IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JACKSONVILLE REALTY, LLC, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S, Defendants.	§	Case No. 4:23-cv-1131-JDK

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an insurance coverage dispute. Plaintiff Jacksonville Realty, LLC seeks summary judgment on its breach of contract claim against Defendants Certain Underwriters at Lloyd's ("Lloyd's"). Docket No. 10. Because there is a material fact dispute regarding an exclusion in the Policy, the Court **DENIES** the motion.

I.

Lloyd's issued Policy No. SUAFEO2124-2201 (the "Policy") to non-party Miller Title, LLC providing errors and omissions coverage related to professional services, including escrow services. Docket No. 1-5. While the Policy was in effect, Miller Title acted as the escrow agent for a real estate transaction between Jacksonville and IBF Retail I, LLC. Docket No. 1-3 at 3. As part of the transaction, IBF deposited $2,750,000 in earnest money with Miller Title. *Id.*

Before closing, IBF breached the purchase agreement, and Jacksonville terminated the agreement. *Id.* at 4. Under the agreement, Jacksonville was entitled

to the $2,750,000 in earnest money as liquidated damages. *Id.* But Miller Title refused to pay Jacksonville the escrow funds. *Id.* Instead, it transferred the money to Benefit Street Partners Realty Partnership, a non-party to the purchase agreement, at the unilateral direction of IBF. *Id.*

Shortly thereafter, Jacksonville sued Miller Title in Minnesota state court for breach of contract. Docket No. 1-1. The court granted summary judgment in favor of Jacksonville, awarding the earnest money as damages. Docket No. 1-3 at 6. Miller Title, however, filed for bankruptcy soon after Jacksonville obtained its judgment, and Jacksonville has not obtained any recovery as a result. Docket No. 10 at 25.

In this action, Jacksonville seeks indemnity from Lloyd's as a third-party beneficiary of the Policy between Miller Title and Lloyd's. Shortly after filing its complaint, and before discovery began, Jacksonville moved for partial summary judgment on its breach of contract claim. Docket No. 10. Lloyd's opposes both procedurally, arguing that Jacksonville's motion is premature because no discovery has occurred, and on the merits, arguing that a dispute of material fact precludes summary judgment. Docket No. 16.

II.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A fact is material only if it will affect the outcome of the case. *See Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine only if the evidence could lead a reasonable jury to find for the nonmoving party. *See id.* In determining whether a genuine issue of material fact exists, courts view all inferences drawn from the factual record in the light most favorable to the nonmoving party, here Lloyd's. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Ragas*, 136 F.3d at 458.

After the moving party has made an initial showing that there is no evidence to support the nonmoving party's claim, the nonmoving party must assert competent summary judgment evidence to create a genuine fact issue. *See Matsushita*, 475 U.S. at 586. Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). The nonmoving party must identify evidence in the record and articulate how that evidence supports its claim. *Ragas*, 136 F.3d at 458. Summary judgment must be granted if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322–23.

III.

Jacksonville is entitled to summary judgment on its breach of contract claim if it can show as a matter of law that it can recover as a third-party beneficiary of the Policy and that the Policy provides coverage for Jacksonville's judgment against Miller Title. *See Turner v. Cincinnati Ins. Co.*, 9 F.4th 300, 312 (5th Cir. 2021); *Siplast, Inc. v. Emps. Mut. Cas. Co.*, 23 F.4th 486, 494 (5th Cir. 2022). Lloyd's can

defeat summary judgment by, among other ways, presenting specific evidence showing a genuine issue of fact that a Policy exclusion bars coverage. *See Siplast*, 23 F.4th at 494; *Occidental Petrol. Corp. v. Wells Fargo Bank, N.A.*, 2024 WL 4219295, at *9–10 (5th Cir. Sept. 18, 2024) (holding that "an affirmative defense will defeat summary judgment in favor of a plaintiff if the defendant supports . . . the defense with summary judgment evidence").

Lloyd's asserts two Policy exclusions as affirmative defenses in its answer and opposition to Jacksonville's summary judgment motion. Docket No. 5 at 7–8; Docket No. 16 at 10–19. And, as explained below, Lloyd's has shown that a genuine issue of material fact exists as to one of these defenses—the Policy's "Willfulness Exclusion" in § III(l). The Court therefore does not need to address whether Jacksonville is a third-party beneficiary or whether the Policy provides coverage.

The "Willfulness Exclusion" precludes coverage for any claim:

> Based on or directly or indirectly arising out of any actual or alleged willful or intentional failure to comply with escrow instructions or underwriting or binding authority.

Docket No. 1-5, § III(l).

Jacksonville argues this exclusion does not apply here because Miller Title stated in a letter dated August 23, 2022, that it could not release the earnest money to Jacksonville without exposing itself to liability based on alleged fraud involving IBF. Docket No. 10 at 20–21; Docket No. 1-1 at 105.[1] Because Miller Title believed

[1] Jacksonville attached the Minnesota state court complaint with exhibits to its complaint in this case. Because there is no consistent pagination throughout the filing, the Court will cite to the PDF page numbers of Docket No. 1-1 for the exhibits attached to the Minnesota state court complaint.

it had no lawful authority to release the escrow funds, Jacksonville contends, Miller Title could not have "willfully" or "intentionally" failed to comply with the escrow agreement. Docket No. 10 at 21.

Lloyd's asserts, however, that there is at least a fact question regarding whether Miller Title acted willfully or intentionally. Lloyd's cites evidence showing that Miller Title transferred the escrow funds to Benefit Street in July 2022—at the unilateral request of IBF—and before Miller Title notified Jacksonville of the potential fraud. Docket No. 16 at 18–19; Docket No. 1-2 ¶ 28. Lloyd's argues that, if true, this contradicts Miller Title's claim about fraud involving IBF. Docket No. 16 at 19. In fact, the evidence suggests that Miller Title no longer held the funds when it wrote the August 23 letter to Jacksonville.

The willfulness of Miller Title's failure to comply with the escrow instructions is a material fact in determining whether the exclusion in § III(l) applies. Because Lloyd's presented some evidence creating a dispute about that fact, summary judgment is precluded. *See, e.g.*, *Matsushita*, 475 U.S. at 586; *Occidental Petrol. Corp.*, 2024 WL 4219295, at *9–10.

Accordingly, Jacksonville is not entitled to summary judgment on its breach of contract claim.

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For the reasons explained above, the Court **DENIES** Jacksonville's motion for partial summary judgment (Docket No. 10).

So **ORDERED** and **SIGNED** this **15th** day of **October, 2024.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE