UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

NATIONAL LIABILITY & FIRE INSURANCE COMPANY,

Plaintiff,

v.

JOHN YOUNG d/b/a RIO RESTAURANT GROUP, et al.,

Defendants.

No. 6:19-CV-031-H

ORDER DENYING NATIONAL LIABILITY'S MOTION FOR SUMMARY JUDGMENT

Before the Court is National Liability and Fire Insurance Company's Motion for Summary Judgment. Dkt. No. 42. In this declaratory-judgment action, National Liability asks the Court to issue a judgment that National Liability has no duty to defend or indemnify the defendants in connection with an underlying state-court lawsuit arising out of a tragic car accident. Under Texas law, the eight-corners rule governs whether an insurer has a duty to defend an insured in an underlying lawsuit—courts may consider only the text of the insurance policy and the text of the pleading in the underlying lawsuit. The Court finds that the First Amended Petition in the underlying lawsuit implicates coverage under the eight-corners rule and that National Liability has not identified any applicable exception to the rule. Because the defendants have not moved for summary judgment, the Court will afford National Liability an opportunity to respond before the Court considers whether to grant summary judgment to the defendants on National Liability's duty-to-defend claim. Additionally, judgment with respect to the duty to indemnify would be premature. Thus, the Court denies National Liability's Motion for Summary Judgment.

1. Factual and Procedural Background

National Liability issued business auto insurance policy number 73 APR 366778 to John Young d/b/a Rio Restaurant Group for the policy period July 23, 2018 through July 23, 2019. Dkt. No. 33 at 3. The policy covers only a specific list of "autos," but it provides for the coverage of any "auto" that the insured "do[es] not own while used with the permission of its owner as a temporary substitute for a covered 'auto' you own that is out of service because of its: a. Breakdown; b. Repair; c. Servicing; d. 'Loss'; or e. Destruction." *Id.* at 4.

The policy covers all sums that the insured "legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." Dkt. No. 33-1 at 24. As to the duty to defend, the policy provides that the insurer has "the right and duty to defend any 'insured' against a 'suit' asking for such damages . . . However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage'. . . to which this insurance does not apply." *Id.* at 25.

On February 6, 2019, Gustina Penna was operating a vehicle rented from Enterprise Rent-A-Car to John Young d/b/a Rio Restaurant Group when she was involved in a collision with Rogelio Castellanos. Dkt. No. 33 at 6. Mr. Castellanos suffered fatal injuries from the collision. *Id.*

Yadira, Bryzeida, and Brayza Castellanos subsequently filed Cause No. D190092C in the 391st Judicial District Court in Tom Green County, Texas against John Young d/b/a Rio Restaurant Group, Rio Concho Catering, Inc., and Gustina Penna, seeking to recover damages for negligence and gross negligence arising from the collision. Dkt. No. 33-2. The plaintiffs in the underlying lawsuit subsequently filed their First Amended Petition. Dkt.

No. 33-3. National Liability concedes that the First Amended Petition "specifically alleges the vehicle operated at the time of the incident in question was rented temporarily to John Young d/b/a Rio Restaurant Group Inc. and was being used temporarily as a substitute for one of his permanent vehicles that was being repaired or serviced at the time of the incident." Dkt. No. 33 at 7.

This federal lawsuit is a declaratory-judgment action in which National Liability seeks a judgment that it has no duty to defend or indemnify in the underlying state-court lawsuit. The insurance company alleges that the rented vehicle that Penna drove at the time of the accident was not covered under the terms of the policy because Young rented the vehicle continuously between August 2018 and February 2019 and because "none of Defendant Rio Restaurant's Specifically Described 'Autos' under the Policy were being repaired." *Id.* at 5. The Court has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, and because the parties are completely diverse pursuant to 28 U.S.C. § 1332. The parties agree that Texas law governs this dispute.

2. Legal Standards

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, courts must not make credibility determinations or weigh evidence but must instead draw all reasonable inferences in favor of the non-moving party. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008); *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002). Nevertheless, summary judgment "may not be thwarted by conclusional allegations,

unsupported assertions, or presentation of only a scintilla of evidence." *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015).

3. Analysis

A. The Court denies National Liability's Motion for Summary Judgment as to the duty to defend because no exception to the eight-corners rule applies.

i. The text of the insurance policy and the text of the First Amended Petition in the underlying lawsuit implicate coverage.

