UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KINSALE INSURANCE COMPANY, an Arkansas corporation,

Plaintiff,

v.

GOLDEN BEGINNINGS, LLC, dba NONNO'S GUEST HOME, a California limited liability company,

Defendant.

Case No. CV 20-10302-DMG (AFMx)

ORDER RE KINSALE'S MOTION FOR PARTIAL SUMMARY JUDGMENT [52]

This matter is before the Court on a Motion for Partial Summary Judgment ("MSJ") filed by Plaintiff Kinsale Insurance Company ("Kinsale"). [Doc. # 52.] Plaintiff filed the MSJ on August 13, 2021. Defendant Golden Beginnings, LLC, doing business as Nonno's Guest Home ("Golden Beginnings"), did not file an opposition. For the following reasons, the Court **GRANTS** the MSJ.

I.

FACTUAL AND PROCEDURAL BACKGROUND[1]

This is an insurance coverage dispute concerning whether Kinsale owes a duty to defend or indemnify Golden Beginnings in a lawsuit brought against Golden Beginnings in Los Angeles County Superior Court entitled *McGee, et al. v. Golden Beginnings, LLC, et al.*, Case No. 20STCV20695 (the "*McGee* Action").

A. The Policy

Golden Beginnings is the operator of an elder care facility in Long Beach, California ("the Facility"). SUF 1.[2] Telitha McGee was a resident of the Facility. SUF 1. On May 4, 2019, Ms. McGee suffered an unwitnessed fall while toileting at the Facility. SUF 2. Golden Beginnings' managing member, Duane Alex Vienna, states that he understands Ms. McGee's daughter, a licensed vocational nurse, visited Ms. McGee shortly thereafter and told staff Ms. McGee "seemed okay and did not require further medical assessment." Vienna Decl. at ¶ 9 [Doc. # 54]. On May 6, 2019, however, two days after the fall, Ms. McGee complained of pain, and the administrator of the Facility contacted Vienna to inform him of the events involving McGee. SUF 3-4. Vienna contacted McGee's daughter and recommended she call 911 to transfer McGee to the hospital. SUF 5. Ms. McGee's daughter instead arranged for a mobile x-ray service to come to the Facility. SUF 5-6. The x-ray, which was conducted on May 7, 2019, revealed that Ms. McGee had suffered a

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[1] A court cannot grant a motion for summary judgment based on the nonmoving party's failure to oppose the motion. A court may grant summary judgment only where the moving party demonstrates that, in light of the undisputed facts in the record, it is entitled to judgment as a matter of law. *See, e.g.*, Fed. R. Civ. P. 56(e)(3); L.R. 7-12; *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010) ("Ninth Circuit precedent bars district courts from granting summary judgment simply because a party fails to file an opposition or violates a local rule, and [district courts must] analyze the record to determine whether any disputed material fact [i]s present.").

[2] All references to "SUF" followed by numbers are to entries in Kinsale's Statement of Uncontroverted Facts and Conclusions of Law. [Doc. # 57.] Because Defendant did not oppose the MSJ or submit any evidence that could controvert Plaintiff's statements of fact, the Court deems these facts uncontroverted. *See* Fed. R. Civ. P. 56(e)(2).

fracture to her right hip. SUF 7. Ms. McGee was taken to the hospital for evaluation and consultation with an orthopedic surgeon. SUF 8-9. Ms. McGee's relatives assert that she was found not to be a good candidate for surgery. First Amended Compl. ("FAC"), Ex. 3, at ¶ 18 (State Court Complaint) [Doc. # 59-3].[3] Ms. McGee returned to the Facility, where she was placed on hospice. SUF 10. Ms. McGee passed away at the Facility on June 3, 2019. SUF 13.

Vienna acknowledges he knew Ms. McGee had fallen, that she was hospitalized, and that he knew in early June 2019 that she ultimately passed away. SUF 11-12, 14. Vienna says that after Ms. McGee died, the McGee family wrote thank you notes and brought food to the Facility staff to thank them for the care they provided Ms. McGee. Vienna Decl. at ¶ 11.

B. The Application and Policy

As the managing member, Vienna was responsible for applying for and purchasing insurance at Golden Beginnings. SUF 3, 15. In late June 2019, Vienna sought a new professional and general liability insurance policy for Golden Beginnings because the company's existing insurance policy was expiring. Vienna Decl. at ¶ 16. Vienna sought insurance through a broker, Sierra Professional Insurance Services, and ultimately received a quote from Kinsale. SUF 16-19. Kinsale provided an application form, which Vienna's broker filled out and Vienna signed on July 1, 2019 (the "Application"). SUF 20-21.

Question 57 of the Application asked the following:

> "In the past **24 months** has any resident fallen and suffered a fracture, been hospitalized or died as a result of the fall? ***If yes, please provide details*** [. . .]"

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[3] On August 13, 2021, Kinsale filed an unopposed *ex parte* application for an order granting leave to file a FAC to correct a scriveners' error in Defendant's name. [Doc. # 51.] On August 13, 2021, the Court granted the application and provided that the Answer already filed was deemed to be the Answer to the FAC. [Doc. # 58.] Kinsale filed its FAC on August 16, 2021. [Doc. # 59.]

Golden Beginnings replied "no" to Question 57, but identified "Mary Meyers" as having suffered a fall on January 28, 2018 and died on February 25, 2018. SUF 24.[4]

Question 73 of the Application asked the following:

> "Is the applicant or any person proposed for this insurance aware of any act, error, omission, fact, circumstance, or records request from any attorney which may result in a claim or suit?"

Golden Beginnings again replied "no" to Question 73. SUF 25. Vienna says he "trusted that Sierra [the insurance broker] had correctly filled out" the Application, and he "do[es] not know why Questions 57 and 73 were marked 'no' [. . .]." Vienna Decl. at ¶ 24. The Application also includes an acknowledgment by the applicant that the answers provided "are based on a reasonable inquiry and/or investigation" and a warranty that "the above statements and particulars together with any attached or appended documents are true and complete and do not misrepresent, misstate or omit any material facts." SUF 26. Kinsale bound coverage on the policy as of July 1, 2019, and it was in place until July 1, 2020 (the "Policy"). SUF 19-23.

The Policy provides that Kinsale will pay for sums "any 'insured' becomes legally obligated to pay as 'damages' and 'defense costs' arising out of 'bodily injury' because of a 'health care incident' [. . .]." The Policy applies, however, "only if [. . .] prior to the effective date of this Policy, no 'insured' had knowledge of any 'health care incident' that could reasonably give rise to a 'claim' under this Policy." SUF 33. A "health care incident" is "any act or omission in the providing or failure to provide 'health care professional services' by an 'insured' to your patients that result in 'bodily injury.' [. . .]" SUF 34.

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[4] Kinsale's underwriter, Tyler Hamblen, was familiar with Golden Beginnings' application. He understood the fall involving Mary Meyers had occurred at another facility affiliated with Vienna, but that the other facility was not applying for coverage under the Policy. Hamblen states that he therefore did not require additional information about the fall because it was not relevant to Golden Beginnings' application. SUF 28; Hamblen Decl. at ¶¶ 6-8, 11.

The Policy also excludes from coverage prior or known claims based on, arising out of, or resulting from "any act, omission or circumstance that could reasonably have been foreseen to give rise to a 'claim' prior to the effective date of the 'policy period' [. . .]." SUF 35.

C. The *McGee* Action

On June 19, 2020, Golden Beginnings tendered a complaint brought by Ms. McGee's heirs to Kinsale, seeking defense and indemnity under the Policy. SUF 37-39. The complaint was filed in Los Angeles County Superior Court on June 2, 2020, against Golden Beginnings, LLC dba Nonno's Guest Home, alleging causes of action for: (1) statutory elder abuse or neglect, (2) negligence, and (3) wrongful death, related to Ms. McGee's fall on May 3, 2019 (the "*McGee* Action"). SUF 37.

The *McGee* Action alleges Ms. McGee fell while using the toilet unassisted despite a care plan requiring assistance with all toileting. The *McGee* Action also alleges Ms. McGee was in immediate pain and cried out for help after she fell, yet Golden Beginnings did not perform a post-fall assessment or otherwise seek healthcare for Ms. McGee for two days. Compl. at ¶ 18; *see also* State Court Compl. at ¶ 17. On November 6, 2020, Kinsale sent Golden Beginnings a letter in which it agreed to undertake the defense of the Facility subject to a full reservation of rights. SUF 40.

D. The Instant Action

On November 10, 2020, Kinsale filed suit against Golden Beginnings and the plaintiffs in the *McGee* Action.[5] Kinsale brought seven claims for declaratory relief: (1) Kinsale owes no duty to defend or (2) indemnify Golden Beginnings in the *McGee* Action because the *McGee* Action does not come within the terms of the Policy; (3) Kinsale owes no duty to defend or (4) indemnify Golden Beginnings in the *McGee* Action due to a material breach of warranty in Golden Beginnings' policy application to Kinsale; (5)

[5] On March 3, 2021, pursuant to the parties' stipulation, the Court dismissed the Complaint without prejudice as to all defendants except Golden Beginnings. [Doc. ## 42, 43.]

Kinsale owes no duty to defend or (6) indemnify Golden Beginnings in the *McGee* Action because the false affirmative warranties Golden Beginnings made on the policy application to Kinsale were material misrepresentations; and (7) Kinsale is entitled to reimbursement for its fees and costs expended to defend Golden Beginnings in the *McGee* Action. FAC at 10-22. Golden Beginnings filed its Answer on February 4, 2021. [Doc. # 32.]

On August 13, 2021, Kinsale filed its Motion for Partial Summary Judgment ("MSJ") against Golden Beginnings, seeking an order granting summary judgment in Kinsale's favor against Golden Beginnings on Kinsale's First, Second, Third, Fourth, and Seventh Claims for Relief. [Doc. # 52.]

Under Local Rule 7-9, Golden Beginnings was to file its opposition by Friday, August 20, 2021. It did not, and the time to do so has now passed. Kinsale nevertheless filed its Reply on August 27, 2021. [Doc. # 60.] The Court may grant an unopposed motion "if the movant's papers are themselves sufficient to support the motion and do not on their face reveal a genuine issue of material fact." *SD-3C, LLC v. Biwin Technology Ltd*, No. CV 12-407-PSG, 2015 WL 1224078, at *3 (N.D. Cal. Mar. 17, 2015) (footnote omitted) (quoting *McColm v. San Fran. Housing Auth.*, No. CV 02-5810-PJH, 2007 WL 1575883, at *10 (N.D. Cal. May 29, 2007)).

II.

LEGAL STANDARD

Summary judgment should be granted "if the movant shows that 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); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III.

DISCUSSION

Kinsale moves for partial summary judgement under two theories. First, Kinsale argues there is no potential for coverage of the *McGee* Action under the Policy because of a material misrepresentation by Golden Beginnings, rendering the Policy void. Second, Kinsale argues the Policy's plain language eliminates the potential for coverage for the *McGee* Action because of the failure of a condition precedent for coverage and an exclusion in the Policy.

Under California law, an insurer may have a duty to defend, or a duty to indemnify, or both. *Buss v. Superior Court*, 16 Cal. 4th 35, 45-46 (1997). While the duty to indemnify "runs to claims that are actually covered" by a given policy "in light of facts proved," the duty to defend "runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed." *Id*. Thus, while insurers must indemnify insureds only for proven claims, insurers are subject to a broader "potential for coverage" standard when there is a duty to defend. *Manzareck v. St. Paul Fire & Marine Ins. Co*., 519 F.3d 1025, 1031 (9th Cir. 2008); *Horace Mann Ins. Co. v. Barbara B.*, 4 Cal. 4th 1076, 1081 (1993) ("[T]he duty to defend is broader than the duty to indemnify; an insurer may owe a duty to defend its insured in an action in which no damages ultimately are awarded."). Insofar as the Court is aware, no liability has been established in the *McGee* Action as of yet. If there is no duty to defend, however, there will be no duty to indemnify.

A. Material Misrepresentations In Breach of Warranty

Kinsale argues Golden Beginnings' inaccurate answers to Questions 57 and 73 were material misrepresentations in breach of warranty and seeks reformation of the policy.

"A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." Cal. Ins. Code § 441. When statements in an application are "expressly declared to be warranties" they must be "strictly true, or the policy will not take effect." *Wolverine Brass Works v. Pacific Coast Cas. Co. of San Francisco*, 26 Cal. App. 183, 185 (1914). Under California Insurance Code section 330,

concealment is when a party neglects to communicate what the party knows, and ought to communicate. "When a policyholder conceals or misrepresents a material fact on an insurance application, the insurer is entitled to rescind the policy." *LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co*., 156 Cal. App. 4th 1259, 1266 (2007).

It is undisputed that Golden Beginnings indicated in its Application that no resident of the Facility had fallen, suffered a fracture, been hospitalized, or died as a result of the fall. It also is undisputed that Golden Beginnings stated it was unaware of any act, error, omission, fact, circumstance, or records request from any attorney which may result in a claim or suit. It is uncontroverted that both statements were untrue. The issue is therefore whether Golden Beginnings' misrepresentations on its application were material, such that Kinsale is entitled to rescind or seek reformation of the contract. *See Williamson & Vollmer Eng'g, Inc. v. Sequoia Ins. Co.*, 64 Cal. App. 3d 261, 275 (1976).

1. Materiality

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Cal. Ins. Code § 334. "'The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.'" *LA Sound*, 156 Cal. App. 4th at 1268-69 (quoting *Thompson v. Occidental Life Ins. Co*., 9 Cal. 3d 904, 916 (1973)). Moreover, materiality may be shown "by the effect of the misrepresentation on the 'likely practice of the insurance company,'" specifically "'the effect which truthful answers would have had upon the insurer.'" *Id*.

Kinsale asked specifically on its application form about whether any falls had occurred. And there is undisputed testimony from the insurer that had Golden Beginnings answered question 57 and 73 truthfully, Kinsale would not have agreed to bind the policy on the given terms. Hamblen Decl. at ¶¶ 16, 18. The omission of information regarding Ms. McGee's recent fall in Golden Beginnings' application was therefore material.

Vienna's contention that he did not knowingly make misrepresentations when answering the application has no effect on the analysis of materiality: concealment, whether intentional or unintentional, of known material facts is grounds for rescission. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (citing *Thompson*, 9 Cal. 3d at 915).

For these reasons, the Court **GRANTS** Kinsale's MSJ as to its Third and Fourth Claims.

B. Coverage Under the Policy

Insurance policies "are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666 (1995). Kinsale argues in the alternative that the terms of the Policy preclude coverage for the *McGee* Action.

1. The Policy's Condition Precedent

Golden Beginnings' Policy provides that Kinsale will pay for damages and defense costs "arising out of 'bodily injury' because of a 'health care incident'" only if "prior to the effective date of this Policy, no 'insured' had knowledge of any 'health care incident' that could reasonably give rise to a 'claim' under this Policy." SUF 33. In other words, the Policy establishes as a condition precedent to coverage that Golden Beginnings did not have knowledge of a health care incident that could reasonably give rise to a claim under the Policy.

