

Styles for Less, Inc. v. RSC Ins. Brokerage, Inc., et al
SACV 16-1324 JVS (JCGx)

**TENTATIVE ORDER REGARDING DEFENDANT’S MOTION FOR JUDGMENT ON
THE PLEADINGS AND MOTION TO STRIKE**

Defendant Westchester Surplus Lines Insurance Company (“Westchester”) moved for judgment on the pleadings with respect to counts two, three, and six of Plaintiff Style for Less, Inc.’s (“Styles for Less”) complaint. (Mot., Docket No. 44.) Defendant and Third-Party Plaintiff RSC Insurance Brokerage, Inc., d/b/a RSC of California Insurance Brokerage, Inc., (“RSC”) opposed. (RSC Opp’n, Docket No. 40.) Styles for Less opposed. (Styles for Less Opp’n, Docket No. 51.) Styles for Less also filed evidentiary objections and moved to strike. (Styles for Less Obj., Docket No. 52.) Westchester replied to each opposition. (Reply, Docket No. 53; Reply, Docket No. 54.)

Westchester also moved to strike RSC’s opposition to Westchester’s motion for judgment on the pleadings. (Mot., Docket No. 56.) RSC opposed. (Opp’n, Docket No. 57.) Westchester replied. (Reply, Docket No. 62.)

For the following reasons, the Court **grants** Westchester’s motion for judgment on the pleadings and **denies** Westchester’s motion to strike.

I. BACKGROUND

RSUI Indemnity Company (“RSUI”) sold Styles for Less a liability insurance policy, which was effective from November 2, 2013, to November 2, 2014. (Compl., Docket No. 1-1 ¶ 10.) Westchester sold Styles for Less an indemnity insurance policy, which was effective from November 2, 2014, to November 2, 2015 (the “Westchester policy”). (Id. ¶ 13.)

On October 22, 2014, a plaintiff filed a class action complaint in Manouchehri v. Styles for Less, No. 14-cv-2521 (S.D. Cal.), (“the underlying lawsuit”). (Id. ¶ 19.) The plaintiff in the underlying lawsuit served Styles for Less, via its registered agent, on October 29, 2014. (Id.)

Styles for Less informed its insurance broker, RSC, about the underlying

lawsuit on November 17, 2014. (Id. ¶ 1.) Styles for Less relied on its broker to provide proper notice of the claim to its insurer. (Id.) RSC notified Westchester about the claim on November 18, 2014, but it did not inform RSUI about the claim until November 20, 2015. (Id. ¶¶ 2, 34.)

Westchester denied coverage on December 23, 2014. (Id. ¶ 34.) RSUI denied coverage on December 9, 2015, because it did not receive notice of the underlying lawsuit until November 20, 2015. (Id.)

Because Styles for Less has not received insurance coverage for the underlying suit, on June 14, 2016, Styles for Less filed the present action in Orange County Superior Court against RSC, Westchester, and RSUI. (Id.) Styles for Less pleaded six causes of action: (1) professional negligence against RSC, (2) breach of contract against Westchester, (3) tortious breach of the implied covenant of good faith and fair dealing against Westchester, (4) breach of contract against RSUI, (5) tortious breach of the implied covenant of good faith and fair dealing against RSUI, and (6) unfair competition against all defendants. (Id. ¶¶ 71–88, 89–93, 94–102, 103–07, 108–16, 117–21.)

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” A motion for judgment on the pleadings should be granted only if “taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.” McSherry v. City of Long Beach, 423 F.3d 1015, 1021 (9th Cir. 2005). A Rule 12(c) motion asserting a failure to state a claim is governed by the same standard as a Rule 12(b)(6) motion to dismiss. United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

In resolving a 12(b)(6) motion, the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Nor must the Court “accept as true a legal conclusion couched as a factual allegation.” Id. at 678-80 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555

(2007)). Second, assuming the veracity of well-pleaded factual allegations, the Court must “determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct.” Id.