Under Texas law, where "the four corners of a petition allege facts stating a cause of action which potentially falls within the four corners of the policy's scope of coverage, the insurer has a duty to defend." *Liberty Mut. Ins. Co. v. Graham*, 473 F.3d 596, 600 (5th Cir. 2006); *accord GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). There is no duty to defend where all the facts alleged in a petition fall outside the policy's scope, but the Court must "resolve all doubts regarding duty to defend in favor of the duty." *Graham*, 473 F.3d at 600; *accord Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

Here, the First Amended Petition in the underlying lawsuit alleges that the "vehicle in question was being used temporarily by John Young in his catering business, Rio Concho Catering, Inc., as a substitute for one of his permanent vehicles that was being repaired or serviced at the time of the incident in question." Dkt. No. 33-3 at 3. Additionally, the First Amended Petition alleges that Young gave Penna permission to use the vehicle and that she was operating it pursuant to her employment with Rio Concho Catering at the time of the incident. *Id.* Under the policy, coverage extends to vehicles that the insured "do[es] not own while used with the permission of its owner as a temporary substitute for a covered

'auto' you own that is out of service because of its: a. Breakdown; b. Repair; c. Servicing; d. 'Loss'; or e. Destruction." Dkt. No. 33-1 at 4.

Application of the eight-corners rule to this case is therefore straightforward. The First Amended Petition alleges that the vehicle Penna was driving at the time of the accident was a temporary substitute auto within the meaning of the insurance policy. National Liability has not identified any applicable exclusion within the policy's text, and the Court has not located any such exception. Thus, the First Amended Petition implicates the policy's coverage. *See Graham*, 473 F.3d at 602.

ii. The only recognized exceptions to the eight-corners rule under Texas law are the Fifth Circuit's *Northfield* exception and the Texas Supreme Court's exception for collusive fraud by the insured.

The eight-corners rule is "a settled feature of Texas law." *Richards v. State Farm Lloyds*, __ S.W.3d __, No. 19-0802, 2020 WL 1313782, at *5 (Tex. Mar. 20, 2020). In its Motion for Summary Judgment, National Liability relied heavily on a district court's proposed exception to the eight-corners rule that would allow district courts to consider extrinsic evidence where the policy does not include an express agreement to defend claims that are "groundless, false or fraudulent." *See* Dkt. No. 42 at 8–10; *see also Richards*, 2020 WL 1313782 at *4 (citing *State Farm Lloyds v. Richards*, No. 4:17-CV-753-A, 2018 WL 2225084, at *3 (N.D. Tex. May 15, 2018) (McBryde, J.)). The Texas Supreme Court held that the omission of groundless-claims clauses does not give rise to an exception to the eight-corners rule. *Richards*, 2020 WL 1313782 at *4. Thus, the omission of a groundless-claims clause from the insurance policy that is at issue here cannot support an exception to the eight-corners rule.

The Fifth Circuit, interpreting Texas law, has periodically applied an exception to the eight-corners rule when (1) "it is initially impossible to discern whether coverage is potentially implicated;" and (2) "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 *3 (quoting *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004)). But while the Texas Supreme Court has acknowledged the *Northfield* exception, that court has never addressed the exception. *Richards*, 2020 WL 1313782 at *3; *see also Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 497 (Tex. 2008) (acknowledging but not addressing the Fifth Circuit's *Northfield* exception).

Where "a panel of the Fifth Circuit has ruled on a specific question or issue and such holding has not been superseded by either Texas case law or a change in statutory authority, this court is bound by such interpretation of Texas law." *Golden Spread Coop., Inc. v. Emerson Process Mgmt. Power & Water Sols., Inc.*, 360 F. Supp. 3d 494, 518 (N.D. Tex. 2019), *aff'd sub nom. Golden Spread Elec. Coop., Inc. v. Emerson Process Mgmt. Power & Water Sols., Inc.*, 954 F.3d 804 (5th Cir. 2020) (citing *Lozovyy v. Kurtz*, 813 F.3d 576, 580 (5th Cir. 2015)). Neither Texas case law nor a change in statutory authority has displaced the Fifth Circuit's *Northfield* exception. Thus, the Fifth Circuit's decisions creating and applying the *Northfield* exception are binding on this Court.

