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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

THE NETHERLANDS INSURANCE COMPANY and CONSOLIDATED INSURANCE COMPANY,	)	
Plaintiffs,	)	
v.	)	
MACOMB COMMUNITY UNIT SCHOOL DISTRICT NO. 185, ED FULKERSON, and JOHN RUMLEY,	)	
Defendants.	)	**Case No. 18-cv-4191**
MACOMB COMMUNITY UNIT SCHOOL DISTRICT NO. 185,	)	
Third Party Plaintiff,	)	
v.	)	
JAMES UNLAND & COMPANY, INC. and PATRICK J. TAPHORN,	)	
Third Party Defendants.	)	

ORDER

On October 4, 2018, Plaintiffs the Netherlands Insurance Company and Consolidated Insurance Company (collectively, "Insurers") filed an Amended Complaint (#4) against Defendants, Macomb Community Unit School District No. 185 ("District"), Ed Fulkerson, and John Rumley, seeking a declaration of their rights and obligations as to Defendants under insurance policies issued by Plaintiffs. On November 5, 2018, the District filed a two-count Counterclaim.

On April 11, 2019, Plaintiffs filed a Motion for Judgment on the Pleadings (#44), seeking a judgment in their favor on the claims in their Amended Complaint and on the claims in Defendants' Counterclaim. Defendants filed a Response (#47) on April 22, 2019, to which Plaintiffs filed a Reply (#52) on May 21, 2019. For the reasons that follow, Plaintiffs' Motion for Judgment on the Pleadings is denied.

BACKGROUND

For the period of December 8, 2017 through December 8, 2018 ("Policy Period"), the District had two insurance policies through Liberty Mutual: a policy from the Netherlands Insurance Company and a policy from Consolidated Insurance Company. During the Policy Period, the District was sued by Jane Doe and Jane Roe, former students at Macomb Senior High School ("MSHS"), a school in the District.

In this declaratory judgment action, the Insurers seek a declaration of their rights and obligations as to Defendants in connection with their policies and the *Doe* lawsuit. The Insurers allege they have no duty to defend or indemnify Defendants in the *Doe* lawsuit.

On November 5, 2018, the District filed a two-count Counterclaim. Count I is a breach of contract claim, alleging the Insurers' denial of coverage and indemnity for the Title IX claims in the *Doe* lawsuit breached the Insurers' contracts with the District. Count II asserts that the Insurers are liable, under 215 Ill. Comp. Stat. 5/155, for vexatiously and unreasonably denying coverage for the *Doe* lawsuit.

The *Doe* Lawsuit

Factual Allegations

The underlying lawsuit, *Jane Doe, et al. v. Macomb Community Unit School District No. 185, et al.*, Case No. 18-cv-1072, was filed on February 16, 2018. The defendants in the underlying suit are Defendants in this case: the District, John Rumley, and Ed Fulkerson.

Concerning Doe, the underlying complaint alleges a series of incidents in 2013 and 2014. During the 2013-14 school year, Doe was a freshman. Another freshman student, M.P., sexually harassed Doe at MSHS twenty times. Doe reported the harassment to Rumley (Principal of MSHS) and a school counselor, but school officials ignored her reports and failed to respond appropriately. Rumley told Doe, "guys are going to do what guys are going to do." In one incident, M.P. "restrained [Doe], shoved his hand down her pants, and penetrated her vagina with his finger, while Jane cried and tried to escape." Defendants learned of that incident but did nothing about it. Fulkerson told Doe's mother that "the situation was Jane's fault, and he would not disrupt his school for 'girls that accuse people of things.'"

M.P.'s parent, a teacher at MSHS, openly gossiped about Doe to other teachers in front of her, and gave her failing grades. The superintendent learned about that retaliation, but permitted it to continue.

