[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 24-11315

Non-Argument Calendar

DONNA AUSBORN,

Plaintiff-Appellant,

versus

ILLINOIS UNION INSURANCE COMPANY,
d.b.a. Chubb,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-02925-JPB

Before WILSON, LAGOA, and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Donna Ausborn appeals the district court's order granting Appellee Illinois Union Insurance Company's motion to dismiss her complaint and denying Ausborn's motion for joinder of additional parties. Having reviewed the record and read the parties' briefs, we affirm the district court's order.

I.

Ausborn brought a wrongful death claim against officers at the East Point jail in Fulton County, Georgia, following the death of her father that occurred while he was in a holding cell at the jail. Neither the City of East Point nor the officers defended the action, and the state court judge issued a default judgment against the officers in the amount of $7,000,000, plus court costs. At the time of the incident, Illinois Union insured the City for up to $7,000,000 in general liability coverage, among other coverage products. The policy contains policy conditions, including defense and settlement conditions. The pertinent conditions here state that Illinois Union has no duty to defend a claim against an insured (the City) seeking damages. It further provides that the insured has the duty to defend any claim up to a retained limit ($150,000), and when the damages and claim expenses exceed the retained limit, the insured will be entitled to indemnification by Illinois Union.

Ausborn filed a direct action against Illinois Union in state court seeking to collect the default judgment. Ausborn argued that

the policy covers the underlying claim (her wrongful death action) such that Illinois Union is required to satisfy the $7,000,000 default judgment, along with costs and accrued interest. Ausborn also sought attorneys' fees and costs. Illinois Union removed the action to federal court, and then filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that Ausborn failed to state a claim on which relief can be granted. Illinois Union asserted that it was not required to satisfy the default judgment because the City breached a condition of the policy: the duty to defend in the wrongful death lawsuit. In addition, Illinois Union claimed that the policy provides no coverage in this case because there was no occurrence as defined under the policy and the policy's Medical Service and Law Enforcement Health Care Services Exclusions apply.

Ausborn filed a motion for joinder of additional parties, requesting to join the officers as defendants under Federal Rules of Civil Procedure 19(a)(1)(B) and 20(a)(2). Illinois Union responded by stating that the only issue in the case is whether the policy obligates it to pay the default judgment; therefore, the officers are neither necessary nor permitted parties. Illinois Union also asserted that joinder of the officers would be fraudulent. The district court granted the motion to dismiss and denied the motion for joinder of additional parties. Ausborn appeals from that district court order.

II.

We review *de novo* a district court's order of dismissal under Federal Rule of Civil Procedure 12(b)(6). *Hunt v. Aimco Props., L.P.*,

814 F.3d 1213, 1221 (11th Cir. 2016). We review for abuse of discretion the district court's order on a motion for joinder of parties. *Swan v. Ray*, 293 F.3d 1252, 1253 (11th Cir. 2002).

III.

In construing the insurance policy, we look first to its text, giving the terms their "usual and common meaning." *See Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 719, 784 S.E.2d 422, 424 (Ga. 2016). If we find the terms "explicit and unambiguous," we simply apply the terms as written, "regardless of whether doing so benefits the carrier or the insured." *Id.* (quotation marks omitted). Under Georgia law, "exclusions from coverage sought to be invoked must be strictly construed," and "all ambiguities as to policy exclusions are interpreted in favor of coverage because the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms." *Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1331-32 (11th Cir. 2017) (quotation marks and alteration omitted). "If the facts as alleged in the complaint even arguably bring the occurrence within the policy's coverage, the insurer has a duty to defend the action." *City of Atlanta v. St. Paul Fire & Marine*, 231 Ga. App. 206, 207, 498 S.E.2d 782, 784 (Ga. Ct. App. 1998).

There are three steps a court undertakes in the construction of a contract: (1) the court decides whether the language is clear and unambiguous, looking to the four corners of the agreement and giving words their usual and common significance; (2) if the court decides that the contract is ambiguous in some respect, the

court must apply the rules of contract construction to ascertain the intention of the parties, construing any ambiguity against the insurer as the drafter of the document; and (3) if the court determines that the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury. *Envision Printing LLC v. Evans*, 336 Ga. App. 635, 638, 786 S.E.2d 250, 252 (Ga. Ct. App. 2016) (quoting *Gen. Steel v. Delta Bldg. Sys.*, 297 Ga. App. 136, 138, 676 S.E.2d 451, 453 (Ga. Ct. App. 2009)); *Brogdon v. Pro Futures Bridge Cap. Fund, L.P.*, 260 Ga. App. 521, 523, 580 S.E.2d 303, 306 (Ga. Ct. App. 2003); *St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co.*, 198 F.3d 815, 820 (11th Cir. 1999) ("Enforcement of the parties' intent is superior to the other rules of construction.").

On appeal, Ausborn contends that, contrary to the district court's conclusion, the more reasonable interpretation of the duty to defend condition imposes a duty on the insured to defend and pay defense costs only up to the retained limit of $150,000. Under Ausborn's interpretation, Illinois Union has exposure for all amounts over the retained limit regardless of whether the City provides a defense. In addition, Ausborn argues that under the policy, Illinois Union has an implied duty to defend when there is a foreseeable risk that the underlying claim will result in damages that exceed the retained limit. However, Ausborn's interpretation is strained and unavailing. A review of the entire policy shows that Ausborn's interpretation is not a reasonable one and attempts to create an ambiguity where none exists. *See Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1253 (11th Cir. 2019) ("[A]mbiguity is not to

be created by lifting a clause or a portion of the contract out of context" and the "natural, obvious meaning is to be preferred over any curious, hidden meaning which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover.") (quotation marks omitted).

Based on the record, we conclude that the district court did not err in finding the policy unambiguous. Under the policy conditions, the policy provides that Illinois Union has "no duty to defend a Claim against an Insured seeking Damages." (Pl.'s App. p. 30.). The policy further states that the insured has a "duty to defend any Claim to which this insurance applies and shall be responsible for the Damages and Claim Expenses up to the Retained Limit." (*Id.*). The City breached this policy condition by failing to defend the officers in the wrongful death suit and subjecting them to a default judgment.

In the context of an insurance policy, a condition precedent, like the one in this policy, must be performed before policy coverage is considered. *Wolverine Ins. Co. v. Sorrough*, 122 Ga. App. 556, 560, 177 S.E.2d 819, 822 (Ga. Ct. App. 1970). The policy here clearly expresses an intention that the insured's failure to comply with the condition will result in forfeiture of the insured's rights under the policy. *See Plantation Pipe Line Co. v. Stonewall Ins. Co.*, 335 Ga. App. 302, 310, 780 S.E.2d 501, 509 (Ga. Ct. App. 2015); *Lankford v. State Farm Mut. Auto. Ins. Co.*, 307 Ga. App. 12, 14, 703 S.E.2d 436, 438-39 (Ga. Ct. App. 2010) (notice provision expressly

made a condition precedent to coverage is valid and must be complied with for the insurer to provide coverage).

We conclude that the policy is not ambiguous and clearly states that Illinois Union has no duty to defend nor a duty to indemnify in this situation. The only duty to defend is on the insured, the City of East Point. The City did not provide a defense to the officers in the underlying wrongful death claim, and because it did not fulfill its duty, Illinois Union has no duty to indemnify damages and claim expenses within or equal to the retained limit. These duties are clearly stated in the policy as "Policy Conditions." Thus, based on the record, we conclude that the district court did not err in granting the City's motion to dismiss.

IV.

Ausborn also argues on appeal that the district court erred by denying her motion for joinder of parties. Ausborn has the burden of demonstrating that the absent party is indispensable, and she fails to meet her burden. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1347 (11th Cir. 2011). Under Rule 19(a)(1), joinder is required if it will not deprive the court of subject matter jurisdiction and, in that party's absence, the court cannot "accord complete relief among existing parties." Fed.R.Civ.P. 19(a)(1). Rule 20(a)(2) states that parties may be joined if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences." Fed.R.Civ.P. 20(a)(2)(A).

It is clear from the record that the district court did not abuse its discretion by denying Ausborn's motion for joinder of parties. The rules indicate that here joinder was not warranted because the officers were not indispensable parties to the action because Ausborn's action was one against Illinois Union only. Thus, we affirm the district court's order denying Ausborn's motion for joinder of parties.

Accordingly, based on the aforementioned reasons, we affirm the district court's order granting Illinois Union's motion to dismiss and denying Ausborn's motion for joinder of parties.

AFFIRMED.