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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-015010 03/15/2018

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

SOUTHWEST ENERGY SYSTEMS L L C RICHARD C GRAMLICH

v.

UNDERWRITERS AT LLOYDS LONDON, et al. KURT M ZITZER

MYLES P HASSETT

RULING ON MOTIONS TO JOIN AND DISMISS

The Court has two motions before it: 1) Farmer Woods Group's motion to join Travelers as a party; and 2) Lloyd's motion to dismiss. The Court reviewed the motions, the responses and replies. The Court held oral argument on March 14, 2018.

I. BACKGROUND

Farmer Woods Group (FW) assisted Southwest Energy Systems LLC (SWE) with purchasing: 1) professional liability insurance from Underwriters at Lloyd's London (Lloyd's) (a claims-made policy); and 2) a CGL policy from Travelers (an occurrence policy). Some arc fires occurred at one of SWE's projects. SWE was blamed by Truland for causing the fires, and SWE arbitrated with Truland for construction damages. SWE claims that it incurred approximately $314,000 in damages from the Truland arbitration. The Truland Arbitration arose out of electrical testing services rendered by SWE.

SWE tendered the claim to Travelers. Travelers denied the tender from Truland Arbitration because of the Professional Services exclusion on February 19, 2014.

Much later, SWE tendered the claim to Lloyd's. Lloyd's denied the tender on the grounds it did not receive timely notice.

In this case, SWE has sued both Lloyd's and FW. SWE alleges that Lloyd's breached the insurance contract and acted in bad faith by failing to pay the Truland claim. SWE alleges that FW was negligent because FW did not advise SWE to tender the Truland claim to Lloyd's.

At the same time, SWE has filed a separate lawsuit against Travelers in federal court.

II. ANALYSIS

A. Motion to Join

FW moves to join Travelers as an indispensable party under Rule 19 or under the permissive joinder of Rule 20.

The Court need not address Rule 19 because the Court finds that joinder is appropriate under Rule 20. The claim against Travelers involves many of the same legal and factual questions at the center of this lawsuit. These include communications surrounding the subject insurance transactions, the reasonableness of the fees incurred by SWE, and the application of the subject insurance policies to the Truland claim. If Travelers is found to have breached the contract, FW's liability would be substantially reduced if not entirely eliminated. With the exception of the claim for bad faith damages, the damages sought against Travelers and against FW are identical. In short, pursuant to Rule 20, the Court finds there is substantial overlap in the relief asserted against FW and the relief asserted against Travelers. The damages involve the same transactions and occurrences. In addition, the Court finds that questions of law and fact are common to both defendants. The Court believes that failure to join could result in inconsistent results and would be a waste of judicial resources. In addition, the Court does not believe that either the Court or the jury will be confused.

IT IS ORDERED that FW's motion to join Travelers as a defendant in this case is granted.

B. Motion to Dismiss

Lloyd's brings a motion to dismiss. The facts are not in dispute. The Complaint alleges that the Truland Arbitration was first asserted against SWE in May 2014, during the Policy Period for the 2013 – 2014 claims-made policy. The policy period was from September 15, 2013 to September 15, 2014. However, by its own admission, SWE did not attempt to place Lloyd's on notice of the Truland Arbitration until October 2015, nearly 17 months after the filing of the

arbitration demand and long after the expiration of both the 2013 – 2014 Policy and its reporting deadline.

Of course, this Court may consider documents that are not attached to the Complaint that that are central to the plaintiff's claims without converting a motion to dismiss into one for summary judgment. *Elm Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 289 (App. 2010). As a result, the Court will consider the insurance policy at issue in this claim.

The insurance policy provides that New York law will apply. It is also a "claims-made" policy. Lloyd's argues that, in order for coverage to be available under the 2013 – 2014 policy, a Claim must be both: 1) first made against the Insured during the policy period of September 15, 2013 and September 15, 2014; and 2) first reported in writing to Lloyd's "as soon as practicable" but in no event later than 60 days after the expiration of the policy period.

As confirmed at oral argument, this means that any Claim under the 2013 – 2014 policy would need to have been reported by November 14, 2014. Yet the Complaint acknowledges that the earliest SWE provided notice to Lloyd's was October 2015. In short, the claim was approximately 11 months too late.

There is nothing confusing or ambiguous about the reporting deadlines. The Policy states:

> If any Claim is made against an Insured, the Insured shall forward as soon as practicable to the Underwriters through the persons named in Item 9(a) of the Declarations written notice of such Claim in the form of a facsimile, email or express or certified mail together with every demand, notice, summons or other process received by the Insured or the Insured's representative, but in no event later than sixty (60) days after the expiration of the Policy Period or during the Optional Extension Period, if purchased.

Thus, the policy clearly and unambiguously sets forth the specific details of when claims must be reported.

Lloyd's cites persuasive authority suggesting that, under New York law, unambiguous language in any claims-made policy requires the policyholder to report claims to the insurer within a specified time period. *See Rochwarger v. Nat. Union Fire Ins. Co.*, 595 N.Y.S.2d 595 (App. Div. 1993). But even if the Court were to apply Arizona law, Lloyd's is entitled to dismissal. The 2013 – 2014 Policy unambiguously required SWE to report the Truland Arbitration by November 14, 2014. Yet the Complaint expressly admits that SWE did not attempt to tender the Truland Arbitration until October 9, 2015. Thus, there is no coverage available under the 2013 – 2014 policy.

The Court does not believe the "reasonable expectations" doctrine applies. New York law typically allows courts to consider the "reasonable expectations" only where the policy language is ambiguous. But even if the Court applied Arizona law, dismissal would be appropriate. There is no ambiguity in the language. It could be reasonably understood by a reasonably intelligent consumer, especially on a professional liability policy. A purpose of a claims-made policy is to allow the insurer to close its books on any given policy period if, as of the reporting deadline, the insurer has not reported any claims. The Court believes any reasonable consumer would be knowledgeable that claims under a policy must be submitted within a reasonable time. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383 (1984) and *Gordinier v. Aetna Cas. & Sur. Co*., 154 Ariz. 266, 272-73 (1987), are distinguishable and do not apply.

Moreover, there is no suggestion in the Complaint or Mr. Hoffman's affidavit that Lloyd's or any of its agents made any representations that would reasonably lead SWE to any other conclusion.

Since Lloyd's had a contractual right to decline coverage, Lloyd's did not violate the covenant of good faith and fair dealing.

In short, for reasons stated in Lloyd's motion and reply, the Court grants Lloyd's motion to dismiss.

IT IS ORDERED that Lloyd's motion to dismiss with prejudice is granted.