III. DISCUSSION

A. Objections

1. Westchester’s Objections to RSC’s Opposition

Westchester asserts that RSC does not have standing to oppose its motion for judgment on the pleadings. (Mot., Docket No. 56.)

Some courts have held that co-defendants lack standing to oppose each other’s motions unless a cross-claim is pending. See, e.g., Eckert v. City of Sacramento, No. 2:07–cv–00825–GEB–GGH, 2009 WL 3211278, at *3 (E.D. Cal. Sept. 30, 2009) (stating that if “there is no crossclaim between the Defendants . . . [they] are not adverse parties and the City therefore does not have standing to oppose [co-defendant’s] motion”). In contrast, other courts have examined a co-defendant’s opposition, even though it had not filed a crossclaim, because that defendant had a strong interest in the outcome of the motion. Indep. Living Ctr. of S. Cali. v. City of Los Angeles, No. CV120551FMOPJWX, 2016 WL 6436652, at *2 (C.D. Cal. Aug. 31, 2016).

Here, although there is no crossclaim between RSC and Westchester, the Court will consider RSC’s opposition. RSC states that “[i]f Westchester is allowed to escape liability by way of its motion for judgment on the pleadings, RSC will be aggrieved because it will not be able to ask a trier of fact to allocate some or all of its potential liability to a party jointly responsible for the claimed damages.” (RSC Opp’n, Docket No. 57 at 6.) However, the Court finds that RSC overstates its interest in the current case because it could file its own claims against Westchester. Nevertheless, the Court would have granted Westchester’s motion for judgment on the pleadings regardless of whether it considered RSC’s opposition.

In conclusion, the Court **denies** Westchester's motion to strike RSC's opposition to Westchester's motion for judgment on the pleadings.

2. Styles for Less' Objections to Westchester's Policy

In support of its motion, Westchester submitted a copy of Westchester's policy, which Styles for Less references throughout its complaint. (See, e.g., Compl., Docket No. 1-1 ¶ 48 ("Styles for Less is entitled to all of the benefits provided by the [Westchester] Insurance Policy.")) However, Styles for Less states that the Court should not consider the alleged Westchester policy because Westchester failed to sufficiently authenticate it. (Styles for Less Opp'n, Docket No. 51 at 5.)

"As a general matter, a district court may not consider any material outside of the pleadings when ruling on a Rule 12(b)(6) motion." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). However, the Ninth Circuit recognizes an exception to this rule that allows consideration of documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." Parrino v. FHP, Inc., 146 F.3d 699, 705–06 (9th Cir. 1998) (internal quotations and citations omitted) (quoting Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)), superseded by statute on other grounds. The purpose of the exception is to "[p]revent[] plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims are based[.]" Id. at 706 (citing Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)).

This Court also stated that "[w]hen a party submits an indisputably authentic copy of a document, and the document is referred to in the complaint, the Court does not have to convert the motion into a summary judgment motion. This is because the purpose of conversion is to give the plaintiff notice and an opportunity to respond." Rose v. Chase Manhattan Bank USA, 396 F. Supp. 2d 1116, 1120 (C.D. Cal. 2005).

Styles for Less states the following in its objection to the declaration of Arthur J. McColgan ("McColgan"):

Mr. McColgan—Westchester’s litigation counsel in this action—is not the proper person to authenticate the purported insurance policy as he is not an employee of Westchester, a custodian of records, or otherwise an adequate witness with knowledge that the document is what it is claimed to be.

Furthermore, it appears that no one at Westchester can authenticate the purported policy either. As set forth in Westchester’s tardy initial disclosures (a copy which is attached hereto as Exhibit “A”), Westchester cannot identify a single individual with discoverable information that Westchester may use to support its “document” based defenses in this action.

(Styles for Less Obj., Docket No. 52 at 1.) Therefore, Styles for Less’ only objection is that McColgan cannot authenticate the document.

