UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MADGETT LAW, LLC, Plaintiff, v. PRAVATI CAPITAL, LLC; PRAVATI INVESTMENT FUND IV, LP; and BERKSHIRE HATHAWAY DIRECT INSURANCE COMPANY d/b/a BIBERK INSURANCE COMPANY, Defendants.	Case No. 23-CV-1271 (NEB/JFD) ORDER ON DEFENDANT BERKSHIRE HATHAWAY DIRECT INSURANCE COMPANY'S PARTIAL MOTION TO DISMISS

Madgett Law, LLC seeks coverage from Defendant Berkshire Hathaway Direct Insurance Company for defense and indemnification in an underlying arbitration over legal funding agreements. The policy at issue is Berkshire's professional liability policy covering the law firm.[1] But the underlying arbitration is for breach of contract. Because the policy referenced in the complaint does not apply to breach-of-contract claims, Berkshire's motion to dismiss is granted.

[1] The named insured under the professional liability insurance policy is "Madgett Law, PLLC." (ECF No. 42-2 at 4.) For purposes of this motion, Berkshire assumes that Plaintiff Madgett Law, LLC is insured under the policy. (ECF No. 41 at 5 n.2.)

BACKGROUND[2]

I. The Underlying Dispute

The underlying dispute involves an arbitration demand that Pravati (including Pravati Investment Fund IV, LP and Pravati Capital, LLC) filed against Madgett Law and Robert R. Hopper & Associates, LLC ("Hopper"). (ECF No. 7-1 ("Compl.") at 3–4.) In the arbitration, Pravati seeks accelerated interest and fees for an alleged breach of contract arising out of legal funding agreements between Pravati and Hopper. (Compl. at 3–4; *id.* ¶¶ 14–16.) Under the agreements, Pravati allegedly transferred funds to Hopper to litigate a case in exchange for a portion of the attorney fees earned by Hopper. (*Id.* ¶ 16.) Madgett Law alleges that it was not a party to these agreements. (*Id.* ¶¶ 15, 21, 34, 45, 48.)

Hopper hired Madgett Law to work as co-counsel on the litigation covered by the legal funding agreements—*Alexander v. 1328 Uptown, Inc. et al.*, No. 18-CV-1544 (ECT/ECW) (D. Minn.) ("*Alexander*"). (Compl.¶¶ 16–18; *see id.* ¶ 7.) Hopper agreed to pay Madgett Law based on an hourly fee. (*Id.* ¶¶ 18, 21.) If the case settled, Madgett Law would not be entitled to any portion of any settlement; nor could he have directed any portion of the settlement to Pravati. (*Id.* ¶¶ 18, 34–35, 48.) Attorney David Madgett's involvement in the *Alexander* litigation appears to have been brief: In January 2022, he filed a Notice of Appearance. (ECF No. 42-1.) And in July, Madgett withdrew after

[2] The Court draws the following background from the complaint, accepting as true all factual allegations in the complaint and drawing all reasonable inferences in favor of the nonmovant. *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014).

Hopper informed him his services "were no longer needed." (Compl. ¶ 25; *see id.* ¶ 26.) Several months later, after *Alexander* apparently settled, Madgett filed a notice of appeal related to a costs motion and a partial summary judgment order.[3] *See Alexander*, ECF No. 294 (D. Minn. Oct. 27, 2022).

In December 2022, Madgett received a demand letter from Pravati alleging a "breach of an unknown agreement and a demand for payment in the amount of $2,831,976.00." (Compl. ¶ 33; *see* ECF No. 38-1 at 146–49 (Dec. 9, 2022 demand letter).) The demand letter asserted that Madgett Law and Hopper violated several provisions of three legal funding contracts and guarantee agreements that had been executed in 2020 and 2021. (ECF No. 38-1 at 147–48.) The letter asserts that Madgett Law and Hopper are "in material default under the Agreements." (*Id.* at 148.)

Madgett informed Pravati that neither he nor his law firms were a party to the legal funding agreements. Pravati nonetheless maintained that Madgett Law breached the agreements. (Compl. ¶¶ 34, 43.) In January 2023, Pravati began an arbitration proceeding against Madgett Law and Hopper for breach of the legal funding agreements. In the arbitration, Pravati brings claims for breach of contract, breach of implied warranty of good faith and fair dealing, fraud, conversion, successor liability, appointment of receiver/examiner, full accounting, imposition of constructive trust, and unjust

[3] The notice of appearance filed in *Alexander* states that Madgett was a lawyer with Madgett & Klein, PLLC. (ECF No. 42-1.) The notice of appeal states that Madgett was a lawyer with Madgett Law, PLLC. *Alexander*, ECF No. 294 (D. Minn. Oct. 27, 2022).

enrichment. (*Id.* ¶¶ 33, 50, 96; *see* ECF No. 57-5 (arbitration demand).) The arbitration claim does not include any claim for negligence or professional liability.

II. The Professional Liability Policy

The complaint alleges that Berkshire insured Madgett Law "for any errors, omissions, and other professional liability." (Compl. ¶ 95.) The professional liability policy at issue ran from August 11, 2022, to August 11, 2023. (ECF No. 42-2 ("Policy") at 4.) Under the policy, Berkshire has "the right and duty to appoint an attorney and defend a covered Claim, even if the allegations are groundless, false or fraudulent." (*Id.* at 9.) A "Claim" is "a written demand or written assertion of a legal right made against any Insured seeking Damages or non-monetary relief, including arbitration proceedings." (*Id.* at 17.) "To be covered, the Claim must also arise from a Wrongful Act committed during the Policy Period . . . ." (*Id.* at 15; *see id.* at 9 (coverage does not apply to any wrongful act committed before the policy's retroactive date); *id.* at 4 (listing retroactive date as Aug. 11, 2022).)

The policy provides for indemnification for wrongful acts committed in the performance of insured services:

> The Company will pay on the Insured's behalf those sums, in excess of the Retention and within the applicable Limit of Insurance, that the Insured becomes legally obligated to pay as Damages or Claim Expense because of Claims first made during the Policy Period or Extended Reporting Period (if applicable) *as a result of Wrongful Acts committed in the performance of Insured Services*.

(*Id.* at 9 (emphasis added).) The policy defines "Wrongful Act" as "the following conduct or alleged conduct by an Insured, or any person or organization for whom an Insured is legally liable . . . [a] negligent act, error or omission."[4] (*Id.*) "Insured Services" are "those services performed for others as stated in Item 4. on the Declarations Page, or as otherwise stated by endorsement to this policy." (*Id.* at 18.) The Schedule of Insured Services identifies "Attorney" as the insured services. (*Id.* at 4.)

> The policy is also subject to the exclusions below:
>
> A. The Company is not obligated to pay Damages or Claim Expense or defend Claims for or arising directly or indirectly out of:
> . . .
> 22. Theft, misappropriation, commingling or conversion of any funds, monies, assets, or property.
> . . .
> C. The Company is not obligated to pay Damages or Claim Expense or defend Claims for the breach of express warranties, guarantees or contracts; provided, however, with respect to allegations of breach of contract this exclusion shall not apply to any liability that would have attached in the absence of such contract nor to coverage for Claims for actual or alleged negligent performance of Insured Services.

(*Id.* at 12, 14.)

In December 2022, after receiving the demand letter (and just before the arbitration began), Madgett Law tendered Pravati's claim to Berkshire and requested defense counsel. (Compl. ¶¶ 54, 96, 98.) Berkshire denied coverage because Pravati's claim did not assert a "Wrongful Act" under the professional liability insurance policy, and because

[4] No party asserts that any other type of "Wrongful Act" identified in the policy is relevant. (*See* ECF No. 41 at 11 n.3.)

the claims were excluded under the policy's breach of contract, and theft, misappropriation, commingling, and conversion exclusions. (*Id.* ¶¶ 100–01.)

Madgett Law brings a single count of breach of contract against Berkshire for failure to defend it against Pravati's claim. (Compl. ¶¶ 94–103.) Berkshire now moves to dismiss for failure to state a claim. (ECF No. 40.)

ANALYSIS

I. Legal Standard

Rule 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "[t]he complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Horras v. Am. Cap. Strategies, Ltd.*, 729 F.3d 798, 801 (8th Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555. At this stage in the litigation, the Court accepts as true all factual allegations in the complaint and draws all reasonable inferences in Madgett Law's favor. *Topchian*, 760 F.3d at 848.

The Court assesses the plausibility of the complaint considering the materials that are necessarily embraced by the pleadings and are exhibits to the complaint. *Trone Health Servs., Inc. v. Express Scripts Holding Co.*, 974 F.3d 845, 850 (8th Cir. 2020). The Court will

consider Pravati's December 2022 demand letter, the arbitration demand, and the professional liability insurance policy because they are "embraced by the pleadings." *Id.* Other documents submitted by Madgett Law are not fairly embraced by the pleadings. (ECF Nos. 57-1–57-4, 57-6, 57-8–57-9.) Because consideration of them would convert this motion to one for summary judgment, the Court declines to do so. *See* Fed. R. Civ. P. 12(d); *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017). The Court also takes judicial notice of public records, including court records. *Stahl v. United States Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss." (citation omitted)); *Levy v. Ohl*, 477 F.3d 988, 992 (8th Cir. 2007) (court records).

Duty to defend and contract interpretation. In a diversity action, "Minnesota law governs [the] interpretation of the insurance policy." *W3i Mobile, LLC v. Westchester Fire Ins. Co.*, 632 F.3d 432, 436 (8th Cir. 2011). An insurer that has agreed to defend an insured in an underlying action that "bring[s] a covered claim against the insured" has a duty to defend the insured. *Cont'l Ins. Co. v. Daikin Applied Americas Inc.*, 998 F.3d 356, 359 (8th Cir. 2021). The duty to defend is broader than the duty to indemnify. *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006).

To trigger an insurer's duty to defend, the insured must meet a threshold burden. *Cont'l Ins.*, 998 F.3d at 359 (citing *St. Paul Mercury Ins. Co. v. Dahlberg, Inc.*, 596 N.W.2d

674, 677 (Minn. Ct. App. 1999)). As the insured, Madgett Law may meet this burden in one of two ways. *Id.*

First, Madgett Law may show that at least one of the claims in the underlying complaint is "'arguably within the policy's scope' based on the allegations in that complaint." *Id.* (citations omitted). In determining whether a claim is arguably within the scope of the policy, the Court construes that complaint liberally, comparing the language of the allegations in the underlying complaint to the relevant language of the insurance policy. *Id.* at 360 (citing *Home Ins. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 535 (Minn. 2003)); *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 616 (Minn. 2012). The Court considers the policy using general principles of contract construction under Minnesota law, giving effect to the intent of the parties. *Jerry's Enters., Inc. v. U.S. Specialty Ins. Co.*, 845 F.3d 883, 887 (8th Cir. 2017) (citing *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002)). The policy "must be construed as a whole, and unambiguous language must be given its plain and ordinary meaning." *Midwest Fam. Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 636 (Minn. 2013) (citation omitted).

Second, Madgett Law may provide "extrinsic facts 'within the insurer's knowledge [that] clearly establish' that a covered claim is at issue in the underlying lawsuit." *Cont'l Ins.*, 998 F.3d at 359 (alteration in original) (citing *Meadowbrook, Inc. v. Tower Ins.*, 559 N.W.2d 411, 418 n.19 (Minn. 1997)).

II. Duty to Defend Covered Claims

Applying these legal standards, the Court finds that Pravati's claim falls outside the scope of coverage of the professional liability insurance policy. The policy covers damages that Madgett Law is legally obligated to pay "because of Claims . . . as a result of Wrongful Acts committed in the performance of Insured Services," which are "Attorney" services. (Policy at 9; *see id.* at 4, 18 ("'Insured Services' means those services performed for others" as "Attorney").) A "Wrongful Act" is "[a] negligent act, error or omission." (*Id.* at 9.) The policy also provides that Berkshire has a duty to defend "a *covered* Claim," and "[t]o be covered, the Claim must . . . arise from a Wrongful Act committed during the Policy Period."[5] (*Id.* at 9, 15 (emphasis added).)

The wrongful acts alleged in the arbitration demand do not match the policy's definition of "Wrongful Act." Pravati's arbitration demand lists ten causes of action: breach of contract; breach of implied warranty of good faith and fair dealing; fraud; conversion; successor liability; appointment of a receiver/examiner; accounting; imposition of a constructive trust; unjust enrichment; and "other legal and equitable relief as is warranted." (ECF No. 57-5 at 1.) True, the arbitration demand lacks a factual basis

[5] Madgett Law argues that Berkshire owes a duty to defend it against Pravati's claim, and that "Pravati's claims do not need to allege a wrongful act to invoke coverage." (ECF No. 53 at 7; *see also id.* at 3 (asserting that Berkshire must "defend all claims made against Madgett Law").) Madgett Law is wrong. The policy language provides that Berkshire has a duty to defend "a covered Claim" which must "arise from a Wrongful Act," (Policy at 9, 15), so Pravati's claim must arise from a wrongful act to invoke coverage.

supporting Pravati's claim. But Pravati's demand letter provides the claim's factual basis, asserting that Madgett Law breached three identified legal funding agreements. (ECF No. 38-1.) The letter maintains that the "Law Firm[6] is in material default under the Agreements," explaining that it "failed to timely and accurately deliver updates, documents, and Proceeds to Pravati," "concealed and failed to disclose material information about it and the Cases," and "tortiously converted Pravati's interest in and to Proceeds." (*Id.* at 148.)

Nothing in the arbitration demand or Pravati's demand letter suggests "a negligent act, error, or omission" committed in the performance of services for others that is covered by the professional liability policy. *Cf. Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 664, 667 (Minn. Ct. App. 1988) (affirming no duty to defend for lack of a covered "negligent act, error or omission" where the underlying complaint asserted a breach-of-contract claim and lacked allegations that insured acted negligently). The complaint does not allege that Pravati accuses Madgett Law of committing a negligent act, error, or omission *while performing services as an attorney*. (*See* Compl. *passim*.) Indeed, Madgett Law admits that "Pravati does not identify any act or omission by Madgett that violated any identifiable duty," and that "no one at Madgett Law . . . has a grasp of the

[6] The letter identifies "Law Firm" in part as "Madgett PLLC f/k/a Madgett & Klein, PLLC; *Madgett Law, LLC a/k/a Madgett Law, PLLC* a/k/a Madgett & Klein APLC d/b/a Madgett & Klein." (ECF No. 38-1 at 146–47 (emphasis added).)

facts at this point, let alone enough information to allege in good faith . . . how those facts fit within the four corners of the policy language." (ECF No. 53 at 4, 5.)

At oral argument, Madgett Law posited that perhaps Pravati had a claim arguably covered by the professional liability policy, such as a claim for its negligent supervision of Hopper in connection with the *Alexander* case. But this claim is nowhere in Pravati's arbitration demand or demand letter. The Court and Berkshire "need not speculate about facts that may trigger its duty to defend." *Dahlberg*, 596 N.W.2d at 677.

As for extrinsic evidence, Madgett Law contends that Pravati's answer to its complaint alleges "a theory that Hopper may have been acting as an agent for Madgett Law and that Madgett Law failed to (or stated otherwise, 'professionally errored') in updating its business records and or specifying Hopper's relationship to the firm." (ECF No. 53 at 6 (citing ECF No. 38 ("Pravati Ans.") ¶ 4).) Assuming Pravati means to assert this theory in the arbitration, it relates to Madgett Law's alleged failure to adhere to legal funding agreements, not any error or omission made "in the performance of" Madgett Law's legal services for others, and thus is not arguably covered by the policy. (Policy at 9; *see* Pravati Ans. at 2–3 ("The claim in arbitration is one for breach of contract, arising out of three Law Firm Legal Funding Contracts & Security Agreements . . . by which the Pravati Fund advanced to Madgett and Mr. Hopper and their firms, a total of $1.8 million dollars.").)

Because Madgett Law fails to present "a covered claim through a complaint or extrinsic evidence," it has not met its burden to trigger Berkshire's duty to defend. *Dahlberg*, 596 N.W.2d at 677. The Court thus grants the motion to dismiss the breach-of-contract claim against Berkshire.[7] *See Sletten & Brettin Orthodontics, LLC v. Cont'l Cas. Co.*, 782 F.3d 931, 934–35 (8th Cir. 2015) (affirming dismissal of breach-of-contract claim for failure to defend).

Finally, Madgett Law contends that it had four insurance policies with Berkshire and that one of those policies *must* cover Pravati's claim. The complaint does not read so broadly as to allege other policies. Instead, it alleges that Berkshire insured Madgett Law "for any errors, omissions, and other professional liability," suggesting the professional liability insurance policy. (Compl. ¶ 95.) The complaint mentions no other type of insurance nor reasonably infers that any other policy might cover Pravati's claim. The Court thus dismisses the breach-of-contract claim without prejudice.[8]

[7] The Court need not consider Berkshire's alternative arguments that any alleged wrongful act occurred before the professional liability policy's retroactive date and policy period, or that policy exclusions bar coverage of Pravati's claim.

[8] Madgett Law also raises new factual allegations and contends that Pravati's answer to the complaint "merits an amended complaint." (ECF No. 53 at 6.) A plaintiff cannot amend its complaint by asserting factual allegations in its opposition brief. *See Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) ("[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss." (citation omitted)).

CONCLUSION

Based on the foregoing and on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant Berkshire Hathaway Direct Insurance Company's motion to dismiss (ECF No. 40) is GRANTED; and
2. The breach-of-contract claim against Berkshire is DISMISSED WITHOUT PREJUDICE.

Dated: December 14, 2023

BY THE COURT:

s/Nancy E. Brasel
Nancy E. Brasel
United States District Judge