NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Continental Casualty Company, Plaintiff, v. Stephen Evans, *et al.*, Defendants.	No. CV-13-02379-PHX-JJT **ORDER**

At issue are the following motions: the Motion for Judgment on the Pleadings (Doc. 35), which Plaintiff Continental Casualty Company (Continental) filed on September 29, 2014; the Motion to Strike Continental's Reply in Support of its Motion for Judgment on the Pleadings (Doc. 45), which Defendant Kool Radiators Incorporated (KRI) filed on December 23, 2014; and the Motion for Summary Judgment (Doc. 49, Mot.), which Continental filed on January 30, 2015. The Court finds these matters appropriate for decision without oral argument, *see* LRCiv. 7.2(f), and now grants Continental's Motion for Summary Judgment while denying all other pending motions as moot.

I. FACTS AND PROCEDURAL BACKGROUND[1]

On April 1, 2009, KRI filed suit (the 2009 suit) against Defendant Stephen Evans (Evans), his wife, HarnerEvans PLC, and Aegis Jet, LLC (Aegis) in Maricopa County

[1] Unless otherwise indicated, the facts in this section are not in dispute.

Superior Court. KRI alleged that Evans approached its owner, Ron Davis, in 2007 with a proposal to invest $250,000 in Aegis on KRI's behalf prior to Aegis' planned acquisition of Aero Jet Services, LLC (Aero Jet). According to the 2009 complaint, Evans represented to Mr. Davis that if Aegis did not purchase Aero Jet, it would return the $250,000 investment. Alleging further that Aegis never purchased Aero Jet but refused to return the investment, KRI brought suit for common law fraud, securities fraud, and negligent misrepresentation, among other counts.

On April 8, 2009, HarnerEvans – the accounting firm where Evans was a partner – tendered defense of the 2009 suit to Continental, pursuant to a policy through which Continental insured HarnerEvans for claims arising from its rendering of professional services (the Policy). On April 22, 2009, Continental agreed to provide a defense to Evans and HarnerEvans in the 2009 suit, subject to a reservation of rights.

On March 26, 2010, the Superior Court dismissed the 2009 suit without prejudice, finding that it was premature. KRI appealed the dismissal and, while its appeal was pending, filed a second suit (the 2011 suit), which survived a motion to dismiss. The Arizona Court of Appeals reversed the Superior Court's decision to dismiss the 2009 suit, and the 2011 suit subsequently proceeded to trial. On June 20, 2013, the jury returned a verdict in KRI's favor and awarded $250,000 in damages and $261,250.94 in attorney's fees.

On November 20, 2013, Continental filed suit in this Court, seeking a declaratory judgment that it has no obligation to continue to defend or indemnify Evans in the 2011 suit. (Doc. 1, Compl. ¶ 2.) Continental now seeks summary judgment, arguing that the Policy is inapplicable for the following reasons: (1) the Policy provides coverage solely for acts committed in the performance of professional services on behalf of HarnerEvans, and Evans acted in his personal capacity in his dealings with KRI; (2) the Policy provides coverage only if Evans did not have a basis to believe, at the time the Policy became effective, that any act of omission on his part would likely result in a claim, and the jury's finding proves that Evans had a basis to so believe; and (3) Evans' actions constituted

fraud and therefore fall under the Policy's fraud exclusion. (Mot. at 7-8.) KRI, as a creditor of the 2011 verdict, has stepped into Evans' shoes to defend this suit and now argues that genuine disputes of material fact remain, thereby rendering summary judgment improper.

II. MOTION FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper when: (1) the movant shows that there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the court finds that the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). Under this standard, "[o]nly disputes over facts that might affect the outcome of the suit under governing [substantive] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises only when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

"A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). "Summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

which that party will bear the burden of proof at trial.'" *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322).

III. ANALYSIS

The Court first considers Continental's argument that, prior to the Policy's inception, Evans knew that his acts or omissions could result in a claim against him. (Mot. at 10-12.) The relevant portion of the Policy makes coverage contingent on the insureds not having, "prior to the effective date of [the] Policy, . . . a basis to believe that any [] act or omission, or interrelated act or omission, might reasonably be expected to be the basis of a claim." (Doc. 50, Pl.'s Statement of Material Facts (SMF) ¶ 3.) Continental claims that the Policy's effective date was September 10, 2008, and that the 2011 verdict establishes that Evans knowingly made materially untrue statements of fact and/or knowingly omitted material facts in 2007. (Mot. at 11.) Therefore, according to Continental, Evans had a basis to believe that his actions and/or omissions "might reasonably be expected to be the basis of a claim" and, as a result, KRI cannot meet the conditions for coverage. (Mot. at 11.)

KRI does not dispute that September 10, 2008, is the effective date of the Policy, but argues that genuine disputes of material fact remain as to whether, before that date, Evans had reason to believe that his acts or omissions might be the basis of a claim. (Doc. 54, Resp. at 15.) First, KRI argues that the jury finding as to knowing misstatements/omissions was part of the securities fraud verdict and not the negligent misrepresentation verdict. (Resp. at 16.) Because, as KRI argues elsewhere in its Response, the negligent misrepresentation verdict does not fall under the Policy's fraud exclusion provision, the Court should only consider findings related to the negligent misrepresentation verdict. (Resp. at 16.) KRI next argues that the Superior Court's dismissal of the 2009 suit as premature "unequivocally establishes that Evans firmly believed . . . that there was no factual basis for a claim at the time HarnerEvans entered into the Policy." (Resp. at 16.) Finally, KRI argues that the jury verdict "is not binding in

this coverage dispute" because a conflict of interest exists between the insured, Evans, and the insurer, Continental. (Resp. at 16-17.)

The Court finds KRI's arguments unavailing. To begin with, KRI's argument that the jury finding as to knowing misstatements/omissions was part of the securities fraud verdict misses the point. The jury answered in the affirmative when asked "Did Stephen Evans *knowingly* make any untrue statement of material fact, or omit to state any material fact necessary in order to make statements made . . . not misleading?"[2] (SMF ¶ 28, Ex. 5 at 2 (emphasis added).) Though it is true that the jury reached that finding in the context of the securities fraud verdict, the Policy required that Evans not have a basis to believe that any "act or omission, or interrelated act or omission, might reasonably be expected to be the basis of a claim." (SMF ¶ 3, Ex. 1, § 11.A.) The Policy does not specify that the insureds not have any basis to believe that their prior acts or omissions might be expected to be the basis of a claim *falling outside of the fraud exclusion*. To the contrary, the language is broad and includes "interrelated" acts or omissions. (SMF ¶ 3, Ex. 1, § 11.A.) Put simply, the Court fails to see how Evans could have satisfied that condition when he made knowing misstatements and/or omissions. *See Cont'l Cas. Co. v. Marshall Granger & Co. LLP*, No. 11-CV-3979 CS, 2014 WL 1100137, at 2 (S.D.N.Y. Mar. 20, 2014) (finding that an insured who had "dup[ed] several of his accounting clients into participating in a nonexistent investment opportunity" was "indisputably [] aware of acts or omissions . . . which a reasonable person would expect to be the basis of a claim"). At the very least, the use of the word "interrelated" in the above-referenced Policy provision prohibits the Court from parsing the jury verdicts in the manner KRI urges.

Furthermore, the Court fails to see how the Superior Court's dismissal of the 2009 suit as premature "unequivocally establishes," as KRI argues, "that Evans firmly believed . . . that there was no factual basis for a claim at the time HarnerEvans entered into the

[2] KRI also argues that the Court should not rely on the jury verdict because it does not specify when the misstatements/omissions in question occurred. (Resp. at 16.) However, all parties agree that the investment at the center of this dispute – which KRI alleged that Evans fraudulently induced – occurred in August 2007. (*See* SMF Ex. 5, ¶ 17.)

Policy." (Resp. at 16.) The relevant inquiry is whether Evans had a basis to believe that an act or omission on his part "might reasonably be expected to be the basis of a claim." (SMF ¶ 3, Ex. 1, § 11.A.) A jury concluded that Evans knew his misstatements and/or omissions were misleading *at the time he made them*. (SMF ¶ 28, Ex. 5 at 2.) KRI fails to elaborate as to how the transaction's partial pendency at the outset of the 2009 suit changes that fact.

Finally, the Court rejects KRI's argument that the jury verdict "is not binding in this coverage dispute" because a conflict of interest exists between the insured, Evans, and the insurer, Continental. (Resp. at 16-17.) The Court need not decide whether the jury verdict – which KRI sought and obtained based on allegations that Evans knowingly deceived Davis and KRI – is binding. It is enough that the Court conclude, as it now does, that KRI has failed to identify any genuine dispute of material fact as to whether Evans had a basis to believe that an act or omission on his part "might reasonably be expected to be the basis of a claim." (SMF ¶ 3, Ex. 1, § 11.A.) Continental provided the Court with evidence that a jury concluded that Evans made knowing misstatements and/or omissions in inducing KRI's investment. (SMF ¶ 28, Ex. 5 at 2.) KRI has responded with conclusory allegations, which are insufficient, *see Taylor*, 880 F.2d at 1045, and argument that the Court should not rely on the jury verdict, which the Court finds unconvincing.

The evidence is such that no reasonable jury could return a verdict in KRI's favor on the question of whether Evans had a reasonable basis to believe that an act or omission on his part might be expected to be the basis of a claim. *See Anderson*, 477 U.S. at 248. No genuine dispute of material fact remains. *Id*. Based on the plain language of the Policy, the Court finds that Continental is entitled to prevail as a matter of law. *See* Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 322-23. The Court grants summary judgment in Continental's favor.

Continental is entitled to summary judgment for the additional reason that no reasonable jury could find that the actions giving rise to Evans' liability constituted

professional services. The Policy provides coverage only for those claims arising from "an act or omission in the performance of professional services." (SMF ¶¶ 8-9, Ex. 1, § 11.A.) Professional services are "those services performed in the practice of public accountancy by you or others for remuneration that inures to the benefit of [HarnerEvans]." (SMF ¶ 9, Ex. 1, § 11.A.) The parties present conflicting evidence as to the capacity in which Evans acted in his dealings with KRI. For example, KRI provides the Court with evidence that, when corresponding with KRI regarding the Aegis deal, Evans used HarnerEvans letterhead and a HarnerEvans signature block. (Doc. 55, Def.'s Controverting Statement of Facts, (CSOF) ¶¶ 63-67.) Continental, on the other hand, provides excerpts of deposition testimony wherein Evans testified that he was "acting as a member of Aegis like all members of Aegis were raising money," (SMF ¶ 31, Ex. 10 at 33:7-14), and Lamar Harner – the other partner of HarnerEvans – testified that he understood that Evans was acting "as a partner of Aegis" and "not as their CPA or representing them for their financial matters," (SMF ¶ 33, Ex. 8 at 46:14-47:9). Genuine disputes therefore remain as to those portions of the "professional services" analysis.

However, no genuine dispute remains as to whether remuneration inured to the benefit of HarnerEvans, as the Policy requires. KRI has the burden of establishing coverage under the Policy. *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 13 P.3d 785, 788 (Ariz. Ct. App. 2000) ("[T]he insured bears the burden to establish coverage under an insuring clause"); *Carpenter v. Superior Court*, 422 P.2d 129, 131 (Ariz. 1996) (holding that a judgment creditor stands in the "shoes" of the insured). KRI does not directly dispute Continental's assertion that Aegis did not pay HarnerEvans for any work associated with the Aegis deal. Instead, KRI suggests that Evans may have worked on the Aegis deal in a *pro-bono* capacity or may have charged Aegis for the work but wrote off the charges in the hopes of obtaining future work from Aegis. (Resp. at 9-10.) However, KRI provides no evidence of a *pro-bono* arrangement or a write-off. As a result, there is insufficient evidence upon which a jury could conclude that the actions giving rise to

Evans' liability constituted professional services. KRI has therefore failed to satisfy its burden, and Continental is entitled to summary judgment for this additional reason.

IV. CONCLUSION

The Court finds that no reasonable jury could return a verdict in KRI's favor on the question of whether Evans had a reasonable basis to believe that an act or omission on his part might be expected to be the basis of a claim. Such a finding is alone sufficient to warrant summary judgment in Continental's favor. However the Court grants summary judgment for the additional reason that KRI has failed to meet its burden of proving that the actions giving rise to Evans' liability constituted professional services. The Court need not consider Continental's remaining arguments in favor of summary judgment.

IT IS THEREFORE ORDERED granting Plaintiff's Motion for Summary Judgment (Doc. 49).

IT IS FURTHER ORDERED awarding Plaintiff a declaratory judgment, pursuant to 28 U.S.C. § 2201, decreeing that it no longer has a duty to defend Stephen Evans in the lawsuit captioned *Kool Radiators, Inc. v. Stephen Evans, et al.*, No. BC493718 (Maricopa County, Ariz. Super. Ct. Mar. 14, 2011), nor does it have a duty to indemnify Stephen Evans for the judgment entered against him in the same action.

IT IS FURTHER ORDERED denying all other pending motions (Docs. 35, 45) as moot.

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment accordingly and terminate this matter.

Dated this 20th day of April, 2015.

Honorable John J. Tuchi
United States District Judge