In response to Styles for Less’ objection, Westchester submitted the declaration of Matt Cibulskas (“Cibulskas”), a Senior Vice President at Westchester. (Cibulskas Decl., Docket No. 53-1.) Cibulskas states the following:

In 2014, I was Senior Vice President, Professional Risk, with oversight responsibility for the group at Westchester who underwrote insurance policy G27525738 001. In that position, I was and am familiar with the insurance policies issued by Westchester Surplus Lines Insurance Company and have personal knowledge with respect to Westchester Surplus Lines Insurance Company’s practices for maintaining copies of such policies.

Attached hereto as Exhibit “A” is a true and correct copy of policy number G27525738 001, issued by Westchester Surplus Lines Insurance Company, providing insurance under certain terms to Styles for Less. [sic] for the period from November 2, 2014, to November 2, 2015.

(Id. ¶¶ 2–3.)

This Court can examine the policy without converting Westchester's motion for judgment on the pleadings into a motion for summary judgment. Based on Cibulskas' declaration, it appears as though Styles for Less' concern regarding authenticity is satisfied. Moreover, Styles for Less only contested McColgan's ability to authenticate the policy and not the actual authenticity of the document itself. The Court further notes that all of Styles for Less' claims against Westchester arise from the Westchester policy. It would be particularly disingenuous for Styles for Less to assert that Westchester is liable under the policy and to not allow Westchester to also rely on the same document to defend itself. To allow Styles for Less to extend Westchester's involvement in this action simply because Styles for Less did not attach the policy to the complaint would go against the purpose of the incorporation by reference doctrine. Therefore, the Court considers Westchester's policy.

In conclusion, the Court will examine the Westchester policy without converting the motion for judgment on the pleadings into a motion for summary judgment.

B. The Language of the Westchester Policy

Westchester asserts that it is not liable because of the language in the Westchester policy. The policy period is from November 2, 2014, to November 2, 2015. (Cibulskas Decl. Ex. A, Docket No. 53-1 at 8.)¹ The terms of the policy state the following:

The employment practices, directors & officers and company, and fiduciary coverage sections of this policy, whichever are applicable, *cover only claims first made against the insured during the policy period* or, if elected, the extended period *and reported to the insurer pursuant to the terms of the relevant coverage section*. The crime coverage section, if applicable, applies only to loss discovered during the policy period. Please read this policy carefully.

....

¹ Any page references to this exhibit will correlate with the docket page numbers.

1. Claim means:

....

g) a civil, criminal, administrative or regulatory investigation *commenced by:*

(I) *the service upon* or other receipt by any natural person Insured of a written notice, investigative order, or subpoena; or

(ii) the service upon or other receipt by any Company of a written notice or investigative order;

(Id. at 8, 27 (italics supplied) (caps and bold omitted) (alteration to paragraph spacing).)

Based on this language, the Court agrees that the Westchester policy does not cover the underlying lawsuit.² The plaintiff in the underlying lawsuit filed her complaint on October 22, 2014. (Compl., Docket No. 1-1 ¶ 19.) She then served the complaint on Styles for Less’ agent on October 29, 2014. (Id. ¶ 31.) The policy makes clear that a claim occurs when service occurs.³ (Cibulskas Decl. Ex. A, Docket No. 53-1 at 8.) Therefore, the claim was first made on October 29, 2016. However, the policy period began on November 2, 2014, which is outside

² RSC argues that the Westchester policy is fatally ambiguous. (RSC Opp’n, Docket No. 40 at 9.) RSC discusses that the phrase “first made” is subject to different interpretations. (Id.) However, when considering the term “first made” in context with the word “claim” and the definition of “claim” in later parts of the policy, the Court does not find the phrase “first made” to be ambiguous.

³ RSC asserts that the claim began on November 4, 2014, because the complaint was only served on Styles for Less’ agent for service of process on October 29, 2014. (RSC Opp’n, Docket No. 40 at 6.) RSC argues that, because Styles for Less did not actually receive the complaint until November 4, 2014, the claim was not made until November 4, 2014. (Id.) However, by making this argument, RSC overlooks the basic principals of service. See, e.g., Cal. Civ. Proc. Code § 416.10 (“A summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods . . . (b) [t]o . . . a person authorized by the corporation to receive service of process.”).

the policy period. (Id.) Because the policy requires that (1) the claim occurs during the policy period *and* (2) that Styles for Less notifies Westchester about the claim, Westchester is not liable to Styles for Less for the underlying lawsuit. (Id.)