Concerning Roe, the underlying complaint alleges that M.P. later assaulted Roe twice. In the fall of 2016, M.P., then a 17-year-old senior, assaulted Roe, a 14-year-old freshman. After isolating her in the school auto shop, he pushed her against a car and

"forcibly raped her with his finger, against her will and without her consent." A few weeks later, at a park, M.P. "grasped [Roe] by the neck, fondled her breasts, touched her thighs, and attempted to kiss her" while she begged him to stop. Roe reported the abuse to school officials, whose response was entirely inadequate. Fulkerson told Roe's mother to keep her daughter home while M.P. was at school.

Doe and Roe allege that defendants: failed to properly investigate or prevent assaults and harassment; refused to comply with civil no contact orders against M.P.; failed to discipline or properly supervise M.P.; failed to tell Roe or her mother about other reports made against M.P.; and took no steps to protect Roe, despite knowing M.P.'s actions against Doe and that criminal charges were filed against M.P. for his sexual abuse of Roe. Doe and Roe allege that defendants' "many failures, along with their retaliation against Plaintiffs for reporting M.P.'s sexual abuse and violence" led them both to transfer to an "alternative" school that did not provide as many educational opportunities and benefits, and Doe and her family moved out of Macomb.

After Roe transferred to the alternative school, the District refused to allow her to return to MSHS and the District denied her request to attend and participate in extracurricular activities.

Legal Claims

The underlying complaint contains seven counts. Counts I-V allege the District and its Board of Education ("School Defendants") violated Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681.

Counts I and II allege the violations occurred through the School Defendants' various actions and inactions, undertaken with a deliberate indifference to the underlying plaintiffs' right to a safe and secure education environment, that materially impaired the plaintiffs' ability to pursue their educations at MSHS.

Counts III and IV allege Doe and Roe suffered retaliation because they reported sexual assault and harassment to school officials.

Count V alleges the School Defendants failed to adequately train administrators, staff, students, and parents on "policies concerning sexual discrimination and harassment against students, Title IX, and/or student-against-student sexual misconduct and identifying, investigating, reporting, and stopping sexual harassment by students like M.P. against students like Jane Doe and Jane Roe."

Count VI alleges an Illinois state law willful and wanton conduct claim against Rumley and Fulkerson. Count VII alleges an Illinois state law premises liability claim against the District, Rumley, and Fulkerson.

The underlying lawsuit remains pending. It is currently scheduled for trial on November 18, 2019.

The Insurance Policies

The Netherlands Policy

The Netherlands Policy ("Package Policy") contains a Sexual Misconduct/Molestation Liability ("SMML") coverage provision, a Commercial General Liability ("CGL") coverage provision, and a School Leaders Errors and Omissions Liability ("SLEOL") coverage provision.

The SMML coverage part and the CGL coverage part cover claims on an occurrence basis. The SMML coverage part applies to a "loss" arising from a "wrongful act," but "only if the 'loss' arises from a 'wrongful act' that is committed . . . during the 'policy period.'" The CGL coverage part applies to some types of "bodily injury" and "property damage," but "only if [t]he 'bodily injury' or 'property damage' occurs during the policy period," and "personal and advertising injury" may be covered "only if the offense was committed . . . during the policy period."

The SLEOL coverage part covers certain "sums that the insured becomes legally obligated to pay because of 'loss' arising from a 'wrongful act' to which this insurance applies." "'Wrongful act' means any actual or alleged act, breach of duty, neglect, error, omission, misstatement, or misleading statement committed by the insured, or by any person for whose acts the insured is legally liable, while in the course of performing 'educational institution' duties." The District is the "educational institution" for the purposes of the Package Policy.

In contrast to the SMML and CGL coverage parts, the SLEOL coverage part cover claims on a claims-made basis. The SLEOL coverage part states, in relevant part, that it applies to 'wrongful acts' that are committed:

> Prior to the 'policy period' and on or after [December 8, 2004], but only if:
>
> (1) On or before the effective date of the first School Leaders Errors and Omissions Liability Coverage Part issued by us and continuously renewed and maintained by the insured:
>
> (a) The insured did not give notice to any prior insurer of such "wrongful act"; and

> (b) The insured had no knowledge of such "wrongful act" likely to give rise to a "claim" hereunder; and
>
> 2) A "claim" is first made against any insured during the "policy period" or any Discovery Period (provided in accordance with SECTION V — DISCOVERY PERIODS).

Plaintiffs' Memorandum of Law in Support of its Motion for Judgment on the Pleadings states, at page 14: "For purposes of the Motion only, Plaintiffs will assume that the Underlying Lawsuit constitutes a 'claim' first made during the policy period."

The CGL and SLEOL coverage parts contain a Sexual Misconduct or Molestation Exclusion. The Sexual Misconduct or Molestation Exclusion to the SLEOL coverage part states:

> This insurance does not apply to . . . [:]
>
> **16. Sexual Misconduct or Molestation**
>
> Any actual or alleged sexual misconduct or sexual molestation of any person; and any allegations relating thereto that an insured negligently employed, investigated, supervised or retained a person, or based on an alleged practice, custom or policy, including but not limited to any allegation that a person's civil rights have been violated. This exclusion does not apply to the extent of coverage provided under Section I.D. — Employment-Related Practices Liability.

The Consolidated Policy

The Consolidated Policy ("Umbrella Policy"), by endorsement, provides sexual misconduct coverage and SLEOL coverage. The Umbrella Policy affords sexual molestation coverage only if the underlying Package Policy's SMML coverage part affords coverage. The Umbrella Policy's SLEOL coverage part affords coverage only if the underlying Package Policy's SLEOL coverage part affords coverage.

The Insurers' Coverage Position

On February 27, 2018, Melissa Schmitt, a Senior Claims Specialist for Liberty Mutual, emailed Dr. Mark Twomey, the District's Superintendent of Schools, about the *Doe* lawsuit:

> As discussed, our policy provides coverage for Counts I-V which allege the violation of Educational Amendments and Constitutional and Federal Rights claims as alleged by the plaintiffs. This coverage is a claims made coverage. The date of loss is associated when the claim is made, or in this case, receipt of the lawsuit (2/22/18).

On April 13, 2018, a different Liberty Mutual employee wrote a letter and emailed Dr. Twomey to inform him "that the polices may not afford coverage" for the *Doe* lawsuit.[1] The letter states:

> Going forward, Netherlands will agree to reimburse the Macomb Defendants for the defense expenses that they incur in connection with the Lawsuit, subject to a full and complete reservation of its rights to terminate the defense upon a determination that the relevant primary policy does not afford coverage to the Macomb Defendants and also subject to Netherlands' rights under the primary policy to seek reimbursement from the Macomb Defendants or Macomb's prior insurer(s) for any amounts that Netherlands incurs to defend the Macomb Defendants against the Lawsuit.

The end of the letter restates the Insurers' reservation of rights a few more times, including restating its reservation of the "right to deny coverage (including any

[1]The Insurers now state that Schmitt's statement in the February 27, 2018 email "was simply incorrect" and an "initial error."

obligation to indemnify) for any settlement or judgment paid or incurred as a result of this Lawsuit, as well as our right to contest the existence of coverage in a declaratory judgment action."

ANALYSIS

The Insurers argue that the court should grant judgment on the pleadings in their favor as to the claims in their Amended Complaint and Defendants' Counterclaim because, as a matter of law, the Package Policy and the Umbrella Policy do not afford coverage for the *Doe* lawsuit. Defendants argue that the Insurers' Motion should be denied because the policies do provide coverage, and they request that the court allow their Counterclaim to proceed.

Judgment on the Pleadings Standard

Under Federal Rule of Civil Procedure 12(c), a party can move for judgment on the pleadings after the filing of the complaint and answer. *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007). "The pleadings include the complaint, the answer, and any written instruments attached as exhibits" such as affidavits, letters, contracts, and loan documentation. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998).

A motion for judgment on the pleadings under Rule 12(c) is governed by the same standards as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28 (7th Cir. 2014). To survive a motion for judgment on the pleadings, a complaint must state a claim to relief that is plausible on its face, which means the plaintiff has pled factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged. *Wagner v. Teva Pharmaceuticals USA, Inc.*, 840 F.3d 355, 357-58 (7th Cir. 2016). In assessing a motion for judgment on the pleadings, the court must draw all reasonable inferences and facts in favor of the nonmovant, but need not accept as true any legal assertions. *Wagner*, 840 F.3d at 358.

Illinois Insurance Law

The parties agree that Illinois law governs the court's interpretation of the insurance policies at issue. Under Illinois law, an insurer must defend an action against its insured unless it is clear that the alleged claims do not fall within the terms of the policy. *Nautilus Ins. Co. v. 1452–4 N. Milwaukee Ave., LLC*, 562 F.3d 818, 821 (7th Cir. 2009). The burden of establishing that coverage is excluded falls on the insurer. *Id.* at 821.

To determine whether an insurer owes a duty to defend, a court must compare the allegations in the underlying complaint with the insurance policy language. *Burlington Ins. Co. v. Phillips-Garrett, Inc.*, 37 F. Supp. 3d 1005, 1013 (S.D. Ill. 2014). "If the underlying complaint alleges facts within or potentially within policy coverage, insurers are obligated to defend their policyholders, even if the underlying allegations are groundless, false or fraudulent." *Id.* "Both the policy terms and the allegations in the underlying complaint are liberally construed in favor of the insured." *Amerisure Mut. Ins. Co. v. Microplastics, Inc.*, 622 F.3d 806, 811 (7th Cir. 2010). "[I]f the insurer relies on an exclusionary provision, it must be 'clear and free from doubt' that the policy's

exclusion prevents coverage." *Fisher v. St. Paul Ins. Co. of Illinois*, 2003 WL 1903983, at *8 (N.D. Ill., April 17, 2003), quoting *Atl. Mut. Ins. Co. v. Am. Acad. of Orthopaedic Surgeons*, 734 N.E.2d 50, 56 (Ill. App. Ct. 2000).

While any doubts of coverage are resolved in favor of the insured, the insurer may refuse to defend the insured where the allegations of the complaint "are clearly outside the bounds of the policy coverage." *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335, 338 (7th Cir. 2010).

In *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011, 1017 (Ill. 2010), the Illinois Supreme Court discussed principles of interpretation for insurance policies:

> "A court's primary objective in construing the language of the policy is to ascertain and give effect to the intentions of the parties as expressed in their agreement. [Citation.] If the terms of the policy are clear and unambiguous, they must be given their plain and ordinary meaning. [Citation.] Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. [Citation.] In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer. [Citation.] A court must construe the policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. [Citation.]"

Pekin Ins. Co. v. Wilson, 930 N.E.2d 1011, 1017 (Ill. 2010), quoting *Amer. States Ins. Co. v. Koloms*, 177 Ill.2d 473, 479 (Ill. 1997) (alterations in original).

The Insurers' Motion for Judgment on the Pleadings

In this case, the Insurers owe a duty to defend and indemnify the Defendants unless they can meet their burden of showing that the allegations of the *Doe* complaint are clearly outside the bounds of the policy coverage.

The Insurers argue that the Package Policy does not afford coverage, identifying three potentially relevant liability coverage parts: (1) the SMML coverage part; (2) the CGL coverage part; and (3) the SLEOL coverage part. The Insurers argue that the SMML and CGL coverage parts do not apply because the alleged wrongful acts did not occur during the policy period, and that the Sexual Misconduct or Molestation Exclusion bars coverage for the *Doe* lawsuit under the SLEOL coverage part (and the CGL coverage part).

The Insurers argue that the Umbrella Policy does not afford coverage because the alleged bodily injury did not occur during the policy period, and because the SMML and SLEOL coverage parts in the Umbrella Policy only afford coverage if the underlying Package Policy's corresponding coverage parts afford coverage, which they do not.

Defendants do not argue that the SMML and CGL coverage parts provide coverage for the *Doe* lawsuit, instead relying only on the SLEOL coverage parts to establish coverage.[2] Defendants argue that both policies' SLEOL coverage parts provide coverage, because the Sexual Misconduct or Molestation Exclusion does not bar coverage.

At issue, then, is whether the SLEOL coverage part affords coverage for the *Doe* lawsuit, or whether the Sexual Misconduct or Molestation Exclusion ("the Exclusion") bars coverage.

The SLEOL coverage part covers certain "sums that the insured becomes legally obligated to pay because of 'loss' arising from a 'wrongful act' to which this insurance applies." "'Wrongful act' means any actual or alleged act, breach of duty, neglect, error, omission, misstatement, or misleading statement committed by the insured, or by any person for whose acts the insured is legally liable, while in the course of performing 'educational institution' duties."

The Exclusion states:

This insurance does not apply to . . . [:]

16. Sexual Misconduct or Molestation

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[2]The SMML and CGL parts provide coverage on an occurrence basis while the SLEOL coverage part provides coverage on a claims-made basis. Because the underlying events are alleged to have occurred prior to the policy period, but the claim was made during the policy period, the court agrees that the SLEOL coverage part is the only coverage part that potentially applies.

> Any actual or alleged sexual misconduct or sexual molestation of any person; and any allegations relating thereto that an insured negligently employed, investigated, supervised or retained a person, or based on an alleged practice, custom or policy, including but not limited to any allegation that a person's civil rights have been violated.

The Insurers argue that the Exclusion unambiguously applies to bar coverage for the *Doe* lawsuit, highlighting the language "including but not limited to any allegation that a person's civil rights have been violated." The Defendants argue that the *Doe* lawsuit, which concerns allegations of sexual misconduct by a *student* and not any employee of the insured, does not fit into the terms of the Exclusion.

The Exclusion is far from a model of clarity in drafting. What matters in this case is whether Defendants' reading of the Exclusion is plausible, because any doubts of coverage are resolved in favor of the insured, policy terms are liberally construed in favor of the insured, and it must be clear and free from doubt that a policy exclusion prevents coverage. *McFatridge*, 604 F.3d 335, 338; *Microplastics, Inc.*, 622 F.3d 806, 811; *Fisher*, 2003 WL 1903983, at *8.

The Exclusion is contained within the School Leaders Errors and Omissions coverage part, covering "wrongful acts" by "any person for whose acts the insured is legally liable, while in the course of performing 'educational institution' duties." The middle part of the Exclusion specifically links itself to some actions that would be performed by school leaders concerning *employees*: "employed, investigated, supervised or retained a person." The rest of the Exclusion can be read as linked to those and other such actions school leaders can take or fail to take concerning the actions of school

employees. If the *Doe* plaintiffs alleged sexual misconduct by a school leader or school employee, the Exclusion would clearly apply. However, the *Doe* plaintiffs allege sexual misconduct by another student, and it is not clear and free from doubt that such underlying conduct by a *student* fits into the Exclusion.

Because it is not clear and free from doubt the Exclusion applies, its presence in the Package Policy does not bar coverage for the *Doe* lawsuit that the SLEOL coverage part provides. See *Fisher*, 2003 WL 1903983, at *8. Because the Umbrella Policy's SLEOL Endorsement follows the Package Policy's provisions and exclusions, it likewise provides coverage for the *Doe* lawsuit. Because their policies do provide coverage for the *Doe* lawsuit, the Insurers' Motion for Judgment on the Pleadings is denied as to the claims in their Amended Complaint.

The Insurers also argue that judgement on the pleadings should be granted in their favor on Defendants' Counterclaim because the Policies do not afford coverage for the *Doe* lawsuit. Having found otherwise, the court denies the Motion for Judgment on the Pleadings as to the Counterclaim as well. The District may proceed on its claims against the Insurers.

IT IS THEREFORE ORDERED THAT:

(1) The Insurers' Motion for Judgment on the Pleadings (#44) is denied.

(2) This case is referred to Magistrate Judge Eric I. Long for further proceedings, including lifting the stay of discovery.

ENTERED this 6th day of August, 2019.

s/COLIN S. BRUCE
U.S. DISTRICT JUDGE