The policy defines a "health care incident" as "any act or omission in the providing or failure to provide 'health care professional services' by an 'insured' to your patients that result in 'bodily injury.'" SUF 34. It is undisputed that Ms. McGee fell and fractured her hip while using the toilet alone, and that her broken hip was not diagnosed for several days after she fell. She was subsequently hospitalized, and later died in Golden Beginnings' Facility. This falls within the definition of a "health care incident." And it is undisputed that Vienna, and therefore Golden Beginnings, knew about this incident. SUF 11-12, 14. The only question is whether Ms. McGee's fall and the events that followed constituted a

health care incident that "could reasonably give rise to a claim" under the Policy. If they were, the language of the Policy is clear: claims arising out of the incident are not covered.

2. The Policy's Exclusion

While insurance "coverage is interpreted broadly so as to afford the greatest possible protection to the insured," "exclusionary clauses are interpreted narrowly against the insurer." *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003) (internal punctuation excluded). Accordingly, to bar coverage insurers must "phrase exceptions and exclusions in clear and unmistakable language." *Id*. Whereas the insured has the burden to establish that the claims fall within the basic scope of coverage, the insurer must demonstrate that the claim is specifically excluded. *Id*.

Golden Beginnings' Policy excludes from coverage prior or known claims based on, arising out of, or resulting from "any act, omission or circumstance that could reasonably have been foreseen to give rise to a 'claim' prior to the effective date of the 'policy period' [. . .]." SUF 35. The language of the exclusion is unambiguous. There is no dispute that the *McGee* Action is a claim arising out of an "act, omission, or circumstance" that occurred prior to the effective date of the Policy. The only question, again, is whether the events surrounding Ms. McGee's fall "could reasonably have been foreseen to give rise to a claim." If they could reasonably have been foreseen to give rise to a claim, then the claim is subject to an exclusion under the Policy and, again, there is no coverage.

3. Whether the *McGee* Action Was Reasonably Foreseeable

Vienna does not assert that he did not realize the events underlying the *McGee* Action could give rise to a claim. But even if he did, his subjective expectation does not matter: whether a claim was reasonably foreseeable is an objective question. In *Weddington v. United Nat. Ins. Co*., the district court articulated a two-part, "subjective-objective" test to apply to determine whether an exclusion for "reasonably foresee[able]" claims applies in a claims-made professional liability insurance agreement:

> The first part requires that the insured have knowledge of the relevant suit, act, error, or omission. The second part is satisfied if the suit, act, error, or

> omission might reasonably be expected to result in a claim or suit. This condition does not require that the insured actually form such an expectation.

No. C 07-1733 SBA, 2008 WL 590512, at *5 (N.D. Cal. Feb. 29, 2008), *aff'd*, 346 F. App'x 224 (9th Cir. 2009) (citations omitted) (citing *Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 237 (3d Cir. 2006)). The first part of the test is subjective; that is, it requires that the insured subjectively "be aware of acts that caused a [. . .] claim to be filed against" it. *Id*. The second part is objective, assessing "whether a reasonable professional in the insured's position might expect a claim or suit to result." *Id*. At this step, it is irrelevant whether the insured subjectively believed a claim or suit would result. *Id*. The subjective-objective test is well-established and has been applied by several Courts of Appeals in interpreting prior knowledge provisions containing language related to reasonableness in claims-made policies. *See, e.g.*, *Chicago Ins. Co. v. Paulson & Nace, PLLC*, 783 F.3d 897, 901 (D.C. Cir. 2015); *Koransky, Bouwer & Poracky, P.C. v. Bar Plan Mut. Ins. Co.*, 712 F.3d 336, 343 (7th Cir. 2013); *Selko v. Home Ins. Co.*, 139 F.3d 146, 152 (3d Cir.1998).

