UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES RIVER INSURANCE COMPANY,

Plaintiff,

v. Case No.: 6:22-cv-613-WWB-DCI

SHEEHE & ASSOCIATES, P.A., PHILLIP J. SHEEHE, JOHANNA E. SHEEHE and KAREN D. FULTZ,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Final Summary Judgment (Doc. 32), Defendants' Opposition[1] (Doc. 35), and Plaintiff's Reply (Doc. 38). For the reasons set forth below, the Motion will be granted.

I. BACKGROUND

Defendant Sheehe & Associates, P.A. ("**Law Firm**") is a Florida law firm, which employs Defendants Phillip J. Sheehe, Johanna E. Sheehe, and Karen D. Fultz. (Doc. 10, ¶¶ 6–9). First Protective Insurance Company ("**Frontline**") retained the Law Firm as panel counsel from 2009 until 2020, during which time the Law Firm represented Frontline primarily in first party property suits. (Doc. 32-1, ¶ 9). Plaintiff James River Insurance Company issued a Lawyers Professional Liability Policy, bearing Policy No. 00008964-

[1] Defendants' Response fails to comply with this Court's January 13, 2021 Standing Order. The parties have already been warned regarding compliance with applicable rules and orders of this Court. (Doc. 29 at 1 n.1). In the interests of justice, the Court will consider the Response, but the parties are cautioned that future failures to comply will result in striking without notice or leave to refile.

15 ("**Policy**," Doc. 10-3), to the Law Firm, effective March 2020 to March 2021. (Doc. 10, ¶ 25). After an internal review of its panel counsels' billing practices, Frontline discovered that the Law Firm had systematically and intentionally charged Frontline excessive fees. (*Id.* ¶¶ 13–15). The Law Firm's allegedly fraudulent billing practices included "billing for time not actually worked, excessive billing of hours for various repetitive tasks, and billings for unproductive and administrative matters for which no time should have been charged." (*Id.* ¶ 15). In addition, Frontline alleges that on 469 occasions in 2019 the Law Firm allegedly billed for more than twenty-four hours of work in a single day. (*Id.*).

In October 2020, Frontline sued Defendants in state court (the "**Underlying Action**") alleging claims for breach of fiduciary duty, negligent supervision, violation of the Florida Deceptive and Unfair Trade Practices Act ("**FDUTPA**"), unjust enrichment, breach of oral contract, and fraud.[2] (*See generally* Doc. 32-1). Plaintiff tendered a defense to the Law Firm in the Underlying Action under a reservation of rights and filed this action seeking a declaration that it has no duty to defend or indemnify Defendants in the Underlying Action. (Doc. 10, ¶¶ 28, 54). Upon Defendants' Joint Motion to Dismiss, (Doc. 21), the Court dismissed the claims as to the duty to indemnify as unripe. (Doc. 29 at 4–5). Further, the Court found it could only resolve the duty to defend issue on summary judgment. (*Id.* at 3–4).

II. LEGAL STANDARD

Summary judgment is appropriate when the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

[2] *First Protective Ins. Co. v. Sheehe & Assocs., P.A.*, No. 2020-CA-002453-15-L (Fla. 18th. Cir. Jan. 12, 2021).

matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.* "The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1313–14 (11th Cir. 2007). Stated differently, the moving party discharges its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

However, once the moving party has discharged its burden, "Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quotation omitted). The nonmoving party may not rely solely on "conclusory allegations without specific supporting facts." *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985). Nevertheless, "[i]f there is a conflict between the parties' allegations or evidence, the [nonmoving] party's evidence is presumed to be true and all reasonable inferences must be drawn in the [nonmoving] party's favor." *Allen*, 495 F.3d at 1314.

III. DISCUSSION

A. Policy Coverage of the Underlying Allegations

Plaintiff first argues that the allegations in the Underlying Action arise entirely out of Defendants' billing practices, which do not fall within Policy Coverage and do not trigger the duty to defend. Under Florida law, "[t]he central inquiry in a duty to defend case is

whether the complaint [in the underlying action] alleges facts that fairly and potentially bring the suit within policy coverage." *Hallums v. Infinity Ins. Co.*, 945 F.3d 1144, 1149 (11th Cir. 2019) (quoting *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1292 (11th Cir. 2006)); *see also Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar. Co.*, 668 F. Supp. 1541, 1545 (S.D. Fla. 1987) (stating that the duty to defend attaches "so long as the allegations against the insured *even arguably* come within the policy coverage" (quotation omitted)); *Hale v. State Farm Fla. Ins. Co.*, 51 So. 3d 1169, 1171 (Fla. 4th DCA 2010) ("If the complaint alleges facts that could bring the insured partially within coverage of the policy, the insurer is obligated to defend the entire suit." (quotation omitted)).

This assessment naturally involves questions of contract interpretation. *See, e.g.*, *James River Ins. Co. v. Arlington Pebble Creek, LLC*, 188 F. Supp. 3d 1246, 1255–58 (N.D. Fla. 2016). Florida courts construe insurance contracts according to their plain meaning. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). A court's inquiry "begins with a review of the plain language of the insurance policy as bargained for by the parties." *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263, 266 (Fla. 2003). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings, Inc. v. U.S. Fid. & Guar Co.*, 913 So. 2d 528, 532 (Fla. 2005) (quotation omitted). The policy must be read as a whole, giving meaning to all parts. *See Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 166 (Fla. 2003). "[T]he insured has the burden of proving that a claim against it is covered by the insurance policy, [and] the insurer has the burden of proving an exclusion to coverage." *Doe v. N. River Ins. Co.*, 719 F. Supp. 2d 1352, 1355 (M.D. Fla. 2010).

The Policy provides that Plaintiff has a duty to defend Defendants against any covered "Claim," defined as "a written demand for monetary damages arising out of or resulting from the performing or failure to perform 'Professional Services.'" (Doc. 10-3 at 4–5). "Professional Services" are, in turn, defined as "those services performed by the 'Insured' for others: (1) as a lawyer, notary public or title agent; (2) as an arbitrator, mediator or similar neutral; (3) as an administrator, executor, conservator, receiver, guardian, escrow agent, trustee, or in any similar fiduciary capacity provided such services are performed in [the Insured's] capacity as a lawyer[;] (4) as a member of a formal accreditation, ethics, peer review, licensing board, standards review board, bar association, or similar board or committee." (*Id.* at 6).

In the context of legal services, Florida courts have interpreted similar "professional services" provisions to cover services or work "provided to or performed on behalf of third parties." *Roberts v. Fla. Law. Mut. Ins. Co.*, 839 So. 2d 843, 846 (Fla. 4th DCA 2003). When determining generally whether a particular act qualifies as a professional service, Florida courts consider "whether the service involves specialized skill, requires specialized training, is regulated, requires a degree, and/or whether there is an entity that certifies or accredits persons or that sets forth standards of practice for the performance of those services." *Travelers Ins. Co. v. Figg Bridge Eng'rs, Inc.*, 389 F. Supp. 3d 1060, 1071 (S.D. Fla. 2019) (quotation omitted). This inquiry examines the character of the act itself rather than the individual performing the act. *Id.*

Defendants contend that counts I (Breach of Fiduciary Duty) and V (Breach of Oral Contract) of the underlying complaint sound in substantive legal malpractice, triggering coverage under the Policy. Count I states that Defendants "failed to ensure the legal

services provided to Frontline for which Defendants were billing, were reasonable and necessary and advanced the best interests of Frontline." (Doc. 10-1, ¶ 23(iii)). Defendants insist this allegation implicates "choices [Law Firm] made in [Frontline's] defense of the lawsuits and strategic decisions made on behalf of Frontline" and thus falls within Policy coverage. (Doc. 35 at 7). But the underlying complaint does not identify any such choices or strategic decisions. Indeed, the only alleged basis for breach of fiduciary duty is Defendants' allegedly fraudulent billing practices. (Doc. 10-1, ¶¶ 19–23). Moreover, the allegation cited by Defendants is entirely consistent with the general allegations that the Law Firm billed Frontline unnecessarily to collect excessive fees, which naturally would run contrary to Frontline's interests.

As to Count V, Defendants argue that the basis for the breach of contract claim is their alleged failure to "handle Frontline's legal matters efficiently and cost effectively" and their "handling files and cases in a systematic 'cookie-cutter' fashion rather than on a case-by-case substantive basis." (*Id.* ¶ 43). Defendants contend that Count V describes a breach of the Florida Rules of Professional Responsibility and, therefore, alleges wrongful provision of professional legal services. Again, however, the remainder of the underlying complaint does not support this argument. First, both cited allegations appear in a paragraph solely describing the Law Firm's billing misconduct. (*Id.*). In this context, it becomes clear that the Defendants' alleged "cookie-cutter" handling of cases relates to the Law Firm's approach for billing, rather than substantively handling, the cases at issue. Further, Defendants' alleged failure to handle legal matters efficiently is one of the alleged drivers of Defendants' excessive fees. It is part and parcel of the alleged billing scheme. (*Id.* ¶¶ 14–15, 43).

The Court therefore concludes that each count in the underlying complaint arises from Defendants' allegedly fraudulent billing practices. And billing practices—legitimate or otherwise—are not "professional services" in the context of legal practice. First, they are not services "provided to or performed on behalf of" Frontline. *Roberts*, 839 So. 2d at 846. Nor do they require the skill, training, and regulation involved with substantive legal practice. *Id.* This is consistent with the approach taken in other jurisdictions. *See, e.g.*, *Evanston Ins. Co. v. Law Off. of Michael P. Medved, P.C.*, 890 F.3d 1195, 1198 (10th Cir. 2018) (holding that defendant attorney's professional services insurance policy "did not create a duty to defend because the allegations had arisen from billing practices, *not professional services*" (emphasis added)); *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 925 (10th Cir. 2008) ("[T]he preparation of bills or invoices does not qualify as professional services."); *Harad v. Aetna Cas. & Sur. Co.*, 839 F.2d 979, 985 (3d Cir. 1988) ("The professional aspect of a law practice obviously involves the rendering of legal advice to and advocacy on behalf of clients . . . . The commercial aspect involves the setting up and running of a business, i.e., securing office space, hiring staff, paying bills and collecting on accounts receivable."). Because Defendants' billing practices are not "professional services" under the Policy, they are not covered thereunder and do not trigger Plaintiff's duty to defend.

The Policy provides coverage for "Damages," defined as "any compensatory amount which [insureds] become legally obligated to pay as a result of a covered 'Claim,' including judgments, awards, and settlements." (Doc. 10-3 at 5). However, "Damages" does not include "any matter, sum or award that is uninsurable under the law." (*Id.*).

"It is axiomatic in the insurance industry that one should not be able to insure against one's own intentional misconduct." *Phila. Indem. Ins. Co. v. Sabal Ins. Grp., Inc.*, 786 F. App'x 167, 171–72 (11th Cir. 2019) (quoting *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So. 3d 1005, 1007 (Fla. 1989)); *see also CNL Hotels & Resorts, Inc. v. Twin City Fire Ins.*, 291 F. App'x 220, 223 (11th Cir. 2008) ("The interpretive principle that a loss within the meaning of an insurance contract does not include the restoration of ill-gotten gains is clearly right." (alterations and quotation omitted)); *Twin City Fire Ins. Co. v. C.R. Tech., Inc.*, 90 F. Supp. 3d 1320, 1325 (S.D. Fla. 2015) ("As a matter of law, [l]oss does not include the restoration of ill-gotten gains." (quotation omitted)).

As discussed above, the Underlying Action arises solely out of the allegedly "ill-gotten gains" Defendants acquired through excessive fees and fraudulent billing practices. Indeed, the only damages Frontline seeks are associated with excessive fees and the costs of pursuing the Underlying Action. Under the terms of the Policy, the damages sought in the Underlying Action are not insurable.

B. Applicability of Policy Exclusions

Next, even assuming *arguendo* that the Underlying Action is covered by the Policy, Plaintiff asserts several exclusions that would also preclude its duty to defend. "When an insurer relies on an exclusion to deny coverage, it has the burden of demonstrating that the allegations of the complaint are cast solely and entirely within the policy exclusion and are subject to no other reasonable interpretation." *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1359 (M.D. Fla. 2001).

1. Fee Dispute Exclusion

The Policy's Fee Dispute exclusion provides that coverage does not extend to claims "[b]ased on or directly or indirectly arising out of the rights or duties under any agreement including disputes over fees for services." (Doc. 10-3 at 6). The Florida Supreme Court has broadly interpreted the phrase "arising out of" to mean "originating from, having its origin in, growing out of, flowing from, incident to or having a connection with." *Taurus Holdings*, 913 So. 2d at 540 (quotation omitted). Each count of the complaint in the Underlying Action originates from or is, at least, incident to the Law Firm's billing practices and the allegedly excessive fees charged to Frontline. (*See generally* Doc. 10-1). Even Counts I and V, which Defendants argue implicate substantive legal malpractice, cite the Law Firm's wrongful billing practices. (*Id.* ¶¶ 23, 43). Thus, the Fee Dispute exclusion clearly applies to the Underlying Action.

Defendants do not contest that the Fee Dispute exclusion applies to fee disputes. Instead, they insist the Fee Dispute exclusion is "fatally ambiguous." (Doc. 35 at 12). "[W]hen insurance policies are ambiguous, Florida courts construe them in favor of coverage." *Zucker ex rel. BankUnited Fin. Corp. v. U.S. Specialty Ins. Co.*, 856 F.3d 1343, 1352 (11th Cir. 2017). "And a policy is ambiguous when a coverage provision and an exclusion are directly at odds." *Travelers Indem. Co. of Conn. v. Richard McKenzie & Sons, Inc.*, 10 F.4th 1255, 1265 (11th Cir. 2021) (quotation omitted). "But if the policy's coverage and exclusion provisions do not negate one another, the coverage is not illusory, and there is no ambiguity, so the plain language of the exclusion controls." *Id.* Accordingly, the policy coverage is only illusory if the policy at issue "grants coverage with one hand and then with the other completely takes away the entirety of that same coverage. Completeness is key." *Id.*

The ambiguity, according to Defendants, arises because the Fee Dispute exclusion applies to claims under *any agreement* including disputes over fees for services. In Defendants' view, this excludes coverage for any claim under any agreement between an attorney and their clients, and thus, the exclusion negates coverage under the Policy. This argument is inapposite because it relies on Defendants' position that the Underlying Action arises in part from substantive legal malpractice. But as discussed above, the Underlying Action relates entirely to a fee dispute between Frontline and the Law Firm. Plaintiff, accordingly, is not attempting to apply the Fee Dispute exclusion to avoid covering all possible wrongs arising under all possible contracts. Instead, it argues only that the Underlying Action—arising only from a fee dispute—falls within the Fee Dispute exclusion. And the plain language of the exclusion applies to "disputes over fees for services." (Doc. 10-3 at 6). Therefore, even reading the exclusion "against the insurer and in favor of coverage," *Taurus Holdings*, 913 So. 2d at 532, there is no construction that would provide coverage for the allegations in the Underlying Action.

2. Gain of Profit Exclusion

The Gain of Profit exclusion bars coverage for any claims "[b]ased on or directly or indirectly arising out of or resulting from . . . [t]he gaining by the insured of any personal profit, gain or advantage to which the insured is not legally entitled." (Doc. 10-3 at 7). This Court has previously enforced a similar exclusion according to its plain language. *See Desai v. Navigators Ins. Co.*, 400 F. Supp. 3d 1280, 1284 (M.D. Fla. 2019) (finding an exclusion of "any profit or advantage to which an Insured was not legally entitled" barred coverage for a state court judgment granting the Florida Department of Financial Services' claw-back claim over a bonus paid to the insured). Here, as discussed above,

the Underlying Action arises out of Defendants' allegedly gaining profits (as excessive fees) to which they were not legally entitled. Defendants argue only that because Counts I and V implicate substantive malpractice, the Gain of Profit exclusion should not apply. Because the underlying complaint clearly alleges unlawful gain of profit for each count against Defendants, the Court finds that the Gain of Profit exclusion applies.

3. Prior Knowledge Exclusion

The Prior Knowledge exclusion precludes coverage for claims arising from professional services "rendered prior to the effective date of the Policy if any insured knew or could have reasonably foreseen that the 'professional service' could give rise to a 'claim.'" (Doc. 10-3 at 6). This Court has found that such an exclusion can be "triggered under two circumstances: (1) if the insured 'knew' that a wrongful act might be expected to be the basis of a claim; or (2) if the insured 'could have reasonably foreseen' that a wrongful act might be expected to be the basis of a claim." *Feldman v. Imperium Ins. Co.*, No. 8:14-cv-1637-T, 2015 WL 5854153, at *6 (M.D. Fla. Oct. 5, 2015). "The first prong requires an insured to have actual knowledge, as evaluated under a subjective standard." *Id.* "By contrast, the second prong involves both a subjective and objective component." *Id.* "Whether an insured 'could have reasonably foreseen' that a wrongful act might be expected to be the basis of a claim is an objective inquiry, but it must be based on the facts subjectively known by the insured." *Id.*; *see also Diamond State Ins. Co. v. Boys' Home Ass'n*, 172 F. Supp. 3d 1326, 1338–39 (M.D. Fla. 2016) (declining to apply a prior knowledge exclusion where it was plausible that the insured "was not subjectively aware that it potentially breached its duties").

The underlying complaint alleges that Defendants intentionally engaged in fraudulent billing practices at Frontline's expense. Further, Defendants Phillip J. Sheehe and Karen D. Fultz are each alleged to have personally billed Frontline for more than twenty-four hours of work in a single day on dozens of occasions; the Law Firm is alleged to have billed Frontline for such work more than 400 times. (Doc. 10-1, ¶ 15). These allegations make it implausible that Defendants were not "subjectively aware" that they had "potentially breached" their duties to Frontline. *Diamond State*, 172 F. Supp. 3d at 1338. Moreover, a reasonable attorney who had billed their client for more than twenty-four hours in one day could readily foresee that their actions would be the basis of a claim. The Court accordingly finds that the Prior Knowledge exclusion also applies here.

C. Affirmative Defenses

Plaintiff also argues that Defendants' Affirmative Defenses do not preclude summary judgment. The First Affirmative Defense asserts that Plaintiff has failed to state a claim and the Second Affirmative Defense argues that the Policy contains "certain ambiguities" that must be construed in favor of coverage. (Doc. 30 at 4–5). Defendants admit that neither is a true affirmative defense. (Doc. 35 at 18); *see also Sos v. State Farm Mut. Auto. Ins. Co.*, No. 6:17-cv-890-Orl, 2017 WL 8813072, at *2 (M.D. Fla. Dec. 8, 2017) ("Courts have held that failure to state a claim is a specific denial rather than an affirmative defense."); *S.-Owners Ins. Co. v. Mac Contractors of Fla., LLC*, No. 2:18-cv-21-FtM, 2019 WL 6696393, at *2 (M.D. Fla. Dec. 9, 2019) ("[W]hether the insurance policy is ambiguous is an issue of contract interpretation. This defense is, in effect, a denial because it alleges defects in plaintiff's prima facie case."). The Third Affirmative Defense, which asserts ambiguity as a defense to the application of the Fee Dispute exclusion,

should likewise be treated as a specific denial. *See Sos*, 2017 WL 8813072, at *2 ("[W]hen a party incorrectly labels a denial as an affirmative defense, the proper remedy is not to strike the claim, but rather to treat it as a denial."). Defendants have raised each of these theories in their opposition to the instant motion, but as discussed above, each fails because Plaintiff has proven both that there is no Policy coverage for the Underlying Action and the applicability of several exclusions even if coverage existed.

IV. CONCLUSION

For the reasons set forth herein, it is **ORDERED** and **ADJUDGED** as follows:

1. Plaintiff's Motion for Final Summary Judgment (Doc. 32) is **GRANTED**.
2. The Clerk is directed to enter judgment in favor of Plaintiff and against Defendants providing that Plaintiff James River Insurance Company does not owe Defendants Sheehe & Associates, P.A., Phillip J. Sheehe, Johanna E. Sheehe, or Karen D. Fultz, a duty to defend in Case No. 2020-CA-002453-15-L in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida, under the terms of Policy No. 0008964-15.
3. Thereafter, the Clerk is directed to terminate all pending motions and close this case.

DONE AND ORDERED in Orlando, Florida on February 12, 2024.

WENDY W. BERGER
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record