

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FOREMOST INSURANCE CO.	:	CIVIL ACTION
	:	NO. 07-0195
v.	:	
	:	
ERIC ERICKSON, et al.	:	
	:	
O'NEILL, J.		AUGUST 7, 2007

MEMORANDUM

On January 1, 2007 plaintiff Foremost Insurance Company brought this declaratory judgment action to determine its obligation to defend and indemnify its insured, defendants Eric and Susan Erickson, from a suit filed by Owen F. Jones in the Court of Common Pleas of Bucks County, Pennsylvania. Before me now are plaintiff's motion for summary judgment, defendants' response and cross-motion for summary judgment, and plaintiff's response thereto. For the reasons provided below, I will grant plaintiff's motion and deny defendants'.

BACKGROUND

Jones commenced the underlying action against defendants on November 22, 2005 alleging that defendants failed to disclose the presence of significant damage and deterioration when they sold him a two-story home located in Morrisville, Pennsylvania. Jones's complaint contains three counts. Count I alleges that defendants fraudulently misrepresented the condition of the home with the intent to induce Jones to purchase in violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. See 73 Pa. Cons. Stat. § 201-9.2. Count II claims that defendants negligently misrepresented the condition of the home with the intent of misleading plaintiff into relying on those

statements. Count III alleges that defendants violated Pennsylvania's Real Estate Seller Disclosure Laws by failing to acknowledge known defects and structural changes to the property in their Seller's Disclosure Statement. See 68 Pa. Cons. Stat. §§ 7301-7315.

Following the initiation of Jones's suit plaintiff provided defendants with a defense but reserved its right to deny any further obligation to defend or indemnify defendants.

Plaintiff contends that the three causes of action contained in Jones's complaint are not an "accident" within the meaning of defendants' insurance policy. Alternatively, plaintiff argues that the damages Jones suffered are economic in nature and outside the scope of property damage covered by the policy. Furthermore plaintiff asserts that the underlying damage claims are barred from coverage by contractual liability, alienated premises, and rot exclusion provisions.

The Landlord Liability Coverage section of the insurance policy states:

If a claim is made or a suit brought against you for damages because of bodily injury or property damage caused by an accident on your premises to which this coverage applies, we will pay up to the Limit of Liability shown on the Declarations Page for the damages for which you are legally liable; and provide a defense at our expense by attorneys of our choice.¹

Bodily injury is defined as "physical injury, sickness, disease or death caused by an accident, sustained by any person except you or any resident of your dwelling."

Property damage is defined as "direct physical damage or destruction of tangible property of others, including loss of its use caused by an accident."

Excluded from coverage are damages "resulting from any act or omission which is intended by any of you to cause any harm or that any of you could reasonably expect to cause harm," "liability assumed in any contract or agreement," and "damage to property owned, sold rented to others, abandoned or given away by any of you."

¹ The insurance policy does not define what constitutes an accident.

Defendants' response is two-fold: first, defendants argue that jurisdiction over declaratory judgment actions is discretionary and that I should decline to exercise jurisdiction here because of the pendency of the underlying case in state court; second, defendants contend that plaintiff must defend them against any claims that potentially fall within their policy's coverage. Defendants assert that Jones's complaint contains allegations of negligence and that these allegations fall within the policy's definition of an "accident." Consequently, defendants argue that because some of Jones's claims may be covered under the policy I should stay plaintiff's declaratory action with respect to any duty to indemnify until the state proceedings have adjudicated defendants' liability.

STANDARD OF REVIEW

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is "material" only if it might affect the outcome of the suit under governing law. Id. at 248. All inferences must be drawn and all doubts resolved in favor of the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985).

On motion for summary judgment, the moving party bears the initial burden of identifying those portions of the record which it believes demonstrate the absence of material fact. Celotex Corp., 477 U.S. at 323. To defeat summary judgment the non-

moving party must respond with facts of the record that contradict the facts identified by the movant and may not rely on mere denials. Id. at 321 n.3, quoting Fed. R. Civ. P. 56(e); see also First Nat’l Bank of Pa. v. Lincoln Nat’l Life Ins. Co., 824 F.2d 277, 282 (3d Cir. 1987). That is, the non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. See Anderson, 477 U.S. at 248-49. In cross-motions for summary judgment “[e]ach side bears the burden of establishing a lack of genuine issues of material fact.” Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998), quoting Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1986).

DISCUSSION

I. Jurisdiction and Choice of Law

Plaintiff commenced the present action under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, to determine its obligation to defend and indemnify defendants. Although the Act does not provide a separate grant of jurisdiction, Luis v. Dennis, 751 F.2d 604, 607 (3d Cir. 1984), citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950), jurisdiction over the parties is proper pursuant to 28 U.S.C. § 1332(a) since they are diverse² and the amount in controversy exceeds \$75,000.

A federal court sitting in a diversity action “must apply the choice of law rules of the forum state to determine what substantive law will govern.” Huber v. Taylor, 469 F.3d 67, 73 (3d Cir. 2006), quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Federal and state courts in this jurisdiction are not agreed as to whether the correct Pennsylvania choice of law rule in contract disputes is a *lex loci* or greatest

² Plaintiff is a Michigan corporation with its principal place of business in Michigan and defendants are residents of Pennsylvania.

interest and contacts standard. Nor do plaintiff and defendants raise any choice of law issues in their briefs. However, I find that under either standard the appropriate law in deciding this case is Pennsylvania contract law.³

II. Cross-Motions

Defendants offer two arguments in support of their motion for summary judgment: (1) I should exercise the discretionary power granted under the Declaratory Judgment Act and decline to hear the present claim; and (2) Jones's complaint includes allegations of negligence that potentially fall within the coverage provided by plaintiff's policy.⁴ Plaintiff contends that I may and should exercise jurisdiction over the claim and furthermore assert that they have no duty to defend or indemnify defendants since the allegations contained in Jones's complaint do not fall within the insurance policy's coverage. Because plaintiff and defendants' motions for summary judgment both turn on the same two issues of law I will analyze the merits of their claims concurrently.

³ The *lex loci* rule requires application of the substantive law of the state in which the contract was delivered. See, e.g., Canal Ins. Co. v. Underwriters at Lloyd's London, 435 F.3d 431, 434 (3d Cir. 2006); Peele v. Atl. Express Transp. Group, Inc., 840 A.2d 1008, 1011 (Pa. Super. Ct. 2003). Here the insurance policy was delivered to defendants' residence in Morrisville, PA, so Pennsylvania contract law applies.

The greatest interest and contacts, or Griffith, rule requires a two-step inquiry: (1) identify whether a conflict exists between applicable state laws; and if so, (2) determine which state has greater contacts and interest in the dispute. Hammersmith, 480 F.3d at 231-35, citing Griffith v. United Air Lines Inc., 203 A.2d 796 (Pa. 1964); see also Budtel Assocs. v. Cont'l Cas. Co., 915 A.2d 640, 644 (Pa. Super. Ct. 2006). Where there is no conflict between the states' laws "the district court sitting in diversity may refer interchangeably to the laws of the states whose laws potentially apply." Huber, 469 F.3d at 74. The only other potentially applicable state law is Michigan contract law since plaintiff is incorporated there. Because Michigan and Pennsylvania contract law are not in conflict under the Griffith rule I may apply Pennsylvania law.

⁴ Defendants further argue that if plaintiff has a duty to defend then I should stay plaintiff's action regarding their duty to indemnify until the state court proceedings have delimited the extent of its liability. Because I find plaintiff does not have a duty to defend I do not address this argument.

A. Declaratory Judgment Discretion

The Declaratory Judgment Act provides federal courts with the discretionary authority to grant declaratory relief. 28 U.S.C. § 2201; see State Auto Ins. Cos. v. Summy, 234 F.3d 131, 133 (3d Cir. 2000), citing Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 495 (1942); see also Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (recognizing that the Act “confers a discretion on the courts rather than an absolute right upon the litigant”). The Court of Appeals has identified several considerations that should guide district courts in exercising their discretion to hear declaratory judgment actions. They include: “(1) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the convenience of the parties; (3) the public interest in a settlement of the uncertainty of obligation; and (4) the availability and relative convenience of other remedies.” Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1224-25 (3d Cir. 1989). In addition, I should decline jurisdiction where the action implicates unsettled questions of state law and judicial economy would be promoted by avoiding duplicative litigation.⁵ Summy, 234 F.3d at 134-35.

Defendants rely on the last consideration of judicial economy arguing that because there are parallel proceedings pending in state court I should decline jurisdiction. However, “[t]he mere pendency of an action in state court or the possibility of other remedies is not, without more, a sufficient ground for declining to exercise jurisdiction.” Allstate Ins. Co. v. Lockhardt, 1989 U.S. Dist. LEXIS 1603, No. 88-9410, at *2 (E.D. Pa. Feb. 15, 1989), citing Allstate Ins. Co. v. Green, 825 F.2d 1061, 1066-67 (6th Cir. 1987).

⁵ If the declaratory judgment action involves federal statutory interpretation, the government’s choice of a federal forum, an issue of sovereign immunity, or inadequacy of the state proceeding then federal courts do not retain open-ended discretion to decline jurisdiction. Summy, 234 F.3d at 134. None of the present claims concern any of these issues, however.

Jones's complaint and defendants' briefs do not indicate that plaintiff is a party to any litigation pending in state court to decide plaintiff's obligations to defendants. Rather, the causes of action brought in the state court proceeding are concerned only with defendants' possible liability to Jones which "is a question distinct from whether [plaintiff] is contractually obligated to defend and cover [defendants]." Lockhardt, 1989 U.S. Dist. LEXIS 1603, at *3; see also State Farm and Cas. Co. v. Czop, 2004 U.S. Dist. LEXIS 4378, No. 02-1048, at *25-26, (E.D. Pa. Feb. 11, 2004) ("Whether [the insured] was negligent or . . . intentionally misled [the purchaser] into purchasing the property will be adjudicated at trial . . . what matters to this declaratory relief action is whether the wrong alleged within [the purchaser's] complaint is covered by [the insurer's] insurance policy or exempted by an exclusion."), citing Gene & Harvey Builders, Inc. v. Pa. Mfrs.' Assoc. Ins. Co., 517 A.2d 910, 914 (Pa. 1986). Indeed, "[a]n action to clarify the extent of an insurer's responsibility is an appropriate subject of a federal declaratory judgment action, even if a separate action against one who claims to be covered by the policy is pending." Lockhardt, 1989 U.S. Dist. LEXIS 1603, at *3. Accordingly, I find that exercising jurisdiction over the present claim does not exceed the discretion granted to me under 28 U.S.C. § 2201.⁶

⁶ Defendants do not address the remaining factors in their brief. Nonetheless, those factors also do not support declining jurisdiction. The present dispute does not raise a novel or unsettled question of state law. Any decision would therefore not be an unguided attempt at predicting state law. See Summy, 234 F.3d at 135 ("[D]istrict courts should give serious consideration to the fact that they do not establish state law, but are limited to predicting it."). Moreover, because defendants are residents of Pennsylvania the forum cannot be characterized as overly burdensome on them. Nor does there appear to be any alternative superior remedies that would resolve the parties' obligations other than a court proceeding or a public interest in delaying adjudication.

B. Plaintiff's Duty to Defend

Defendants next argue that Jones's amended complaint contains claims predicated on negligence, which they assert potentially fall within the policy's coverage of accidents. "The duty to defend is a distinct and broader obligation than the duty to indemnify," which is triggered if the underlying allegations state at least "one cause of action [which] may potentially fall within the scope of [the policy's] coverage" Augenblick v. Nationwide Ins. Co., 1999 U.S. Dist. LEXIS 16183, No. 99-3419, at *6 (E.D. Pa. Oct. 8, 1999). In deciding that question I must look to the underlying factual allegations and not just the particular cause of action pleaded to determine the extent of coverage. See Mutual Benefit Ins. Co. v. Haver, 725 A.2d 743, 745 (Pa. 1999). With regards to indemnification an insurer "need only indemnify those insureds found liable for conduct that actually falls within the scope of the policy." Czop, 2004 U.S. Dist. LEXIS 4378, at *15. If it is determined that an insurer does not have a duty to defend then that implies that it also has no duty to indemnify its insured since the former is broader and inclusive of the latter. Id. at *14. As discussed below, I find that plaintiff does not have a duty to defend and indemnify defendants because the underlying claims brought against them do not fall within their insurance coverage.

"Pennsylvania courts have defined accident as a fortuitous, untoward or unexpected happening." Czop, 2004 U.S. Dist. LEXIS 4378, at *15, citing McGaw v. Bloomsburg, 257 A.2d 622, 624, (Pa. Super. Ct. 1969). Jones's complaint generally alleges that defendants acted "with an evil motive in failing to make proper and adequate disclosures" and that defendants "knew the true condition of the property at all times relevant" to the dispute. With regards to Counts I and III, the fraudulent

misrepresentation and inadequate disclosure claims, he also asserts that defendants knew the representations were “false, deceptive and/or misleading.” Plaintiff has no duty to defend against these allegations because intentional conduct is not a fortuitous or unexpected happening and therefore does not constitute an accident. See, e.g., Augenblick, 1999 U.S. Dist. LEXIS 16183, at *8 (“Not only is it clear that such [intentional] conduct can not be considered an accident, but also because the policy specifically excludes coverage for damage which is expected or intended by the insured.”) (internal quotations omitted).

Count II, the claim of negligent misrepresentation, also does not constitute an accident.⁷ Although defendants’ actions are characterized as negligent the claim “arose out of a breach of contract and not from an accident.”⁸ State Farm Fire and Cas. Co. v. Povilitus, 2003 U.S. Dist. LEXIS 25243, No. 01-2119, at *16 (E.D. Pa. July 14, 2003) (finding that an insurer had no duty to defend its insured against a third party claim of negligent misrepresentation in a home purchase).

In Augenblick, the court faced a set of circumstances similar to this case: a seller was sued in state court for alleged intentional and negligent representations concerning a home the buyer ultimately purchased.⁹ Augenblick, 1999 U.S. Dist. LEXIS 16183, at *2-

⁷ Jones alleges that defendants made representations under circumstances in which they ought to have known that the representations were false” and did so with “the intent of misleading plaintiff into relying [on] such statements.”

⁸ The Povilitus court relied on a “gist of the action” test to arrive at its conclusion. The Court of Appeals has since overruled the use of the “gist of the action” test. Berg Chilling Sys. v. Hull Corp., 2003 U.S. App. LEXIS 14304, No. 02-2241, at *13-14 (3d Cir. Jul. 11, 2003). That outcome does not affect the result in this case because here the “insured and the person who committed the injurious act are one and the same Unlike the Berg litigation, where the insured requested coverage from its insurer in response to the injuries and delays caused by third parties” Czop, 2004 U.S. Dist. LEXIS 4378, at *16 n.2.

⁹ The insurance policy in Augenblick contains language nearly identical to that disputed in this case: the insurer “will pay damages the insured is legally obligated

5. The court held that the insurer had no duty to defend or indemnify its insured against the claims of intentional and negligent representation since “[the insured] entered a contract that required her to present to the [buyers] a reasonably sound house. According to the Underlying Complaint, she either intentionally or negligently failed to do this. In other words, she breached the contract.” *Id.* at *12-13; see also *Czop*, 2004 U.S. Dist. LEXIS 4378, at *14 (“Assuming that [the insured] breached her contract with [the buyer] . . . whether intentionally or negligently . . . Any such breach would not be an accident or occurrence within the scope of the insurance policies . . . Intentional acts certainly cannot be described as accidental, and a negligent misrepresentation is no accident either.”). Because none of Jones’s allegations potentially fall within defendants’ insurance coverage I find that plaintiff has no duty to defend. I therefore conclude that plaintiff also has no duty to indemnify defendant.¹⁰ *Czop*, 2004 U.S. Dist. LEXIS 4378, at *14 (“If the Court concludes that [the insurer] owes no duty to defend [the insured], then it may also conclude that [the insurer] owes no duty to indemnify either.”).

An appropriate Order follows.

to pay due to an occurrence . . . an occurrence is defined as bodily injury or property damage resulting from an accident . . . excluded from coverage are damages caused intentionally by or at the direction of the insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct.” *Augenblick*, 1999 U.S. Dist. LEXIS 16183, at *4-5. That policy also does not further define what constitutes an accident.

¹⁰ Having concluded that plaintiff has no duty to defend or indemnify on these grounds I need not consider plaintiff’s alternative arguments.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FOREMOST INSURANCE CO.	:	CIVIL ACTION
	:	NO. 07-0195
v.	:	
	:	
ERIC ERICKSON, et al.	:	

ORDER

AND NOW, this 7th day of August 2007, upon consideration of plaintiff's motion for summary judgment, defendants' response and cross-motion for summary judgment, and plaintiff's response thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that plaintiff's motion for summary judgment is GRANTED and defendants' cross-motion for summary judgment is DENIED. Judgment is entered in favor of plaintiff and against defendants.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.