Likewise, in *Coregis Ins. Co. v. Camico Mut. Ins. Co.*, 959 F. Supp. 1213 (C.D. Cal. 1997), a court in this District applying California insurance law found a similar provision precluded coverage for a claim arising from conduct that a reasonable person would have foreseen might form the basis of a claim or suit—even though the defendant did not actually foresee that it would. 959 F. Supp. at 1222 (citing *Phoenix Ins. Co. v. Sukut Construction Co*., 136 Cal. App. 3d 673, 676 (1982)).

It is undisputed that Vienna knew about Ms. McGee's fall, fracture, subsequent hospitalization, and death. Vienna states Ms. McGee's family wrote letters and brought food to thank the staff for the care they provided Ms. McGee, which might militate against a finding that a reasonable person would have expected a lawsuit to follow. The majority of the facts, however, tend to support the conclusion that a reasonable person would have foreseen a suit. Ms. McGee fell while using the bathroom alone. She suffered a serious injury, of exactly the kind that might be expected from such a fall in an elder care facility,

that was nevertheless not diagnosed for several days. She was hospitalized for her injuries, placed on hospice, and later died. A reasonable professional would have foreseen that Ms. McGee's fall was likely to give rise to a claim.

Based on the foregoing, the Court finds the condition precedent was not triggered and thus the Policy never attached to the risk. The undisputed facts also eliminate any possibility of coverage under the conditions set forth in the exclusion. The Court therefore **GRANTS** Kinsale's MSJ as to its First and Second Claims.

C. Reimbursement of Defense Fees & Costs

Kinsale's MSJ seeks an adjudication that it is entitled to recover any attorney's fees and costs it has expended on Golden Beginnings' behalf in defense of the *McGee* Action. Kinsale advanced fees and costs to defend Golden Beginnings in the *McGee* Action, but did so under a full reservation of rights. Hafey Decl. at ¶ 8. In its letter from November 6, 2020, counsel for Kinsale stated that although it did not believe the claims against Golden Beginnings fell under the Policy, it would undertake the defense of Golden Beginnings subject to a full reservation of rights, including the right to seek reimbursement of any amounts paid by Kinsale in connection with the *McGee* Action and to seek declaratory relief to determine Kinsale's right and obligations under the Policy. *Id*.

An insurer may condition its proffer of a defense upon reservation of a right to later seek reimbursement of costs advanced to defend claims "that are not, and never were, potentially covered by the relevant policy." *Buss*, 16 Cal. 4th at 65. Thus, an insurer may recoup defense expenses it advanced, but which in hindsight it never owed. *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal. 4th 643, 657 (2005). To do so, an insurer must first demonstrate it did not have a duty to defend these claims.

The duty to defend arises upon tender of a potentially covered claim and lasts until the underlying lawsuit has concluded, or until it has been determined there is no potential for coverage. 36 Cal. 4th at 655. When the duty to defend is extinguished, by showing no claim could be covered, "it is extinguished only prospectively and not retroactively." *Buss*, 16 Cal. 4th at 46. But if an insurer shows none of the claims are even *potentially* covered,

the insurer does not have a duty to defend, because it "has not been paid premiums by the insured for a defense." *Id*. at 47.

Here, Kinsale's November 6, 2020 letter expressly reserved its rights to seek reimbursement of any amounts it paid towards Golden Beginnings' defense of the *McGee* Action. The Court has determined that Kinsale never had a duty to a defend Golden Beginnings in the *McGee* Action because there was no coverage under the Policy. Additionally, the material misrepresentations in Golden Beginnings' Application render the policy void. Therefore, the Court **GRANTS** Kinsale's MSJ as to its Seventh Claim.

IV.
CONCLUSION

In light of the foregoing, the Court **GRANTS** Plaintiff's MSJ. Plaintiff shall submit a proposed Judgment for the Court's consideration within 10 days from the date of this Order. All scheduled dates and deadlines are VACATED.

IT IS SO ORDERED.

DATED: September 15, 2021

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE