurance context, [subrogation] takes the form of an insurer's right to be put in the position of the insured in order to pursue recovery from third persons [,including other insurers,] legally responsible to the insured for a loss which the insurer has both insured and paid." *St. Paul Fire & Marine Ins. Co. v. Lexington Ins. Co.*, No. 05-80230-CIV, 2006 WL 1295408, at *6 (S.D. Fla. Apr. 4, 2006) (citing *Ranger Ins. v. Travelers Ins.*, 389 So. 2d 272 (Fla. 1st DCA 1980)). The insurer "stands in the shoes" of its insured and has no greater rights than that of its insured. *Cincinnati Ins. Co. v. Superior Guar. Ins. Co.*, 441 F. Supp. 3d 1271, 1275 (M.D. Fla. 2020).

Alternatively, Travelers is asserting a claim for equitable contribution for half of the settlement funds loaned to Carpenter in connection with the Settlement Agreement. In Florida, contribution is meant "to distribute equally among those who have a common

obligation, the burden of performing that obligation." *Zurich Am. Ins.*, 314 F. Supp. 3d at 1297. Generally, for an insurer to prevail on an equitable contribution claim against a co-insurer, the insurers must "share (1) the same level of obligation (2) on the same risk (3) to the same insured." *Id* at 1298.

Old Dominion argues that it is not liable for any portion of the Settlement Agreement because Carpenter and Travelers breached the conditions of the Old Dominion Policy by entering into the Settlement Agreement without Old Dominion's consent and while Old Dominion was providing an unconditional defense to Carpenter from the inception of the Underlying Action. The Court agrees. "[W]hile an insured is free to enter into a reasonable settlement when its insurer has wrongfully refused to provide it with a defense to a suit, we find that the insured is not similarly free to independently engage in such settlements where, as here, the insurer had not declined a defense to suit." *First Am. Title Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 695 So. 2d 475, 476 (Fla. 3d DCA 1997).

The case of *American Reliance Insurance Company v. Perez*, 712 So. 2d 1211 (Fla. 3d DCA 1998), is instructive on this issue. The insured was sued for battery and negligence. American Reliance, the insurer, tendered a defense to the insured under a reservation of rights and simultaneously sought declaratory relief in a separate action. *Id* at 1212. During the pendency of the declaratory action, the insured entered an agreement to settle the personal injury case for $200,000 with the plaintiff. *Id.* The insured then

sought to establish coverage under the American Reliance policy in the declaratory action, along with a finding that American Reliance was responsible for the indemnity payment. *Id.* The trial court granted summary judgment in the insured's favor, concluding that American Reliance must cover the claim despite the insured's $200,000 voluntary payment to settle the personal injury case. *Id.*

American Reliance appealed and the Florida appellate court concluded that the trial court improperly granted the insured summary judgment and reversed the trial court, holding that the insured breached the American Reliance policy by entering into a settlement agreement without American Reliance's consent. The appellate court noted that the policy stated: "the insured will not except at the insured's own cost, voluntarily make payment, assume obligation or incur expense other than for first aid to others at the time of the bodily injury" and the insured was in breach of this requirement. As a consequence, American Reliance was not obligated under the policy for any indemnity payment. *Id.* *See also, Zurich Am. Ins. Co. v. Frankel Enterprises, Inc.*, 509 F. Supp. 2d 1303, 1311 (S.D. Fla. 2007) (concluding that "an insurer cannot be bound by an unauthorized settlement when it has not refused to defend, even if it denies coverage.").

Lumbermens Mutual Casualty Company v. Foremost Insurance Company, 425 So. 2d 1158, 1159 (Fla. 3d DCA 1983), is also instructive. Lumbermens filed a complaint against another carrier, Foremost Insurance Company, seeking to recover the amount it

paid in settlement of the plaintiff's claim in the original lawsuit. *Id.* at 1159–60. The court held that Lumbermens waived its claim through its failure to preserve a cause of action against the other insurance carrier for either indemnity, contribution, and/or equitable subrogation through an identifiable agreement, either oral or written. *Id.* Similarly, there is no such agreement, either oral or written, between Travelers and Old Dominion that preserves any cause of action against Old Dominion. *See also Lehman–Eastern Auto Rentals, Inc. v. Brooks*, 370 So. 2d 14 (Fla. 3d DCA 1979).

It is also undisputed that Old Dominion was providing Carpenter an unconditional defense in the Underlying Action when Travelers and Carpenter entered into the Settlement Agreement. Old Dominion informed Travelers that it would continue to defend Carpenter. Old Dominion also specifically informed Travelers that any settlement would require Old Dominion's consent pursuant to the language in the Old Dominion Policy.

Notably, Carpenter never rejected Old Dominion's defense. When Travelers hired Hermida to also represent Carpenter, it was expressly communicated that Hermida would be acting in a co-counsel capacity. The record reflects that Carpenter was fully protected against an adverse judgment under the Old Dominion CGL policy up to the policy limits of $1,000,000. Further, Carpenter was fully protected under the Old Dominion Umbrella Policy in the amount of $1,000,000.

The Court underscores that Travelers did not enter into an agreement with Old Dominion that preserved Travelers' right to seek indemnity against Old Dominion. Also, Travelers never denied its liability in the Underlying Action. Travelers never issued a reservation of rights letter to Carpenter in which Travelers advised Carpenter that an exclusion may apply to eliminate coverage under the Travelers Policy.

In sum, the Court agrees with Old Dominion that Travelers is essentially seeking to disclaim coverage after tendering a defense to Carpenter without a reservation of rights and after settling the Underlying Action without Old Dominion's consent. Travelers, standing in Carpenter's shoes, receives the same rights afforded to Carpenter. But Carpenter's indemnity rights were extinguished because he breached the Old Dominion policy when he entered into the Settlement Agreement without Old Dominion's consent. Although the Court cannot find a case that is directly on point factually, the Court concludes that these undisputed facts make clear that the equitable remedies of subrogation and contribution are unavailable to Travelers as a matter of law.

It is therefore **ORDERED AND ADJUDGED** that:

1. Defendant's Amended Motion for Final Summary Judgment (Dkt. 61) is granted.
2. The Clerk of Court is directed to enter Final Judgment in favor of Defendant and against Plaintiff.

3. The Clerk of Court is directed to close this case and terminate any pending motions as moot.

DONE and **ORDERED** in Tampa, Florida on February 1, 2021.

JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record