In conclusion, the Court **grants** Westchester’s motion for judgment on the pleadings because of the policy language.

C. Estoppel

Styles for Less and RSC⁴ argue that a judgment on the pleadings is not appropriate because Westchester is estopped from denying coverage for the claim. (Styles for Less Opp’n, Docket No. 51 at 6; RSC Opp’n, Docket No. 40 at 11.)

A plaintiff cannot use estoppel to extend coverage under an insurance policy. Aetna Cas. & Sur. Co. v. Richmond, 76 Cal. App. 3d 645, 652–53 (1977). However, there is an exception: “[t]he general rule supported by the great weight of authority is that if a liability insurer, with knowledge of a ground of forfeiture or noncoverage under the policy, *assumes and conducts the defense of an action* brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words, the insurer’s *unconditional defense* of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert such grounds.” Miller v. Elite Ins. Co., 100 Cal. App. 3d 739, 755 (1980) (italics supplied) (internal quotes and cites omitted) (quoting Ins. Co. of N. America v. Atl. Nat’l Ins. Co., 329 F.2d 769, 775–76 (4th Cir. 1964)). “The duty to defend, where it exists, exists at the prelitigation as well as litigation stages and California courts recognize that a large percentage of insurance claims are settled without litigation.” Id. (quoting Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 659 (1958)).

⁴ RSC also argues that Westchester contributed to the failure to tender to RSUI by negligently failing to reply to the tender from Styles for Less in a timely fashion. (RSC Opp’n, Docket No. 40 at 15.) However, Styles for Less has not pleaded negligence as a cause of action against Westchester. (Compl., Docket No. 1-1.) In addition, RSC cannot assert its own causes of action against Westchester in an opposition; if RSC wishes to litigate against Westchester for any alleged negligence, then RSC can file its own complaint or crossclaim.

RSC relies on Miller to argue that Westchester is estopped from denying coverage because Westchester's actions caused Styles for Less to reasonably believe that Westchester was providing coverage. (RSC Opp'n, Docket No. 40 at 11.) In Miller, the insurer, Elite Insurance Company ("Elite"), assured the plaintiff, Gary Miller ("Miller"), that there was not a potential coverage problem. 100 Cal. App. 3d at 748, 749. Elite also engaged in negotiations with the opposing insurance company, National American Insurance Company ("National"). Id. The court made the following arguments while examining whether estoppel applied:

Miller relied to his detriment on Elite's defense under the policy as evidenced by his failure to retain an attorney, his failure to negotiate with either Elite or National, and his failure to deal directly with the Johnsrudes or their attorney. Further, Miller was denied the possibility of choosing to settle the claim by compromise because he was not informed of National's first offer and Elite's subsequent refusal. Miller, when informed by National of their second offer of compromise for \$5,000, assumed that there was no problem because that amount was within his policy limit.

Id. at 755. Based on these facts, the court determined that Elite was estopped from asserting its coverage defenses. Id.

The Court finds that Styles for Less cannot use estoppel to extend coverage under an insurance policy because the exception does not apply. Unlike in Miller, Styles for Less has not pleaded Westchester engaged in negotiations on its behalf or that Westchester assured Styles for Less that there was no potential coverage problem. (See, e.g., Compl., Docket No. 1-1 ¶¶ 47–53.) Instead, Styles for Less pleaded that Westchester denied coverage on December 23, 2014, which was without merit. (Id. ¶ 51.) Therefore, Styles for Less cannot use estoppel.

In conclusion, the Court does not deny Westchester's motion on this ground.

IV. CONCLUSION

For the aforementioned reasons, the Court **grants** Westchester's motion for judgment on the pleadings and **denies** Westchester's motion to strike.

IT IS SO ORDERED.