Earlier this month, the Texas Supreme Court expressly approved an exception to the eight-corners rule for the first time. *Loya Ins. Co. v. Avalos*, __ S.W.3d __, No. 18-0837, 2020 WL 2089752 (Tex. May 1, 2020). The insurance litigation in *Avalos* stemmed from a case in which the insured's husband, who was excluded from the insured's policy, drove the insured's automobile when it collided with another vehicle. 2020 WL 2089752 at *1. The

insured, her husband, and the remaining victims of the car accident, who in turn became the plaintiffs in an underlying lawsuit, all agreed to falsely tell both the responding police officer and the insurance company that the insured was driving the automobile at the time of the accident. *Id.* However, the insured disclosed the lie to her attorney during discovery in the underlying suit, who in turn disclosed the lie to the insurance company. *Id.* Subsequently, the insurance company denied the insured coverage and a defense, and the question of whether the insurer had a duty to defend was litigated. *Id.* Noting that there was no dispute on the record that the insured, her husband, and the other car-accident victims colluded to defraud the insurance company, the Texas Supreme Court held that the eight-corners rule "does not bar courts from considering such extrinsic evidence regarding collusive fraud by the insured in determining the insurer's duty to defend." *Id.* at *3.

Under Texas law, an insurer therefore "owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist." *Id.*

iii. No recognized exception to the eight-corners rule applies here.

Because neither the *Northfield* exception nor the *Avalos* exception for collusive fraud applies to the claims against John Young d/b/a Rio Restaurant Group, Rio Concho Catering, Inc., and Gustina Penna in the underlying lawsuit, no exception to the eight-corners rule applies. Thus, the Court may not consider extrinsic evidence in determining whether National Liability owes a duty to defend.

1. The *Northfield* exception does not apply because it is initially possible to determine that coverage is implicated.

Although National Liability contends that the issue of whether the vehicle Penna was driving at the time of the accident "qualified as a temporary substitute pursuant to the Policy's terms" does not "overlap with the merits of the Underlying Lawsuit or engage the truth or falsity of any substantive facts bearing upon liability," the facts demonstrate otherwise. Dkt. No. 57 at 3 (citing *Northfield*, 363 F.3d at 531). The First Amended Petition in the underlying lawsuit alleges that the "vehicle in question was being used temporarily by John Young in his catering business, Rio Concho Catering, Inc., as a substitute for one of his permanent vehicles that was being repaired or serviced at the time of the incident in question." Dkt. No. 33-3 at 3. The policy provides for the coverage of any "auto" that the insured "do[es] not own while used with the permission of its owner as a temporary substitute for a covered 'auto' you own that is out of service because of its: a. Breakdown; b. Repair; c. Servicing; d. 'Loss'; or e. Destruction." Dkt. No. 33 at 4. Thus, it is initially possible to determine that the First Amended Petition implicates the policy's coverage for a "temporary substitute for a covered 'auto.'" *Cf. Interstate Fire & Cas. Co. v. S. Tank Leasing, Inc.*, No. CIV.A. H-10-4908, 2012 WL 1231738, at *5 (S.D. Tex. Apr. 12, 2012) ("The *Northfield* exception for use of extrinsic evidence does not apply because it is not initially impossible to discern [from the Underlying Suit] whether coverage is potentially implicated . . . It is.") (internal quotation marks omitted).

National Liability has not identified any applicable exclusion within the policy's text, but the insurance company instead argues that the vehicle that Penna drove at the time of the accident was not truly a temporary substitute. *See* Dkt. No. 57 at 7. Thus, as in *Northfield*, the Court may not consider extrinsic evidence because any extrinsic evidence that

National Liability asks the Court to consider would in fact "engage the truth or falsity" of substantive facts bearing upon liability. 363 F.3d at 535 (affirming the district court's ruling that the court could not consider extrinsic evidence because the evidence "overlaps with the merits of the [plaintiffs'] underlying negligence suit"); *see also Liberty Surplus Ins. Corp. v. Allied Waste Sys., Inc.*, 758 F. Supp. 2d 414, 427–28 (S.D. Tex. 2010) (reaching the same conclusion as to a claim alleging "facts that bring the claim within the scope of the policy without triggering an exclusion").

2. The exception for collusive fraud by the insured does not apply, and National Liability's allegations of "gamesmanship" do not alter the result.

This case does not fit within the framework of the narrow exception to the eight-corners rule that the Texas Supreme Court recently carved out in *Avalos*. There, the Texas Supreme Court held that "an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exist." 2020 WL 2089752 at *3. But here, National Liability does not allege that the insured—John Young or Rio Restaurant Group—conspired to manipulate a groundless, false, or fraudulent claim against National Liability. Rather, National Liability attacks the alleged "gamesmanship of the underlying plaintiffs in amending their original petition after this coverage action was filed." Dkt. No. 57 at 4. Moreover, National Liability lacks "conclusive evidence" that any manipulation occurred. 2020 WL 2089752 at *3. Thus, the *Avalos* exception does not apply here.

Artful pleading, in which National Liability effectively alleges that the plaintiffs in the underlying lawsuit engaged, does not give rise to an exception to the eight-corners rule.

If an insurer "knows [the underlying plaintiffs'] allegations to be untrue, its duty is to establish such facts in defense of its insured, rather than as an adversary in a declaratory judgment action." *GuideOne*, 197 S.W.3d at 311; *accord Allied Waste Sys.*, 758 F. Supp. 2d at 420 ("Artful pleading, absent evidence of collusion between the third-party claimant and the insured, does not create an exception to the general rule."). National Liability's vague allegations against the underlying plaintiffs do not alter the Court's analysis with respect to the eight-corners rule.

iv. The Court gives notice under Federal Rule of Procedure 56(f) that the Court will consider whether to grant summary judgment to the defendants as to the duty to defend.

Federal Rule of Civil Procedure 56(f) authorizes the Court to grant summary judgment to a nonmovant after giving "notice and a reasonable time to respond." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.").

Although the defendants here have not moved for summary judgment, the Court is not aware of any genuine dispute of material fact that would preclude the Court from granting summary judgment to the defendants as to the duty to defend. Thus, pursuant to Rule 56(f)'s notice requirement, the Court orders National Liability to file a response by June 12, 2020. The response shall detail any reason why the Court should not grant summary judgment in favor of the defendants as to the duty to defend given that the Court has rejected National Liability's interpretation of the insurance contract and the eight-corners rule. *See O'Connor v. Atherio, Inc.*, No. 3:16-CV-01731-B, 2018 WL 2739037, at *2

(N.D. Tex. June 7, 2018) (ordering a summary-judgment movant to submit a similar response).

B. National Liability's Motion for Summary Judgment as to the duty to indemnify is denied as premature.

The duty to indemnify is separate from the duty to defend, and "the existence of one does not necessarily depend on the existence or proof of the other." *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 745 (Tex. 2009). However, it is often "necessary to defer resolution of indemnity issues until after the underlying third-party litigation is resolved because coverage may turn on facts actually proven in the underlying lawsuit." *Id.*; *see also GuideOne*, 197 S.W.3d at 310 (explaining that "the facts actually established in the underlying suit control the duty to indemnify"); *Willbros RPI, Inc. v. Constr. Cas. Co.*, 601 F.3d 306, 313 (5th Cir. 2010) (same).

Here, Court understands that the underlying lawsuit that gives rise to this litigation remains pending in Texas state court, so the operative facts that will control the duty to indemnify have not yet been established. Accordingly, the Court denies as premature National Liability's Motion for Summary Judgment as to the duty to indemnify. *See Burlington Ins. Co. v. JC Instride, Inc.*, 30 F. Supp. 3d 587, 598 (S.D. Tex. 2014) (denying a motion for summary judgment as to the duty to indemnify as premature). The denial of National Liability's Motion for Summary Judgment as to the duty to indemnify is without prejudice to refiling. *See WFG Nat'l Title Ins. Co. v. Pinnacle Premier Properties, Inc.*, No. CV H-14-0842, 2014 WL 12537168, at *6 (S.D. Tex. July 18, 2014) (denying a motion for summary judgment as to the duty to indemnify without prejudice after concluding that the plaintiff had a duty to defend).

4. Conclusion

The eight-corners rule implicates coverage in the underlying lawsuit, and no exception to the rule allows the Court to consider extrinsic evidence. Thus, National Liability's Motion for Summary Judgment as to the duty to defend is denied. National Liability shall file a response by June 12, 2020 detailing any reason why the Court should not enter summary judgment for the defendants as to the duty to defend. Further, National Liability's Motion for Summary Judgment as to the duty to indemnify is denied without prejudice as premature.

So ordered on May 12, 2020.

JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE